NO. _____

In the
Supreme Court of the United States

D.K. WILLIAMS, in her individual and official capacity as Warden of FCI Danbury and HERMAN QUAY, in his individual capacity,

Petitioners,

v.

RAFIQ SABIR and JAMES J. CONYERS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners D.K. Williams and Herman Quay are former federal prison wardens. Each maintained a preexisting policy that limited group prayer of three or more inmates to the prison chapel. Respondents are inmates who claim that the policy violated the Religious Freedom Restoration Act ("RFRA"). The Second Circuit affirmed the denial of Petitioners' motion to dismiss based on qualified immunity.

When assessing qualified immunity, this Court has "repeatedly told courts … not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Yet the Second Circuit denied qualified immunity based on the entirely generic truism that it was clearly established that "substantially burdening prisoners' religious exercise without justification violates RFRA." App.12. The panel concluded that the requirement not to formulate the law at a high level of abstraction does not apply to RFRA claims. App.28.

The questions presented are:

1. Are RFRA claims exempt from the normally applicable qualified immunity requirement not to define clearly established law at a high level of generality; and

2. Was it clearly established that a policy limiting group prayer of three or more inmates to the prison chapel violated RFRA?

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Sabir, et al. v. Williams, et al.*, No. 22A825 (U.S.) (granting application for extension of time to file a petition for certiorari, issued on Mar. 17, 2023).
- *Sabir, et al. v. Williams, et al.,* No. 19-3575-cv (2d Cir.) (amended opinion affirming order below, issued on Oct. 28, 2022); and
- *Sabir, et al. v. Williams, et al.*, No. 3:17-cv-749-VAB (D. Conn.) (order denying motion to dismiss, issued on Aug. 27, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

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Assessing whether the law was "clearly established" for purposes of qualified immunity often comes down entirely to how broadly or narrowly the law at issue is defined. Courts sometimes have defined the law so abstractly—*e.g.*, "the right to be free from unreasonable searches and seizures"—that *any* alleged violation would contravene the so-called "clearly established" law.

This Court has therefore "repeatedly told courts … not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). More than just repeatedly "telling" the lower courts to adhere to that principle, this Court has regularly *summarily reversed* decisions that flout this admonition. Here, the Second Circuit defined the law at the highest level of generality possible, in conflict with both this Court's decisions and the decisions of numerous other circuits facing similar claims.

Plaintiffs (Respondents here) are two Muslim prisoners who were incarcerated at the Federal Correctional Institution in Danbury, Connecticut ("FCI-Danbury"). They challenge a policy that required group prayer of three or more individuals to be held in the facility's chapel. They claim that this policy burdened their right to "engag[e] in congregational prayer with the maximum number of practicing Muslims possible." App.94. They filed a lawsuit against former wardens Herman Quay and D.K. Williams, Petitioners here.

In denying qualified immunity, the Second Circuit defined the law as abstractly as possible. It held that

it was clearly established that "substantially burdening prisoners' religious exercise without justification violates RFRA." App.12. That does little more than repeat the elements of a RFRA claim. *See* 42 U.S.C. § 2000bb-1(a), (b).

The Second Circuit's approach defies this Court's requirement that the qualified immunity analysis be "particularized to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (internal quotation marks omitted). The need for that requirement is obvious: "Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (internal quotation marks and alterations omitted). But the court below improperly refused to apply that particularity requirement outside the Fourth Amendment context.

The Second Circuit's analysis conflicts with other circuit court decisions in similar circumstances. For example, the Seventh Circuit granted qualified immunity when facing a prison group-prayer policy by *rejecting* almost exactly the same abstract definition of the law that the Second Circuit adopted: "the right of prisoners not to have their religious practices interfered with and prevented absent a legitimate penological basis." *Kemp v. Liebel*, 877 F.3d 346, 352 (7th Cir. 2017).

The question at issue in this case is both important and recurring. Many states across the country have policies regarding group prayer in prison facilities, including all the states within the Second Circuit. The decision below casts doubt on officials'

ability to administer these policies without being subjected to the burdens of litigation and the risk of personal damages liability—exactly what qualified immunity is intended to protect against. The issue is all the more important after this Court's recent decision permitting claims for money damages against prison officials in their individual capacity under RFRA. *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020).

Finally, this case is an ideal vehicle to resolve the questions presented. There may be some cases where it is difficult to determine how narrowly to define the law at issue. But here, there is no dispute that when evaluating the law "particularized to the facts of the case," it was *not* clearly established that Petitioners' conduct violated RFRA. Plaintiffs twice conceded before the district court that "no Supreme Court or Second Circuit case has specifically recognized a right to group prayer under Plaintiffs' circumstances." 2d Cir. JA75; *see also* App.136. There is accordingly no question that Plaintiffs "failed to identify a case where an officer acting under similar circumstances was found to have violated" the law. *White*, 580 U.S. at 79.

Given the division among the circuit courts, the Court may wish to grant this petition for plenary review. But this Court has frequently issued summary reversals based on the same error the Second Circuit made here: denying qualified immunity by defining the law at too high a level of generality. And because it is evident that no binding precedent established either that a policy like FCI-Danbury's substantially burdened inmates' religious exercise, or that any such burden was not adequately justified—as noted, Plaintiffs effectively conceded as much—it would be

appropriate for the Court to summarily reverse and hold that Petitioners are entitled to qualified immunity. Alternatively, the Court could summarily reverse the Second Circuit's holding that qualified immunity's particularity requirement does not apply to RFRA claims and remand for that court to evaluate Petitioners' entitlement to immunity by asking appropriately particularized questions about the state of the law at the time of the conduct in this case: not whether it was clearly established that violating RFRA violated RFRA, but whether it was clearly established that a policy like FCI-Danbury's substantially burdened inmates' religious exercise and, if so, whether it did so without adequate justification.

OPINIONS BELOW

The initial opinion of the Second Circuit is reported at 37 F.4th 810 and reproduced at App.30-58. The amended opinion of the Second Circuit is reported at 52 F.4th 51 and reproduced at App.1-29. The unreported opinion of the District of Connecticut can be accessed electronically at 2019 WL 4038331 and is reproduced at App.59-87.

JURISDICTION

The Second Circuit had appellate jurisdiction because the district court's order denying Petitioners' motion to dismiss was a final decision within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985).

The Second Circuit issued its opinion and judgment on June 17, 2022. The Second Circuit issued an amended opinion and an amended judgment on

October 28, 2022. The Second Circuit denied a timely petition for rehearing en banc on December 29, 2022.

On March 17, 2023, Justice Sotomayor granted an application for an extension of time to file a certiorari petition (No. 22A825), which under Rule 30.1 extended the deadline until May 30, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiffs seek damages for an alleged violation of their rights under RFRA, 42 U.S.C. § 2000bb-1. RFRA is reproduced at App.137.

STATEMENT

Plaintiffs Sabir and Conyers are practicing Muslims who were incarcerated at FCI-Danbury. App.92. They assert that they hold the sincere beliefs that they must pray "five times each day," and that "if two or more Muslims are together at a time of required prayer, they must pray together behind one prayer leader" and are not permitted "to break up into smaller groups." App.93; App.95.

In March 2014, before Petitioners began their tenure as warden at FCI-Danbury, a predecessor warden implemented a policy providing that inmates of "all faith groups" could pray "individually or in pairs" without restriction, and that "group prayer of 3 or more is restricted to the Chapel." App.97; App.109 (the "Policy"). Petitioners are alleged to have "kept the Policy in effect." App.89. Plaintiffs filed grievances

claiming the Policy was unlawful, which were denied. App.111-34.

In the operative Second Amended Complaint, Plaintiffs sued petitioners in the District of Connecticut, claiming that the Policy violated RFRA and the Free Exercise Clause of the First Amendment. Petitioners asserted qualified immunity in a motion to dismiss, which the district court denied in relevant part. App.60.

The Second Circuit affirmed, holding that "the plaintiffs' rights under RFRA were clearly established at the time of the alleged violations." App.14. The court below explained that "it was clearly established that prison officials cannot substantially burden inmates' religious exercise without offering any justification." App.25.

The Second Circuit explicitly rejected the argument that its formulation of the law was "an abstract legal principle that cannot establish law for purposes of qualified immunity." App.27 (quotation omitted). The court acknowledged that in "some contexts" a "higher degree of specificity is required to establish the law for purposes of qualified immunity." App.27. According to the Second Circuit, "the Fourth Amendment's prohibition of unreasonable searches and seizures is an abstract right because it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered." App.27.

But the court held that "no such concerns are present here." App.28. As a result, the court opined based on the "text of [RFRA] itself" that "it is not

difficult for an official to know whether an unjustified substantial burden on religious exercise will be deemed reasonable." App.28.

Petitioners filed a petition for panel rehearing or rehearing en banc. In response, the panel amended its opinion to remove its reliance on the outdated, pre-*Twombly/Iqbal* "no set of facts" pleading standard. App.24 & n.8; App.53. Petitioners then filed a second petition for rehearing en banc, which the Second Circuit denied.[1] This petition followed.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly admonished lower courts not to define clearly established law at a high level of generality when assessing qualified immunity. And the Court has frequently summarily reversed lower courts for ignoring that fundamental requirement. The Second Circuit's ruling here—defining the law at the most abstract level possible—contradicts this Court's decisions. *See infra* § I.

Other circuit courts in similar circumstances have expressly *rejected* formulations of the law that are nearly identical to the one the Second Circuit *accepted*. *See infra* § II.

This case presents an important and recurring question. The Second Circuit's decision eliminates qualified immunity in RFRA cases as a practical matter. And numerous states have prison policies

[1] The Department of Justice represented Petitioners through the panel stage, and undersigned counsel were retained to represent Petitioners in seeking further review pursuant to 28 C.F.R. §§ 50.15 & 50.16.

similar to the one at issue here that are threatened by the Second Circuit's decision. *See infra* § III.

This Court should grant the petition for plenary review or summarily reverse the decision below.

I. The Decision Below Conflicts With This Court's Qualified Immunity Precedent.

A. The law cannot be defined at a high level of generality.

For "decades," this Court has consistently reiterated that "clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79. Even where a "general principle" is clearly established, qualified immunity shields officials unless "the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12, 14 (2015) (per curiam). That analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* Qualified immunity is supposed to shield conduct unless precedent has "placed the … question beyond debate." *White*, 580 U.S. at 79.

It is "error" to "define[] the qualified immunity inquiry at a high level of generality." *Mullenix*, 577 U.S. at 12. That is because focusing on abstract or generalized legal principles "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014).

So, for example, "[t]he general proposition … that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether

the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742. An approach that elevates general principles over specific precedent would "convert the rule of qualified immunity that [this Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

This Court has therefore "repeatedly told courts … not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742.

B. This Court has repeatedly issued summary reversals when courts fail to heed qualified immunity's particularity requirement.

This Court has not hesitated to correct lower courts that define the law too broadly, and it has repeatedly issued summary reversals in those circumstances.

This Court's 2017 summary reversal in *White v. Pauly* illustrates the Second Circuit's error here. In *White*, the Tenth Circuit concluded that the cases broadly setting forth the general excessive force standard—*Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989)—provided the "clearly established" law the officer defendants violated. *White*, 580 U.S. at 78.

The Court began by explaining that "in the last five years, this Court ha[d] issued a number of opinions reversing federal courts in qualified immunity cases." *Id.* at 79. It "found this necessary both because qualified immunity is important to

society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *Id.* (internal quotation marks and citations omitted).

The Court explained that it was "again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'" but rather "must be 'particularized to the facts of the case.'" *Id.*

The Tenth Circuit "misunderstood the 'clearly established' analysis" because it "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.* Instead, the panel had "relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level." *Id.*

Under the correct analysis focused on the facts of the case, qualified immunity applied: "[c]learly established federal law d[id] not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like [those at issue] from assuming that proper procedures, such as officer identification, have already been followed." *Id.* at 80.

Only two years later, this Court needed to issue another unanimous summary reversal in *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019). In that case, the Ninth Circuit had rejected qualified immunity by improperly concluding that the "right to be free of excessive force" was clearly established. *Id.* at 503.

This Court explained that the Ninth Circuit's "formulation of the clearly established right was far too general" and that it had "repeatedly told courts not to define clearly established law at a high level of generality." *Id.* (ellipses omitted). The problem: "The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in [the] manner [he did]." *Id.* at 504.

There are multiple examples of similar summary reversals when the lower court had defined the right too broadly. *E.g., Mullenix*, 577 U.S. at 12 (summarily reversing because the "use [of] deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others" was not a particularized definition of the law); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (summarily reversing, noting that "the general tests set out in *Graham* and *Garner*" for excessive force did not clearly establish the law as relevant to the case and "are cast at a high level of generality").

And there are still more cases where this Court summarily reversed because the precedents the lower court relied on were not sufficiently analogous to the factual circumstances of the case. *See, e.g*, *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021); *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *Taylor v. Barkes*, 575 U.S. 822, 825 (2015); *Stanton v. Sims*, 571 U.S. 3, 6 (2013).

C. The Second Circuit's decision flouts this Court's precedents.

Ignoring this Court's instructions, the Second Circuit defined the law at the *highest* level of generality possible.

The Second Circuit denied qualified immunity because it was clearly established "that prison officials cannot substantially burden inmates' religious exercise without offering any justification." App.25. That just restates the terms of RFRA. Of course it was clearly established that violating RFRA violates RFRA. But that begs rather than answers the question on which qualified immunity turns: Was it clearly established that the Policy substantially burdened inmates' religious exercise and, if so, that it lacked adequate justification?

To support that approach, the Second Circuit improperly held that the qualified immunity analysis is different for RFRA claims. The court concluded that, unlike in the Fourth Amendment context, where "it may be difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered," "[n]o such concerns are present here" in the context of RFRA. App.28. Rather, according to the court below, the "text of [RFRA] itself" is clear enough that "it is not difficult for an official to know whether an unjustified substantial burden on religious exercise will be deemed reasonable." App.28 (internal quotation marks and brackets omitted).

But the requirement for factually analogous precedent—sufficient to put a defendant on clear notice that the law prohibits "what he is doing,"

District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018)—is not limited to the Fourth Amendment. It applies whenever qualified immunity is asserted. It is simply how qualified immunity works.

This Court has consistently held, in every context presenting the issue, that the law can be clearly established only by factually analogous precedent. *See, e.g.*, *Taylor*, 575 U.S. at 826 (inmate suicide prevention screening); *Lane v. Franks*, 573 U.S. 228, 245-46 (2014) (government employee speech); *Wood v. Moss*, 572 U.S. 744, 759-60 (2014) (viewpoint discrimination); *Reichle v. Howards*, 566 U.S. 658, 664-65, 670 (2012) (retaliatory arrest for protected speech); *Davis v. Scherer*, 468 U.S. 183, 184 (1984) (due process right to a pretermination hearing).

There is no reason why RFRA claims should be treated differently. The Second Circuit's view that it is not difficult to know when RFRA may be violated defies reality. Just as it is difficult for an officer to know when a particular use of force will be deemed unreasonable, it is *also* difficult for prison officials to know, absent on-point precedent, whether a court will determine that a particular policy: (1) substantially burdens an inmate's religious exercise, (2) is justified by interests that are sufficiently compelling, and (3) is the least restrictive means of furthering those interests. Courts regularly disagree over these exact issues, and non-lawyers cannot be expected to know intuitively where courts will draw those lines. *Cf. Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

Under this Court's rule against defining the law at a high level of generality, qualified immunity should have been granted. Plaintiffs in fact twice conceded before the district court that "no Supreme Court or Second Circuit case has specifically recognized a right to group prayer under Plaintiffs' circumstances." 2d Cir. JA75; *see also* App.136. That is dispositive.

The Second Circuit also did not identify any case holding that the Policy at issue here, or any similar one, imposed a substantial burden on inmates' religious exercise. Nor did it identify any case establishing that no reasonable prison official could have believed that the Policy was justified by a compelling government interest. No such cases exist. There was nothing to put Petitioners on notice that their conduct could be found to violate RFRA.

Rather, the Second Circuit relied only on its own *Salahuddin* precedent, App.25-27, but that case did not involve limits on group prayer. Instead, it held that prison officials violated RFRA when they "forced Shi'ite and Sunni Muslims to conduct Ramadan services jointly." *Salahuddin v. Goord*, 467 F.3d 263, 269 (2d Cir. 2006).

The Second Circuit's "clearly established" analysis was so generalized that it amounts to holding that RFRA's terms were clearly established. That is as abstract as it gets. And it cannot be squared with the "decades" of precedent holding that "clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79.

D. This is not a case of an obvious violation.

There is a small category of cases where "the unlawfulness of the [official's] conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590. But these cases are "rare." *Id*. And this is not remotely one of them.

Qualified immunity does not protect those who "knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and so it does not apply where government officials had "fair warning" that their actions were unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In *Hope*, this Court held that "a general constitutional rule ... may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id*. at 741. Where the challenged conduct is so "obvious[ly]" illegal that "any reasonable officer should have [so] realized," qualified immunity does not apply. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020). Officials therefore can "still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

This Court has relied only twice on this "obvious violation" exception to qualified immunity's particularity requirement. Those cases show that the exception does not come close to applying here. In *Hope*, a prisoner was handcuffed to a hitching post, where he was forced to "remain[] shirtless … while the sun burned his skin," for a "seven hour[]" period during which "he was given water only once or twice and was given no bathroom breaks." This Court concluded that "[t]he obvious cruelty inherent" in the

conduct "should have provided respondents with some notice," *id*. at 745, even if the facts of prior cases were "not identical," *id*. at 742-43.

In *Taylor*, an inmate was confined in two "shockingly unsanitary cells," including one that "was covered, nearly floor to ceiling, in massive amounts of feces," and another that was "frigidly cold" and was "overflow[ing]" with "raw sewage" in which the plaintiff was "left to sleep naked." 141 S. Ct. at 53-54 This Court held that "no reasonable correctional officer could have concluded that … it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions." *Id*. Thus, officials had "fair warning" that their actions were illegal, even though there was no case holding that "prisoners couldn't be housed in cells teeming with human waste for only six days." *Id*.

The Second Circuit did not cite *Hope* or *Taylor*, nor did it suggest that this was an "obvious" violation case. For good reason: Petitioners merely enforced a preexisting policy that allowed groups of two inmates to pray together freely and allowed groups of three or more to pray together in the prison chapel. At most, the Policy restricted the time, place, and manner of Plaintiffs' congregate religious practice. *Cf. Sause v. Bauer*, 138 S. Ct. 2561, 2562 (2018) ("[T]here are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place."). These are not the "particularly egregious facts" that can make out an "obvious" violation of the law. *Taylor*, 141 S. Ct. at 53. Petitioners here simply did not violate Plaintiffs' rights in a manner that would have been "obvious" to

any reasonable official. *Hope*, 536 U.S. at 740-41. Thus, this was not a case where a general principle could clearly establish the law "without a body of relevant case law." *Brosseau*, 543 U.S. at 199.

II. The Decision Below Conflicts With Decisions Of Other Circuits.

Other circuits have rejected the Second Circuit's approach in similar circumstances.

The Seventh Circuit reached the exact opposite result in a materially indistinguishable case. In *Kemp*, inmates claimed they were unable to attend group Jewish services based on the application of a group-religious-services policy in effect at the facility. 877 F.3d at 348-50. In rejecting the plaintiffs' claim and finding qualified immunity, the Seventh Circuit recognized that rights cannot be defined generally, noting that this Court has "repeatedly stressed" in the Fourth Amendment context that *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), "lay out excessive-force principles at only a general level" and thus "do not by themselves create clearly established law outside an obvious case." 877 F.3d at 352 (quoting *White*, 580 U.S. at 80).

Applying this Court's admonition against "over-general formulations of clearly established law in the Fourth Amendment context," the Seventh Circuit rejected as "too broad" the plaintiffs' attempt to define the right at issue as "the right of prisoners not to have their religious practices interfered with and prevented absent a legitimate penological basis." *Id.* That is essentially the same formulation of the right the Second Circuit *accepted* here. *See* App.25 ("it was

clearly established that prison officials cannot substantially burden inmates' religious exercise without offering any justification").

In stark contrast to the Second Circuit's analysis, the Seventh Circuit held in *Kemp* that plaintiffs' formulation of the right at issue "simply restates the standard for analyzing prisoners' constitutional claims created by the Court in *Turner v. Safley*, 482 U.S. 78 (1987)," that "[j]ust as *Garner* and *Graham* create a generalized excessive force standard, *Turner* creates a generalized framework to analyze prisoners' constitutional claims," and thus, "like the *Garner* and *Graham* standard, the *Turner* test cannot create clearly established law outside an obvious case." 877 F.3d at 352.

From there, the Seventh Circuit determined that "the proper inquiry is whether there existed a 'clearly established constitutional right on the part of prisoners to congregate services and study absent appropriate leadership and supervision at the time of an interfacility transfer.'" *Id.* at 353 (quoting *Kemp v. Liebel*, 229 F. Supp. 3d 828, 836 (S.D. Ind. 2017)). And the court held there was no such right, because:

> Plaintiffs cite no case where we held that the Free Exercise Clause provides prisoners the right to group worship when outside volunteers were unavailable to lead or train inmates. Likewise, they cite no case where we held that a prison official violates the Free Exercise Clause by transferring inmates to a facility that does not provide congregate worship and study, or by failing to delay a

> transfer until the new facility provides congregate worship and study.

Id. Under *Kemp,* Petitioners would have been granted qualified immunity had they been in charge of FCI-Pekin in Illinois rather than FCI-Danbury in Connecticut.

The Third and Fifth circuits have similarly rejected formulations of the law akin to the one the Second Circuit adopted. In *HIRA Educational Services North America v. Augustine*, 991 F.3d 180, 190-91 (3d Cir. 2021), the Third Circuit rejected the plaintiff's argument that "the general constitutional rule that government officials cannot interfere with the free exercise of religion was sufficiently clear to give the Legislators fair warning of liability," reasoning that, "given the high degree of specificity required to prove that a right has been clearly established, the general constitutional rule [plaintiff] points to does not suffice."

The Fifth Circuit rejected a plaintiff's argument that it was "clearly established that no restriction on religious practice is constitutional absent a reasonable relationship between the restriction and a legitimate penological concern." *Taylor v. Nelson*, 2022 WL 3044681, at *2 (5th Cir. 2022). The court explained that "plaintiffs who assert religion-based rights cannot overcome qualified immunity by defining those rights at such a 'high level of generality.'" *Id*. (quoting *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014)). *Taylor* is non-precedential, but well-reasoned.

And the Ninth Circuit has rejected the Second Circuit's "religious-case" exception to this Court's

prohibition against defining rights broadly for purposes of qualified immunity. In *Sabra v. Maricopa County Community College District*, 44 F.4th 867, 891-92 (9th Cir. 2022), the plaintiff sued a local community college teacher alleging that a course module on terrorism forced the plaintiff to answer quiz questions suggesting that Islam encouraged terrorism. *Id.* at 877. The district court granted the defendants' motion to dismiss based on qualified immunity. The Ninth Circuit affirmed. The plaintiff "concede[d] that there is no case, or body of case law, that clearly establishes [his] right not to be subjected to a quiz like the one in this case." *Id.* at 890. So, defendants were entitled to qualified immunity because "[t]he absence of such authority … dooms Plaintiffs' Free Exercise claim under the second prong of the qualified immunity analysis." *Id.*

Judge Bress dissented, arguing that "the 'level of generality' problem in qualified immunity cases is more pronounced in cases … which involve more open-ended constitutional rights.'" *Id.* at 915 (Bress, J. dissenting). He argued, "I do not believe we need an exhaustive body of case law to conclude that it is improper to impose a penalty based on hostility or animus toward a particular religion, assuming that is what happened here." *Id.* Judge Bress would have defined the law more abstractly than the Ninth Circuit majority—but still more specifically than the Second Circuit in the decision below: "that the state cannot condition a benefit or impose a penalty based on a person's adherence or non-adherence to a religious belief." *Id.* at 917.

The Ninth Circuit majority expressly rejected that reasoning. Noting that this Court has "chided lower courts for 'fail[ing] to identify a case where an officer acting under similar circumstances ... was held to have violated' the relevant constitutional provision," *id*. (quoting *White*, 580 U.S. at 79), the majority explained "the dissent has not furnished a single case recognizing a Free Exercise violation under facts remotely similar to this case." *Id*. The majority also rejected the dissent's theory that "the 'level of generality' problem is less of an issue here than it is in cases involving 'more open-ended constitutional rights," because, "[a]s far as we can discern, the Supreme Court's admonition to avoid framing clearly established rights at a high level of generality is not limited to 'open-ended' rights, whatever those may be." *Id*. at 891-92. Under *Sabra*, the Ninth Circuit also would have decided this case differently.

The Second Circuit's decision deviates from the precedent of many other circuits—a split this Court should resolve.

III. This Case Presents An Important Question That Is Likely To Recur.

A. The decision below is a boon for vexatious prison litigation.

Qualified immunity is important "to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). But the Second Circuit's decision virtually eliminates qualified immunity for RFRA claims. If the high-level requirements of RFRA are clearly established, as the court held, RFRA plaintiffs can defeat qualified immunity without identifying binding case law that is

"particularized to the facts of the case." *White*, 580 U.S. at 79. That collapses the two prongs of qualified immunity into one—*i.e.*, it is clearly established that RFRA is law, so whenever an official violates RFRA, that official violates clearly established law. And it "convert[s] the rule of qualified immunity ... into a rule of virtually unqualified liability" by permitting RFRA plaintiffs to avoid dismissal "simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 640.

That defeats the very purpose of qualified immunity. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). And because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis omitted). Thus, this Court has "repeatedly … stressed the importance of resolving immunity questions at the *earliest possible* stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added). "Until this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818. Indeed, this Court unanimously reversed a denial of qualified immunity at the pleading stage, noting the importance of resolving qualified immunity questions early. *Wood*, 572 U.S. at 755 n.4, 764.

Despite this Court's precedents, the Second Circuit relied on its own cases to conclude that "advancing qualified immunity as grounds for a motion to dismiss is almost always a procedural mismatch" and is "usually not successful." App.24.

Under the Second Circuit's approach, RFRA claims will regularly survive a motion to dismiss and barrel on towards trial. It does not take particularly creative lawyering to allege that a policy substantially burdens religious exercise without an adequate justification. If the decision below is left to stand, these claims will regularly "subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," and the "excessive disruption of government" that qualified immunity is intended to prevent will be the norm. *Harlow*, 457 U.S. at 817-18.

Just as "[q]ualified immunity is no immunity at all if clearly established law can simply be defined as the right to be free from unreasonable searches and seizures," *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015) (internal quotation marks omitted), so too will the immunity ring hollow if it can be overcome anytime plaintiffs allege—as every RFRA plaintiff with a competent lawyer will do—that their religion was burdened without justification.

This issue has become only more important in recent years after this Court held that RFRA plaintiffs are entitled to assert claims for money damages against government officials personally. *Tanzin*, 141 S. Ct. at 491-92. Inmates can now weaponize RFRA to harass prison officials. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 562 (1974) ("Guards and inmates co-exist in direct and intimate contact. Tension between them is

unremitting. Frustration, resentment, and despair are commonplace.").

By giving enterprising prison litigants a roadmap to plead around qualified immunity, the decision below will permit the costly litigation and potentially ruinous damages liability that qualified immunity is intended to prevent. And it will further strain a judicial system already taxed by prisoner complaints—over 27,000 civil rights cases were filed by prisoners in the twelve months before September 30, 2022. *See* Admin. Office of the U.S. Courts, Civil Cases Filed by Jurisdiction, Nature of Suit, and District (Sept. 2022).[2]

B. The decision below casts doubt on policies followed by many other prisons.

Prison policies like FCI-Danbury's are commonplace. The Second Circuit's decision calls them all into question and potentially subjects officials to personal monetary liability for enforcing them.

Every state within the Second Circuit limits congregate prayer in prison. In New York state, "Congregate or group prayer may only occur in a designated religious area during a religious service." N.Y. State Dep't of Corr. & Cmty. Supervision, Directive No. 4202: Religious Programs and Practices, at 7 (Oct. 19, 2015).[3] In Connecticut prisons, "collective religious activity" involving two or more inmates "shall be conducted and supervised by a Department authorized chaplain or religious

[2] https://perma.cc/9V6U-RXEN.

[3] https://perma.cc/F592-ER53.

volunteer." Conn. Dep't of Corr., Dir. 10.8: Religious Services, at 4 (Aug. 11, 2020).[4] And "[a]n inmate may not conduct a collective religious activity under any circumstances." *Id*. In Vermont, "[f]ormal group prayer may only occur in a designated faith area during a faith service or at times authorized by the Superintendent and/or designee, and in a manner, that does not interfere with the safety and security of the facility." Vt. Dep't Corr., Guidance Document: Faith Services Procedures, at 5 (Mar. 20, 2017).[5]

Other state policies limit group prayer in various ways. Some require that group religious activities be scheduled in advance. *See, e.g.*, Tenn. Dep't of Corr., Directive 118.01: Religious Programs, at 6 (Feb. 15, 2014) ("Inmates may engage in prayer as an individual religious exercise during periods of recreation … Corporate or group prayer shall be reserved for scheduled religious activities.")[6]; Haw. Dep't of Pub. Safety, Policy No. Cor.12.05, at 7-8 (May 3, 2017) (religious service or program requires "prior written approval from the Warden" and "offenders are not allowed to lead, conduct, and/or initiate religious services and/or programs").[7]

Others require the supervision of an approved volunteer. *See* Ark. Dep't of Corr., Policy 605: Religious Services, at 35 (Jan. 1, 1984) ("No religious service will be held unless the approved free world

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[4] https://perma.cc/SA45-G2WW.

[5] https://perma.cc/9A52-Z6HD.

[6] https://perma.cc/TL64-UM97.

[7] https://perma.cc/5G9Z-A2GX.

sponsor is present and in charge. No inmate shall conduct a religious service/teaching.")[8]; Colo. Dep't of Corr., Reg. No. 800-01: Religious Programs, Services, Clergy, Faith Group Representatives, and Practices, at 6 (Apr. 1, 2022) ("Group gatherings should not be allowed outside of the identified gathering days for any faith group without a volunteer present.").[9]

Under the Second Circuit's approach, all these policies could generate lengthy and costly litigation against those enforcing them anytime an inmate alleges that a policy is not justified. That eliminates the protections qualified immunity was designed to provide. The Second Circuit's conclusion leaves prison officials across the country in the dark about how to regulate inmates' religious exercise permissibly without fear of personal suits for damages.

[8] https://perma.cc/27F7-YWEF.

[9] https://perma.cc/B6BX-4RX3.

CONCLUSION

This Court should grant the petition and either summarily reverse the decision below or set this case for plenary review.

Respectfully submitted,

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