No. _____

In the
Supreme Court of the United States

MARK ANTHONY SPELL, et al.,
Petitioners,
v.

JOHN BEL EDWARDS, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a vital case of first impression concerning our most sacred rights of religious freedom and the very nature of the Church and State as separate and distinct institutions. Petitioner Tony Spell, pastor of Petitioner Life Tabernacle Church, was arrested, charged with 6 violations of wrongful church assembly with possible imprisonment of up to 3 years, confined to his home in an ankle bracelet, ordered not to preach to an assembly of more than 10 people (including himself), threatened with contempt of court if he continued preaching, and his home and church were put on video surveillance when he did not comply with Louisiana Governor John Bel Edwards' orders restricting church assembly.

In the decision below, the Fifth Circuit held that these State restrictions did not violate Petitioners Pastor Spell and Life Tabernacle Church's clearly established rights under the Religion Clauses of the First Amendment. The court implied Pastor Spell and the Church would have won their case if they had argued under *Lukumi* that the restrictions on church assembly were disparate treatment compared to restrictions on secular assemblies. But, because Pastor Spell argued that the Governor had no right to limit church assembly whatsoever under the Founders' understanding as articulated in *Everson*, the court found that he chose to lose.

The questions presented are:

1. Whether bringing an Establishment Clause claim in conjunction with an inextricably intertwined Free Exercise Clause claim negates

this Court's precedent holding that Establishment Clause claims are to be reviewed based on the Founders' understanding as articulated in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2018) and reiterated in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

2. Whether State orders that restrict Church assembly and worship violate the Establishment and Free Exercise Clauses under the Founders' understanding of the Religion Clauses:

a. Whether the Founders' understanding of the Religion Clauses enshrined a jurisdictional separation of Church and State that requires that the State "shall not" restrict the Church absent "overt acts against peace and good order" as understood by the Founders and articulated by this Court in *Reynolds v. United States*, 98 U.S. 145 (1878).

b. Whether this Court's decision in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947) recognizes the Founders' jurisdictional understanding of separation of Church and State as forbidding the State from forcing people to stay away from church or punishing those who attend.

c. Whether the Church's internal decision to assemble together for worship is a decision that "affects the faith and mission of the church itself" such that the State cannot interfere with it as articulated in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.,* 565 U.S. 171 (2012).

PARTIES TO THE PROCEEDING

Petitioners are Pastor Mark Anthony "Tony" Spell and First Apostolic Church of East Baton Rouge d/b/a Life Tabernacle Church who were the plaintiffs and appellants below.

Respondents are Louisiana Governor John Bel Edwards; Chief of Police of Central City, Louisiana, Roger Corcoran; and Sheriff of East Baton Rouge Parish, Louisiana, Sid Gautreux who were the defendants and appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioners are an individual and a Church that does not have a parent corporation and does not issue stock.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. Court of Appeals for the Fifth Circuit and this Court:

Spell et al. v. Edwards et al., No. 20-30358 (5th Cir.) (June 18, 2020)

Spell et al. v. Edwards et al., No. 20A19 (Nov. 27, 2020) (denying application for injunctive relief)

Spell et al. v. Edwards et al., No. 20-30712 (5th Cir.) (June 11, 2021) (remanding with instructions)

Spell et al. v. Edwards et al., No. 22-30075 (5th Cir.) (Feb. 17, 2023)

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The Fifth Circuit's unreported decision is reproduced at App.1. The district court's decision granting a motion to dismiss for failure to state a claim is reported at 579 F. Supp. 3d 806 and reproduced at App.11.

JURISDICTION

The Fifth Circuit issued its opinion on February 17, 2023. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. 1.

INTRODUCTION

In the decision below, the Fifth Circuit implied Pastor Spell and Life Tabernacle Church would have won their case if they had argued under *Lukumi* that Governor Edwards' restrictions on church assembly were disparate treatment compared to restrictions on secular assemblies. App.1-9. In concurrence, Judge Oldham joined by Judge Elrod, even stated that Pastor Spell "insisted on taking a loss" because he chose to argue that the Governor had no right to limit church assembly whatsoever under the Founders' understanding of the First Amendment as articulated in *Everson*. App.8-9. Yet, the Fifth Circuit never addressed

why, much less how, the current Free Exercise jurisprudence "directly contradicts" Pastor Spell's theory of jurisdictional separation under the Establishment Clause.

In fact, the Fifth Circuit did not address the Establishment Clause at all beyond the *ipse dixit* that "Pastor Spell cannot prevail on the theory he advances." App.5. Thus, Pastor Spell's Establishment Clause claim was ignored in favor of applying Free Exercise precedent that did not involve Establishment Clause challenges. The Fifth Circuit reached this conclusion despite this Court's clear caselaw holding that Establishment Clause claims are to be reviewed on the basis of the Founders' understanding. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (*citing Town of Greece v. Galloway*, 572 U.S. 565, 576-77 (2014); *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

In either case, it is clear that Governor Edwards had absolutely no right to interfere with Pastor Spell and Life Tabernacle Church's constitutional rights to assemble together for religious worship. In fact, for over 200 years neither the federal nor state governments intruded upon the institution of the Church as harshly as restricting and shutting down the assembly of the Church itself, even in times of contagious disease—until COVID-19.

As argued in the lower courts, Pastor Spell and Life Tabernacle Church's jurisdictional theory of the Religion Clauses is that the Founders intended and understood the First Amendment's

Establishment and Free Exercise Clauses to enshrine a jurisdictional separation of Church and State. Petitioners never waived the argument that the Founders' understanding is clearly established in this Court's caselaw and that the First Amendment requires that Governor Edwards "shall not" restrict Pastor Spell and Life Tabernacle Church's assembly together for worship.

This Court should grant certiorari to clarify the true meaning of the First Amendment and the relationship of the Religion Clauses as understood by the Founders. It is clearly established that the Founders would never have tolerated State intrusion upon the Church like Governor Edwards has committed against Pastor Spell and Life Tabernacle Church.

STATEMENT OF THE CASE

A. Factual Background

Tony Spell is the pastor of Life Tabernacle Church in the City of Central, Louisiana which has over 2000 members. App.19. Pastor Spell and the Church have the sincere religious belief that the Bible requires them to meet in person in their church building. App.19. They also have the sincere religious belief that baptisms, communion, the offering, laying on of hands, and anointing the sick with oil and praying with them must be done in person in church assembly. ROA.1517-18, 1523-25.[1]

During the COVID-19 outbreak, Louisiana

[1] "ROA" refers to the record on appeal filed with the Fifth Circuit in appeal No. 22-30075.

Governor John Bel Edwards issued a series of proclamations that severely restricted Pastor Spell and the Church from assembling together and performing religious exercise as they were accustomed. App.11-19. Each of these orders was more restrictive than the last, with the order at the time this litigation commenced prohibiting all gatherings of 10 or more people. App.15. While each of these orders exempted a number of secular entities, churches were not exempted. App.15.

Refusing to violate their religious convictions, Pastor Spell and Life Tabernacle Church continued to assemble and worship together in person. App.19-20. Submitting to the Governor's orders would have deprived them of all aspects of their religious assembly and exercise, and they could not submit to this intrusion of their church in good conscience.

On March 17, 2020, Chief Fire Marshall Butch Browning visited Pastor Spell's house, relaying a message from Governor Edwards to discontinue services. ROA.1525. After Pastor Spell declined, Appellee Sheriff Gautreaux visited with Pastor Spell, threatening to arrest him if he continued to hold services. ROA.1525. During this time, two church buses were vandalized, but the police did essentially nothing about it. ROA.1525-26.

On March 31, 2020, Appellee Roger Corcoran, Chief of Police for the City of Central, issued Pastor Spell six misdemeanor summonses for violating Governor Edwards's orders, each punishable by a fine of $500 and/or up to 90 days in jail. App.19-20; ROA.1528. These criminal charges against Pastor

Spell were pending for over two years until dismissed by the Louisiana Supreme Court. *Louisiana v. Spell*, No. 21-KK-00876 (May 13, 2022).

On April 21, 2020, Chief Corcoran arrested Pastor Spell for aggravated assault (even though no confrontation, threat, or physical contact occurred) after he attempted to confront a lone protestor outside his church who had been making vulgar remarks and gestures to the Church's women and children. ROA.1531-32. The presence and actions of the lone protestor had been reported to police, but no actions were taken to remove him. ROA.1531. Pastor Spell was released on bail but told by Judge Crifasi of the Louisiana 19th Judicial Circuit that as a condition of his bail he could not preach to "such an assembly [more than 10 people] in person…that's prohibited." ROA.1533. When Pastor Spell could not assent to these terms, Judge Crifasi placed Pastor Spell under house arrest and had him equipped with an ankle bracelet to track his location. ROA.1533-34. Chief Corcoran informed Pastor Spell that if he left his home, he would be arrested. ROA.1533.

Following his religious conviction that he must obey God rather than man, Pastor Spell went to his church and conducted a service on April 26, 2020. ROA.1534. Judge Crifasi threatened to increase his bail by $25,000, but he subsequently recanted after Pastor Spell refused to assent. ROA.1534. Although Judge Crifasi refused to immediately put Pastor Spell in jail, he said he would later consider the contempt and a revocation of bond. ROA.1534.

B. Procedural History

Pastor Spell and Life Tabernacle Church filed suit in the United States District Court for the Middle District of Louisiana on May 7, 2020, along with a motion for a temporary restraining order and preliminary injunction. App.20-21. The District Court denied the motion finding that petitioners were unlikely to prevail and that the church assembly restrictions were reasonably aimed to stop the spread of COVID-19. App.21-22. Petitioners appealed to the Fifth Circuit, requesting an emergency injunction pending appeal. App.24. The Fifth Circuit denied, finding the appeal on the basis of the injunction moot because the orders had expired. App.24.

On November 10, 2020, the district court dismissed the lawsuit for failure to state a claim on the basis that the church assembly restrictions were reasonable to reduce COVID-19. App.26. Petitioners appealed, and on June 11, 2021, the Fifth Circuit vacated the dismissal and remanded with instructions for the district court to review the case in light of recent United States Supreme Court authority. App.28-32. On remand, the district court again dismissed all claims with prejudice for failure to state a claim. App.10. The court also declined to exercise jurisdiction over state law claims when the Supreme Court of Louisiana found that Governor Edwards' orders restricting church assembly and worship violated Pastor Spell and Life Tabernacle Church's clearly established rights under the First

Amendment. App.52.[2]

On February 17, 2023, the Fifth Circuit affirmed the district court's dismissal. App.1. In a per curiam opinion, the court found that Pastor Spell had waived all arguments that defendants violated his clearly established rights except on the basis of a jurisdictional separation between Church and State as acknowledged in *Everson*. App.2-5. The court also found that Pastor Spell abandoned his claim for permanent injunctive relief despite never expressly waiving the same. App.5-6. On Pastor Spell's claims for damages, the court found that he "cannot prevail on the theory he advances" because "controlling precedent directly contradicts Pastor Spell's jurisdictional theory of the Religion Clauses." App.5. The court did not analyze Pastor Spell's theory under the Establishment Clause anywhere in the opinion, and the "controlling precedent" the court cited were strictly Free Exercise Clause cases. App.2-5.

REASONS FOR GRANTING THE WRIT

In the decision below, the Fifth Circuit made an egregious error in its application of this Court's Establishment and Free Exercise jurisprudence and upheld an unprecedented intrusion of the Church by the State. The court's error has created a novel case of first impression regarding the relationship between the Religion Clauses that requires this Court's plenary power. Unless this

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[2] The Supreme Court of Louisiana found that Pastor Spell could not be convicted for violating orders restricting church assembly during COVID-19. *Spell*, No. 21-KK-00876.

Court intervenes, the Fifth Circuit's decision will further obscure the Founders' understanding of the jurisdictional separation of Church and State enshrined by the First Amendment until it is lost to bad precedent forever.

Judge Oldham, joined by Judge Elrod, noted in his concurrence below that, "had Pastor Spell's counsel not affirmatively *waived* the *Lukumi* argument [that treating houses of worship worse than comparable secular assemblies is unconstitutional], his victory was all but assured. ...But oddly, Pastor Spell's counsel insisted on taking a loss." App.8-9.

As this Court considers whether to grant certiorari, the Court is entitled to an explanation of counsel's "odd" course of action. As the Fifth Circuit and the Louisiana Supreme Court both observed, houses of worship are entitled to at least equal treatment with secular establishments. If Pastor Spell had claimed a victory based on disparate treatment requiring strict scrutiny, the Fifth Circuit implied that it would have ruled in his favor.

But that would not have been a victory, because from our earliest history those who framed the First Amendment to the United States Constitution recognized a jurisdictional separation between the institutions of Church and State. Pastor Spell and Life Tabernacle Church wish to restore the Founders' understanding of religious liberty before it is lost to tangled precedent forever.

As late as 1947, Justice Hugo Black wrote for a majority of this Court that "the First Amendment

has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 17 (1947). The dissent in *Everson* used even stronger language, stating that "Madison was certain in his own mind that under the Constitution 'there is not a shadow of right in the general government to intermeddle with religion' and that 'this subject is, for the honor of America, perfectly free and unshackled. The Government has no jurisdiction over it.'" *Id.* at 38-39 (Rutledge, J., dissenting).[3] At the Fifth Circuit below, Judge Elrod appeared to question the wisdom of that Court.[4]

The Fifth Circuit, confused by the current state of today's convoluted Establishment and Free Exercise jurisprudence, failed to analyze petitioner's claim under the Establishment Clause. Instead, finding that petitioner had waived all arguments except a jurisdictional separation of church and state, found that this Court's jurisprudence under the *Smith/Lukumi* framework

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[3] Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, appended the full text of Madison's *Memorial and Remonstrance Against Religious Assessments*. *Id.* at 38-39, 63-72.

[4] Judge Elrod of the Fifth Circuit below posed the question to Pastor Spell's counsel in oral argument: "If the caselaw is not such that there is this *impregnable barrier between church and state* such that there can be no regulation among all kinds of entities, but the law is instead that you can't treat religious entities different from other entities—if that is the law in the United States, are you saying that you don't wish to argue that theory even if you could prevail on it?" App.4. (emphasis added).

is the controlling precedent for the whole scope of the Religion Clauses. App.4-5. In doing so, the Fifth Circuit neglected to analyze petitioner's jurisdictional argument at all by overlooking the Establishment Clause claim and the whole body of this Court's Religion Clause jurisprudence.

This petition for certiorari should be granted because the Fifth Circuit's has made an egregious error that has created a vital case of first impression that involves continuing confusion of the meaning and application of the First Amendment, especially where both the Establishment and Free Exercise Clauses are implicated together. This case is the perfect vehicle for this Court to clarify the true meaning of the Religion Clauses according to the Founders where the Establishment and Free Exercise Clauses are inextricably linked because it deals with the very essence of the Church itself: the Church assembly.

I. The Decision Below Is Egregiously Wrong And Conflicts With This Court's Precedent Instructing Establishment Claims to be Reviewed Based on the Founders' Original Understanding.

The Court's Establishment Clause and Free Exercise Clause jurisprudence has been in a quagmire of judicial policymaking for decades. Both have been subjected to an ever-changing myriad of "tests" which have more often than not served to confuse rather than clarify. After decades of confusion, this Court has recently set the Establishment Clause free of these tests and instructed that it "must be interpreted by reference

to historical practices and understandings" where "the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Kennedy*, 142 S. Ct. at 2428 (*citing Town of Greece*, 572 U.S. at 576-77; *American Legion*, 139 S. Ct. at 2087 (plurality opinion)).

Despite this clear guidance, however, the Fifth Circuit did not analyze petitioner's claim under the Establishment Clause at all, much less under this Court's direction to look to the understanding of the Founders. By ignoring petitioner's Establishment Clause claim and finding that petitioner "waived" a victory under the *Smith/Lukumi* Free Exercise framework, the court below adopted an inappropriate "warring" view of the First Amendment, rather than the proper "complementary" view. *See Kennedy*, 142 S. Ct. at 2426 ("A natural reading of the First Amendment suggests that the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." (*citing Everson*, 330 U.S. at 13)). In doing so, the Fifth Circuit's decision conflicts with both this Court's precedent concerning the Religion Clauses as well as the plain meaning of the First Amendment as understood by the Founders.

As argued below, petitioners' claim is that the Founders understood Church and State in a jurisdictional sense such that the State is simply without jurisdiction to force people to stay away from Church absent overt acts against peace and good order. By failing to analyze petitioners' claim

under the Establishment Clause, the Fifth Circuit has presented this Court the perfect vehicle to clarify once and for all the complementary nature of the Religion Clauses and restore First Amendment jurisprudence to the Founders' intent.

This Court can adopt the Founders' jurisdictional separation approach to the First Amendment without overruling previous cases in either the Establishment Clause context or the Free Exercise Clause context. In the Establishment Clause context, the Founder's understanding "has long represented the rule rather than some 'exception' within the Court's Establishment Clause jurisprudence. *Kennedy*, 142 S. Ct. at 2428 (*citing Town of Greece*, 572 U.S. at 575).

And, the Free Exercise Clause cases cited by the Fifth Circuit below—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993); *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 66–67 (2020*); Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990)—adopted strict scrutiny and other tests for evaluating state regulation of religion only because a jurisdictional separation argument had not been presented and they did not involve corollary Establishment Clause claims. The Founders' intent and understanding that the First Amendment recognizes a jurisdictional separation between Church and State is now squarely before this Court to vindicate.

II. The Decision Below Conflicts With The Founders' Understanding of the First Amendment Religion Clauses.

This Court has instructed that Establishment Clause claims must be reviewed on the basis of the Founders' original understanding. *Kennedy*, 142 S. Ct. at 2428. However, because of the decades of jurisprudence that strayed from the Founders' intent, *see id.* at 2427, this is not an easy task for the lower courts, and the court below got it egregiously wrong.

The Founders viewed Church and State as distinct institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and state," he meant a jurisdictional separation. The Founders inherited this jurisdictional understanding of Church and State from a lineage as long as the institutions themselves—from ancient times, through the medieval period, to the Reformation, and beyond.

The ratification of the Constitution by the States was predicated on the understanding that it would be accompanied by a Bill of Rights, enshrining certain inalienable rights and ensuring their protection from the new federal government. While drafting and ratifying the First Amendment, the Founders' understanding of history shaped the Religion Clauses. The Founders would have had difficulty imagining a more drastic State intrusion into the Church's jurisdiction than the State closing the Church and forbidding worship services. But that is exactly what happened in this case.

In order to understand why the Fifth Circuit is so wrong to allow this injury to go unremedied, the Founders' understanding must be analyzed with regard to the plain meaning of the Religion Clauses themselves, the history of preceding generations, and the Founders' own words and actions in applying them.

A. The Founders' Understanding Of The Plain Meaning Of The Establishment And Free Exercise Clauses.

In order to understand the plain meaning of the Religion Clauses to the Founders, it is imperative that the text be defined. The text of the Establishment and Free Exercise Clauses of the First Amendment is: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." James Madison defined religion in his *Memorial and Remonstrance* as "the duty which we owe to our Creator, and the manner of discharging it, [which] can only be directed by reason and conviction, not by force or violence." *Quoted by Everson*, 330 U.S. at 64. This definition was well known to the Founders and was verbatim George Mason's definition of religion as included in the 1776 Virginia Bill of Rights. [5] Justice Joseph Story acknowledged this to be the Founders' definition of religion in his 1833 Commentaries on the Constitution.[6]

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[5] *See* 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Law of the States, Territories, and Colonies* 3814 (Francis Newton Thorpe ed., 1st ed. 1909).
[6] Joseph Story, 3 *Commentaries on the Constitution* § 1870.

This Court has adopted the Founders' definition of religion before. In 1878, this Court stated that the meaning of religion must be found by analyzing the precursors to the First Amendment Religion Clauses. *Reynolds*, 98 U.S. at 163 (1878). Then in 1890, this Court expressly adopted the Founders' definition. As this Court stated, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will." *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated on other grounds by Romer v. Evans*, 517 U.S. 620 (1996).

When read with the Founders' definition of religion in mind, the plain meaning of the Religion Clauses is clearer: Congress shall make no law respecting the establishment of [*the duties which we owe to our Creator and the manner of discharging those duties*], or prohibiting the free exercise of [*the duties which we owe to our Creator and the manner of discharging those duties*]. In the Founders' minds, these clauses were complementary and meant to reinforce one another. *See Kennedy*, 142 S. Ct. at 2426 ("the Clauses have 'complementary' purposes, not warring ones"). By applying the Founders' definition of religion, the Religion Clauses' complementary nature is more readily apparent.

B. The Founders' Understanding of History Rooted the First Amendment Religion Clauses in a Jurisdictional Separation of Church and State.

Another fundamental basis of the Founders' understanding of the Religion Clauses is that they did not view Church and State simply as man-made institutions. They did not accept Rousseau's enlightenment notion that the State is above all other institutions, including the Church.[7] Instead, the Founders were well versed in ancient, medieval, and reformation theology, and, like the people of their time and those before them, they understood Church and State as divinely established institutions, each with distinctive authority and distinctive limitations.[8]

This institutional separation goes back to the ancient Hebrews as seen in the Old Testament in which Israel's kings were of the Tribe of Judah while Israel's priests were of the Tribe of Levi; these were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the

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[7] Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984), demonstrated that Americans writers from 1760-1805 most frequently cited the Bible (34%), Montesquieu (8.3%), Blackstone (7.9%), Locke (2.9%), and Roussseau least of all (0.9%).

[8] The influence of the Bible on the Founders and its relevance to law is well established; Congress even declared 1982 the "Year of the Bible" due to its influence on the Founding. Pub. L. No. 97-280 (1982).

functions of the priesthood. For example, when King Saul offered sacrifices instead of waiting for Samuel the priest, God cut off his descendants from the kingship forever. And, when King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, God smote him with leprosy, and he remained a leper all the days of his life. *II Chronicles* 2:19-23 (King James).

This institutional separation continued in the New Testament. When the Pharisees asked Jesus about paying taxes to the Roman government, He pointed to Caesar's image on a coin and answered, "Render therefore to Caesar the things which are Caesar's; and to God, the things that are God's." *Matthew* 22:21 (King James). Lord Acton said that Christ's statement,

> gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but he also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.[9]

From the beginning, Church scholars understood that Church and State were distinct kingdoms. Augustine of Hippo (AD 356-430), who many consider the greatest influence on the Church between Paul and Martin Luther, wrote of the City

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[9] Lord Acton, *The History of Freedom in Antiquity* (1877), in *The History of Freedom and Other Essays* 1 (John Neville Figgis & Reginald Vere Laurence eds., 1907).

of God and the City of Man in his *Civitas Dei*.[10] The understanding that Church and State were separate and distinct kingdoms was universal; the only question was the nature of the precise relationship between them. Pope Gelasius I (died AD 496), Bernard of Clairvaux (circa AD 1150), and Pope Boniface (circa AD 1302) all wrote of the two swords of the two kingdoms of Church and State.[11]

In ancient and medieval thought, then, Church and State were separate kingdoms, and neither controlled the other. The Church often influenced temporal rulers by admonition, reprimand, discipline, excommunication, and interdiction. Kings sometimes insisted they had the power to approve appointments to ecclesiastical offices within their realms, although church officials often disputed this. But in the West, as a rule, kings and princes did not become popes and bishops, and popes and bishops did not become kings and princes. Of course, a noted exception to this rule occurred in AD 1534 when King Henry VIII of England separated the Church of England from the Roman Catholic Church and proclaimed himself as the head of the Church. The Founders' belief in the

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[10] John Piper, *The Swan Is Not Silent: Sovereign Joy in the Life and Thought of St. Augustine* 1 (Bethlehem Conference for Pastors 1998).

[11] Pope Gelasius I, *Letter to Emperor Anastasius* (496); Bernard of Clairvaux, *Book Four on Consideration* (1150), *reprinted in From Irenaeus to Groitus: A Sourcebook in Christian Political Thought* 276 (Oliver & Joan Lockwood O'Donovan eds., 1999); Pope Boniface VIII, *Unuum Sanctum*, (1304) *reprinted in Select Historical Documents of the Middle Ages* 436 (Ernest F. Henderson ed., 1965).

separation of Church and State was in part a reaction against this union of Church and State in England.

The Protestant Reformation took force in Northern Europe in the 1500s, a century before the settlement of the English colonies in North America. The Reformers' understanding of Church and State is therefore instrumental in understanding the views of the Founders. Being children of the Reformation,[12] they understood that God had established two kingdoms, Church and State, each with distinctive authority. As Luther said,

> []these two kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other.[13]

And John Calvin, in his *Institutes of the Christian Religion,* stated that "[t]here are in man, so to

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[12] Dr. M.E. Bradford established that the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. *A Worthy Company: Brief Lives of the Framers of the United States Constitution* pp. iv-v (Plymouth Rock Found., 1982). Yale History Professor Sydney E. Ahlstrom has said, "85 or 90 percent" of the Founders held Reformation beliefs. *A Religious History of the American People* I:169 (Image Books, 1975).

[13] Martin Luther, *Secular Authority: To What Extent It Should Be Obeyed*, 1523, *reprinted in Works of Martin Luther* III:237 (Baker Book House, 1982).

speak, two worlds, over which different kings and different laws have authority."[14]

Long before Jefferson would speak of the "wall of separation between church and state," Rhode Island founder Roger Williams wrote of a "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world."[15] This "Two Kingdoms" approach to Church and State relations was not limited to Protestantism post-Reformation. The *Catechism of the Catholic Church* recognizes distinct jurisdictions between Church and State as well.[16]

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the Founders on a foundational level. As Yale History Professor Sydney E. Ahlstrom has noted,

> No factor in the "Revolution of 1607-1760" was more significant to the ideals and thought of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church. [17]

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[14] John Calvin, *Institutes of the Christian Religion,* III:19:15 (1537).

[15] Roger Williams, quoted by Lynn R. Buzzard and Samuel Ericsson, *The Battle for Religious Liberty* 51 (David C. Cook, 1982).

[16] Catechism of the Catholic Church Part III, §§ 2245-46 (1995).

[17] Ahlstrom, *supra*, at I:423.

C. The Founders' Understanding Of The Religion Clauses' Jurisdictional Separation Of Church And State Is Reflected In Their Own Words and Actions.

The Founders were thus well acquainted with the history of the preceding generations and carried this understanding of jurisdictional separation between Church and State with them as they drafted and ratified the First Amendment. Perhaps the best reflection of this understanding is the Founders' own actions concerning religious liberty leading up to ratification and after.

Throughout his *Memorial and Remonstrance*, Madison emphasized the distinct jurisdictional separation between Church and State, stating that "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." *Everson*, 330 U.S. at 64. And, as discussed *supra*, Madison's definition of religion within his *Memorial and Remonstrance* was the primary definition the Founders were familiar with when Madison introduced the First Amendment on the floor of Congress in June 1789.

Thomas Jefferson's often misunderstood "wall of separation," must also be viewed in this context: as a jurisdictional separation between the two kingdoms, Church and State. While Jefferson's statement has been wrongly construed at times as a one-sided total limitation on the Church in the public sphere, this was not his intention. Rather, written in 1802 while he was President, Jefferson's

statement was a reassurance concerning government overreach over the Church:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state.[18]

Jefferson's understanding that the "wall of separation" was meant to protect the Church from State intrusion is also apparent from his later writing:

> I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. . . . Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government.[19]

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[18] *Reynolds*, 98 U.S. at 164 (quoting Thomas Jefferson's letter to the Danbury Baptist Association (Jan. 1, 1802)).

[19] *From Thomas Jefferson to Samuel Miller, 23 January 1808*, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-7257 (last visited May 4, 2023)

Two days after writing his letter to the Danbury Baptists, President Jefferson attended a church service conducted by a Baptist minister *inside of* the House of Representatives.[20] Jefferson would continue to attend such church services held in State buildings throughout his Presidency.[21] Clearly, Jefferson did not consider such public recognitions and worship of God within government to offend the separation of Church and State. In fact, his actions are fully within his understanding of the jurisdictional separation of Church and State as he described them in the Virginia Bill for Religious Freedom in 1777. In 1878, this Court quoted Jefferson:

> "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

Reynolds, 98 U.S. at 145 (quoting Bill for Establishing Religious Freedom, 1 Jeff. Works 45; 2 Howison, History of Va. 298). This Court followed Jefferson's words by stating: "In these two

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[20] William Parker & Julia Perkins Cuttler, *Life Journals and Correspondence of Rev. Manasseh Cuttler* 45 (1888).

[21] See James H. Hutson, *Religion and the Founding of the American Republic* 84 (1998).

sentences is found the true distinction between what properly belongs to the church and what to the State." *Id.*

The *Reynolds* Court continued, commenting on Jefferson's words following the ratification of the First Amendment,

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Id. at 164. This is a recognition of the separate jurisdictions of Church and State; the State only has authority over actions of the Church that, as Jefferson phrased it, were "overt acts against peace and good order."

III. This Court's Precedent Recognizes That The Religion Clauses Enshrine The Founders' Understanding Of A Jurisdictional Separation Of Church And State.

Beginning with *Reynolds* in 1878, this Court recognized the Religion Clauses enshrine the jurisdictional separation of Church and State as understood by the Founders. Rather than an amorphous and subjective "test," the Founders' true instruction for the Religion Clauses is this: Congress shall make no law respecting an

establishment of the duties which we owe to our Creator, and the manner of discharging those duties, or prohibiting the free exercise of the duties which we owe to our Creator, and the manner of discharging those duties *unless those duties break out into overt acts against peace and good order*.

This Court upheld laws against polygamy in *Reynolds* using this Founding understanding of the Religion Clauses. *See id.* at 13-15. The Court, finding that "polygamy has always been odious" among the English forefathers and a punishable offence against society at common law, held that polygamy as a practice was an overt act against peace and good order akin to human sacrifice and self-immolation. *Id.* at 15-16. In reviewing the common law, the Court expressly noted the jurisdictional separation of Church and State reflected in the ecclesiastical courts which held exclusive jurisdiction over ecclesiastical rights, matrimonial causes and offences against marriage, as well as testamentary causes and settlements of decedent estates. *Id.* at 14.

After *Reynolds*, this Court continued to apply the Founders' understanding of jurisdictional separation of Church and State under the Religion Clauses. In 1892, this Court overturned the application of national immigration law to an alien pastor from England who had been contracted to work with a church in New York. *Holy Trinity Church v. United States*, 143 U.S. 457. After finding that the statute's language could not be construed to include more than manual laborers, the Court found that "beyond all these matters, no purpose of action against religion can be imputed to

any legislation, state or national, because this is a religious people." *Id.* at 465. This Court found that the colonial records, state constitutions, and the Declaration of Independence show "a constant recognition of religious obligations." *Id.* at 465-71. Comparing these recognitions of God to the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, the Court went on to say:

> There is no dissonance in these declarations. There is a universal language pervading them all having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, 11 Serg. & R. 394, 400, it was decided that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men."

Id. at 470. The Court then applied the Founders' understanding of jurisdictional separation to hold that a valid immigration law could not be applied to the Church where "the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country

affirm could not have been intentionally legislated against." *Id.*

The first Supreme Court Establishment Clause case, *Everson v. Board of Educatio*n[22] is based on the Founders' understanding of a jurisdictional separation of Church and State. Justice Hugo Black, alluding to Jefferson, concluded the Court's majority opinion with the famous statement that "[t]he First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18.

As the Court explained this "wall of separation" earlier:

> The 'establishment of religion' clause of the First Amendment means *at least this*: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.*

Id. at 15-16. (emphasis added). *Everson* did not address any subjective tests or issues of strict

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[22] As noted by Justice Rutledge in his dissent. *Everson*, 330 U.S. at 29.

scrutiny, compelling interest, or rational basis. Nor did the Court discuss specific types of state regulation of churches. Rather, the Court stated as an absolute that "neither a state nor the Federal Government" can "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." *Id.* The *Everson* Court made the straightforward conclusion that simple church assembly is not an "overt act against peace and good order" and recognized that it is a matter of Church jurisdiction that the State cannot breach.

Even as recently as 2020, this Court has recognized the jurisdictional separation of Church and State enshrined in the Religion Clauses, holding that "State interference [with matters of faith and doctrine], and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Our Lady of Guadalupe Sch. v. Morrisey-Berru* 140 S. Ct 2049, 2060 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 186 (2012))

In *Hosanna-Tabor*, this Court held that there is a "ministerial exception" which precludes the application of employment discrimination laws to the Church. 565 U.S. at 187-88 (2012). This Court held that the Religion Clauses require that "the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' *Kedroff v. St. Nicholas Cathedral of Russian*

Orthodox Church in North America, 344 U.S. 94 (1952)—is the church's alone." *Id.*

The *Hosanna-Tabor* Court's "ministerial exception" is really just a label on what the Founders would have considered a necessary and obvious result of the jurisdictional separation of Church and State. *Hosanna-Tabor* illustrates how this jurisdictional separation is inherent in both Establishment and Free Exercise:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89.

The Court distinguished its decision in *Hosanna-Tabor* from *Smith* by stating that, while the discrimination law was a valid and neutral law of general applicability, "a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government's interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190. In the present case, Pastor Spell and Life Tabernacle Church's internal church decision to assemble for

worship is the very essence of the "faith and mission of the church itself."

IV. The Decision Below Failed To Follow This Court's Instruction To Apply The Founders' Understanding Of The Religion Clauses And Has Created An Egregiously Wrong And Dangerous Precedent As A Result

Whereas this Court has specifically noted in *Everson* that the Establishment Clause forbids forcing or influencing people to stay away from Church, 330 U.S. at 15-16, the Fifth Circuit ignored Pastor Spell's Establishment Clause claim and has allowed Governor Edwards and his officials to force petitioners to "remain away from church against [their] will," punish Pastor Spell, and interfere in the affairs of the Church. This is exactly what the Founders intended the First Amendment to forbid.

Rather than analyze Pastor Spell's claim under the Establishment Clause according to the Founders' understanding, the Fifth Circuit instead analyzed Pastor Spell's claims under a *Smith*/*Lukumi* Free Exercise framework. App.4-5. After finding that Pastor Spell's counsel waived all arguments excepts a jurisdictional separation of Church and State as found in *Everson*, the Fifth Circuit held that Spell could not prevail because "controlling precedent directly contradicts Pastor Spell's jurisdictional theory of the Religion Clauses." App.5. However, each case the Fifth Circuit cites as controlling precedent that "directly contradicts" the jurisdictional theory of the Religion Clauses does not do anything of the kind—each

case involved strictly Free Exercise claims with no corollary Establishment Clause claims. *Church of Lukumi*, 508 U.S. at 546–47; *Roman Cath. Diocese,* 141 S. Ct. at 66–67; *Smith*, 494 U.S. at 872.

By so ruling, the Fifth Circuit adopted a "warring" application of the Religion Clauses which subsumed Pastor Spell's Establishment Clause claim into a *Smith/Lukumi* Free Exercise framework. Had the Fifth Circuit analyzed Pastor Spell's Establishment claim, the proper conclusion is that the Founders would have never accepted the type of State interference in the Church as committed by Governor Edwards and his officials. There is not a single instance in the Founding period where the government attempted to restrict church assembly in the manner at issue in this case.

To the contrary, if we apply the Founders' understanding to the present claim, there is a clearly established record that indicates the Founders and their immediate descendants recognized the vital importance of church assembly and encouraged it. President George Washington, in his 1789 Thanksgiving Address, called upon Americans to "unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations." [23] Likewise, President James Madison in his 1815 Thanksgiving Address scheduled and recommended Americans to observe a "day on which the people of every religious

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[23] *Thanksgiving Proclamation, 3 October 1789*, National Archives, https://founders.archives.gov/documents/Washington/05-04- 02-0091 (last visited May 4, 2023).

denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering to their Heavenly Benefactor of their homage of thanksgiving and of their songs of praise."[24]

Despite facing regular epidemics of diseases such as cholera, yellow fever, smallpox, influenza and more, there is no indication in the historical record that the Founders ever considered the government to have the power to restrict church assembly to stop the spread of disease. In 1849, just one generation after the Founders, President Zachary Taylor issued a Proclamation recommending a National Day Fasting, Humiliation, and Prayer in response to an ongoing cholera epidemic:

> At a season when the providence of God has manifested itself in the visitation of a fearful pestilence, which is spreading itself throughout the land, it is fitting that a people, whose reliance has ever been in his protection, should humble themselves before his throne; and, while acknowledging past transgressions, ask a continuance of the Divine mercy.
>
> It is, therefore, earnestly recommended that the first Friday in August be observed throughout the United States as a day of Fasting, Humiliation, and Prayer. All business will be suspended in the various

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[24] *Presidential Proclamation, 4 March 1815*, National Archives, https://founders.archives.gov/documents/Madison/03-09-02-0066 (last visited May 4, 2023).

> branches of the public service on that day; and it is recommended to persons of all religious denominations to abstain, as far as practicable, from secular occupations, and to assemble in their respective places of Public Worship, to acknowledge the infinite goodness which has watched over our existence as a nation, and so long crowned us with manifold blessings; and to implore the Almighty, in his own good time, to stay the destroying hand now lifted against us.[25]

Following this Court's Establishment Clause caselaw regarding the Founders' understanding, it is clearly established that the Founders did not consider church assembly during a time of epidemic to be an "overt act against peace and good order" and therefore, the State has no jurisdiction to restrict it. Thus, Governor Edwards' restriction of Pastor Spell and Life Tabernacle Church's assembly is an unconstitutional State intrusion of the Church that violates the Establishment Clause's separation of Church and State.

Had the Fifth Circuit conducted an Establishment Clause analysis, it would have given pause to its Free Exercise analysis because the Religion Clauses are complementary. *Kennedy*, 142 S. Ct. at 2426. If Pastor Spell wins under the Establishment Clause as understood by the

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[25] *Proclamation—Day of Fasting, Humiliation, and Prayer, July 3, 1849*, The American Presidency Project, https://www.presidency.ucsb.edu/documents/proclamation-day-fasting-humiliation-and-prayer (last visited May 4, 2023).

Founders, then the Founders would have likewise found him successful under the Free Exercise Clause because the claims are inextricably linked, and the Founders' jurisdictional understanding must be applied to both. Nonetheless, the Fifth Circuit jumped directly to an inapposite Free Exercise analysis and cite cases that do not include corollary Establishment Clause claims. App.5.

While *Roman Catholic Diocese* also dealt with COVID-19 restrictions on churches, the development of the case is very different. The church and synagogue in that case complied with the orders. 141 S. Ct. at 66. Here, Pastor Spell and Life Tabernacle Church continued church services as they always had, and Pastor Spell was criminally prosecuted by the Governor for doing so. App.11-20. The key distinction, however, is that the church and synagogue alleged only a Free Exercise violation, and this Court issued a preliminary injunction only on the basis of a likely Free Exercise violation under a *Smith*/*Lukumi* framework. *Roman Cath. Diocese*, 141 S. Ct. at 67-69. It is erroneous to apply this precedent to the present case, where Pastor Spell and Life Tabernacle Church have alleged that Governor Edwards violated the Establishment Clause by intruding into a "strictly ecclesiastical" matter that is the sole jurisdiction of the Church, to wit, ordering the Church on how it conducts its religious assembly and worship—thereby also violating the Free Exercise Clause by limiting religious exercise outside the Founders' understanding of "overt acts against peace and good order."

The *Smith*/*Lukumi* Free Exercise framework is simply not equipped to handle the complexity of Pastor Spell and Life Tabernacle Church's dual Establishment and Free Exercise claims. *Smith* involved an individual's religious exercise that was an "outward physical act" of ingesting peyote, not "government's interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor,* 565 U.S. at 190. As Judge Willett of the Fifth Circuit has noted, "'Ekklesia,' the Greek word for church, means the gathered ones, an assembly of the faithful." *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (Willet, J., concurring) (citing *Ekklesia*, The Oxford Dictionary of Byzantium (Alexander P. Kashdan, ed., 1991)).

Thus, the church assembly *is the Church itself*. As the United States District Court for the District of Columbia held, "*it is for the Church, not the District or this Court, to define for itself the meaning of 'not forsaking the assembling of ourselves together.' Hebrews* 10:25." *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 288, 295 (D.C. Dist. Ct. 2020) (emphasis added). Pastor Spell and Life Tabernacle's decision on how to conduct worship services is the very core of "the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190.

As for *Lukumi*, while that case did involve a church body, petitioners there brought only a Free Exercise claim, and this Court reviewed it under *Smith*. 508 U.S. at 531-32. This Court noted that "in our Establishment Clause cases we have often

stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," yet found that the "Free Exercise Clause is dispositive" because those cases "for the most part have addressed governmental efforts to benefit religion or particular religions." *Id.* at 532. However, the fact that the petitioners simply did not bring an Establishment Clause claim is a necessary consideration of the *Lukumi* Court's reasoning: the case is inapposite to Pastor Spell and Life Tabernacle Church's case because their Establishment and Free Exercise Claims are inextricable.

Ultimately, the *Smith*/*Lukumi* framework requiring "equal treatment" is wholly inadequate where such "equal treatment" both restricts religious exercise that is historically not an "overt act against peace and good order" and also results in State interference with internal church decisions regarding "the faith and mission of the church itself." By bringing an Establishment Clause claim in conjunction with a Free Exercise claim, Pastor Spell and Life Tabernacle Church sought to vindicate this truth. However, the regrettably still tangled precedent of the Religion Clauses resulted in the Fifth Circuit applying the *Smith*/*Lukumi* Free Exercise framework without analyzing the Establishment Clause at all. This is an egregious error that only this Court can remedy.

* * *

If the Fifth Circuit's decision is left unreviewed, it sets the precedent that the Establishment Clause

is not implicated by the State directly restricting the practices of the Church as long as it does so "equally." This goes against the clearly established understanding of the Founders that the Establishment Clause is meant to protect the Church from the State as much if not more so than to protect the State from the Church. The decision below has overlooked this critical truth, will wreak havoc on religious liberty, and destroy the true meaning of the separation of Church and State. The extraordinary circumstances of this case bring a vital issue of first impression regarding our most sacred rights of religious freedom that only this Court can resolve.

V. This Case Is Vitally Important To Confirm The Founders' Understanding And Intent To Enshrine A Jurisdictional Separation Of Church And State In The First Amendment.

Great strides have been made to restore the Establishment Clause to the Founders' intent and understanding. This Court has acknowledged, abandoned, and superseded the bad precedent that caused chaos in the Establishment Clause. *Kennedy*, 142 S. Ct. at 2427-28 (*citing Town of Greece*, 572 U.S. at 576; *American Legion*, 139 S. Ct. at 2087). However, the Fifth Circuit has sowed a seed of chaos in the guise of settled precedent that threatens to upend this good development. If left unremedied, any time the Church brings an Establishment Clause claim alleging that the State has intruded its jurisdiction in violation of the Religion Clauses, lower courts will be free to ignore any analysis of the Founders' understanding of

such a scenario. Instead, like the Fifth Circuit, lower courts will be able to simply apply a *Smith*/*Lukumi* framework to Establishment Clause claims, which completely ignores the Founders' understanding that the Religion Clauses enshrine a jurisdictional separation of Church and State.

We have already seen some of the bad fruit that will come from this. After church assembly was restricted and shut down across the country three years ago, church attendance has taken a measurable hit. Pew Research Center has reported that attendance is three percent lower since 2019 and twenty percent of Americans attend church less than they did before.[26] Some churches have also been fined for defying COVID-19 restrictions. A California Superior Court recently ordered Calvary Chapel San Jose to pay over $1 million in fines for not complying with the "equal" COVID-19 mask mandates. *California v. Calvary Chapel San Jose*, Case No. 20CV372285 (Cal. Super. Ct., April 7, 2023). And of course, in the present case Pastor Spell was arrested and put in an ankle bracelet for simply preaching to his congregation.

The Founders fought a revolution for much less. Their understanding of a jurisdictional separation of Church and State enshrined by the First Amendment means something more than the Church being intruded upon "equally" to

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[26] Justin Nortey & Michael Rotolo, *How the Pandemic Has Affected Attendance at U.S. Religious Services*, Pew Research Center (March 28, 2023), https://www.pewresearch.org/religion/2023/03/28/how-the-pandemic-has-affected-attendance-at-u-s-religious-services/.

department stores. The Supreme Court's jurisprudence recognizes this truth, and Pastor Spell and Life Tabernacle's case is the perfect opportunity for this Court to clarify the Founders' understanding of the Religion Clauses where the Establishment and Free Exercise Clauses are inextricably violated.

The Fifth Circuit's decision threatens to destroy the relationship between the Religion Clauses and the separation of Church and State. This Court should grant certiorari and confirm that a Free Exercise Claim does not negate and subsume an inextricably linked Establishment Clause Claim, that the Founders' understanding is the standard of review for Establishment Clause claims, and that the Founders' understanding of a jurisdictional separation of Church and State is enshrined by the Religion Clauses and requires that the State "shall not" restrict the assembly of the faithful that is the *Ekklesia*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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