No. 24-887

In the Supreme Court of the United States

Johnny Moats, Sheriff, Polk County, Georgia, et al.,
Petitioners,

v.

Stephen Jarrard,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The decision below rests on two long-settled First Amendment rules. First, government officials may not retaliate against or disfavor a person based on their own disagreement with the viewpoints he expresses. Pet.App.19. Second, the government must establish basic criteria to channel the discretion of officials who pick and choose what speech to allow in government facilities and programs. Pet.App.24. Applying those foundational rules to the facts in the summary judgment record, the Eleventh Circuit held that Polk County Jail officials clearly violate the First Amendment when they ban a person from participating in a volunteer ministry program because he does not share the Sheriff's reading of the Bible.

The questions presented are:

1. Does *Pickering v. Board of Education*'s exception to normal First Amendment analysis for ordinary workplace speech by government employees apply to a volunteer jail minister whose activities look nothing like employment?
2. Does an applicant who has been repeatedly denied access to a volunteer ministry program under a policy that affords officials unbridled discretion have an actionable First Amendment claim?
3. Are County officials entitled to qualified immunity when they exclude a person from participating in a volunteer ministry program based on their own disagreement with his religious views and when they issue policies that give unbridled discretion to pick and choose who may partake in that program?

CORPORATE DISCLOSURE

The petition's corporate disclosure statement is correct with respect to Respondent.

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INTRODUCTION

This case does not warrant the Court's review for multiple reasons. Petitioners do not identify a single court that splits on a single aspect of the questions presented. The Eleventh Circuit's decision below is explicitly fact-bound and obviously correct. And even resolving every question presented in Petitioners' favor would not end this case or avoid a trial. This is a manifestly poor candidate for this Court's intervention.

1. Start with the decision itself, which is dictated by a straightforward application of long-settled First Amendment rules to the egregious facts in this record. For years, Polk County Jail officials have denied Stephen Jarrard the opportunity to participate in the Jail's volunteer ministry program because they personally reject his views on baptism. Jarrard has long ministered at jails in Georgia, where he shares his belief that baptism is necessary for salvation with interested inmates. But Petitioners—the Sheriff of Polk County, Johnny Moats, and the former Chief Jailer of Polk County Jail, Al Sharp—read the Bible differently. And, after Jarrard was removed from the ministry program, they have repeatedly denied him readmission because he held firm to his own views on the role of baptism. The Jail's "stance," Moats explained *in writing* to Jarrard, is that "baptism can wait until after release since it is not a requirement for salvation." Pet.App.5 n.2. And, Moats explained, Jarrard would not be welcomed back until he aligned his teachings with the Sheriff's view of salvation. But Jarrard doesn't and so, true to Petitioners' word, they have excluded him from the program.

Unsurprisingly, the Eleventh Circuit held that the First Amendment prohibits Petitioners' blatant suppression of Jarrard's disfavored views. It also rightly determined that the Jail's policies violated the First Amendment because they failed to provide any meaningful standards to guide officials' review of volunteer ministry applications. And, because these bedrock First Amendment principles have long been clear, the Eleventh Circuit properly concluded that qualified immunity did not shield Petitioners from damages. That straightforward application of this Court's precedents does not warrant review.

Nor can Petitioners evade the plain demands of the First Amendment by attempting to recast this case as a question of the government's ability to control workplace speech of its employees under the standards set forth for First Amendment claims against government employers in *Pickering v. Board of Education*. As the decision below lays out at length, the logic of *Pickering* and the particular details of Jarrard's volunteer ministry give no reason to believe that this exception to normal First Amendment analysis has any relevance on the facts here.

2. None of this implicates even the shallowest circuit split. Indeed, Petitioners do not even attempt to assert a split on the second and third questions presented. And their passing efforts to conjure a split on the first question fail. In fact, the decision below explicitly *agrees* with Petitioners' suggested rule—that *Pickering* sometimes applies to non-employees, including government volunteers. The decision below simply declined to apply that exception *on the facts here*, after concluding that the actual circumstances of

Jarrard's volunteer ministry look nothing like *Pickering* or its progeny. Petitioners do not identify a single court that has—or would—answer that record-bound question differently. And their blind assertion that the Eleventh Circuit announced a new "special exception" from this Court's government-employee cases for volunteer ministers is flatly wrong.

3. Regardless, this case is an unsuitable candidate for review. The decision below is fact-bound, with disputes of fact that remain to be decided by a jury and cannot be resolved here or now. What's more, a decision in Petitioners' favor—even on every question presented—would not avoid that trial. Reversal here promises only more litigation, with potentially the same result in the end.

The petition should be denied.

STATEMENT OF THE CASE

A. Factual background

Stephen Jarrard has visited Georgia jails and prisons as a volunteer minister for nearly two decades. Pet.App.3. As a member of the Church of Christ, Jarrard believes that baptism by full immersion is necessary for salvation. Pet.App.2-3. And he shares those theological views with inmates, in hopes of helping fellow believers get "baptized into Christ . . . before Jesus returns." Pet.App.3.

In 2012, Jarrard began ministering at Polk County Jail through a volunteer program that broadly invited community members of all faiths to visit the Jail and share their religious beliefs with inmates. Pet.App.3-4. To participate, all a person needed to do was to go to the Jail and "ask and put [his] name on [a] list."

Pet.App.3-4. Indeed, the Jail approved Jarrard's application to participate in the program within minutes. Pet.App.4. At one point, the participant list included 140 volunteers, though only about 10 actually showed up. Pet.App.4.

Soon after he began volunteering, Jarrard faced challenges to his religious views from others involved in the program. Another volunteer minister personally objected to Jarrard's beliefs on baptism, and the "leader" of the volunteer ministry team told Jarrard that he could continue his ministry only if he stopped teaching about baptism. Pet.App.4. Sure enough, after Jarrard refused, he was kicked out of the program. Pet.App.4. Jarrard attempted to sort out the issue with the newly elected Sheriff of Polk County, Johnny Moats, but Moats too disagreed with Jarrard's views on baptism, and he declined to allow him back in the Jail. Pet.App.4.

Sheriff Moats eventually allowed Jarrard to return to the Jail, and over the next year, Jarrard ministered without incident—including performing two baptisms for inmates. Pet.App.4-5.

In 2015, the Jail suspended the volunteer ministry program. Pet.App.5. Moats and Al Sharp, the Chief Jailer, then implemented a new policy to govern the ministry program and religious services in the Jail. Pet.App.5. That policy banned "[r]eligious rituals such as baptism and wedding ceremonies" for inmates. Pet.App.5. In the Jail's view, baptism was not theologically necessary, and therefore could wait until an inmate's release. Pet.App.5. Indeed, Moats later explained this reasoning in a letter to Jarrard's counsel. The letter quoted the Bible at length and

explained, "Our stance is since the Polk County Jail is a short term detention center, *baptism can wait until after release since it is not a requirement for salvation*." Pet.App.5 n.2 (emphasis added); *see also* Pet.App.69-70.

At the same time the Jail issued its new policy, Chief Jailer Sharp likewise told Jarrard that he could not participate in the program if he continued to express his views on baptism. Pet.App.5. Jarrard nonetheless completed a training course on the new policies and applied to resume his ministry. Pet.App.5. The Jail denied his application without explanation. Pet.App.5. Sheriff Moats later asserted that Jarrard was barred from the ministry program because of interactions with "other members of the jail ministry program [who] did not share his radical religious views" and because, Moats believed, Jarrard had "some mental health issues." Pet.App.5-6.

Thereafter, Jarrard held a regular vigil outside the Jail to protest his exclusion from the program. Pet.App.6. On multiple occasions, Moats and Sharp stopped to talk with Jarrard—always about "baptism and the officials' theological disagreement with Jarrard's views on the subject." Pet.App.6.

B. Proceedings below

Jarrard and Ollie Morris—a former inmate whose request to be baptized was denied—sued Moats and Sharp, seeking declaratory, injunctive, and monetary relief.[1] Pet.App.6 & n.3. For his part, Jarrard alleged

[1] Jarrard also sued Deputy Dustin Strop. Pet.App.6 n.3. The district court granted summary judgment to Strop, and Jarrard did not appeal that ruling. Pet.App.6 n.3.

that (1) Petitioners unlawfully retaliated against him for exercising his First Amendment rights by expressing his views on baptism, and (2) the Jail's policies governing the volunteer ministry program violated the First Amendment by affording Jail officials "unbridled discretion" over whom to allow to take part in the program. Pet.App.6, 8, 62. Morris likewise alleged that Petitioners violated the First Amendment by banning baptism and denying his own request to be baptized by Jarrard. Pet.App.62.

Throughout this litigation, Petitioners have amended the policy governing religious services and volunteer ministers several times. Pet.App.7. Each time, Jarrard reapplied to resume his ministry under the new policy. Pet.App.7-8. And each time, Petitioners denied his application. Pet.App.7-8. These shifting policies first reallowed religious rituals like baptism. Dist. Ct. Doc. 53-4 at 1. Then they banned them again. Pet.App.7. Finally, they allowed baptisms once more. Dist. Ct. Doc. 68-1 at 4. The rules for how one applies to participate in the ministry program and basic rules of conduct for volunteers also shifted along the way. Pet.App.7-8. But it was not until this last policy (the fourth) that the Jail specified any criteria to guide Jail officials' consideration of those applications—or any reasons for which an application could be denied. Pet.App.7-9.

Jarrard amended his complaint after each new policy to keep up and to reflect the changes and repeated denials of his applications. Pet.App.7-9. Finally, after the fourth policy specified a timeline for review of ministry applications and actual reasons why one might be denied, Jarrard dropped his request

for injunctive relief on the policy claim. He maintained his claims for damages against the prior deficient policies under which his applications had previously been denied. Pet.App.9.

Eventually, Petitioners moved for summary judgment and Jarrard moved for partial summary judgment on his policy claim. Pet.App.8, 62.

First, the district court denied Petitioners' motion for summary judgment as to Morris's challenge to the denial of his requests for baptism. Pet.App.63. "A jury could easily conclude," the district court reasoned, that Moats and Sharp imposed a substantial burden on Morris's religious exercise by "enact[ing] a written policy outright *banning* baptism." Pet.App.66. Petitioners' "baptism-can-wait argument" failed, the court continued, because it "is based on [their] own reading of the Bible rather than [Morris's] beliefs." Pet.App.68. Moreover, "[t]here is substantial evidence that Defendants Sharp and Moats banned inmate baptism and denied [Morris's] baptism request because they personally believe baptism is not necessary for salvation." Pet.App.69. The district court thus concluded that, "[t]o the extent [Petitioners] prevented [Morris] from getting baptized simply because they believe baptism is theologically unnecessary, their conduct . . . violates the First Amendment." Pet.App.70. And the court found unpersuasive Petitioners' assertions about their actual reasons for banning baptism, noting that "the only contemporaneous evidence" of motive "focuses on theology" and rejecting their "after-the-fact testimony about safety and security" concerns as "vague" and "conclusory." Pet.App.70.

The district court also declined to award qualified immunity on Morris's claim. Pet.App.73-74. "No reasonable officer," the court observed, "could think it is lawful to ban inmate baptism, including for those who believe baptism is essential for salvation, simply because the officer personally holds a different religious view." Pet.App.73. But Petitioners "went ahead anyway based solely on their own religious view that baptism is unnecessary. That was an obvious First Amendment violation." Pet.App.73. Petitioners thereafter settled Morris's claim. Pet.App.6 n.3.

But, on Jarrard's claims, the district court nonetheless granted summary judgment to Petitioners. Pet.App.63. The court first opined that the First Amendment simply does not protect Jarrard's religious ministry under *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968). In the court's view, because Jarrard was effectively a "government employee," his religious expression as a volunteer minister "count[ed] as employee speech" subject to the Jail's control. Pet.App.80-84. And even if Jarrard had spoken as a citizen, the court concluded, his claim failed because his "personal view of baptism" is not "a subject of legitimate news interest" or of "concern to the community." Pet.App.86 (quotation omitted). Next, the court concluded that qualified immunity shielded Petitioners because it was not clearly established that the First Amendment protected Jarrard's speech as a volunteer minister. Pet.App.87-88. Finally, although the prior policies "arguably violated" the First Amendment's prohibition on unbridled discretion, the court awarded qualified immunity on that claim as well. Pet.App.92-94.

The Eleventh Circuit reversed. Pet.App.36. "[O]n the particular facts of this case," the court explained, "*Pickering* doesn't provide the proper framework for determining whether Jarrard's speech was 'constitutionally protected.'" Pet.App.13. As the court explained, *Pickering* "operate[s] as an exception of sorts . . . in cases involving government employees." Pet.App.14. But Jarrard wasn't a government employee, and, the court detailed, *Pickering*'s "logical underpinnings" do not "readily apply to Jarrard's participation in a volunteer prison ministry." Pet.App.17. Nor did his activities "bear any of the traditional hallmarks of employment." Pet.App.17. Because in "no practical respect did Jarrard's participation in the ministry program resemble a traditional government 'job,'" there was no basis to apply *Pickering*'s framework built upon the unique interests of government employers. Pet.App.18.

Instead, the court determined that "Jarrard's claim should be evaluated under the 'forum analysis' that traditionally governs speech-related claims." Pet.App.13. Under that analysis, the governing rule is clear: The First Amendment prohibits viewpoint discrimination across all forums and all types of government facilities. Pet.App.19. Moats and Sharp violated this basic principle when they excluded Jarrard from the Jail's ministry program simply because of "their disagreement with Jarrard's beliefs about baptism." Pet.App.22. That was "viewpoint discrimination, pure and simple." Pet.App.22.

The Eleventh Circuit further held that the standardless policies under which Jarrard's many previous applications were denied violated the First

Amendment because they failed to provide any meaningful criteria or timeline to guide decisions on volunteer applications. Pet.App.24, 27.

Finally, the court concluded that qualified immunity did not bar either of Jarrard's claims, given the obvious First Amendment rules at stake. Pet.App.29. That is, "Moats and Sharp were—*had to have been*—on notice that excluding Jarrard from the volunteer ministry program based on his views about baptism was unlawful. And yet, given the facts as we must construe them [on summary judgment], that's exactly what they did." Pet.App.34 (emphasis added). Likewise, "the law has long been clearly established that decisionmakers like Moats and Sharp may not exercise unbridled discretion in deciding who can (and can't) speak." Pet.App.35. Judge Rosenbaum concurred in all parts but the court's conclusion on qualified immunity. She wrote that, even if *Pickering* does not apply here, she disagreed that the answer to that question was clear enough to overcome qualified immunity. Pet.App.37.

Moats and Sharp petitioned for rehearing en banc, but no judge called for a vote. Pet.App.60.

REASONS FOR DENYING THE WRIT

I. This Case Implicates No Circuit Split.

The decision below is hardly surprising; it certainly implicates no circuit split. Petitioners fail to identify a single facet of the decision with which even one circuit disagrees. They do not even *try* to assert a split on the second and third questions presented. And in their strain to manufacture a split on the first question—on Jarrard's First Amendment retaliation

claim—they ignore the actual decision below, attacking instead a ruling of their own imagination.

The decision itself is straightforward. The Eleventh Circuit observed a bedrock First Amendment rule, with which no circuit can or does disagree: Government officials may not discriminate against a person merely because he has expressed religious beliefs which the officials dislike. *See* Pet.App.23 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). In more legalistic terms: "[A]ny regulation of speech based on the speaker's viewpoint is presumptively invalid and must, at the very least, satisfy strict scrutiny." Pet.App.19 (citing *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The court then applied that unassailable rule to the summary judgment record in this case. After cataloging the "ample evidence that . . . Moats and Sharp disagreed with Jarrard's views on baptism," the court found that a jury could reasonably "infer that they denied his applications on the basis of that disagreement." Pet.App.20-21. Therefore, "[a]t least for summary-judgment purposes, [the court] conclude[d] that Moats and Sharp engaged in viewpoint discrimination," which could not withstand strict scrutiny. Pet.App.22.

Along the way, the court declined to apply "an exception of sorts" to "usual" First Amendment analysis—where, under *Pickering*, ordinary on-the-job expression gets lesser protection "in cases involving government employees." Pet.App.14. The court recognized that the *Pickering* exception "may be

validly applied even to some individuals who aren't traditional government employees," including volunteers. Pet.App.15. But that rule is not in dispute. Rather, "[t]he real and more granular question [wa]s whether, *given the particulars of Polk County's volunteer ministry program and Jarrard's participation in it*, he was a de facto employee for *Pickering* purposes." Pet.App.15 (emphasis added). The answer to that fact-intensive question was no. Pet.App.15; *see also* Pet.App.19 ("[N]either *Pickering*'s theoretical underpinnings nor the practical realities of Jarrard's situation support the application of the *Pickering* analysis.").

No surprise, Petitioners do not cite a single case that would hold to the contrary. They instead ignore the decision's fact-bound reasoning, and blindly assert that the court below announced a categorical "special exception" to *Pickering* for "government volunteer roles that include a religious component." Pet.17, 42. In their view, that rule would split from a consensus view that *Pickering* can apply to "claims by government volunteers in general." Pet.17-18; *see* Pet.24 (citing circuits that "have applied the *Pickering-Garcetti* framework to . . . government volunteers"). Petitioners are mistaken several times over.

First, the Eleventh Circuit did not craft any "exception" to *Pickering*. Quite the opposite, the court *agreed* with the "consensus" rule Petitioners describe: *Pickering* can, and sometimes does, apply to unpaid volunteers.[2] Indeed, the court began its discussion by

[2] Curiously, Petitioners include the Eleventh Circuit among the courts that follow this "consensus" rule—showing that their

observing that *Pickering* sometimes applies "beyond traditional employment relationships"—for instance, to government contractors, "an unpaid political appointee," or a volunteer firefighter. Pet.App.15-16 & n.12 (citing *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996); *McKinley v. Kaplan*, 262 F.3d 1146, 1149 & n.5 (11th Cir. 2001); *Rodin v. City of Coral Springs*, 229 F. App'x 849 (11th Cir. 2007)). The court cautioned that *Pickering* might apply even though Jarrard was neither "a Polk County employee" nor "on the payroll." Pet.App.14. The key, the court explained, is not categories like contractor or volunteer; rather, *Pickering*'s reach depends "on the particular facts of th[e] case." Pet.App.13. And the court only rejected *Pickering*'s framework after determining it is an ill fit for *the facts here*. *See* Pet.App.15 ("*Pickering*'s logic doesn't comfortably apply to volunteer ministers *like Jarrard*." (emphasis added)); Pet.App.17 (*Pickering*'s "delivery-of-government-services rationale doesn't readily apply to Jarrard's participation" in the ministry program.); Pet.App.17 ("[E]ven setting aside *Pickering*'s logical underpinnings, Jarrard's participation in the ministry program doesn't bear any of the traditional hallmarks of employment."); Pet.App.18 ("In no practical respect did Jarrard's participation . . . resemble a traditional government 'job.'").

Nothing in the decision below suggests that *Pickering* never applies to volunteers, "religious" or otherwise. That would have made for a much shorter

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quibble is not with Eleventh Circuit law, but rather with how the panel below applied that law to these particular facts. Pet.24.

opinion. The court's thorough inspection of the facts of the Jail's ministry program and Jarrard's participation in it underscores the actual point: *Pickering* can apply to volunteers, but it depends on the details. Petitioners do not identify a single circuit that disagrees or a single case that holds *Pickering* must apply to all government volunteers, regardless of their circumstances. Quite the opposite, circuits around the country have "cautioned against extending [*Pickering*] beyond the public employment context." *CarePartners LLC v. Lashway*, 545 F.3d 867, 881-82 (9th Cir. 2008) (collecting cases from First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits).

Second, Petitioners have identified no split on *Pickering*'s application to volunteer ministers in particular. In fact, Petitioners do not cite a single circuit decision applying *Pickering* to a volunteer minister—let alone a decision holding that *Pickering* applies to all such volunteers or to ones in programs that resemble Polk County's. The cases cited reference roles that look nothing like Jarrard's. *See* Pet.24 (five volunteer firefighters, volunteer police officer, probation-department volunteer, AmeriCorps volunteer with Indiana National Guard, and unpaid political appointee). Petitioners make no effort to analogize Jarrard's participation in the Jail's ministry program to the facts of those obviously different cases. Pet.24-26. Regardless, reaching different conclusions after applying the same legal rule to different facts hardly suggests a "split" of authority, let alone one worthy of this Court's attention. The decision below did not state any new or disfavored rule; it applied an

existing, utterly uncontroversial rule to a particular set of facts.[3]

II. The Decision Below Is Correct.

The decision below is also manifestly correct. It sits comfortably on two bedrock principles of First Amendment law. *First*, government officials may not suppress religious viewpoints with which they disagree. Pet.App.22; *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *Second*, officials may not wield unbridled discretion when deciding whether to permit or deny expressive activity in a government forum of any kind. Pet.App.24; *see, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-70 (1988). And because these foundational rules have long been clear, the Eleventh Circuit correctly held that qualified immunity offers no shield for Petitioners' blatant violations of them. Pet.App.33. These unremarkable conclusions do not warrant this Court's review.

A. The First Amendment plainly bars Petitioners' viewpoint discrimination.

The upshot of the Eleventh Circuit's decision is simple: Petitioners may not ban Jarrard from the volunteer ministry program because they personally

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[3] In a last-ditch effort to create a split, Petitioners cite a handful of district court cases involving volunteer chaplains. Pet.25. As the court below noted, the vast majority did not even "assess[] whether [*Pickering*] was the proper analytical framework but, rather, seemed to take it as a given." Pet.App.17 n.13. And, regardless, these unreasoned district court decisions cannot create conflict among courts of appeals warranting this Court's review. Sup. Ct. R. 10(a).

disagree with his religious beliefs. Pet.App.23. That holding is narrow and, more importantly, correct.

As the Eleventh Circuit observed, the First Amendment's foundational prohibition of viewpoint discrimination applies across all types of government facilities and activities. Even if Polk County had not opened a limited forum for the expression of a "diversity of views" in the ministry program, *Rosenberger*, 515 U.S. at 834, the rule is the same. Pet.App.19. The government may never exclude speech or speakers from a facility on the basis of his viewpoint—even in a "nonpublic forum" like a jail that has not been designated for expressive activity. *Perry Educ. Ass'n*, 460 U.S. at 49; *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *see also Barnette*, 319 U.S. at 642. The government has wider latitude to regulate speech in nonpublic fora, but it may do so only if "the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

Petitioners' viewpoint-based exclusion fares no better in a jail. Pet.22-23. To be sure, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). But that difficulty does not permit "prison officials and employees to apply their own personal prejudices and opinions as standards" when deciding what views to allow into the jail. *See Thornburgh v. Abbott*, 490 U.S. 401, 416 n.14 (1989) (quoting *Procunier v. Martinez*, 416 U.S. 396, 415 (1974)). And Petitioners certainly cannot justify Jarrard's exclusion

based on their view that his beliefs about baptism are "highly undesirable to jail administrators." Pet.29. That is exactly the kind of value judgment about contested ideas that the First Amendment proscribes. *See Barnett*, 319 U.S. at 642. And even if Petitioners' concerns were valid—and they are not—the Eleventh Circuit rightly observed that Jarrard's exclusion would *still* fail strict scrutiny given the many more narrowly tailored options to address them, an issue the petition does not even address. Pet.App.22-23.

B. This case presents no "tension" with *Pickering* or *Umbehr*.

Petitioners ignore these core principles and argue that the court should have instead applied *Pickering*'s narrow exception to the First Amendment's normal protections. Pet.23. Far from it.

1. The *Pickering* exception affords the government greater control over its employees' speech to ensure "the efficiency of [its] public services." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568). But that doctrine is limited to the government's special interests in controlling speech on ordinary workplace affairs. Indeed, *Pickering* rejected the idea that government employees broadly sacrifice their First Amendment rights to speak as individuals on important matters, even while on the job. *Connick*, 461 U.S. at 142; *see also Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Thus, *Pickering* "seek[s] a balance between the interests of the 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." *Connick*, 461 U.S. at 142 (quotation and alteration omitted).

The Eleventh Circuit correctly held that this exception has no bearing on the facts here. Jarrard *wasn't* a Jail employee or anything like one. Pet.App.14-18. The unique interests that animate *Pickering*—"promoting the efficiency of the public services [the government] performs through its employees," 391 U.S. at 568—are utterly absent. Pet.App.17. Jarrard did not deliver messages on behalf of the Jail, nor did he provide any other public service the Jail would need to fill in his absence. Pet.App.17. Moreover, Jarrard's participation in this community volunteer program looked nothing like traditional government employment. Pet.App.17-18.

2. Nor is there any "tension" between the decision below and this Court's decision in *Umbehr*. Pet.20. In *Umbehr*, this Court extended *Pickering*'s reach beyond formal government employees to paid government contractors. 518 U.S. at 674. But that short extension merely reflects the government's common interests in regulating services performed through its employees and its contractors. *Id.* In that case, this Court "turn[ed] initially to [its] government employment precedents for guidance" because "[t]he similarities between government employees and government contractors . . . are obvious." *Id.* Like employees, contractors are hired so that the government may further "its interests as a public service provider." *Id.* at 678. And 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." *Id.* at 674.

Those similarities are glaringly absent here. Pet.App.17-18. The government didn't hire Jarrard to perform "a public service" or pay him "for the time he spent teaching and counseling inmates." Pet.App.17-18. To join the program, he only had to "put his name on a list" and he was approved "within minutes." Pet.App.18. The Jail did not direct his ministry or even require him to show up. Pet.App.18. In fact, "no more than 10 of the 140-some-odd people on the sign-up list ever showed up." Pet.App.18. That volunteers were eventually required to sign a confidentiality agreement, execute a liability waiver, and pass a criminal background check, *see* Pet.6-7, did not render them "de facto employee[s]." Pet.App.18. Indeed, the Jail subjected other visitors to "similar conditions." Pet.App.18. All told, in "no practical respect did Jarrard's participation in the ministry program resemble a traditional government 'job.'" Pet.App.18.

There is no good reason on the facts of this case to deviate from the typical framework for analyzing restrictions on speech. Pet.App.19. That conclusion is consistent with this Court's own caution in *Umbehr* that even for government contractors—with their many "obvious" similarities to employees—the concerns of *Pickering* are less relevant than for actual employees. 518 U.S. at 680. The Eleventh Circuit was correct not to extend *Pickering* here, where the similarities are altogether lacking.

C. The standardless application policies are plainly unlawful.

Next, the Eleventh Circuit held that several of the Jail's policies violated the First Amendment because they failed to provide any meaningful standards to

guide administrators' evaluation of volunteer ministry applications. Pet.App.24. There is no serious argument that the Jail's barebones policies were actually constitutional.

1. The First Amendment requires the government to set some basic rules to channel officials' discretion when deciding whether to allow certain speech. *City of Lakewood*, 486 U.S. at 769-70. This Court has identified at least "two evils" that such policies must avoid. *FW/PBS v. City of Dallas*, 493 U.S. 215, 225 (1990). *First*, the government may not give an official "unbridled discretion" to permit or deny expression. *Id.* at 225-26 (quoting *City of Lakewood*, 486 U.S. at 757). *Second*, the government must "place limits on the time within which the decisionmaker must" act. *FW/PBS*, 493 U.S. at 226.

The Jail's policies run afoul of both requirements. As the Eleventh Circuit explained, the policies did not "even attempt[] to provide the substantive standards" required to constrain Petitioners' discretion. Pet.App.27. "Nor [did] they include a time limit within which [Jail officials] must make a decision." Pet.App.27 (quotation omitted). And Jarrard then suffered unconstitutional censorship based on his viewpoint.

2. Petitioners argue that the Eleventh Circuit has overprotected the First Amendment right by confusing "potential harm" with "actual constitutional harm." Pet.31-32. In their view, "the most unconstitutional policy imaginable" creates no First Amendment claim unless officials actually deny an application for an impermissible reason. Pet.34. But, they contend, if officials quickly deny an application on a

"constitutionally permissible" ground, the applicant has suffered no harm and has no claim. Pet.32. In short, no harm, no foul. That argument fails for at least two reasons.

First, Petitioners misunderstand the First Amendment. As this Court has explained, the First Amendment harm here comes from "the *mere existence* of the [official's] unfettered discretion," which may "intimidate[] parties into censoring their own speech, *even if the discretion and power are never actually abused*." *City of Lakewood*, 486 U.S. at 757 (emphasis added). In other words, it is not simply a prophylactic rule to help guard against some "potential" constitutional violation like *Miranda*. *See* Pet.32. The point is that the First Amendment itself prohibits policies that invite "censorship" and "arbitrary suppression," *FW/PBS*, 493 U.S. at 226-27—harms that materialize independent of any particular decision. Indeed, Petitioners' call to inspect the actual reasons for any given decision would not even work. One of the many problems of a standardless policy is that it may prevent a court from ever answering "whether an official's . . . decision *was* impermissibly based on content or viewpoint"—because we don't know what it was based on at all. *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1221 (11th Cir. 2017) (emphasis added).[4]

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[4] Petitioners' reference to situations in which a plaintiff has suffered no Article III injury are likewise beside the point. Certainly, plaintiffs lack standing to vindicate constitutional violations that they merely hypothesize might occur. *See* Pet.33; *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996). And, sure, a person

Tellingly, Petitioners do not even attempt to identify a circuit split on this issue. The Eleventh Circuit's straightforward application of this Court's precedents does not warrant review.

Second, even if it mattered, Petitioners' suggestion that Jarrard's applications *were* denied quickly and for valid reasons is simply wrong—and not for this Court to decide. This case arrives on summary judgment and, as the court below noted, there is "ample evidence" for a jury to find that Jarrard's applications were denied based on viewpoint discrimination, Pet.App.20-21, and sometimes after great length, *supra* n.4. Petitioners cannot escape a trial by attempting to litigate those facts here.

D. Qualified immunity does not bar Jarrard's claims.

Finally, the Eleventh Circuit rightly held that qualified immunity does not bar Jarrard's First Amendment claims. Petitioners were plainly on notice that their actions violated these bedrock First Amendment rules. Pet.App.33.

1. First, a foundational point Petitioners omit: Qualified immunity *cannot* resolve this case in their favor because Jarrard still has live claims for

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who has his application quickly *approved* might have no grounds to complain. Pet.33-34. But that says nothing about this case, where officials repeatedly *denied* Jarrard's applications, including sometimes after great length. Dist. Ct. Doc. 53-10 (Application, August 8, 2021); Dist. Ct. Doc. 69-1 (Denial of Application, March 9, 2022). Of course he can challenge the constitutional infirmities of the process that has held him out of the Jail for years.

injunctive and declaratory relief. Pet.App.34 n.19. Qualified immunity or not, a trial will commence.

2. Second, there is simply no error in the lower court's qualified immunity analysis. Once again, Petitioners suggest no split on the legal standards that apply. Qualified immunity does not shield officials from liability where "in light of pre-existing law[,] the unlawfulness" of officials' actions is "apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Constitution's prohibition of viewpoint discrimination could not be more firmly rooted or readily apparent. As discussed, across contexts and regardless of the type of government facility, officials may not suppress viewpoints or exclude speakers with which they personally disagree. *Supra* Part II.B; Pet.App.34. Against this backdrop, the "contours of the right" could not be clearer. *Anderson*, 483 U.S. at 640. Any "reasonable official would understand," *id.*, that banning volunteer ministers because they hold the "wrong" religious views violates the First Amendment. *See* Pet.App.34.

Petitioners' invocation of *Pickering* cannot save them. As cleanly laid out below, Jarrard looks nothing like a government employee, and no reasonable official could have believed otherwise. Pet.App.14-19; *see also* Pet.App.35 n.20 ("Nor . . . could Moats and Sharp have reasonably thought, as a matter of fact, that Jarrard was a government employee."). Even Petitioners didn't think that Jarrard was some kind of quasi-employee whose speech they could control in the "workplace" until well into this litigation. They did not recast this claim as a novel extension of *Pickering* until they failed to dismiss it under straightforward

application of standard government forum analysis. *See* Dist. Ct. Doc. 18-2 (Brief in Support of Pre-Answer Motion to Dismiss) (not mentioning *Pickering*); Dist. Ct. Doc. 34 (Opinion & Order) (same). Still now, Petitioners cite only a handful of unreasoned district court decisions to support their theory that *Pickering* is even relevant to so-called "volunteer religious workers." Pet.25. And they cannot cite a single case, at any level, in which a court has held—under *Pickering* or otherwise—that a person can be excluded from a volunteer program like this simply because the Sheriff doesn't like his religious beliefs.

Likewise, any reasonable official would have known that the Jail's policies affording unrestrained discretion to officials were unconstitutional. The First Amendment requires that policies provide objective standards and time limits to constrain officials' discretion in choosing whether to permit or deny expressive activity. *FW/PBS*, 493 U.S. at 225-26. No reasonable official could think that the Jail's policies containing *no* approval criteria satisfied this basic requirement. Pet.App.35-36. Petitioners do not dispute this, arguing instead that the requirement doesn't apply to "public employment." Pet.40. That argument is wrong for all the same reasons as their resort to *Pickering*. *Supra* Part II.B; Pet.App.14-19.

3. In the end, Petitioners errantly demand that the Eleventh Circuit identify a case with the same "particular circumstances" as this. Pet.37. They build that argument from a scattershot of Fourth Amendment cases, where this Court has held that "specificity is especially important" given the often split-second decisions involved. *Mullenix v. Luna*, 577

U.S. 7, 12 (2015) (per curiam). But it is black-letter law that not all constitutional violations need precise factual analogues to be clear, and this Court has emphasized that "officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added); *see also id.* at 740-41 (quoting *United States v. Lanier*, 520 U.S. 259, 270-71 (1997)). It has warned lower courts against "a rigid, overreliance on factual similarity" where the right is otherwise clear. *Id.* at 742.

Here, the right is clear, and an official could not miss the point: The First Amendment does not allow officials to pick and choose who comes into the Jail, or who participates in volunteer programs, based on whether they share the Sheriff's reading of the Bible. No "specific case" is needed to understand that or to appreciate the egregiousness of Petitioners' actions. The Sheriff of Polk County removed Jarrard from the volunteer ministry program and told him—in writing—he could not come back unless he aligned his baptismal teachings with the Sheriff's own beliefs. That is unconstitutional, and obviously so.

III. This Case Is an Unsuitable Candidate for this Court's Review.

Even if any of the questions presented warranted this Court's attention, this fact-bound, interlocutory decision is a poor candidate for their review.

A. The decision below is fact-bound, and critical disputes remain to be litigated.

1. The decision below involves the application of uncontroversial principles of First Amendment law to

"the particular facts of this case." Pet.App.13. There is no serious question—let alone a recognizable split on—what principles of law govern. There are only fights over the "granular question" of how the First Amendment's protections apply to the "particulars of Polk County's volunteer ministry program and Jarrard's participation in it." Pet.App.15. Petitioners argue that the Eleventh Circuit got the application of settled law to those facts wrong; that complaint does not warrant this Court's review. Sup. Ct. R. 10.

2. Petitioners' own arguments reveal their hope to litigate facts here. They repeatedly suggest that the law might allow officials to exclude a volunteer for reasons other than religious viewpoint—like disruption or dishonesty. Pet.23, 28. And, Petitioners claim, they in fact excluded Jarrard for those reasons. Pet.7-9, 29. That is all beside the point now. Those factual disputes were not before the Eleventh Circuit on summary judgment review, and they certainly are not to be brought to this Court now.

The Eleventh Circuit's decision remands the case for trial to determine the ultimate question that matters: "[W]hether Moats and Sharp unconstitutionally barred Jarrard from the volunteer ministry program because they disagreed with his viewpoint concerning baptism." Pet.App.13; *see also* Pet.App.23 (remanding to allow trial "court to consider the 'adverse conduct' and 'causal relationship' prongs" of retaliation claim "in the first instance"). As the court recognized, there is "ample evidence" on Jarrard's side of that question. Pet.App.20-21. It is now the role of the jury to decide it.

B. Resolving the questions presented in Petitioners' favor will not prevent trial and may not affect the result at all.

Even if this Court were to grant review and rule in Petitioners' favor, that decision would not resolve this case, could not avoid trial, and might not change the outcome below *at all*.

1. The primary question below was whether the district court correctly dismissed Jarrard's retaliation claim by finding that his speech in the Jail was unprotected under *Pickering*. Pet.App.13. That question includes two steps: (1) whether the district court was even right to apply *Pickering* in the first place; and if so (2) whether, under *Pickering*, Jarrard's ministry is the kind of workplace speech that gets lesser First Amendment protections. *See* Pet.App.13. The Eleventh Circuit reversed after determining the district court erred at the first step—that *Pickering* does not apply to these facts at all.

For the reasons discussed, that decision was right. But even if it were *wrong*, it would only raise the second question: Under these facts, is Jarrard's ministry nonetheless protected under *Pickering*? That is a question that will require substantial re-litigation of other arguments that were pressed below, but were ultimately unnecessary to resolve. And it is a question likely to be answered in Jarrard's favor once again. As Jarrard demonstrated below, even under *Pickering*, the answer is the same: A volunteer minister's religious expression is not the kind of routine "workplace" expression that loses First Amendment protection under *Pickering*. *See* Eleventh Circuit Doc.

37 (Appellant's Opening Brief) at 27-41; Eleventh Circuit Doc. 50 (Appellant's Reply Brief) at 10-17.

Indeed, there is no serious argument that Jarrard "speak[s] on the government's behalf" or delivers a message "the government itself ha[s] commissioned or created" when he shares his views on salvation. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423-25 (2022); *see also Garcetti*, 547 U.S. at 421. And his religious expression and exercise obviously touch on matters of broader First Amendment significance, not merely workplace concerns. *See Connick*, 461 U.S. at 146-47; *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465-66 (1995); *see also Kennedy*, 142 S. Ct. at 2423. Nor can Petitioners show that any concerns aside from theology actually motivated their suppression of Jarrard's speech as workplace matter. *See* Dist. Ct. Doc. 34 (Opinion & Order) at 42 (rejecting other concerns as pretextual). Jarrard's ministry is constitutionally protected, even under *Pickering*.

2. Second, and similarly, reversal on the second question presented would only raise the factual question on which Petitioners' theory of unbridled-discretion rests: *why* they denied Jarrard's applications and whether it was actually for a "constitutionally permissible" reason. Pet.32; *see supra* Part II.C. Given the "ample evidence" for a jury to find that Jarrard's applications were denied based on impermissible viewpoint discrimination, Pet.App.20-21, it is highly unlikely they ever prevail on that factual point at trial.

3. Third, even a reversal on qualified immunity will not resolve this case or prevent trial. Qualified immunity, of course, shields Petitioners only from

monetary damages. *Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009). But, as the court below held, Jarrard's request for injunctive relief against Petitioners' unconstitutional retaliation still remains. Pet.App.34 n.19. Qualified immunity is no impediment to that. *Pearson*, 555 U.S. at 242-43. Thus, regardless whether this Court intervenes on qualified immunity, Petitioners must stand trial. Their assertion otherwise is simply wrong. *See* Pet.43.

CONCLUSION

The petition for a writ of certiorari should be denied.

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