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 DOROTHY FRAME, ANNLEE POST & THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc., Dorothy Frame, and Annlee Post submit this brief because they have an interest in how the Free Exercise Clause protects religious employees.

The Foundation has been the nation's leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys pioneered litigation protecting employees from having to choose between their faith and their job when forced to pay compulsory union fees. *See*, *e.g.*, *EEOC. v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990). More broadly, Foundation litigators defended the political and religious autonomy of employees in many cases before this Court, including *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

Dorothy Frame and Annlee Post are, with Foundation legal aid, litigating to force their unions to reasonably accommodate their religious beliefs under Title VII. Statutory accommodations are difficult to obtain, frequently require litigation, and because of *Employment Division v. Smith*, 494 U.S. 872 (1990), religious objectors have no constitutional recourse under the Free Exercise Clause. Title VII is the only option, and it is frequently inadequate.

Unions and employers often do not take Title VII religious accommodation requirements seriously.

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[1] Under Supreme Court Rule 37.3(a), the parties consented to the filing of this brief. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission.

They often refuse to accommodate employees and turn Title VII litigation into a religious examination. Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 Pepp. L. Rev. 471, 495, 510 n.136 (2019) (listing examples). Unions commonly argue that religious objectors are wrong about their religion. In Ms. Frame's case, her union challenged her beliefs and required her to provide a theological defense to meet its "standard for a 'legitimate justification'"—a standard found nowhere in Title VII or in caselaw. A letter from her priest was not enough. The union's lawyer told Ms. Frame that her objection was "not well founded in [her] Roman Catholic Faith," and he sent her information to educate Ms. Frame about *her* religious beliefs.

Courts have also significantly undermined the effectiveness of Title VII accommodations. Even though Title VII creates an affirmative duty to accommodate, some courts have held that an employer or union does not have to accommodate an employee unless she is "disciplined or discharged." *See, e.g.*, *Reed v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 569 F.3d 576, 580 (6th Cir. 2009) ("Unless a plaintiff has suffered some independent harm . . . a defendant has no duty to make any kind of accommodation."). In practice this means that an employee must wait uneasily for her employer to discipline or discharge her. Moreover, this Court held that an employer does not have to accommodate an employee under Title VII if it requires "more than a *de minimis* cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

Smith conveys that religious exercise is trivial and subordinate to general secular interests—altering

how employers, unions, and courts view and treat religion. Overruling *Smith* and restoring a broad constitutional right to freely exercise religion would provide significant protection for religious employees and create legal alternatives when Title VII is inadequate.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court eliminated a substantive right to exercise religion under the Free Exercise Clause and replaced it with an equal protection rule. Although equal protection might have prevented the Inquisition, it would not have saved Daniel from the lion's den or prevented Catholic persecution in England under Oliver Cromwell. When Daniel's enemies wanted to remove him, they used a generally applicable law. *Daniel* 6:7–9. Even in the ancient world, rivals knew how to use generally applicable laws to target religious minorities. Equal protection is not enough to prevent persecution or guarantee religious liberty. The Founders intended more than generally applicable equal suppression.

Under *Smith*, the court below held that the City of Philadelphia could prohibit Catholic Social Services ("CSS")—a ministry of the Archdiocese of Philadelphia—from carrying out its religious mission serving foster children and parents *only because* of its religious beliefs. CSS has not turned down a single foster parent because of its beliefs about marriage. J.A. 171–172; Pet. App. 14a. To date, the City cannot even identify a single client who complained about CSS, let alone who did not receive service. Pet. App. 138–39a. This is not about anti-discrimination enforcement to solve a problem; it is a blatant attempt to drive CSS

out of the profession or force it to conform to the City's viewpoint. Commissioner Figueroa told CSS, it should follow "the teachings of Pope Francis"—"times have changed," "attitudes have changed," it is "not 100 years ago." J.A. 182, 365–366. Minutes later, the City cut off CSS's foster care referrals.

The lower court thought that the City's conduct was neutral—even though it targeted the only religious foster care agency with traditional religious beliefs about marriage, and even though, with one exception, the City *only investigated religious* foster care agencies. The lower court also thought that the city's nondiscrimination requirement generally applied—even though the City allows agencies to discriminate based on "mental health, ethnicity, and family relationships" *but not for religious reasons*. City's Br. in Opp. 24. Because the City's policy also forbids secular individuals and those who hold non-traditional beliefs about marriage from discriminating based on traditional beliefs about marriage, the lower court thought that the City's conduct was neutral and generally applicable. Pet. App. 26a. In other words, contrary to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), if the City prohibited Christians, Jews, and Santeria followers from sacrificing animals, the policy would be neutral and generally applicable according to the lower court. As a matter of law, that is wrong.

Smith has failed: it has allowed religious persecution and it has not avoided analytic difficulties or prevented judicial balancing. It merely signals to judges and officials that religious rights are second tier rights—religious believers belong in the back of a profession, or they do not belong in that profession at all. *Smith* furthermore conflicts with the Court's broad

reading of other constitutional provisions that provide "exemptions" from generally applicable laws through as-applied constitutional challenges or directly, for example, when general regulations burden speech. And while the Court has constricted the Free Exercise Clause, it has enlarged the Commerce Clause—increasing the federal government's contact and interference with religion—and it has extended the Fourteenth Amendment's Due Process Clause recognizing implicit, unenumerated rights that often conflict with religious exercise. This has *created* persistent conflict.

Smith moreover is fundamentally flawed. It has been repudiated by a virtually unanimous United States Congress, by the Executive Branch under President Bill Clinton, by numerous state legislatures and judiciaries, by several Supreme Court Justices, and by many scholars. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 154–55 (1997); Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 142 (2009). *Smith* is irreconcilable with the Free Exercise Clause's text—the text describes a substantive right to freely exercise religion without limitation. *Smith* is irreconcilable with the Free Exercise Clause's original understanding—the free exercise of religion is an unalienable right that includes protection from generally applicable laws. *Smith* is irreconcilable with the Free Exercise Clause's purpose—the clause guarantees religious liberty by restricting the majority's ability to regulate religious exercise. And *Smith* unjustifiably abandons the Court's constitutional role—the Court circularly answered the constitutional question, and because, according to the majority, it would be horrible if judges examined religious claims, the Court held it is

better to allow the government to *prohibit* religious exercise *with no justification*. *Smith* is egregiously wrong. It should be overruled.

ARGUMENT

I. The Court Should Overrule *Employment Division v. Smith*.

The Free Exercise Clause guarantees a substantive right to *freely exercise* religion by restricting the majority's power to interfere with religious exercise. This is a sensible solution. The Founders recognized that some neutral and generally applicable laws inflict unique, disproportionate harm on religious minorities. And unlike other rights, religious rights are inordinately vulnerable to general regulation. Speech restrictions, for example, normally allow alternative forms of communication and do not require individuals to violate their identity. Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 692 (1992). Religious restrictions, on the other hand, do and often allow no alternatives. Thus, our Founders reasonably protected religious *liberty* under the First Amendment, not merely equality.

The *Smith* Court erred by replacing substantive liberty with equal protection, and the Court failed to recognize the distinction between religious exercise and nonreligious activity. It assumed that the religious use of peyote, or wine, constitutionally equals its recreational use. By that logic, "[a] soldier who believes he must cover his head before an omnipresent God is constitutionally indistinguishable from a soldier who wants to wear a Budweiser gimme cap." Douglas Laycock, *The Remnants of Free Exercise*,

1990 Sup. Ct. Rev. 1, 11. If the government can prohibit nonreligious conduct, the Court thought, the government can extend its prohibition to religious conduct. This approach is not neutral, and it is not the free exercise of religion.

Textually, historically, and normatively, the free exercise of religion is a substantive right: the government should not interfere with religious exercise unless the government can prove that noninterference would jeopardize the peace and safety of the community.

A. *Smith* Conflicts with the Text of the Free Exercise Clause.

Smith contradicts the constitutional text. The opinion admitted that religiously motivated conduct is an "exercise of religion," which Oregon prohibited. 494 U.S. at 876–77. Yet the Court held that prohibiting Smith's exercise of religion is not "prohibiting the free exercise [of religion]." *Id.*

The text of the Free Exercise Clause is absolute. It provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Other clauses in the Bill of Rights have limiting language: security against "*unreasonable* searches and seizures," "*due* process of law," "*excessive* bail," and "*cruel and unusual* punishments." U.S. Const. amends. IV, V, VIII (emphasis added). The Free Exercise Clause, on the other hand, does not. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. Rev. 299, 300 (1986). As with freedom of speech and press, the Constitution unconditionally protects exercising religion. Any limitation therefore must be narrowly implied by necessity—to remain faithful to the text—because the text itself

supplies no limitations. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1116 (1990). The Court's approach in *Smith*, however, conflicts with the text: it allows unwritten limitations to swallow an absolute, written rule.

The text also confers substantive protection—the Constitution forbids the government from prohibiting the exercise of religion—not merely equal protection. An average reader, now or in the eighteenth century, would not conclude that the text allowed the government to prohibit religious exercise if it prohibited religious exercise equally. A tyrant could equally suppress the exercise of religion. "There would be perfect equality, but no religious liberty." Laycock, *Remnants of Free Exercise*, *supra*, at 13. The equal-opportunity tyrant reveals the grave error of replacing substantive protection under the Free Exercise Clause with equal protection. *Id.* at 13–14. The Founders knew this and therefore broadly penned the Free Exercise Clause to protect religious liberty.

If the Founders, as *Smith* suggests, wanted to just establish equal protection, they knew how to do it. They understood the English language. The Free Exercise Clause does not say that "Congress shall make no law discriminating against religion, or that no state shall deny to any religion within its jurisdiction the equal protection of the laws." *Id.* at 13. It says that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Constitution allows Congress to prohibit many things, but not the exercise of religion. Laycock, *Remnants of Free Exercise*, *supra*, at 13. As Professor Laycock has written: "On its face, this is a substantive entitlement, and not merely a pledge of non-discrimination." *Id.*

The Founders had ready examples of statutes that used general laws as a limiting principle for religious rights. The English statute that "governed the relationship between religious and civil law within the Church of England" would have been a familiar example. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 836 (1998). That statute provided that religious law should govern unless it was "repugnant to the laws, statutes, and customs of this realm, [or damaged or hurt] the King's prerogative." *Id.* If the Founders intended to limit the exercise of religion by compliance with general laws, "they would have used familiar language of this sort." *Id.* They did not.

A broad, substantive interpretation is the most obvious and literal reading of the text. *Smith* contradicts the broad character of the right: it allows unwritten exceptions to destroy the rule, and it relies on words and concepts found nowhere in the constitutional text.

B. *Smith* Conflicts with the Original Understanding of Free Exercise.

Smith contradicts the Free Exercise Clause's original understanding. The intellectual context and the development and application of the free exercise of religion concept supports a broad, substantive understanding of the Free Exercise Clause.

1. Smith *is Irreconcilable with the Intellectual Context and Understanding of Religious Liberty at the Founding.*

The founding generation considered religious liberty as an unalienable right. Michael W. McConnell,

The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1456 (1990). Two years before the ratification of the federal Bill of Rights, every state, except Connecticut, adopted a constitutional provision protecting religious liberty. *Id.* at 1455. Four states—New Hampshire, Pennsylvania, North Carolina, and Delaware—for example, expressly affirmed that liberty of conscience is an "unalienable right." *Id.* at 1456, 1517 n.242. New York, Virginia, Rhode Island, and North Carolina made similar declarations when they ratified the federal Constitution and proposed a bill of rights. *Id.* at 1480–81, 1517 n.360. Their proposals recognized that the exercise of religion, "according to the dictates of conscience," is an "unalienable right." *Id.*

Although theorists at the founding debated many philosophical and theological arguments for religious freedom, the most common argument advanced in America was that conscience is inviolable. McConnell, *Freedom from Persecution*, *supra*, at 823. James Madison articulated the most famous presentation of this argument in his Memorial and Remonstrance Against Religious Assessments. *Id.* There, he wrote:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any

> particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id. at 823–24. Madison therefore declared that religious liberty is "in its nature an unalienable right": because "what is here a right towards men, is a duty towards the Creator." *Id.* at 824.

Thus, religious liberty was not merely understood as a nondiscrimination principle forbidding persecution. It was understood as an unalienable right—an irrevocable duty to God, determined by conscience, that is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society." *Id.* And that right conferred substantive protection from laws that conflict with a person's conscience. Other rights may be "surrendered to the polity in exchange for civil rights and protection," but inalienable rights—particularly religious freedoms—are not. *Id.* at 823.

Smith contradicts the substantive understanding of religious freedom at the founding, explained by Madison, and the general recognition then that religious freedom is an unalienable right. *Smith* replaces a sacred, unalienable right with an equal protection rule: if the government asks everyone to bow down, religious believers must bow down too or face the government's wrath.

2. Smith *is Irreconcilable with the Free Exercise Principle Developed in the Colonies.*

The free exercise of religion developed as a legal principle in the American colonies to protect religious minorities. Due to religious persecution and intolerance in England, many believers traveled to America to achieve religious freedom. The term "free exercise" appeared in an American legal document as early as

1648, when Lord Baltimore required Maryland officials to not disrupt Christians, particularly Roman Catholics, in the free exercise of their religion. McConnell, *Origins*, *supra*, at 1425. Shortly after, in 1649, Maryland enacted the first free exercise clause in the colonies. It stated:

> noe person . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way be compelled to the beliefe or exercise of any other Religion against his or her consent.

Id.

Rhode Island's Charter of 1663 also protected religious liberty but used the analogous term "liberty of conscience." *Id.* It protected residents from being "molested, punished, disquieted, or called into question, for any differences in opinione in matters of religion, and doe not actually disturb the civil peace of our sayd colony." *Id.* at 1426. The Charter also provided that individuals may "freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments . . .; they behaving themselves peaceblie and quietlie and not useing this libertie to lycentiousnesse and profanenesse, nor to the civil injurye or outward disturbeance of others." *Id.* The proprietors of Carolina and New Jersey similarly guaranteed religious freedom through agreements with prospective settlers that paralleled the Rhode Island Charter of 1663. *Id.* at 1427.

Notably, the Rhode Island Charter deviated from an earlier decree of the state legislature that "none be accounted a delinquent for doctrine, provided that it be not directly repugnant to the government or laws established." *Id.* at 1426. The royal Charter, in sharp

contrast, did not limit religious freedom to all "laws established." Instead, when religious and legal obligations conflicted, believers only had to obey laws directed to maintain the civil peace and to refrain from using their liberty for licentiousness, profaneness, or the injury of others. *Id.*

These provisions suggest that the early American colonists recognized that the freedom to practice, and not merely believe, religion was an essential liberty. The provisions extended protection to all "judgments and contiences in matters of religion" and were not limited to opinion, communication, profession, or worship. *Id.* at 1427.

These provisions also did not limit the exercise of religion by using common terms to refer to all laws—colonial compacts often used the terms "the public good" or "the common good" to convey the full scope of legislative power. McConnell, *Freedom from Persecution*, *supra*, at 836. Instead, they limited the free exercise of religion *only* when it was necessary to protect the civil peace or to prevent licentiousness.

In modern constitutional terms, the original free exercise principle in the colonies meant that religion prevailed when religious obligations and secular legal requirements conflicted, unless indispensable state interests *required* government interference. This framework parallels the rule this Court expressed in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), but ignored in *Smith*: "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

3. Smith *is Irreconcilable with the Free Exercise Principle Found in Early State Constitutions.*

The free exercise principle set forth in the early colonial charters animated the state free exercise clauses enacted after the Revolutionary War. McConnell, *Origins*, *supra*, at 1427. The colonial free exercise principle supplied the common pattern found in the state provisions: they "guaranteed the free exercise of religion or liberty of conscience, limited by particular, defined state interests." *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).

i. *The State Free Exercise Clauses Created Substantive Protection from General Laws.*

These state constitutions provide direct evidence of the original understanding of the federal Free Exercise Clause because it is reasonable to infer that the drafters of the Free Exercise Clause understood the term's historical meaning. *Id.* at 1456. And it is reasonable to infer that the term, "free exercise of religion" in the First Amendment, meant what it meant in earlier state constitutions.

The New York Constitution of 1777, for example, was typical. It provided:

> [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.

McConnell, *Origins*, *supra*, at 1456. Other state provisions followed the same pattern. Each provision began by defining the free exercise right based on the understanding (conscience) of the individual believer. *Id.* at 1458–59. The right was not defined negatively by identifying religious and nonreligious domains. And the right extended to religiously motivated conduct. None of the clauses confined the right to beliefs and opinions. *Id.* at 1459. Six of the constitutions used the word "exercise," which contemporary dictionaries defined as "action." *Id.* Two other constitutional provisions used broader terms—Maryland referred to religious "practice" and Rhode Island referred to matters of "religious concernment." *Id.*

The state free exercise clauses identified only a limited set of circumstances where the right to religious liberty did not apply. Nine of the states—the overwhelming majority—limited the free exercise of religion "to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state." *Id.* at 1461. The Georgia Constitution of 1777, for example, provided: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." *Id.* at 1457.

The limiting language is highly instructive. It confirms that the free exercise of religion included conduct and protection from generally applicable laws. Otherwise, there was no need to specify a limitation. Beliefs by themselves do not disturb the public peace. *Id.* at 1462. And if exercising religion was subject to *every* law, there would have been no need to identify specific laws and circumstances that limited the right. The New York Constitution, for instance, specified that the free exercise of religion should not be "construed as to excuse acts of licentiousness, or justify

practices inconsistent with the peace or safety of [the] State." *Id.* at 1456. Such a proviso, if *Smith* were correct, would have been superfluous. Precise limitations are useless if generally applicable laws are enforceable regardless of religious objections. The state provisions only make sense if the free exercise principle compelled protection from (at least some) generally applicable laws. *Id.* at 1462.

ii. *The Limiting Provisos in State Free Exercise Clauses Did Not Mean Every General Law.*

The argument that these limiting provisos were synonyms for the public interest, or every law, is textually and historically implausible. As a textual matter, states had different provisos—nine limited the free exercise of religion to "actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state"; of these nine, four included acts of licentiousness or immorality; two others included acts that interfere with another individual's religious practice; one added acts that injure or disturb others; another inserted acts contrary to good order; and one more included acts contrary to the happiness, peace, and safety of society. *Id.* at 1461–62. It is farfetched to presume these terms and variations all had the same meaning.

Recorded debates occurred in two states—New York and Virginia—concerning the language of the provisos. McConnell, *Freedom from Persecution*, *supra*, at 837. In Virginia, James Madison and George Mason disagreed about the extent of the proviso and proposed alternative limiting provisions. John Jay and Governor Morris did the same in New York. *Id.* If, as the *Smith* approach assumes, the provisos referred

to any violation of law, then these debates and conflicting proposals would have been pointless. *Id.* So as a textual and historical matter, "[w]e can say with some confidence that these formulations were not idle rhetorical variations." *Id.*

iii. The Lack of a Limiting Proviso in the Federal Free Exercise Clause Suggests Limitations Only Exist by Necessity.

Critics of the substantive interpretation have also argued these state provisions are irrelevant because the federal Free Exercise Clause includes no limiting proviso. So, the critics argue, even if the state provisions provided protection from generally applicable laws, the federal clause does not. This argument is mistaken. The meaning of the free exercise of religion is the issue. And that legal principle is embodied in earlier state and colonial documents. The limiting provisos merely confirm that the free exercise principle of religious liberty entails protection from generally applicable laws.

The Virginia Bill of Rights, which served as a model for three of the state proposals for the First Amendment, is instructive. George Mason proposed a broad proviso that presumably included all legitimate legislation. McConnell, *Origins*, *supra*, at 1462–63. Madison objected and proposed a narrow proviso only limiting the "full and free exercise of religion" when it "manifestly" endangers "the preservation of equal liberty and the existence of the State." *Id.* at 1463. The Virginia legislature, however, compromised through silence. It chose to protect the broad right and left the limitation to be implied by necessity.

Following Virginia's example, Madison did not include a proviso in his initial draft of the federal Free

Exercise Clause. *Id.* at 1481. Congress followed that approach and agreed to constitutionally recognize the broad right and exclude any limitation. This suggests that the Founders intended the limitation, as in the Virginia Bill of Rights, to be implied by necessity, no doubt based on their understanding of the free exercise principle.

4. Smith *is Irreconcilable with the Application of the Free Exercise Principle by Colonial and State Governments.*

The practice in the colonies and early states suggests that the free exercise principle entailed exemptions for religious practice from generally applicable laws. *Id.* at 1466. Although conscience and civil law rarely conflicted, when it did, the colonists and Founders viewed exemptions as the solution.

As early as 1665, the second Charter of Carolina explicitly provided for religious exemptions. The Charter authorized the proprietors to grant "indulgences" and "dispensations" to residents who could not conform with the general law because of their "private opinions." *Id.* at 1428. Indulgences and dispensations were technical terms that referred to the King's power to exempt citizens from the law. In England, Charles II and James II used this power to exempt religious minorities from conflicting laws. *Id.* In Carolina, the proprietors used this authority to exempt Quakers from oath requirements and to allow non-Anglican towns to choose their own ministers. *Id.* Thus, dating back to England, exemptions were used to resolve conflicts between law and religion.

During the founding era, conflict between religion and law mainly involved three issues: oath require-

ments, military conscription, and religious assessments. *Id.* at 1466. Each conflict was commonly resolved by exemptions.

Oath requirements were by far the most common source of tension. *Id.* at 1467. Quakers, along with other Protestant sects, believed that it was wrong to take oaths or swear allegiance to civil authority. Without accommodation, their beliefs would have prevented them from testifying in court, leaving them vulnerable to adversaries and unable to legally protect themselves. *Id.* The no-exemption principle would have only allowed the government to eliminate the oath requirement for everyone or insist on the requirement without exemption. But virtually every state rejected those choices. By 1789, nearly all states resolved the conflict by providing exemptions. *Id.* 1468.

Conflicts also occurred because of military conscription. Quakers and Mennonites refused to bear arms because of their religion. *Id.* Significant debate occurred because of the cost of this exemption. An exemption required people with other religious beliefs to disproportionately bear the military burden. Yet Rhode Island, North Carolina, and Maryland exempted religious objectors from military service, and New York, Massachusetts, Virginia, and New Hampshire later followed. *Id.*

During the Revolutionary War, the Continental Congress, which struggled to field an army, granted exemptions for religious objectors using these words:

> 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.

Id. at 1469. The language and substance of the policy is significant. It mirrored the worldview that Madison discussed in his Memorial and Remonstrance. The policy treated religious conscience as a superior duty to the claims of civil society, even at a time of "universal calamity." *Id.* And the policy allowed the religious objector to determine the appropriate accommodation—it did not compel an alternative payment or cost.

The conflict between faith and law also occurred in states and colonies with established churches. *Id.* These governments typically required citizens to financially support the established church or another church the tithe payer selected. Baptists, Quakers, and others, however, opposed all government compelled tithes for religious reasons. *Id.* The *Smith* principle would have resolved these conflicts by crushing religious opposition. Instead, many states thought accommodation was the appropriate resolution. Massachusetts, Connecticut, New Hampshire, and Virginia, for example, all responded by exempting religious objectors from the tax. *Id.*

The argument that these exemptions were provided by legislatures misses the point. These exemptions demonstrate how the founding generation understood the free exercise principle of religious freedom. McConnell, *Freedom from Persecution*, *supra*, at 839–40. The decisive question is not whether exemptions were enacted legislatively before the Constitution—constitutional judicial review did not yet exist. The question is whether people at the adoption of the

First Amendment considered exemptions the appropriate *government* remedy when law and conscience conflict. McConnell, *Origins*, *supra*, at 1470. The answer appears to be yes—exemption, not general regulation, was the solution.

The Founders enshrined rights and principles in the Constitution that they often recognized before 1789. McConnell, *Revisionism*, *supra*, at 1119. The best assumption is that the substance of these preexisting rights did not change when they gained constitutional status. *Id.* Thus, it is reasonable to presume that the First Amendment's framers—many of whom served in colonial or state government—expected that courts would apply the Free Exercise Clause similarly to safeguard religious liberty. *Id.* There is no reason to assume that constitutional recognition diminished the free exercise principle as it was then understood and applied.

C. *Smith* Conflicts with the Purpose of the Free Exercise Clause to Prevent Persecution and Preserve Religious Liberty.

The Founders enshrined the free exercise principle in the Constitution's First Amendment to prevent persecution and preserve religious liberty. *Smith* profoundly undermines these aims. Under *Smith*, the political majority can prohibit unpopular religiously motivated conduct. The right to exercise religion thus depends on popularity and luck: if the majority says otherwise, there is no right to exercise religion, unless the majority creates inconsistent rules or exceptions. In the *Smith* world, Islamic police officers who believe they are required to have a beard must hope exceptions are made for officers with skin conditions. Native Americans who are part of the Native American

Church must hope peyote becomes a popular or medically useful drug. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J.L. & Pub. Pol'y 627, 664 (2003).

1. Religious Liberty Requires Protection from Generally Applicable Laws.

Religious liberty reduces human suffering—it liberates individuals from the cruel choice between "incurring legal punishment and surrendering core parts of their identity." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 842 (2014). Religious beliefs are extraordinarily important to believers—important enough to die and suffer for. Douglas Laycock, *Religious Liberty As Liberty*, 7 J. Contemp. Legal Issues 313, 317 (1996). Governmental attempts to punish believers because of their religion produces conflict and suffering. Religious liberty reduces human conflict and allows people with different religious viewpoints to peacefully live together. *Id.*

Smith undermines these aims—it does not prevent persecution or preserve religious liberty. *Smith* means that followers of the Native American Church in Oregon, or individuals who hold traditional religious beliefs about marriage in Philadelphia, can believe their religion but cannot practice it. Religious liberty, however, is nonexistent without the right to practice religion. Laycock, *Exemption Debate*, *supra*, at 149. The right to believe but not practice is hollow—it subjects believers to persecution for exercising their faith. This is not religious liberty, and it is not the *free exercise* of religion. *Id.*

The majority in *Smith* drew its line in the same place that Oliver Cromwell did in the Seventeenth

Century. Laycock, *Remnants*, *supra*, at 22. Cromwell told the Catholics of Ireland that he would not interfere with any person's conscience. But, "if by liberty of conscience you mean a liberty to exercise the mass, . . . where the Parliament of England have power, that will not be allowed." *Id.* *Smith* would allow Cromwell to effectively outlaw traditional Catholic Mass by simply prohibiting the consumption of wine.

The Founders did not draft the Free Exercise Clause to allow the winners of a religious civil war to suppress Catholic Mass. *Id.* Free exercise clauses were meant—at the very least—to prevent these types of conflicts from occurring. *Id.* *Smith*, however, does the opposite: it allows winners of political battles to suppress religious exercise with *no* justification if it is done generally.

For a Quaker during the seventeenth century, it would have made little difference if Massachusetts prohibited Quakers from the colony or allowed Quakers to live in the colony but required them, along with other citizens, to serve in the military and swear oaths to testify in court. Laycock, *Exemption Debate*, *supra*, at 149–50. A conscientious Quaker could not live in Massachusetts if he had to serve in the military or testify in court, and if he did live there, conflict and persecution would have resulted. *Id.* Bans on religious practices equal bans on believers.

Smith thus fundamentally undermines the Free Exercise Clause's purpose and creates conflicts the clause was intended to prevent. *Id.* The solution under *Smith*—governmental suppression and persecution of religious minorities—is not a noble goal.

Religious liberty reduces human conflict and suffering. If everyone is guaranteed the right to practice religion and exercise their identity, there is much less

reason to fight. Laycock, *Religious Liberty and the Culture Wars*, *supra*, at 842. In a pluralistic society, both believers and lovers can express their identity. Blaine L. Hutchison, *Protecting Religious Pluralism: How the Liberty That Supports Same-Sex Marriage Protects Religious Convictions*, 30 Regent U. L. Rev. 461 (2018); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The 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."). Liberty for all is the best approach.

2. Religious Liberty Requires Protection from the Political Process.

The Founders recognized that protecting religious liberty, particularly of religious minorities, cannot be left up to the majority. Historical conflicts reveal that the majority is often unlikely to protect unpopular religious minorities, and in fact is often responsible for religious suppression. Yet *Smith* eliminated substantive constitutional protection and replaced it with majoritarian rule. This fundamentally undermines the purpose of the Free Exercise Clause—to prevent persecution and preserve religious liberty *by restricting the ability of the majority to interfere with religion*. The Founders created the Bill of Rights to delimit the majorities ability to regulate fundamental rights—like the free exercise of religion. Majoritarian rule is at odds with the text's purpose and it is insufficient to protect religious freedom.

Lukumi is a perfect test case. It is widely considered a clear example of religious discrimination—the

Court *unanimously* invalidated the ordinance in question. But Representative Steve Solarz of New York could not get a single member of Congress to join an *amicus* brief supporting the church. Laycock, *Exemption Debate*, *supra*, at 159. The religious harm and governmental interests involved did not matter. All that mattered was that the religious practice was unpopular. *Id.* Thus, even in *clear* cases of religious discrimination, *Smith*'s majoritarian approach fails to protect religion. The Court should not continue this error.

Legislators represent the majority and are vulnerable to lobbyists and political pressure. Judges are, or at least should be, different. *See Perez v. Mortgage Bankers Ass'n*, (Thomas, J., concurring) 575 U.S. 92, 120 (2015) ("One of the key elements of the Federalists' arguments in support of [the judiciary's power] to make binding interpretations of the law was that Article III judges would exercise independent judgment"). They are at least *sometimes* willing to protect unpopular minorities. Laycock, *Exemption Debate*, *supra*, at 163. Legislators, on the other hand, are seldom willing, because they cannot afford to protect groups that many voters reject. Thus, legislators "are least likely to protect those religious minorities who are most in need of protection." *Id.*

Legislative exemptions are inadequate in practice and theory. *Smith* requires religious individuals and churches to ask and receive exemptions every time a law conflicts with religious practice. And they must win these political battles every year at every level of government. "If they lose even once in any forum, they have lost the war; their religious practice is subject to regulatory interference. This is not a workable means of protecting religious liberty." Douglas Laycock, *The*

Religious Freedom Restoration Act, 1993 B.Y.U. L. Rev. 221, 228–29 (1993). The Founders did not make this error and the Court should not repeat it by continuing to uphold *Smith*. Religious liberty requires protection from generally applicable laws, i.e., protection from the political process.

D. *Smith* Unjustifiably Abandons the Court's Constitutional Role.

The *Smith* majority gave two reasons for its conclusion that generally applicable laws that prohibit the exercise of religion are not laws "prohibiting the free exercise [of religion]," U.S. Const. amend. I. After the Court recognized its decision would leave religious protection up to the political process, it remarked that this "unavoidable consequence of democratic government" was "preferred" because otherwise: (1) each conscience would become a law unto itself, and (2) judges would have to "weigh the social importance of all laws against the centrality of all religious beliefs." *Smith*, 494 U.S. at 890. Both reasons are invalid and unsound.

The Court's first reason is viciously circular. To determine whether the supreme law of the land—the Constitution—protects the exercise of religion from general laws, the *Smith* majority argued it does not, because doing so would be unlawful: "[a]ny society adopting such a system," according to the majority, "would be courting anarchy." *Id.* at 888. But this begs the question. If the Constitution protects religiously motivated conduct from neutral and generally applicable laws, then it is not lawless to *correctly* apply the Constitution, and neither is it antidemocratic. The ultimate question is whether the Constitution protects believers from neutral and generally applicable laws.

The *Smith* Court failed to answer that question—it merely concluded "we do not think the words must be given that meaning." *Smith*, 494 U.S. at 878.

Smith's claim that anarchy would ensue is not new, and it is not accurate. In the seventeenth century, both Roger Williams and William Penn dismissed this claim made by critics, like John Cotton. McConnell, *Origins*, *supra*, at 1447–48. In Penn's *The Great Case of Liberty of Conscience*, he called the anarchy claim "foully ridiculous." *Id.* at 1447. Religious liberty did not excuse believers from "keeping those excellent Laws, that tend to Sober, Just, and Industrious Living." *Id.* at 1448. A century later, John Leland, the leader of the Virginia Baptists, addressed the same claim. He condemned the assertion that liberty of conscience would justify crimes such as murder or tax evasion. He argued, "when a man is a *peaceable* subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience." *Id.*

Religious liberty does not excuse believers from every law, and far from courting anarchy, it is necessary for people with conflicting beliefs to live together in harmony. Religious liberty did not create anarchy before *Smith* under federal or state free exercise clauses. And it has not created anarchy since under statutes or state free exercise clauses.[2] Laycock,

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[2] Existing protections are inadequate. The Constitution was meant to protect everyone and preserve fundamental liberties. Although these laws protect some individuals, many others—because of *Smith*—are left unprotected. *Smith* furthermore allows—and perhaps encourages—federal and state governments to disregard or eliminate substantive religious liberty protection.

Exemption Debate, *supra*, at 142. Congress and numerous states responded to *Smith* by enacting Religious Freedom and Restoration Acts to protect religious liberty. *Id.* These laws have not led to anarchy.

The majority's claim is contradicted by practice and theory—liberty is the best antidote to tyranny and oppression. *Smith*'s equal suppression method, on the other hand, has failed historically and leads to conflict and human suffering. Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 683, 692–93 (1990). In our constitutional system, religious liberty is not "a private right to ignore generally applicable laws." *Smith*, 494 U.S. at 886. However, it *is* a constitutional right—democratically enacted—that limits the power of the majority to interfere with religion.

The *Smith* majority also retorted that its approach is "preferred" over judicial balancing. *Id.* at 890. This attitude, however, conflicts with the role of the Court and the purpose of the Bill of Rights. "Disadvantaging" minority religions is not "unavoidable," as the Court wrote, if courts enforce the Free Exercise Clause. The purpose of the Bill of Rights was to avoid certain "consequences" of democratic government by securing fundamental rights from the reach of simple majorities. As Justice Jackson wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights

> may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *Smith* turns this fundamental understanding upside down and leaves the protection of religion—the first right guaranteed by the Bill of Rights—to the political process.

The majority argued that it would be a constitutional anomaly to apply the compelling interest test under the Free Exercise Clause because it would produce individual exceptions to generally applicable laws. *Smith*, 494 U.S. at 886. First, this logic is unpersuasive—distinctiveness is sensible. Different clauses of the Constitution, unsurprisingly, have different meanings. There is no reason to expect the Free Exercise Clause to parallel clauses with different terms and functions. Second, individual exceptions from generally applicable laws is *not* a free exercise anomaly. An as-applied challenge is a precise parallel. McConnell, *Revisionism*, *supra*, at 1138. Under an as-applied challenge, a law is valid for most individuals but not for others because its application would be a constitutional violation. *Id.* Third, substantive protection from generally applicable laws *is* "an established part of the protections for free speech and press under the First Amendment." *Id.* The case *United States v. O'Brien*, 391 U.S. 367 (1968), is a familiar example.

Religion is anomalous, however, in other respects—it is uniquely harmed by generally applicable laws. McConnell, *Accommodation of Religion*, *supra*, at 692. "Speech can be threatened by generally applicable laws," but normally there are alternative channels of communication for the speaker to convey his message. *Id.* Although O'Brien was prohibited from

burning his draft card, he could still denounce the draft. *Id.* When religious individuals, however, are prohibited from practicing their religion, no alternative means to practice religion exist. For members of the Native American Church in Oregon, after *Smith* no alternative *legal* means existed to ingest peyote. Generally applicable laws, therefore, "have a far more serious effect on religious freedom than on any other constitutional right." *Id.*

Yet the Court thought it would be "horrible" for judges to make these determinations. *Smith*, 494 U.S. at 889 n.5. But judicial balancing is the norm in virtually every other area of constitutional law. There is no reason to believe judges are any more prone to err when applying the Free Exercise Clause than with any other clause. The majority's opinion suggests that the special problem with religion is that it requires judges to evaluate the relative merits of religious claims. *Id.* at 886–87. But this harm, even when judges err, is far less injurious than *Smith*'s alternative. Rather than weigh the religious claim in *Smith*, the Court's alternative was to allow Oregon to prohibit a central tenet of the Native American Church *with no justification*. With these alternatives, it is hard to conclude that any believer would choose the *Smith* approach.

Smith is simply wrong. Although religious liberty may be imperfect, like any other human endeavor, it is preferable to evenhanded repression. Of course, there is a possibility that judges will err when they apply the correct standard. But the possibility of error does not justify abandoning the protection our founding generation enshrined and mandated in the First Amendment's Free Exercise Clause.

In this case, *Smith* has allowed Philadelphia to selectively investigate and shut down a religious foster care agency because of its beliefs. Absent judicial intervention, it is hard to see why the City will not investigate every other religious organization in Philadelphia and do the same. This is persecution. It should be prevented, yet *Smith* invites it. This Court should not sanction it by continuing to uphold *Smith*.

CONCLUSION

The Court should overrule *Smith* and reverse the decision below.

Respectfully submitted,

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