No. 19-725

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.,

Respondents.

JONMICHAEL GUY,

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v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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1. Respondents do not dispute lower courts are entrenched in a conflict over the proper application of qualified immunity to the Religion Clauses—namely, whether government officials are immune for discriminating against beliefs sincerely and religiously held by the victim until binding caselaw recognizes the victim's belief system as "a clearly established 'religion.'" *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000); *see* Pet. 8-14. Instead, Respondents claim this case is removed from the split based on dubious representations about the record below.

First, Respondents say "none" of their arguments in the courts below "advocated for the adoption of the rule from *Kalka*." BIO 3-4. That is absurd. Respondents literally told the district court that they were entitled to qualified immunity because Petitioner failed to show "how *Kalka* is not directly on point."[1] Invoking *Kalka*, they argued they were immune because "it has not been clearly established whether Humanism is even a 'religion.'"[2] According to Respondents, as long as Petitioner could "point to no authority clearly establishing that inmates are entitled to any constitutional protections stemming from a Humanist practice," they could not be held liable for discriminating against Petitioner's beliefs, irrespective of Petitioner's allegations that those beliefs were sincere and religious to him.[3] Respondents repeated the same on appeal to the Wyoming Supreme Court: under *Kalka*, the relevant legal inquiry was whether a "system of beliefs qualifie[s] as a 'religion,'" Appellee Br. 23 (quoting *Kalka*, 325 F.3d at 99), and thus Respondents were immune 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 24-25; *see also id.* at 24 (spending nearly a page discussing *Kalka*).[4]

Second, Respondents contend "[t]he Wyoming Supreme Court did not adopt the *Kalka* test." BIO 11. Rather, they say, the court simply "cited to the *Kalka*

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[1] Defendants' Reply in Support of Mot. to Dismiss at 10.

[2] *Id.* at 9-10 (citing *Kalka*, 215 F.3d at 99).

[3] *Id.* at 10.

[4] The Wyoming Supreme Court briefs are available online at https://efiling.courts.state.wy.us/public/caseView.do?csIID=25943.

case at some point in its opinion." BIO 13. That is not credible, either. The Wyoming Supreme Court explicitly adopted Respondents' submission that, for the purposes of qualified immunity, "the 'right' at issue is Humanism's status as a 'religion.'" Pet. App. 15a. Because Petitioner failed to "demonstrate that the question of whether Humanism is a religion . . . has been placed 'beyond debate,'" Respondents could not be held liable for any discrimination against Petitioner's beliefs. Pet. App. 16a. That is the *Kalka* rule, and the Wyoming Supreme Court even said so: that its view was "demonstrated by the D.C. Circuit" in *Kalka*, block-quoting *Kalka*'s analysis that qualified immunity applies given the absence of binding caselaw "that humanism, no matter in what form and no matter how practiced, amounts to a religion." Pet. App. 17a-18a (quoting *Kalka*, 215 F.3d at 99). Indeed, while the BIO defends the decision below mostly by retreating to high-level articulations of the qualified immunity standard, Respondents themselves concede the Wyoming Supreme Court's inquiry ultimately turned on its view of the "status of Humanism as a religion." BIO 11. That *is* the *Kalka* rule.

2. Respondents claim the petition asks the Court to overrule its objective qualified immunity standard in favor of a subjective standard. BIO i, 11-13. This is a strawman. The petition asks the Court to adopt the approach of the Second and Seventh Circuits. In those circuits, when a plaintiff alleges that a government official discriminated against a belief that was sincere and religious to him, the official's and the court's view that the belief "was not religious is beside the point." *Ford v. McGinnis*, 352 F.3d 582, 597-98 (2d Cir. 2003)

(Sotomayor, J.). That is because officials are not supposed to make decisions whether to accommodate a someone's religious practice based on the officials' personal assessment of whether the belief is a "religion" in some general sense; rather, consistent with this Court's longstanding recognition that religion is a matter for individual conscience, officials are to consider whether a victim's belief is "sincerely held and '*in his own scheme of things*, religious.'" *Id.* at 598 (emphasis in original). The defense of qualified immunity accordingly requires a defendant to show a reasonable mistake in ascertaining the answer to that question—the official must show he "reasonably attempted to determine whether [the plaintiff] has a sincere belief that his religion requires" the requested accommodation. *Vinning-El v. Evans*, 657 F.3d 591, 595 (7th Cir. 2011) (Easterbrook, C.J.); *see* Pet. 16 ("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."). The argument adopted by the court below—that Respondents were entitled to assess whether Petitioner's practices were "a tenet of religious faith" at some general, abstract level—has been described by the Seventh Circuit as a reason to conclude officials *violated* "clearly established rights and [are] not entitled to immunity." *Vinning-El*, 657 F.3d at 594.

Petitioner's complaint alleges that he practices religious Humanism, that his belief is sincere, and that it "comforts, guides, and provides meaning to [Petitioner] in the way that religions traditionally provide such comfort, guidance, and meaning to others." Pet. App. 53a, 56a. The complaint also alleges that Respondents discriminated against Petitioner "because

of [his] sincerely held convictions," out of preference for theistic religions. Pet. App. 53a-54a, 61a.[5]

3. Respondents do not contest that the petition raises a constitutional problem of the highest order. A legal standard that gives courts the power to "clearly establish" certain belief systems as "religion"—and the unbridled discretion to withhold that status for other belief systems (as occurred both in *Kalka* and, nineteen years later, here)—embroils the judiciary in ecclesiastical questions that are an affront to the Establishment Clause, which guarantees religion will be left to the conviction and conscious of people, not the government. Pet. 14-19. Moreover, Respondents do not contest that this approach inherently relegates minority, unpopular or unorthodox religions or sects to second-class status—as demonstrated by its application to exclude protection for followers of the Nation of Islam and Petitioner's non-theistic religion. *See* Pet. 10-11, 17-18; *see also* Amicus Br. of Muslim Advocates 13-16 (describing systematic disfavoring of the "Nation of Gods and Earth," formed as an alternative to the Nation of Islam, and other unpopular religions in prison).

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[5] Respondents suggest a competing narrative in which they rejected Petitioner's request to identify as a member of his faith and form a study group because he "did not provide the Department with enough information for [them] to make a safety determination," providing only an unexplained citation to their grievance policy document. BIO 2 (citing R. 153-55). However, as the court below recognized, this case arises on a motion to dismiss and therefore "the facts as alleged in Mr. Guy's complaint are presumed true." Pet. App. 12a.

4. Respondents offer two reasons why "[t]his case is not a proper vehicle," and both are facially implausible.

First, they point to the Wyoming Supreme Court's conclusion that Respondents' post-litigation conduct mooted Petitioners claims, "except for the claim to monetary damages." BIO 14. But qualified immunity is *only* a defense to monetary damages, so any case presenting the point of conflict will arise in that context. That this case no longer concerns Petitioner's injunctive claims does not make it an improper vehicle; that makes it a clean one.

Second, Respondents claim that "alternative arguments" they advanced in the district court impede this Court from addressing the question presented. This is frivolous. Respondents do not contest that the application of qualified immunity was the Wyoming Supreme Court's sole basis for affirming the dismissal of Petitioner's damages claim. In fact, the three alternative arguments the BIO now invokes as an obstacle—failure to state a claim, res judicata, and failure to exhaust, *see* BIO 14-16—were not even raised by Respondents in the Wyoming Supreme Court. They never mentioned failure to state a claim or res judicata in their appellate brief, and they explicitly disclaimed any reliance on failure to exhaust, stating that "*although the argument may become proper on remand, Defendants did not argue below and do not argue here* that Guy's request that the Department of Corrections recognize Humanism was not properly exhausted." Appellee Br. 4-5 (emphasis added); *see also* Appellee Br. 4, 16 (repeating that failure to exhaust was not presented). It is simply not credible to claim that issues never raised or affirmatively waived in the

Wyoming Supreme Court now pose an obstacle to this Court's review.[6]

This Court can and should review the Wyoming Supreme Court's proliferation of the *Kalka* rule and, consistent with routine practice, remand for Wyoming courts to consider alternative arguments in the first instance.

CONCLUSION

For the reasons here and in the petition, the Court should grant certiorari.

Respectfully submitted,

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[6] None of Respondents' alternative arguments are jurisdictional, and Respondents do not suggest otherwise. This Court has recognized that failure to exhaust under 42 U.S.C. § 1997e(a) and res judicata are affirmative defenses, not jurisdictional requirements. *See Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense[.]"); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) ("Preclusion, of course, is not a jurisdictional matter." (citing Fed. R. Civ. P. 8(c))); *see also* Wy. R. Civ. P. 8(c) (parallel to Federal Rule 8(c), recognizing res judicata as an affirmative defense).