No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF GREAT LAKES JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM WAGNER
Counsel of Record
ERIN ELIZABETH MERSINO
JOHN S. KANE
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy
Lansing, MI 48917
(517) 322-3207
AttyContact@GreatLakesJC.org

Counsel for Amicus Curiae

June 3, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The City of Philadelphia chose to exclude a religious agency from the City's foster care system unless the agency agreed to act and speak in a manner inconsistent with its sincere religious beliefs about marriage. The Third Circuit upheld that action under *Employment Division v. Smith*.

The questions presented are:

1. Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?

2. Whether *Employment Division v. Smith* should be revisited?

3. Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

Amicus Curiae addresses issues number two and three.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Great Lakes Justice Center, submits this brief.[1] *Amicus Curiae* is a non-profit 501(c)(3) organization that promotes principles of good governance and the Rule of Law. Most pertinent to the instant matter, *Amicus Curiae* encourages this Court to revisit *Smith* and restore the objectivist constitutional standard present in the plain meaning of the words of the Free Exercise Clause. *Amicus Curiae* believes that doing so is necessary to restore the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment. *Amicus Curiae* cares deeply about the social and legal impact of politically-unaccountable judicial decisions that improperly change the plain meaning of constitutional provisions.

---

[1] Respondents City of Philadelphia, Department of Human Services for the City of Philadelphia, and Philadelphia Commission on Human Relations granted blanket consent for the filing of *Amicus Curiae* in this matter. *Amicus Curiae* sought consent from both the Petitioners Sharonell Fulton, Toni Lynn Simms-Busch, and Catholic Social Services; and Intervenors Support Center for Child Advocates, and Philadelphia Family Pride, and received consent from the Petitioners' and Intervenor's counsel of record. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the Great Lakes Justice Center, made a monetary contribution to the preparation or submission of this *Amicus Curiae* brief.

Our lawyers' experience includes representing national religious organizations as parties and as *Amici Curiae* before this Court, as well as in the highest levels of government in other nations. We previously represented state and federal legislators as *Amici Curiae* encouraging this Court to: 1) look to the plain meaning of the words in the Establishment Clause; and 2) revisit *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In the instant case *Amicus Curiae* encourages this Court to 1) look to the plain meaning of the words in the Free Exercise Clause; and 2) revisit *Employment Div. v. Smith,* 494 U.S. 872 (1990).

Amicus Curiae works with legislative, executive, and judicial bodies, as well as with citizen groups, to further good governance practices and the Rule of Law. With experience in all three branches of government, *Amicus Curiae* understands the proper scope of the Article III judicial power and the proper role of the federal judiciary in our constitutional republic. From its experience, it holds special knowledge helpful to this Court about the importance of properly applying Constitutional provisions, like the Free Exercise Clause, that limit the exercise of governmental power.

Amicus Curiae files this brief to encourage this Honorable Court to guide the American judiciary, and other branches of government, to return to a sound constitutional basis for religious liberty in our nation.

SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution prohibits governmental infringement on the free exercise of religion. U.S. Const. amend. I. The writers of the First Amendment did not say "make no law prohibiting the free exercise of religion, unless you can find an unelected city official or federal judge to say the law is neutral and generally applicable."

In *Employment Division v. Smith,* this Court drifted away from its constitutional jurisprudence that recognized freedom of religion as a fundamental liberty interest. 494 U.S. 872 (1990). Even though the government's action in *Smith* substantially infringed on the free exercise of religious liberty, *Smith* required no justification by the government for its conduct. To reach this radical result, *Smith* deemed neutral laws of general applicability excepted from the constitutional protection contra-expressed in the plain language of the Free Exercise Clause. *Smith* did so despite a dearth of any supporting jurisprudence deeply rooted in our Nation's history and traditions, or implicit in the concept of ordered liberty.

Unless a State affirmatively acts to restore fundamental right status to the free exercise of religion, *Smith*, as a practical matter, denudes any meaningful constitutional protection for religious liberty as a limit on the exercise of the State's power. Ubiquitous special preferences such as sexual orientation and gender identity (hereinafter "SOGI"), imposed by state and local authorities, exacerbate the threat. These government actions necessarily require Christian people to: 1) relinquish their religious

identity recognized by this Court in *Obergefell v. Hodges*; and 2) surrender their right to freely exercise their religious conscience protected by the First Amendment. 135 S. Ct. 2584 (2015). This Court, therefore, ought to revisit and correct *Smith*.

The government-imposed SOGI conditions in the case at bar substantially interfere with Petitioners' religious identity and exercise of its religious conscience. Here, the City expressly requires Petitioners to renounce their religious character and identity to participate in an otherwise accessible public foster care program. When a governmental condition imposes a penalty on the free exercise of religion that government action must face the "most rigorous" scrutiny.

ARGUMENT

I. THIS COURT SHOULD REVISIT *SMITH* AND RESTORE FULL FUNDAMENTAL RIGHT STATUS TO THE UNALIENABLE LIBERTY PROTECTED BY THE FIRST AMENDMENT.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. . . ." U.S. Const. amend I. This language includes no exemption for laws the government labels as "neutral."

A. The Free Exercise of Religious Conscience is an Unalienable Fundamental Right.

Reflecting the accurate understanding of the plain meaning of the Free Exercise Clause, this Court, in

Sherbert v. Verner and *Wisconsin v. Yoder,* struck down government actions that substantially interfered with a person's sincerely held religious beliefs. *Sherbert,* 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs). Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to provide a compelling interest to justify its interfering with such a fundamental liberty interest. This Court, in applying strict scrutiny to the government actions, further required the government to show it used the least restrictive means available to accomplish its interest.

B. *Employment Division v. Smith* Unconstitutionally Diminished the Free Exercise of Religious Conscience as a Fundamental Right.

In *Employment Division v. Smith,* this Court departed from its constitutional jurisprudence recognizing freedom of religion as a fundamental liberty interest protected by the First Amendment. 494 U.S. 872 (1990). Even though the government's action in *Smith* substantially infringed on the free exercise of religious liberty, *Smith* required no justification by the government for its conduct. To reach this radical result, *Smith* deemed neutral laws of general applicability excepted from the constitutional protection contra-expressed in the clear and plain

language of the Free Exercise Clause.[2] *Smith* did so despite a dearth of any supporting jurisprudence deeply rooted in our Nation's history and traditions, or implicit in the concept of ordered liberty.

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq*. The act expressly provides that:

> Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, [unless] … it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. In promulgating the RFRA, Congress correctly acknowledged: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. § 2000bb(a)(1). Congress stated the purpose of the legislation was

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is

---

[2] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (applying strict scrutiny to a law substantially infringing on religious liberty when, in the subjective view of the reviewer, the law is not a neutral law of general applicability).

> substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b)(1)-(2). Although this Court upheld the RFRA as applied to federal government actions, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), it also held Congress acted outside the scope of its constitutional authority as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, notwithstanding the plain language of the Free Exercise Clause, and despite Congress' attempt to statutorily reinstate an accurate understanding of the correct constitutional standard, *Smith* unconscionably continues to allow State authorities to substantially interfere with the free exercise of religious conscience. Consequently, unless a State affirmatively acts to restore fundamental right status to the free exercise of religion, *Smith*, as a practical matter, destroys any meaningful constitutional protection for religious liberty as a limit on the exercise of the State's power. This Court, therefore, ought to revisit and reverse *Smith*.

Ubiquitous special SOGI preferences, imposed by state and local authorities, exacerbate the threat to the free exercise of religious conscience. These government actions necessarily require Christian people to: 1) relinquish their religious identity; and 2) surrender their right to freely exercise their religious conscience. State enforcement of "neutral" SOGI preferences often weaponize State action to eliminate the Free Exercise Clause as an important constitutional constraint on the

exercise of State authority. Indeed, since *Smith,* religious people in our nation face a far more nefarious predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined.

C. This Court's Post-*Smith* Cases Point Toward Restoring the Free Exercise of Religious Conscience as an Unalienable Fundamental Right.

In *Obergefell*, this Court found in the Constitution a right of personal identity for all citizens. 135 S. Ct. 2584 (2015). The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018). *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 135 S. Ct. at 2589. If this Court meant what it said in *Obergefell*, the right of personal identity applies not just to those who find their identity in their

sexuality and sexual preferences—but also to citizens who define their identity by their religious beliefs.

Christian people, like Petitioners, find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation.

There can be no doubt that this Court's newly created substantive due process right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people. Indeed, government must not use its power in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 138 S. Ct. at 1731. Certainly, government ought to protect and not impede the free exercise of religious conscience. *See, e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a

religious school). State actions must uphold constitutionally-protected freedoms, not grant special protections for some, while coercing others to engage in conduct contrary to their religious identity and conscience.

Contrary to *Obergefell's* holding, *Smith* eviscerates the constitutional right to one's religious identity and free exercise, enabling States to subjectively deem infringement on religious conscience as neutral and generally applicable (as it always does when it imposes special SOGI preferences). This Court should revisit *Smith's* diminishment of religious liberty, especially in light of *Obergefell's* recognition of constitutional protection afforded to personal identity, liberty, and equal protection.

Indeed, this Court held that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop,* 138 S. Ct. at 1727, (citing *Obergefell* 135 S. Ct. at 2607 and holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

For Christian people in the *Smith* environment, though, that right continues to manifest as a mirage. In practice, state and local government authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special

preferences embodied in government SOGI classifications, like those in the case at bar, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop* 138 S. Ct. at 1731 (internal quotations and citations omitted).

As this Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Masterpiece Cakeshop, 138 S. Ct. at 1731 (citing *Church of Lukumi Babalu Aye,* 508 U.S. at 534, 547) (internal quotes omitted).

While the Court here characterized its analysis as addressing a lack of neutrality in the government's

action, government imposition of SOGI preferences unavoidably are *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like those present here, *necessarily* require Christian people to relinquish their religious identity and the freedom to exercise their religious conscience. For the "free exercise" of religion to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

In *Trinity Lutheran*, the government coercively conditioned a generally available public benefit on an entity giving up its religious character. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). This Court reaffirmed that,

> The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 . . . Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." *McDaniel v. Paty*, 435 U.S. 618, 628, 98 S. Ct. 1322, 55 L.Ed.2d 593 (1978) (plurality opinion) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972)).

Trinity Lutheran, 137 S. Ct. at 2019. *Trinity Lutheran*

went on to recount "the fundamentals" of this Court's free exercise jurisprudence:

> A law . . . may not discriminate against "some or all religious beliefs." [*Church of Lukumi Babalu Aye,*] 508 U. S., at 532. . . . Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The Free Exercise Clause protects against laws that "'impose[ ] special disabilities on the basis of . . . religious status.'" 508 U.S., at 533 (quoting *Smith,* 494 U.S., at 877, 110 S. Ct. 1595); see also *Mitchell v. Helms,* 530 U.S. 793, 828, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion) (noting "our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"[ ).]

Trinity Lutheran, 137 S. Ct. at 2021 (also citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

The government imposed SOGI conditions in the case at bar substantially interfere with Petitioners' religious identity and exercise of its religious conscience. Philadelphia ought not require Petitioners to disavow their sincerely held religious beliefs in order to participate in its city foster care program. *Sherbert* teaches that the "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights."

374 U.S. at 405. The City of Philadelphia's discrimination against Petitioners' religious exercise here lies in its refusal to allow the Petitioners—solely because it is a religious organization with sincerely held religious doctrines—to participate on equal footing with secular organizations informed by secular belief systems, in the City's program.

Here the City expressly requires Petitioners to renounce their religious character and identity to participate in an otherwise accessible public foster care program. When a government condition like this one imposes a penalty on the free exercise of religion, that government action must face the "most rigorous" scrutiny. *Trinity Lutheran,* 137 S. Ct. at 2016; *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. "Under that stringent standard, only a state interest 'of the highest order' can justify the government's discriminatory policy." *Trinity Lutheran,* 137 S. Ct. at 2024 (citing *McDaniel*, 435 U.S. at 628) (internal quotation marks omitted). And as *Masterpiece Cakeshop* recognized, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." 138 S. Ct. at 1732.

Perhaps an important place to start is understanding that the expression of one's religious identity, and exercise of religious conscience is not invidious discrimination. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus

would, therefore, ever wilfully discriminate against another person based on who they are. Christian people will, though, never concede their constitutionally protected religious identity and free exercise of conscience. *Amicus Curiae* condemns invidious discrimination and holds no animus toward anyone. We seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry.

Obergefell teaches that beyond the First Amendment's protection for religious liberty, a substantive due process right to personal identity now provides religious people additional enhanced constitutional protection. Government action not only must avoid compelling a religious citizen to facilitate or participate in policies contrary to their religious conscience protected by the First Amendment, it must also refrain from violating their personal identity rights. In this light, therefore, *Smith's* low-level judicial review for neutral and generally applicable laws can no longer stand. This Court should, therefore, revisit *Smith* and restore the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

CONCLUSION

For the reasons provided in this brief, *Amicus Curiae* urges this Court to revisit *Smith*, restore the right of all persons to exercise fundamental freedoms under the First Amendment, and reverse the decision of the Third Circuit.

Respectfully submitted,

WILLIAM WAGNER
Counsel of Record
ERIN ELIZABETH MERSINO
JOHN S. KANE
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy
Lansing, MI 48917
(517) 322-3207
AttyContact@GreatLakesJC.org

Counsel for Amicus Curiae