No. 22-204

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN AND
AARON WAYNE KLEIN,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

Brief for *Amicus Curiae* CONSTITUTIONAL ATTORNEYS In Support of Petitioners

JOHN A. EIDSMOE
Counsel of Record
TALMADGE BUTTS CONSTITUTIONAL ATTORNEYS
One Dexter Avenue
Montgomery, AL 36104
(334) 324-1812
eidsmoeja@juno.com
talmadge@morallaw.org
Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Constitutional Attorneys are two attorneys in Montgomery, Alabama, who believe the Constitution should be interpreted as its Framers intended, and who believe the Framers intended the God-given right to religious liberty is the first and foremost of our constitutional freedoms. Attorney John Eidsmoe is admitted to practice in Iowa and serves as Professor of Constitutional Law for the Oak Brook College of Law and Government Policy. Attorney Talmadge Butts is licensed to practice law in the State of Alabama and serves as Counsel for a legal foundation. The Constitutional Attorneys have an interest in this case because they believe that Petitioners' case is an example of a recurring problem in the clash between religious liberty and same-sex relations and that religious liberty should prevail.

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[1] Pursuant to Rule 37.2, Attorney Eidsmoe originally filed notice of intent to file on September 12, 2022, on behalf of the Foundation for Moral Law, but Attorneys Eidsmoe and Butts subsequently decided to file as Constitutional Attorneys instead. Counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.2, all parties have consented to the filing of this brief. 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.

SUMMARY OF ARGUMENT

Melissa and Aaron Klein operated a bakery, Sweetcakes by Melissa, in Gresham, Oregon, until they were forced to close rather than violate their religious convictions by designing and preparing a cake to celebrate a same-sex wedding.

Rachel Cryer and her mother came to Sweetcakes to order a wedding cake.[2] After being informed that the wedding involved two brides, Aaron Klein explained politely that because of their religious convictions they could not design and prepare a cake for a same-sex wedding. Shortly thereafter, Rachel's mother returned alone and initiated a discussion with Aaron about the Bible and same-sex marriage. She said she had once shared his beliefs but "her truth had changed" and she now believes the Bible is silent about same-sex relationships. Aaron responded by quoting *Leviticus* 18:22: "Thou shalt not lie with a male as one lies with a female; it is an abomination." Rachel's mother ended the conversation, returned to the car, and told Rachel that Mr. Klein had called her an "abomination." In fact, Mr. Klein had only quoted the Bible in

[2] In January 2013, when the incident that underlies this case occurred, gay marriage was banned in Oregon by constitutional amendment, and neither *United States v. Windsor*, 570 U.S. 744 (2013), nor *Obergefell v. Hodges*, 135 U.S. 2017 (2015), had been decided. This Court noted the significance of parallel facts in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

response to the mother's statement that the Bible is silent about same-sex relations. Aaron only quoted a Bible passage that called same-sex relationships an abomination; he never directed that epithet toward the persons involved. Even though acknowledging that the mother had misquoted Aaron and the Bible, the Oregon Bureau of Labor and Industries (BOLI) penalized Sweetcakes by Melissa $135,000 for the trauma allegedly caused to the same-sex couple.

Penalizing the Kleins for simply quoting the Bible in a conversation that Rachel's mother had initiated and in response to her statement that the Bible is silent about same- sex relationships, and after the mother had distorted Mr. Klein's statement and the Bible passage when she conveyed the conversation to her daughter, is an unconscionable infringement on free exercise of religion and free speech.

In fairness to BOLI and to the Oregon Court of Appeals, their failure to protect the Kleins' constitutional rights in part attributable to this Court's downgrade of the free exercise of religion in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Subsequently, the Court has further jeopardized free exercise by ignoring the refusal of some lower courts to apply Smith's hybrid rights test. This Court should grant the petition for a writ of certiorari to restore religious liberty to its rightful place as the first and foremost of our freedoms.

ARGUMENT

I. The traditional Judeo-Christian view of marriage has occupied a favored position in American law.

The traditional view of marriage as between one man and one woman has been so ensconced in American law that American courts have, until recently, refused to even recognize alternatives. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court held that the Free Exercise Clause does not protect the right to engage in polygamous marriage. In *Davis v. Beason,* 133 U.S. 333 (1890), the Court affirmed its holding in *Reynolds,* saying polygamy is not protected by the Free Exercise Clause because it is a crime "by the laws of all civilized and Christian countries." *Id.* at 341. The right to engage in other forms of marriage is not recognized because the Judeo-Christian view of marriage between one man and one woman is firmly part of our legal system, and "Christianity is part of the common law[.]" Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law at Harvard University* 20 (1829); *cf.*, *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394, 400 (Pa. 1824); *People v. Ruggles,* 8 Johns. 290, 294-95 (N.Y. 1811) (opinion by Chancellor Kent); *Vidal v. Girard's Executors,* 43 U.S. 127, 2 How. 127, 198 (1844) (opinion by Justice Story).

II. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded "strict scrutiny."

Religious liberty is the first of all human rights because rights themselves are the gift of God, and because religious liberty involves matters eternal rather than merely matters temporal.

The inaugural document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and that all people possess "unalienable" rights that are "endowed by their Creator." As Justice Douglas wrote for the Court in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being." In *McGowan v. Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Freedom of religion and freedom of expression were not given to us by the government through the First Amendment; they are, as the Declaration of Independence says, "endowed by [the] Creator." Government through the Constitution only "secures" the rights that God has already granted. The recognition of those rights predates the Constitution by centuries if not millennia.

a. The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The statute recognizes that "Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States."

Professors Donald S. Lutz and Charles S. Hyneman, after conducting a thorough search of the writings of leading American political figures for the period 1760-1805, found that 34% of all quotations in the Framers' writings came from the Bible.[3]

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[3] Donald S. Lutz, The Relative influence of European Writers on Late Eighteenth Century American Political Thought, Amer. Pol. Sci. Rev. 189 (1984); *see also* Charles S. Hyneman and Donald S. Lutz,

Liberty of conscience is a central principle the Framers derived from the Scriptures. In 1751 the Pennsylvania Assembly commissioned a bell to commemorate the 50th anniversary of the Charter of Privileges of 1701 and inscribed on the bell *Leviticus* 25:10: "Proclaim liberty throughout all the land unto all the inhabitants thereof." They well knew the words immediately preceding this verse: "And ye shall hallow the fiftieth year," the year of jubilee. The bell rang again in July 1776 to celebrate the Declaration of Independence and is now known as the Liberty Bell.

The Hebrews observed the Passover to commemorate Moses leading the people out of bondage in Egypt into liberty in the Promised Land. Christians also cite these passages as well as New Testament verses such as "If the Son, therefore, shall make you free, ye shall be free indeed" (*John* 8:36), and "Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage" (*Galatians* 5:1).

The Bible values liberty of conscience so highly that duty to obey God is placed above duty to obey civil government, and at times disobedience to tyrants is obedience to God.

American Political Writing during the Founding Era (1983); Eran Shalev, American Zion: The Old Testament as a Political Text from the Revolution to the Civil War (2013).

Jesus told the Pharisees: "Render to Caesar the things that are Caesar's, and to God the things that are God's" (*Mark* 12:17). When the apostles were prohibited from preaching the Gospel, they answered, "We must obey God rather than men" (*Acts* 5:29). *Exodus* 1:17 states that the Hebrew midwives "feared God, and did not as the king of Egypt commanded them [to kill the male Hebrew infants]." Daniel faced execution in a den of lions because he prayed to God in violation of King Darius's command (*Daniel* 6). His companions, Shadrach, Meshach, and Abednego, faced execution in a fiery furnace rather than worship a graven image as commanded by King Nebuchadnezzar (*Daniel* 3). The early Christians and Christians throughout the centuries into the present have faced "dungeon, fire, and sword" rather than compromise their consciences.

b. The Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave some recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it stood against the power of the State.[4] Martin Luther (1483-

[4] *See generally* Oliver O'Donovan & Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (1999); James J. Walsh, *The Thirteenth, Greatest of Centuries* 338-91 (2nd ed. 1909).

1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[5]

Calvinists (who constituted a strong majority of America's early settlers and also of the founding generation[6]) likewise believed in liberty of conscience. The Westminster Confession of Faith, drafted by the Westminster Assembly in 1643 at the call of the Long Parliament, declares in Chapter XX, Section 2:

> God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[7]

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[5] *Reply to the Diet of Worms* (Apr. 18, 1521), quoted in Roland Bainton, *Here I Stand: A Life of Martin Luther* 184-85 (1950).

[6] Loraine Boettner, *The Reformed Doctrine of Predestination* 382 (1972).

[7] Westminster Confession of Faith (1643), Chapter XX, Section II;

John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholic, Anglican, and Royalist doctrines. Nonetheless, in 1644 he defended freedom of conscience in an address to Parliament.[8]

John Bunyan (1628-1688), the Puritan author of *Pilgrim's Progress,* was convicted in 1660 of unauthorized preaching and failure to attend the Church of England. He declared before the court that

> a man's religious views – or lack of them – are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[9]

Cambridge Puritan theologian William Perkins (1558-1602) declared that "God hath now

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reprinted in *Trinity Hymnal* 860 (1999).

[8] Reprinted in *The Portable Library of Liberty;* files.libertyfund.org/pll/qotes/51.html

[9] Transcript of Trial of John Bunyan before Judge Wingate (Oct. 3, 1660), reprinted in *John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty

in the New Testament given a liberty of conscience."[10] He added that God sometimes requires us to disobey, because sometimes "men are bound in conscience not to obey."[11]

Bishop Joseph Hall (1574-1656) insisted that "Princes and churches may make laws for the outward man, but they can no more bind the heart than they can make it."[12] Bishop George Downame (1560-1634) stated: "The conscience of a Christian is exempted from human power, and cannot be bound but where God doth bind it."[13]

John Locke (1632-1704), a major influence on the American founding generation,[14] wrote that "religion is the highest obligation that lies upon mankind," that "there is nothing in the world that is of any consideration in comparison with eternity," that "the care of each man's salvation belongs only to himself," and that no life lived "against the dictates of his conscience will ever bring him to the mansions of the blessed."[15] The son of a Puritan lawyer, Locke was very much

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[10] I William Perkins, *Works* 529 (1612-1618), quoted in L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea* 4, 21 (1992).
[11] I Perkins, *Works* 530; quoted in Van Til, *Liberty of Conscience* 23.
[12] VI Bishop Joseph Hall, *Works* 649 (1863), quoted in Van Til, *Liberty* 41.
[13] Bishop George Downame, *The Christian's Freedom* 102, 104ff (1635), quoted in Van Til 41.
[14] *See* Hyneman and Lutz, *supra* n. 2. Lutz and Hyneman concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone.
[15] John Locke, *A Letter Concerning Toleration* 34, 46 (1688-89) (Patrick Romanell, ed. 1955).

influenced by the Puritan tradition.

c. The Colonial Foundations of Religious Liberty

While much of the groundwork for liberty of conscience was laid by the Puritans in England, Van Til asserts that "[l]iberty of conscience triumphed in America, while it failed in England."[16] As evidence for that proposition, colonial charters and constitutions at the time of the American War for Independence strongly recognized and protected liberty of conscience, although 9 colonies expressly so within the bounds of Christian orthodoxy. New York and Virginia are provided below :

New York:

And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed,

[16] Van Til 128.

within this State, to all mankind. . . .[17]

Virginia:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[18]

In light of this Biblical, Reformation, and colonial background, it is understandable that James Madison submitted the religious liberty article of the Bill of Rights with this original wording:

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[19]

Because there was no verbatim

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[17] New York Constitution of 1777, Article XXXVIII, avalon.law.yale.edu/18th_century/ny01.asp

[18] Virginia Constitution of 1776 and Declaration of Rights, Sec. 16, https://law.gmu.edu/assets/files/academic/founders/VA-Constitution

[19] Lib. of Cong., *Religion and the Founding of the American Republic*, https://www.loc.gov/exhibits/religion/rel06.html

> transcript of the first session of Congress, it is unclear exactly how or why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise" because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Religious freedom is meaningless without the right to act on one's beliefs. So long as no machine can read the thoughts of the heart, liberty of conscience exists everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal consequences. As J. Howard Pew has noted: "From Christian freedom comes all other freedoms."[20]

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[20] J. Howard Pew, quoted in Van Til 3.

III. *Employment Division v. Smith* does not do justice to the Framers' vision of religious liberty.

The Framers might well view with skepticism the preoccupation of today's courts with tiers and tests. But they would be utterly incredulous that the Court in *Employment Division v. Smith* would downgrade the Free Exercise Clause to a "lower tier" right that, unlike other rights, can be infringed with merely a rational basis.

Amicus questions whether even strict scrutiny is sufficient to protect this first and foremost of our liberties. But unless and until the Court is willing to reconsider the whole issue of tiers and tests, at the very least Free Exercise should be given the strict scrutiny protection it rightfully deserves.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view. He stated: "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion...." *Meek v. Pittinger,* 421 U.S. 349, 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Laurence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle."[21] Voluntarism is central to the case at hand, for the Oregon Court of Appeals ruling has the effect of compelling the Kleins to act in contravention of their most basic beliefs, thus violating the right of free exercise at its very core.

This Court gave high protection to religious liberty in early free exercise cases. In *Cantwell v. Connecticut*, the Court held that

> the [first] amendment raises two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

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[21] *American Constitutional Law* 833 (1978). *Cf.* 2d ed. at 1160.

310 U.S. 296, 303-04 (1940). *Cantwell* seems to say that infringements on free exercise are subject to higher scrutiny than a mere reasonable relationship to a legitimate state purpose.

The high protection test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to cases in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, which was an almost-unanimous decision,[22] *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. He said that freedom of belief is absolute, as is freedom to engage in certain traditionally religious activities like attending worship services, but lower protection applies when religious persons engage in activities that nonreligious persons might engage in as well. *Smith* at 877-79. Justice Blackmun dissented, joined by Justices Brennan and

[22] Only Justice Douglas dissented, and only in part. He did not dispute the Court's basic reasoning but dissented because he noted a potential conflict between the rights of the parents and those of the child that had not been fully articulated in the case.

Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent. She excoriated the majority for departing from the strict scrutiny test but concurred because she believed the state had a compelling interest in regulating controlled substances that could not be achieved by less restrictive means.

Smith received harsh criticism from the beginning. A massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-3, in the House by a voice vote and in the Senate 97-3, President Clinton added his signature but this Court struck down the law as applied to the states by a vote of 6 to 3 in *Boerne v Flores*, 521 U.S. 507 (1997). The Court unanimously upheld RFRA as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Twenty-one states have adopted versions of RFRA that require application of the compelling-interest/less-restrictive-means test. Ten additional states have incorporated the principles of the Act by state court decision.[23]

Many legal scholars have criticized *Smith.* Professor Michael McConnell, who later served on the Tenth Circuit, cogently observed that the Court effectively decided *Smith* on its own initiative, as none of the parties had asked the Court to abandon the *Yoder* test.[24] John Witte, Jr., Professor of Law at Emory University, demonstrated that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[25]

However, *Amicus'* analysis of *Smith* must begin with a recognition that *Smith* did get one thing right: Religious liberty is a jurisdictional

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[23] *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil- and-criminal-justice/state-rfra-statutes.aspx

[24] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also noted that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[25] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1999).

issue in that government has no jurisdiction over religion. As the Court said at 877-78,

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner, supra,* 374 U.S. at 402. The government may not compel affirmation of religious belief, *see Torcaso v. Watkins,* 367 U.S. 488 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard,* 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.
>
> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they

> display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

(Cleaned up). This reasoning in *Smith,* the "jurisdictional" portion, is sound and should be preserved. The Framers understood church and state to be separate kingdoms or jurisdictions, neither of which could dictate to the other. This applied not only to religious beliefs but also to actions associated with religious belief, such as worship, partaking of the sacraments, or bowing before idols.

But another portion of *Smith,* which we will call the "general applicability" portion, is dangerous:

> Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we

> do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

(Cleaned up). The harsh criticism of *Smith* has been directed toward the "general applicability" portion of the decision, not the decision as a whole. *Amicus* agrees with that criticism. The "general applicability" portion of *Smith* has taken the foremost of all rights, religious liberty, and relegated it to bottom, the lowest of all rights.

Further, a court-created right such as same-sex marriage should not take precedence over the sacred rights of religious conscience enshrined in the First Amendment. As this Court stated in *Bowers v. Hardwick*: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made

constitutional law having little or no cognizable roots in the language or design of the Constitution." 478 U.S. 186, 194 (1986) (overruled on other grounds by *Lawrence v. Texas*, 539 U.S. 558 (2003)). Neomi Rao, Associate Professor of Law at Antonin Scalia Law School, questions whether the importation of expansive and subjective notions of "dignity" into the Constitution comports with the Founders' design.[26]

In *Fulton v. Philadelphia,* ___ U.S. ___ (2021), this Court addressed a Philadelphia requirement foster care agencies may not discriminate against same-sex couples. The Court did not expressly overrule *Smith* because the Court could uphold Fulton's claim without overruling *Smith.* The Court held that, because the Philadelphia ordinance allowed other exemptions for the requirement that foster care agencies must not discriminate against same-sex couples, it must use strict scrutiny before refusing Fulton's religious objection to the requirement. But five of the Justices (Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ) made it clear in their concurring opinions that they believe it is time to overrule *Smith.* Justice Gorsuch observed

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[26] Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 Va. L. Rev. Online 29 (2013); *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183 (2011); *On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 201 (2008).

in his *Fulton* concurrence, "No fewer than ten Justices – including six sitting Justices – have questioned [*Smith's*] fidelity to the Constitution." *Fulton* at ___. Although the decision did not expressly overrule *Smith,* in Mark Silk's words it put the "*Smith* decision on life support."[27]

In summary, the "general applicability" portion of *Employment Division v. Smith*:

- Was adopted *sua sponte* without request, argument, or briefing from the parties.
- Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.
- Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.
- Was sharply criticized by a wide spectrum of the legal and religious communities of the nation.
- Was repudiated by an overwhelming vote of Congress in adopting the

[27] Mark Silk, "Supreme Court Puts Scalia's Smith Decision on Life Support," June 21, 2021, https://religionnews.com/2021/06/21/scotus-puts-scalias-smith-decision-on-life-support/

Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores.*

- Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes, state constitutional amendments, or state court decisions.
- Has been ignored, strained, or limited by many circuit courts and other courts.
- Has proven unfair and unworkable in practice.
- Is manifestly contrary to the Framers' elevated view of religious liberty by reducing this most- cherished right to mere lower-tier status.

Because of all of these reasons, it is clearly time for this Court to reconsider the "general applicability" portion of *Employment Division v. Smith.*

IV. This case clearly qualifies as a hybrid- rights exception to *Smith.*

If the Court is not going to reconsider *Smith* at this time, then the Court should put some "teeth" into *Smith's* hybrid-rights doctrine and apply that doctrine to this case.

Smith's hybrid-rights doctrine asserts that

strict scrutiny must be applied to a free exercise of religion claim when that claim is raised in tandem with a claimed violation of another constitutional right.

The Kleins assert that their artistic expression in preparing wedding cakes is protected free speech. And what could be more protected First Amendment expression than Mr. Klein's quotation from the Bible in response to the brash assertion that the Bible is silent about same-sex relationships?

Even if cake-decorating is only middle-tier speech, the *Smith* hybrid-rights doctrine never said the hybrid right must be an upper-tier fundamental right. If it did, the doctrine would make no sense, because such rights can stand on their own independent of a free exercise claim. As Justice Souter stated concerning the hybrid-rights doctrine:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an

> exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring in part and concurring in judgment).

Lower federal courts routinely ignore *Smith*'s "hybrid rights" exception.[28] According to Stephen Aden and Lee Strang:

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith* – that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith* – is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[29]

After discussing numerous federal circuit court cases in which hybrid rights claims have

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[28] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).
[29] *Id.* at 587.

been denied, Aden and Strang explain why the lower courts have not followed this Court's guidance:

1. The hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent;

2. The compelling interest test in the realm of free exercise jurisprudence was never "compelling," and hybrid claims simply suffer a continuation of the reluctance to excuse conduct because of religious belief;

3. Difficulty in determining the proper burdens and procedures to assert a hybrid claim, namely the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and

4. Growing hostility to exemptions from state anti-discrimination laws which have ever increasing numbers of protected classes.[30]

Three of this Court's 2022 decisions concerning religion clearly qualify as hybrid cases: *Shurtleff* (free exercise and free speech), *Carson* (free exercise and parental rights), and *Kennedy* (free exercise and free speech). In the fourth case, *Ramirez,* the Texas prison

[30] *Id.* at 602.

requirement of "absolute silence" during an execution could conceivably be "neutral" and of "general applicability," but the Court nevertheless applied strict scrutiny based on RUILPA and based on "a historical tradition of clerical prayer at the time of a prisoner's execution that stretches well back before the founding and continues today."

While *Amicus* strongly disagrees with any assertion that free exercise of religion is anything less than a fundamental right, we suggest that when a free exercise claim is asserted in tandem with a non-fundamental right, the combined weight of the two rights requires that they be treated together as a fundamental right entitled to strict scrutiny.

CONCLUSION

This case presents the Court with a special opportunity to correct an egregious Free Exercise and Free Speech violation and also to revisit *Smith* and clarify the true meaning of religious liberty. We urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN A. EIDSMOE
Counsel of Record
TALMADGE BUTTS
CONSTITUTIONAL ATTORNEYS
One Dexter Avenue

Montgomery, AL 36104
(334) 324-1812
eidsmoeja@juno.com
talmadge@morallaw.org

Counsel for *Amicus Curiae*

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