No. 19-123

In the

Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), should be revisited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of Free Exercise of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

SUMMARY OF ARGUMENT

This case presents an opportunity to reexamine this Court's rulings on the constitutional guaranty of the free exercise of religion. As the past three decades have made clear, the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), eviscerated that guaranty. And it did so unmoored from the original understanding of the Free Exercise Clause. *Smith*'s ahistorical nature thus puts it in deep tension with this Court's recent trend in cases involving the Religion Clauses of interpreting those clauses according to their original meaning.

What is more, the *Smith* decision was immediately rejected by bipartisan action of Congress and by the

---

[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

President. Had the *Smith* decision upheld the exercise of a right against majoritarian action, then such a rejection would be of less relevance. But *Smith* upheld majoritarian interference with an individual right. That Congress and the President would seek to overturn such a decision is noteworthy. Reexamination of *Smith* is thus also warranted as a measure of respect for the considered judgment of the coordinate branches of government that share in the responsibility of interpreting and upholding the Constitution.

REASONS FOR GRANTING THE WRIT

I. *Smith* Made No Attempt to Determine the Original Meaning of the Free Exercise Clause, In Tension with This Court's Recent Cases Involving the Religion Clauses.

A. This Court looks to original meaning and practice when interpreting the Religion Clauses

This decade the Court has decided three cases that together send a clear message regarding the proper methodology for determining the meaning of the First Amendment's Religion Clauses: look to the original meaning and historical practices.

1. *Hosanna-Tabor*

This Court began its return to a jurisprudence of original meaning as to the Constitution's Religion Clauses in the unanimous decision of *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). There, in determining whether the Constitution required a "ministerial exception" to federal antidiscrimination laws in the context of employ-

ment, the Court determined that both the Free Exercise Clause and the Establishment Clause independently required recognizing such an exception. *Id.* at 181.

In so concluding, the opinion first reviewed the history regarding free exercise of religion, starting with the Magna Carta in 1215, turning to the English Acts of Supremacy and Uniformity, addressing the American colonial experience, examining the First Amendment's adoption, and concluding with events from the early Republic. *Id.* at 182-185. Only after reviewing this history of religious liberty did the Court look at relevant precedent, which "confirm[ed]" what the original meaning analysis had revealed. *Id.* at 185.

It would seem methodologically inconsistent for this Court to rely first and foremost on historical analysis when interpreting the Free Exercise Clause in light of a federal employment antidiscrimination statute in *Hosanna-Tabor*, and then to jettison such an approach in other contexts. What is more, *Hosanna-Tabor* recognized that such discrimination laws are "valid and neutral law[s] of general applicability." *Id.* at 190. Yet this Court refused to apply *Smith* in that context. *Id.*[2]

[2] It is true *Hosanna-Tabor* may have sought to keep *Smith* on life support by noting that a church's selection of a minister is different from drug laws, but its reasoning was sparse and more declaratory than analytical on that point. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189-90 (2012).

2. *Town of Greece*

Just two years after *Hosanna-Tabor*, this Court faced the question of the constitutionality of legislative prayer under the Establishment Clause in *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014). In answering that question, the Court emphatically declared that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 576 (internal quotation marks omitted). Further, the Court declared that any First Amendment test "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 566. And the Court framed its inquiry as "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Id.* at 577.

The Court compared the contested practice against that historical yardstick, examining the practices of the Continental Congress, *id.* at 583-84, the practices of the First Congress, *id.* at 576, 578-79, and the practices and debates of Congress in the decade before the passage of the Fourteenth Amendment, *id.* at 576. Noting legislative prayer, even sectarian prayers, had existed continuously "[f]rom the earliest days of the Nation," *id.* at 584, the Court upheld the town's prayers, *id.* at 591-92.

3. *American Legion*

Finally, just this year the Court decided *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019). In determining whether a World War I memorial in the form of a Latin cross that was located in a public

park violated the Establishment Clause, the Court rejected the ahistorical *Lemon* test and instead turned to historical understandings and longstanding practices. *Id.* at 2080-85.

For example, the Court examined the "prevalen[t] … philosophy at the time of the founding [a]s reflected in … prominent actions taken by the First Congress" and President Washington as proof that "the Framers considered [some practices as] benign acknowledgment[s] of religion's role in society." *Id.* at 2087 (quoting *Town of Greece*, 572 U.S. at 576) (plurality opinion). And the Court held that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in th[e] tradition" of "recogni[zing] … the important role that religion plays in the lives of many Americans[,]" such monuments, symbols, and practices "are likewise constitutional." *Id.* at 2089 (plurality opinion). Thus, the cross did not violate the Establishment Clause based on this historical analysis. *Id.*

B. *Smith*'s interpretive methodology completely lacked historical analysis

Despite being authored by modern originalism's godfather, Justice Scalia, *Smith*'s analysis of the Free Exercise Clause lacked any inquiry into original meaning, instead focusing entirely on precedent—precedent that didn't start until a century after the Clause's adoption. *See* 494 U.S. at 877-89. Not even a single footnote examined original meaning even in the most cursory way.

As one scholar put it: "[t]his is a strange and unconvincing way to deal with the text of the Constitu-

tion, or of any law." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990). *See also id.* at 1116-17 ("[T]he Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the [meaning] of the [Clause's] text. This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning."). Of course, *Smith* could have reached the right decision by the wrong methodology. But the fact that the Court made no attempt to determine the Free Exercise Clause's meaning in light of original meaning and historical practice makes the decision's conclusions suspect at best. And *Smith*'s ahistorical analysis is in deep tension with this Court's recent Religion Clauses jurisprudence.

C. Justice Scalia's concurrence in *City of Boerne* failed to correct *Smith*'s missing original meaning analysis

Perhaps sensing the methodological inadequacies of his *Smith* opinion, Justice Scalia sought to buttress it with some historical analysis in his concurring opinion in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). However, Justice Scalia himself confessed that he only attempted to "respond briefly" to historical arguments raised by Justice O'Connor that *Smith* was inconsistent with the Free Exercise Clause's original meaning. *Id.* at 537 (Scalia, J., concurring in part).

And "respond briefly" he did. Moving quickly from one historical criticism to another of *Smith*, Justice

Scalia's analysis hardly gave serious weight to the historical evidence, or appeared to cherry pick that evidence. *Id*. at 538-44. Specifically, Justice Scalia made four arguments regarding the historical evidence. *See* 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, 832-40 (1998). These arguments suffered from "selective quotation" that ignored the fullness of founding-era colonial and state religious liberty protections, *id*. at 833, overly broad but less likely readings of key words in founding-era state constitutions, *id*. at 834-37, ignoring variations within these same constitutions, *id*. at 837, ignoring relevant evidence, *id*. at 838, interpreting statements regarding the accommodation of religion from period before the adoption of the First Amendment as though they showed an understanding of the legal force of that amendment, *id.* at 837-40, and committing the logical fallacy that the absence of early case law evidence of a reading of the clause in opposition to *Smith* is the evidence of the absence of that reading, *id*. at 840.

Ultimately, Justice Scalia dismissed the evidence against his position as nothing more than an "extravagant claim," boiling down *Smith* to the issue of "whether the people, through their elected representatives, or rather this Court, shall control the outcome of … concrete cases" involving religious liberty. *Id*. at 544. And his answer: "It shall be the people." *Id*. Given that by using the term "the people" Justice Scalia meant legislatures rather than the Constitution, *Smith*'s true concerns emerge: strengthening democratic rule and limiting judicial activism. Whatever the merits of those concerns, nowhere else in the

Bill of Rights does the Court determine that a constitutionally protected right is subject to the whims of the majority. In short, Justice Scalia's concurrence in *City of Boerne* does not rectify the *Smith* Court's failure to grapple with the original meaning of the Free Exercise of Religion.

II. Review Is Warranted to Interpret the Free Exercise Clause According to its Original Meaning.

The *Smith* decision moved closer to the view espoused in *Reynolds*, that the Free Exercise Clause protects only private belief and perhaps the right to recite the prayers of one's own choosing while behind the closed doors of a house of worship. *Compare Smith*, 494 U.S. at 876-77 *with Reynolds v. United States*, 98 U.S. 145, 164, 166 (1878). But moving in this direction threatens to rewrite the Free Exercise Clause to protect only freedom of belief, something already accomplished by the Free Speech Clause. *See West Virginia Bd. Of Ed. v. Barnett*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). And the founding generation understood the Religion Clauses to protect much more than mere private belief. In short, they sought to guaranty the protection of the right to *exercise* one's religion, not just espouse belief in its tenets. *See* Levi Hart, *Liberty Described and Recommended: In a Sermon Preached to the Corporation of Freemen in Farmington*, *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805 311 (Charles S. Hyneman & Donald

S. Lutz eds., 1983) ("Religious liberty is the opportunity of professing *and practicing* that religion which is agreeable to our judgment and consciences, without interruption or punishment from the civil magistrate.") (emphasis added).[3]

Important clues to the scope of religious liberty the founding generation recognized and intended to protect in the First Amendment can be found in the writings of those in founding era, particularly James Madison; the record of the First Congress; the 1787 Constitution; the actual practices of state governments at the time of the founding; and early court cases. Additionally, other important clues can be gleaned from the understanding of the Framers of the Fourteenth Amendment through which the First Amendment was incorporated against the states.

A. The Founders protected the free exercise of religion because they recognized duty to God as superior to duty to government.

The free exercise of religion recognized and protected by the First Amendment reflects the founding generation's view that the duty one owes to the Creator is both prior to and higher than any duty owed to government. Because this fundamental right pre-existed the Constitution, the Court should broadly accommodate Free Exercise claims. James Madison articulated the principal religious argument for the

---

[3] *See also* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1996) (finding that during the founding era the term "free exercise" "generally connoted various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, [and] religious education, *among others*") (emphasis added).

right to accommodation of religion in *Memorial and Remonstrance*, his famous attack on Patrick Henry's general assessment bill.

Madison defined religion as "the duty we owe to our Creator." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 11 (1785), *reprinted in* 5 THE FOUNDERS CONSTITUTION 83 (Phillip Kurland and Ralph Lerner, eds., 1987). Because beliefs cannot be compelled, he wrote, the "[r]eligion … of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it, as these may dictate." *Id.* According to Madison, the free exercise of religion is, by its nature, an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went on to explain, "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id. See also* James Madison, *On Property* (1792), *reprinted in* AMERICAN STATE PAPERS, at 159 (William A. Blakely ed., De Capo Press 1970) (1911) ("Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of [conscience] being a natural and unalienable right.").

The right to free exercise of religion, Madison reasoned, precedes civil society and is superior even to legitimate government. In *City of Boerne*, Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive

simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne*, 521 U.S. at 561 (O'Connor, J., dissenting).

The Founders appealed to the higher "Laws of Nature and Nature's God" to justify signing the Declaration of Independence. THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). Free Exercise claims likewise entail duties to a higher authority. Because the Founders operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670), *in* WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN (introduction and annotations by Andrew R. Murphy, Liberty Fund 2002).

Madison, therefore, did not conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he believed that citizens have the individual liberty under the Free Exercise Clause to live in accord with their faith. Madison observed that in matters of religion, a man "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION at 83.

Others from the founding era, both greater- and lesser-known figures, had similar views about the preeminence of religious liberty vis-à-vis other rights and

other demands on one's conscience. Thomas Jefferson similarly exalted religious liberty among the pantheon of rights when he referred to it as "the most inalienable and sacred of all human rights." Thomas Jefferson, *Freedom of Religion at the University of Virginia* (Oct. 7, 1822), *in* THE COMPLETE JEFFERSON: CONTAINING HIS MAJOR WRITINGS, PUBLISHED AND UNPUBLISHED, EXCEPT HIS LETTERS 958 (Saul K. Padover ed., 1943). Alexander Addison referred to religious liberty as "a natural right of a superior order for the exercise of which we are answerable to God," and placed the right above that of the freedom of the press in importance. Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1785 1090 (Charles S. Hyneman & Donald S. Lutz eds., 1983). In fact, so common were references to the superiority of the right of religious liberty to other rights that "[v]irtually all eighteenth[-]century writers embraced religious liberty as the 'first liberty' and the 'first freedom.'" John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 389 (1996).

B. The record of the First Congress supports interpreting the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

Two pieces of evidence from the First Congress support the position that *Smith* is wrong. The first is the only direct discussion in the records of the First Congress addressing the accommodation of religion from generally applicable laws. A special committee had proposed, as part of what eventually became the

Second Amendment, a provision declaring "no person religiously scrupulous shall be compelled to bear arms." 1 ANNALS OF CONG. 749 (1789) (J. Gales ed. 1834). The discussion that followed indicated that the Founders recognized, as part of their legal landscape, broad accommodation of religion.

Representative Jackson proposed to modify the original proposed exemption to require that those individuals pay for a substitute. 1 ANNALS OF CONG. 750 (1789) (J. Gales ed. 1834) (proposal of Rep. Jackson). Representative Sherman objected to Jackson's "upon paying an equivalent" modification, however, reminding his colleagues that "those who are religiously scrupulous at bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other." 1 ANNALS OF CONG. 750 (1789) (J. Gales ed. 1834) (remark of Rep. Sherman).

Moreover, Sherman's additional statement that "[w]e do not live under an arbitrary Government," *id.* implied that even the unconditional accommodation was unnecessary. For him, refusing to accommodate pacifist sects like the Quakers and Moravians from military service—those who were "religiously scrupulous" from bearing arms—would be the very definition of arbitrary government.

Sherman's view that Congress had nothing to do with religion was very common at the time the First Amendment was ratified. But even the position of the representatives who believed the provision was essential to free exercise, like Elias Boudinot, who hoped the new government would show the world that the United States would not restrict anyone's religious exercise, "strongly suggests that the general idea of free

exercise exemptions was part of the legal culture." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1501 (1990).

The second piece of evidence is the discussion of religious persecution in England of William Penn. Penn had been indicted for speaking to an unlawful assembly when he had held a worship service on a street because Quakers were legally prohibited from meeting inside a building for worship. *See id*. at 1472. When he appeared in court, Penn refused to remove his hat due to religious beliefs when ordered to do so by the judge. *Id*. Penn, though acquitted for the charge that compelled him to court, was held in contempt for refusing to remove his hat and imprisoned. *Id*.

The First Congress alluded to this well-known event while discussing the Bill of Rights. *See id.* at 1472 n.320. Theodore Sedgwick complained about the number and detail of the Select Committee's list of freedoms proposed to be protected, scoffing that "they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights." 1. ANNALS OF CONG. 759-60 (1789) (J. Gales ed., 1834). To which John Page responded that "whether a man has a right to wear his hat or not … ha[s] been opposed, and a man has been obliged to pull of his hat when he appeared before the face of authority," referencing Penn's case. *Id*. at 760. This reminder quieted opposition to the listed constitutional rights. Perhaps more importantly, that example did

not evoke a concern that Penn's religious liberty should fall before the neutral and generally applicable law of removing one's hat in court.

C. The Oath Clause also supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

That the Founders recognized and intended to accommodate religious conscience, which may sometimes conflict with federal practice, is further supported by the noticeable parallel between the proposal to exempt those with religious scruples against bearing arms and the Oath Clause, which ended up in the 1787 Constitution. The Oath Clause contemplated a protection for the free exercise of religion in those situations in which the Founders foresaw a potential conflict between federal practice and individual liberties.

The Oath Clause of Article VI provides state and federal elected representatives, judges, and executive officers "shall be bound by oath *or affirmation*, to support this Constitution." U.S. CONST. art. VI (emphasis added). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*) … ." U.S. CONST. art. II.

The exception for "affirmations" was an important addition to preserve free exercise of religion. Oaths were not sworn merely under penalty of secular punishment. The concept of an oath at the time of the founding was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of

afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. Letter from James Madison to Edmund Pendleton, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 125 (John P. Kaminski, *et al.* eds., Univ. of Virginia Press 2009) ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?").

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead recognized freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

All the early state constitutions sought to guarantee the free exercise of religion. In every state, the government had no power to prohibit peaceful religious exercise. Some state constitutions included the pragmatic Jeffersonian provision permitting governmental interference with religiously motivated acts against public peace and good order. But those state constitutions challenge the idea that religiously informed conduct as opposed to mere belief is not protected against generally applicable laws. *E.g.*, N.Y. CONST. of 1777, § 38; MASS. CONST. of 1780, art. II. Rather, in recognizing exceptions to free exercise even where the individual's acts were religiously motivated, those provisos tend to confirm that the founding generation understood "free exercise" to mean "freedom of action" and to include conduct as well as belief.

State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, some state constitutions contained religious conscience exemptions. The constitution of New Jersey, for example, excused any person from paying religious taxes. CONST. OF N.J. OF 1776, art. 18. Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. STEPHEN M. KOHN, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (1987). Statutes containing a similar

exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. MARGARET E. HIRST, THE QUAKERS IN PEACE AND WAR 331, 396-97 (1972). These early protections acknowledged the Quakers' higher duty to their Creator and accepted that Quaker religious belief forbade the use of arms, thus choosing to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War, where the religious consciences of religiously motivated pacifists were treated with great delicacy. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight.

Washington's commitment to this accommodation of religious conscience was demonstrated in the orders he issued to towns that were in the path of the British army's march. In January 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as are Conscientiously scrupulous against in every case*) should give their personal service." George Washington, Letter of January 19, 1777, *in* JAILED FOR PEACE, *supra* at 10 (emphasis added). The call for every man to "stand ready … against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great Britain, and treated as common enemies of the American states." Proclamation issued January 25, 1777,

in W. B. ALLEN, GEORGE WASHINGTON, A COLLECTION 85 (1988). Again, however, the order expressly excused those "conscientiously scrupulous against bearing arms." *Id.* Even in the face of the most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate their religious beliefs.

E. The nation's first case interpreting the Free Exercise Clause

There are only a handful of cases regarding religious liberty in the early Republic, all but one from state courts. The first of those early free exercise cases is of particular relevance to the validity of *Smith*.

In *People v. Philips*, N.Y. Ct. Gen. Sess. (1813), *reported in* WILLIAM SAMPSON, 1 THE CATHOLIC QUESTION IN AMERICA 5 (1813), decided just twenty-two years after the adoption of the First Amendment, a priest refused to divulge information he had learned during a confession. The district attorney responded to the priest's religious liberty defense with the argument that the constitutional right of religious freedom "expelled the demon of persecution from our land; but it has not granted exemption from previous legal duties." *Id.* at 51. The New York state court opinion, written by DeWitt Clinton, observed that "it is a general rule, that every man when legally called upon to testify as a witness, must relate all he knows." *Id.* at 96-98.

Yet, the court rejected British common-law precedent that would have compelled the priest's testimony and granted the priest an exemption from a neutral and generally applicable law based both on New

York's state constitution, which granted "free exercise and enjoyment of religious profession and worship," and based on the federal Constitution's Free Exercise Clause. *Id*. at 108-114 (concluding that Catholics "are protected by the laws and *constitution of this country*, in the full and free exercise of their religion") (emphasis added). Thus, the earliest interpretation of the First Amendment's Free Exercise Clause in the context of a requested religious exemption from neutral and generally applicable laws held that the Constitution required recognition of the exemption.[4]

F. Evidence around the time of the 14th Amendment's adoption

As Catholic Social Services is challenging a city's actions, it is relying on the Fourteenth Amendment's incorporation of the Free Exercise Clause against the states. At the time of the Fourteenth Amendment's adoption, the Free Exercise Clause was also understood to provide exemptions to neutral and generally applicable laws. *See generally* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106 (1994). In fact, Professor Lash has argued that the South created "a complex and highly regulated system of religious exercise—a system so

---

[4] The only antebellum federal case where a religious exemption under the Free Exercise Clause was raised was *Permoli v. Municipality No. 1 of the City of New Orleans*, 44 U.S. 589 (1845). There the Supreme Court heard an appeal from Louisiana state court regarding the constitutionality, under the First Amendment's Free Exercise Clause, of a prohibition of open-casket funerals and the subsequent prosecution of a Catholic priest for violating the ordinance. The Court would correctly dismissed the case because the First Amendment had yet to be incorporated against the states.

abhorrent to members of the thirty-ninth Congress that its abolition was explicitly cited as one of the purposes behind the Fourteenth Amendment." *Id*. at 1133-34.

Yet at times after the Civil War, the values of equality and religious liberty would clash. The Civil Rights Bill of 1870 was one of those moments. The initial draft prohibited discrimination based on "race, color, or previous condition of servitude" in "any accommodation, advantage, facility, or privilege furnished by innkeepers … by trustees and officers of *church organizations*, cemetery associations, and benevolent institutions incorporated by national or State authority." CONG. GLOBE, 42d Cong., 2d Sess. (1872), *as reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES 600 (Alfred Avins ed., Va. Comm'n on Constitutional Gov't in Richmond 1967) (emphasis added). There was sharp opposition to the inclusion of church organizations. *Id*. (opposition of Senator Matthew Carpenter claiming the inclusion violated the Constitution). And Senator Henry Anthony, while a proponent of equality, drew the line when it came to religious liberty. *Id*. at 610. He observed that he was "very anxious indeed to vote to give the colored people all their legal rights, but I shall not vote to … take from any person any religious rights." *Id*. In order for the bill to pass, the church provision had to be dropped. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 533 (1988). Despite a neutral and generally applicable law of civil rights protections, the post-Civil War generation still viewed religious liberty as superior to other rights.

The foregoing evidence demonstrates that the founding generation, and the generation that ratified

the Fourteenth Amendment, understood religious liberty to mean that even generally applicable laws do not permit government to compel a citizen to violate his religious beliefs. The Free Exercise Clause's original understanding thus forbids the City of Philadelphia from compelling Catholic Social Services to violate its religious beliefs—certiorari is warranted here to reconsider the Court's decision in *Employment Division v. Smith*.

III. Review Is Warranted Where the Court's Free Exercise Jurisprudence Has Been Rejected by the Coordinate Branches of Government, Which Have a Shared Responsibility for Interpreting the Constitution.

This Court is not alone in its authority to interpret the Constitution. Members of Congress and the President all take an oath to uphold and defend the Constitution as well. This Court has recognized the role of Congress and the President in interpreting the Constitution, albeit in a limited manner. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015). But the Court should take special notice where Congress seeks to protect individual liberties against majoritarian action. *Cf.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) (constitutional protections of speech are meant to protect against legislative majorities or dominant political groups).

Shortly after this Court's decision in *Smith*, Congress and the President acted jointly to reinstate protection of free exercise of religion for individuals against legislative majorities or dominant political groups. *See City of Boerne*, 521 U.S. at 512-15. The Religious Freedom Restoration Act was passed by voice vote in the House and by a vote of 97-3 in the

Senate before being signed into law by President Clinton.

This bipartisan (and nearly unanimous) action of the Congress and the President to reinstate the protection of a liberty against political majorities is noteworthy. The Court, however, rejected this bipartisan effort and refused to reconsider its decision in *Smith. City of Boerne*, 521 U.S. at 536. Oddly enough, this Court defended its decision in *Boerne* by noting "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *Id.* at 535-36. Congress and the President have a role in the interpretation of the Constitution. Further, respect for the Constitution counsels paying attention to the original understanding of liberties that it sought to protect.

CONCLUSION

During the American Revolution, when the cost in lost men and money was painfully high, John Adams observed that recent advances in religious liberty in some states "so far as to give compleat Liberty of Conscience to Dissenters" was "worth all of the Blood and Treasure which has been and will be Spent in this war." Letter of John Adams to James Warren (Feb. 3, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789 202 (Paul H. Smith et al. eds., 2000). This case presents this Court the opportunity to return to an interpretation of the protection of the free exercise of religion that is faithful to the original understanding of the First Amendment—and worth "all of the blood and treasure" spent to obtain it. The petition for certiorari should be granted.

August, 2019

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae