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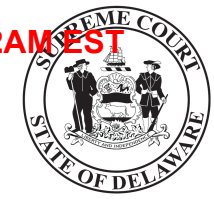

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE COVID-RELATED RESTRICTIONS ON RELIGIOUS SERVICES	**No. 354, 2023** Courts Below: The Superior Court of the State of Delaware, C.A. No. N23C-01-123-MAA; and The Court of Chancery of the State of Delaware, C.A. No. 21-1036-JTL

[PROPOSED] BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, PASTOR ALAN HINES AND REVEREND DAVID W. LANDOW, AND SUPPORTING REVERSAL

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Dated: December 29, 2023

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INTEREST OF AMICUS CURIAE

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Amicus submits this brief to further explain the historical importance of religious liberty in Delaware and the role qualified immunity currently plays in judging violations of rights protected by the First Amendment. *Amicus* seeks to inform the Court of the reasons for limiting this ahistorical and atextual doctrine of qualified immunity which too often forecloses remedies for serious rights violations. This Court should reverse the Superior Court's decision granting the Delaware Governor qualified immunity and make clear that qualified immunity does not protect government officials who brazenly disregard clearly established constitutional rights for want of caselaw perfectly matching the facts presented to the Court.

Amicus seeks to file this brief by leave of Court granted on the accompanying Motion For Leave To File pursuant to Rule 28.

ARGUMENT

I. Delaware has a strong, unique foundation based on religious liberty.

The Delaware legislature has recognized that "William Penn is the father of representative government in Delaware." Delaware General Assembly, "History of the State House," https://legis.delaware.gov/Resources/History (quoting CAROL E. HOFFECKER, DEMOCRACY IN DELAWARE: THE STORY OF THE FIRST STATE'S GENERAL ASSEMBLY 1 (Cedar Tree 2004)). Thomas Jefferson, who authored the Declaration of Independence and the Virginia Statute for Religious Freedom of 1786, praised Penn as "the greatest lawgiver the world has produced, the first in either antient or modern times who has laid the foundation of govmt in the pure and unadulterated principles of peace of reason and right." *From Thomas Jefferson to Peter Stephen Duponceau, 16 November 1825*, *reprinted in* NATIONAL ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/98-01-02-5663 (accessed Dec. 26, 2023).

Penn created four charters of government, the last of which in 1701 governed Delaware until the events of 1776. JOHN A. MUNROE, COLONIAL DELAWARE: A HISTORY 109 (Del. Heritage Press, 2d ed., 2003); *see* HOFFECKER, *supra*, at 9 ("Penn's Frame of Government of 1682 was Pennsylvania and Delaware's first constitution."). At the time, Delaware was appended to Pennsylvania and was known as the "Territories," the "Three Lower Counties on the Delaware," and the like.

MUNROE, *supra*, at 217. Penn had a "zeal for Delaware," and its "inhabitants…were to enjoy, fully, and equally, the same privileges as the people of the Province of Pennsylvania." *Id.* at 80, 83; *accord* HOFFECKER, *supra*, at 10; SALLY SCHWARTZ, "A MIXED MULTITUDE": THE STRUGGLE FOR TOLERATION IN COLONIAL PENNSYLVANIA 37 (NY Univ. Press 1989). Thus, the Delaware Constitution's absolute protection for religious liberty can be directly traced to Penn's earlier charters for his Pennsylvania colony.

Penn's province "was planted on a broader conception of religious liberty than were Maryland and Rhode Island." Scott D. Gerber, *Law and the Holy Experiment in Colonial Pennsylvania*, 12 NYU J. OF LAW & LIBERTY 620 (2019); *see* SCHWARTZ, *supra*, at 2-3, 8-9, 292, 297 (discussing the uniqueness of Penn's approach compared to that of other colonies). Penn's "goal was to establish, in almost absolute terms, religious liberty, with the expectation that mutual tolerance would prevail." SCHWARTZ, *supra*, at 9. Pursuant to that goal, "Penn envisioned a society that enshrined liberty of conscience as its fundamental principle, to the degree that he pronounced it unalterable in the Charter of Privileges in 1701." ANDREW R. MURPHY, WILLIAM PENN: A LIFE 362 (Oxford Univ. Press 2019). The protection of religious liberty in the 1701 Charter "was very similar to the earlier constitutions promulgated by Penn and the acts for liberty of conscience enacted while he was in the colony." Sally Schwartz, *William Penn and Toleration:*

Foundations of Colonial Pennsylvania, PENNSYLVANIA HISTORY 301-02 (vol. 50, no. 4, October 1983), https://journals.psu.edu/phj/article/view/24413/24182 (accessed Dec. 26, 2023).

The 1701 Charter "opened with a reaffirmation of Penn's famous commitment to liberty of conscience," and then continued and required that such religious liberty rights "remain without any Alteration Inviolably for ever." Gerber, *supra*, at 653-54; CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES, OCTOBER 28, 1701, art. I ("no person…shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to…do…any other Act or Thing, contrary to their religious Persuasion"), art. VIII ("the First Article of this charter relating Liberty of Conscience…shall be kept and remain, without any Alteration, inviolably for ever."), *reprinted in* THE AVALON PROJECT, YALE LAW SCHOOL, https://avalon.law.yale.edu/18th_century/pa07.asp (accessed Dec. 26, 2023). These are direct predecessors to the Delaware Constitution's current Article I, § 1 and Reserve Clause.

From Penn's earliest writings[1] to his later ones,[2] including his charters, "liberty of conscience" always included public worship free from any governmental interference. "Pennsylvanians wanted the freedom to attend worship services or to stay at home, to pay a minister or to ignore him." J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 3 (Cambridge Univ. Press 1990). That personal choice by each individual was the essence of Penn's "liberty of conscience."

"[T]here can be no credible doubt that the commitment to liberty of conscience that characterized colonial Pennsylvania (and Delaware) traced directly

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[1] *See, e.g.*, WILLIAM PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE 11-12 (1670), *reprinted in* Early English Books Online Text Creation Partnership, https://quod.lib.umich.edu/e/eebo/A54146.0001.001/1:6?rgn=div1;view=fulltext (accessed Dec. 26, 2023) ("First, By Liberty of Conscience, we understand not only a meer Liberty of the Mind, in believing or disbelieving this or that Principle or Doctrine, but the Exercise of our selves in a visible Way of Worship, upon our believing it to be indispensibly required at our hands, that if we neglect it for Fear or Favour of any Mortal Man, we Sin, and incur divine Wrath…. Secondly, By Imposition, Restraint, and Persecution, we don't only mean, the strict requiring of us to believe this to be true, or that to be false; and upon refusal, to incur the Penalties enacted in such Cases; but by those tearms we mean thus much, any coersive let or hindrance to us, from meeting together to perform those Religious Exercises which are according to our Faith and Perswasion."); *see also* SCHWARTZ, *supra*, at 14-15 (such government restraint "invaded the Divine Prerogative…prevented the operation of grace in each…soul and contradicted the nature and ends of government").

[2] MURPHY, *supra*, at 314 ("liberty of conscience" was broadly interpreted and included "faith, worship, and discipline, and by public and private meetings related thereunto") (quoting William Penn, *Requests to Queen Anne, September 1, 1705*, *in* 4 PAPERS OF WILLIAM PENN, 1701-1718 392 (Univ. Penn. Press 1987)).

to William Penn's vision, example, and determination." Gerber, *supra*, at 714-15, 619; *see* SCHWARTZ, *supra*, at 297 ("It was only with the grant of Pennsylvania and the Lower Counties to William Penn that the ideology of tolerance, and with it a principled commitment to religious and ethnic heterogeneity, were articulated, and the earlier, pragmatic pattern became firmly established as a matter of principle"). This same commitment to religious liberty continued after Penn allowed the Lower Three Counties to establish their own legislative body in 1704:

> the spirit of Penn, who was determined, as he wrote in the preamble to his Great Law,[3] to establish a government where "true Christian and Civil Liberty" would be preserved and wherein "God may have his due, Caesar his due, and the people their due," was largely retained in the Lower Counties as in Pennsylvania.

MUNROE, *supra*, at 83. Other historians have acknowledged the same. *See* Gerber, *supra*, at 619, 625-26, 662-72, 707-14 (addressing the long and "unusual" history of religious toleration in Delaware dating back to the Lenni-Lenape Indians, continuing and being written into law under Penn, and concluding with Section 2 of the Delaware Declaration of Rights of 1776); SCHWARTZ, *supra*, at 12, 297 (similar observations for the larger Delaware Valley); SANFORD H. COBB, THE RISE OF

[3] The Great Law was a series of statutes written by William Penn and enacted by the earliest Pennsylvania and Delaware Assembly. *See The "Great Law" – December 7, 1682*, PENNSYLVANIA HISTORICAL & MUSEUM COMMISSION, https://www.phmc.state.pa.us/portal/communities/documents/1681-1776/great-law.html (accessed on December 26, 2023). Chapter 1 of the Great Law is another of the predecessors to Article I, § 1 of the Delaware Constitution. *See* Gerber, *supra*, at 638-39, 644.

RELIGIOUS LIBERTY IN AMERICA: A HISTORY 71, 440 (MacMillan Co. 1902) (even after the separation of their legislatures, they "showed little difference in their treatment of religious matters").

Delaware continued that same commitment into its independence and statehood in Section 2 of its 1776 Declaration of Rights, and strengthened it in Article I, Section 1 of its 1792 Constitution, which still retains the same wording today. Delaware's right to continue Penn's commitment to liberty of conscience as expressed in communal religious worship free from governmental interference is the essence of federalism.[4] Thus, Article I, Section 1 reflects why "William Penn is commonly ranked among the heroes of American history for his contribution to religious freedom." FROST, *supra*, at 10.

[4] *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (Oxford Univ. Press 2018).

II. Especially in light of Delaware's history and commitment to liberty of conscience and religious freedom, its Governor had more than fair notice that it was clearly established that his interference and discrimination against religious groups and practices violated constitutional rights.

Concerning governmental interference with liberty of conscience, Justice Gorsuch issued serious criticisms and grave warnings about executive actions taken during the COVID-19 pandemic in a statement which is relevant and on-point with the executive actions at issue in this case:

> Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. *Governors and local leaders…closed churches even as they allowed casinos and other favored businesses to carry on*. … Courts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them. … Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat. … We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—*the right to worship freely*, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes. … The concentration of power in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound government. … And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.

Arizona v. Mayorkas, 143 S. Ct. 1312, 1314-16 (2023) (Mem.) (statement of Gorsuch, J.) (emphasis added).

In a case involving religious restrictions related to COVID-19, the U.S. Supreme Court held that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, *strike at the very heart of the First Amendment's guarantee of religious liberty*." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (*per curiam*) (emphasis added).

Despite the Plaintiffs' "right to worship freely," the Superior Court below allowed the Governor to "put away" and forget the Constitution by holding that the Governor has qualified immunity because "the law was not clearly established as to whether these and similar restrictions violated Plaintiffs' rights pursuant to the U.S. Constitution." (Tab A at 21.) The Superior Court reasoned that the U.S. Supreme Court's ruling against a government's COVID-19 related religious restrictions in *Roman Catholic Diocese* "was issued on November 25, 2020, and therefore did not clearly establish the law between March-June 2020, when the Governor issued the Challenged Restrictions in this case," and thus the Governor did not have "fair notice" that the restrictions were unconstitutional. (Tab A at 27-28.)

However, the Superior Court's holding and reasoning is in error because in *Roman Catholic Diocese*, as well as in other rulings against COVID-19 related religious restrictions, the U.S. Supreme Court did not overturn any prior decision or establish any new law, principle, or standard from what was already well known for

at least the past three decades. In one such case, *Tandon v. Newsom*, the Court even noted that "[i]t is *unsurprising* that such litigants are entitled to relief" against California's COVID restrictions on religious exercise. 141 S. Ct. 1294, 1298 (2021) (*per curiam*) (emphasis added). It was indeed "unsurprising" because the law and constitutional protections requiring strict scrutiny were already so clearly established long ago.

In *Roman Catholic Diocese*, the Court issued a relatively short opinion finding that the applicants challenging the government's religious restrictions were likely to succeed on the merits. 141 S. Ct. at 66-67. This finding and analysis were simply based on the Court's prior 1993 decision and holdings in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*. *Id.* The Court explained in *Roman Catholic Diocese* "that the challenged restrictions violate 'the minimum requirement of neutrality' to religion" and "[b]ecause the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 546 (1993)). As the Court later summarized in *Tandon*, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious

exercise." *Tandon*, 141 S. Ct. at 1296 (emphasis in original) (citing *Roman Catholic Diocese*, 141 S. Ct. at 67-68).

The Court reiterated in *Tandon* that, "*historically*, strict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' That standard 'is not watered down'; it 'really means what it says.'" 141 S.Ct. at 1298 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 546) (emphasis added) (internal citation omitted). "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Tandon*, 141 S. Ct. at 1296-97. Applying strict scrutiny in these cases took very little time and did not require any novel or complicated analysis for the Court to find that "the Governor's severe restrictions on the applicants' religious services must be enjoined" for not being narrowly tailored when "they single out houses of worship for especially harsh treatment" and have no justification for such "striking" "disparate treatment" between houses of worship and "even non-essential businesses." *Roman Catholic Diocese*, 141 S. Ct. at 66-69; *see also Tandon*, 141 S. Ct. at 1297-98.

Because such restrictions, just like the restrictions in this case, "strike at the very heart of the First Amendment's guarantee of religious liberty," rather than merely touching on the outer bounds of First Amendment protections, the religious rights at issue in this case were obviously and clearly established long before the

Governor issued the restrictions violating those rights. The Governor did not need the "unsurprising" decisions by the U.S. Supreme Court in *Roman Catholic Diocese* or other COVID-19 related religious restriction cases, like *Tandon*, to have fair notice, as the Superior Court claimed (Tab A at 27-28), because those decisions merely confirmed and simply applied what had already been clearly established at least as far back as 1993 in *Church of Lukumi Babalu Aye*. Therefore, the Delaware Governor should not be granted qualified immunity for the religious restrictions imposed upon the Plaintiffs in this case.

Additionally, since the Governor's restrictions on the Plaintiffs' religious practice was a violation of such a clearly established right under the First Amendment to the U.S. Constitution, it should have been an even more apparent violation of Article I, Section 1 of the Delaware Constitution. Thus, contrary to the Superior Court's holding that the Governor is immune pursuant to the State Tort Claims Act (Tab A at 28, 30), the clearly established rights set forth above along with the allegations of the Governor's preferential treatment of other religions and their practices, as well as the unrepresentative composition of the Governor's handpicked "Delaware Council of Faith-Based Partnerships," (Appellants' App. at A560-61 ¶¶ 103-106 (Pls.' Corrected Consolidated Compl.)) show that the challenged restrictions were not undertaken in good faith by the Governor, and rather indicate that there was "a state of mind affirmatively operating with…ill will" in

"the conscious doing of a wrong" (see Tab A at 31-32) to violate Plaintiffs' religious rights. Therefore, the Governor should not be granted immunity under the State Tort Claims Act either.

III. Clear violations of constitutional rights are not protected by qualified immunity.

The Superior Court was wrong to essentially require a perfect match in factual circumstances to past case law as the only source of clearly established law that would abrogate qualified immunity for the Governor violating Plaintiffs' First Amendment rights. Under binding U.S. Supreme Court precedent, when a constitutional violation is "obvious," 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). Qualified immunity thus cannot protect officials who, for example, hold prisoners in "deplorably unsanitary conditions for [] an extended period of time." *Taylor v. Rojas*, 141 S. Ct. 52, 53 (2020).

In some cases, such as Fourth Amendment probable cause or excessive force cases, a "high degree of specificity" might be necessary to provide the requisite notice. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). But in other cases—like this one—no such situational similarity is required to make it over the clearly established hurdle. Rather, a "general statement[] of the law" provides fair warning, as long as it applies with "obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741, 745-46.

The U.S. Supreme Court fairly recently affirmed that obvious violations of constitutional law can be judged at a less stringent standard for purposes of qualified immunity than the split-second decision-making of police officers in excessive force

cases. First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry in a prison conditions case. 141 S. Ct. at 53-54. The Court was untroubled by the absence of a prior case establishing that the specific conditions at issue in *Taylor* were unconstitutional. *Id*. Instead, the "obviousness of Taylor's right" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id*. at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741).

More recently, the Court granted, vacated, and remanded another qualified immunity case: *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who sprayed a prisoner with pepper spray for no reason. *Id.* Although the Court did not explain its reasoning, the Fifth Circuit had rejected McCoy's argument that the assault was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020). The dissent had centered on this issue, vigorously contending that the majority erred in not applying the "obviousness exception." *Id*. at 236 (Costa, J., dissenting).

McCoy and *Taylor* emphasize that lower courts can and must look carefully at whether "general statements of the law" apply with "obvious clarity" in a given case, even in the absence of a prior factually-similar case. Doing so here reveals that

the Governor certainly had fair notice that the challenged restrictions would unconstitutionally burden and discriminate against Plaintiffs by interfering with their religious practice.

Moreover—unlike Fourth Amendment excessive force cases involving police officers making an arrest—the Governor and his staff were not making split-second decisions and instead had adequate time to research, consider, and develop their policies. So, in First Amendment cases such as the one here, clearly established law can be derived from obviousness and general decisional rules far more easily than in, say, Fourth Amendment cases where the bar for showing probable cause is "not [] high" and arrests often require officers to make on-the-spot decisions in stressful and imminently dangerous situations. *See Wesby*, 138 S. Ct. at 586.

As explained in Section II above, U.S. Supreme Court precedent shows that discriminatory treatment of religious believers cannot be abided under the Constitution. *See, e.g., Tandon*, 141 S. Ct. at 1296-97. Additionally, no lack of "clarity" existed as to "[t]he clearest command of the Establishment Clause"—"that one religious denomination cannot be officially preferred over another," *Larson v. Valente,* 456 U.S. 228, 244 (1982), as was alleged in this case.

But the Superior Court's application of qualified immunity nonetheless demanded an unduly "extreme level of factual specificity" between this case and a previous one to find that the applicable constitutional law was "clearly established."

See *United States v. Lanier*, 520 U.S. 259, 267 (1997). This was error. As the U.S. Supreme Court has explained, "clearly established law" does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Wesby*, 138 S. Ct. at 590. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," and the outward attributes of a case do not have to be "fundamentally similar" or "materially similar" to those in previous precedents. *Hope*, 536 U.S. at 739, 741. Thus, qualified immunity does not apply when "courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

In sum, the First Amendment does not allow the government to favor one religious creed over another, nor to favor secular groups and gatherings over religious ones. Thus, the Governor had abundant notice that the COVID-19 related religious restrictions violated constitutional rights. Nor does the First Amendment allow the Governor to lace arbitrary restrictions on worship. The Superior Court's apparent determination that qualified immunity was appropriate for lack of a basically identical comparison in existing case law is reversible error in this context where the general principles are sufficient and a constitutional violation occurred.

IV. Because the doctrine of qualified immunity rests on shaky ground and helps perpetuate constitutional violations, qualified immunity should not be broadly applied, especially when it comes to religious freedom.

Qualified immunity has been the subject of withering criticism from a growing number of jurists, scholars, elected officials, and practitioners. *See, e.g., Baxter v. Bracey,* 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of *certiorari*) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes,* 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," telling them that "they can shoot first and think later"); William Baude, *Is Qualified Immunity Unlawful?,* 106 CAL. L. REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 NOTRE DAME L. REV. 1797 (2018); Emma Tucker, *States Tackling "Qualified Immunity" for Police as Congress Squabbles Over the Issue,* CNN (April 23, 2021), https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html. In addition to Justices Thomas and Sotomayor, judges across the country have strongly criticized qualified immunity. *See, e.g., Cole v. Carson,* 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting from the denial of rehearing *en banc*) ("The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated."). Further, a majority of the general public supports ending qualified

immunity as well. *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police,* CATO INSTITUTE (July 16, 2020), https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police.

And applying the same qualified immunity standard for police officers to every government official provides undue protection to actors who enjoy the benefit of forethought. As Justice Thomas indicated, "qualified immunity jurisprudence stands on shaky ground" and it should not be applied as a "one-size-fits-all test": "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (2021) (statement of Thomas, J., respecting the denial of *certiorari*).

As such, Justice Sotomayor has warned qualified immunity jurisprudence "sends an alarming signal…that palpably unreasonable conduct will go unpunished." *Kisela,* 138 S. Ct. at 1162 (Sotomayor, J., dissenting). The doctrine thus serves to "insulat[e] incaution," and "formalizes a rights-remedies gap through which untold constitutional violations slip unchecked." *Cole,* 935 F.3d at 470-71 (Willett, J., dissenting from the denial of rehearing *en banc*). In particular, the vicious cycle created by *Pearson v. Callahan,* 555 U.S. 223 (2009)—allowing courts

to decide cases by skipping to prong two on the clearly established element without first deciding whether there was a constitutional violation at prong one—means that government officials flagrantly violate the law in similar ways, over and over again, until and unless a court finally decides to intervene and address prong one. The growing frequency of this "Escherian Stairwell" where "Section 1983 meets Catch-22," *Zadeh v. Robinson,* 928 F.3d 457, 479-80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part), is proven by empirical research. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity,* 89 S. CAL. L. REV. 1, 6-7 (2015) (quantifying post-*Pearson* reduction in courts establishing constitutional violations at prong one).

Finally, qualified immunity has no basis in the statutory text or common law. Justice Thomas has said as much several times in recent years. *See, e.g., Baxter,* 140 S. Ct. at 1862, 1864 (Thomas, J., dissenting from the denial of *certiorari*) ("our § 1983 qualified immunity doctrine appears to stray from the statutory text," and "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act") (internal quotation marks omitted); *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("we have diverged from the historical inquiry mandate by the statute…[and] completely reformulated qualified immunity along principles not at all embodied in the common law" (internal quotation marks omitted)).

Scholars also agree. *See, e.g.,* Baude, *supra,* at 50-60 (explaining that neither the statutory text nor historical common law immunities provide support for qualified immunity); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic,* 85 N.Y.U. L. REV. 1862, 1863, 1928-29 (2010) (matters of indemnity and immunity were left to Congress, not the judiciary, in the founding era); Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1506-07 (1987) (the lone historical defense against constitutional torts was legality).

Section 1983 was enacted in 1871 in the Ku Klux Klan Act during Reconstruction. Congress passed the law to combat civil rights violations in the post-war south where government officials were violating constitutional rights with impunity. *See, e.g.,* Baude, *supra,* at 45, 49 (contextualizing the enactment of Section 1983 in the Reconstruction Era). The law was unambiguously intended to hold public officials to account. That intent has been undermined by the development of the qualified immunity doctrine. Critically, Section 1983 provides no statutory basis for any immunities, let alone qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("[Section 1983] on its face does not provide for any immunities"). Despite the lack of any explicit immunities in the statute, qualified immunity has been read into Section 1983 based on similar immunities that were purportedly established in the common law at the time Section 1983 was enacted. But the

doctrine's untethering from the statutory text to reinstate the historical practice which the Act was intended to prevent thus makes the "heads government wins, tails plaintiff loses" outcome much of the modern qualified immunity caselaw.

Qualified immunity is particularly difficult to reconcile with expansive religious rights. "[R]eligious freedom ... has classically been one of the highest values of our society." *Braunfeld v. Brown,* 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting). And qualified immunity is least necessary in religious liberty cases: While the need for 'split-second' decision-making in the use-of-force context might justify some kind of good-faith defense for police officers in the heat of an arrest, decisions about whether to restrict religious liberty—often made, as here, with the luxury of much more time, consideration, resources, and legal knowledge than what is available to police officers in the heat of an arrest—do not.

With qualified immunity having such a questionable and "shaky ground," it should not be broadly applied to protect the Governor for violating Plaintiffs' right to freedom of religious worship simply because no other controlling case on all fours has been published before.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Superior and Chancery Courts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATIONS

1. The [Proposed] Brief of The Rutherford Institute as Amicus Curiae in Support of Plaintiffs-Appellants, Pastor Alan Hines and Reverend David W. Landow, and Supporting Reversal complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Microsoft 365.

2. The [Proposed] Brief of The Rutherford Institute as Amicus Curiae in Support of Plaintiffs-Appellants, Pastor Alan Hines and Reverend David W. Landow, and Supporting Reversal complies with the type-volume limitation of Rule 28(d) because it contains 4,985 words, which were counted by Microsoft Word for Microsoft 365.

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