No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, *et al.*,

Respondents.

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

BRIEF OF AMERICAN ATHEISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a non-profit corporation, and has been granted 501(c)(3) status by the IRS. It has no parent company nor has it issued stock.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

SUMMARY OF THE ARGUMENT

The Petitioners, Sharonell Fulton, Toni Lynn Simms-Busch, and Catholic Social Services ("CSS"), insist that the best interests of the children served by CSS, the interests of the City of Philadelphia ("the City" or "Philadelphia") in preventing invidious discrimination, and the rights of foster parents in Philadelphia must be secondary to their own interest in preserving and promulgating their religious beliefs about sex and sexuality. Without a hint of irony, CSS argues that it *must* be permitted to continue providing foster care services *and* discriminate (out of religiously motivated hostility) against same-sex couples because,

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[1] The parties have consented to the filing of *amicus curiae* briefs in this matter. 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 its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

inter alia, two Philadelphia officials made statements about the Archdiocese of Philadelphia and the Pope. In so doing, the Petitioners' argument goes, those officials tainted the City's decisions with religious hostility and thereby violated Petitioners' right to the free exercise of their religious beliefs.

In arguing for that position, Petitioners dangerously warp this Court's jurisprudence regarding religious hostility under the First Amendment's Free Exercise Clause at the expense of the same Amendment's guarantee of Freedom of Speech for political and career government officials. Political officials, be they elected or appointed, must be able to speak freely on matters of public concern, including matters touching on religion. Career government employees, as citizens, must likewise be allowed to engage in the free exchange of ideas and express their views on matters of public concern outside of their officials duties. Petitioners are asking this Court for nothing less than a judicially created blasphemy law that will only function to chill the speech of government officials, for fear that even the most innocuous statement about religion will invalidate governmental actions.

The Petitioners' reasoning dangerously misreads this Court's prior decisions in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719, 1731 (2018). That line of cases established that government acts that do not facially single out religious beliefs may nonetheless violate the right to the free exercise of religion if the act intentionally discriminates against religious beliefs in practice, a "religious gerrymander," as the Court has termed it.

The courts, in order to determine whether such a gerrymander exists, examine the facts and circumstances surrounding the act, which include hostile statements of government decision makers. Petitioners cast aside the object of the inquiry—veiled religious gerrymanders—and argue instead that the statements of government officials alone are sufficient to invalidate a government act, regardless of whether a religious gerrymander exists. This position is both at odds with the decisions of this Court and unworkable in practice.

If the Court adopts Petitioners' position, the ramifications will be immediate and far-reaching. Atheists have, for centuries, been among the most reviled communities in the United States. Numerous statutes, practices, and policies at every level of government have in their roots a deep animosity toward nonbelievers. The forest of government actions that sprang from soil fertilized by hatred of the heathen, the godless, the "militant secularist," will face immediate challenge if, as the Petitioners argue, the statements complained of by the Petitioners violated their free exercise rights.

Government is not neutral toward religion when fawning praise of faith and the faithful and uncritical acceptance of their practices are the only things government officials may express. Yet that is exactly what the Petitioners ask of this Court. Such a proposition must be rejected.

ARGUMENT

According to the Petitioners, Philadelphia's decision not to enter into a new contract for adoption and foster care services with CSS violated their right to the free exercise of their religion because, among other things, they claim that statements made by two government officials demonstrated that the decision was the result of religious hostility. This argument would be laughable were it not so insidious.

I. PETITIONERS ALLEGE THE STATEMENTS OF TWO CITY OFFICIALS DEMONSTRATE RELIGIOUS HOSTILITY.

A brief summary of the statements of Mayor Kenney and Commissioner Figueroa is warranted for the sake of the issues raised later in this brief.

Although there is nothing to suggest that Mayor Kenney influenced the decisiom-making process of the Philadelphia Department of Human Services (DHS), *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 687 (E.D. Pa. 2018) (*Fulton I*), Petitioners appear to complain of three statements by Mayor Kenney,[2] two of which were made before Kenney was even elected as mayor:

> First, [Petitioners] cite a nearly three-year-old Philadelphia Magazine article about then mayoral candidate Jim Kenney in which

[2] In a footnote in their merits brief to this Court, Petitioners cite a fourth statement by Mayor Kenney that he was "hopeful that [Chaput's successor], who seems to be extremely sensitive and understanding, may have a different approach than [Chaput]," Brief for Petitioners at 10 n.2, Fulton, No.19-123, but it is not clear if the statement, which post-dates the acts complained of by the Petitioners by nearly two years, is cited as evidence of religious hostility.

> Kenney appeared critical of policies of the Archdiocese of Philadelphia and the Archbishop of Philadelphia, but appeared otherwise approving of Pope Francis, Catholic sisters, and other Catholic orders and programs. Second, [Petitioners] cite a nearly two year old Philadelphia Inquirer article in which Mayor Kenney was quoted as saying that Philadelphia Archbishop Chaput's guidelines on the implementation of a Catholic text, *Amoris Laetitia*, were "not Christian." Third, [Petitioners] cite a March 16, 2018 comment by the Mayor where the Mayor stated "we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status . . . . It's just not right."

Fulton I, 320 F. Supp. at 687.

The Petitioners also point to several comments made by Commissioner Figueroa on March 16, 2018, during negotiations aimed at continuing the contractual relationship between the City and CSS for foster care services. Commissioner Figueroa urged that CSS follow "the teachings of Pope Francis" and that "times" and "attitudes have changed." Brief for Petitioners at 11, *Fulton v. City of Philadelphia*, No.19-123 (U.S. filed May 27, 2020). She also commented that it was "not 100 years ago." *Id.* at 24.

Though the City was not able to come to a mutually acceptable agreement with CSS regarding foster care placement services, the City continues to contract with CSS for numerous other youth-oriented services, to the tune of approximately $17 million annually. Pet. App. 16a, 187a; JA 208-09, 505.

II. GOVERNMENT OFFICIALS RETAIN THE RIGHT TO SPEAK ON MATTERS OF PUBLIC CONCERN.

Like a student passing through the schoolhouse gate, Americans who hold elected, appointed, or career public office do not forfeit their free speech rights when they take their official positions.

Even the lowliest government employee retains the right to speak, outside of their official duties, on matters of public concern, *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). Elected officials and those they appoint to implement their agenda are entitled to significantly greater protection. In fact, political officials have far more freedom to express their views. This Court has long recognized that it is part and parcel of the duties of an elected official to debate and take a position on even the most controversial matters of public concern. Elected officials play a vital role in democratic societies, which "makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962).

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. . . . Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be

> represented in governmental debates by the person they have elected to represent them.

Bond v. Floyd, 385 U.S. 116, 135-37 (1966).

The petitioners in the present case seek to severely curtail this freedom and inhibit political officials' ability to meet this obligation, at least to the extent that the government official happens to be expressing an idea that offends the petitioners' religious sensibilities. In essence, the petitioners ask this Court to create a doctrine, akin to a blasphemy law, that would prohibit government officials from making any statements that offend religious sensibilities. Though such a holding would not subject officials to criminal sanction for their speech, *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring), nor create an explicit prior restraint, *Burstyn v. Wilson*, 343 U.S. 495, 503-05 (1952), the end result is the same: Political officials, "set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies," *id.* at 504-05, will be inhibited "from making [benign] statements" about matters touching on religious concerns, "thereby 'chilling' a kind of speech that lies at the First Amendment's heart," *Alvarez*, 567 U.S. at 733, (Breyer, J., concurring).[3]

In the name of preserving government neutrality, the Petitioners seek to establish a regime that would

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[3] That chilling effect will only be exacerbated if this Court expands the scope of the Religious Freedom Restoration Act to include claims against government officials in their individual capacities for damages. *See generally* Brief of American Atheists et al. as *Amici Curiae* in Support of Petitioners, *Tanzin v. Tanvir*, Docket No. 19-71 (U.S. Jan. 13, 2020).

effectively stifle all speech by government officials on matters that intersect with religion, unless that speech consisted of fawning praise for religious beliefs. Statements promoting religious figures and viewpoints, particularly those that are well-established, would be permissible, even encouraged, while statements critical of (or even neutral toward) policies and viewpoints of a religious nature would be evidence of hostility toward those beliefs and therefore forbidden since they could endanger any government action by rendering it a violation of the free exercise of religion.

III. THE REMARKS COMPLAINED OF ARE NOT EVIDENCE THAT PHILADELPHIA'S ACTIONS WERE MOTIVATED BY RELIGIOUS HOSTILITY.

Petitioners argue that the City, by refusing to renew CSS's contract to provide foster care placement services, acted with hostility toward CSS's religious beliefs and therefore violated CSS's First Amendment right to free exercise. In doing so, Petitioners drastically overreach. By basing their argument on the statements of Mayor Kenney, who had no involvement in the decisionmaking process, and by Commissioner Figueroa while she worked diligently to find a way to *maintain* Philadelphia's relationship with CSS in the foster care placement context, the petitioners dangerously warp the neutrality principle developed by this Court.

There is no serious dispute that government restrictions targeting religious activity are constitutionally dubious. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). This is true regardless of whether the act is directed at religiously-motivated activity in an overt

or covert manner. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). The determinative question is not whether the challenged act is facially discriminatory but, rather, whether "[t]he design of the[act] accomplishes instead a 'religious gerrymander.'" *Id.* at 535, quoting *Waltz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). "'[C]ontemporaneous statements made by members of the decision[-]making body'" are but one of the "[f]actors relevant" to determining whether a facially neutral act that, in practice, impacts the exercise of particular religious beliefs constitutes such a religious gerrymander. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. ___, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi*, 508 U.S. at 540).

To avoid confusion among the lower courts and ensure that the free speech rights of political and career government officials are preserved, the Court should reiterate that the *contemporaneous* statements of decision makers are but one factor to be considered in determining whether an act hindering religiously motivated conduct did so intentionally. Such statements are not sufficient, in and of themselves, to constitute a violation.[4] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf v. Usi Film Prods.*, 511 U.S. 244, 251 (1994).

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[4] Maintaining the *Lukumi* analysis also ensures that legitimate government efforts to accommodate religious exercise do not stray into unconstitutionally favoring religion. *See* Amicus Curiae Brief for Freedom From Religion Foundation, et al., at part 1(C).

Petitioners' application of these cases would warp this principle beyond recognition. They ask the Court to look past the fact that the Fair Practice Ordinance and the contract language incorporating it predate the City learning of CSS's policy, *Fulton I*, 320 F. Supp. 3d at 683, that DHS looked into the conduct of non-Catholic foster care agencies, *id.* at 687, that DHS did not "grant[] exemptions to the fair practice provisions of foster agency contracts for secular reasons, [while denying] CSS an exemption for religious reasons," *id.* at 689, and that DHS and the City continue to maintain a contractual relationship with CSS for numerous other youth-related services, Pet. App. 16a, 187a; JA 208-09, 505, to nonetheless find that the action discriminated against CSS out of religious hostility. They argue, in effect, that the statements of government officials—contemporaneous or not and without regard for the official's relation to the decisionmaking process—must be both the beginning and end of the inquiry. This interpretation is not only at odds with this Court's precedent and the lower courts' application of those decisions but, moreover, is unworkable in practice and will chill the speech of government officials.

A. The statements of Mayor Kenney and Commissioner Figueroa are not relevant to the inquiry.

The statements made my Mayor Kenney and Commissioner Figueroa bear little resemblance to those the courts have previously determined warranted consideration in determining the existence of a religious gerrymander.

As a threshold matter, the trial court came to the conclusion that there was no factual support to

conclude that Mayor Kenney "had any influence in DHS's decisions in this case." *Fulton I*, 320 F. Supp. 3d at 687. For this reason alone, his statements are irrelevant to determining whether DHS's action was motivated by religious animus. *Lukumi*, 508 U.S. at 540.

Setting aside his non-involvement in the decision-making process, two of his statements were far from contemporaneous to the action in question. The petitioners complain of "a nearly three-year-old Philadelphia Magazine article about then mayoral candidate Jim Kenney" and "a nearly two year old Philadelphia Inquirer article . . . ." *Fulton I*, 320 F. Supp. 3d at 687. Not only did Kenney make these statements long before the City decided not to renew its contract with CSS, but each was made before he, the City, or DHS became aware of CSS's discriminatory practice on March 9, 2018. *Fulton I*, 320 F. Supp. 3d at 671-72.

The one statement by Mayor Kenney complained of by the petitioners that was contemporaneous to the decision-making process makes no mention of religious beliefs and, if it can be said to shed any light whatsoever on the motivations of a decision-making process in which he had no involvement, indicates that religious beliefs had nothing to do with the ultimate outcome. *Fulton I*, 320 F. Supp. 3d at 687. Likewise, Commissioner Figueroa's statements shed no light on whether the City's decision was motivated by the Petitioners' religious beliefs. The trial court found that "Commissioner Figueroa's words themselves are unclear whether references to 'we' and 'our current Pope Francis' were references to her own beliefs as a Catholic who was educated by the Jesuit order, or as a representative of DHS." *Id.* at 689. These statements

appear to be, as the Third Circuit concluded, no more than a reasonable attempt by an official to "speak[CSS's] language and mak[e] arguments they may find compelling from within their own faith's perspective." *Fulton v. City of Phila.*, 922 F.3d 140, 157 (3d Cir. 2019) (*Fulton II*).[5] Her statements give no indication of whether the city's decision was made *because* of the Petitioners' beliefs or *regardless* of Petitioners' beliefs.

In short, none of the statements cited by the Petitioners are relevant to the aim of the inquiry because they provide no indication as to whether the object of the decision was neutral toward religion. *Lukumi*, 508 U.S. at 540.

B. Petitioners' skewed reading of the *Lukumi-Masterpiece* line of cases would be unworkable.

Perhaps aware that the statements they point to as evidence that DHS's decision was a religious gerrymander motivated by animus toward its religious beliefs are nothing of the sort, the Petitioners urge this Court to distort its prior cases and deem the statements to be evidence of religious hostility nonetheless. To do so would create a wholly unworkable standard.

Adopting the Petitioners' position would throw the lower courts into disarray. The district and circuit courts have been diligently applying the standard laid out in *Lukumi* for decades, examining the statements of government officials in service of the broader inquiry into whether a facially neutral government act nonetheless had as its object a religious gerrymander.

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[5] Atheists and members of religious minorities would likely count themselves lucky to be engaged by government officials in a similar manner.

See New Hope Family Servs. v. Poole, No. 19-1715-cv, 966 F.3d 145, 2020 U.S. App. LEXIS 22630, at *51-53 (2d Cir. 2020) (ambiguous statements examined alongside multiple other factors suggesting potential for a religious gerrymander in the context of a motion to dismiss); *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 332 (D.C. Cir. 2018) (merely listing religion as an impermissible topic for advertisements does not indicate hostility); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1078 (9th Cir. 2015) (administrative history of the challenged act was "a patchwork quilt of concerns, ideas, and motivations"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1133-34 (9th Cir. 2009) (same); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 430-31 (2d Cir. 1995) (anti-Hasidic statements were among many factors showing a free exercise violation); *New Creation Fellowship of Buffalo v. Town of Cheektowaga*, 2004 U.S. Dist. LEXIS 25431, at *126-28, 138 (W.D.N.Y. Jul. 2, 2004) (local commissioner speaking loudly (and even in anger) while visiting a house of worship to address enforcement of a local ordinance did not constitute animus); *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-753, 2019 U.S. Dist. LEXIS 151494, at *73-74 (S.D. Ohio Sep. 5, 2019) (comments critical of Christian doctrines did not violate free exercise rights because "comments were not contemporaneous with the decision" and there was no allegation that the defendant played a role in the decision-making process); *Slockish v. United States FHA*, 2018 U.S. Dist. LEXIS 174002, at *7-8 (D. Or. Oct. 10, 2018) ("A single comment made by one engineer, years before federal defendants began the process for this project is not the kind of hostility contemplated in *Masterpiece*."); *Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 408-13,

424-25 (S.D.N.Y. 2015) (suspicious timing, unequal treatment, and contemporaneous hostile statements showed discriminatory intent behind zoning ordinances); *Sephardi v. Town of Surfside*, No. 99-1566-CIV, 2000 U.S. Dist. LEXIS 22629, at *26-28 (S.D. Fla. Jul. 13, 2000) (statements that the town "does not want any churches or synagogues in that area or anywhere else" in a particular zone is not, by itself, sufficient to show a free exercise violation). These statements were considered only in pursuit of the broader inquiry into the government's motivation, not as potential violations in and of themselves.

The Petitioners' warped view of *Lukumi* and *Masterpiece* as standing for the proposition that statements interpreted as hostile, even in the absence of a religious gerrymander, should nonetheless be sufficient to invalidate a government action would place the courts in an impossible position. Can a court examine an allegedly aggrieved party's claim that a statement was hostile to determine whether it is genuine or a post-hoc rationalization? Is the aggrieved party's subjective sense that a statement was hostile relevant to the inquiry? What of the government official's subjective intent? What is to be done if a statement genuinely intended as benign is genuinely interpreted as hostile, as appears to be the case here? Should the hostile nature of the statement be determined through the eyes of a reasonable observer? How closely involved with the decision-making process must the speaker be for the statement to be relevant? Is a remark by an engineer in a report to an agency years before a challenged act, as in *Slockish*, too attenuated? What of decision makers who had conflicting intent, as in *Stormans*? What if one decision maker acts out of unconstitutional hostility while another is

motivated by the constitutional desire to maintain religious neutrality, yet they arrive at the same result?

If adopted, such a standard would be so vague and so resistant to consistent application that it would inevitably chill the speech of government officials. As discussed in Part I, above, all government officials retain some quantum of the right to speak on matters of public concern. For political officials, doing so is nothing short of an occupational necessity. *Bond*, 385 U.S. at 136-37; *Wood*, 370 U.S. at 395. Yet government officials may rightly prefer to stay mute under such a standard. Religion conceivably intersects with every possible topic of discussion and, as a result, an official has no way to know in advance whether an attempt "to speak the language" of the religious individual, or even an off-hand remark, could invalidate carefully crafted policy implemented in good faith.

In order to preserve the right to the free exercise of religion while also maintaining the free speech right of political and career government officials, the Court should reiterate the importance of the analysis laid out in *Lukumi*. Only after first determining that an adverse impact was "the effect of a law in its real operation," *Lukumi*, 508 U.S. at 535, did the Court then seek to determine "the city council's object from both direct and circumstantial evidence," *Lukumi*, 508 U.S. at 540. The second step of the analysis is only necessary because an "adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination." *Lukumi*, 508 U.S. at 535.

The instant case is just such a situation. The Petitioners, however, seek to eliminate the pivotal first step in the neutrality analysis by making the

mere fact of official utterances arguably hostile to a religious position both the beginning and end of the inquiry. They ask this Court to ignore copious evidence showing that DHS and the city did not target CSS for its beliefs but rather were seeking to enforce an ordinance addressing a social harm—one that only incidentally intersects with Petitioners' religious beliefs. In so doing, they would transform even benign invocations of religion into unconstitutional violations of free exercise.

IV. NUMEROUS GOVERNMENT ACTIONS AND POLICIES, ROOTED IN ANIMUS TOWARD ATHEISTS, WILL FACE CONSTITUTIONAL CHALLENGE IF PETITIONERS' POSITION IS ADOPTED BY THE COURT.

For more than two centuries, atheists and nonreligious people in America have been subjected to repeated, systemic, and genuine hostility from government officials. If the Court adopts the position of the Petitioners that the statements of Mayor Kenney and Commissioner Figueroa amounted to religious hostility, numerous government acts excluding atheists from public life or otherwise disadvantaging them because of their atheism will face constitutional challenge as violations of the free exercise rights of atheists.[6]

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[6] *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961); *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 872-73 (7th Cir. 2014); *Kaufman v. Pugh*, 733 F.3d 692, 696-97 (7th Cir. 2013) (atheism protected by Free Exercise Clause, though plaintiff failed to sufficiently plead such a claim); *Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005) (same); *Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1295 (M.D. Fla.

The petitioners argue that the statements of Mayor Kenney and Commissioner Figueroa "express[ed] hostility toward CSS's religious exercise," Brief for Petitioners at 17, and that this hostility showed that the action was not neutral as required by *Smith*, *id.* at 24, and *Lukumi*, *id.* at 25. Adopting such reasoning will ultimately force this Court, as well as district and circuit courts around the country, to either invalidate numerous government policies and practices or engage in embarrassing casuistry in order to *uphold* acts rooted in invidious hostility toward atheists while *striking down* those "tainted" by benign statements relating to Christianity.

A recent survey of 33,897 nonreligious Americans provided a glimpse into the hostility that members of this community are subjected to, often at the hands of government officials. S. Frazer, A. El-Shafei, & Alison Gill, *Reality Check: Being Nonreligious in America*, 14 (2020). This hostility comes in two forms: stigmatization and discrimination. *Id.* at 5-7. Nearly two in five survey respondents (37.9%) reported being treated like they did not understand the difference between right and wrong within the previous twelve months as a result of their beliefs about religion. *Id.* at 26. Just over a quarter reported being explicitly told, sometimes, frequently, or almost always, that they are not a "good person" because of their atheism. *Id.* In addition to the stigma that often accompanies a person's decision to be openly atheist, members of the community often face discrimination, particularly in the realm of education, where nearly a third of respondents (29.4%) reported experiencing negative

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2017); *see also United States v. Seeger*, 380 U.S. 163, 188-93 (1965) (Douglas, J., concurring).

interactions as a result of their lack of religious belief. *Id.* at 24. In addition, more than one in ten (11.0%) reported being subjected to discrimination by the court system and more than one in twenty (6.0%) reported discrimination by police. *Id*.

These experiences are not surprising in light of the views many Americans express about atheists. A 2017 survey conducted by Baylor University showed that atheists are the second most feared religious group in the United States. Institute for Studies of Religion, Baylor University, *American Values, Mental Health, and Using Technology in the Age of Trump* 13 (2017), https://www.baylor.edu/baylorreligionsurvey/doc.php/292546.pdf. 29.5% of Americans believe atheists have values inferior to their own. *Id.*

> Over half of Evangelicals believe that atheists have inferior values . . . . Around 3 in 10 Mainliners, Black Protestants, and Catholics say that atheists hold inferior values. Note that for all groups, except Americans with "other" or "no" religion, the values of atheists are the most disparaged.

Id. at 14. A 2019 survey by the Pew Research Center reached a similar conclusion, though the numbers suggest that the negative view of atheists has worsened since Baylor conducted its survey, with 36% of Americans believing atheists cannot be moral because they lack a belief in a deity. Pew Research Center, *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions* 72 (Dec. 17, 2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/12/PP_2019.12.17_Political-Values_FINAL.pdf

Unlike the Petitioners in the present matter, atheists in America are unlikely to interact with a government official willing to "speak[their] language and mak[e] arguments they may find compelling from within their own . . . perspective." *Fulton II*, 922 F.3d at 157. Quite the contrary. One U.S. Secular Survey respondent lamented the lack of "an atheist presence in elected officials," adding that "[t]he more religious people we vote in, the more discrimination against nonbelievers will continue[.]" *Reality Check* at 50.

A. Government officials frequently attack atheists because of their beliefs.

Federal officials in the Trump Administration regularly direct their ire at atheists who they term "secularists" or, in certain cases, "*militant* secularists." In contrast to several statements pointed to by the Petitioners in this case, these statements were made by officials directly involved in numerous decisions, were contemporaneous with those decision-making processes, and were directed not at discrete and unrelated matters but rather expressed a broad, explicit hostility at atheist Americans themselves, because of their atheism, without qualification.

Then-senator Jeff Sessions, during his confirmation hearing for Attorney General, stated in response to a question from Senator Whitehouse that he was "not sure" that "a secular person has just as good a claim to understanding the truth as a person who is religious." Attorney General Confirmation Hearing, Day 1 Part 3, C-SPAN (Jan. 10, 2017) https://www.c-span.org/video/?420932-6/attorney-general-confirmation-hearing-day-1-part-3. In a prior radio interview, Sessions had even gone so far as to say that the Department of Justice would be "less . . . lawful" as a result of a potential Clinton administration hiring more "secular"

(i.e., atheist) employees. Sandy Rios, *National Security with Sen. Jeff Sessions, Election News with Rick Manning, and George Soros with Kelly Monroe Kullberg*, American Family Radio (Nov. 7, 2016), https://www.listennotes.com/podcasts/sandy-rios-in-the/national-security-with-sen-rJDb1TO4y-W/

Sessions' successor, Attorney General William Barr, has managed to be even more explicit in his animosity, claiming in a speech at the University of Notre Dame that "militant secularists today do not have a live and let live spirit – they are not content to leave religious people alone to practice their faith." *Attorney General William P. Barr Delivers Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame*, U.S. Dept. of Justice (Oct. 11, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics. He blamed "modern secularists" for "the wreckage of the family," "soaring suicide rates, increasing numbers of angry and alienated young males, an increase in senseless violence, and a deadly drug epidemic," among other societal ills. *Id*.

This open hostility by Attorneys General Sessions and Barr toward "secular" Americans—and atheist employees of the Justice Department in particular—casts a constitutional shadow over a staggering number of decisions within the Department of Justice during their tenures, from employment matters and Civil Rights Division cases to FBI investigations and federal prosecutions.

In addition to hostility exhibited by federal officials, lawmakers in states around the country have, in recent legislative sessions, introduced bills that are expressly hostile to secular humanism. These law-

makers, through the bills they introduced, expressly denounced secular humanism as a religion that "tends to erode community standards of decency," H.B. 2318, 88th Leg., Reg. Sess. § 2:18-38 (Kan. 2019); H.B. 2320, 88th Leg., Reg. Sess. §§ 2(g), 5(a) (Kan. 2019); Assemb. B. 8077, 242d Leg., Reg. Sess. § 2:32-54 (N.Y. 2019); Assemb. Res. 293, 242d Leg., Reg. Sess. (N.Y. 2019); S.B. 778, 57th Leg., 1st Reg. Sess. §§ 2(15)-(20) (Okla. 2019); H.B. 7879, 2019-20 Leg., Reg. Sess. §§ 3:16-19 (R.I. 2019); H.B. 1490, 111th Gen. Assemb., Reg. Sess. §§ 3(15)-(20), 6(3)-(7) (Tenn. 2019); H.B. 2935, 66th Leg., 2020 Reg. Sess. (Wash. 2020); H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020), "promote[s] licentiousness," Wash. H.B. 2935 § 1(29), or "desensitize[s], divides, dehumanize[s], depersonalize[s], and has been shown to increase[] suicide rates[,]" W. Va. H.C.R. 95, 84th Leg., 1st Reg. Sess. (W. Va. 2020), and accuse secular humanists of engaging in a campaign to "persecute nonobservers of the religion of Secular Humanism and to infiltrate public schools with the intent to indoctrinate minors to the Secular Humanist worldview[,]" N.C. H.B. 65, § 2:12-16. They disparage secular humanism by expressly equating it with "zoophilia and objectophilia." Kan. H.B. 2320; *see also* W. Va. H.C.R. 95. Some lawmakers, in introducing these bills, even go so far as to declare that "secular humanism is a *disfavored* religion because it involves indecent speech that tends to erode community standards of decency and promote licentiousness[.]"[7] Wash. H.B. 2935 (emphasis added).

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[7] In addition to being overtly hostile to secular humanism, the bills attempt to *define the tenets* of secular humanism, ostensibly in an effort to *avoid* an Establishment Clause violation. Kan. H.B. 2318, § 1(b); Kan. H.B. 2320; N.Y. Assemb. B. 8077; N.Y. Assemb. Res. 293; N.C. H.B. 65, § 1:31-34; Okla. S.B. 778, §§ 2(12), 5(C)(2)-

Although none of these bills were enacted, several contemporaneous bills aimed at the same objectives were passed by the same legislative bodies. For example, in Tennessee, the legislators who cosponsored House Bill 1490, the "Life Appropriation Act," also cosponsored House Bill. 2263 that same legislative session. Through House Bill 2263, many of the same abortion restrictions became law, albeit without the disparaging comments about secular humanism. H.B. 2263, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019).

At one time, this Court and the lower courts were skeptical of looking to the statements or intentions of individual lawmakers when determining the object of a legislative enactment. However, the Court's recent decision in *Espinoza v. Montana Department of Revenue* suggests that this skepticism may have fallen away, ___ U.S. ___, 207 L. Ed. 2d 679, 694 (2020) (examining lawmakers' intentions with regard to the Blaine Amendment); *see also Id.* at 704-11 (Alito, J., concurring); *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 1394 (2020) (statements of constitutional delegates indicate that acts were racially motivated), if it ever applied in the First Amendment context in the first place. *Lukumi*, 508 U.S. at 547 ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."); *see also McCreary County v. ACLU*, 545 U.S. 844, 862 (2005) ("But scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts.").

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(7); R.I. H.B. 7879, § § 2:23-26, 4:6-7; Tenn. H.B. 1490, §§ 3(11)-(12); Wash. H.B. 2935; W. Va. H.C.R. 95 (W. Va. 2020); *see also* H.B. 1215, 95th Gen. Assemb., 2020 Reg. Sess. § 2(3) (S.D. 2020).

Under the Petitioners' formulation, laws such as the one recently enacted by Tennessee are motivated by religious hostility toward secular humanists and therefore must survive strict scrutiny if subjected to a free exercise challenge.

B. "In God We Trust" was adopted as the national motto as a result of explicit hostility toward nonbelievers.

The anti-atheist animus exhibited by the statements from executive branch officials and the declarations by legislators in the recent bills mentioned above is nothing new. The adoption of "In God We Trust," first as a slogan to be inscribed on Union coins during the Civil War, then as the national motto at the height of McCarthyism, was deeply rooted in animus toward atheists. Even today, numerous governmental bodies, agencies, and officials are choosing to display the motto as a reaction to the steady growth of the atheist and nonreligious population in the United States.

Prior to being statutorily declared as the national motto, "In God We Trust" was inscribed on U.S. coins. *History of "In God We Trust,"* U.S. Treas. Dept. https://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx (last visited on July 9, 2020). The "first mention" of including any reference to the Christian god (and it is explicitly a reference to the Christian god) on American coinage came in a letter from Rev. M. R. Watkinson, of Ridleyville, PA, in a letter to the Treasury Secretary at the time, S. P. Chase, dated November 13, 1861. U.S. Treas. Dept., Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1896, H. Rep. Doc. No. 54-8, at 260 (1897). Rev. Watkinson remarked in his letter that a recognition of the Christian god on the

Union's coins would "relieve us from the ignominy of heathenism." *Id.* at 260-61. One week later, Secretary Chase instructed the Director of the Mint, James Pollock, that "[t]he trust of our people in God should be declared on our national coins." *Id.* at 261. (In both the Union and Confederacy, "heathenism" and non-belief in Christianity were synonymous with wickedness, barbarism, and a general uncivilized nature. *See Confederate School Books—What They Contain—Their Influence on the Uprising Generation*, N.Y. Times, 1 (Aug 13, 1865); *Condition of the South—Proceedings of the Texas Constitutional Convention*, N.Y. Times, 1 (Mar. 18, 1866).) It did not take long for the Mint to follow through on Chase's instructions. *History of "In God We Trust," supra*.

Congress did not see fit to declare an official motto of the United States until 1956, Act of Jul. 30, 1956, Pub. L. No. 84-851 (codified at 36 U.S.C. § 302), when the nation was deep in the morass of McCarthyism. It did so without debate, 102 Cong. Rec. 6359 (1956), but this presents no real barrier to determining whether religious hostility played a role in the decision-making process, since the legislative history is but one form of evidence relevant to the inquiry. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at 540. A cursory examination of the "historical background of the decision" and "statements made by members of the decision[-]making body" reveal that animosity toward atheists was pervasive among both lawmakers and the general public at that time and motivated the enactment of the motto. "In God We Trust" was statutorily declared as the national motto (superseding the far more inclusive unofficial motto, "*E pluribus unum*") in order to differentiate the United States from the "godless Communists" and to be an atheist during this

time was widely regarded as indistinguishable from being a Soviet agent. 102 Cong. Rec. at 5907 (1956). For many, then and now, to be an atheist was to be un-American. This anti-atheist sentiment[8] is perhaps best summed up by President Eisenhower: "Without God, there could be no American form of Government, nor an American way of life. Recognition of the Supreme Being is the first—the most basic—expression of Americanism." Associated Press, *Eisenhower Urges Nation To Join 'Back to God' Drive*, New York Herald Tribune, Feb. 21, 1955, at 1; *see also Quotes*, Dwight D. Eisenhower Presidential Library, https://www.eisenhowerlibrary.gov/eisenhowers/quotes (last accessed Jul. 10, 2020).

The national motto remains tied to the idea that to be an atheist is to be not truly American or moral. In the last several years, state and local government entities around the country have increasingly required the display of the national motto in public buildings, William L. Spence, *Idaho lawmakers vote to add 'In*

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[8] This sentiment permeated every level of American government. Just three years after the motto was adopted, Mr. Roy R. Torcaso challenged Maryland's statute barring atheists from holding public office. *Torcaso*, 367 U.S. 488. During oral arguments before this Court in that case, Maryland argued that the exclusion of "the ungodly," Oral Argument at 1:12:47, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (No. 61-373), https://s3.amazonaws.com/oyez.case-media.mp3/case_data/1960/373/19610424a_373_part2.delivery.mp3 (last accessed Aug. 14, 2020), was a reasonable "safeguard[] to assure to itself a security of good conduct for public officials," *Id.* at 1:03:05. "[T]he theory . . . is for the purpose of equating that declaration of a belief in the existence of God with moral accountability for one's actions." *Id.* at 1:04:04. In short, according to Maryland in 1961, atheists were properly excluded from public office because they had no moral accountability.

God We Trust' to chambers, Lewiston Tribune (Feb. 28, 2020), https://lmtribune.com/northwest/idaho-lawmakers-vote-to-add-in-god-we-trust-to/article_c928b4bc-e053-5ccf-9667-03b4f1e22468.html, on law enforcement vehicles, Jim Talbert, *Tazewell hosts community prayer service*, SWVA Today (May 7, 2019), https://swvatoday.com/news/article_b3fdacd0-5679-11e6-a25f-73112a081aa3.html ("officers put 'in God we Trust' on their vehicles not as the country's motto but to show their belief in God"), and in public schools, Hemant Mehta, *A KY School District Found a Brilliant Loophole for the "In God We Trust" Law*, Friendly Atheist (Aug. 14, 2019), https://friendlyatheist.patheos.com/2019/08/14/a-ky-school-district-found-a-brilliant-loophole-for-the-in-god-we-trust-law/, all as part of a coordinated effort, generally referred to as "Project Blitz," to combat the steady growth in the number of atheists and adherents to non-Christian faiths in the United States.[9] *See Report and Analysis on Religious Freedom Measures Impacting Prayer and Faith in America*, Congressional Prayer Caucus Foundation, https://static1.squarespace.com/static/5bd8728e7eb88c68a5c8509f/t/5c70487c08522984a598facf/1550862463524/Project+Blitz+2019.pdf (last accessed Aug. 11, 2020); *Toolkit*, Congressional Prayer Caucus Foundation, https://cpcfoundation.com/first-freedom-coalition-project-blitz/ (last accessed Aug. 11, 2020); Bob Allen, *Baptist groups join coalition opposing 'Project Blitz' playbook for pro-Christian legislation*, Baptist News Global (Feb. 1, 2019), https://baptistnews.com/article/baptist-groups-join-coalition-opposing-project-blitz-pl

[9] "Project Blitz" attempts to advance Christianity while denigrating and showing outright hostility to atheists and adherents to religious minority groups in numerous ways beyond emphasizing "In God We Trust."

aybook-for-pro-christian-legislation/; *Project Blitz: An Attack on Equality, Secular Values, and Religious Freedom*, American Atheists, https://www.atheists.org/wp-content/uploads/2018/08/Project-Blitz-Fact-Sheet.pdf (last accessed Aug. 11, 2020).

Arkansas, for example, now requires the "prominent" display of the national motto in every "[p]ublic institution of higher education and elementary and secondary school library and classroom," as well as every "[p]ublic building or facility . . . maintained or operated by state funds." Ark. Code Ann. § 1-4-133 (2019). State Representative Jim Dotson, the lead sponsor of the series of bills now reflected in the statute, "said the national motto reflects a central part of what it means to be an American . . . ." Moriah Balingit, *Does 'In God We Trust' belong in schools?*, Wash. Post (Dec. 2, 2018), https://www.washingtonpost.com/local/education/does-in-god-we-trust-belong-in-schools-more-and-more-states-say-yes/2018/12/01/d846f870-e863-11e8-b8dc-66cca409c180_story.html

When Minnesota State Senator Scott Dibble opposed a similar effort in his state, he was promptly accused of being part of a "war on God," while the bill's proponent, State Senator Dan Hall, denigrated atheists and non-Christians by equating the lack of belief in the Christian god with a general lack of disrespect. Lauren DeBellis Appell, *Minnesota Democrats wage war on God, faith and American history*, Fox News (May 13, 2018), https://www.foxnews.com/opinion/minnesota-democrats-wage-war-on-god-faith-and-american-history. He "describ[ed] the lack of 'respect' in schools because of an 'anti-faith movement' in the country." Katherine Rodriguez, *Bill Allowing 'In God We Trust' Motto in Schools Challenged in MN Senate*, Breitbart (May 6, 2018), https://www.breitbart.com/

politics/2018/05/06/bill-allowing-god-trust-motto-schools-challenged-mn-senate/.

Given the hostility toward "heathens" and the "godless" that motivated every stage of the adoption of "In God We Trust" as the national motto, recent actions by state and local governments around the country to mandate the display of the motto must face strict scrutiny if the Petitioners' argument is adopted.

C. Atheists are subjected to unequal treatment when engaging in expressive activity.

This same hostility that prompted the enactment of the motto motivated the display of depictions of the Ten Commandments, including the display previously upheld by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005), in the 1950s and 1960s. Organizations like the American Legion donated numerous monuments to the Ten Commandments in an effort to combat "godless Communism" as part of its "Back to God" project. Associated Press, *Nation Needs 'Positive Acts' Of Faith, Eisenhower Says*, N.Y. Times, Feb. 8, 1954, at 1. In the decades since, these anti-atheist attitudes have continued to motivate government actions implicating expressive activity.

In Porter County, Indiana, when an atheist sought to participate in "Holly Days," an annual, local celebration, and engage in the same expressive activity on courthouse property that had previously been granted to entities expressing religious viewpoints, members of the Porter County Board of Commissioners were openly combative with the resident, accusing him of "causing trouble" and admonishing another atheist present at the meeting to "[g]o back to Michiana." Hemant Mehta, *After Simple Request, Indiana Official*

Tells Atheists to Stop "Causing Trouble," Friendly Atheist (Oct. 9, 2019), https://friendlyatheist.patheos.com/2019/10/09/after-simple-request-indiana-official-tells-atheists-to-stop-causing-trouble/. The councilmember was so incensed by the atheist's request for equal treatment that he had to be *physically restrained* by the county attorney. *Id.*

Until recently, a bench donated by the local chapter of the VFW and bearing the inscription "Men Who Aren't Governed By God Will Be Governed By Tyrants" stood in Justus Park in Oil City, Pennsylvania. Chris Rossetti, *Tyrants Bench to be Removed from Oil City's Justus Park Given Back to VFW*, Explore Venango (Apr. 28, 2017), https://explorevenango.com/tyrants-bench-to-be-removed-from-oil-citys-justus-park-given-back-to-vfw/. Though Oil City eventually removed the "Tyrants Bench" and the surrounding display from Justus Park and returned it to the VFW chapter that initially donated it, the weeks leading up to that decision were punctuated by heated debate, during which Oil City's mayor accused atheist groups of targeting depressed communities in order to take advantage of their weak financial circumstances. Ron Wilshire, *"No" to Atheist's Request May Be Expensive; Tyrants Bench May Be Moved*, ExploreClarion.com (Nov. 30, 2016), https://www.exploreclarion.com/2016/11/30/no-to-athiests-request-may-be-expensive-tyrants-bench-may-be-moved/#more-239652. Had Oil City elected instead to retain the bench, the Mayor's statement, under the Petitioners' formulation, may have been sufficient on its own to invalidate the decision to keep the bench as a violation of the free exercise of religion.

Atheists delivering (or seeking to deliver) secular invocations to governmental bodies at the local, state, and federal level have encountered unbridled hostility

from numerous government officials. On August 4, 2020, Sarah Ray delivered a secular invocation at a meeting of the Lake Wells City Commission, two members of which refused to be in the room during her remarks. Chevon T. Baccus, *Atheist Offering Invocation at Commission Meeting Met with Resistance, Prayer*, Lake Wales News (Aug. 5, 2020), https://www.lakewalesnews.net/story/2020/08/05/news/atheist-offering-invocation-at-commission-meeting-met-with-resistance-prayer/1722.html. On multiple occasions, two members of the Arizona Legislature have encountered religiously motivated hostility from fellow lawmakers, including House leadership, after delivering secular invocations. Joseph Flaherty, *'God is in the Gallery': John Kavanagh Mocks Athena Salman's Secular Prayer*, Phoenix News Times (Feb. 13, 2019), https://www.phoenixnewtimes.com/news/god-in-the-gallery-arizona-legislator-criticized-mock-secular-speech-11205643.

If this Court adopts the Petitioners' test, American Atheists and other organizations will utilize it to zealously defend the rights of atheists who have, for centuries, suffered the consequences of religiously motivated government hostility.

CONCLUSION

For the foregoing reasons, American Atheists respectfully requests that this Court AFFIRM the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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