No. _____

In the Supreme Court of the United States

PLEASANT VIEW BAPTIST CHURCH, ET AL.,
Petitioners,

v.

ANDY BESHEAR,
IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether qualified immunity applies to a state actor who, despite multiple circuit court decisions directing him not to burden religious activities more than secular activities where the risks of COVID-19 transmission are comparable for both, continues to violate the Free Exercise Clause by burdening religious activities more than secular activities where the risks of COVID-19 transmission are comparable for both?

2. Whether this Court should overrule, or at least modify, its prior cases concerning the defense of qualified immunity, at least as applied to a state actor who has the benefit of forethought and premeditation, where the defense is contrary to the plain text of 42 U.S.C. § 1983?

3. Whether qualified immunity is an affirmative defense with the burden of proof on the party raising it, or whether a plaintiff has the burden of disproving the defense?

PARTIES TO THE PROCEEDING

The following individuals and entities were Plaintiffs before the trial court and Appellants in the Sixth Circuit: Pleasant View Baptist Church; Pleasant View Baptist School; Pastor Dale Massengale; Veritas Christian Academy; Maryville Baptist Church; Micah Christian School; Pastor Jack Roberts; Mayfield Creek Baptist Church; Mayfield Creek Christian School; Pastor Terry Norris; Faith Baptist Church; Faith Baptist Academy; Pastor Dan Otto; Wesley Deters and Mitch Deters, on behalf of themselves and their minor children MD, WD, and SD; Central Baptist Church; Central Baptist Academy; Pastor Mark Eaton; Cornerstone Christian School; Cornerstone Christian Church; John Miller, on behalf of himself and his minor children BM, EM, and HM (collectively "Petitioners").

The following individual is the Defendant before the trial court and the Appellee in the Sixth Circuit: Andrew G. Beshear in his individual capacity ("Respondent").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, the undersigned counsel state that none of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court for the Eastern District of Kentucky, *Pleasant View Baptist Church, et. al. v. Beshear*, 2:20-cv-00166, Entry dated September 30, 2021

U.S. Court of Appeals for the Sixth Circuit, *Pleasant View Baptist Church, et. al. v. Beshear*, 21-6028, Entry dated August 14, 2023

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion that is the subject of this petition for a writ of certiorari is the *Opinion* and *Judgment,* entered August 14, 2023, by the United States Court of Appeals for the Sixth Circuit in Case No. 21-6028 (App.1–App.1-38), and is reported at *Pleasant View Baptist Church v. Beshear*, 78 F.4th 286 (6th Cir. 2023). Petitioners' petition for rehearing *en banc* was denied by the Sixth Circuit Court of Appeal's *Order*, entered October 3, 2023 (App.63-64), which is reported at *Pleasant View Baptist Church v. Beshear*, 2023 U.S. App. LEXIS 26780 (6th Cir. 2023).

The *Opinion* in the United States District Court, Eastern District of Kentucky, entered September 30, 2021, granting Respondents' motion to dismiss (App.39-App.60), is reported in at *Pleasant View Baptist Church v. Beshear*, 2021 U.S. Dist. LEXIS 188202 (E.D.Ky. Sep. 30, 2021).

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c). This Petition was timely filed under the terms of Supreme Court Rule 13(1) and (3).

The *Opinion* and *Judgment* of the Sixth Circuit Court of Appeals was entered on August 14, 2023. (App.1-App.38). A timely petition for rehearing *en banc* was filed with the Sixth Circuit on September 11, 2023. On October 3, 2023, the Sixth Circuit entered its order denying the petition for rehearing *en banc* (App.63-App.64). On November 28, 2023, this Court, through Justice Kavanaugh, extended time to file a petition for certiorari to February 20, 2024. *See* Application at 23A481.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AMEND I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves Respondent's shuttering of religious schools in November and December, 2021 (the "School Ban"), as a purported response measure to COVID-19, while simultaneously liberally allowing a bevy of secular activities involving comparable, or more even dangerous, COVID-19 risks, to include large capacity daycare centers (including those with classroom settings), secular colleges and universities (again including classroom settings), movie theaters,

indoor auction facilities, strip clubs, and all manner of retail establishments and other businesses where the public was allowed to congregate.

Respondent did not write his School Ban with a blank slate: he was aware that at least three separate, published Sixth Circuit decisions, *directed specifically at him*, held that he could not treat religious activities less favorably than secular activities, where such activities involved comparable risks from a COVID-19 mitigation perspective. *Maryville Baptist Church v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (*Maryville*); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 977 F.3d 561 (6th Cir. 2020) (*Maryville II*). Then, on November 25, 2020, this Court weighed in as well, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and reiterated consistent with *Roberts* that governors, in their response measures to COVID-19, could not treat religious activities less favorably than secular activities, where all such activities involved comparable risks from a COVID-19 mitigation perspective.

Respondent then rejected clear Sixth Circuit and Supreme Court precedent. Respondent made the conscious choice to issue his School Ban and targeted protected religious exercise once again, and even backed his order by criminal penalties of a year in jail, prohibiting children from attending classes at religious schools, all while leaving open numerous secular activities involving comparable, or even more dangerous, COVID-19 risks.

Petitioners sued and the district court and Sixth Circuit found that, even though three published

decisions directed to this Respondent informed him about religious discrimination in his COVID-19 orders, he was nonetheless entitled to qualified immunity.

Now, Petitioners seek review of three issues:

First, whether qualified immunity applies to a state actor who, despite multiple circuit court decisions directing him not to burden religious activities more than secular activities where the risks of COVID transmission are comparable for both, continues to violate the Free Exercise Clause by burdening religious activities more than secular activities where the risks of COVID-19 transmission are comparable for both?

Second, whether this Court should overrule, or at least modify, its prior cases concerning the defense of qualified immunity, at least as applied to a state actor who has the benefit of forethought and premeditation, as Respondent did here, where the defense is contrary to the plain text of 42 U.S.C. § 1983, as it was here?

Third, whether qualified immunity is an affirmative defense with the burden of proof on the party raising it, or whether a plaintiff has the burden of disproving the defense, as the Sixth Circuit required below?

B. FACTUAL BACKGROUND

Petitioners are citizens whose religious beliefs inform every aspect of their lives. They include parents, churches, and operators of religious schools. (Am. Compl., DE#40-2, ¶¶ 42-49, App. 80-86). The religious schools operate as extensions of Petitioners' churches and their church ministries, which include

religious education and chapel service. *Id.* For Petitioners, attendance at religious schools and the instruction provided by these schools are an extension of the sincerely held religious beliefs of the congregants of these churches. *Id.* By fall, 2020, in response to the COVID-19 pandemic, Petitioners had implemented, at significant cost, numerous COVID-19 mitigation measures including, without limitation, social distancing, sanitation, temperature checks, partitions, lunchroom procedures, mask wearing, and other CDC recommended control measures. *Id.* None of Petitioners' schools or their associated churches had any community spread of COVID-19. *Id.*

1. The Sixth Circuit repeatedly rebuked Respondent for violating the Free Exercise Clause, and the *Cuomo* decision in November, 2020, likewise created clearly established law on the Free Exercise issue involved here

In March, 2020, Respondent issued a series of executive orders, purportedly to address the spread of COVID-19. These orders prohibited all religious gatherings. However, the orders simultaneously permitted a wide range of secular activities where all such activities involved comparable risks of spreading COVID-19. (*Id.* at ¶7, App. 69). As a result, suit was filed, resulting in two sequential published decisions in May of 2020 enjoining Respondent's orders. First, a published decision enjoining the executive order prohibiting drive-in religious worship services. *See Maryville*, 957 F.3d 610. Then, a second published decision enjoining the executive order prohibiting in-

person religious worship services. *Roberts*, 958 F.3d 409.

On October 19, 2020, the Sixth Circuit reconfirmed that when it comes to *Maryville* and *Roberts*, "each [is] still binding in the circuit." *Maryville II*, 977 F.3d 561. Moreover, these decisions hardly broke new ground where the Sixth Circuit's first foray into Free Exercise comparators occurred in 2012, in *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). Then, on November 25, 2020, this Court removed all doubt as to whether Respondent's actions violated the First Amendment. *Cuomo*, 141 S. Ct. 63.

This history sets the legal backdrop under which Respondent issued his School Ban on November 18, 2020.

2. The November 18, 2020 Orders

On November 18, 2020, months after *Maryville I* and *Roberts*, and weeks after *Maryville II*, Respondent issued two more executive orders: Executive Orders 2020-968 and 2020-969. Both were attached to the Complaint below. (Am. Compl., DE#40-2 at ¶27, App. 99-105).

Executive Order 2020-969, the School Ban, prohibited and criminalized in-person instruction for all schools, including private, religious schools, in grades K-12. *Id.* at ¶28, App. 76-77. The School Ban did not include, and Respondent still permitted, a number of secular activities of comparable risk, involving varying sized groups. *Id.* at ¶29, App. 77. The activities Respondent permitted included limited

duration childcare centers,[1] which were permitted to have children in group sizes from 15 to hundreds of children. *Id.* at ¶30. These facilities, like the religious schools Respondent shut down, provided meals for children and ***instructed children in classroom setups identical to schools***. *Id.* These centers provided secular education instruction in a classroom setting as part of their programming, including assisting children with school assignments. *Id.* Unlimited sized groups of persons also were permitted to assemble in businesses and manufacturing facilities with appropriate social distancing, and with classroom instruction permitted in these settings as well.[2] *Id.* at ¶31, App. 77-78.

At the time of his School Ban, Respondent permitted movie theaters to operate, with children in attendance, at 50% capacity.[3] *Id.* at ¶32; App. 78. He also permitted gyms and fitness centers to operate, at 33% capacity. *Id.* at ¶33. Respondent permitted auctions to operate, at 50% capacity indoors, and

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[1] A limited duration center was a "pop up" daycare center as opposed to a longstanding daycare center, originally set up for the children of "essential" workers. *Id.*

[2] https://govsite-assets.s3.amazonaws.com/s47CFNaSK6YhJMGPHBgB_Healthy%20at%20Work%20Reqs%20-%20Manufacturing%20Distribution%20Supply%20Chain%20-%20Final%20Version%203.0.pdf (last visited 1/22/2024).

[3] https://govsite-assets.s3.amazonaws.com/0iTtfR0ET2GFa05zMWie_2020-7-1%20-%20Healthy%20at%20Work%20Reqs%20Movie%20Theaters%20-%20Final%20Version%203.0.pdf (last visited 1/22/2024).

unlimited capacity outdoors.[4] *Id.* at ¶34. Gas stations, grocery stores, retail establishments, and other businesses where the public congregated also were allowed to remain open. *Id.* at ¶35. Respondent permitted gaming (gambling) facilities to remain open.[5] *Id.* at ¶36. Respondent permitted secular colleges and universities to remain open in order to carry out classroom instruction. *Id.* at ¶37, App. 79.

And, the very day after Respondent issued the School Ban, the director of the CDC announced that "[t]he truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school," and that it is "counterproductive … from a public health point of view, just in containing the epidemic, if there was an emotional response, to say, 'Let's close the schools.'"[6] *Id.* at ¶40; App. 79-80.

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[4] https://govsite-assets.s3.amazonaws.com/VTgkgeDSbmgsImOob3lA_2020-7-22%20-%20Healthy%20at%20Work%20Reqs%20-%20Auctions%20-%20Version%203.1.pdf (last visited 1/22/2024).

[5] https://www.kentuckytoday.com/stories/as-many-mitigate-restriction-damages-gaming-venues-keep-rolling,29171 (last visited 1/22/2024).

[6] https://www.washingtonexaminer.com/news/school-is-safest-place-for-kids-to-be-cdc-director-says (last visited 1/23/2024).

https://www.c-span.org/video/?c4924557/cdc-director-redfield-data-supports-face-face-learning-schools&fbclid=IwAR1Kp3HKvUhZu8CJ1F8tGSISsMtnP0zNDJ3598kSC7sYffb6kDjhKS90zC0 (last visited 1/23/2024).

3. The Proceedings Below

Petitioners sued, alleging constitutional violations, specifically a claim for violation of the Free Exercise Clause, naming Respondent in his individual capacity. (Pl.'s Verified Compl, RE#1).

The district court decided the qualified immunity issue on a FRCP 12(b)(6) motion. That required the district court to "construe the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law." *Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327 (6th Cir. 2007). The district court was required to determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The district court and Sixth Circuit found that Respondent had qualified immunity. *Pleasant View Baptist Church v. Beshear*, 2021 U.S. Dist. LEXIS 188202 (E.D.KY 2021) (App. 39-App.60); *Pleasant View Baptist Church v. Beshear*, 78 F.4th 286 (6th Cir. 2023) (App.1-App.38).

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit Court of Appeal's decision on qualified immunity, contradicts this Court's precedents.

The two-step sequence, announced in *Saucier v. Katz*, 533 U.S. 194 (2001), for resolving a government official's attempt to avail himself of qualified immunity first requires a court to determine whether the facts alleged in the complaint make out a violation of a constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the alleged misconduct. *Id.* To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

A plaintiff overcomes qualified immunity by citing to "cases of controlling authority in their jurisdiction at the time of the incident" or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

Here, the district court and the Sixth Circuit erroneously determined that the clearly established law that prohibited treating religious activities less favorably than secular activities, where the risks of COVID-19 were comparable, was not clearly established with respect to the prohibitions contained in Respondent's School Ban. The district court and the

Sixth Circuit so held, despite the fact there were five cases, three of which were decided against Respondent ***himself*** in his official capacity**,** that instructed Respondent how to craft his COVID-19-related executive orders in manner consistent with the First Amendment's robust protections.

First, *Ward*, 667 F.3d 727, where the Sixth Circuit explained that "[i]f the law … in practice is riddled with exemptions," it is not neutral or generally applicable and strict scrutiny applies. *Id.* at 738. The Sixth Circuit then explained that "[a]t some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions … just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

Second, *Maryville I*, 957 F.3d 610, directed at Respondent's COVID-19 executive orders. In that case, the Sixth Circuit told Respondent directly, and other state actors generally, that "[d]iscriminatory laws come in many forms." *Id.* at 614. "Outright bans on religious activity alone obviously count." *Id.* "**So do general bans that cover religious activity when there are exceptions for comparable secular activities**." *Id.* (emphasis added). "As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Id.* "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Id.*

In *Maryville I*, the Sixth Circuit also told Respondent ***how he had to conduct the comparison***: namely, based on the health risks arising from permitted and prohibited activities rather than the labels attached to those activities: "And many of the serial exemptions for secular activities pose comparable public health risks to worship services." *Id.* To avoid any doubt, the Sixth Circuit provided him with the proper considerations for drafting such executive orders: "[f]or example: The exception for 'life-sustaining' businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions." *Id.* "But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors." *Id.* The Sixth Circuit then drove home its point:

> But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one. *Id.* at 615.

Perhaps most significantly in *Maryville I,* the Sixth Circuit admonished Respondent that "**the reasons people gather in a particular place have nothing to do with the risk of contagion analysis."** *Id.* at 615. (emphasis added).

Just a week later, and in response to Respondent's illogical argument that *Maryville I* was limited to "drive-in services" (and rejecting Respondent's argument that he need not conduct the comparison analysis that the Sixth Circuit in *Maryville I* directed him to conduct, but instead he only needed to comply with that court's injunction to permit drive-in worship services) the Sixth Circuit issued its decision in *Roberts*, 958 F.3d 409. And once again, the Sixth Circuit analyzed whether "the four pages of exceptions in the orders, and the kinds of group activities allowed, remove them from the safe harbor for generally applicable laws?" *Id.* Not surprisingly, the *Roberts'* court answered the question of whether strict scrutiny must apply: "We think so." *Id.*

In *Roberts*, the Sixth Circuit <u>again</u> reminded Respondent that "many of the serial exemptions for secular activities pose comparable public health risks to worship services." *Id.* at 414. In other words, and for the second time, the Sixth Circuit personally instructed Respondent that through his orders, ***he could not treat religious activity less favorably than secular activity if both involve comparable "risks" from a "public health" perspective***. *Id.* As a result, the Sixth Circuit again admonished Respondent that "restrictions inexplicably applied to one group and exempted from another do little to further these goals

and do much to burden religious freedom." *Id.* "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Id.* at 414-415.

In October, 2020, the Sixth Circuit rejected new arguments by Respondent that he need not comply with the binding precedent the Sixth Circuit set, in *Roberts* and *Maryville I,* because this Court's decisions denying certain injunctions pending appeal somehow rendered inapplicable published, binding, case law from the Sixth Circuit. *Maryville II*, 977 F.3d 561. In rejecting his latest argument, the Sixth Circuit instructed Respondent that both *Maryville I* and *Roberts* were each "still binding in the circuit." *Id.* at 563. The Sixth Circuit also instructed Respondent that in drafting any further COVID-19 orders (and more generally, evaluation of laws under the Free Exercise Clause), **"[t]he free exercise inquiry must account for both sides of the equation—the specific limitation on faith-based practices and the comparison of those limitations to similar activities."** *Id.* at 565-566. (emphasis added).

Were the Sixth Circuit's **four published religious liberty decisions, three of them directed to this very Respondent's COVID-19 orders,** clearly established case law as far as any future COVID-19 restrictions? To merely pose the question is to answer it. Without question these decisions were "cases of controlling authority in their jurisdiction at the time of the incident." *Wilson*, 526 U.S. 603, 617. And in case there was any doubt, along came this Court's decision in *Cuomo*, 141 S. Ct. 63.

While *Cuomo* was issued on November 25, 2020, exactly one week after Respondent issued his School Ban, it was clearly established caselaw during the majority of the duration his School Ban remained in effect. This raises two salient points: *Ward*, 667 F.3d 727, *Roberts*, 958 F.3d 409, *Maryville I*, 957 F.3d 610, and *Maryville II*, 977 F.3d 561 were already clearly established law that plainly put Respondent on notice as to how he had to draft his COVID-19 executive orders. But, if *Cuomo*, 141 S. Ct. 63 was the tipping point, then the law was clearly established from November 26, 2020 onward, thus foreclosing any qualified immunity defense after that date. That is because just like the Sixth Circuit's precedent, this Court in *Cuomo* confirmed that ***the comparison that must be conducted*** by a governor when crafting a COVID-19 order is a general comparison of the COVID-19 risks associated with the permitted and unpermitted activities. *Id.* at 66.

While Respondent's School Ban prohibited and criminalized in-person instruction for all schools, including private, religious schools, in grades K-12, that does not help Respondent for purposes of whether his order violated clear precedent. (Am. Compl., DE# 40-2 at ¶28, App. 76-App.77). While banning in-person religious education and instruction at religious schools, Respondent simultaneously permitted numerous secular activities, of varying, even unlimited sizes, involving comparable COVID-19 risks. *Id.* at ¶¶ 29-37, App. 77-79.

In defending what is logically indefensible, Respondent argued below that because he prohibited

in-person attendance at all K-12 schools, both secular and religious, this made his School Ban neutral or generally applicable. However, that same argument and analysis was repeatedly rejected in *Roberts,* 958 F.3d 409, *Maryville I*, 957 F.3d 610, and *Maryville II*, 977 F.3d 561. However, the comparison is not based upon the labels given to the prohibited and permitted activities, but instead tied to the governmental interest posed: here, disease control and health risks. *Roberts,* 958 F.3d 409 at 414 ("And many of the serial exemptions for secular activities pose comparable public health risks to worship services.").

The panel decision below relied upon a separate panel decision in *Ky. ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020). It did so, even though there were three, earlier published decisions that controlled, and it did so even though another Sixth Circuit panel clearly repudiated the *Ky. ex rel. Danville Christian Acad., Inc.* decision a few weeks later in *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477 (6th Cir. 2020). Consequently, *Ky. ex rel. Danville Christian Acad., Inc.*, 981 F.3d 505 is not a shield for Respondent. *Danville Christian* deviated from the previous, published Sixth Circuit decisions in *Roberts*, 958 F.3d 409, and both *Maryville* decisions, 957 F.3d 610, and 977 F.3d 561. Those three cases all were clear: in a Free Exercise Challenge, the comparison between permitted activities and prohibited activities is not the labels attached to those activities, but rather involves a comparison of the infectious disease-related risks stemming from the activities at issue. *Id.* And without question, Sixth Circuit case law was clear that those earlier, published

decisions controlled. *United States v. Simpson*, 520 F.3d 531, 539 (6th Cir. 2008).

In fact, the Sixth Circuit has applied, in the qualified immunity context, the earliest published decision rule enunciated in *Simpson*, 520 F.3d 531, 539, and held the state actor to the requirements of the law as set forth in the earlier, published decision. *King v. Taylor*, 694 F.3d 650, 660, n.7 (6th Cir. 2012).

Moreover, *Ky. ex rel. Danville Christian Acad., Inc.*, 981 F.3d 505 is irrelevant to the issue of whether Respondent disregarded established precedent. At the time he issued his School Ban, that authority did not exist. And to make this point even more clear, the Sixth Circuit repudiated the panel decision in *Danville Christian* a few weeks later, in *Monclova Christian Acad.*, 984 F.3d 477, because, relying on *Maryville I, Maryville II and Roberts,* the *Monclova* Court acknowledged that, just like Respondent here, the panel in *Danville Christian* failed to account for all of the relevant comparators. Likewise, the panel below failed to account for all of the relevant comparators. And the panel below, when it suggested that *Roberts* and *Maryville I* were somehow targeting decisions, erred as a matter of law where *Roberts* and *Maryville I,* in the decisions themselves, indicated that they were not.

Further underscoring that Respondent cannot avail himself of qualified immunity is *Maye v. Klee*, 915 F.3d 1076 (6th Cir. 2019). There, as here, the Sixth Circuit dealt with the assertion of qualified immunity for state actors who previously had injunctive relief entered against them on virtually identical facts. The *Maye*

Court found that the prior litigation alerted those actors as to their personal liability for their later, similar conduct. *Id.* at 1087. The *Maye* decision makes perfect sense—qualified immunity was intended as a shield for well-meaning officials attempting to navigate legally ambiguous situations. It was not intended, as it is being used here, as an unchecked weapon against First Amendment rights.

Thus, the panel decision below meets several of the Rule 10 considerations for the grant of certiorari: (a) the Sixth Circuit's decision below so far departs from the accepted and usual course of judicial proceedings in violation of this Court's and the Sixth Circuit's own precedents, it warrants this Court's supervision; and (b) the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court.

B. Qualified immunity constitutes an abrogation of the plain text of 42 U.S.C. § 1983, and should be overruled or modified, at least as applied to a state actor who had the benefit of forethought and premeditation, warranting review by this Court.

Statutory interpretation "begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Yet, few judicial doctrines have deviated so sharply from this axiomatic proposition as qualified immunity. Rarely can one comfortably cite the entirety of an applicable federal statute in a brief, but 42 U.S.C. §1983 is an

exception. As currently codified, Section 1983 provides, in relevant part:

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

42 U.S.C. § 1983 (emphasis added).

Notably, "the statute on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language simply states that any person acting under state authority who causes the violation of a constitutionally protected right "shall be liable to the party injured." Further, Section 1983's unqualified textual command makes sense in light of the statute's historical context. It was passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[7] This statutory purpose would have been undone by anything resembling modern qualified immunity jurisprudence. The Fourteenth Amendment itself had only been adopted three years

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[7] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

earlier, in 1868, and, by 1871, the full implications of its broad provisions were not "clearly established law." If Section 1983 had been understood to incorporate qualified immunity, then Congress's attempt to address rampant civil rights violations in the post-war South would have been toothless, simply words on a page.

Of course, no law exists in a vacuum, and a statute will not be interpreted to extinguish, by implication, longstanding legal defenses available at common law. *See Forrester v. White*, 484 U.S. 219, 225-26 (1988). In the context of qualified immunity, this Court framed the issue as whether "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (*quoting Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). However, the historical record shows that, in fact, the common law of 1871 did not provide for anything close to the qualified immunity doctrine as it exists today. In other words, the Sixth Circuit's version of qualified immunity was not "well established" in 1871.

Today, the doctrine of qualified immunity has morphed into a generalized good-faith defense for all public officials, as it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. However, the relevant legal history does not justify importing any such defense into the operation of Section 1983. On the contrary, the sole historical defense against constitutional torts, including in 1871, was legality.

In the early years of the Republic, constitutional claims typically arose as a part of suits to enforce general common-law rights. For example, an individual might sue a federal officer for trespass; the defendant would claim legal authorization as a federal officer; and the plaintiff would in turn claim the trespass was unconstitutional, thus defeating the officer's defense. And, as many scholars over the years have demonstrated, these founding-era lawsuits did not permit a good-faith defense to constitutional violations.[8] The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), which involved a claim against an American naval captain who captured a Danish ship off the coast of France. Federal law authorized seizure only if a ship was going to a French port (which this ship was not), but President Adams had issued broader instructions to also seize ships coming from French ports. *Id.* at 178. The question was whether Captain Little's reliance on the President's specific instructions was a defense against liability for the unlawful seizure.

The *Little* Court seriously considered, but ultimately rejected, Captain Little's defense, a defense which was based on the very rationale that would later come to support the modern doctrine of qualified

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[8] *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3-14, 16-17 (2017); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14-21 (1972); Ann Wool-handler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414-22 (1986).

immunity. Chief Justice Marshall explained that "the first bias of my mind was very strong in favour of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages." *Id.* at 179. He noted that the captain had acted in good-faith reliance on the President's order, and that the ship had been "seized with pure intention." *Id.* Nevertheless, the Court held that "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.* In other words, the officer's only defense was legality.

This rule of personal liability of officials violating the Constitution persisted through the nineteenth century. Courts continued to hold public officials personally liable for unconstitutional conduct without regard to any defense resembling a good-faith shield. *See, e.g., Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891) (Holmes, J.) (town health board members liable for mistakenly killing an animal they thought was diseased, despite being ordered to do so by government commissioners).

Moreover, the Court originally rejected the application of a good-faith defense to Section 1983 itself. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court held that a state statute violated the Fifteenth Amendment's ban on racial discrimination in voting. *Id.* at 380. The defendants argued that they could not be liable for money damages under Section 1983 because they acted on a good-faith belief that the statute was constitutional. The *Myers* Court noted that "[t]he non-liability . . . of the election officers for their

official conduct is seriously pressed in argument," but it ultimately rejected any such good-faith defense. *Id.* at 378.

While the *Myers* Court did not elaborate extensively on this point, the lower court decision it affirmed was more explicit:

> [A]ny state law commanding such deprivation or abridgment is nugatory and not to be obeyed by anyone; and anyone who does enforce it does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Anderson v. Myers, 182 F. 223, 230 (C.C.D. Md. 1910). This forceful rejection of any general good-faith defense is exactly the logic of the founding-era cases, alive and well in the federal courts decades after Section 1983's enactment.

In creating the modern version of qualified immunity, the Court's primary rationale for doing so was the purported existence of similar immunities that were well-established in the common law of 1871. *See, e.g., Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (defending qualified immunity on the ground that "[a]t common law, government actors were afforded certain protections from liability"). But to the extent contemporary common law included any such protections, these defenses were incorporated into the elements of the particular torts that then existed.

For example, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826), held that a U.S. naval officer was not liable for capturing a Portuguese ship that had attacked his schooner under an honest but mistaken belief in self-defense. *Id.* at 39. The Court found that the officer "acted with honourable [sic] motives, and from a sense of duty to his government," *id.* at 52, and declined to "introduce a rule harsh and severe in a case of first impression." *Id.* at 56. The Court's exercise of "conscientious discretion" on this point was justified based on a traditional component of admiralty jurisdiction over "marine torts." *Id.* at 54-55. In other words, the good faith of the officer was incorporated into the *substantive* rules of capture and adjudication, not treated as a separate and freestanding affirmative defense.

As the Court explained in *Pierson*, 386 U.S. 547, "[p]art of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Id.* at 556-57. But this defense was not a protection from liability for unlawful conduct. Rather, at common law, an officer who acted with good faith and probable cause simply did not commit the tort of false arrest in the first place (even if the suspect was innocent). *Id.*

Relying on this background principle of tort liability, the *Pierson* Court "pioneered the key intellectual move" that became the genesis of modern qualified immunity. *Pierson* involved a Section 1983 suit against police officers who arrested several people under an anti-loitering statute that the Court subsequently found unconstitutional. Based on the

common-law elements of false arrest, the Court held that "the defense of good faith and probable cause . . . is also available to [police] in the action under [Section] 1983." *Id.* Critically, the *Pierson* Court extended this defense to include not just a good-faith belief in probable cause for the arrest, but a good-faith belief in the legality of the statute under which the arrest itself was made. *Id.* at 555.

Even this very first application of the modern defense of qualified immunity (*i.e.* the good-faith exception to personal liability under §1983), questionable as a matter of constitutional and common-law history, was applied only to on-the-ground police officers, who often are forced to make split-second, life or death judgments. In contrast, and conceptually, there is a major difference between good faith as a factor that determines whether conduct was unlawful in the first place (as with false arrest), and good faith as a defense to liability for admittedly unconstitutional conduct where the government actor had ample opportunity (and notice from the Court) to contemplate, seek legal advice, and find alternative legal avenues to accomplish the goal sought to be attained. As discussed above, the baseline historical rule at the founding, and in 1871, was strict liability for constitutional violations. *See Anderson*, 182 F. at 230 (anyone who enforces an unconstitutional statute "does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law").

Worse, the Court's qualified immunity cases soon discarded even this loose tether to history and the plain language of the statute. In 1974, the Court abandoned

the analogy to common-law torts that permitted a good-faith defense. *See Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Next, the Court disclaimed reliance on the subjective good faith of the defendant, instead basing qualified immunity on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Thus, the Court's qualified immunity jurisprudence has diverged sharply from any plausible legal or historical basis. Section 1983 provides no textual support for this jurisprudence, and the relevant history establishes a baseline of strict liability for constitutional violations—at most providing a good-faith defense against claims analogous to some common-law torts. Yet qualified immunity functions today as an across-the-board defense, based on a "clearly established law" standard that was unheard of before the late twentieth century. In short, the doctrine has become exactly what the Court assiduously sought to avoid—a "freewheeling policy choice," at odds with Congress's judgment in enacting Section 1983. *Malley*, 475 U.S. at 342. In other words, at least one free unconstitutional bite of the apple (or here, three free unconstitutional bites).

Since *Harlow*, as the panel did here, cases have gone far beyond the general proposition that "[t]he Constitution is not blind to" those who "are often forced to make split-second judgments." *City & Cnty of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) (*quoting Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014)). Rather, the decisions below are just another episode of

a stunning trend of lower courts to liberally extend qualified immunity, even in the most egregious circumstances. Here, Respondent had the benefit of highly competent legal counsel, forethought and premeditation, and not to mention three previous decisions directly addressed to that state actor. The qualified immunity line does not extend into infinity, and this is a case where the line must stop.

Respondent here had multiple published circuit decisions directed *to him* on the *same issue and subject matter*. *Maryville I*, 957 F.3d 610; *Roberts*; 958 F.3d; *Maryville II*, 977 F.3d. Even worse, after this Court's decision in *Cuomo* made clear that Respondent's School Ban was illegal, Respondent continued his School Ban undeterred by even this Court. *Cuomo*, 208 L. Ed. 2d.

The Sixth Circuit's decision in this case demonstrates the shortcomings of qualified immunity, in effect turning it into a rudderless standard of a circuit judge knows it when she sees it. The Sixth Circuit ignored its own clearly established caselaw, and this Court's as well, in order to provide extend Respondent his unearned qualified immunity shield.

In fact, the Sixth Circuit is *more* lenient toward Respondent's premeditated actions than they are for law enforcement's actions where "a situation unfolds quickly," because in those situations, "qualified immunity is available *only* where officers make split-second decisions in the face of serious physical threats to themselves and others." *Mullins v. Cyranek*, 805 F.3d 760, 766-67 (6th Cir. 2015) (emphasis added) (citing *Godawa v. Byrd*, 798 F.3d 457, 465 (6th Cir. 2015); *Smith v. Cupp*, 430 F.3d 766, 774-75 (6th Cir.

2005); *Sample v. Bailey*, 409 F.3d 689, 696-97 (6th Cir. 2005)). In other words, if there is no serious threat to the public's or the officer's physical well-being, there is no qualified immunity despite the lack of deliberation involved in the officer's decision making process. Respondent did not make any split-second decision. Respondent had *months* to make his decision, had weeks in which COVID-19 cases were rising, had the benefit of legal counsel, and had more than half a year's worth of decisions from the Sixth Circuit, ***three to be exact,*** where he personally had been found to have violated the Free Exercise Clause because he failed to treat religious activities in a like manner to similar secular activities where the risks of COVID-19 were comparable for both. On this record, granting qualified immunity to Respondent makes a mockery of First Amendment guarantees, and underscores the need to revisit qualified immunity generally, or at least with respect to state actors who have the benefit of time and deliberation for their actions.

This Court also has focused on the fact that split-second decision-making is often the crux of why a government agent "had no 'fair and clear warning' of what the Constitution requires,'" thus warranting the Court's understandable allowance for qualified immunity in those limited circumstances. *City & Conty. of San Francisco v. Sheehan*, 575 U.S. 600, 612-13, 617 (2015) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011)). But even when a government actor's actions are viewed to be a "split-second decision," this Court rarely grants qualified immunity unless the law is "equivocal" at the time of the split-second decision. *Stanton v. Sims*, 571 U.S. 3, 10 (2013).

As shown *supra*, regarding the controlling legal standards for government actions restricting First Amendment freedoms, the law here was not in any sense "equivocal" or well-settled as to support Respondent's School Ban. To the contrary, settled precedent made abundantly clear that Respondent's actions would violate the First Amendment. There was no dispute that Respondent was on notice of the unequivocal (*i.e.* clearly established) law prohibiting him from engaging in disparate treatment between religious activities and similar secular activities, where the risks of COVID-19 were comparable for both. Simply put, Respondent's decision was no split-second decision, and, even if it were, he violated well-established precedent. Thus, he is not entitled to qualified immunity.

As discussed, the contemporary doctrine of qualified immunity is an egregious legal error, which flatly contradicts both the text and history of the statute on which the doctrine purportedly is based. These legal infirmities have not gone unnoticed by past and current members of this Court. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In further elaborating the doctrine of qualified immunity . . . we have diverged from the historical inquiry mandated by the statute."); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 USC § 1983

has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably in-tended to subsume."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

A growing chorus of lower-court judges have also recognized the serious legal and practical deficiencies of today's qualified immunity standards. *See, e.g.*, *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring) ("I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work … But immunity ought not be immune from thoughtful reappraisal."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 U.S. Dist. LEXIS 132455, *46 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."); *Villarreal v. City of Laredo*, 2024 U.S. App. LEXIS 1533 (5th Cir. 2024) (Willett, J., dissenting) (arguing that qualified immunity should be reserved for "split-second judgments" for law enforcement officers, and arguing that, similar to *Chevron*, qualified immunity is a one-sided legal doctrine where the little guy is denied justice and the powerful dodge accountability); *Id.* (Graves, J., dissenting) (same); *Id.* (Ho, J., dissenting) ("The Supreme Court has made clear that public officials who commit obvious constitutional violations are not

entitled to qualified immunity" . . . . "The actions taken here were not split-second judgment calls.").

Although *stare decisis* is a "vital rule of judicial self-government," it "does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). Rather, it is important precisely "because it 'promotes the evenhanded, predictable, and consistent development of legal principles.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The rule therefore "allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable." *Id.* Qualified immunity—especially the "clearly established law" standard—is a textbook example of an unworkable doctrine that has utterly failed to provide the "stability, predictability, and respect for judicial authority" that comprise the traditional justifications for *stare decisis* in the first place. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

If there were a better demonstration for this principle on unworkability of qualified immunity than the present matter, in which the Sixth Circuit (and this Court) issued multiple decisions on the same subject matter and law, to the same state actor, it is difficult to discern it. The Sixth Circuit's opinion practically turns qualified immunity into a form of absolute immunity, contrary to the plain language of 42 U.S.C. § 1983, the history and tradition of Constitutional tort law, and even the bedrock notion that one is entitled to a remedy when their rights are violated.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court announced the rule that defendants are immune from liability under Section 1983 unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This test was intended to define qualified immunity in "objective terms," *id.* at 819, in that the defense would turn on the "objective" state of the law, rather than the "subjective good faith" of the defendant. *Id.* at 816. But the "clearly established law" standard announced in *Harlow* has proven hopelessly malleable and indefinite. As evidenced by the decisions below, there is simply no objective way to define or apply the "clearly established law" standard. Because of the amorphous standard, what happens in practice is that courts interpret the standard at a high level of generality when there is a "gut feel" that immunity should apply, and analyzing the particular facts of the case at a granular level if the court has a "gut feel" that qualified immunity is not warranted.

Since *Harlow* was decided, this Court has issued dozens of substantive qualified immunity decisions that attempt to hammer out a workable understanding of "clearly established law," but with no practical success. On the one hand, this Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and has stated that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (*quoting Anderson v. Creighton*, 483 U. S. 635, 640 (1987)). On the other hand, this Court also has said that its case law "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*, 137 S. Ct. at 551), and that "'general statements of the law are not inherently incapable of giving fair and clear warning.'" *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

To the extent that judicial precedent fails to promote the goals of stability and predictability, *stare decisis* is entitled to proportionally less weight. *See Johnson*, 135 S. Ct. at 2562. That is exactly the case with the existing qualified immunity standards, and for these reasons it would be especially appropriate for the Court to reconsider this precedent.

One of the most compelling reasons not to treat this precedent with special solicitude is that this Court itself has not done so in the past. In *Pierson*, 386 U.S. 547, for example, the Court created a good-faith defense to suits under Section 1983, after having rejected the existence of any such defenses in *Myers*. Then in *Harlow*, the Court replaced subjective good-faith assessment with the "clearly established law" standard. 457 U.S. at 818-19. And the Court created a mandatory sequencing standard in *Saucier v. Katz*, 533 U.S. 194 (2001), requiring courts to first consider the merits and then consider qualified immunity, but then overruled *Saucier* in *Pearson v. Callahan*, 555 U.S. 223 (2009), which made that sequencing optional.

Indeed, the *Pearson* Court explicitly considered and rejected the argument that *stare decisis* should prevent the Court from reconsidering its qualified immunity jurisprudence. The Court noted that the *Saucier* standard was a "judge-made rule" that "implicates an

important matter involving internal Judicial Branch operations," and that "experience has pointed up the precedent's shortcomings." *Id.* at 233-34. As this brief has endeavored to show, the same charges can be asserted against qualified immunity in general. It would be a strange principle of *stare decisis* that permitted modifications only as a one-way ratchet in favor of *greater* immunity (and against the grain of text and history to boot).

The issue has taken on fresh urgency in the wake of scholarship that directly undermines this Court's rationale for the doctrine. Professor Alexander Reinert's new article, Qualified Immunity's Flawed Foundation, 111 Cal. L. Rev. 201 (2023), calls into question this Court's reliance on the so-called anti-derogation canon to interpret Section 1983 to encompass qualified immunity. *Pierson*, 386 U.S. 547. It shows how a key phrase from the oft-overlooked original text of Section 1983—omitted from the modern U.S. Code only by historical accident—directly forecloses using the anti-derogation canon to adopt this reading.

As this Court has already warned, where its precedents derive from "an erroneous historical narrative," reversing course and correcting the record will often trump the force of stare decisis. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022). The Court should correct what is now plainly revealed as a fundamentally mistaken premise for the modern qualified immunity doctrine.

Reinert's scholarship also reveals that Congress was not silent as to whether it intended to displace the

common law and instead it expressly displaced all existing barriers to relief. As Congress originally passed, Section 1983 stated any "law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." *Id.* at 235 (*quoting* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13). This clause affirmatively displaced existing state law barriers, including state common law barriers, to constitutional accountability. In light of that text, the anti-derogation canon was the very last principle the Court should have applied in construing Section 1983. An apparent scrivener's error introduced during the codification process meant this clause was omitted from the United States Code. *Id.* at 236–37. Recovery of the omitted words reveals that qualified immunity directly contravenes the statute's full text. Such a direct conflict between statutory text and existing precedent is precisely the kind of "superspecial justification" that warrants revisiting past precedent. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

This section of the petition has focused primarily on the legal, historical, and doctrinal arguments against contemporary qualified immunity doctrine. However, the practical effect of the contemporary doctrine is to all but eviscerate our best means of ensuring official accountability. In today's day and age, the reason there seems to be more public outcry over government abuses stems, in no small part, from the lack of a deterrent. The civil remedy created by Section 1983 exists not just to provide a remedy for citizens whose rights are violated, but also—at a structural level—"to hold public officials accountable when they exercise power irresponsibly." *Pearson,* 555 U.S. at 231.

Qualified immunity has hastened a world that the Section 1983 Congress assiduously sought to eradicate—one in which the rights of individuals are routinely trampled without accountability.

Stare decisis does not justify adhering to precedent that continues to encourage government officials to violate constitutional rights. *See Arizona v. Gant*, 556 U.S. 332, 348 (2009). Qualified immunity has the effect of abetting constitutional violations. The mere fact that some state officials may have come to view the protection of the doctrine as an entitlement "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Id.* at 349.

Finally, this case presents an appropriate vehicle to reassess qualified immunity, and whether it is an appropriate defense for government actors who had the ability to contemplate their unconstitutional decisions. Thus, the decision below meets the Rule 10 consideration for the grant of certiorari that: (a) the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court (and should be revisited by this Court).

C. The Sixth Circuit Court of Appeal's requirement placing the burden of proof on Plaintiffs to overcome the defense of qualified immunity contradicts this Court's precedents, and is in conflict with the decisional law of other Circuits.

The Sixth Circuit improperly placed the burden of proof on the Petitioners to prove that qualified immunity does not apply. *Pleasant View Baptist Church,* 78 F.4th at 295 (holding that "it is the plaintiff's burden to show that the defendants are not entitled to qualified immunity") (*quoting Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017); *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)). However, this Court has articulated that qualified immunity is an affirmative defense, which leads to the conclusion that the burden, appropriately, was on Respondent. *Gomez v. Toledo*, 446 U.S. 635, 640-641 (1980). From this holding, five circuits have ruled that, as an affirmative defense, the burden of proof on the defense of qualified immunity rests with the defendants. *See DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001); *Outlaw v. City of Hartford*, 884 F.3d 351, 368 (2d Cir. 2018); *Reiff v. Marks*, No. 08–CV–5963, 2011 WL 666139 at *5 (E.D. Pa. Feb. 23, 2011), aff'd., 511 Fed. Appx. 220 (3d Cir. 2013); *Slater v. Deasey*, 789 Fed. Appx. 17, 21 (9th Cir. 2019); *Reuber v. United States*, 750 F.2d 1039, 1057, n. 25 (D.C. Cir.1984), *overruled on other grounds, Kauffman v. Anglo–Am. School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994) (same). Additionally, the Fourth Circuit holds that defendants bear the burden of proof on the issue of plaintiff's constitutional rights not being clearly

established at the time of defendants' misconduct. *Bryant v. City of Cayce*, 332 Fed. Appx. 129, 132 (4th Cir. 2009).

CONCLUSION

This case affords the opportunity to end the circuit split on this issue. Thus, the decision below meets another of the Rule 10 considerations for the grant of certiorari: (a) the Sixth Circuit's decision below conflicts with the decision of another United States Court of Appeals in the same important matter, and it has so far departed from the accepted and usual course of judicial proceedings to warrant this Court's supervision.

Respectfully Submitted,

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