No. _____

In The
Supreme Court of the United States

GLOW IN ONE MINI GOLF, L.L.C.; AARON KESSLER; MYRON'S CARDS AND GIFTS, INC.; LARRY EVENSON; THE A J HULSE COMPANY; ANDREW HULSE; and GAY BUNCH-HULSE,

Petitioners,

v.

GOVERNOR TIM WALZ, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; and ATTORNEY GENERAL KEITH M. ELLISON, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES V.F. DICKEY
Counsel of Record
DOUGLAS P. SEATON
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 300
Golden Valley, MN 55426
james.dickey@umwlc.org
(612) 428-7002

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Minnesota's Governor has qualified immunity against Petitioners' Fifth Amendment Takings Clause claims for ordering the shut-down of their businesses—but not other like businesses—and prohibiting ingress into those shut-down business properties based on the Governor's declaration of a COVID-19 pandemic emergency.

2. Whether the Court should overrule *Pearson v. Callahan*, 555 U.S. 223 (2009), and reinstate the requirement in *Saucier v. Katz*, 533 U.S. 194 (2001), that lower courts examine whether a government official violated a constitutional right before proceeding to the question of whether the law governing that official's conduct was "clearly established" at the time of the violation.

3. Whether a government official sued in his or her individual capacity may be liable for takings under the Fifth Amendment.

4. Whether Petitioners' claims for declaratory and injunctive relief under the Fourteenth Amendment's Equal Protection Clause are not moot because Minnesota's Governor voluntarily ceased his shut-down orders, which conduct can later be resumed, after vigorously defending those orders throughout this case.

PARTIES TO THE PROCEEDING

Petitioners Glow In One Mini Golf, L.L.C., Myron's Cards and Gifts, Inc., and The A J Hulse Company are Minnesota businesses. Petitioners Aaron Kessler, Larry Evenson, and Gay Bunch-Hulse are natural persons, citizens of the State of Minnesota, and those businesses' respective owners.

Respondents are Governor Tim Walz, individually and in his official capacity, and Attorney General Keith Ellison, in his official capacity. Parties believed to no longer have an interest in the outcome of the petition for writ of certiorari are Mike Freeman, in his official capacity as County Attorney of Hennepin County, Minnesota; Anthony Charles Palumbo, in his official capacity as County Attorney for Anoka County, Minnesota; and John Choi, in his official capacity as County Attorney for Ramsey County, Minnesota.

CORPORATE DISCLOSURE STATEMENT

Petitioners Glow In One Mini Golf, L.L.C., Myron's Cards and Gifts, Inc., and The A J Hulse Company certify that they have no parent companies, that no publicly held companies own 10% or more of their stock, and that no publicly traded companies or corporations have an interest in the outcome of this appeal.

Petitioners Aaron Kessler, Larry Evenson, and Gay Bunch-Hulse are natural persons, so no corporate disclosure is required for them under Rule 29.6.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings in the U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Eighth Circuit:

- *Northland Baptist Church of St. Paul, et al. v. Walz, et al.*, No. 20-cv-1100 (D. Minn.), judgment entered March 30, 2021;
- *Northland Baptist Church of St. Paul, et al. v. Walz, et al.*, No. 21-2283 (8th Cir.), judgment entered June 16, 2022; and
- *Northland Baptist Church of St. Paul, et al. v. Walz, et al.*, No. 21-2283 (8th Cir.), denial of petition for rehearing and rehearing *en banc*, ordered August 9, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The Eighth Circuit's panel decision appears at 37 F.4th 1365 and is reproduced at App. 1–18. The District of Minnesota's decision appears at 530 F. Supp. 3d 790 and is reproduced at App. 25–68.

JURISDICTION

The Eighth Circuit issued its panel decision on June 16, 2022. It denied rehearing *en banc* on August 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment's Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV

The Fifth Amendment's Takings Clause states that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V

STATEMENT OF THE CASE

Petitioners are three Minnesota businesses and their respective owners. On March 13, 2020, Governor Walz issued Emergency Executive Order (hereinafter

"EO") 20-01, which declared Minnesota to be in a "peacetime emergency." App. 3. On March 16, and effective the next day, Governor Walz issued EO 20-04, closing some "places of public accommodation," like Petitioner Glow In One Mini Golf, but not others, like Target or Wal-Mart. App. 4.

On March 18, Governor Walz issued EO 20-08, which amended EO 20-04, effective immediately, to include salons like Petitioner A J Hulse Company, a hair salon with two locations owned by Petitioners Andrew Hulse and Gay Bunch-Hulse. *Id*.

From March 27, 2020 through May 3, 2020, EOs 20-20, 20-33, and 20-38 totally shut down Petitioner Myron's Cards and Gifts' business and continued to shut down A J Hulse and Glow In One's business.

At the same time Petitioners were shut down, Governor Walz entirely exempted tribal lands, Target and other big-box stores from the EO. 8th Cir. Joint App'x 107, R. Doc. 57-1, Decl. of Elizabeth Kramer, Exhibit 11 at ¶ 5(h). Governor Walz also exempted, in addition to Target and other big-box stores:

- providers of "reproductive health care";
- workers in bicycle shops;
- the news media; and
- labor union "essential activities," including the administration of health and welfare funds, and monitoring the wellbeing and safety of members providing services in the Critical Sectors.

8th Cir. Joint App'x 010–011, 107–113 (Second Am. Compl. ¶ 51; Kramer Decl. Ex. 11 at ¶ 6).

Throughout 2020, Governor Walz continued issuing EOs and extended, modified, or replaced previously issued guidelines to reflect Minnesota's "ever-evolving response to the virus." App. 5.

In May 2020, Governor Walz issued an EO that permitted certain businesses, including Myron's Cards and Gifts and A J Hulse, to begin conducting curbside retail sales and, later, EOs that allowed businesses like Myron's Cards and Gifts to begin operating at 50% capacity and A J Hulse to begin operating at 25% capacity. *Id*. Finally, on June 5, 2020, effective June 9, Governor Walz issued EO 20-74. *Id*. EO 20-74 allowed businesses like A J Hulse to reopen at 50% capacity and Glow In One to reopen at 25% capacity. App. 6. However, by June 9, Glow In One had closed completely due to lack of income and could not reopen. *Id*. Associated with each of these EOs were criminal penalties which included jail time and fines for failure to comply. *Id*.

In short, while like businesses, such as Target, Wal-Mart, and others were allowed to operate in full and without capacity restriction—and tribal lands were entirely exempted despite the Governor's civil jurisdiction over them under Public Law 280—Governor Walz shut down Petitioners' businesses, causing massive revenue losses.

Petitioners therefore filed this action. App. 6. The district court granted qualified immunity to

Governor Walz insofar as Petitioners brought claims against him in his individual capacity. *Id*. The district court alternatively dismissed Petitioners' equal protection and takings claims pursuant to Rule 12(b)(6) for failure to state a claim. *Id*. The district court did not consider mootness. *Id*.

Petitioners appealed the district court's dismissal of their equal protection and takings claims. While the appeal was under advisement, another panel of the Eighth Circuit decided *Heights Apartments, L.L.C. v. Walz*, 30 F.4th 720 (8th Cir. 2022), which also sought damages against Governor Walz in his individual capacity for Takings Claims. That panel reversed the district court to allow the takings claims against Governor Walz individually to go forward. *Id*. at 735. Petitioners notified the Eighth Circuit panel assigned to their case of this decision in a Rule 28(j) letter on April 6, 2022. Despite this conflicting intra-circuit precedent, the panel in this case affirmed the district court.

REASONS FOR GRANTING THE PETITION

While this case presents important constitutional questions that this Court may eventually agree to resolve, Petitioners in this appeal specifically challenge the failure of the court below to *reach* the constitutional questions at issue based on an application of the judicially created doctrine of qualified immunity and failure to apply the voluntary-cessation exception to mootness.

As to the issue of qualified immunity, Petitioners ask this Court to grant review and reverse the Eighth Circuit's decision that Governor Walz has qualified immunity from suit. After World War II—an "emergency" circumstance if there ever were one—this Court permitted just compensation claims to proceed against the United States when the United States took over General Motors and Kimball Laundry Company, among other businesses. There is no good reason to distinguish between that precedent and governors' actions in response to other emergencies, like COVID-19. To hold otherwise requires such a granular analysis of what is "clearly established" that future litigants could not overcome that *de facto* bar. The law is "clearly established" that just compensation must issue where businesses are "taken" in response to an emergency, like a pandemic. The Eighth Circuit erred by holding to the contrary. App. 16–18.

But even if the Court were to eventually decide that a "taking" has not occurred under these circumstances, the Eighth Circuit's approach to the question of qualified immunity illuminates the practical problems created by this Court's *Pearson v. Callahan* decision. Judges and commentators across the country have decried the "Escherian paradox" created by *Pearson*, namely that law *never becomes* "clearly established" if courts simply hold that it hasn't reached that threshold yet in granting qualified immunity to government defendants. Bypassing *Saucier's* first prong, where courts would ordinarily "clearly establish" constitutional violations, many courts far too often reach

reflexively for the second prong to find that no precedent has been "clearly established." The next set of plaintiffs then jumps on the same merry-go-round, doomed to fail because the prior court did not "say what the law is" in a real case or controversy. Because *Pearson* has done more harm than good in the 13 years since it was decided, the Court should reverse it and reimpose the two-step ordered requirement of *Saucier v. Katz*.

Finally, Petitioners ask this Court to grant review and reverse the Eighth Circuit's decision that Petitioners' constitutional equal protection claims for declaratory and injunctive relief are moot. The Eighth Circuit panel held that, due to "substantial changes in public health conditions since May 2020," Petitioners' claims were not capable of repetition yet evading review. *Northland Baptist Church of St. Paul v. Walz*, 37 F.4th 1365, 1373 (8th Cir. 2022). The panel failed to analyze whether the Governor's actions satisfied the voluntary-cessation exception to mootness despite Governor Walz' voluntary cessation of the conduct at issue. And the panel failed to consider the facility with which the Minnesota Governor may redeclare a peacetime emergency and reimpose his executive orders to address the persistent mutations of the COVID-19 virus.

Petitioners address these issues in turn.

I. The Court Should Grant Certiorari to Address the Twin Problems of What Defines "Clearly Established" Law Vis-à-vis Declared Emergencies and the Problems Created by *Pearson* in the Qualified Immunity Analysis.

As the Court in *Harlow* stated from the earliest days of the qualified-immunity doctrine, "the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 504–06 (1978)) (internal citations omitted). Qualified immunity's essential purpose has always been to deter and quickly expel "insubstantial claims" to preserve judicial resources and, generally, to avoid the "costs of subjecting officials to the risks of trial" and all that that might entail. *Id*. at 816–17.

To best effect this purpose, the *Harlow* Court trimmed its qualified immunity analysis to only the objective prong: "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, the *Harlow* Court declared,

"[t]he public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id*. at 819. The test remains unchanged to this day.

Pearson and the Eighth Circuit's granular abstraction approach below destroy this balance. The Eighth Circuit held:

> [Petitioners] suggest that, for decades, it has been clearly established that just compensation is required for government takings. We agree with that general proposition, as it is written within the Fifth Amendment's text. However, that does not explain how Governor Walz, in 2020, would have known that his EOs, issued in response to an unprecedented pandemic, constituted a taking for which just compensation was owed.

App. 16. As noted above, the Petitioners did not suggest this incredibly high level of abstraction. Rather, they argued that "governments have been required to compensate businesses for takings during more severe emergencies which threatened the very existence of this nation, such as World War II, 80 years ago." Appellants' Br., July 20, 2021, at 27. Petitioners' approach accords with this Court's repeated advisory that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citing *United States v. Lanier*, 520 U.S. 259 (1997)) (and quoted approvingly by *Taylor v. Riojas*, 141 S. Ct. 52, 53–54

(2020)) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

The Eighth Circuit's approach compounded its "level of abstraction" problem by jumping straight to the "clearly established" analysis, as allowed by *Pearson*. By doing so, that court refused to "establish" what the law is as to emergency orders in Minnesota which impact property rights. Chapter 12 of the Minnesota Statutes governs the declaration of peacetime emergencies and orders derived from those declarations. It is not limited to pandemics. It includes acts of war, terrorism, floods, fires, civil unrest, and so on. Minn. Stat. § 12.31, Subd. 2. Governor Walz alone has invoked it at least 30 times in his 4 years in office.[1] Without a decision by the courts, Minnesotans (and citizens of other states subject to their own emergency laws) are deprived of a decision—in a real case or controversy—as to whether governors can strip property rights under the guise of an emergency declaration.

The Eighth Circuit's decision below upsets the balance this Court created in *Harlow v. Fitzgerald*, and the Court should grant the petition for a writ of certiorari to correct that imbalance.

---

[1] *See* "Executive Orders from Governor Walz," *Office of Governor Tim Walz & Lt. Governor Peggy Flanagan*, *available at* https://mn.gov/governor/news/executiveorders.jsp (last visited Nov. 2, 2022).

A. Given Federal Courts' Apparent Difficulty Applying a "General Constitutional Rule" to Novel Fact Situations, the Court Should Clarify *Lanier* and *Hope*'s Precedent.

Lower courts consistently have trouble finding the proper boundaries of what is "clearly established." They often measure the factual contours too narrowly, at a granular level of abstraction. Their unpredictable—and at times seemingly arbitrary—analyses are a result of apparently conflicting directions: this Court has counseled that the inquiry "does not require a case directly on point for a right to be clearly established," *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)), and yet "clearly established law must be 'particularized' to the facts of the case." *Pauly*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Eighth Circuit's decision below demonstrates the vagary of the "clearly established" standard in its current form because it essentially ignores the "general constitutional rule"—just compensation must be paid to a litigant even if the taking occurred during an emergency—by magnifying the less consequential particulars of the case—a pandemic versus some other kind of emergency allegedly requiring discriminatory business shut-downs. *Contra Hope*, 536 U.S. at 741. Thus, the subjective element that the *Harlow* Court sought to write out from its qualified-immunity test persists in the level of scrutiny—broad versus specific—of what is "clearly established." Courts often

apply "clearly" as "specifically," or "minutely," but also draw it too generally. *See*, *e.g.*, *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *Kisela*, 138 S. Ct. at 1152.

Despite the Eighth Circuit's approach below, recent decisions of this Court have breathed new life into the "obviousness principle" derived from *Hope*. As Judge Willett of the Fifth Circuit Court of Appeals put it, the "obviousness principle" means that "[e]ven if the precise fact pattern is novel, there is no need for a prior case exactly on point where the violation is obvious." *Ramirez v. Guadarrama*, 2 F.4th 506, 523 (5th Cir. 2021) (Willett, J., with Graves and Higginson, JJ., dissenting from denial of rehearing *en banc*). The Court's recent decisions in cases such as *Taylor v. Riojas*, 141 S. Ct. 52 (2020), and *McCoy v. Alamu*, 141 S. Ct. 1364 (2021), are consistent with this reasoning.

The Court first articulated this principle in *Anderson v. Creighton*, 483 U.S. at 640, and carried it forward in *Lanier*, *Hope*, and most recently in *Taylor v. Riojas*. The principle means that the specifics of the official action need not have been previously held unlawful if the unlawfulness is "apparent in the light of pre-existing law." *Anderson*, 483 U.S. at 640. The Court thus directs the lower courts to look for a "general constitutional rule" that applies to the "particular type of conduct at issue." *Lanier*, 520 U.S. at 271. This "general rule" cannot be merely the constitutional right itself, *Anderson*,

483 U.S. at 639, but some more particular application of it.

The general rule derived from Eighth Amendment caselaw to which *Taylor* cites, *see* 141 S. Ct. at 54, was articulated in *Hope* as "[t]he unnecessary and wanton infliction of pain" "totally without penological justification." *Hope*, 536 U.S. at 737 (internal quotes omitted). This general rule made it obvious in *Taylor* that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." 141 S. Ct. at 54.

In this case, the Eighth Circuit failed to pick up on the "obviousness" of the constitutional violation at issue. The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Petitioners draw from easy application of relevant World War II case law that government takings made pursuant to an emergency require just compensation. In *United States v. General Motors Corp.*, 323 U.S. 373 (1945), and again in *Kimball Laundry Co. v. U.S.*, 338 U.S. 1 (1949), this Court recognized that, even in an emergency, the government must provide compensation when it takes a property for the public use. In *General Motors*, the Court ordered the United States to pay GM compensation for the rental value of the property, the cost of destroyed fixtures and equipment, and depreciation. 323 U.S. at 383–84. In *Kimball*, the Court ordered the United States to pay

Kimball Laundry compensation for the rental value of the laundry facility, damage to machinery beyond normal wear and tear, and the going concern value of the company taken. 338 U.S. at 15–16. These decisions give the clear and obvious warning that just compensation must be paid for shutting down a business during an emergency and preventing ingress and egress to and from its premises. Moreover, in both cases, the government taking was so obvious that the point was not in contention. Neither the novelty of the COVID-19 pandemic nor the nuance of Governor Walz' actions detracts from the "obvious" fair warning established by this Court's World War II Takings precedents.

Thus, the Eighth Circuit erred when it reached for the specific circumstances of the COVID-19 pandemic to distinguish the facts of this case from the World War II cases. The specific reason for a selective shutdown of some Minnesota businesses (but not other like businesses), whether a pandemic, a terrorist activity, an act of nature, a flood, or a fire, is irrelevant to whether a taking of those businesses occurs. It is telling that Minn. Stat. § 12.31 includes each of these triggering events (other than a public health emergency) as a predicate for an emergency declaration and subsequent emergency orders. It follows that the general constitutional rule derived from the Fifth Amendment's Takings Clause in the WWII cases gives obvious and "fair warning" to governments who effect a taking during even the gravest of emergencies. *Hope*, 536 U.S. at 740 n.10 (equating "clearly established" with "fair warning"). The Eighth Circuit's granular analysis

concluding that Governor Walz did not know his EOs might constitute a taking is tantamount to arguing that someone did not know assault could be perpetrated with a knife as opposed to a gun.

But even if the Court were to see this case as a closer case, in closer cases, where there is (a) analogous decisional law similar to the context of the case but (b) enough differences between fact patterns such that the violation is not "obvious," inconsistency—and arguably "subjectivity"—remains the rule. Here, the Court can provide additional clarity in the law.

First, the character of the constitutional violation is important to the determination of what level of abstraction courts should apply to alleged violations of that right. This is not to say that the Court should "Balkanize" the analysis and give greater or less deference to plaintiffs or the government in one type of violation over another, as the *Anderson* Court feared.[2] *See Anderson*, 483 U.S. at 642–43. Rather, it means that the Court should direct lower courts to consider the common-law history of the establishment of the rights at issue in determining whether a right is "clearly established." Doing so keeps courts' focus on whether government

[2] The *Anderson* Court's fear of "Balkanization" of qualified immunity analysis made no impact on the *Taylor* Court's unanimous reversal of the application of qualified immunity based on an Eighth Amendment violation under the "obviousness principle." *See Taylor*, 141 S. Ct. at 53–54 ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

defendants are reasonably on notice of their potential liability.

Hope, for example, derived its particular Eighth Amendment rule from prior caselaw, drawing from *Whitley v. Albers*, 475 U.S. 312 (1986), and *Rhodes v. Chapman*, 452 U.S. 337 (1981). Likewise, alleged Fourth Amendment violations are very different from Fifth Amendment Takings Clause violations in their level of development by the Court and lower courts. In *Anderson*, for example, the Court lamented that limiting qualified immunity to specific types of warrantless searches which violate the Fourth Amendment is a fool's errand, where the Creightons had asked for a "procrustean" rule: "no immunity should be provided to police officers who conduct unlawful searches of innocent third parties' homes in search of fugitives." 483 U.S. at 644. Such a limitation on qualified immunity would fail to provide adequate notice to police officers as to what *else* might be their financial responsibility in the event of allegations of wrongdoing. *See id.*

But whether "just compensation" must be paid where there is a taking of private property for public use is a much less fact-intensive inquiry, certainly at the pleading stage. For any triggered payment under the Fifth Amendment's Takings Clause, the Court either applies the "regulatory taking" analysis described in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) or the physical taking analysis outlined in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). As noted above, where the U.S. Government has, in the past, been ordered by this Court to pay just

compensation to businesses taken during the emergency of World War II, *see Kimball Laundry Co.*, 338 U.S. at 11–12; *U.S. v. Petty Motor Co.*, 327 U.S. 372 (1946); *Gen. Motors Corp.*, 323 U.S. 373, it is hard to imagine why there would be any need for further fact detail to determine whether Governor Walz had adequate notice that he could be liable for selectively shutting down Minnesota small businesses.

Second, the Court should clarify that plaintiffs do not have to *allege* a granular level of detail to demonstrate that defendants have received adequate notice as to the potential for liability at the motion-to-dismiss stage. At this early juncture, plaintiffs have no way to ascertain what *actual* notice the government defendant may have had as to the possibility of liability, or how the defendants determined their course of action. Whether a defendant considered the possibility of liability and the insight provided by discovery into their motives and actions are relevant to the objective analysis announced by *Harlow*.

Consistently, commentators have recognized that "qualified immunity is an issue that benefits from a developed factual record because it is a defense that almost always turns on some questions of fact. After discovery, the question of whether the defendant is entitled [to] qualified immunity can be dramatically altered, such that neither party chooses to appeal." Justin C. Van Orsdol, *The New Qualified Immunity Quandary*, 100 Neb. L. Rev. 692, 712 (2022). This is good reason to wait to decide *all* qualified immunity questions until after discovery, where the courts have

a clearer understanding of the considerations that went into a decision to deprive individuals of liberty or property and the specific actions the defendants took. *See*, *e.g.*, *King v. Bd. of Cnty. Comm'rs*, No. 8:16-CV-2651-T-33TBM, 2017 U.S. Dist. LEXIS 41941, at *25–26 (M.D. Fla. Mar. 23, 2017) (finding that defendants were not entitled to qualified immunity at the motion to dismiss stage "but, with the benefit of discovery, they may be able to establish that they are entitled to qualified immunity later in the proceedings").

The Court should grant the petition for a writ of certiorari to develop the law related to the "obviousness principle" of qualified immunity, to provide additional guidance to lower courts as to how to consider common-law development related to the deprivation of constitutional rights, and to instruct lower courts to consider the minimal development of a record at the pleading stage when analyzing whether to afford a defendant qualified immunity. Upon granting the petition, Petitioners ask the Court to reverse the Eighth Circuit and remand for consideration of the constitutional issues presented by this case.

B. The Court Should Reconsider *Pearson v. Callahan*.

In *Saucier v. Katz*, this Court instructed courts to ask a particular sequence of questions to determine whether to apply qualified immunity to a defendant. 533 U.S. 194 (2001). The first question was, "taken in the light most favorable to the party asserting the

injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 201. The purpose behind requiring this first step was "to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This first step allowed courts "to set forth principles which will become the basis for a holding that a right is clearly established." *Saucier*, 533 U.S. at 201. Only if a court found a constitutional right had been violated would it then need to go on to the second question to answer whether that right had been "clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202.

Pearson v. Callahan removed the mandate of the sequence and permitted courts to skip to question two and thereby avoid deciding the constitutional issue. But the Court's justifications for the change are severely undermined by the constitutional stagnation that *Pearson* has introduced. This is in spite of the *Pearson* Court strongly encouraging courts to continue to follow the *Saucier* sequence because it is "often appropriate," "often beneficial." *Pearson*, 555 U.S. at 236. The *Pearson* Court even noted that "the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id*.

First among the *Pearson* Court's reasons for abandoning the *Saucier* process was preservation of "scarce

judicial resources" and the parties' resources. *Id*. at 236–37. Yet the Court had already baked resource-preservation into its qualified-immunity doctrine by instituting it to weed out unsubstantial claims; *Harlow* assigns the benefit of this weeding to government officials, *see* 457 U.S. at 807, 817, but the very existence of qualified immunity benefits the judiciary as well by reducing caseload. And *Harlow* even balanced this value against the "remedy to protect the rights of citizens." *Id*. at 807. *Pearson* skewed this balance to the disadvantage of potential victims.

Next, the *Pearson* Court reasoned that these "difficult questions [] have no effect on the outcome of the case," that the courts see them as "essentially academic exercises," and that "opinions [on question one] often fail to make a meaningful contribution" to the development of constitutional precedent. *Pearson*, 555 U.S. at 237. While the Court was certainly correct that, in some cases, opinions on question one will not make a meaningful contribution to the relevant law, the Court's full abandonment of *Saucier* went too far and created moral hazard for lower courts to abdicate their duty to judicially engage real cases or controversies over constitutional issues. And even when the federal courts *do* exercise their "*Pearson* discretion" to reach the constitutional claims, they now overwhelmingly do so to announce that no constitutional violation took place. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 35 (2015). Further, the post-*Pearson* stagnation in constitutional law development is real: in only five percent (5%) of

post-*Pearson* cases where the law is not clearly established did the lower courts "recognize a new constitutional violation . . . that, because of the court's decision would be [clearly established] in future cases." *Id.* at 35–36. The *Pearson* approach fails to adequately appreciate the meta-judicial function that a court's determination on the constitutional merits has on the present victim, the potential future victim, and society. Commentators are not alone in their criticism of post-*Pearson* discretion. Some judges have noted the effect of the trends just mentioned, labeling the qualified-immunity doctrine as "unqualified impunity" for government officials. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

The *Pearson* Court also reasoned that mandating the *Saucier* sequence risks bad decision-making because of an inadequate factual record. *Pearson*, 555 U.S. at 238-39. It is true that "qualified immunity is an issue that benefits from a developed factual record," as described above. Van Orsdol, 100 Neb. L. Rev. at 712. But this is reason to wait to decide all qualified immunity questions until after discovery, where either party may be benefitted. *See*, *e.g.*, *King*, 2017 U.S. Dist. LEXIS 41941, at *25–26 (finding that defendants were not entitled to qualified immunity at the motion to dismiss stage).

Among other criticisms of *Saucier*, the *Pearson* Court also reasoned that the prudential rule of constitutional avoidance militates against addressing the constitutional merits of qualified immunity questions.

Pearson, 555 U.S. at 241. But the prudence of this rule, and the remainder of the *Pearson* Court's criticisms of the *Saucier* rule, do not overcome the problems *Pearson* has created. Further, constitutional avoidance does little to serve its prudential purpose when it acts within the sphere of judge-made rules. *See In re Citizen Complaint by Stout*, 493 P.3d 1170, 1179 (Wash. 2021) ("We are the sole body with authority to consider the constitutionality of our own, judge-made court rules. We therefore have less justification for avoiding the task.").

The justice of qualified immunity depends upon the courts establishing precedents both to deter unconstitutional conduct as well as to punish the same conduct in the future. Needless to say, no other branch of government can establish such precedents. So, if courts decline to identify constitutional violations and thus fail to establish precedent, or if the overwhelming use of *Pearson* discretion leads to the declaration of no constitutional violation by the defendant, constitutional stagnation results, and the purpose behind § 1983—of vindicating citizens' rights—is hampered, if not institutionally undermined. Plaintiffs, like Petitioners here, are thus vulnerable to a paradox in which their constitutional harms will never be redressed because no court ever redressed them before. Judge Willett of the Fifth Circuit Court of Appeals aptly describes the situation as:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional

> questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

Zadeh, 928 F.3d at 479-80 (Willett, J., concurring in part and dissenting in part); *see also Eves v. LePage*, 927 F.3d 575, 591 (1st Cir. 2019) (*en banc*) (Thompson, J., with Torruella and Barron, JJ., concurring).

Two Tenth Circuit cases illustrate this paradox frustratingly well. *See Yeasin v. Durham*, 719 F. App'x 844 (10th Cir. 2018); *Hunt v. Bd. of Regents*, 792 F. App'x 595 (10th Cir. 2019). Both cases concerned a university disciplining one of its students for off-campus, online speech. In *Yeasin*, the first, the court found no clearly established precedent in this area. Despite acknowledging that "[a]t the intersection of university speech and social media, First Amendment doctrine is unsettled," the court declined to set a precedent. *Yeasin*, 719 F. App'x at 852. Not two years later, *Hunt* came before the court—another university student disciplined for off-campus, online speech—and, again, the court declined to decide the merits because "[o]ff-campus, online speech by university students, particularly those in professional schools, involves an emerging area of constitutional law." 792 F. App'x at 604. Even as the court cited to decisions being made in other circuits—and *Yeasin* itself—it refused to help elaborate the law in the "emerging area." *Id.*

As noted in part above, data on the effects of *Pearson* in the lower courts also support its reevaluation. An analysis of more than eight hundred published and un-published qualified immunity decisions between 2009 and 2012 revealed the following:

- "courts decided the constitutional question first in 'about half of the claims considered (45.5% or 665 claims)' ";
- " '[r]oughly a quarter of the time (26.7% or 390 claims) courts did not choose to exercise their discretion, opting instead to just declare that the right was not clearly established' "; and
- of the 1,055 claims on which qualified immunity was granted, courts did not reach the constitutional question more than one-third of the time (36.9% or 390 claims).

Samantha K. Harris, *Have A Little (Good) Faith: Towards A Better Balance In The Qualified Immunity Doctrine*, 93 Temp. L. Rev. 511, 519 (Spring 2021) (quoting Nielson & Walker, 89 S. Cal. L. Rev. at 1–2). The same analysis concluded that the imbalance of courts exercising their discretion may lead to certain circuits having "an outsized voice regarding the meaning of the Constitution." Nielson & Walker, 89 Cal L. Rev. at 6. More, "the data suggest that judges who hold certain substantive views may be more willing to decide constitutional questions than judges who hold different substantive views." *Id*. at 6. Thus, attending constitutional stagnation is the risk of constitutional disequilibrium. There is even some evidence "that a court's decision to avoid a constitutional determination is a

product of its interest in controlling constitutional precedent." Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. Rev. 468, 469 (2011).

The foregoing problems can only be addressed if the Court reconsiders *Pearson*, which Petitioners respectfully request. Upon reviewing *Pearson*, Petitioners ask the Court to overrule it and reverse the Eighth Circuit below.

II. The Court Should Address the Apparent Circuit Split on Whether Government Officials May Be Required to Pay Just Compensation, in Their Individual Capacities, Upon Establishment of a Taking.

The Eighth Circuit below held that it could not find an example of "the Supreme Court or this Court" holding "a government official individually liable for a government taking." App. 16–17. In doing so, the court avoided the question of whether Governor Walz' prohibition on ingress or egress to Petitioners' shut-down business premises constituted a taking under *Cedar Point Nursery*. This carefully worded statement avoids the holdings of sister circuits, namely the Second and Eleventh Circuits, which have left open that possibility.

First, the Second Circuit's holding that officials may be held liable for damages in their individual capacities when they are "personally involved in the alleged constitutional deprivations." *Grullon v. City of New Haven*, 720 F.3d 133, 137 (2d Cir. 2013) (cited in

the Takings Clause context by *Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 42–43 (E.D.N.Y. 2020)). The Eleventh Circuit has also "left open the possibility that plaintiffs may bring a Fifth Amendment Takings Clause claim against individual government officials alleged to have trespassed on their land." *Spencer v. Benison*, No. 7:16-cv-01334-LSC, 2018 U.S. Dist. LEXIS 173463, at *20–21 (Oct. 9, 2018), *rev'd on other grounds*, *Spencer v. Benison*, 5 F.4th 1222 (11th Cir. 2021) (citing *Garvie v. City of Ft. Walton Beach*, 366 F.3d 1186, 1189 n.2 (11th Cir. 2004)); *Harbert Int'l v. James*, 157 F.3d 1271 (11th Cir. 1998).

Splitting on this issue with these courts are the Eighth, Fourth, and Sixth Circuits. App. 16–18; *Langdon v. Swain*, 29 F. App'x 171, 172 (4th Cir. 2002); *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984). The Court has a substantial interest in resolving existing circuit splits. *See* S. Ct. R. 10(a). The Court should therefore grant review and resolve this split.

III. The Court Should Grant Certiorari to Clarify the Capable of Repetition and Voluntary-Cessation Exceptions to Mootness in the Context of a Government-Declared Emergency.

Petitioners acknowledge that, related to their claims for declaratory and injunctive relief under the Equal Protection Clause of the Fourteenth Amendment, the offending executive orders have been terminated, and

the Minnesota peacetime emergency is no more—for now. However, the ease with which a Minnesota Governor can declare an emergency and issue orders under the Minnesota Emergency Management Act militates in favor of this Court granting review and clarifying the application of the voluntary-cessation doctrine and the "capable of repetition yet evading review" exception to mootness.

Courts around the country have struggled to apply the Court's voluntary-cessation and "capable of repetition" exceptions to mootness in the context of the COVID-19 pandemic. And if declaratory and injunctive relief are not available to restrain government actors from imposing illegal restrictions on their citizens on an emergency basis, citizens will never be able to have the *merits* of their constitutional claims adjudicated where government claims an "emergency" justifies its actions. Instead, the next time a claimed emergency arises, plaintiffs will be forced to proceed through rushed temporary restraining order proceedings which may be determined on non-merits issues and which unfairly impose a higher burden on plaintiffs to carry.

A. The Government's Voluntary Cessation of COVID-19 Restrictions Does Not Moot a Case When the Original Predicate for the Restrictions Remains Live and the Government Has Vigorously Defended Its Restrictions.

The Eighth Circuit did not address the application of the voluntary-cessation doctrine to this case, but Petitioners raised the voluntary-cessation doctrine below, Appellants' Reply Br., Sept. 15, 2021, at 5, and ask the Court to grant the writ of certiorari and apply it here.

The Court has stated that "'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)). Indeed, if a restriction is capable of reimposition and the government "vigorously defends the legality of such an approach," it is impossible for the government to prove that its voluntary cessation moots the case. *Id*. (internal quotes omitted).

That is the case here. Governor Walz has repeatedly claimed in this litigation that he can declare another COVID-19 peacetime emergency at any time under Minnesota Statutes Chapter 12, with no explanation as to why an emergency should be declared. *E.g.*, R. Doc. 56 at 31–40 ("Plaintiffs similarly contend that the Governor lacked authority to issue EO 20-01 because it 'provides no evidentiary support or rational

basis for the[e] claim' that local government resources are inadequate. . . . This is not a requirement of Chapter 12. . . ."). Further, in Minnesota, under Chapter 12, the Minnesota Legislature cannot stop Governor Walz from shutting down Minnesota's economy via a peacetime emergency unless *both houses* vote to do so in a special session called 30 days after the declaration. Minn. Stat. § 12.31. Minnesota has a divided Legislature, and the House, controlled by the Governor's party, refused to end Governor Walz' declared emergency for 15 months after its initial declaration. The declared emergency lasted until the full Legislature agreed on political concessions in late June 2021.[3]

While many courts have not applied mootness exceptions to prospective claims for relief in COVID-19 litigation, other courts and federal judges have. As some members of the Ninth Circuit have noted, a "crucial" factor in determining mootness "is whether the defendant retains the power to issue similar orders." *Brach v. Newsom*, 20-56291, 2022 WL 2145391, at *9 (9th Cir. June 15, 2022) (Paez, J., with Berzon, Ikuta, R. Nelson, and Bress, JJ., dissenting). Likewise, in the Eighth Circuit, Judge Stras dissented from a decision holding moot a declaratory and injunctive relief challenge to St. Louis County, Missouri's COVID-19 restrictions. *Hawse v. Page*, 7 F.4th 685, 698-99 (8th Cir.

---

[3] *See*, *e.g.*, Diane Sandberg and John Croman, "Governor Tim Walz to end emergency powers July 1," *KARE-11*, June 30, 2021, *available at* https://www.kare11.com/article/news/politics/walz-emergency-powers-to-end-july-1-minnesota-governor/89-0e39c940-f149-4031-88fb-8b175ee0ce45 (last accessed Nov. 2, 2022).

2021) (Stras, J., dissenting). Further, in the Sixth Circuit, Judge Bush and Judge Readler dissented from the *en banc* panel's decision holding another COVID-19 restriction challenge moot. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 531–54 (6th Cir. 2022) (*en banc*) (Readler and Bush, JJ., dissenting). In the Fifth Circuit, Judge Ho likewise noted that it is theoretically possible that a challenge to government action can become moot after voluntary cessation of that action, but only given certain assurances on the record:

> If a government not only ceases the challenged behavior, but also assures the plaintiffs and the courts that it will *never* return to its previous course of conduct, a court might reasonably decide to credit that promise, and hold the case moot, so long as it finds no reason to doubt the government's credibility on this score.

Tucker v. Gaddis, 40 F.4th 289, 295 (5th Cir. 2022) (Ho, J., concurring).[4]

---

[4] Other federal courts and at least two state courts have decided that claims for declaratory and injunctive relief as to expired COVID-19 orders are not moot. *See Roush v. Alexander*, 2022 U.S. Dist. LEXIS 50088, at *25–27 (M.D. La. Feb. 24, 2022) ("Given the ever-evolving government responses to the current pandemic, as well as the decisions by the Supreme Court, this action presents an ongoing 'case or controversy' under Article III."); *Southwell v. McKee*, No. PC-2021-05915, 2022 R.I. Super. LEXIS 42, at *7 (June 6, 2022) ("Here, the Court has no indication that our state will never impose another student masking requirement."); *Ector Cty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 Tex. App. LEXIS 7492, at *18 (Tex. App. Sep. 9, 2021) ("However, the Governor and the State have not admitted that

There are no such assurances here, and Governor Walz has vigorously defended his power to impose unequal restrictions on like Minnesota businesses throughout this litigation. And while the peacetime emergency declaration has lapsed, the same predicate for an emergency declaration remains robustly active (i.e., COVID-19's variant lineage). That means, pursuant to Minnesota law, the Governor retains the power to easily and unilaterally declare another peacetime emergency at any time in order to issue orders with "the full force and effect of law." Minn. Stat. § 12.32.

Given the Governor's vigorous defense of his lockdown orders and the ongoing predicate for their reimposition, it cannot be "absolutely clear" that it is unreasonable to expect he will reimpose them. Again, the Eighth Circuit did not address this issue, but Petitioners raised the voluntary-cessation doctrine below, Appellants' Reply Br., Sept. 15, 2021, at 5, and request the Court grant certiorari and clarify the doctrine in the context of emergency orders.

---

any of the executive orders were wrongfully issued and continue to maintain that the Governor has the authority to issue such orders. . . . On this record, the Governor and the State did not meet their heavy burden to make it absolutely clear that restrictions on people patronizing, and being served in, bars will not be reimposed through a future executive order.").

B. This Case Is Not Moot Because the Facts Demonstrate That the Controversy Is Capable of Repetition, Yet Evading Review.

Just recently, this Court recognized the potential problem plaintiffs might run into with inherently ephemeral COVID-19 executive orders:

> Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

Likewise, in *Davis v. FEC*, the Court held that the capable of repetition, yet evading review exception to mootness "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." 554 U.S. 724, 735 (2008) (internal quotation marks omitted). A "mere physical or theoretical possibility" is insufficient to satisfy this standard. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Rather, "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same

controversy will recur involving the same complaining party." *Id.*

In *Honig v. Doe*, the Court noted that the "reasonableness" of an expectation depends on "whether the controversy [is] *capable* of repetition and not . . . whether the claimant [has] demonstrated that a recurrence of the dispute [is] more probable than not." 484 U.S. 305, 318 n.6 (1988) (emphasis original). "'Reasonableness' in this context is not an exacting bar," and it "certainly does not require 'repetition of every "legally relevant" characteristic.'" *Brach*, 2022 WL 2145391, at *8 (Paez, J., dissenting) (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007)).

In contrast, the Eighth Circuit panel's standard for "reasonableness" requires Petitioners to prove that "Governor Walz *will*, first, declare a second peacetime emergency and, then, *will* issue additional EOs—specifically, EOs like 20-74 that [would treat Petitioners] differently than other, similarly situated businesses and impede them from conducting their businesses as they wish." App. 11 (emphasis added). This is an impossible, and improper, standard because it demands a prophetic level of certainty. This Court's precedent has never required such a level of certainty as to a government's future actions.

This standard is particularly improper because Petitioners pointed out below that the Governor had repeatedly "moved the goalposts" with his conduct throughout his declared COVID-19 emergency. Governor

Walz "turned the dials" of his illegal power grab multiple times related to small businesses like Petitioners, while continuing to exempt big businesses like Target and Wal-Mart.[5]

As noted above, the law and the circumstantial predicate (i.e., COVID-19 and its variants) to the Governor's original peacetime emergency declaration and ensuing orders remain unchanged. Because nothing has changed in this respect, the controversy is capable of repetition and this case is not moot. The Court should grant the writ of certiorari, reverse the Eighth Circuit, and remand for consideration of the merits of this dispute.

[5] *E.g.*, EO 20-99, "Implementing a Four Week Dial Back on Certain Activities to Slow the Spread of COVID-19," Nov. 18, 2020, *available at* https://mn.gov/governor/assets/EO%2020-99%20Final%20%28003%29_tcm1055-454294.pdf.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

JAMES V.F. DICKEY
Counsel of Record
DOUGLAS P. SEATON
UPPER MIDWEST LAW CENTER
8421 Wayzata Boulevard, Suite 300
Golden Valley, MN 55426
james.dickey@umlc.org
(612) 428-7002

Counsel for Petitioners
November 7, 2022