

No. 25-1389

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD HERSHEY,

Petitioner,

v.

CITY OF BOSSIER CITY; BOBBY GILBERT,
individually and in his capacity as Deputy Marshal;
DANIEL STOLL; DAVID SMITH; TYSHON HARVEY;
EUGENE TUCKER,
Respondents.

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

**BRIEF OF AMICUS CURIAE JEWISH
COALITION FOR RELIGIOUS LIBERTY IN
SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Jewish Coalition for Religious Liberty respectfully submits this brief amicus curiae in support of Petitioner Richard Hershey.¹

The JCRL is committed to defending religious liberty by bringing to the attention of courts issues important to religious Jews, among other things. The JCRL maintains that failing to extend the protections provided in *Hope v. Pelzer*, 536 U.S. 730 (2002) to religious liberty claims will uniquely threaten practitioners of minority religions such as Orthodox Judaism.

INTRODUCTION

Religious Jews comprise only a small fraction of the American population. Approximately 2.4% of

¹ This amicus brief was authored in whole by Mr. Mark C. Lamb and Ms. Ashley D. Burman, attorneys with the law firm Carney Badley Spellman, P.S. and signatories to this amicus curiae brief. Mr. Lamb and Ms. Burman provided their legal services *pro bono*. Carney Badley Spellman, P.S. paid for any fees necessary for the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus, its members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Further, on July 6, 2026, Ms. Burman provided notice via email to Petitioner's and Respondent's counsel that this amicus brief would be filed on behalf of the Jewish Coalition for Religious Liberty. No party has withheld consent to the filing of this amicus curiae brief.

Americans identify as Jewish, and only about 1.9% identify as religious Jews. BRANDEIS, AMERICAN JEWISH POPULATION ESTIMATES 2020 SUMMARY & HIGHLIGHTS (2021). By contrast, approximately 62% of American adults identify with some branch of Christianity. GREGORY A. SMITH ET AL., PEW RESEARCH CENTER, DECLINE OF CHRISTIANITY IN THE U.S. HAS SLOWED, MAY HAVE LEVELED OFF (Feb. 26, 2025).

The Jewish community is also religiously diverse, encompassing numerous movements, traditions, and religious practices. *See, e.g.*, PEW RESEARCH CENTER, A PORTRAIT OF JEWISH AMERICANS (Oct. 1, 2013). Because religious Jews comprise a small and diverse minority, religious liberty disputes involving Jewish practices are less likely to have generated extensive factually analogous precedent. A rule requiring plaintiffs to identify prior cases involving nearly identical religious conduct would therefore disproportionately burden minority faith adherents. This Court should therefore grant certiorari and reverse the decision below.

SUMMARY OF ARGUMENT

The Petition presented by Richard Hershey seeks review of a circuit split regarding whether the protections provided in *Hope v. Pelzer*, 536 U.S. 730 (2002) extend to Free Speech and Free Exercise claims. *Hope's* principle is simple: when the unconstitutionality of official conduct is obvious, government officials do not need to see a prior case involving materially identical facts to have fair notice that the conduct is unlawful. And if they violate

someone's First Amendment rights in such a manner, they are not entitled to qualified immunity from a civil claim.

The Fifth Circuit held that *Hope's* principle is limited to the Eighth Amendment. That is an unduly narrow reading. There is no reason for courts to distinguish between the Eighth and First Amendments in this regard. Religious liberty and freedom of speech are essential to our constitutional order. Their violation is no less harmful nor less obvious than that of the Eighth Amendment. Worse, that requirement creates a self-perpetuating cycle: where no binding case says certain governmental acts violate the protections of those Amendments, it's less likely any such future case will arise because qualified immunity prevents courts from making such determinations. Because of those reasons, this Court should grant certiorari and reverse the Fifth Circuit's holding.

ARGUMENT

I. Religious exercise claims frequently arise from uncommon and highly fact-specific religious practices.

America's religious landscape is extraordinarily diverse. The United States is a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961), and a "rich mosaic of religious faiths." *Town of Greece v. Galloway*, 572 U.S. 565, 628 (2014) (Kagan, J., dissenting). Because the Free Exercise Clause safeguards religious liberty in a pluralistic society, its protections must extend to a wide range of religious practices, including practices unfamiliar to government officials and courts.

Moreover, the Free Exercise Clause does not just protect the dominant expressions of a particular faith. "Intrafaith differences" are common, and "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 715–716 (1981). Religious exercise disputes can arise in specific theologically complex circumstances involving practices that have never previously been considered by a court.

A rule requiring a prior decision involving materially similar facts thus creates a particular problem in the religious liberty context. Government actions burdening uncommon religious practices are, by their very nature, unlikely to have generated precedent.

II. Religious liberty claimants often lack factually analogous precedent.

The “clearly established” principle for satisfying qualified immunity “requires a high degree of specificity.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (citation modified). The unlawfulness of an official’s conduct must “follow immediately from the conclusion that the rule was firmly established.” *Id.* at 64 (citation modified).

That requirement poses particular difficulties in the religious liberty context. Religious exercise takes countless forms, and government burdens on religious practice arise in a wide variety of factual settings. As a result, plaintiffs often struggle to identify prior decisions involving sufficiently similar conduct, even when general constitutional principles strongly favor their claims.

The Eighth Circuit's decision in *Business Leaders in Christ v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021), illustrates the problem. There, a religious student organization alleged that university officials violated the Free Exercise Clause after the organization was penalized for limiting leadership positions to those who shared its religious beliefs. *Id.* at 971–977. Although prior decisions addressed related issues, the Eighth Circuit held that those decisions did not clearly establish the unconstitutionality of the officials’ conduct and therefore affirmed qualified immunity. *Id.* at 986–988. This was true despite the fact that, at the same time, the court found that the officials were not

entitled to qualified immunity as to claims arising from the violation of other constitutional rights. *Id.* at 980–986.

Because qualified immunity foreclosed liability, *Business Leaders in Christ* produced no precedent clearly establishing that the challenged conduct violated the Free Exercise Clause. The result is a self-perpetuating cycle: the absence of factually analogous precedent defeats the damages claim, and the defeated claim produces no precedent for future litigants.

Business Leaders in Christ involved adherents to a majority faith. The same problem is even more acute for religious minorities. Because their practices arise less frequently in litigation, adherents of minority faiths are less likely to find precedent addressing their particular religious obligations with the “high degree of specificity” qualified immunity requires.

Consider the Eighth Circuit’s opinion in a different case, *Sisney v. Reisch*, 674 F.3d 839 (8th Cir. 2012), involving a religious Jew. There, Sisney, a Jewish prisoner, wanted to celebrate the Jewish holiday of Sukkot by erecting a “succah” in the prison’s recreation yard. *Id.* at 841. A succah is a small tent or booth used for dining and other activities during observance of Sukkot. *Id.* Sisney requested permission to erect his succah in the prison recreation yard, but his request was denied. *Id.* at 842. The district court granted the denying official qualified immunity because the right at issue was not clearly

established at the time of the alleged violation. *Id.* at 844.

Sisney cited examples where other prisoners had been guaranteed the right to reasonable dietary and meal accommodations consistent with their religious beliefs. *Id.* at 846–847. The Eighth Circuit rejected that analogy, concluding that precedent recognizing prisoners’ rights to religious dietary accommodations did not clearly establish a right to erect a succah. *Id.* at 847. It is hardly surprising that there was no precedent involving the requirement to eat in a succah, a practice adhered to by a small number of Americans for only a few days each year. Those are not factors that should lead to a religious practice receiving diminished constitutional protection, but that is exactly the result under the Fifth Circuit’s rule. Because no prior case addressed that specific religious practice, qualified immunity barred Sisney’s damages claim.

Sisney illustrates the unique difficulty minority faith claimants face. The very feature that makes many minority faith disputes distinctive—the presence of religious practices unfamiliar to most courts—also makes it more difficult to identify the factually analogous precedent that qualified immunity demands.

III. The Fifth Circuit’s rule threatens to prevent religious liberty precedent from ever developing.

Hope addresses this problem directly. By recognizing that some constitutional violations are

sufficiently obvious even in the absence of closely analogous precedent, *Hope* permits constitutional doctrine to develop in novel factual settings. The Fifth Circuit’s decision departs from that principle and risks freezing the development of religious liberty law.

Under this Court’s precedent, lower courts are not required to evaluate whether a constitutional violation occurred in a suit for damages against a government official if they can determine that the right in question is not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Where courts repeatedly conclude that a constitutional right is not clearly established, they may never reach the underlying constitutional question. As a result, the precedent necessary to clearly establish the right never develops. *See, e.g., Zadeh v. Robinson*, 928 F.3d 457, 479–480 (5th Cir. 2019) (Willett, J., concurring) (“Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one’s answered them before.”).

That problem is especially acute in the religious liberty context. Many of the most important First Amendment precedents arose from challenges brought by religious minorities whose practices were unfamiliar to courts and government officials alike. One minority faith in particular—Jehovah’s Witnesses—played an outsized role in developing

modern First Amendment doctrine.² Through a series of cases involving public preaching, distribution of religious literature, and other forms of religious expression, Jehovah’s Witnesses helped secure constitutional protections that now benefit all Americans. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (invalidating conviction arising from religious solicitation); *Murdock v. Pennsylvania*, 319 U.S. 105, 113–115 (1943) (holding that a municipality could not impose a license tax on the distribution of religious literature); *Martin v. City of Struthers*, 319 U.S. 141, 146–149 (1943) (protecting door-to-door religious advocacy). While those cases are not squarely on point, they highlight the important role that religious minorities play in developing Free Exercise doctrine.

Their role was not accidental. The distinctive practices of Jehovah’s Witnesses frequently brought them into conflict with government regulations and public officials. As this Court recognized, Jehovah’s Witnesses engage in religious practices that differ from those of many other religious groups. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953).

Thus, the very novelty of those disputes is what made them important. The constitutional protections recognized in *Cantwell*, *Murdock*, and *Martin* did not emerge from repeatedly litigated factual scenarios. They arose because members of a religious minority

² *See, e.g.,* Joshua C. McDaniel, Religious Minorities and Secular Rights, Wash. & Lee L. Rev., 111, 128–133 (2026) (discussing the outsized role Jehovah’s Witnesses have played in securing “rights-expanding court victories”).

challenged government actions that had not previously been tested against the First Amendment. Those cases subsequently became foundational precedents protecting religious liberty and expression for all Americans.

Had courts dismissed those early claims on the ground that no prior decision involved materially similar facts, many foundational First Amendment precedents might never have emerged.³ The Fifth Circuit's rule risks producing precisely that result. Religious minorities are often the first to challenge novel burdens on religious exercise. If government officials are entitled to qualified immunity whenever no factually analogous precedent already exists, the very cases most likely to develop First Amendment doctrine will be extinguished before that doctrine can develop.

Hope prevents that result by recognizing that some constitutional violations are so obvious that prior precedent is unnecessary. That principle is particularly important in the religious liberty context, where constitutional protections have often been forged through litigation brought by minority faiths confronting government actions not previously addressed by the courts. This Court should clarify

³ These early victories pre-dated the qualified immunity doctrine. The qualified immunity doctrine originated in 1967 with *Pierson v. Ray*, 386 U.S. 547 (1967), which held that the common law good faith and probable cause defense available to police officers was not abolished by 42 U.S. § 1983. It was cemented in later-dating cases, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which established the purely objective “clearly established law” standard still used today.

that *Hope*'s principle extends to religious liberty cases and provide greater protection to the most basic and obvious Free Exercise rights.

CONCLUSION

Hope recognizes a simple principle: clear fundamental constitutional rights do not depend on the existence of a prior case involving identical facts clearly establishing those rights. Nowhere is that principle more important than for religious minorities, whose distinctive religious practices may never generate a body of factually analogous precedent. If the Fifth Circuit's rule stands, novel burdens on religious exercise may repeatedly evade review, preventing the development of precedent necessary to protect future claimants. Many of this Court's most important religious liberty decisions arose from claims involving practices and circumstances not previously addressed by the courts. The petition for a writ of certiorari should be granted.

Respectfully submitted this 16th day of July,
2026.

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