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 *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues. The First Amendment is an area in which the Institute has been particularly active in terms of legal representation and public education alike.[2]

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[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

[2] Recent cases before the Court in which the Institute has submitted an amicus brief include *The American Legion v. American Humanist Ass'n and Maryland National Capital Park and Planning Commission v. American Humanist Ass'n*, Nos. 17-1717 and 18-18; *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 18-548; *Hoever v. Belleis*, No. 17-1035; and *Holt v. Hobbs*, No. 13-6827. Other First Amendment cases decided by the Court in which the Institute has been involved include *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001) and *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989).

The Institute has been similarly active at the state level. For example, the Institute challenged an Oklahoma requirement for submitting to a biometric photograph as a condition of obtaining a driver's license. It has also urged the California legislature to accommodate religious objections to a mandatory vaccine law.

This case is of particular concern to the Institute because the Third Circuit's decision threatens not only one but two of the fundamental freedoms guaranteed by the First Amendment: freedom of religion and freedom of speech. The First Amendment simply does not permit the City of Philadelphia (the "City") to exclude Catholic Social Services ("CSS") from the City's foster care program unless CSS agrees to violate the religious teachings of the Catholic Church and instead espouse the City's views on family values. By permitting the City to punish CSS for its religious beliefs, the Third Circuit has deprived CSS of its religious freedom and its right to free speech. Religious freedom was the main aspiration that sent America's founders searching for independence from England. That is why the Framers included the guarantee of freedom of religion in the First Amendment. Unfortunately, the site of the Constitutional Convention—Philadelphia—is now a place where the First Amendment's guarantee of religious freedom is honored in the breach. A desire to right that wrong is why the Institute urges that cert. be granted and that the decision of the Third Circuit be reversed.

## SUMMARY OF ARGUMENT

After more than a century of service to the community, Petitioner Catholic Social Services ("CSS") finds itself unable to provide foster care services in Philadelphia because its name includes the word "Catholic" and it is not merely Catholic in name only. Rather, CSS actually practices what it preaches, limiting its placement of children in foster care to traditional families headed by a man and a

woman who are married to one another. The city government in Philadelphia (the "City") may consider CSS's views quaint, or worse, and its leaders are certainly entitled to their opinions. The City is not free, however, to use its monopoly over the provision of foster care services to force CSS to espouse views with which it disagrees and to violate its religious principles or else be precluded from providing foster care services in Philadelphia. Yet that is exactly what the City has done. And rather than protect CSS's rights under the First Amendment's Free Exercise Clause, the Third Circuit has upheld the various subterfuges by which the City has shut down CSS as a provider of foster care services—starting with enforcement of an inapplicable "Fair Practices Ordinance." To justify finding the City's actions as merely "neutral" with respect to religion, the Third Circuit has adopted a view of the Free Exercise Clause that is inconsistent with the First Amendment jurisprudence of virtually every other Circuit (all but the Ninth Circuit) and with the Court's leading First Amendment decisions. Unless the decision of the Third Circuit is reversed, the freedom of religion protected by the First Amendment will be relegated to history rather providing the freedoms that the Framers envisioned.

## ARGUMENT

### A. Free Exercise Decisions of the Third and Ninth Courts Have Created a Split Among the Circuits That the Court Should Resolve in This Case.

By rejecting the City's challenge under the Free Exercise Clause, the Third Circuit has joined the Ninth Circuit in "raising the bar" as to what a plaintiff must prove to show that a law violates the First Amendment. The Third Circuit imposed upon CSS the burden of showing that "it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religion views." (App. 26a). Finding that CSS had failed to make such a showing, the Third Circuit thus held that the City's "Fair Practices Ordinance" and related acts that targeted CSS were neutral and generally applicable. (App. 26a).

In so holding, the Third Circuit thus joined the Ninth Circuit in holding that laws are considered neutral and generally applicable as long as they prescribe "the same conduct for all, regardless of motivation." *Stormans, Inc. v. Wiesman,* 794 F.3d 1064, 1077 (9th Cir. 2015). The standard for establishing a violation of the Free Exercise Clause in the Third and Ninth Circuits is thus more exacting than that applied in every other Circuit that has addressed the issue—including the Second, Sixth, Seventh, Tenth, and Eleventh Circuits. Federalism does not contemplate that the protections of the First Amendment vary from state to state. Yet that is in fact the case given the current state of Free Exercise Clause jurisprudence.

In the Second, Sixth, Seventh, Tenth, and Eleventh Circuits, a plaintiff alleging violation of the Free Exercise Clause can rely upon different forms of evidence to prove that a law is not neutral or generally applicable by making at least one of three showings: (1) the government issues individualized exemptions; (2) the law exempts secular conduct that undermines the government's interest; or (3) the law's history indicates non-neutrality. The Sixth, Tenth, and Eleventh Circuits apply strict scrutiny if the government uses a system of individualized exemptions or carves out other secular exemptions to its policies.

The Sixth Circuit applies strict scrutiny where "the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (Sutton, J.) The policy at issue in *Ward* was not "neutral and generally applicable" because it "permit[ted] secular exemptions but not religious ones and fail[ed] to apply the policy in an even-handed … manner." *Id.* at 739-40.

The Tenth Circuit applies strict scrutiny where the government has in place a "case-by-case system" of determinations, noting that "greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004). The Tenth Circuit applies this test even where the policy is otherwise "not pretextual but rather *** neutral and generally applicable." *Id*. at 1295.

The Eleventh Circuit applies strict scrutiny "where a law fails to similarly regulate secular and

religious conduct implicating the same government interests." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004). Under the foregoing test, the City's "Fair Practices Ordinance" fails. Philadelphia's policies are riddled with exceptions. The City's own foster care operations are not subject to the FPO. Referrals are made all the time to others. And the City allows exceptions—but not for CSS.

Five circuits consider a law's history to determine whether it is neutral under *Employment Div. v. Smith*, 494 U.S. 872, 894 (1990). According to the Second Circuit, a law "prompted" by a particular religious practice must face strict scrutiny. *Central Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene,* 763 F.3d 183, 195 (2d Cir. 2014). The Sixth Circuit has similarly held that a policy must face strict scrutiny where "[a]mple evidence support[ed] the theory that no such policy existed—until [Plaintiff] asked for a referral on faith-based grounds." *Ward v. Polite*, 667 F.3d at 739. The Seventh Circuit considers "the specific series of events leading to the enactment or official policy in question." *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e must look at available evidence that sheds light on the law's object, including *** 'historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history.'") (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). The Eighth Circuit has held that lack of neutrality "can be evidenced by objective factors such as the law's legislative history." *CHILD, Inc. v. De Parle*, 212 F.3d

1084, 1090 (8th Cir. 2000) (citing *Lukumi*, 508 U.S. at 535, 540). In the Tenth Circuit, religiously discriminatory action is not saved by the fact that a decisionmaker can assert some secular justification: "the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (McConnell, J.).

Here, there is more than ample evidence that City targeted CSS, as detailed in the Petitioner's Brief. Virtually anywhere else in the country, such evidence would be sufficient to invalidate the City's "Fair Practices Ordinance." That will no longer be the case in Philadelphia, however, unless the decision below is reversed.

### B. Prior Decisions of the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit Are More Faithful to the Court's Free Exercise Jurisprudence.

In this case, the Circuit split is easy to resolve—against the Third and Ninth Circuits. The standard applied in the decision below and previously by the Ninth Circuit is inconsistent with the Court's Free Exercise Clause precedents, including *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730 (2018), and even the precedent that the Third Circuit purported to follow, *Smith*. As articulated in *Lukumi*, the test of neutrality is whether the government

permits nonreligious conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." *See Lukumi*, 508 U.S. at 543. *Lukumi* relied on exceptions permitting "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia" as relevant comparisons under ordinances banning animal sacrifice. *Id.* at 537. The Brief of Petitioner identifies numerous comparable exceptions to the City's "Fair Practices Ordinance" showing why it is anything but neutral in its application to religious expression.

In *Masterpiece Cakeshop*, the Court similarly found evidence to support the conclusion that the "treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent." 138 S. Ct. at 1730 (2018). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" 138 S. Ct. at 1731. Here, as in *Masterpiece Cakeshop*, the Brief of Petitioner identifies numerous acts and statements on the part of the City that—individually and together—leave no doubt that the City targeted religious organizations in general and CSS in particular.

Finally, the very precedent cited by the Third Circuit, *Smith*, holds that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 894. Again, the Brief of Petitioner identifies the various exceptions to Philadelphia's "Fair Practices

Ordinance" and why CSS should similarly be exempt if there is to be any such policy at all. To reverse the Third Circuit, the Court therefore need not reconsider *Smith*. Still, there are some good reasons that doing so might well be advisable, as discussed below.

### C. Rather Than Continue to Limit *Smith*, the Court Should Expressly Overrule It to Eliminate Confusion About the Scope of the Free Expression Clause.

If the Third Circuit's reliance on *Smith* was justified, it is long since past time to reconsider *Smith*. Subsequent decisions of the Court, including *Lukumi* and *Masterpiece Cakeshop*, have certainly limited *Smith*. Still, there is no getting around the fact that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (Alito, J., concurring). The fear expressed in *Smith* that allowing religious believers to challenge generally applicable laws would be "courting anarchy" (494 U.S. at 888) "is contrary to the deep logic of the First Amendment." McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990). Thirty years of experience post-*Smith* have confirmed that courts are "up to the task" of engaging in "case-by-case consideration of religious exemptions to generally applicable rules," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006), without creating "anarchy."

*Smith* has created a muddle of conflicting decisions in the lower courts. *See* Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5-6, 15 (2016). In practice, governments have ***not*** continued "to be solicitous of"

religious liberty as contemplated by *Smith*. 494 U.S. at 890. "The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2074 (2019). The intent of the Framers is thus better served by overruling *Smith* expressly rather than continuing to do so *sub silentio*.

### D. By Compelling Catholic Social Services to Endorse the City's Views on Family Values, the City Has Violated CSS's First Amendment Rights.

"The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 309 (2012) (internal quotations omitted) (citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). A crucial extension of this belief is that "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."[3] In this case however, the City has run roughshod over this long-recognized principle of the Court's First Amendment jurisprudence.

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[3] *Knox*, 567 U.S. at 309 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 447–448 (1969) (*per curiam*); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713–715, (1977); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (The First Amendment protects "the decision of both what to say and what not to say" (emphasis deleted)).

The City has done so by conditioning CSS's continued participation in the foster care program upon its endorsement of the City's views on gay marriage and the fitness of unmarried couples to be foster parents. Within its jurisdiction, the City has a monopoly on awarding contracts to foster care vendors. As a result, the City's requirement that all such vendors adhere to its views on certain religious and political issues to participate in the foster care system serves as a *de facto* licensing requirement. The government has the sole power to allow vendors to participate in the foster care system and uses its absolute authority to award its contracts only to vendors that espouse its beliefs regarding marriage. The City is thus thwarting the exercise of free speech—and compelling the exercise of government approved speech only. This "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" in violation of the First Amendment. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994)). As the Court recognized in *Becerra*, the government does not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375. The imposition of a licensing requirement upon individuals or groups as a means to violate their First Amendment rights is so harmful because such individuals or groups are left without any outlet to exercise their rights without sacrificing their ability to enjoy the privilege they sought the license for in the first place.

The City seeks to rely upon "benefit condition" cases in which the Court upheld conditions similar to

those placed on CSS. Those cases are easily distinguishable, however, because each of the plaintiffs remained free to continue participating in the protected activity "without federal assistance" or by "declin[ing] the funds." *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.*, 570 U.S. 205, 214 (2013) (citing *United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality)); *see also Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (plaintiff's First Amendment rights were not violated because the recipient of the funds could "terminate its participation in the [] program and thus avoid the [program's] requirements"). That is not an option for CSS, which cannot place foster children in Philadelphia unless it follows the City's party line.

The Court has previously limited the government's ability to impose conditions on the receipt of funds that impose under burdens on First Amendment Rights. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (First Amendment establishes "a limit on Congress' ability to place conditions on the receipt of funds"). The foundation from which the Court's benefit-condition cases operate—"that the state has broad authority under its spending powers to attach conditions to its grant of public funds"—is "inapposite" when the government's condition is "akin to an occupational license." *Dept. of Texas, Veterans of Foreign Wars of the United States v. Texas Lottery Commission*, 760 F.3d 427, 437 (5th Cir. 2014) (*en banc*) (political advocacy restrictions on the use of funds by charities with bingo licenses was invalid under the First Amendment). Here, unlike the cases cited by the City, CSS has no similar option to "decline

the funds." Rather, the condition to which CSS must stipulate is coercive and is tantamount to "an offer that cannot be refused." *Alliance for Open Society Intern.*, at 214. To obtain a "license" from the City to continue providing safe homes for the most vulnerable members of our society, CSS must agree to espouse the City's approved viewpoints and disavow its own. Such a dynamic is inconsistent with the First Amendment's protections. *See Becerra*, at 2375 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–424 (1993) ("unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement" would give states "a powerful tool to impose 'invidious discrimination of disfavored subjects'")).

For decades, the Court's precedents have recognized that "it is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is ... squarely rejected by precedent." *McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring). Catholic teaching on the principles of the sanctity of marriage and the importance of traditional family values are essential tenets of CSS's approach to finding homes for foster

children.[4] CSS wishes to express its deeply held conviction that marriage is between a man and a woman and the importance of the family structure on the upbringing of a child while continuing to provide foster care services to Philadelphia's children as it has for decades. By conditioning CSS's ability to continue participating in the foster care system on the disavowal of its religious beliefs, the City has forced CSS to either violate its sacred religious tenets or cease participating in the City's foster care system.

When such a condition is imposed upon individuals seeking government benefits, the Court has resoundingly ruled that such conditions are unconstitutional "punish[ments]" on "the free exercise of religion." *Comer*, 137 S. Ct. at 2022 (citing *McDaniel*, 435 U.S., at 626) ("[t]o condition the availability of benefits...upon [a recipient's] willingness to … surrender his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties"). The City asserts that its so-called "Fair Practices Ordinance" applies to all groups

[4] "Marriage is a symbol of life... the Sacrament of love of Christ and the Church, a love which finds its proof and guarantee in the Cross," stated Pope Francis during his homily for the feast of Exaltation in 2014. Pope Francis to couples: Cross Illuminates purpose of marriage by Ann Schneible https://www.catholicnewsagency.com/news/pope-to-couples-cross-illuminates-purpose-of-marriage-91485; "There does not exist any 'opening' to unions between persons of the same sex as some people erroneously have claimed," Archbishop Giacomo Morandi, the doctrinal official, told Vatican News Dec. 19. Biblical document does not signal opening to gay marriage, official says by Cindy Wooden https://cruxnow.com/vatican/2019/12/biblical-document-does-not-signal-opening-to-gay-marriage-official-says/.

regardless of "race, ethnicity, color, sex, sexual orientation, gender identity, disability, marital status, [or] familial status."[5] However, the Free Exercise Clause extends beyond facial discrimination. Any "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993). The City's policies may appear facially neutral. The City's enforcement of those policies, however, has deliberately targeted CSS and religious groups with similar beliefs for punishment.[6]

Here, the discrimination against religious exercise is not the mere denial of a contract to participate in the City's foster care system. Rather, it is the City's refusal to allow CSS—solely because it is a Catholic organization—to participate with secular organizations in the same foster care system as it has done successfully for decades. *See Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993) (unconstitutional for the government to refuse to allow a church—solely because it is a church—to compete with secular organizations for a grant). The City's actions are antithetical to the guarantee of religious freedom promised by the Free Exercise

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[5] *Petition for Writ of Certiorari*, pg. 11.

[6] *Petition for Writ of Certiorari*, pg. 9 (Respondent investigated only "whether religious agencies certified same-sex couples" and "did not investigate secular agencies." Furthermore, in her meeting with CSS, the Commissioner of the Department of Human Services told CSS that "times had changed" and it is "not 100 years ago" right before they ceased granting foster care referrals to CSS.

Clause. *See Comer*, 137 S. Ct. at 2022 (citing *Sherbert*, 374 U.S. at 405) (government's requirement that a church "disavow its religious character" in order "to participate in a government benefit program...inevitably deter[s] or discourage[s] the exercise of First Amendment rights").

Although the City argues that CSS's participation in Philadelphia's foster care system will have an adverse impact on gay and unmarried couples that wish to participate, the Court has acknowledged that there are certain exercises of religion "that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1727 (2018). CSS is one of many participants in Philadelphia's foster care system. Most participants do not adhere to the same religious beliefs as those of CSS. These other participants offer numerous opportunities for gay and unmarried couples to serve as foster parents.[7] The principal purpose of the City's actions is not to further the opportunity for gay and unmarried couples to take in foster children. There is no such threat here. Rather, the City wants to force CSS to either disavow its cornerstone religious tenets or end its participation in Philadelphia's foster care system altogether. The imposition of such a requirement by the government is a violation of CSS's right to freely exercise its religion and therefore should be

[7] Foster Care Licensing Facilities listed by Philadelphia Department of Human Services, https://www.phila.gov/media/20190710120952/DHS_Philadelphia_Foster_Care_Agencies_041119.pdf

invalidated. *See 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").

## CONCLUSION

The decision of the Third Circuit permitting the City to substitute its values for the deeply held religious beliefs of the First Amendment is contrary to the majority of the Circuits, contrary to the Court's Free Exercise Clause Precedents, and contrary to the very purpose of the First Amendment. CSS therefore respectfully requests that it be overturned.

Respectfully submitted,

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