No. 19-968

IN THE
Supreme Court of the United States

CHIKE UZUEGBUNAM, ET AL.,

Petitioners,

v.

STANLEY C. PRECZEWSKI, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law (hereinafter "the Foundation") is an Alabama-based–legal organization dedicated to defending religious liberty and promoting a strict reading of the Constitution as intended by its Framers. The Foundation believes that religious liberty is the God-given right of all people claimed in the Declaration of Independence and protected by the First Amendment. The Foundation has an interest in this case because the Respondents' attempts to defend their actions involved classifying the Petitioners' preaching as "fighting words." If sharing the Gospel falls under the fighting-words doctrine, then it will be "open season" on Christians who preach what Christians have preached for two thousand years and what was preached at the time of the Founding.

SUMMARY OF THE ARGUMENT

Over the past five years, this Court has repeatedly gone out of its way to address impending threats to religious liberty. Even when the Court as a whole has not done so, the individual Justices of this Court have

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[1] Pursuant to Rule 37.2, all parties were given ten days' notice of intent to file this brief and have consented to its filing. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

repeatedly flagged underlying religious liberty issues in the cases before them. This has been especially true when religious liberty has clashed with the orthodoxy of political correctness. The message this Court has been sending to the nation is that the protection of religious liberty in such cases presents "an important federal question." Supreme Court Rule 10(c).

In this case, the Respondents threatened Petitioners' religious liberty in an incredibly dangerous way. They claimed that Petitioners' speech, in which they simply shared the Gospel of Jesus Christ, fell under the antiquated "fighting words" doctrine. In other words, the government claimed that sharing the message that Christians have been sharing for 2,000 years is speech that is calculated to incite a reasonable person to violence.

The Foundation has never before seen sharing the Gospel classified as "fighting words." The Framers of the First Amendment certainly considered sharing the Gospel to be protected by the First Amendment, and the same is true today. If this Court fails to rebuke that argument, then the consequences for religious liberty will be disastrous.

As the Petitioners stated in their brief, this case is important because of the rights that nominal damages represent. The Foundation agrees, adding only that the Respondents' attempts to dismiss the Petitioners' preaching as fighting words makes it all the more important to grant certiorari and condemn

the blatantly unconstitutional suppression of Petitioners' preaching.

ARGUMENT

I. The Justices of this Court have repeatedly emphasized the importance of the issue in this case.

A. The clash between political correctness and Christianity

At the heart of this case is the Petitioners' right to share their religious convictions. The Court knows well that traditional Christianity is under attack in this nation's culture wars. This Court's job is to ensure that free exercise of religion and freedom of speech are protected in that battle.

The Foundation is not aware of any attempt by Christians to use force to silence the speech of those who oppose them, but it is very aware of attempts to silence the speech of Christians. Over the past decade, there have been many lawsuits in which the government has attempted Christians to speak or act contrary to their religious convictions. *See, e.g.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (attempting to punish a Christian baker for not celebrating a same-sex wedding); *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (forcing Catholic adoption agency to place children with same-sex couples), *cert granted*, *Fulton v. City of Philadelphia*, No. 19-123

(U.S. Feb. 24, 2020); *State of Washington v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017) (forcing Christian florist to provide custom floral arrangement for a same-sex wedding against her will), *rev'd sub nom. Arlene's Flowers, Inc. v. Washington*, 138 S.Ct. 2671 (2018), *aff'd sub nom. State of Washington v. Arlene's Flowers*, 441 P.3d 1203 (Wash. 2019). The list could go on, but the point is that there is a strong and terrible movement in the United States to punish Christians and religious Americans who dissent from the new orthodoxy of political correctness.

B. Even in *Obergefell v. Hodges*, all nine Justices went out of their way to stress the importance of protecting religious liberty.

The justices of this Court have gone out of their way many times over the last five years to stress that such suppression of religious speech is impermissible. Even in *Obergefell v. Hodges*, which set the issue of same-sex marriage on a collision course with religious liberty, the majority opinion stated:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. *The First Amendment ensures that*

> *religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths*, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015) (emphasis added).

The dissenters in *Obergefell*, however, were not convinced that the threat to religious liberty was abated by this concession. Chief Justice Roberts, joined by Justices Scalia and Thomas, said,

> Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. I.
>
> ....
>
> The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage.... The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Id. at 2625 (Roberts, C.J., dissenting).

Justice Thomas, joined by Justice Scalia, likewise warned, that the Court's decision in *Obergefell* would

have "unavoidable and wide-ranging implications for religious liberty." *Id.* at 2638 (Thomas, J., dissenting) (citations and quotation marks omitted). And Justice Alito, in a nearly prophetic warning, predicted, "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, the will risk being labeled as bigots and treated as such by governments, employers, and schools." *Id.* at 2642-43 (Alito, J., dissenting).

Thus, all nine justices in *Obergefell* recognized that an inevitable clash with religious liberty was coming, and all nine stressed that religious liberty must be protected. Although the four dissenters stressed the need for more protection, all nine seemed to agree, at the least, that the First Amendment would protect religious speech.

Although the clash with same-sex marriage is not necessarily the issue in this case, the concurrence of all nine Justices in *Obergefell* shows that the protection of religious speech, even when the hearers find it offensive, is incredibly important. Why? Because religious liberty is our first freedom, fundamental to our system of government, and an ultimately an unalienable right that is a gift from our Creator.

C. The Court has protected religious liberty from the attacks of political correctness four times in the last five years, illustrating that this is a very important issue.

After *Obergefell*, the Court has ruled in favor of religious liberty three times. In *Masterpiece Cakeshop*, it ruled 7-2 in favor of a Christian baker when the government demonstrated hostility towards his religious objections to same-sex marriage. *Masterpiece Cakeshop*, 138 S.Ct. at 1729-31. Since then, the Court has reversed the judgments of two state appellate courts who ruled against Christians that did not wish to use their artistic talents to promote homosexuality and remanded them for reconsideration in light of *Masterpiece Cakeshop*. *Arlene's Flowers*, 138 S.Ct. at 2671-72; *Klein v. Oregon Bureau of Labor & Indus.*, 139 S.Ct. 2713 (2019). This Court also just granted certiorari to determine whether forcing a Catholic adoption agency to place children with same-sex couples contrary to their religious beliefs violates the First Amendment. *Fulton v. City of Philadelphia*, No. 19-123 (U.S. Feb. 24, 2020).[2]

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[2] The Foundation respectfully submits that the Court did not go far enough in *Masterpiece Cakeshop* in recognizing the full scope of protection that the Free Exercise Clause provides, and it hopes that the Court will take the opportunity to consider that issue in *Fulton*. Nevertheless, the Foundation's point in discussing *Masterpiece Cakeshop* and subsequent decisions is to illustrate the Court's trend of addressing religious liberty issues.

In addition, the Court protected religious liberty from the oppression of abortion in *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018). In that case, California attempted to make pro-life advocates advertise pro-abortion materials. The Court recognized that this was content-based discrimination and held that the law was unconstitutional. *See id.* at 2378. Justice Kennedy, joined by Chief Justice Roberts and Justices Alito and Gorsuch, concurred, arguing that the First Amendment prohibits the government from forcing people to say something contrary to their religious or moral beliefs. *Id.* at 2379 (Kennedy, J., concurring).

Thus, this Court has continually demonstrated that the protection of religious liberty when it collides with the orthodoxy of political correctness is an "important question of federal law." Supreme Court Rule 10(c).

D. Individual Justices have warned many times over the last five years that religious liberty is under attack and must be protected.

The statements of individual justices also illustrate that the protection of religious liberty remains an important question of federal law worthy of consideration by this Court.

In their concurrences in *Masterpiece Cakeshop*, Justices Thomas and Gorsuch went out of their way to address even more fundamental First Amendment issues than the majority opinion discussed. Colorado

seemed to believe it could regulate Jack Phillips's religious beliefs because (in Colorado's opinion) saying homosexuality was sinful was somehow "offensive" or "stigmatizing." Justice Thomas pointed out that the Court had protected far more "offensive" or "stigmatizing" speech in the past, such as signs that say, "God Hates Fags," or white supremacists burning a 25-foot cross, or preventing gays from marching in a parade. *Masterpiece Cakeshop*, 138 S.Ct. at 1747 (Thomas, J., concurring in part and concurring in judgment). Justice Thomas certainly did not condone those actions; his point was that if the Court protected such speech that truly was offensive, then it should also have no problem protecting religious speech that objects to same-sex marriage.

Likewise, Justice Gorsuch, joined by Justice Alito, noted that some would find Phillips's beliefs offensive. Neither Justice Gorsuch nor Justice Alito agreed with that proposition. But for the sake of argument, even if Phillips's beliefs really were offensive, they wrote, "Just as it is the proudest boast of our free speech jurisprudence that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive." *Id.* at 1737 (Gorsuch, J., concurring). Thus, Justices Gorsuch and Alito demonstrated that the offensiveness of religious beliefs is irrelevant. The Free Exercise Clause protects the free exercise of religion, regardless of whether it offends others.

Last year, in *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634 (2019), the Court denied a petition for a writ of certiorari, in which a high-school football coach claimed that a school violated his freedom of speech when it prohibited him from praying at the 50-yard line after football games. Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, issued a statement respecting denial of certiorari, arguing that factual issues made it hard to address the free speech claim but encouraging Coach Kennedy to bring his free exercise claim. They noted:

> "What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith — even when the coach is plainly not on duty.... The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable."

Kennedy, 139 S.Ct. at 637 (statement of Alito, J.).

There have been several other cases over the last two years where justices of this Court have flagged underlying religious liberty issues that should be addressed in future cases. *See, e.g.*, *Patterson v. Walgreen Co.*, No. 18-349 (U.S. Feb. 24, 2020) (Alito, J., joined by Thomas and Gorsuch, JJ., concurring) (arguing that Title VII gives religious liberty more protection than the Court's precedents recognize); *Roman Catholic Archdiocese of San Juan, Puerto*

Rico v. Feliciano, No. 18-921 (U.S. Fed. 24, 2020) (Alito, J., joined by Thomas, J., concurring) (arguing that the Court should consider underlying free exercise issues if the case comes back to the Court); *Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Foundation*, 139 S.Ct. 909, 911 (2019) (statement of Kavanaugh, J., joined by Alito and Gorsuch, JJ.) (arguing that "prohibiting historic preservation grants to religious organizations simply because the organizations are religious would raise serious questions under this Court's precedents).

E. Conclusion

Especially over the last five years, this Court and its members have gone out of their way to defend religious liberty when it has been threatened. This has been especially true when religious beliefs have clashed with the new orthodoxy of political correctness, as it has here.

There is no evidence that the Petitioners sought to focus on a single issue, such as abortion or homosexuality. Instead, they were merely sharing the Gospel of Jesus Christ with people. The Gospel should not be offensive at all, because it teaches that forgiveness of sins and eternal life are offered to all freely in Jesus Christ. So why is this good news so offensive to some? Because it includes the fact that repentance is necessary. People do not wish to hear that they have a problem with sin, even if it is a necessary predicate to explaining how forgiveness of sins is available. But just as religious speech concerning homosexuality and abortion must be

protected even though it is offensive to some, so the sharing of the Gospel must be protected as well.

The Petitioners have done a masterful job of explaining why the courts "should not treat nominal damages—and the violations they vindicate—as worthless." Petition for Writ of Certiorari at 3, *Uzuegbunam v. Preczewski* (No. 19-968). The Foundation agrees. The rights that the Respondents violated in this case are the free exercise of religion and freedom of speech, which the Court has shown from the preceding to be "important questions of federal law." Supreme Court Rule 10(c). Thus, this Court should grant certiorari to address the underlying First Amendment issues that the nominal damages in this case seek to vindicate.

II. This Court should severely rebuke the argument that sharing the Gospel falls under the fighting-words doctrine.

A. Petitioner's speech did not rise to the level of fighting words

Respondents claim Petitioner's words arguably rise to the level of fighting words. This argument, if adapted by legal practitioners, will set a dangerous precedent. This Honorable Court should consider the question of fighting words and put an end to further application of the doctrine to religious speech.

Religious speech does not fall under the fighting-words doctrine and should remain protected by the First Amendment. The First Amendment guarantees

citizens the rights to freedom of speech and free exercise of religion, and it protects them from government regulation of that speech. U.S. Const. amend. I. Under this Court's precedents, there are some forms of speech that are not protected under the First Amendment, such as fighting words. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Fighting words are defined as speech that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The test for this doctrine, under this Court's precedents, is not whether a single hearer subjectively finds himself offended, but rather "what men of common intelligence would understand would be words likely to cause an average addressee to fight." Id. at 573.[3]

Respondents claim Petitioner's speech rose to the level of fighting words because he spoke a divisive message while standing on a stool and caused a disturbance. They claim he used "contentious religious language that, when directed to a crowd, has a tendency to incite hostility." App. at 155a. However, the facts only indicate he was passing out pamphlets and speaking on the love of Christ. He was speaking using only his own voice, no amplification was utilized. He did not approach any students nor force any to speak with him. He was in no way forceful. His message was that of repentance and accepting the love of Christ and how salvation is only through Him. App. at 90a.

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[3] It should also be remembered that the government's first job in such a situation is attempt to control the crowd, not silence the speaker. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

The message of the love and salvation Christ offers is not offensive to a person of common intelligence. This message has been preached for at least two thousand years and has never been condemned as "fighting words." In fact, many have welcomed this message. Even if the test laid out in *Chaplinsky* were applied, the Petitioners' speech would not rise to the level of fighting words. But looking into the future, the use of this argument can have negative consequences.

B. The Court should rule that religious speech is not fighting words

Today's political climate has caused any form of speech to have the possibility of inciting violence. Any disagreement can turn into a moral disagreement and thus make the listener violent. Riots form just for saying there are only two genders. Americans no longer know how to reasonably disagree. If a listener were able to claim "fighting words" just for hearing the comforting truth of the Gospel message, what more can they do with the misuse of this doctrine? If Respondents are successful and the Court rules Petitioner's speech did constitute fighting words, then it will have a chilling effect on free speech. Christians will no longer be able to preach a message fundamental to their faith.

This Court should set the record straight on whether religious speech can or should be construed as fighting words. The use of it in Respondent's brief at the trial level could encourage others to sue

religious people under the fighting words for no better reason than that the listener was offended. It would open up a floodgate of litigation against all religions as proselytizing is a key part of religion. If the Court corrects this theory now, it can avoid having to address it down the road.

C. Recent Supreme Court decisions cast severe doubt on whether the fighting words doctrine remains legitimate

In *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017), this Court held that prohibiting offensive speech is a form of viewpoint discrimination because "[g]iving offense is a viewpoint." Likewise, in *Masterpiece Cakeshop*, the Court held that the government cannot abridge free exercise of religion because it finds religious content offensive. *Masterpiece Cakeshop*, 138 S.Ct. at 1731. And in *Janus v. AFSCME*, 138 S.Ct. 2448, 2476 (2018), the Court stated that speech involving "sensitive political topics ... occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *See also R.A.V. v. City of St. Paul*, 505 U.S. 337 (1992).

It is difficult to see how the fighting words doctrine can continue to be justified in light of these precedents. Though the culture is becoming more sensitive, this Court has affirmed again and again that free speech means protecting someone's right to speak even when another takes offense. It may not be necessary in this case to answer the broader question of whether the fighting words doctrine is still valid. However, the Court should reaffirm, at the very least,

that the government should not presume that offensive speech should be prohibited under the fighting-words doctrine. This should be especially true when the speech is not offensive—like sharing the Gospel of Jesus Christ.

III. The Framers of the First and Fourteenth Amendments would not have considered sharing the Gospel as falling within the fighting words doctrine.

Courts do not make law. They apply the law that already exists. Consequently, if the fighting-words doctrine is consistent with the First Amendment, then the question is whether a reasonable person would have been provoked to fight at the time of the Amendment's ratification. At the time, sharing the Gospel was very common (as it is today). It would have shocked the Framers of the First Amendment to suggest that sharing the Gospel would not be protected by that Amendment.

A. The Bible teaches that Christians must share the Gospel

The Bible teaches that after Jesus rose from the dead, He commanded His disciples to go and share the Gospel with others. The Book of Matthew concludes with what has been called "The Great Commission," in which Jesus said, "Go therefore and make disciples of all the nations, baptizing them in the name of the Father, and the Son and the Holy Spirit, teaching them to observe all that I commanded you." *Matthew* 28:19-20. Mark's Gospel

also concludes with a similar command: "Go into all the world and preach the gospel to all creation. He who has believed and has been baptized shall be saved; but he who has disbelieved shall be condemned." *Mark* 16:15-16.

For Christians, this is not an option. It is a command, given straight from the Son of God Himself. Christians are bound by divine command to obey this precept, even at the expense of suffering harm and death.

When the Church began in Jerusalem, the Apostles did not hesitate to preach the Gospel directly to the crowd that had called for Jesus' crucifixion. During the sermon to the crowd who had once cried, "Crucify Him," Peter concluded His sermon by saying, "Therefore let all the house of Israel know for certain that God has made Him both Lord and Christ—this Jesus whom you crucified." *Acts* 2:36. He told the crowd to their face that they were responsible for Jesus' death, but God raised Him from the dead.

If the Respondents claimed that Petitioners' preaching was arguably "fighting words," then they would have had a real problem with St. Peter as well. But the hard truths that Peter had to share with the crowd had a wonderful effect. Many repented, and nearly 3,000 people were baptized in the name of Jesus Christ that day. *Acts* 2:37-42.

Violence did not dissuade the Apostles from continuing to share the Gospel. After Peter's second

sermon, the Sanhedrin had Peter and John arrested for preaching in the name of Jesus after healing a man who could not walk. Peter said to the people who wanted to condemn him and John, "Let it be known to all of you and to all the people of Israel, that by the name of Jesus Christ the Nazarene, whom you crucified, whom God raised from the dead—by this name this man stands here before you in good health." *Acts* 4:10. When the Sanhedrin ordered them not to preach in Jesus' name anymore, the Apostles replied, "Whether it is right in the sight of God to give heed to you rather than God, you be the judge; for we cannot stop speaking about what we have seen and heard." *Acts* 4:19-20.

When the Apostles were arrested again, they told the same thing to the Sanhedrin. The Scripture says that when the Apostles shared the Gospel with the Sanhedrin again, they were cut so deeply that they wanted to kill them. *Acts* 5:27-33. Responding to the command to cease preaching in Jesus' name, the apostles said, "We must obey God rather than man." *Acts* 5:29. The Sanhedrin had them beaten instead of killed, but the Apostles went away rejoicing because they were counted worthy to suffer for Jesus' name. *Acts* 5:40-41. Then they kept on sharing Jesus every day, despite the Sanhedrin's commands. *Acts* 5:42.

Thus, the Bible teaches that Christians are ordered to share the Gospel of Jesus Christ, regardless of whether the message is welcomed with rejoicing or rejected with violence. Christians are expected to stand fast for the Gospel, even at the expense of their own lives.

B. The influence of the Bible on the Founding generation that framed the First Amendment

It is beyond dispute that the predominant religion in America was Christianity. From 1760 to 1805, the Bible was cited more than any other source for political literature. Donald S. Lutz, *The Origins of American Constitutionalism* 140-41 (1988). St. Paul was cited at least as frequently as Montesquieu and Blackstone, and Deuteronomy was cited almost twice as much as all of Locke's writings combined. *Id.* The Bible accounted for 34% of all citations during that time, whereas all of the enlightenment thinkers combined accounted for 22%. *Id.* at 141. Whig political thought accounted for 18%, the common law 11%, and the classics 9%. *Id.* The miscellaneous sources account for the remaining 6%. Thus, as Lutz concludes, "If we ask which book was most frequently cited in that literature, the answer is, the Bible." *Id.* at 140.

The Founders were not only familiar with the Gospel, but they also *encouraged* the propagation of Christianity. In a speech to the Delaware Chiefs on May 12, 1779, George Washington said, "You will do well to wish to learn our ways of life, and above all, the religion of Jesus Christ. These will make you a greater and happier people than you are." John Eidsmoe, *Christianity and the Constitution* 120 (1987). And in Washington's Farewell Address, he famously said, "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports." George

Washington, Farewell Address (Sept. 17, 1796), *quoted in* Eidsmoe, *supra*, at 119. John Adams likewise wrote to Dr. Benjamin Rush, "[R]eligion and virtue are the only foundations, not only of republicanism and of all free government, but of social felicity under all governments and in the combinations of human society." John Adams, Letter to Benjamin Rush (Aug. 28, 1811), *quoted in* Eidsmoe, *supra*, at 294.

Perhaps more relevant than the statements of any particular founder is the Northwest Ordinance of 1787, which the United States Code recognizes as part of the organic law of the United States. Article 3 of that ordinance states, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787 (July 13, 1787). This was a public declaration by the United States Congress that religion is necessary to good government and the happiness of mankind.

Justice Joseph Story seems to have summarized the Founders' sentiment on sharing the Gospel best:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [i.e. the First Amendment], the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of

> conscience, and the freedom of religious worship.

Joseph Story, *Commentaries on the Constitution of the United States* § 1868 (1833). Thus, the Founders believed not only that the Gospel should be shared as a necessary means to preserving the welfare of society, but also that the government should encourage it as long as it was not inconsistent with the private rights of conscience.

C. Conclusion

In light of the foregoing, it cannot be seriously maintained that the people who framed the First Amendment's protections for free exercise of religion and freedom of speech would have ever intended for sharing the Gospel to fall within the fighting-words doctrine. The right to share the Gospel is categorically protected by the First Amendment. It is an unalienable right of every person given by God, and it is the birthright of every American protected by the First Amendment.

IV. If this Court fails to rebuke the argument that sharing the Gospel is fighting words, then the consequences for religious liberty will be disastrous.

Although a historical analysis and a review of the Court's precedents should settle the matter, the Foundation believes that if this Court does not address this issue now, then it will become a popular theory to test in the lower courts in the future.

It is no secret that there are many who desire to silence Christianity, often by labeling it as "hate speech." The Court's precedents hold that even so-called "hate speech" is protected under the First Amendment. Nevertheless, the desire to find a way around the First Amendment's protections is very strong and only getting stronger.

The Court usually lets issues percolate in the lower courts before addressing them. But as Section I of this brief demonstrates, the Court has repeatedly gone out of its way to address impending threats to religious liberty over the last five years. The country needs the Court to do so again in this case.

James Madison wrote in his famous *Memorial and Remonstrance*,

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it.

James Madison, *Memorial and Remonstrance* (June 20, 1785).

In the same way that it was proper for the Americans of the Revolution to take alarm at the first experiment of their liberties, and just as it was proper for Madison to take alarm at the first experiment of Virginians' liberties, so it is proper for this Court to take alarm at the first experiment of religious liberty. This Court should not wait to rebuke this argument until "usurped power ha[s] strengthened itself by exercise, and entangled the question in precedents." *Id.* Instead, it should see "all the consequences in the principle, and [avoid] the consequences by denying the principle." *Id.*

And what would the consequences of the principle be in this case? If sharing the Gospel is not protected by the First Amendment, then ordinary God-fearing Americans could be targeted under both criminal and civil laws. They could be threatened with prison or financial ruin through endless lawsuits. Moreover, failing to rebuke the argument that sharing the Gospel is fighting words will give a green light to universities who want to shut down Christians like the Petitioners in the future.

If the judiciary starts believing that preaching the Gospel is fighting words, then the Free Speech Clause's usual protections, even against discrimination that is patently content or viewpoint based, will no longer apply to such preaching. Thus, the most egregious viewpoint-based discrimination that would draw condemnation from conservative and liberal legal scholars alike would be acceptable

as long as the target was somebody who was preaching the Gospel of Jesu Christ.

If anti-Christian activists succeed in gutting the Free Speech Clause, then the only hope for Christians will be the Free Exercise Clause. The Foundation has argued many times before that the Framers of the First Amendment believed that free exercise of religion was an unalienable right given by God and that free exercise of religion is entitled to robust protection, even more than the strict-scrutiny test provides.[4] Unfortunately, at this time, this Court's decision in *Employment Division v. Smith* has robbed the Free Exercise Clause of much of its power. Legislatures hostile to Christianity could probably get around this Court's protections for religious freedom announced in *Church of the Lukumi Babalu Aye* and *Masterpiece Cakeshop* if they are careful enough not to state that they are targeting Christians and to criminalize speaking "hate speech" across the board.

CONCLUSION

The threat to religious liberty is dire, and the idea that sharing the Gospel is fighting words needs to be discredited before it gains traction. The Foundation therefore requests that this Court grant certiorari not only to vindicate the rights of the Petitioners, but also to protect the religious liberty of every American

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[4] *See, e.g.*, Cert-Stage Brief of *Amicus Curiae* Foundation for Moral Law at 11-15, *Little Sisters of the Poor v. Pennsylvania*, U.S. No. 19-431 (discussing the original intent of the Free Exercise Clause).

who wonders whether it's about to be open season on them as they share the message of Jesus Christ with people they love, in hopes of saving their souls.

Respectfully submitted,

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