NO. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
PETITIONERS
v.
CITY OF PHILADELPHIA, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF FIFTEEN PENNSYLVANIA STATE SENATORS, *AMICI CURIAE,* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, fifteen Pennsylvania State Senators, Senate President Pro Tempore Joseph Scarnati, Senate Majority Leader Jake Corman, David Argall, Dave Arnold, Ryan Aument, Michele Brooks, John DiSanto, John Gordner, Scott Hutchinson, Scott Martin, Doug Mastriano, Joe Pittman, Pat Stefano, Judy Ward, and Kim Ward, are tasked with enacting legislation for the Commonwealth of Pennsylvania. These elected members of the Pennsylvania Senate recognize that at times laws end up interfering with citizens' religious exercise rights. The Senators have an interest in ensuring that their legislative enactments do not infringe on Pennsylvania citizens' religious exercise in both foreseen and unforeseen ways. They also have an interest in restoring constitutional limits on the practice of subjecting religious exercise to political horse-trading, where legislators trade off some rights in order to garner enough votes to pass legislation or to prevent even greater religious liberty deprivations. Instead, *amici* Pennsylvania Senators have an interest in ensuring that the proper framework is used to determine whether a violation of the Free Exercise Clause has occurred.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amici curiae* or its counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties.

INTRODUCTION

On March 15, 2018, Philadelphia stopped placing foster children with families working with Catholic Social Services (CSS), which was just one among roughly 30 foster agencies in the City. The City terminated its contract with CSS and refused to work with the agency unless it abandoned its longstanding religious beliefs and instead endorsed and implemented the City's beliefs about the nature of marriage.

Foster care agencies seek to place children in as ideal a situation as possible given the circumstances. One of CSS's sincerely held religious beliefs is that marriage is between a man and a woman, a relationship that represents the diversity of the sexes. As such, CSS does not provide home studies or endorsements for unmarried heterosexual couples or same-sex couples. App. 259a. If asked, CSS would refer those couples to another agency. App. 265a. CSS's religious beliefs have never prevented a child from finding a home. The important societal and ecclesiastical task of helping children in need is furthered by CSS's work. Allowing agencies with a multiplicity of views invites more opportunities to provide homes for these children. By cutting off CSS, the City has made its foster care crisis even worse.

CSS's religious beliefs were targeted by every branch of city government. The City Council accused the agency of "discrimination" occurring "under the guise of" religion. App. 147a. The Mayor (after a history of disparaging comments against the Archbishop) involved the City's Human Relations

Commission. Commissioner Figueroa excoriated CSS's leadership, telling them it was "not 100 years ago" and accusing them of failing to follow "the teachings of Pope Francis." App. 305a-306a. The City admitted that it only investigated religious entities as to its policies regarding same-sex marriage. App. 278a-279a.

Despite this targeting of Catholic Social Services' religious beliefs about marriage, the Third Circuit held that under *Employment Division v. Smith*, 494 U.S. 872 (1990), Philadelphia's exclusion of CSS was subject only to rational basis review rather than strict scrutiny. *See Fulton v. City of Phila.*, 922 F.3d 140, 147 (3d Cir. 2019).

SUMMARY OF ARGUMENT

The City did not act in a neutral manner toward religion in selecting CSS for punitive treatment. However, even if the record was devoid of the extensive religious targeting that occurred, fundamental rights should not depend on whether a government body studiously avoided making any public statement manifesting ill-intent. Neither should *Smith* impede the protection of free exercise even where lawmakers had no intention or foreknowledge of the manner in which its rule may later impact religious exercise.

Robust religious liberty is indispensable to a free society. However, *Smith* and its progeny are flawed, making the job of legislators who desire to uphold the principles of religious liberties next to impossible. Courts should once again evaluate substantial

burdens on religious liberties under strict scrutiny so that such rights are not subject to the whims and dangers of politics or mere legislative majorities. Application of *Smith* has resulted in a system by which legislators are required to barter away religious liberties in order to get legislation passed. The bigger the ideological divide between the prevailing views and a disfavored religious view, the less religious liberties are protected in legislation. This results in key liberties changing based on what state a person happens to live in. Worse, even in states where there is consensus in protecting religious liberties, legislators cannot forecast all the ways a piece of legislation will impact religious liberties. Once an unforeseen application arises, courts applying *Smith* too often rule that freedom of religion must lose.

Our history has proven that we can respect religious liberty without compromising social order. "In [*Smith*], the Court drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring). This Court should return to the religious liberty standard utilized in *Wis. v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), which better balanced governmental interests and fundamental rights.

ARGUMENT

I. Our history demonstrates that religious liberty is a fundamental right of higher value than *Smith* supposes.

Many view their favored policy preferences as uniquely enlightened and any claim of conscientious objection as mere manipulation or, worse, weaponization of religion. Our founders had a different view. Madison understood religious objectors to be caught, by no fault of their own, between the claims of competing sovereigns — the state and, as he described it, the "Universal Sovereign." James Madison, Memorial and Remonstrance against Religious Assessments (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, 10 March 1784-28 March 1786, 295-306 (Robert A. Rutland and William M.E. Rachal eds., Univ. of Chicago Press 1973), ¶ 1. Rather than concluding these competing allegiances are contrary to good order, he described our duty toward our Creator as "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and, thus, "unalienable." *Id*. To take a contrary view is to understand civil society and religion more like the European societies the colonists fled than the America of our founders.

Early in our history, most colonial governments gave no quarter to dissenting religious conduct. As a result, religious minorities faced many difficulties, often involving conscientious objection to military service and the taking of oaths. *See* Michael W. McConnell, *The Origins and Historical*

Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1466 (May 1990). Conscientious objectors to military service, such as Quakers and Mennonites, were punished on account of their refusal to bear arms. *See id.* at 1468. The burden motivating that punishment by the majority was manifest, because if the Quakers and Mennonites refused to do their share, others needed to take their place. *See id.* Those refusing oaths were particularly harmed by that requirement, because they could not put on evidence in court. Thus, they could neither benefit from the judicial process or defend themselves if they were sued. *See id.* at 1467. Yet from the standpoint of the majority, the refusal to take oaths undermined a key component at that time in ensuring truthful testimony. *See id.*

Eventually the model of religious toleration and freedom, which was exemplified in Pennsylvania, *see id.* at 1430, affected thinking more broadly so that by the time the Continental Congress called on the colonists to take up arms, the Continental Congress recognized an important truth — it is better to benefit from our diversities than to needlessly create conflict.[2]

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[2] The lesson to be applied in the present context is to value the diversity that various adoption and foster care providers bring to Philadelphia's children. Catholic Social Services found placement for some of the most difficult cases through their Catholic network, appealing to that church's particular understanding of virtue and truth. And yet, because of the diversity of providers, same-sex couples had no difficulty in receiving placements. Ironically, respect for diversity only goes so far in the City, so that those with traditional religious views

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo, reprint 1968). In contrast to the European view that required uniformity — even as to core religious practices — America embraced a liberal form of toleration that recognized the rights of persons with disfavored religious beliefs.

It is out of this history — one that respects the consciences of religious minorities and majorities alike — that the Free Exercise Clause was born. It is a protection — not designed by either modern liberals or modern conservatives — but recognized as unalienable because of the core principle of conscience

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regarding marriage are singled out for punishment. This is contrary to what is best in our American tradition, the ability to find ways in a pluralistic society to benefit from and work with each other in the ways that we can. Indeed, Catholic Social Services has been "contributing liberally" to the "distressed" and "oppressed" children in need of foster care for over a century and about 50 years before the City started to become involved in foster care. App. 252a-254a.

that it protects for everyone. It may be that conservatives are more likely to recognize the value when liberals have the upper hand, and vice versa. But the universality of the principle is like that of speech. One may not agree with another's speech, but the protection of speech creates a free society for everyone — regardless of whether particular speech is popular, offensive, or even carries a cost. The same is true for religious freedom, or as Madison often described it, freedom of conscience. If government can manipulate persons to violate their most fundamental convictions — or punish them if they do not — there is no stopping tyranny. Without this firewall against oppression, none of our other freedoms are safe. Indeed, our freedoms travel together — a government that is willing to trample the one will quickly trample another.

This lesson in freedom appears to be one that each generation must learn afresh. Just four years after this Court in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940), allowed Jehovah's Witnesses to be punished for refusing to salute the flag in school, the case was effectively overruled in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).[3] *Barnette* described the danger of

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[3] Recognizing that *Barnette* effectively overruled *Minersville*, it is odd that the *Smith* majority quoted *Minersville* to say:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the

uniformity: "[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id*. at 641.

We should not assume that if the Court continues to limit religious freedom, we can ensure that everyone will cooperate in reaching what the majority believes to be society's noble goals. Instead, many will refuse to surrender their principles no matter what. Neither can we nor should we force compliance. "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id*. Otherwise, we only engage in meaningless punishments that hurt the society as a whole and not just the religious objector. Consider Catholic Social Services in the present controversy. Everyone is worse off because one of the best providers for these children is being forced out of providing service since it was denied a license due to remaining true to its mission. Freedom is the better approach. "[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *Id*. at 641-42.

> citizen from the discharge of political responsibilities.

494 U.S. at 879.

Far from religious liberty being a tool for the manipulative, it is a principle benefiting society as a whole, regardless of whether the religious practice in question may be described as conservative, liberal, or neither. Indeed, when political winds change, practices that are well accepted now may later be in jeopardy. It is no wonder, then, that this principle appears as the first in the list of fundamental rights enumerated in the Bill of Rights.

II. Because religious liberty is a fundamental right, it should not be subject to inconsistent protection.

Both sides of the political spectrum were committed to restoring religious liberty after the *Smith* decision, even uniting then Congressman Chuck Schumer (D-N.Y.) and Senator Ted Kennedy (D-Mass.) with Senator Orrin Hatch (R-Utah) to sponsor the Religious Freedom Restoration Act (RFRA). They recognized

> that some general laws can burden the exercise of religion every bit as much as laws that are directed specifically at religious activity. . . . In other words, a church denied the right to use wine in a communion service is just as adversely affected if the restriction is brought about by a general prohibition on alcohol consumption as by a specific law banning alcohol in religious services.

Cong. Rec. 26178 (1993) (Statement of Sen. Kennedy). Senator Bill Bradley (D-N.J.) observed, "It is a

testament to the importance of RFRA that virtually every religious group, spanning the entire spectrum, has voiced its support for this bill. It is a rare thing when such a diverse coalition joins in wholehearted agreement." *Id*. at 26415.

The bill passed unanimously in the House and nearly unanimously in the Senate and was signed by Bill Clinton in 1993. RFRA was intended to restore the pre-*Smith* protections of strict scrutiny, for neutral laws of general applicability, on a nationwide basis with respect to federal, state, and local infringements on religious liberties. This was necessary since most states interpreted the religious liberty protections in their constitutions to be coequal with the federal Free Exercise Clause; but after *Smith,* these provisions no longer applied to neutral laws of general applicability. *See Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 103, 186 (prior to Alabama amending its constitution, only ten states — Alaska, Indiana, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Washington, and Wisconsin — declined to follow *Smith*). However, this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), found the federal statutory religious protections were beyond the power of Congress as applied to state and local governments. As a result, some states passed religious freedom laws to augment state constitutional religious protections, other states did not. In the end, a right that should be recognized as inalienable has been subject to a patchwork from state to state based on state constitutions, state law, and inconsistent interpretations.

A. Differing religious freedom legislation and state constitutional provisions have led to inconsistent protections among the various states and the federal government.

Amici legislators recognize that religious liberty deserves protection universally as a fundamental right, and it should not depend on the political will of any state to protect it. Nevertheless, *Smith* has resulted in a patchwork of protections. In much the same way that only ten states recognize broad pre-*Smith* religious protections as part of their states' constitutions, the 22 states that enacted religious liberty protections between 1993 and 2015[4] vary in the amount of protection offered. As a result, religious liberties are increasingly dependent on what state a person lives in.

While all of the 22 statutes protect against individuals being deprived of their religious liberties,

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[4] These are Alabama, *see* Ala. Const. Art. I, § 3.01, Arizona, *see* Ariz. Rev. Stat. §§ 41-1493 to -1493.02, Arkansas, *see* A.C.A. § 16-123-404, Connecticut, *see* Conn. Gen. Stat. § 52-571b, Florida, *see* Fla. Stat. §§ 761.01-.05, Idaho, *see* Idaho Code §§ 73-401 to -404, Illinois, *see* 775 Ill. Comp. Stat. 35/1-30, Indiana, *see* Ind. Code Ann. § 34-13-9-1, *et seq.*, Kansas, *see* Kan. Stat. § 60-5301, *et seq*., Kentucky, *see* Ky. Rev. Stat. § 446.350, Louisiana, *see* La. Rev. Stat. § 13:5231, *et seq.*, Mississippi, *see* Miss. Code § 11-61-1, Missouri, *see* Mo. Rev. Stat. §§ 1.302-.307, New Mexico, *see* N.M. Stat. §§ 28-22-1 to 28-22-5, Oklahoma, *see* 51 Okl. St. §§ 251-258, Pennsylvania, *see* 71 P.S. §§ 2401-2407, Rhode Island, *see* R.I. Gen. Laws § 42-80.1-1 to -4, South Carolina, *see* S.C. Code §§ 1-32-10 to -60, Tennessee, *see* Tenn. Code § 4-1-407, Texas, *see* Tex. Civ. Prac. & Rem. Code §§ 110.001-.012, Utah, *see* Utah Code §§ 63L-5-101 to -403, and Virginia, *see* Va. Code § 57-2.02.

only seven explicitly protect non-profit organizations,[5] and of those, only four explicitly protect for-profit corporations as well.[6] Pennsylvania, one of the seven states that expressly protects non-profits, for instance, does not permit a claim under the Pennsylvania Religious Freedom Protection Act by a for-profit corporation. But it is no more acceptable for the government to infringe on the religious exercise of a business owner in the way that she runs her business (such as a religious newspaper or periodical) than to infringe on that same business owner's free speech rights. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (analogizing the purpose of recognizing corporations' religious rights to the purpose of recognizing corporations' Fourth Amendment rights). "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of" those people "who are associated with a corporation" because "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Id.* at 706-07. Because of the statutory limitation of religious freedom laws like Pennsylvania's, many are deprived of an unalienable right that should have been recognized as afforded to them through the text of the First Amendment itself.

The contrast in protections under RFRA and state laws helps to illustrate the inconsistency of our religious liberty protection. In *United States v.*

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[5] These are Arizona, Indiana, Kansas, Louisiana, Pennsylvania, South Carolina, and Utah.

[6] These are Indiana, Kansas, South Carolina, and Utah.

Hoffman, No. CR-19-00693-001-TUC-RM, 2020 U.S. Dist. LEXIS 19060, at *5 (D. Ariz. Jan. 31, 2020), four people were charged with entering the Cabeza Prieta National Wildlife Refuge (CPNWR) in Southern Arizona without a permit, abandoning property, and driving in a wilderness area. They were part of a faith-based organization, called "No More Deaths/No Más Muertes." Because of their Universalist Unitarian religious beliefs, they had left food and water along foot trails at locations where bodies of people who crossed the border illegally had been recovered in hopes it would help prevent future deaths. *Id*. at 4.[7] The prohibitions were neutral laws of general applicability. Under *Smith*, the defendants would lose. But the District Judge reversed the conviction based on Federal RFRA, relying heavily on *Hobby Lobby*.[8]

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[7] Increased immigration enforcement in other places had caused more people who entered the United States illegally to go through the CPNWR, which the refuge calls in documents that visitors are required to sign to enter the area, "one of the most extreme environments in North America," and warns visitors that the area "contains no sources of safe drinking water." *Id*. There were 32 bodies recovered in 2017 alone despite the government's installation of rescue beacons placed throughout the refuge to save lives. *Id*.

[8] Interestingly, the Unitarian Universalist Association opposed Hobby Lobby's particular religious beliefs so much that they participated in a protest outside a Hobby Lobby store in Illinois by handing out condoms to customers. *See* Jack Jenkins, *Clergy Protest Supreme Court By Handing Out Condoms At Hobby Lobby*, ThinkProgress, July 3, 2014, available at https://archive.thinkprogress.org/clergy-protest-supreme-court-by-handing-out-condoms-at-hobby-lobby-5e1617f060e5/. This demonstrates the beauty of a strong Free Exercise Clause in that however we might disagree with a particular religious exercise,

However, if the Federal land had been state land, and the state had identical prohibitions but a weaker religious freedom protection or no state RFRA at all, the defendants' religious exercise would have been prohibited and the convictions would have stood. Furthermore, if the group had been acting as part of a for-profit entity, their collective religious exercise could still have been protected under federal law, but under state laws like Pennsylvania's, their religious exercise would have been prohibited. *Smith* has resulted in inconsistent protections of the promise that the text of the Free Exercise Clause requires.

As a result of the patchwork of protections, there is no uniformity of result. If this Court, once again, were guardian of religious liberty — even as to laws of general applicability — then consistency could be brought to bear on results. Catholic adoption and foster care agencies have been shut down in Boston, San Francisco, Buffalo, the District of Columbia, and Illinois, *see Fulton v. City of Phila.*, 320 F. Supp. 3d 661, 676 (E.D. Pa. 2018), because those agencies were unwilling to abandon their Catholic convictions about the nature of marriage. However, similar Catholic agencies are in operation elsewhere without issue. If these Catholic agencies were able to appeal to a single constitutional standard, the results would not be based on the interpretations, state by state, of differing religious liberty protections. Instead, Catholic charities could vindicate their religious liberties in a way that would apply nationally. *Amici* state Senators ask this Court not only to restore the

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strong religious liberty protections (which unfortunately has needed RFRA's lifeline since *Smith*) benefits all people.

broad pre-*Smith* religious liberty rights, but find that the City does not have a compelling governmental interest in prohibiting religious exercises that conflict with the City's beliefs and practices relating to the nature of marriage.[9]

B. Even legislation drafted to restore pre-*Smith* protections has been interpreted with significant limitations, undermining legislative intent of restoring a pre-*Smith* standard.

Even in states with legislative religious liberty protections, courts have watered them down and applied them as sparingly as possible, often defaulting to *Smith*. By way of example, the text of Connecticut's religious freedom law provides broad pre-*Smith* religious liberty protections. It applies strict scrutiny even if "the burden results from a rule of general applicability." Conn. Gen. Stat. § 52-571b. Nevertheless, case law interpreting this provision states the opposite, that a claim under § 52-571b fails, *see First Church of Christ v. Historic Dist. Comm'n*, 737 A.2d 989-90 (Conn. App. Ct. 1999) (relying on the opinion of the court below), because "a claim of exemption from the laws based on religious freedom can[not] be extended to avoid otherwise reasonable and neutral legal obligations imposed by

[9] While we must endeavor as a society to create a more civil and respectful environment, punishing actions based on religious beliefs about the nature of marriage hardly brings people closer together. Unlike class-based bigotry, the view that marriage "is by its nature a gender-differentiated union of man and woman" has "long . . . been held — and continues to be held — in good faith by reasonable and sincere people." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

government," *First Church of Christ v. Historic Dist. Comm'n*, 738 A.2d 224, 231 (Conn. Super. Ct. 1998). While the Connecticut Supreme Court did, in another case, recognize in the abstract that the law was intended to apply to neutral laws of general applicability and restore the pre-*Smith* strict scrutiny standard, it concluded that limitations placed on the construction of a house of worship placed no burden on religious exercise. *See Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n*, 941 A.2d 868, 895-96 (Conn. 2008). Connecticut's experience illustrates the point, which is unfortunately not limited to Connecticut,[10] that even in the presence of a clear state statute, inconsistent results abound, and religious liberty is stifled.

Pennsylvania's Religious Freedom Protection Act is another example. The statute gives broad protections, stating that the government "shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," and subjecting such burdens to strict scrutiny, § 2404, even though the protections are limited only to individuals, religious entities, and other non-profits, *see* § 2403. However, various courts limit the statute by delving into a person's religious beliefs under the definition of

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[10] *See, e.g.*, Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 485 (observing that "[c]ourts often interpret state RFRAs in an incredibly watered down manner that does not resemble *Gonzales*-style review or even *Sherbert*/*Yoder*-style review. This is one of the surest ways of taking the teeth out of state RFRAs.").

"substantial burden" — something which is not done under federal RFRA. *See Fulton*, 922 F.3d at 163 n.12.

The statute defines "substantially burden" as an "action that does any of the following:"

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
>
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
>
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

§ 2403. According to case law, courts "scrutinize claims of religious burden to see whether the burdened activity is truly 'fundamental to the person's religion.'" *Fulton*, 922 F.3d at 163 (quoting *Commonwealth v. Parente*, 956 A.2d 1065, 1074 (Pa. Commw. Ct. 2008)). This, however, ignores the plain language of the statute, which gives four specific ways to show a substantial burden, only one of which involves activities "which are fundamental to the person's religion." § 2403. Moreover, the Third Circuit itself recognizes that such a reading of the statute would inappropriately require courts to answer

religious questions. *See Fulton*, 922 F.3d at 163. *See also Hernandez v. Commissioner*, 490 U.S. 680, 109 S. Ct. 2136 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

Amici, Pennsylvania Senators, ask this Court to return to its pre-*Smith* jurisprudence so that the fundamental right of religious liberty is not held hostage to the all-too-common judicial misinterpretations of the patchwork of state statutes that legislators cobbled together to preserve — what they could — of this right.

III. When broad protections prove elusive, legislators are subjected to horse-trading religious liberty protections as part of the legislative process.

The purpose of the Free Exercise Clause was to enumerate a fundamental right and prevent the horse-trading of religious liberty by legislative factions. The *Smith* majority openly worried that according judicial protections in the context of neutral laws of general applicability would be "courting anarchy," but evidence for such a worry or *Smith*'s limiting construction can be found in neither the text of the clause or in the logic of religious liberty. "If there is nothing wrong with statutory commands of the sovereign that make exceptions from generally applicable laws in cases of conflict with religious conscience, then there should be nothing wrong with constitutional commands of the same sort." Michael

W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1150 (1990).

As to the text of the Free Exercise Clause, professor Michael W. McConnell points out that "the more natural reading of the term is that it prevents the government from making a religious practice illegal," as opposed to a reading that only prohibits laws that discriminate specifically against the exercise of religion. *Id.* at 1115. Comparing the text to other sections of the Bill of Rights makes the natural reading of the First Amendment even more compelling:

> It is significant that the provision is expressed in absolute terms. Unlike the Fourth Amendment, the First Amendment does not limit itself to prohibitions that are "unreasonable." Unlike the Fifth Amendment, the First Amendment does not authorize deprivations of liberty with due process of law. Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary. It is odd, given this text, [for *Smith*] to allow the limitations to swallow up so strongly worded a rule.

Id. at 1116.

Smith has resulted in legislators bartering away religious liberties in order to get legislation passed or jeopardizing some religious liberties in order to prevent worse violations. The bigger the ideological divide in a given state between a majority advancing certain legislative goals and those seeking to protect those religiously disadvantaged, the more religious liberties are vilified and trampled. Without the Constitution serving as the basis for upholding religious liberty, any hope of its protection is in vain when a legislative majority busily promotes whatever the zeitgeist of that age may be with dogmatic and unyielding fervor, whether it be wartime patriotism in the 1940s, support for the Vietnam war in the 1960s and 70s, or certain beliefs about human sexuality today. It is precisely those times that religious exercise is most in need of constitutional protections, yet it is also those times where lawmakers are most likely to create broadly-sweeping, exceptionless "laws of general applicability." The promise of the First Amendment is that the lawmakers who desire to protect religious exercise but who are outnumbered should not be the last line of defense for the consciences of the religiously disadvantaged constituents they represent.

Furthermore, even when the legislative hurdle is cleared and religious exercise is protected by exemptions in a law, those protections are increasingly being challenged in court, thus further incentivizing legislators to simply avoid providing any protections for religious exercise. *See*, *e.g*., *Little*

Sisters of the Poor v. Pennsylvania,140 S. Ct. 918 (2020) (granting writ of certiorari); Complaint, *Rogers v. United States Dep't of Health and Human Servs.*, No. 19-01567 (D.S.C. May 30, 2019) (lawsuit attempting to strip away religious protections given to religious foster care agency in South Carolina), ECF No. 1.; Complaint, *Marouf v. Azar*, No. 18-cv-00378 (D.D.C. Feb. 20, 2018) (lawsuit attempting to strip away religious protections given to religious foster care agency involved in the federal government's Unaccompanied Refugee Minors (URM) Program), ECF No.1.

Pre-*Smith*, the free exercise rights of religious groups, whether popular or unpopular, could receive equal solicitude. However, in a post-*Smith* world where religious liberty claims turn on demonstrating religious targeting, even many religiously biased governmental actions evade review. Legislation that impacts popular religious exercise will either not be passed or be written with exceptions. By contrast, legislation that impacts disfavored religious practices will be passed without exception. So, while legislators pick and choose between favored and unfavored religious exercise, because burdens on disfavored religious practices are packaged as neutral and generally applicable, they evade review. *See* McConnell, 57 U. CHI. L. REV. at 1132. "In the end, the only hope for achieving denominational neutrality is a vigorous Free Exercise Clause." *Id.*

Simply put, *Smith's* desire to avoid situations where judges must weigh the importance of a law against a person's religious beliefs, *see Smith*, 494 U.S. at 890, has not panned out. Instead, it has

complicated the matter for legislators, citizens, and courts alike,[11] all while subjecting religious exercise to a lower standard of protection than other First Amendment rights.

IV. Because of *Smith*, the unforeseen need for religious protections has resulted in the loss of religious liberties.

Even in states where there is consensus for protecting religious liberties when a given piece of legislation is passed, in the absence of broad, well understood constitutional protections, that same piece of legislation may later undermine religiously motivated conduct that is unforeseeable at the time of passage. The best way to ensure religious liberty is by recognizing the broad protections in place prior to *Smith*.

By way of example, in 1969 the Commonwealth of Pennsylvania enacted protections against discrimination on the basis of sex. *See* 1969 Pa. Laws

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[11] By way of example, the question of whether a law is neutral and generally applicable has been a source of confusion for courts, especially where some religious and some analogous secular conduct is prohibited, but not other analogous secular conduct. *See* Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5-6, 15 (2016). This confusion has allowed circuits to avoid applying strict scrutiny. The petitioners' in *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016), pointed out that: "in the quarter century since *Employment Division v. Smith*, with only one exception that was later reversed, the nation's largest circuit has never held a law subject to strict scrutiny under the Free Exercise Clause." Petitioners' Reply Brief for Cert. Pet. at 13, *Stormans*, 136 S. Ct. 2433 (No. 15-862).

56. However, in 2018 the Pennsylvania Human Relations Commission, which investigates and prosecutes discrimination in Pennsylvania, deemed sex to include sexual orientation and gender identity. *See* Pennsylvania Human Relations Commission, *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*.[12] Thus, the legislators who added sex in 1969, never contemplated it would be applied by an agency to include sexual orientation or gender identity — or the religious liberty considerations that would arise from such application. But now it is clear that conflicts can result, as was the case in Philadelphia, with adoption and foster care providers being prevented from providing their services consistent with their religious mission.

Similarly, legislators in Wisconsin never considered the plight of the Amish, at stake in *Yoder*, when they passed Wisconsin's compulsory attendance law. Compulsory education began in that state in 1889, nearly 80 years prior to the Amish arriving there. *See State v. Yoder*, 182 N.W.2d 539, 543 (Wis. 1971).[13] Because, as was the case in Wisconsin, it is

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[12] Available at https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf.

[13] "[T]he first influx of Amish people into Wisconsin came in the 1960s. E.A. Torriero, *Amish find refuge in Wisconsin*, Chicago Tribune, March 26, 2004, https://www.chicagotribune.com/news/ct-xpm-2004-03-26-0403260245-story.html; *see also* Amish America, *Wisconsin Amish*, https://amishamerica.com/wisconsin-amish/ ("[r]elatively few Amish settled in Wisconsin before the 1960s, when the state began to see an influx of Amish.")

impossible to foresee specific harms to religious liberty — we need more than legislatively crafted exceptions to generally applicable laws. Instead, the Free Exercise Clause requires that we abandon *Smith* so that we can protect against unplanned infringements on religious liberty.

Unforeseeable religious liberty harms not only arise out of legislation, but out of regulatory action. Agency interpretations create additional headaches for legislators who desire to protect religious exercise since they cannot anticipate how a current agency, let alone a future agency may interpret a law. For instance, the lawmakers who voted for the Affordable Care Act voted to mandate preventative care, but they did not know that mandate would result in mandatory coverage for certain forms of contraception that burden the consciences of many religious employers. Instead, that mandate was the result of agency action. *See* 42 U.S. Code § 300gg–13(a)(4) (delegating the determination of what constitutes preventive care).

It is no understatement to say that *Smith* causes significant harm to the Free Exercise Clause, to religious liberty for citizens, and immense difficulty for legislators because rational basis review is unsuited to address the unforeseen need for religious protections.

V. Our pre-*Smith* history demonstrates that broad religious liberty can be achieved without sacrificing our social order.

Contrary to *Smith*'s assumption that broad religious liberty protections court anarchy, Madison, as discussed in Section I, *supra*, did not consider religious believers to be advancing individual privilege resulting in them becoming a law unto themselves. Instead of being anarchists of a sort subject to no law, he understood that they were limited by their duties towards two sovereigns, the civil magistrate and the Creator.[14] Free governments should avoid creating a conflict of conscience for those who, for no fault of their own, wish to follow both sovereigns.

Robust religious liberty protections are consistent with ordered liberty. Our nation would not "court[] anarchy" without "determination to coerce or suppress" "society's diversity of religious beliefs." *Smith*, 494 U.S. at 888. To the contrary, this Court has long recognized that the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Barnette*, 319 U.S. at 642. Yet

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[14] "More accurately, this idea is not anarchic but dyarchic. The individual is not free from law; he is subject to two potentially conflicting sources of law, spiritual and temporal. This is an important distinction, because the established tenets of a religious tradition have their own dynamic safeguards of order and good sense, superior to individual will." McConnell, 57 U. CHI. L. REV. at 1151 n.182 (citing F. A. Hayek, in W. W. Bartley III, ed., *The Fatal Conceit* 66, 88 (Chicago, 1988)).

order can be preserved all the while protecting religious liberty with the same vigor applied to speech and assembly. Religious liberty does not result in, as *Smith* purports, "a system in which each conscience is a law unto itself." *Smith*, 494 U.S. at 890. Our nation has proven that broad protections do not unravel the social order, because prior to *Smith* the Court was able to balance competing interests. *See, e.g., id*. at 896 (O'Connor, J., concurring) (listing cases where religious liberty claims were denied because of the government interest involved, thus demonstrating that the social order is not jeopardized). *Smith*, by contrast, was a "dramatic[] depart[ure] from well-settled First Amendment jurisprudence" and "incompatible with our Nation's fundamental commitment to individual religious liberty." *Id*. at 891 (O'Connor, J., concurring).

> If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides."

Id. at 894 (O'Connor, J., concurring) (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141-142 (1987)).

Prior to *Smith*, it was recognized that while "religiously grounded conduct must often be subject to the broad police power of the State [it] is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and, thus, beyond the power of the State to control, even under regulations of general applicability." *Yoder*, 406 U.S. at 220. Jettisoning this principle rejects "the essence of a free exercise claim" and instead requires "abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." *See Smith*, 494 U.S. at 897 (O'Connor, J., concurring). In a free society, the civil community should never be reserved for those with majoritarian views. Instead, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

A return to pre-*Smith* jurisprudence would be consistent with the high aim of our Bill of Rights. Robust protection of our fundamental rights is not a mere "luxury" as *Smith* suggests, 494 U.S. at 888, but can be carried out while still maintaining the social order. As applied to the present matter, Catholic Social Services' sincerely held religious belief is that marriage is between a man and a woman and represents the diversity of the sexes. The City, however, prohibits them from placing any children in foster care or adoption unless they communicate and demonstrate support for the City's contrary view. While the City has an interest in placing children for foster care and adoption, that interest is not harmed

by Catholic Social Services. Instead, allowing agencies with a multiplicity of views to operate invites more opportunities to provide homes for these children.

CONCLUSION

Amici Pennsylvania State Senators ask this Court to overrule *Smith* and apply strict scrutiny to neutral laws of general applicability that substantially burden religious liberty. Religious liberty is too important to be subjected to rational basis since no free government should lightly subject its citizens to a crisis of conscience. It was the critical nature of this right that led to both the federal and state RFRAs. The result, however, has been that religious liberty is subject to a patchwork of protections. This right deserves consistent protection from our highest court, one that prevents our rights from being traded away and that protects unforeseen threats to this liberty. Protecting religious liberty in this way does not jeopardize the social order, but our history has demonstrated that both can be maintained simultaneously.

Petitioners should prevail under that standard because the City does not have a compelling governmental interest in enforcing a uniformity of belief and action regarding the nature of marriage or what is the ideal family structure to best serve children. Instead, the diversity of beliefs among adoption and foster care providers ensures that the maximum number of families are present to serve the children of the City. Indeed, even the City's interest in eradicating invidious discrimination is not

supported by the City's actions since Catholic Social Services' belief about the nature of marriage is not invidious but rather is one that "continues to be held — in good faith by reasonable and sincere people." *Obergefell*, 135 S. Ct. at 2594.

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