No. 22-1093

IN THE
Supreme Court of the United States

MARK ANTHONY SPELL, ET AL.,

Petitioners,

v.

JOHN BEL EDWARDS, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

MATTHEW J. CLARK*
**Counsel of Record*
ALABAMA CENTER FOR LAW
AND LIBERTY
P.O. Box 680979
Prattville, AL 36068
matt@alabamalawandliberty.org
256-510-1828

Counsel for *Amicus Curiae*

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

COMES NOW Amicus Curiae, Alabama Center for Law and Liberty ("ACLL"), and moves for leave to file the attached brief in support of Petitioners.

ACLL is a conservative nonprofit public-interest firm based in Birmingham, AL, dedicated to the defense of limited government, free markets, and strong families. ACLL's parent nonprofit organization, the Alabama Policy Institute ("API"), was founded in 1989 by Congressman Gary Palmer and Chief Justice Tom Parker of the Alabama Supreme Court. API has fought for conservative causes for over 30 years.

ACLL has an interest in this case because it believes that, until 2020, the right of churches to assemble for worship was undisputed. Because religious freedom is essential to limited government, and because the right to assemble for church is a core First Amendment right, ACLL believes that this case presents an important question of federal law that the Court should consider. ACLL also notes that the Fifth Circuit faulted Petitioners for advocating for a bolder theory of First Amendment protections than what that court preferred, even though Petitioners had a good-faith basis for doing so. Because ACLL often leads with bold arguments and then falls back to more conventional arguments if needed, ACLL is concerned that allowing the Fifth Circuit's error to stand will have a chilling effect on bold constitutional advocacy.

ACLL believes that this brief would be helpful to the Court because it provides 12 examples when this Court ruled in favor of religious liberty as a simple black-and-white rule, holding that a matter was completely off limits to the government instead of subject to judicial balancing tests (even strict scrutiny). Thus, it demonstrates that Petitioners' approach to this case is not unprecedented. It also argues that this case is a good vehicle to answer Justice Barrett and Kavanaugh's calls from *Fulton v. City of Philadelphia* to examine religious-freedom matters in a more nuanced light. Whatever the full scope of religious freedom may be, there is little doubt that the text, history, and precedent of this Court (prior to 2020) held that churches had the right to assemble for worship.

ACLL submits this Motion because, regretfully, its counsel failed to provide the required 10-day notice to Respondents of its intent to file the brief. ACLL's counsel read this Court's updated rules when it promulgated them but has not revisited them since. When it came time to prepare this brief, he recalled that the Court had abolished the rule that parties had to consent at the cert-stage. He thought he remembered that the Court abolished 10-day notice rule also. He was mistaken and regrets his actions, and he assures the Court that it will not happen again. While he had already given Petitioners more than 10-day notice, he reached out to Respondents and asked if they would consent anyway. Sherriff Gautreaux and Chief Corcoran have consented. While he has not heard back from Governor Edwards, the Governor has also not objected. *See also* Waiver of Right of

Respondent John Bel Edwards to Respond, *Spell v. Edwards*, U.S. No. 22-1093 (May 25, 2023).

WHEREFORE, ACLL respectfully requests that this Court grants this Motion to file the attached brief in support of Petitioners.

Respectfully submitted,

MATTHEW J. CLARK*
**Counsel of Record*
ALABAMA CENTER FOR LAW
AND LIBERTY
P.O. Box 680979
Prattville, AL 36068
matt@alabamalawandliberty.org
256-510-1828

Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

The Alabama Center for Law and Liberty ("ACLL") is a conservative nonprofit public-interest firm based in Birmingham, AL, dedicated to the defense of limited government, free markets, and strong families. ACLL's parent nonprofit organization, the Alabama Policy Institute ("API"), was founded in 1989 by Congressman Gary Palmer and Chief Justice Tom Parker of the Alabama Supreme Court. API has fought for conservative causes for over 30 years.

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[1] ACLL provided timely notice to Petitioners but failed to provide the 10-day notice to Respondents, but 2 of 3 have consented to filing of this brief anyway. 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.

faith basis for doing so. Because ACLL often leads with bold arguments and then falls back to more conventional arguments if needed, ACLL is concerned that allowing the Fifth Circuit's error to stand will have a chilling effect on bold constitutional advocacy.

SUMMARY OF THE ARGUMENT

Over the last several decades, members of this Court – and the Court itself – have been moving away from judicial balancing tests (like strict scrutiny) and adopting rules based on the Constitution's text and history. The Fifth Circuit faulted Petitioners for failing to argue that strict scrutiny applied in their case. But to Petitioners' credit, not only has this Court been pushing for more bright-line tests, but ACLL has been able to identify 12 of this Court's precedents placing certain religious-freedom matters completely off limits to the government. Since this proves that not every religious-freedom matter is subject to the *Smith-Lukumi* framework, Petitioners were well within their rights to argue that assembling for church was one of those freedoms.

Following this Court's recent approach to analyzing constitutional claims, this brief analyzes the Constitution's text, history, and precedent as applied to this case. The text of the Constitution protects Petitioners' actions under the Establishment Clause, Free Exercise Clause, and Assembly Clause of the First Amendment. As for history, nothing in the historical record suggests that the government was free to order churches not to assemble. It may be true, as Justice Alito argued in *Fulton v. City of Philadelphia*, that the Founding Generation

recognized an exception for the public safety. However, the data shows that the shutdowns slowed the mortality rate by only .2% (and that the virus already had a 98.9% survival rating). Since the benefit to the public safety was so de minimis and the intrusion on religious freedom was unprecedented, the government should have to explain whether its actions sufficiently met the criteria for the public-safety exception if its actions are allowed to stand. Finally, before 2020, the lone Supreme Court precedent on point also established a black-and-white rule that worked in Petitioners' favor.

As well-meaning of a test as strict-scrutiny is, it is beyond dispute that a simple, absolute, black-and-white test would protect freedom more than strict scrutiny would. Thus, if the Fifth Circuit's decision is allowed to stand, then the question becomes whether the rights to believe, to teach in accordance with one's faith, to share one's faith, to bow down in worship, and to allow churches to have the final say over matters of doctrine, discipline, and ministers will likewise be subject to judicial-balancing tests when they were completely off limits previously. Thus, this case presents an important question of federal law that cries out for this Court's adjudication so that other absolute rights will not be lost as well.

ARGUMENT

I. Some Religious-Freedom Rules Are Black and White Instead of Subject to Judicial Balancing Tests

Since at least 2008, there have been growing calls from this Court to abandon judicial balancing tests

and adopt bright-line rules instead. The late Justice Scalia, for instance, abhorred balancing tests and urged the courts to adopt general rules based on the text and original understanding of the Constitution. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). And as Justice Kavanaugh aptly put it, applying tests like strict scrutiny, well-meaning as they may be, is like telling an umpire to call balls and strikes without telling him where the strike zone is. Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1915 (2017).

The Court as a whole seems to be adopting this view more frequently than not. In 2008, the Court rejected an interest-balancing approach to the Second Amendment, reasoning that the amendment itself "is the very *product* of an interest-balancing by the people[.]" *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). In the last term, the Court rebuked the lower courts for subjecting the right to bear arms to intermediate scrutiny, instead adopting a standard that it exegeted from the text itself. *N.Y. St. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

Thus, in the present case, the Fifth Circuit should not have been surprised that Petitioners would seek to set a stronger precedent than merely having their case decided under the framework articulated *Employment Division v. Smith*, 494 U.S. 872 (1990), and expounded in cases like *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). While it may very well

be true that Petitioners could have won *this case* under an unequal-treatment theory, if there was an even more solid basis for their position, then they could have ensured that they won *and* that they could not have been subject to that abuse again.

So the question then becomes whether there are any religious-liberty principles that are subject to a clear black-and-white rules discussed in *Heller*, *Bruen*, and the like. Here are some examples from this Court's precedents that avoid judicial balancing tests—even strict scrutiny—and establish a simple rule holding that these matters are off-limits to the government:

- The right to teach, even on subjects that are politically incorrect (like marriage). *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015).
- The right of clergy to decline to solemnize a same-sex marriage. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2017).
- The "freedom to believe … is absolute[.]" *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940).
- "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Id.*
- The freedom to hold what a court might find not "acceptable, logical, consistent, or comprehensible" beliefs. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

- The freedom to differ from one's denomination's beliefs *and practices* while still identifying as part of that denomination. *Id.* at 715-16.
- The "freedom to profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).
- The right to bow down in worship. *Id.* at 877-78.
- The right of ecclesiastical authorities to decide religious disputes within their own church. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976).
- The right of churches to have the final say on matters of "church discipline" or "the conformity of the members of the church to the standard of morals required of them[.]" *Watson v. Jones*, 80 U.S. 679, 733 (1871).
- The freedom of churches and religious organizations to choose their ministers. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).
- And, finally, as Petitioners have observed, the government may not "*force or influence a person to go to or remain away from church against his will ….*" *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

The Fifth Circuit seemed to believe that *every* religious liberty case is governed by the *Smith-Lukumi* framework and that every religious-liberty

claim is subject to either rational-basis review or strict-scrutiny review. But as thoroughly demonstrated above, this notion runs afoul of *Watson*, *Cantwell*, *Everson*, *Milivojevich*, *Thomas*, *Smith*, *Hosanna-Tabor*, *Obergefell*, and *Masterpiece Cakeshop*. While the *Smith-Lukumi* framework has undoubtedly been the most common way of evaluating religious-freedom claims since at least 1990, it does not follow that *Smith* and its progeny eviscerated the rules listed above. Even after *Smith* and its progeny, **the Constitution and this Court's precedents still place certain religious-liberty matters *completely* off limits to the government.**

Moreover, if there was ever a time for Petitioners to argue that this case fits better into a simple black-and-white rule, it is now. Two terms ago, Justices Alito, Thomas, and Gorsuch said it was time to overhaul *Smith*'s framework completely. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in judgment). Justices Barrett and Kavanaugh agreed that the First Amendment by its very nature had to be more than a nondiscrimination provision but called for a more "nuanced" approach in rethinking *Smith*. *Id.* at 1882-83 (Barrett, J., concurring). None of this Court's nine justices made any serious attempt to defend *Smith*. *Id.* at 1931 (Gorsuch, J., concurring in judgment). Because *Smith*'s credibility has thus been severely impeached, Petitioners' attempt to argue that this case falls into a simple black-and-white rule is not poor advocacy. The

time is ripe to reconsider the precedents governing whether Americans are free to go to church.[2]

II. Textual, Historical, and Precedential Evidence Presents a Compelling Case That Petitioners Are Correct

This Court has been walking away from judicial balancing tests and adopting a historical analysis of the Constitution where possible. *See, e.g.*, *Bruen*, 142 S. Ct. at 2126; *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022). In light of this trend, ACLL will argue here that text, history, and precedent support Petitioners' view.

A. The Constitution's Text

The First Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … or the right of the people peaceably to assemble." U.S. Const., amend. I.

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[2] This case also fits well within Justice Barrett's call to take a nuanced approach in reexamining *Smith*. The question presented here is not whether each individual has the right to do what he pleases in the name of religious exercise but whether people may go to church or not. *See Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) (asking whether churches should be treated differently than individuals if *Smith* were reconsidered). This Court's precedents answer that question in the affirmative. *Everson*, 330 U.S. at 15.

1. "Religion"

Let us begin with the word "religion." As Justice Alito observed in *Fulton*, exploring the "outer boundaries" of this word may be difficult. *Fulton*, 141 S. Ct. at 1895 n.29 (2021) (Alito, J., concurring in judgment). However, a basic assessment of this word should leave no reasonable doubt that the Founding Generation understood it to include going to church.

Petitioners have made a compelling case that the original public meaning of "religion" during the Founding Era meant "the duty which we owe to our Creator, and the manner of discharging it." Pet. 14. In addition to the excellent sources Petitioners cite such as James Madison, Joseph Story, the Virginia Bill of Rights, and this Court's decision in *Davis v. Beason*, 133 U.S. 333 (1890), ACLL will attempt to analyze several other sources that may aid this Court's analysis.

One of Samuel Johnson's definitions of "religion" was "[a] system of divine faith *and worship* as opposite to others." *Religion*, Samuel Johnson's Dictionary, https://johnsonsdictionaryonline.com/views/search.php?term=religion (last visited June 5, 2023) (emphasis added). As an example of "worship," Johnson wrote in his 1773 edition, "[u]nder the name of *church*, I understand a body, or collection of human persons professing faith in Christ, gathered together in several places of the world for the *worship* of the same God, and united into the same corporation." *Worship*, in *id.*, https://johnsonsdictionaryonline.com/views/search.ph

p?term=worship (last visited June 5, 2023) (first emphasis added). Thus, the English-speaking reader would have understood "religion" to include assembling at church for the purpose of worshiping God together.

Webster's 1828 Dictionary compels the same result. One of Webster's definitions of "religion" was "[a]ny system of faith and worship." *Religion*, Webster's 1828 American Dictionary of the English Language 680 (Walking Lion Press 2010) (1828). "Worship" meant "*[c]hiefly* and *eminently*, the act of paying divine honors to the Supreme Being; or the reverence and homage paid to him in religious exercises, consisting in adoration, confession, prayer, thanksgiving, and the like." *Worship*, in *id.*, at 928. Since those "religious exercises" would commonly have been done in church, the public would have understood "religion" to include assembling in church for the purpose of adoration, confession, prayer, and thanksgiving.

2. "Free Exercise"

Thus, the *free exercise* of religion would have included the right to go to church for the purpose of assembling with other people and engaging in those activities together. *See Fulton*, 141 U.S. at 1896 (Alito, J., concurring in judgment). The words therefore extend *prima facie* to going to church, suggesting then that any governmental restriction thereon should be proved by the government based on the amendment's text and history rather than by forcing people who

want to go to church to prove that an exception does not apply. *Cf. Bruen*, 142 S. Ct. at 2126.

3. "Establishment"

Webster wrote that "establishment" was "the act of establishing, founding, ratifying, or ordaining," such as "the episcopal form of religion, so called in England." *Establishment*, *in* Webster, *supra*, at 304. Thus, if the government dictates the way in which churches may assemble, it has ordained the way in which church is permissible. That is exactly what happened during the COVID era. The government allowed churches to assemble if it had 10 people or less or if people sat in their cars, but not if they wanted to assemble in person. Thus, by allowing people to go to church one way but not the other, it temporarily established a government-favored religion.

4. "Peaceably to Assemble"

One other clause of the First Amendment must be considered. The word "church," as used in the Bible, is the Greek word *ekklesia*, which literally means "assembly," as multiple judges acknowledged during the pandemic. *See, e.g.*, *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F. 3d 669, 670 n.1 (5th Cir. 2020) (Willett, J., concurring); *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901, 912 (W.D. Ky. 2020). Webster's second definition of "assembly," to nobody's surprise, is "a congregation or religious society convened." *Assembly*, *in* Webster, *supra*, at 56.

Thus, unless the word "peaceably" limits "assembly" in this context, church assembly is protected. "Peaceably" during the Founding era meant "Without war; without tumult or commotion; without private feuds and quarrels." *Peaceably*, *in* Webster, *supra*, at 588. Notice that the First Amendment does not say the right to assemble *safely*; it says the right to assemble *peaceably*. The two concepts are related but distinct. The text indicates that the Framers were concerned about assemblies turning violent, like a riot or rebellion. "Safely" would have been a broader term that would have encapsulated that plus general public safety concerns. But they did not say "safely." They said "peaceably."

In this case, nothing in the record indicates that Petitioners were not peaceful. They only wanted to do what Christians have done for two millennia, especially when life gets hard: go to church. They took up no arms; they started no riots; they engaged in no feuds. They just went to church. Thus, the text of the amendment covers their conduct.

B. History

Long ago, Chief Justice Marshall wrote:

> If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction…. We know of no

> rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188-89 (1824). Thus, when the Court looks to history to determine the meaning of a constitutional provision, the object for which a provision was to govern should be given great importance. Just as the primary object of the Free Speech Clause it to protect core political speech and the primary object of the Second Amendment is to protect the right to self-defense,[3] the Religion Clauses must have an object as well.

There is a strong historical case that the primary object of the religion amendments was to allow people to go to the church of their choice without interference from the national government. It is well-established that the people who settled New England did so to escape having to conform to the Church of England, and they set up congregationalist churches in accordance with their own Puritan beliefs. *See* 3 John Eidsmoe, *Historical and Theological Foundations of Law* 1266 (2011). The middle colonies tended to have "diverse backgrounds," especially colonies like Pennsylvania that wanted to provide a haven for liberty of conscience. *See id.* at 1321. Maryland was

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[3] *See Heller*, 554 U.S. at 628 ("the inherent right of self-defense is central to the Second Amendment right"); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (using the term "core political speech.").

also the one American colony founded as a haven for Catholics. *Id.* "The Southern colonies were mostly Anglican, Presbyterian, and Methodist." *Id.*

The wide variety of churches in America left people wondering whether the new national government would pick an official church like many of the states had done. As Justice Scalia observed, the touchstone of historical establishments was forced church attendance and support through taxes of the government's preferred church. *Lee v. Weisman*, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting). But by prohibiting the national government from setting up an established church and prohibiting the interference with free exercise of religion, the First Amendment guaranteed that the people (and the states) were free to support the churches of their choices. *Accord* 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1871-73 (1833) (noting that the real object of the amendment was not to prostrate Christianity but to eliminate rivalry among Christian sects by leaving the matter of church support to the states and to the people).

As with nearly every rule, there are limitations. For instance, nobody in their right mind would argue that a so-called church would have the constitutionally protected right to sacrifice children if they held that it was part of their liturgy. But as Justice Alito thoroughly explained, freedom of religion generally did not extend to that which would endanger the public peace or safety. *Fulton*, 141 S. Ct. at 1901 (Alito, J., concurring in judgment). There is no doubt that

Petitioners posed no threat to the public peace, so the only plausible ground for restricting them is the public safety.[4]

"In ordinary usage, the term 'safety' was understood to mean: '1. Freedom from danger. . . . 2. Exemption from hurt. 3. Preservation from hurt. . . .' *Id.* at 1904 (omissions in original). Undoubtedly, COVID presented *a* danger to the public safety. However, now that COVID has died down, we have to wrestle with the fact that COVID in the United States has a mortality rate of 1.1%, which means that its survival rate is 98.9%. *Mortality Analysis*, Johns Hopkins University Coronavirus Resource Center, https://coronavirus.jhu.edu/data/mortality (last updated Mar. 16, 2023). While every single COVID death is undoubtedly tragic, data from Johns Hopkins reveals that the lockdowns **only reduced the morality rate by .2%.** Jonas Herby, Lars Jonung, and Steve H. Hanke, *A Literature Review and Meta-Analysis of the Effects of Lockdowns on COVID-19 Mortality*, Johns Hopkins Institute for Applied Economics (Jan. 2022), *available at* https://tinyurl.com/m3npxwus.

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[4] Petitioners appear to take a narrower view than Justice Alito's, quoting Thomas Jefferson's words that the civil magistrate may intrude only if "principles break out into overt acts against peace and good order." Pet. 23. ACLL's argument about the public safety here is not intended to undercut Petitioners' contentions; ACLL addresses the public-safety issue only in case the Court disagrees with Petitioners and sees the public safety as a broader ground for state intervention.

Given that the text and history of the First Amendment weigh in favor of the right to go to church and that there is only slight justification for invoking the public-safety exception, the burden should be on the government to find a historically analogous situation that justifies the massive shutdown a core First Amendment liberty for such de minimis results. *Cf. Bruen*, 142 S. Ct. at 2126 (holding that the burden shifts to the government to find a historically analogous exception after plaintiffs prove that the text establishes a prima facie case in their favor).

C. Precedent

Before this Court's decision in *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020), the only precedent ACLL has been able to find addressing this issue is *Everson*, which held that the government may not "force or influence a person … to remain away from church against his will[.]" *Everson*, 330 U.S. at 15.[5] Thus, the lone Supreme Court precedent on point was in Petitioners' favor.

Roman Catholic Diocese did not undermine *Everson*'s more powerful holding because it was decided under a different clause – the Free Exercise Clause – during the midst of an emergency. As the

[5] This Court's recent decision in *Kennedy* may have cast doubt on the entire line of Establishment Clause precedents stretching back to *Everson*. However, in light of what history teaches about the role of the Religion Clauses, ACLL believes this portion of *Everson* is historically sound, thus complying with *Kennedy*'s command to analyze Establishment Clause cases in light of history.

Sixth Circuit aptly observed, "it's not always easy to decide what is Caesar's and what is God's—and that's assuredly true in the context of a pandemic." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020). However, there was no Establishment Clause issue presented in *Roman Catholic Diocese*. Thus, *Roman Catholic Diocese* establishes that unequal treatment when it comes to church assembly requires *at least* strict scrutiny review under the Free Exercise Clause, but it did not displace the simple black-and-white Establishment Clause rule that *Everson* established. Nor did it rule out the possibility after the emergency ended that the Court could recognize a similar black-and-white rule under the Free Exercise Clause, which is part of what Petitioners are trying to prove here.

D. Conclusion

At least three clauses of the Constitution strongly cover the right to assemble for church. History reveals that the right to assemble for church was not only *a* right protected by the First Amendment, but it was also the foremost right protected by the Amendment. Supreme Court precedent also establishes the simple black and white rule that the government may not attempt to force people away from church.

The only plausible justification for the government's actions is the public-safety exception. But again, the lockdowns made only a .2% difference while crushing *the* core right protected by the Religion Clauses. In light of the foregoing, if these actions were

justified, the burden should be on the government to demonstrate that there is a historically analogous case that the Founding Generation would have accepted. *Bruen*, 142 S. Ct. at 2126; *Kennedy*, 142 S. Ct. at 2428. Such a de minimis benefit in light of a crushing burden on religious freedom is unlikely to stand.

III. More Fundamental Religious Freedoms Could Be Lost If the Court Does Not Act

The Fifth Circuit appeared to believe that every religious-freedom claim in a Section 1983 case is subject to *Smith* and its progeny. But as the long-list of cases cited in Part I, *supra*, establishes, there are many aspects of religious freedom that are not subject to judicial balancing tests but instead impose absolute rules. One of those rules under *Everson* was the right to go to church. As well-meaning as the strict scrutiny test is, the fact is that it is weaker than a simple black-and-white absolute rule that places this matter off limits to the government.

Thus, if the Fifth Circuit's decision is allowed to stand, then the question becomes which of the other rights, that are protected as absolute, will be subject to *Smith* and its progeny. Those rights would include:

- The right to believe;
- The right to worship;
- The right to select ministers;
- The right to preach and teach in accordance with one's faith;
- The rights of churches to decide matters of church discipline;

- The rights of churches to decide disputed theological matters; and
- The right to share one's faith.

See Part I, *supra*.

If the government passed a law providing that nobody can believe that engaging in homosexual conduct or the like is morally wrong, then instead of invoking the iron-clad protections of *Cantwell* and the like, churches would first have to establish that (1) they were the objects of targeting, or (2) the government is making exceptions for others but not for them. If so, they get strict scrutiny. But if not, then they probably lose under rational-basis review.

Such a proposition would be, in the words of Justice Scalia, "[p]ure applesauce." *King v. Burwell*, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting). It means that the burden of proof would shift to religious adherents to prove why they could not hold to the most basic of religious freedoms – the freedom to believe – before the burden shifted back to the government to justify its actions. A government telling its people that they don't have the right to believe—or select their ministers, or share their faith, or teach their precepts, etc.—until they can invoke some exception is fitting for the government of North Korea, China, Iran, or the Old Soviet Union, but not the United States.

IV. This Case Presents an Important Question of Federal Law That the Court Should Consider

The text, history, and prior precedent of this Court are all on point. Under ordinary circumstances, there would be no question that the government's actions would be unconstitutional. Granted, pandemics are not "ordinary circumstances." But as Justice Gorsuch recently observed, history teaches that governments tend to abuse emergency actions to set precedents that ultimately take away liberty. *See Arizona v. Mayorkas*, No. 22-592, slip op. at 4-8 (U.S. May 18, 2023) (statement of Gorsuch, J.).

For over a century, this Court recognized that the First Amendment built "'a wall of separation between church and State.'" *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's Letter to the Danbury Baptist Association). The problems with this metaphor are well-documented, and *Kennedy* recently made necessary adjustments to correct them. However, a kernel of truth from the wall-of-separation metaphor is that the government could not dictate how churches function. Churches were free to believe, teach, worship, assemble, administer the sacraments, and do the things that churches had traditionally done without government interference.

But for the first time, when COVID hit, the government intruded into the realm that every reasonable person in America from the Founding until now thought belonged exclusively to the church. If this precedent is allowed to stand, then there is little reason to think that preaching, worshiping, administering the sacraments, and the like will not be next. Thus, this case presents an important question

of federal law that cries out for this Court's adjudication. Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant certiorari and place the burden on the government, as it did in *Bruen*, to find a historically analogous exception in the historical record to justify its actions. If it cannot do so, then the right of churches to assemble should prevail.

Respectfully submitted,

MATTHEW J. CLARK*
**Counsel of Record*
ALABAMA CENTER FOR LAW
AND LIBERTY
P.O. Box 680979
Prattville, AL 36068
matt@alabamalawandliberty.org
256-510-1828

Counsel for *Amicus Curiae*