No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioner,
v.
CITY OF PHILADELPHIA, ET AL.,
Respondents,

.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation is interested in this case because it exemplifies a recurring problem in the clash between religious liberty and same-sex relations.

SUMMARY OF ARGUMENT

The lower courts' failure to protect the Petitioners' constitutional rights is due in part to the fact that this Court downgraded free exercise of religion in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990), and further jeopardized free exercise by ignoring lower courts' refusal to apply *Smith's* hybrid rights test. This Court should grant this petition for writ of certiorari

[1] Pursuant to Rule 37.2, counsel of record for all parties received timely notice of intent to file this brief. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

to restore religious liberty to its rightful place as the first and foremost of our freedoms.

ARGUMENT

I. The traditional Judeo-Christian view of marriage has occupied a favored position in American law.

The traditional view of marriage as between one man and one woman has been so ensconced in American law that American courts have, until recently, refused to even recognize alternatives. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court held that the Free Exercise Clause does not protect the right to engage in polygamous marriage. In *Davis v. Beason,* 133 U.S. 333 (1890), the Court affirmed its holding in *Reynolds,* saying polygamy is not protected by the Free Exercise Clause because it is a crime "by the laws of all civilized and Christian countries." *Id.* at 341. The right to engage in other forms of marriage is not recognized because the Judeo-Christian view of marriage between one man and one woman is firmly part of our legal system, and "Christianity is part of the common law[.]" Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law at Harvard University* 20 (1829); *cf.*, *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394, 400 (Pa. 1824); *People v. Ruggles,* 8 Johns. 290, 294-95 (N.Y. 1811) (opinion by Chancellor Kent); *Vidal v. Girard's Executors,* 43 U.S. 127*,* 2 How. 127, 198 (1844) (opinion by Justice Story).

II. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded "strict scrutiny."

Religious liberty is the first of all human rights because rights themselves are the gift of God, and because religious liberty involves matters eternal rather than merely matters temporal.

The foundational document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and says the rights of human beings are "unalienable" because they are "endowed by their Creator." Justice Douglas wrote in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952) that "We are a religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Freedom of religion and freedom of expression were not given to us by the government through the

First Amendment; they are, as the Declaration of Independence says, "endowed by [the] Creator." Government through the Constitution only "secures" the rights that God has already granted. And the recognition of these rights predates the Constitution by centuries if not millennia.

(A) The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentences of the statute stated:

> Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States....

Professors Donald S. Lutz and Charles S. Hyneman conducted a thorough search of the writings of leading American political figures from 1760-1805 and found that 34% of all quotations in the Framers' writings came from the Bible.[2]

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[2] Donald S. Lutz, "The Relative influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review* 189 (1984), 189-97; see also, Charles S. Hyneman and Donald S. Lutz, *American Political Writing during the Founding Era,* Vols. I & II (Liberty Press 1983); Eran Shalev, *American Zion: The Old*

Liberty of conscience is a central principle the Framers derived from the Scriptures. In 1751 the Pennsylvania Assembly commissioned a bell to commemorated the 50th anniversary of the Charter of Privileges of 1701 and inscribed on the bell Leviticus 25:10: "Proclaim liberty throughout [all] the land unto all the inhabitants thereof." As they well knew, the words immediately preceding this verse are "And ye shall hallow the fiftieth year," the year of jubilee. The bell rang again in July 1776 to celebrate the Declaration of Independence and is now known as the Liberty Bell.

The Hebrews observe the Passover to commemorate Moses leading the people out of bondage in Egypt into liberty in the Promised Land. Christians likewise cite these passages as well as New Testament passages such as "If the Son, therefore, shall make you free, ye shall be free indeed" (John 8:36), and "Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage" (Galatians 5:1).

The Bible values liberty of conscience so highly that duty to obey God is placed above duty to obey civil government, and sometimes disobedience to tyrants is obedience to God. Jesus told the Pharisees to "Render to Caesar the things that are Caesar's, and to God the things that are God's" (Mark 12:17). When the apostles were prohibited from preaching

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Testament as a Political Text from the Revolution to the Civil War (Yale University Press 2013).

the Gospel, they answered, "We must obey God rather than men" (Acts 5:29). In Exodus 1:17 we read that the Hebrew midwives "feared God, and did not as the king of Egypt commanded them [to kill the male Hebrew babies]." Daniel faced execution in a den of lions because he prayed to God in violation of King Darius's command (Daniel 6), and his companions Shadrach, Meshach, and Abednego faced execution in a fiery furnace rather than worship a graven image as commanded by King Nebuchadnezzar (Daniel 3). The early Christians, and Christians throughout the centuries into the present, have faced "dungeon, fire, and sword" rather than compromise their consciences.

(B) The Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave some recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it stood against the power of the State.[3] Martin Luther (1483-1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is

[3] See generally, Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999); James J. Walsh, *The Thirteenth, Greatest of Centuries* 2nd ed., Catholic Summer School Press 1909), 338-91.

> neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[4]

In his letter "Temporal Authority: To What Extent It Should Be Obeyed" he declared, "The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul."[5]

Calvinists (who constituted a strong majority of America's early settlers and the founding generation[6]) likewise believed in liberty of conscience. The Westminster Confession of Faith, drafted by the Westminster Assembly in 1643 at the call of the Long Parliament, declares in Chapter XX, Section 2:

> II. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience: and the requiring

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[4] Martin Luther, 1521, *Reply to the Diet of Worms,* quoted in Roland Bainton, *Here I Stand: A Life of Martin Luther* 184-85 (1950).

[5] Martin Luther, "Temporal Authority: To What Extent It Should Be Obeyed," reprinted in Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999) 591.

[6] Dr. Loraine Boettner, *The Reformed Doctrine of Predestination* (Presbyterian and Reformed 1972) 382.

> of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[7]

The following year (1644) John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholics, Anglicans, and Royalists, but he defended freedom of conscience, and he declared in a speech for Parliament:

> Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[8]

John Bunyan (1628-1688), the Puritan author of *Pilgrim's Progress,* convicted in 1660 of unauthorized preaching and failure to attend the Church of England, declared before the court:

> ...a man's religious views -- or lack of them -- are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to

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[7] Westminster Confession of Faith (1643), Chapter XX, Section II; reprinted in *Trinity Hymnal* (Great Commission Publications 1990, 1999) 860.

[8] John Milton, 1644; reprinted in *The Portable Library of Liberty;* files.libertyfund.org/pll/quotes/51.html

> hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[9]

Cambridge Puritan theologian William Perkins (1558-1602) declared that "God hath now in the New Testament given a liberty of conscience."[10]

Bishop Joseph Hall (1574-1656) insisted that "Princes and churches may make laws for the outward man, but they can no more bind the heart than they can make it."[11] Bishop George Downame (1560-1634) explained that "The conscience of a Christian is exempted from human power, and cannot be bound but where God doth bind it."[12]

John Locke (1632-1704), a major influence on the American founding generation,[13] wrote that "religion is the highest obligation that lies upon mankind,"[14] that "there is nothing in the world that is of any consideration in comparison with eternity,"[15] that

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[9] John Bunyan, October 3, 1660; Transcript of Trial before Judge Wingate; reprinted in *John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty

[10] William Perkins, *Works* (London, 1612-1618) I:529; quoted by L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea* (Presbyterian and Reformed Publishing) 4, 21.

[11] Bishop Joseph Hall, *Works* (London 1863) VI:649; quoted by Van Til 41.

[12] Bishop George Downame, *The Christian's Freedom* (London 1635) pp. 102, 104ff; quoted by Van Til 41.

[13] See Lutz and Hyneman, n. 2. Lutz and Hyneman concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone.

[14] John Locke, *A Letter Concerning Toleration* (1688-89), Patrick Romanell, ed. (1955) p. 46.

[15] Locke, p. 46.

"the care of each man's salvation belongs only to himself,"[16] and that no life lived "against the dictates of his conscience will ever bring him to the mansions of the blessed."[17] The son of a Puritan lawyer, Locke was very much influenced by the Puritan tradition.

America's colonization and settlement came largely out of the Reformation background.

(C) The Colonial Foundations of Religious Liberty

While much of the groundwork for liberty of conscience was laid by the Puritans of England, Van Til says "Liberty of conscience triumphed in America, while it failed in England."[18] And the colonial charters and constitutions at the time of the American War for Independence clearly recognize and protect liberty of conscience:

Pennsylvania:

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of

[16] Locke, p. 46.
[17] Locke, p. 34.
[18] Van Til 128.

> worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[19]

Maryland:

> XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in

[19] Pennsylvania Constitution of 1776, Declaration of Rights, Sec. II. avalon.law.yale.edu/18th_century/pa08.asp

> their natural, civil, or religious rights....[20]

New Jersey:

> XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience...[21]

North Carolina:

> XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[22]

Georgia:

> Art. LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State...[23]

South Carolina:

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[20] Maryland Constitution of 1776, Article XXXIII. avalon.law.yale.edu/17th_century/ma02.asp

[21] New Jersey Constitution of 1776, Art. XVIII. avalon.law.yale.edu/18th_century/nj15.asp

[22] North Carolina Constitution and Declaration of Rights of 1776, Article XIX. avalon.law.yale.edu/18th_century/nc07.asp

[23] Georgia Constitution of 1777, Article LVI. avalon.law.yale.edu/18th_century/ga02.asp

> XXXVII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.[24]

Massachusetts:

> It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[25]

New York:

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[24] South Carolina Constitution of 1778, Article XXXVIII. avalon.law.yale.ed/18th_century/sc02.asp. Article XXXVIII continues with provisions as to what constitutes orthodoxy.

[25] Massachusetts Constitution of 1780, Declaration of Rights, Article II. www.nhinet.org/ccs/docs/ma-1780.htm

> XXXVIII. ...[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[26]

Virginia:

> Declaration of Rights, Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[27]

In light of this Biblical, Reformation, and colonial background, it is understandable that James

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[26] New York Constitution of 1777, Article XXXIX. avalon.law.yale.edu/18th_century/ny01.asp

[27] Virginia Constitution of 1776 and Declaration of Rights, Sec. 16. https://law.gmu.edu/assets/files/academic/founders/VA-Constitution

Madison submitted the religious liberty article of the Bill of Rights with this original wording:

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

Because there was no verbatim transcript of the first session of Congress, it is unclear exactly how or why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise" because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Otherwise, religious liberty is meaningless. So long as there is no machine that can read the thoughts of the heart, there is liberty of conscience everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal

consequences; and as J. Howard Pew has noted, "From Christian freedom comes all other freedoms."[28]

Surely, this Philadelphia policy that requires all foster care placement agencies to agree to place children with same-sex or transgender couples in violation of their sincere and deeply-held religious beliefs, violates the "natural and unalienable" (Pennsylvania, North Carolina) right to engage in the "free exercise" (New York, Georgia, Virginia) of "religious persuasion or profession, or for his religious practice" (Maryland) of which "no person shall ever be deprived" (New Jersey). The supposed state interest in protecting the rights of same-sex couples can be no stronger than the rights of same-sex couples, and those are merely recent court-created "rights" that cannot take precedence over the God-given right to free exercise of religion which is explicitly recognized as the first freedom protected by the Bill of Rights.

III. *Employment Division v. Smith* does not do justice to the Framers' vision of religious liberty.

The Framers might well view with skepticism the preoccupation of today's courts with tiers and tests. But they would be utterly incredulous that the Court in *Employment Division v. Smith* would downgrade the Free Exercise Clause to a "lower tier" right that, unlike other rights, can be infringed with merely a rational basis.

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[28] J. Howard Pew, quoted by Van Til 3.

The Foundation questions whether even strict scrutiny is sufficient to protect this first and foremost of our liberties. But unless and until the Court reconsiders the whole issue of tiers and tests, at the very least Free Exercise should be given the strict scrutiny protection it rightfully deserves.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view, writing in *Meek v. Pittinger,* 421 U.S. 349 (1975), "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion...." *Id.* at 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle." Lawrence H. Tribe, *American Constitutional Law* 833 (1978).[29] Voluntarism is central to the case at hand, for Philadelphia's policy compels Catholic Social Services to act involuntarily in contravention of their most

[29] *Cf.* 2d ed. at 1160.

basic beliefs. This is a violation of the right to free exercise at its very core.

This Court appeared to accord strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court held:

> ...the [first] amendment raises two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

310 U.S. at 303-04. The Court seems to say even as early as *Cantwell* that infringements on free exercise are subject to some higher standard than lower-tier reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to cases in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from the strict scrutiny test but concurred because she believed there was a compelling interest in regulating controlled substances.

Smith received harsh criticism from the beginning. A massive coalition, ranging from liberal organizations like the American Civil Liberties Union to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993, 42 U.S. Code §2000bb-3, in the House by a voice vote and in the Senate 97-3, which was signed into law by President Clinton, and which was struck down 6-3 as applied to the states in *Boerne v Flores*, 521 U.S. 507 (1997), but unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Following *Flores,* in 2000 the American Civil Liberties Union worked with a coalition of

organizations to secure passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§2000cc et seq. RLUIPA prohibits the imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states including Pennsylvania have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to apply the compelling-interest/less-restrictive-means test, and ten additional states have incorporated the principles of the Act by state court decision.[30]

Scholars have likewise criticized *Smith*. Professor Michael McConnell cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case.[31] Jane Rutherford, writing

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[30] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[31] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also notes that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. See also Michael W. McConnell,

in the *William and Mary Bill of Rights Journal,* argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[32] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review,* demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[33]

Aden and Strang document the failure of lower federal courts to follow *Smith* by routinely ignoring the "hybrid rights" exception.[34] According to Aden and Strang,

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*--that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*--is the law. In fact, litigants

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The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990).

[32] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

[33] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1966).

[34] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).

> assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[35]

After discussing numerous cases in which hybrid rights claims have been denied, Aden and Strang suggest reasons the circuit courts have not followed *Smith*: (1) the hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent; (2) hybrid claims simply suffer a continuation of that reluctance to excuse conduct because of religious belief; (3) the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and (4) growing hostility to exemptions from state anti-discrimination laws with ever-increasing numbers of protected classes.[36]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims,"[37] "persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings,"[38] and "the increasing regulation of private life by state governments through anti-discrimination statutes."[39]

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[35] *Id.* at 587.

[36] *Id.* at 602.

[37] *Id.* at 602-03.

[38] *Id.* at 604.

[39] *Id*.

Furthermore, the *Smith* hybrid-rights doctrine makes no sense. If the right asserted with free exercise is a fundamental right, it can stand on its own independent of a free exercise claim.[40] As Justice Souter said in his concurring opinion in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520 (1993) concerning the hybrid-rights doctrine,

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.[41]

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[40] The meaning of the hybrid-rights doctrine may be that if free exercise is asserted along with a nonfundamental right, the combined weight of the two rights requires that they be given strict scrutiny.

[41] *Hialeah*, 508 U.S. at 566-67 (Souter, J., concurring in part and concurring in judgment).

In summary, *Employment Division v. Smith*:

* Was adopted *sua sponte* without request, argument, or briefing from the parties.

* Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.

* Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.

* Was sharply criticized by a wide spectrum of the legal and religious community of the nation.

* Was criticized by a wide spectrum of constitutional scholars.

* Was repudiated by an overwhelming vote of Congress in adopting the Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores*.

* Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes or state constitutional amendment or state court decisions.

* Has been ignored, strained, or limited by many circuit courts and other courts.

* Has proven unfair and unworkable in practice.

* Is manifestly contrary to the Framers' elevated view of religious liberty because it reduces this most-cherished right to mere lower-tier status.

* Involves a "hybrid-rights" doctrine that is nonsensical because other fundamental rights can stand on their own.

Because of all of these factors, it is clearly time for this Court to reconsider *Employment Division v. Smith.*

IV. This case clearly qualifies as an exception to *Smith* because, like *Hileah*, this policy is aimed at religion.

In *Smith,* this Court held that Oregon's prohibition of mind-altering drugs was not directly aimed at Smith or the Native American Church.

The Native American Church nationally has only a few thousand Oregon members. Peyote is a comparatively mild hallucinogen, and the Native American Church uses it only in carefully-controlled ceremonies. There was no evidence that the Church's use of peyote in its ceremonies led to crime, addiction, or other forms of abuse. Oregon's drug laws were not aimed at the Native American Church or its peyote ceremonies; they were aimed at drug abuse generally, and the Smith and the Native American Church were "caught in the net" with others.

But Hileah's ordinance prohibiting animal sacrifice was much different from the peyote use in *Smith*. Although the ordinance did not specifically name the Church of Lukumi Babalu Aye but simply prohibited "sacrifices of animals for any type of ritual," Lukumi's animal sacrifice was the subject of much public outrage and was clearly the motivating factor behind the ordinance. Because the effect of the ordinance was to burden the Church of Lukumi Babalu Aye, the Court imposed a strict scrutiny requirement.

This case is different from *Smith* and similar to *Hileah*. Philadelphia's requirement that foster care agencies must support same-sex marriage was not specifically aimed at churches. However, traditional or conservative churches, church agencies, and church members are the most numerous, most intense, most vocal, and most active opponents of same-sex marriage.[42] The practical effect of Philadelphia's policy is to exclude traditional or conservative church agencies from the City's foster care system. Thus, under the *Hileah* rationale, the policy must undergo strict scrutiny. There is no compelling interest in excluding church agencies from the foster care program, as same-sex couples have no difficulty finding other agencies to work with

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[42] "Views about Same-Sex Mariage," Pew Research Center, https://www.pewforum.org/religious-landscape-study/views-about-same-sex-marriage/; Steven Waldman, "A Common Missed Conception: Why Religious People Are Against Gay Marriage," *Slate* November 19, 2003 https://slate.com/human-interest/2003/11/why-religious-people-are-against-gay-marriage.html ("A new poll from the Pew Forum on Religion & Public Life Found, not surprisingly, that opposition to gay marriage and homosexuality is highest among the most religious.")

in foster care. The policy is not narrowly-tailored to provide exceptions for church agencies or others with religious objections, and the Commissioner's entanglement with religion by telling Catholic Social Services personnel that "attitudes have changed" and they should follow "the teachings of Pope Francis"[43] are very disturbing (Cert. Petition p. 10). The policy must therefore yield to a Free Exercise claim.

V. The Philadelphia policy also violates CSS's free speech and freedom of association rights.

Petitioners have raised a clear free exercise objection to the policy, far more strongly than those that were successfully raised in *Little Sisters of the Poor v. Burwell,* 136 S.Ct. 1557 (2016) and in *Burwell*

[43] The Commissioner's attempt to dictate to CSS what they should believe about same-sex marriage is not only disturbing religious coercion and entanglement with religion; she is also factually incorrect. Although Pope Francis may take a softer approach to LGBT persons by showing them Christ's love, he has not altered the Church's historic position on same-sex marriage. On November 17, 2014, Pope Francis said children "have the right to grow up in a family, with a father and a mother," and "We cannot qualify [the family] with concepts of an ideological nature that only have strength in a moment of history and then fall." In 2015 and 2016 he urged Slovakian and Slovenian voters to support bans on same-sex marriage and adoption. As recently as May 2019 the Pope said he does not approve homosexual acts, "far from it," and he opposes same-sex marriage because "it is an incongruity to speak of homosexual marriage." New Ways Ministry June 1, 2019, https://www.newwaysministry.org/2019/06/01/pope-francis-on-lgbt-people-if-we-were-convinced-that-they-are-children-of-god-things-would-change-a-lot/

v. Hobby Lobby, 573 U.S. ___ (2014). They have also raised a free speech objections to the policy When they place a child with a married couple, they are required to determine that that couple is a fit and proper home for the child and must thereby affirm what they believe is false. This is compelled speech, as this Court recognized in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), in *Wooley v. Maynard,* 430 U.S. 705 (1977), and most recently in *National Institute of Family and Life Advocates v. Becerra,* 585 U.S. ___ (2018).

The policy also violates CSS's freedom to associate or not associate by forcing CSS to enter into associations with same-sex couples for purposes which CSS disapproves; see *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

CONCLUSION

This case presents the Court with a special opportunity to correct an egregious Free Exercise, Free Speech, and Freedom of Association violation, and also to revisit *Smith* and clarify the true meaning of religious liberty. We urge this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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