NO. 24-_____

In the Supreme Court of the United States

SHERIFF JOHNNY MOATS
AND AL SHARP,

Petitioners,

v.

STEPHEN JARRARD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This qualified immunity case concerns the proper First Amendment analysis for a claim by a volunteer applicant to a jail religious ministry program operated by a Georgia sheriff. The program employs volunteers to provide religious ministry to local jail inmates. Respondent was denied admission to the program.

Seven circuits have applied the Court's *Pickering-Garcetti* framework to First Amendment claims by volunteers who apply to or serve in government programs. See *Garcetti v. Ceballos*, 547 U. S. 410 (2006); *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968).

Here, however, the Eleventh Circuit held that the unique circumstances of this case rendered the *Pickering-Garcetti* framework inapplicable. Instead, the Eleventh Circuit applied First Amendment forum analysis, under which the court held (1) viewpoint discrimination is prohibited and (2) the unbridled discretion doctrine required jail policies to contain specific criteria to guide officials' decisions.

Accordingly, the questions presented are:

1. Whether the Court's *Pickering-Garcetti* framework applies to a First Amendment claim by an applicant for volunteer religious work in a local jail's program for inmates.

2. If the *Pickering-Garcetti* framework does not apply, whether a jail policy that lacks standards compliant with the First Amendment "unbridled discretion" doctrine is a basis for a damages claim under 42 U.S.C. § 1983, where an official's decision under the policy is made within a reasonable time and for a reason that does not violate the First Amendment.

3. Whether it was clearly established that the *Pickering-Garcetti* framework did not apply, and that petitioners' conduct violated clearly established law, thereby justifying denial of qualified immunity.

PARTIES TO THE PROCEEDING

Petitioners are Johnny Moats, the Sheriff of Polk County, Georgia, and Al Sharp, the now retired Jail Administrator for the Polk County jail. Sheriff Moats and Mr. Sharp were sued individually and in their "official capacities," making the Sheriff of Polk County, Georgia a party as well. Petitioners were defendants in the district court and appellees in the Eleventh Circuit.

Respondent is Stephen Jarrard. Respondent was the plaintiff in the district court and the appellant in the Eleventh Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioners Moats and Sharp are individuals. Sheriff Moats also was sued in his "official capacity," as the Sheriff of Polk County, Georgia. The Sheriff's Office is a public law enforcement entity. Respondent Jarrard is an individual.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

A. *Jarrard,* Plaintiff-Appellant *v. Polk County Sheriff, et al.*, Defendants-Appellees, No. 23-10332 (11th Cir.) (opinion reversing judgment of district court, issued September 16, 2024);

and

B. *Jarrard,* Plaintiff *v. Moats, et al.*, Defendants, No. 4:20-cv-2-MLB (N.D. Ga.) (order granting summary judgment to defendants, filed September 27, 2022).

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

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This case presents First Amendment claims by an applicant to a volunteer religious ministry program at a local jail. Petitioners are a sheriff and former jail administrator, who administered the volunteer program to serve prisoners.

Respondent is an applicant who contends he was excluded from the jail volunteer program because of his view about baptism. Respondent separately contends that previous policies describing the volunteer program violated his First Amendment rights due to "unbridled discretion" vested in decision makers.

This is unsettled First Amendment territory, but the Court of Appeals rejected petitioners' qualified immunity defenses, in spite of a trenchant dissent that pointed out the dearth of clearly established law.

In *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), the Court established a framework (hereafter the "*Pickering-Garcetti* framework") for evaluating First Amendment claims by government employees. The Court extended *Pickering* to government contractors in *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

Excluding the Eleventh Circuit, seven circuits have applied the *Pickering-Garcetti* framework to First Amendment claims by government volunteers.

The Eleventh Circuit has applied *Pickering-Garcetti* to volunteer firemen and a volunteer serving on a government board. But in this particular case the Eleventh Circuit deviated, finding that traditional "forum" analysis applied to respondent's First Amendment claims.

This case is an ideal vehicle to resolve the Eleventh Circuit's divergence from other circuits and provide guidance to the lower courts on the application of the *Pickering-Garcetti* framework to First Amendment claims by volunteers in government programs.

Government volunteers continue to generate litigation, and in the great majority of cases their claims are evaluated under the *Pickering-Garcetti* framework. The issue has public importance, not least because it impacts the calculus that government entities must undertake when they consider whether to utilize volunteers in government programs. And the Eleventh Circuit's rule strikes the wrong balance by disincentivizing government programs that provide religious ministry to prisoners.

Regardless of how those issues are resolved, petitioners deserved qualified immunity because it is not even arguable that the law was clearly established in this area. Whether to clarify *Pickering*'s reach or to clarify qualified immunity for the lower courts, the Court should grant certiorari. Alternatively, petitioners seek summary reversal to

correct the Eleventh Circuit's erroneous denial of qualified immunity.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 115 F.4th 1306 and reproduced at App.1-58. The district court's decision granting summary judgment to petitioners is not reported in the Federal Reporter but is reproduced at App.61-95.

JURISDICTION

The Eleventh Circuit issued its decision on September 16, 2024, and denied a timely petition for rehearing on November 12, 2024. App.1, 59. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> 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.

42 U.S.C. § 1983 provides, as relevant here:

> Every person who, under color of any statute, ordinance, regulation, custom, or

> usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured. . . .

STATEMENT OF THE CASE

A. Legal Background

The legal backdrop for this case falls into three general categories: (1) First Amendment claims under the *Pickering-Garcetti* framework, (2) First Amendment claims under "forum" analysis, and (3) qualified immunity.

These bodies of law are interrelated here because there is a lively debate about whether *Pickering-Garcetti* or forum analysis properly applies to the unique facts of this case. Petitioners take the *Pickering* view, but for qualified immunity it only matters that the law was unclear when petitioners had to make decisions. The law was not settled in respondent's favor "beyond debate," so qualified immunity should apply.

B. Factual Background

Petitioner Johnny Moats was first elected as Sheriff of Polk County, Georgia in 2012. CA11.Appx.Vol.3.28. At most times relevant to this case, Petitioner Al Sharp was the Jail Administrator.

CA11.Appx.Vol.3.122.

Respondent Stephen Jarrard is member of the Church of Christ.[1] App.2. For two time periods before 2017, he worked as a volunteer religious minister at Polk County Jail. App.2, 61. He was terminated from the jail volunteer program twice, once before Sheriff Moats took office and the last time in December 2016.[2] CA11.Appx.Vol.2.111.

In 2020 and 2021, during the pendency of this lawsuit, respondent submitted two applications to serve as a volunteer religious minister at the Polk County Jail. CA11.Appx.Vol.1.211-230, 235 *et seq*.

Respondent's claims arise from denial of his 2020 and 2021 applications, and from policies about the Sheriff's Office jail ministry program. App.91. More detail will be provided below.

Before his dismissal in 2016, respondent repeatedly taught Polk County inmates that baptism by immersion is necessary for salvation. App.61-62. Respondent contends petitioners denied both applications "solely due to his teaching on baptism." App.83.[3] The Eleventh Circuit held there was at least enough evidence for a jury to draw that

1 Respondent says he is not a "reverend," so that title is not used here. CA11.Appx.Vol.2.71 ("Reverend won't work."). No disrespect is intended.

2 Respondent sued about the 2016 termination but the district court found the claim was time-barred, a ruling that is not at issue here.

inference in respondent's favor. App.21.

By contrast, petitioners presented evidence that the applications were denied for reasons that have nothing to do with Jarrard's teaching about baptism. App.20; CA11.Appx.Vol.1.232-233. In part those reasons centered on respondent's track record of creating conflicts in jails. That track record is summarized later.

1. The Jail Volunteer Ministry Program

The Polk County Jail is operated by the Polk County Sheriff's Office. CA11.Appx.Vol.3.30, 35, 39. The Jail inmate population commonly has between 150 and 190 inmates, most of whom are pretrial detainees. CA11.Appx.Vol.3.30-31.

Since before Sheriff Moats took office, the Sheriff's Office has utilized volunteers from the local community to provide religious services to inmates who wish to participate. For the time frame relevant to this case, persons who wished to serve in the volunteer program were required to submit an application to the Sheriff's Office.

The Sheriff's Office application form refers to jail ministry as "volunteer work." App.78. It notes applicants can be "terminat[ed]" once "hired." App.78. It requires applicants to sign the same

3 Respondent does not contend that petitioners denied his applications due to any other form of his protected expression. App.83.

confidentiality agreement as employees. App.78. It requires applicants to sign other employment-like forms, including a waiver of liability and a criminal history check. App.78. The Sheriff's Office also hired a lead jail minister, gave him staff, put him in charge of volunteer ministers, and gave him authority to terminate those ministers. App.78.

Aside from application and qualification, volunteers were required to complete a safety-related course focused on how to act in a jail setting. CA11.Appx.Vol.3.42.

At Polk County and other jails, respondent's usual jail ministry meeting format consisted of a Bible study rather than a traditional worship service. CA11.Appx.Vol.2.95-98.

2. Respondent's History of Conflicts at Local Jails

After Sheriff Moats was elected in 2012, respondent was re-admitted to jail ministry at the Polk County Jail. CA11.Appx.Vol.2.103-104, 110; CA11.Appx.Vol.3.59. After that, the head of the Polk County Jail's ministry program expressed to the Sheriff's administration numerous "concerns about Mr. Jarrard upsetting his staff and upsetting a lot of inmates in our jail. [H]e said that several of the other preachers in jail refused to go into the same pod as Mr. Jarrard because of his behavior … ." CA11.Appx.Vol.3.45.

Sheriff Moats understood that respondent "gets real confrontational [about theological differences], and instead of just moving on from it, … he just keeps pushing and pushing and pushing. That's why he was disrupting my [ministry] staff that I had in place for years and was working in the jail and disrupting our inmates." CA11.Appx. Vol.3.47-48.

Sheriff Moats understood part of the disputes centered on the inmate ministry program's philosophy that the volunteers were supposed to be helping inmates rather than agitating them, and respondent's conduct conflicted with that basic tenet of the program. CA11.Appx.Vol.3.54, 56, 63.

Sheriff Moats was concerned because respondent's teaching stirred up inmates by making them distraught due to his claim they had to be full-immersion baptized to avoid going to Hell. CA11.Appx.Vol.3.48-49, 52-53, 57.

The Sheriff's Office wanted the program to help inmates rather than agitate them, and respondent was producing agitated inmates and disruption of the ministry program. CA11.Appx. Vol.3.48, 53, 62.

3. Sheriff's Letter to the Attorney

Respondent contended that his viewpoint discrimination contention is supported by a 2019 letter from Sheriff Moats in response to a demand letter from respondent's attorney. Sheriff Moats

wrote that Mr. Jarrard "was barred from the Polk County Jail, not because of his insistence on baptizing inmates, but because of his disruptive behavior toward other members of the jail ministry program that did not share his radical religious views." CA11.Appx.Vol.3.113.

The letter further explained that respondent "was verbally abusive and argumentative, challenging the denominational beliefs of the other jail ministry personnel in the presence of the inmates and causing doubt and confusion among those he was attempting to convert." CA11.Appx. Vol.3.113.

In the letter Sheriff Moats explained he was discussing inmate baptisms because it "was part of [respondent's attorney's] assertions." *Id.* The sheriff explained his understanding about baptism, and indicated that inmate baptisms could wait until inmates were released. *Id.*

4. Respondent's 2020 Jail Ministry Application

In March 2020, the Sheriff's Office adopted what the Eleventh Circuit called the "Second Policy" which in relevant part states:

> Clergymen and religious advisors wishing to hold services or conduct programs in the jail must make written application to the Polk County Sheriff's

> Office with supporting documentation, attend a training session and then be approved by the Jail Administrator.

App.27.

The application form provides various criteria for qualification to the volunteer ministry and rules governing the program. CA11.Appx.Vol.1.211-230 (respondent's April 2020 application).

After filing this lawsuit but having practically all claims dismissed, respondent re-applied for volunteer work in the jail ministry program. CA11.Appx.Vol.1.211-230. After investigating respondent's history at other facilities and in Polk County, petitioners learned respondent has a history of being at the center of disruption and religious disputes at other facilities, similar to his history in Polk County. CA11.Appx.Vol.3.45, 47-48, 60, 168-169.

Sheriffs in two other jurisdictions reported that Mr. Jarrard had been ejected from jail ministries at both places due to causing disruption. CA11.Appx.Vol.3.60. The same was true for a third agency. CA11.Appx.Vol.3.60-61, 168-169.

The Sheriff's Office is interested in preventing controversy in the jail, and the administration recognized respondent has a history of promoting conflicts. CA11.Appx.Vol.3.48-49, 61, 136, 159-160. The Sheriff's Office denied respondent's 2020 application in part based on his history of conflict in

the course of jail ministry in Polk County and other jail facilities. CA11.Appx.Vol.3.60, 62, 169, 173; CA11.Appx.Vol.1.232-233.

Also, the Sheriff's Office investigation revealed respondent's application did not indicate the true nature of his dismissal from jail ministry at other facilities. CA11.Appx.Vol.3.62, 168-169. Information from an outside agency conflicted with information from respondent's application, casting doubt on the application's truthfulness. CA11.Appx. Vol.3.62, 64, 66-67, 168-169.

Specifically, respondent's application stated he left the Paulding County program due to being "rotated out," whereas the Paulding County Sheriff indicated Mr. Jarrard had been banned for disruptive behavior. CA11.Appx.Vol.3.65. Lack of truthfulness in an application is a disqualifier for all Sheriff's Office positions, whether employment or the volunteer program. CA11.Appx.Vol.3. 62, 64. For that additional reason, respondent's application was denied. CA11.Appx.Vol.1.232-233.

5. Revision of the Policy and Respondent's 2021 Application

In 2021, the Sheriff's Office adopted a new policy governing admission of volunteers to minister to inmates at the Polk County Jail. The Eleventh Circuit called this the "Third Policy", which provides:

The Polk County Sheriff's Office

> encourages Clergy from the community to minister to the inmates. Clergymen and religious advisors wishing to hold services or conduct programs in the jail must submit a volunteer application. Members of the clergy allowed within the inner security perimeter or allowed contact visitation, must complete background checks, including the jail ministry program[.]

App27.[4]

As under the prior policy, the application form for the volunteer ministry program details various minimum qualifications for volunteer jail ministry, including verification of basic ministry credentials, criminal history check and other items. App.78; CA11.Appx.Vol.1.235-247.

In order to preserve standing and avoid mootness due to adoption of a new policy, Jarrard submitted his last application in August 2021. CA11.Appx.Vol.1. 235 *et seq*., Vol.2.192-193.

The jail ministry program was shut down for most of 2020 and 2021 due to the Covid-19 pandemic, so the Sheriff's Office did not take action on that application until March 9, 2022. App.75 n.8; The application was denied on the grounds of "[f]ailed background due to not compliant with

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4 The Third Policy was superseded by another policy, which is not challenged in the lawsuit.

501(c)3 standards" and "[f]ailed background due to being dismissed from Floyd County Sheriff's Office and Cobb County Sheriff's Office Jail Ministry Programs." CA11.Appx.Vol. 3.221.

C. Proceedings Below

Respondent sued petitioners under 42 U.S.C. §1983, claiming that they denied his applications for volunteer jail ministry based on his teaching about baptism, in violation of the First Amendment. Respondent separately contended that policies governing admission to the volunteer program violated his First Amendment rights due to "unbridled discretion" to deny volunteer applications. App.2.

1. The district court granted petitioners summary judgment on respondent's claims, both on the merits and due to qualified immunity. On the merits, the court held that the *Pickering-Garcetti* framework governs respondent's First Amendment retaliation claim, and that First Amendment forum analysis does not apply. App.80. Under *Pickering*, respondent's view about baptism, expressed in the jail ministry program, (1) was not citizen speech, and (2) was not a matter of public concern. App.84. And, given the employment-like context, the First Amendment "unbridled discretion" doctrine arguably does not apply to jail policies about the ministry program. App.92.

The district court further held that qualified immunity bars the claims. As for the retaliation claim, case law indicated that the *Pickering-Garcetti* framework applies, there is no viable claim under *Pickering-Garcetti*, and no binding case clearly established that respondent has a valid First Amendment claim for denial of his applications. "The Eleventh Circuit has not resolved any of these [*Pickering-Garcetti*] issues in Plaintiff's favor." App.88.

As for the policy claim, the district court found that no authoritative court "has ever applied the unbridled-discretion doctrine on facts like these. And it is not clear they would." App.92. So, regardless of the theoretical answer, qualified immunity applied because a "reasonable official could think the unbridled-discretion doctrine does not apply to a jail's policies and procedures for appointing volunteer ministers." App.93.

2. The Eleventh Circuit reversed, both on the merits and on qualified immunity, and remanded the case for further analysis. App.36. On the merits, the court found that "*Pickering* doesn't provide the proper framework for determining whether Jarrard's speech was "constitutionally protected" and that, instead, Jarrard's claim should be evaluated under the "forum analysis" that traditionally governs speech-related claims." App.13.

Distinguishing government volunteer cases that apply *Pickering*, the Eleventh Circuit held that

volunteer work in a jail religious program is unlike government employment because (1) it does not involve delivery of services traditionally provided by the government, (2) volunteer jail ministers do not "advise [jail administrators] or represent their interests with prisoners" and (3) participation in the ministry program lacks pay, mandatory attendance requirements and so forth. App.16-18.

After finding that *Pickering* does not apply, the Eleventh Circuit applied First Amendment forum analysis to respondent's discrimination and policy claims. The court found that a jury could find viewpoint discrimination was the basis for denial of respondent's applications, respondent's "speech was constitutionally protected and ... the Second and Third Policies violated the unbridled-discretion doctrine" due to lack of criteria that governed officials' decisions about admission to the volunteer ministry program. App.21, 29.

Turning to qualified immunity, the two-judge majority acknowledged that there are no previous cases that dictate the outcome. App.32. Likewise, the majority conceded this is not the kind of egregious case where qualified immunity can be denied "notwithstanding the lack of case law." App.32.

Nevertheless, the majority denied qualified immunity on the basis that respondent's "right to be free from viewpoint discrimination and his right not to be subject to decisionmakers' unbridled discretion were clearly established . . . in broad statements of

principle expressly articulated in governing caselaw." App.33 (cleaned up).

3. Judge Rosenbaum dissented from the denial of qualified immunity. App.37 *et seq*. She explained that reasonable officials could view this situation as falling under *Pickering* and its progeny, which is what prior case law suggested. App.42-44. The dissent explained in detail that under the *Pickering-Garcetti* framework respondent does not have a viable First Amendment claim. App.46-57. And, when *Pickering-Garcetti* applies, the unbridled discretion doctrine has no application. App.41.

The dissent opined that respondent's "damages claim succumbs to qualified immunity because he can point to neither case law with indistinguishable facts nor a broad statement of principle within the Constitution, statute, or case law that directs us to disregard *Pickering*'s framework." App.41 (cleaned up).

In response to Judge Rosenbaum's detailed qualified immunity analysis, the majority opinion expressed "doubt that [petitioners] have ever even heard of *Pickering* or the multistep balancing analysis that courts have fashioned around it—so surely neither of those can be the object of the notice required that modern qualified-immunity jurisprudence protects." App.34-35 n. 20. Judge Rosenbaum responded that qualified immunity is a purely objective matter, so that petitioners' subjective knowledge about legal doctrine (or lack

thereof) is irrelevant. App.46 n. 2 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985)). See also *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (explaining the purely objective nature of qualified immunity).

REASONS FOR GRANTING THE PETITION

There are two reasons to grant this petition, and both merit the Court's review. First, there is now a circuit split about how to evaluate First Amendment claims by government volunteers. Second, the Eleventh Circuit's qualified immunity denial is grossly out of line with the Court's precedents.

1. The Eleventh Circuit's decision created a circuit split on a recurrent First Amendment issue "that has not been, but should be, settled by this Court." Supreme Court Rule 10 (c). That issue is whether the *Pickering-Garcetti* framework governs First Amendment claims by government volunteers in general, and if so, whether there is a special exception for volunteers in religiously-oriented government programs like the one in this case.

With the lone exception of the Eleventh Circuit, seven circuits apply the *Pickering-Garcetti* line of cases to First Amendment claims by volunteers who serve in government programs. The present case presents an outlier, a special exception for volunteers who apply for government volunteer roles that include a religious component.

The Eleventh Circuit's deviation from the consensus is reason enough for this Court to grant certiorari. This petition presents an excellent opportunity to resolve a frequently recurring question of constitutional law on which the lower courts seem united, with the lone exception of the peculiar Eleventh Circuit judgment in this case.

2. The Eleventh Circuit's denial of qualified immunity squarely conflicts with the Court's oft-repeated insistence on fact-specific evaluation of qualified immunity claims, in the light of previous precedent. As the Eleventh Circuit dissent points out, reasonable officials were not even arguably on notice that petitioners' alleged conduct in this case violated clearly established law.

Since at least 2004, the Court periodically has found it necessary to re-explain the proper analysis governing evaluation of the qualified immunity defense. Regrettably, this case raises the need for the Court to send that message again.

Below, petitioners elaborate why the Eleventh Circuit decision is in error, and why this case is worthy of the Court's review.

I. The Decision Below is in Tension With *Umbehr* and Conflicts With Volunteer Cases in Other Circuits

The crucial threshold question in this case is whether the *Pickering-Garcetti* framework applies to

an applicant for religious volunteer work in a jail setting.

In *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563 (1968) ("*Pickering*"), the Court struck "a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. at 568. *Pickering's* balance considered "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U. S. 138, 143 (1983).

Under the *Pickering-Ceballos* line of cases, a government employee's First Amendment speech is protected only if (1) the employee's expression was made as a citizen on a matter of public concern; and (2) the "government entity [lacks] an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

If protected speech was a "substantial motivating factor" in the government's challenged action, then the burden shifts to the government to prove that it would have taken the same action even in the absence of the protected speech. *Bd. of Cty.*

Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) ("*Umbehr*").

A. The Decision Below is in Tension With *Umbehr*

Since *Pickering*, the Court has refined different aspects of the *Pickering* balancing framework. The Court has never considered whether *Pickering* applies to government volunteers. However, in *Umbehr* the Court expanded *Pickering* beyond traditional government employment to encompass First Amendment retaliation claims by government contractors. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 673 (1996).

Umbehr resolved a circuit split about "whether, and to what extent, independent contractors are protected by the First Amendment" when they contract with government entities. *Umbehr*, 518 U.S. at 673. The Court invoked its *Pickering* line of cases because "[t]he similarities between government employees and government contractors with respect to this issue are obvious." *Id.* at 674.

The Court explained that the "government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of

corruption." *Umbehr,* 518 U.S. at 674. On the other hand, contractors merited some First Amendment protection from retaliation, since otherwise they might refrain from airing valuable information of public concern for fear of losing a financial benefit. *Id*. So the Court ruled that the *Pickering* framework applied to such claims.

With one minor exception, *Umbehr*'s reasoning applies with equal force to volunteers in government roles. The one minor distinction is that volunteers serve for some reason other than an immediate financial benefit. Yet presumably every volunteer sees some benefit to volunteer service, even if the benefit is not financial.

Umbehr reasoned that "[i]ndependent contractors … lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government." *Umbehr,* 518 U.S. at 680. Applied to this case, government volunteers "lie somewhere between … government employees" and government contractors. That logically puts volunteers squarely into the *Pickering-Garcetti* framework.

Umbehr explained that "as in government employment cases, the [government defendant] exercised contractual power, and its interests as a public service provider, including its interest in being free from intensive judicial supervision of its

daily management functions, are potentially implicated. Deference is therefore due to the government's reasonable assessments of its interests as contractor." *Umbehr,* 518 U.S. at 678.

The Court's recognition of government concerns in *Pickering* and *Umbehr* should be reflected, if not amplified, here. This case involves a law enforcement agency's provision of services to inmates in a local jail, where harmony, order and inmate discipline are of paramount concern.

The Court has long recognized the great difficulty in operating an incarceration facility and managing inmates, and has afforded corresponding deference on questions about internal jail operations. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) ("We ... reaffirm our refusal ... to substitute our judgment on … difficult and sensitive matters of institutional administration, [cite] for the determinations of those charged with the formidable task of running a prison." (cleaned up)); *Turner v. Safley*, 482 U.S. 78 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (stating "the institutional objectives furthered by [the] regulation and the measure of judicial deference owed to corrections officials in their

attempt to serve those interests are relevant in gauging the validity of the regulation.").

Following the Court's lead, circuit courts have long held that the jail environment heightens the government interests in order and security when it comes to First Amendment claims grounded in employee speech. See *Cygan v. Wis. Dep't of Corr.*, 388 F.3d 1092, 1101 (7th Cir. 2004) (holding that the "time, place, and manner of [correction officer's] speech and its potential disruptiveness weigh heavily against her. … GBCI, as a correctional facility, has a very strong interest in maintaining order and control over inmates… ."); *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (maintaining employer's efficiency, integrity and discipline is highly protected for "Police ... because they are 'paramilitary'—discipline is demanded, and freedom must be correspondingly denied."); *Jackson v. Bair*, 851 F.2d 714, 722 (4th Cir. 1988), opinion withdrawn due to *en banc* consideration, 863 F.2d 1162 ("The district court rightly considered that employment in the prison context presents special considerations favoring the public employer in the balancing process.").

The upshot is that the *Pickering-Garcetti* framework provides the most reasonable and workable fit for this case. The government has clear and compelling interests in providing services to inmates and effective jail administration. *Pickering* provides a framework for balancing those interests

while still providing for First Amendment protections to volunteers in the religious ministry program.

B. The Decision Creates a Circuit Split

Seven federal circuit courts—and the Eleventh Circuit in a different published case—have applied the *Pickering-Garcetti* framework to First Amendment claims by government volunteers. *LeFande v. District of Columbia*, 841 F.3d 485, 488 (D.C. Cir. 2016) (reserve police officer volunteer); *Janusaitis v. Middlebury Vol. Fire Dep't*, 607 F.2d 17, 18, 25 (2d Cir. 1979) (volunteer firefighter); *Versage v. Township of Clinton*, 984 F.2d 1359 (3d Cir. 1993) (volunteer firefighter); *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F.3d 337, 339, 351–56 (4th Cir. 2000) (volunteer firefighter); *Harnishfeger v. United States*, 943 F.3d 1105, 1109, 1113–19 (7th Cir. 2019) (Volunteer in Service to America (VISTA) volunteer); *Shands v. City of Kennett*, 993 F.2d 1337, 1340, 1342–48 (8th Cir. 1993) (volunteer firefighters); *Hyland v. Wonder*, 972 F.2d 1129, 1132, 1136–40 (9th Cir. 1992) (probation-department volunteer).

The Eleventh Circuit applied *Pickering* to an unpaid appointee to a public advisory board, and later to a volunteer firefighter. *McKinley v. Kaplan*, 262 F.3d 1146, 1150 n.5 (11th Cir. 2001) (unpaid appointee); *Rodin v. City of Coral Springs*, 229 F. App'x 849 (11th Cir. 2007) (firefighter).

Moving to religious workers, circuit courts have applied *Pickering* to paid government chaplains. *Akridge v. Wilkinson*, 178 F. App'x 474, 476, 481 (6th Cir. 2006); *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986); *Donahue v. Staunton*, 471 F.2d 475, 479 (7th Cir. 1972).

Moving to volunteer religious workers, at least four district courts have applied *Pickering* to volunteer chaplains specifically. *See, e.g.*, *Kuenzi v. Reese*, No. 3:23-cv-00882-IM, 2024 U.S. Dist. LEXIS 196052, at *1 (D. Or. Oct. 28, 2024); *Fox v. City of Austin*, No. 1:22-cv-00835-DAE, 2024 U.S. Dist. LEXIS 159628, at *4 (W.D. Tex. Sep. 4, 2024) (volunteer chaplain for fire department); *Mustapha v. Monken*, 2013 WL 3224440, at *1, *7–8 (N.D. Ill. June 25, 2013) (volunteer chaplain for the state police); *Mayfield v. City of Oakland*, 2007 WL 2261555, at *1, *4–6 (N.D. Cal. Aug. 6, 2007) (volunteers for city's volunteer police chaplaincy program).

The Eleventh Circuit's decision in this case seemingly stands alone. Before this decision, no court recognized a "religious volunteer" exception to *Pickering*'s scope.

The Court should grant certiorari and resolve whether the *Pickering-Garcetti* framework applies to claims by volunteers in government programs, and if so, whether the religious component of this case renders it different from the volunteer cases decided

under the *Pickering-Garcetti* framework by the overwhelming majority of circuit courts.

II. The Decision Below Is Wrong on Multiple Grounds

A. Petitioners Should Prevail Under the *Pickering-Garcetti* Framework

As the district court and the Eleventh Circuit dissent explain, application of the *Pickering-Garcetti* framework would entitle petitioners to summary judgment. App.46-57, 84. Under that framework, respondent's expression about baptism in the jail volunteer program context would be expressed as a government volunteer, not as a citizen. Respondent's particular view on baptism is not a matter of public concern. Additionally, a balancing of interests under *Pickering* favors petitioners. These points are elaborated briefly below.

First, regarding the citizen speech element, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court explained that the line between speaking as a citizen or as a public employee turns on whether the speech "owes its existence to a public employee's professional responsibilities." *Id.* at 421-22. Applied to the jail volunteer context, respondent's basis for speaking to inmates about his view of baptism would be as part of the volunteer work he agreed to perform at the jail.

That work is explicitly contemplated to involve communication of religious content to inmates in the jail. Therefore, under *Garcetti*, respondent's speech about baptism to inmates would "owe[] its existence to [respondent's] professional responsi-bilities." *Id.* at 421-22. So it is not protected speech in the context of the volunteer program.

Second, respondent's baptism view—allegedly the basis for denial of his volunteer applications—is not a matter of public concern. In terms of context, form, and audience, respondent's communication about baptism would be expressed orally in a local jail to inmates, who voluntarily listen during a designated time for religious discussion. The non-public nature of these communications in a highly restricted jail setting cuts against a finding of "public concern." As for the purpose, the point of baptism speech is to tell inmates about a particular doctrinal point. The content of that doctrine is that (according to Mr. Jarrard) full immersion baptism is a condition to eternal salvation, absent which every human being is condemned to Hell.

Regardless of the importance that anyone may attach to respondent's baptism doctrine and/or view of Biblical soteriology, it is not a matter of "public concern" as that term of art has been defined in the First Amendment *Pickering-Garcetti* context. See App.86-87. While many people care deeply about religious beliefs, any given person's religious belief is not a matter of "public concern." See *Daniels v. City*

of Arlington, 246 F.3d 500, 504 (5th Cir. 2001) ("Visibly wearing a cross pin ... obviously is a matter of great concern to many members of the public, [but] in this case it simply is not a matter of "public concern" as that term of art has been used in the constitutional sense."); *Akridge v. Wilkinson*, 351 F. Supp. 2d 750, 762 (S.D. Ohio 2004) (jail chaplain's doctrinal teachings did not "constitute matters of public concern.").

Third, even if respondent's religious view in the jail volunteer context is protected speech, the resulting interest balancing test favors petitioners. To further the purpose of effective and efficient public service, "the Government … must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Connick v. Myers*, 461 U.S. 138, 151 (1983). This concern is no less weighty when it comes to government volunteers.

Moreover, the jail aspect of this case is critical. "First Amendment rights must be applied in light of the special characteristics of the environment in a particular case." *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972). In a jail environment, harmony, order and discipline are of paramount concern. For that reason the Court has long exercised deference to jail administrators on questions about internal jail operations.

Where a volunteer is supposed to "contribute to an agency's effective operation [but instead] begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him]." *Waters v. Churchill,* 511 U.S. 661, 675 (1994) (plurality opinion). Applied to this case, respondent adversely impacted jail administration in two ways. First, he consistently had conflicts with other jail ministers. This was the case at the Polk County Jail and it happened at other jails too. Second, respondent told inmates that they were condemned to Hell if they died without being baptized in his prescribed manner (full immersion). Predictably this produced numerous upset inmates, which is highly undesirable to jail administrators and cut against the very point of the volunteer religious ministry program.

Where a volunteer's conduct adversely affects the overall jail ministry program, adversely affects inmates, and runs counter to the point of the jail program, petitioners' substantial interests in effective and efficient jail management outweighed respondent's First Amendment interest in espousing his particular theological view to inmates. See *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986) (rejecting minister's claim where his "religious activities ... were detrimental to the best interests of the patients and to the general maintenance of order at the hospital.").

To sum up, petitioners would prevail under the *Pickering-Garcetti* framework, or at least be entitled to qualified immunity. And under that framework the "unbridled discretion" doctrine has no application to jail policies. Yet even on a contrary view, as discussed next, the Eleventh Circuit's unbridled discretion ruling has a flaw that merits the Court's review.

B. The Unbridled Discretion Ruling Confuses Breach of a First Amendment Policy Requirement With Violation of Respondent's Individual Rights

Having rejected the *Pickering-Garcetti* framework for this case, the Eleventh Circuit found that two superseded versions of the written jail ministry policy ran afoul of the "unbridled discretion" doctrine, thereby violating respondent's First Amendment rights. App.29, 35.

The unbridled discretion doctrine applies to permitting schemes, wherein a citizen seeks permission to use a government facility. See, *e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."). The typical unbridled discretion case involves a facial challenge to a statute or ordinance regulating access to or expression in a government space.

Under the unbridled discretion doctrine, "a time, place, and manner regulation [must] contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323. In a "limited public forum" case, the Eleventh Circuit has imposed a requirement for a "time limit within which [an official] must make a decision on a permit application." *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1222 (11th Cir. 2017).

Here, the district court ruled that even if the policies in this case ran afoul of the unbridled discretion doctrine, respondent's applications were answered within a reasonable time under the circumstances, and for much of the time there was no ongoing jail ministry program due to the Covid-19 pandemic. App.75 n.8. In other words, the district court correctly understood that an arguably unconstitutional policy does not necessarily cause a particularized constitutional violation. The Eleventh Circuit missed that point.

The unbridled discretion doctrine is designed to protect expression from censorship by (1) making judicial review more efficient and (2) confining official discretion to objective criteria that is unrelated to protected expression. See *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988). The doctrine aims to limit or eliminate opportunity for unconstitutional censorship. The rule protects

against potential harm. Actual constitutional harm may or may not be present.

In that respect, the rule operates like the Fifth Amendment warnings required by *Miranda v. Arizona*, 384 U. S. 436 (1966). *Miranda* warnings protect Fifth Amendment rights, but lack of a required *Miranda* warning does not necessarily lead to a violation of a detainee's Fifth Amendment rights.

That was the ruling in *Vega v. Tekoh*, 597 U.S. 134 (2022), where the Court reiterated that the Fifth Amendment requires *Miranda* warnings, but held that "a violation of *Miranda* does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute 'the deprivation of [a] right . . . secured by the Constitution.' 42 U. S. C. § 1983." *Vega*, 597 U.S. at 150.

The same is true of a policy that runs afoul of the unbridled discretion doctrine. A citizen who submits an application under a constitutionally deficient policy does not necessarily suffer a constitutional violation. The application may be ruled upon on the same day, and it may be denied on a ground that is constitutionally permissible. Yet seemingly the Eleventh Circuit would still authorize a federal damages lawsuit in that scenario, for anyone who submits an application under a policy found to contain a First Amendment deficiency.

In holding that respondent's rights were violated by the Second and Third Policies, the Eleventh Circuit erred by removing the fundamental requirement for constitutional harm. The text of 42 U.S.C. § 1983 only provides for redress of actual "deprivation of ... rights, privileges, or immunities secured by the Constitution … ." And "[i]t is the role of courts to provide relief to claimants ... who have suffered, or will imminently suffer, **actual harm**… ." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis supplied).

In *Lewis* the Court applied that principle by holding that inmates who have no federally protected reason to access a law library have no claim when a law library is not provided. *Lewis*, 518 U.S. at 351. Likewise, *Lewis* explained that *healthy* inmates cannot recover for violation of their right to medical care, no matter how deficient the prison medical care might be. *Lewis*, 518 U.S. at 350.

Moving back to the the licensing context, consider a hypothetical city policy for issuing parade permits, where the policy has no time limit for a decision and no criteria about reasons for denial of a permit. Suppose that the ABC Organization applies to hold a parade and a permit is granted the next day. Under that scenario ABC Organization applied under an unconstitutional policy, but the defective policy did not lead to a violation of its rights. In that scenario there should be no First Amendment claim

under § 1983 because there is no constitutional injury.

The point is that the most unconstitutional policy imaginable does not create § 1983 liability without an *actual constitutional violation*. The Eleventh Circuit's unbridled discretion ruling errs in finding otherwise.

C. Petitioners Plainly Are Entitled to Qualified Immunity

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 584 U. S. 100, 104 (2018) (*per curiam*) (internal quotation marks omitted). Qualified "immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id*. (quoting *White v. Pauly*, 580 U. S. 73, 79 (2017)). For the reasons detailed below, petitioners were not plainly incompetent and did not knowingly violate the law, so they should be entitled to immunity.

1. General Rules Do Not Overcome Qualified Immunity in This Case

The Eleventh Circuit's qualified immunity ruling commits a cardinal error that the Court has been condemning for decades. The Court's qualified immunity cases emphasize over and over again that normally officials cannot be held liable in the

absence of "existing precedent [that] placed the … constitutional question **beyond debate**. This inquiry must be undertaken in light of the **specific context of the case**, **not as a broad general proposition**." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021) (cleaned up; emphases supplied). The Court has been explaining that for over 20 years now. See *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (*per curiam*).

The Court has "repeatedly told courts … not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 584 U.S. 100, 104. (2018).

So, for example, nobody doubts that officers cannot use excessive force. But that truism is not a basis for denying qualified immunity. "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, 584 U.S. at 105.

The Eleventh Circuit majority's qualified immunity ruling did exactly what *Kisela* says should not be done, except that the Eleventh Circuit substituted First Amendment truisms for the Fourth Amendment truism against excessive force, featured in *Kisela*.

In other words, the Eleventh Circuit majority

relied solely on broad general propositions to deny qualified immunity in a case where its opinion is a clear outlier, and the critical legal issues were unsettled and hotly debated. Specifically, the two-judge majority relied upon two general rules, namely that viewpoint discrimination is prohibited, and that "any permitting-like scheme must entail both (1) substantive criteria to guide and cabin the decisionmakers' discretion and (2) a timeline specifying how long those decisionmakers have to respond to applications." App.34-35.

If the Eleventh Circuit is correct that the general prohibition against viewpoint discrimination plus evidence supporting viewpoint discrimination is sufficient for denial of qualified immunity, then it is quite curious that the Court unanimously granted qualified immunity in *Wood v. Moss*, 572 U.S. 744 (2014). There the Ninth Circuit denied qualified immunity to officers whose actions supported the inference of viewpoint discrimination. *Id*. at 756.

The Court reversed, finding that "[n]o decision of this Court so much as hinted that [officers'] on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President." *Wood*, 572 U.S. at 748. Instead of relying on general rules, *Wood* considered the specific context of the case, the specific officers and the specific situation that confronted them. Finding no case that held the

officers' actions clearly unlawful in their particular circumstances, the Court granted qualified immunity. *Id*. at 764.

That is how the qualified immunity evaluation should have occurred in the court below. Instead, the Eleventh Circuit took the Ninth Circuit approach.

The Eleventh Circuit's truism-based qualified immunity analysis misses the realities that all prior government volunteer decisions pointed to the *Pickering-Garcetti* framework as the proper body of law for this claim, respondent's speech in the jail program context probably has no protection under that framework, and this case concerns a volunteer program designed to serve prisoners in a jail, which is quite unlike any "permitting-like" scheme that any binding court decision has ever addressed.

The clearly established law inquiry asks whether a "reasonable . . . **similarly situated**" official "would have comprehended" the constitutional right in question. *Wood v. Moss*, 572 U.S. 744, 748 (2014) (emphasis supplied). General rules from First Amendment cases involving highly dissimilar settings say little or nothing about how the First Amendment requires an officer to administer a volunteer jail ministry program.

Put differently, reasonable jail administrators easily "could miss the connection between the situation confronting" *non-jail* officials in cases that had nothing to do with jail administration or

government volunteers. See *Kisela*, 584 U.S. at 108 ("a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.").

Aside from the Eleventh Circuit's flawed methodology, the fact is that no decision pointed petitioners to a clear answer in this case. In other words, the law was not clearly established "beyond debate" that petitioners' actions violated the First Amendment. That point is amplified next.

2. The Law Was Not Clearly Established

It hardly needs saying that where a substantial debate exists about what body of law to apply to a particular situation, the law is not clearly established. Here, there is a strong basis to apply the *Pickering-Garcetti* framework, under which respondent has no viable claims. Perhaps the Eleventh Circuit's surprising choice to employ forum analysis to a quasi-employment context will prevail. But when petitioners had to make decisions, they could not have known that.

For qualified immunity it raises a red flag when an experienced and competent district judge followed a majority of circuit courts in applying the *Pickering-Garcetti* framework. That was followed by Judge Rosenbaum's dissent in this case, which explains in painstaking detail why the law was not

even remotely clear enough to deny qualified immunity. App.39-57.

As the Court pointed out decades ago, if "judges . . . disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Likewise, "[l]aw enforcement officers should never be subject to damages liability for failing to anticipate novel developments in constitutional law." *Brosseau v. Haugen*, 543 U.S. 194, 202 (2004) (Stevens, J., dissenting from the grant of qualified immunity).

Here the Eleventh Circuit found that certain unique circumstances of this case, including a religious component, make other volunteer cases distinguishable. Even if that is so, these newly identified distinctions strongly favor qualified immunity because no jail administrator could possibly know ahead of time that the court of appeals would find cherry-picked, particular unique facts important enough to remove the case from the ambit of other government volunteer cases that apply the *Pickering-Garcetti* framework.

Likewise, in regard to the unbridled discretion doctrine the district court correctly observed that no binding opinion "has ever applied the unbridled-discretion doctrine on facts like these. And it is not clear they would." App.92. There is no binding case holding a policy and application process for volunteer

service in a jail religious ministry program is subject to the unbridled discretion rule. In fact the great weight of authority strongly indicates that a jail volunteer program is governed by standards applicable to public employment, where the unbridled discretion rule has no application.

Nevertheless, the Eleventh Circuit majority held that in crafting a volunteer ministry policy and application process petitioners must have known based on "clearly established law" that they had to account for the "unbridled discretion" doctrine, which has never before been applied to a jail policy of this type. The Eleventh Circuit failed to identify a single case for that point, and manifestly the matter was not established "beyond debate."

No existing precedent told petitioners that their conduct, as alleged by respondent, was clearly illegal. The unsettled questions raised by this case are subject to substantial debate by reasonable legal professionals. The Eleventh Circuit's unique answer comes years after the operative events; its conclusions about a variety of previously unsettled issues are far from obvious; and there was no way for petitioners to anticipate this ruling when they had to make decisions. So, this is a case where qualified immunity obviously should apply.

It cannot be said that existing precedent "placed beyond debate the unconstitutionality of" petitioners' actions when they decided to adopt

policies and rejected respondent's applications to the jail ministry program. See *Taylor v. Barkes*, 575 U.S. 822, 825 (2015). Therefore, the Eleventh Circuit erred in denying qualified immunity. Judge Rosenbaum's dissent is entirely correct about qualified immunity. App.37 *et seq*.

3. The Court Should at Least Exercise Summary Reversal

In the event that the Court declines to consider the substantive First Amendment issues raised by this case, the Eleventh Circuit's qualified immunity ruling is appropriate for summary reversal. The Court's immunity standards are "settled and stable, the [summary judgment record is] not in dispute, and the decision below is clearly in error" about qualified immunity. See *Schweiker v. Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting).

The Court frequently has exercised its "summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3; see also *Mullenix* v. *Luna*, 577 U.S. 7 (2015); *Taylor* v. *Barkes*, 575 U.S. 822 (2015); *Stanton* v. *Sims*, 571 U.S. 3 (2013). The Eleventh Circuit's qualified immunity ruling reflects "clear misapprehension" that merits at least summary reversal of its qualified immunity holding.

III. The Questions Presented Are Critically Important, and This is an Ideal Vehicle to Resolve Them

The questions presented are plainly certworthy. The Eleventh Circuit decision creates a circuit split over how to evaluate First Amendment claims by government volunteers in general, and by volunteers in government programs that have a religious component, in particular.

Aside from that, the Eleventh Circuit decision provides an incentive for government agencies to shut down programs (or parts of programs) that utilize volunteers in any type of role that arguably involves religious teaching, instruction or ministry. The issue is of great practical importance, because it is likely to impact government decisions about (1) whether to create programs using religious volunteers at all, and (2) how such programs must be administered.

Even under a narrow reading that the decision below merely carves out a special exception for volunteers performing some religious function, the decision disincentivizes programs like the jail ministry program in this case by exposing government administrators to protracted litigation by disgruntled volunteers. If problematic volunteers cannot be rejected or dismissed without the protections provided to government agencies and personnel under the *Pickering-Garcetti* framework,

that is a price many astute policy makers will be unwilling to pay.

The likely result is closure of government volunteer programs, or retraction of government entities from volunteer programs that would otherwise benefit communities. That is not good for government administrators, it is not good for well-intentioned volunteers who provide important services through government programs, and it is not good for the populations (like prisoners) who benefit from religiously-motivated volunteers serving in a government program.

On the other side of the ledger, there appears to be no countervailing value to the Eleventh Circuit's deviation from the constitutional and practical balance struck long ago in *Pickering*.

This case is an ideal vehicle to resolve these issues. The facts are not particularly complicated, the issues are clear and the record is well-developed.

Turning to qualified immunity, absent this Court's intervention petitioners will face a trial, with all of the costs and risks that this Court's *Pickering* and qualified immunity jurisprudence are designed to prevent. Respectfully, the Court should grant certiorari to review the Eleventh Circuit's resolution in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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