No. 22-942

In the
Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON, ATTORNEY GENERAL OF WASHINGTON, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* WAGNER FAITH & FREEDOM CENTER IN SUPPORT OF PETITIONER

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April 26, 2023

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QUESTIONS PRESENTED

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause.

2. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

This amicus brief primarily addresses the second question, focusing on whether this Court should revisit *Employment Division v. Smith*.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, the *Wagner Faith & Freedom Center* (WFFC) submits this brief.[1]

Housed on the campus of Spring Arbor University, the *Wagner Faith & Freedom Center* serves as a national academic voice for faith and freedom. Working daily to secure the future for freedom of thought, conscience, and religion, the WFFC equips the next generation with strategies promoting good governance and the Rule of Law. Contending for the faith, the WFFC strategically works to ensure the next generation may share the Gospel free of persecution and oppression. In public forums throughout the world the WFFC speaks on behalf of the persecuted and most vulnerable. The WFFC champions the cause of the defenseless and oppressed, standing for faith and freedom all around the world.

Amicus Curiae has special knowledge helpful to this Court in this case, having a significant interest in the protection of the constitutional rights and

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[1] Pursuant to Rule 37(a), *Amicus curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amicus Curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

religious freedom of citizens. *Amicus Curiae* is committed to preserving good governance under the Rule of Law, including protection of the legal rights and freedoms of Christians working in their chosen professions, and is a leading voice in this area.

Amicus Curiae files this brief to encourage this Honorable Court to guide the American judiciary, and other branches of government, to return to a sound constitutional basis for protecting First Amendment liberty in our nation.

SUMMARY OF THE ARGUMENT

The First Amendment to the United States Constitution prohibits governmental infringement on the free exercise of religion and religious expression. U.S. Const. amend. I. The writers of the First Amendment did not say "make no law prohibiting the free exercise of religion, unless you can find an unelected state regulatory regime or federal judge to say the law is neutral and generally applicable." Indeed, instead, the Framers of the First Amendment doubly protected freedom of religious expression. *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2421, 2426 (2022)

In *Employment Division v. Smith,* this Court drifted away from its constitutional jurisprudence that recognized freedom of religion as a First Amendment fundamental liberty interest. 494 U.S. 872 (1990). Even though the government's action in *Smith* substantially infringed on the free exercise of religious liberty, *Smith* required no justification by the

government for its conduct. To reach this radical result, *Smith* deemed neutral laws of general applicability excepted from the constitutional protection contra-expressed in the plain language of the Free Exercise Clause. *Smith* did so despite a dearth of any supporting jurisprudence deeply rooted in our Nation's history and traditions, or implicit in the concept of ordered liberty.

Unless a State affirmatively acts to restore fundamental right status to the free exercise of religious conscience, *Smith*, as a practical matter, denudes any meaningful constitutional protection for religious liberty as a limit on the exercise of the State's power. Divesting Petitioner of any fundamental liberty protection, the appellate court characterized the SOGI conversation censorship law here as neutral and generally applicable, even though it primarily, if not exclusively, burdened religious conscience and expression. The SOGI conversation censorship law here, therefore, necessarily requires Christian people to: 1) surrender their right to freely express and exercise their religious conscience protected by the First Amendment; and 2) relinquish their religious identity recognized by this Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015). This Court should, therefore, grant the Petition, revisit *Smith*, and correct the error.

The SOGI conversation censorship law in the case at bar substantially interferes with Petitioner's religious identity and expressive exercise of his religious conscience. Here, the State of Washington expressly requires Petitioner to renounce his religious

expression, conscience, identity, and sincerely held religious beliefs, or face professional discipline under the full force of law and punishment. When the government substantially interferes with a citizen's free exercise of religious expression and conscience, that government action must face the "most rigorous" scrutiny.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO REVISIT *SMITH* AND RESTORE FULL FUNDAMENTAL RIGHT STATUS TO THE UNALIENABLE LIBERTY PROTECTED BY THE FIRST AMENDMENT.

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...." U.S. Const. amend I. Although this language includes no exemption for laws the government labels as "neutral" or "generally applicable," *Employment Division v. Smith* wrongly held that it does. 494 U.S. 872 (1990). This case provides the opportunity for the Court to overrule this wrongly decided precedent that government authorities increasingly use to unconscionably (and unconstitutionally) burden a

person's religious expression and free exercise of their religious conscience.[2]

This Court holds liberty protected by the First Amendment applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Reflecting an accurate historical understanding of the plain meaning of the Free Exercise Clause, this Court, in *Sherbert v. Verner* and *Wisconsin v. Yoder,* struck down government actions that substantially interfered with a person's sincerely held religious beliefs. *Sherbert,* 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs). Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to provide a compelling interest to justify its interfering with such a fundamental liberty interest. This Court, in applying strict scrutiny to the government actions, further required the government to show it used the least restrictive means available to accomplish its interest. Recently, in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881

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[2] The necessity of resolving the circuit splits outlined in the Petition additionally provide significant reasons to grant certiorari.

(2020), this Court confirmed that government action infringing on First Amendment religious liberty warrants the strictest of scrutiny. Moreover, in *Kennedy v. Bremerton School District,* this Court confirmed that religious expression is doubly protected under the First Amendment requiring the application of strict scrutiny. 142 S. Ct. 2407, 2421, 2426 (2022) citing, *Fulton,* 141 S. Ct. at 1876-1877; *Reed v. Town of Gilbert,* 576 U.S. 155, 171 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert*, 374 U.S. at 403 (1963).

A. *Employment Division v. Smith* Erroneously Diminished the Free Exercise of Religious Conscience as a Fundamental Right.

In *Employment Division v. Smith,* this Court departed from its constitutional jurisprudence recognizing freedom of religion as a fundamental liberty interest protected by the First Amendment. 494 U.S. 872 (1990). Even though the government's action in *Smith* substantially infringed on the free exercise of religious liberty, *Smith* required no justification by the government for its conduct. To reach this radical result, *Smith* deemed neutral laws of general applicability excepted from the constitutional protection contra-expressed in the clear and plain language of the Free Exercise Clause.[3]

[3] *Cf. Lukumi,* 508 U.S. 520 (1993) (applying strict scrutiny to a law substantially infringing on religious liberty when, in the subjective view of the reviewer, the law is not a neutral law of general applicability). Given that the law in the case at bar

Smith did so despite a dearth of any supporting First Amendment jurisprudence deeply rooted in our Nation's history and traditions, or implicit in the concept of ordered liberty.

Justice Alito, concurring in *Fulton*, joined by Justices Thomas and Gorsuch, correctly recognized that:

> [*Smith*] abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

Fulton, 141 S. Ct. at 1882 (Alito, J., Thomas, J., and Gorsuch, J. concurring); see also, Justice Barrett, concurring in *Fulton*, joined by Justice Kavanaugh, documenting that "the textual and structural arguments against *Smith* are more compelling." *Id.* at 1883.

Indeed, *Smith's* rule diverges drastically from the protections afforded to religious practice during the

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primarily, if not exclusively, burdens religious conscience and expression, strong arguments exist that it is not a neutral law of general applicability.

founding period. When "important clashes between generally applicable laws and the religious practices of particular groups" occurred, "colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests." *Id.* at 1905.

Under the original understanding of the Free Exercise Clause, the Constitution protected a person against government actions violating the person's religious conscience. Thus, even when a generally applicable law, such as taking an oath or military conscription, interfered with religious conscience, the First Amendment provided protection. *Id.* at 1905-1906.

The accommodation for religious conscience during the revolutionary war "is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, the very survival of the new Nation often seemed in danger, and the Members of Congress faced bleak personal prospects if the war was lost. Yet despite these stakes, exemptions were granted." *Id.* at 1906. In the face of a highly compelling governmental interest (the survival of the nation) and the presence of a generally applicable neutral law (military conscription), the willingness of the founders to grant exemptions based on religious conscience demonstrates how extensively the Free Exercise Clause was meant to protect religious practice. "In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free exercise right, the case for *Smith* fails to overcome the more natural reading of

the text. Indeed, the case against Smith is very convincing." *Id.* at 1912.

Undeniably, the only real limit on religious liberty during the founding period, according to the constitutions and laws of the states, was whether conduct would endanger "'the public peace" or "safety."' *Id.* at 1901. These words had precise meanings during the founding period. Peace meant, "1. Respite from war. . . . 2. Quiet from suits or disturbances. . . . 3. Rest from any commotion. 4. Stillness from riots or tumults. . . . 5. Reconciliation of differences. . . . 6. A state not hostile. . . . 7. Rest; quiet; content; freedom from terror; heavenly rest. . . ." While Safety was understood as "1. Freedom from danger. . . . 2. Exemption from hurt. 3. Preservation from hurt. . . ." *Id.* at 1903-04 (citations omitted).

In comparison to the very specific meaning of the "public-peace-or-safety" carveouts limiting the free exercise of religion during the founding period, the *Smith* test inappropriately restricts the free exercise of religion under "neutral and generally applicable" laws.

Unsurprisingly, therefore, in response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.* The act expressly provides that:

> Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, [unless] … it demonstrates that application of

> the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. In promulgating the RFRA, Congress correctly acknowledged: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." 42 U.S.C. § 2000bb(a)(1). Congress stated the purpose of the legislation was

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b)(1)-(2). Although this Court upheld the RFRA as applied to federal government actions, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), it also held Congress acted outside the scope of its constitutional authority as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, notwithstanding the plain language of the Free Exercise Clause, and despite Congress' attempt to statutorily reinstate an accurate understanding of the correct constitutional standard, *Smith* wrongly continues to allow State authorities to substantially interfere with the free

exercise of religious conscience and expression. Consequently, unless a State affirmatively acts to restore fundamental right status to the free exercise of religion, *Smith* extinguishes critical constitutional limits on the exercise of the State's power. Given our nation's history, and the history of those who have fled to our shores, the framers rightly made religious liberty our First Liberty. For only as long as this Court preserves the freedom of conscience protected under the First Amendment, will our other freedoms remain secure. This Court, therefore, ought to grant the Petition, revisit, and reverse *Smith*.

The SOGI conversation censorship law in the case at bar (and other ubiquitous special SOGI preferences, imposed by state and local authorities), exacerbate the threat to the free exercise of religious conscience. These government actions necessarily require Christian people to: 1) relinquish their religious identity; and 2) surrender their right to freely exercise and express their religious conscience. State enforcement of "neutral" SOGI preferences often weaponize State action to eliminate the Free Exercise and Speech Clauses as important constitutional constraints on the exercise of State authority. Indeed, since *Smith,* religious people in our nation face a far more horrific predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined. This is especially so in any regulated profession where the government recharacterizes religious conscience and expression as the regulation of professional conduct. For example, a State Supreme Court recently proposed a rule compelling all State judges to address attorneys and

parties using SOGI pronouns provided by the attorneys and parties. See, *Comment of the Religious Liberty Law Section of the State Bar of Michigan on Proposed Amendment of Rule 1.109 of the Michigan Court Rules (The proposed rule provides no accommodation for religious conscience).*

B. This Court's Post-*Smith* Cases Point Toward Restoring the Free Exercise of Religious Conscience as an Unalienable Fundamental Right.

The writers of the First Amendment did not say "make no law prohibiting the free exercise of religion, unless you can find an unelected state regulatory regime or federal judge to say the law is neutral and generally applicable."

1. Significance of Post-Smith First Amendment Cases

In *Fulton,* this Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

Fulton, 141 S. Ct. at 1881.

While the government action in *Fulton* was not generally applicable, nothing in the Court's holding suggests the fundamental nature of the constitutional protection ought to diminish where it is.

Subsequently, in *Kennedy*, this Court confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. *Kennedy,* 142 S. Ct. 2407, 2421, 2426 (2022). In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.* The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et a*l., 138 S. Ct. 2448, 2464 (2018). Such actions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner Broad Sys., Inc. v FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L.Ed. 2d 497 (1994).

Here the SOGI censorship law coerces professionals to betray their convictions. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this

reason, ... a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus,* 138 S. Ct. at 2464 (2018) quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943).

The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (cleaned up). Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their

freedoms but embrace the security and liberty only a pluralistic society affords. That is why the First Amendment protects expression of a religious person's viewpoints and ideas, subjecting a State to the strictest of scrutiny if it substantially interferes. See, e.g., *Masterpiece Cakeshop, LTD., v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1745-46 (2018) (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where Colorado's law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder v. Humanitarian Law Project*, 561 U.S.1, 28 (2010); see also, *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 164 (2015).

In *Shurtleff v. Boston*, this Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" 142 S. Ct. 1583, 1593 (2022) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). See also, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

The SOGI censorship law requires forced acceptance of political policy preferences, by force of law and punishment and is especially wrong because the government action here substantially interferes with constitutionally protected liberty. Here, the proposed rule, masquerading as a *neutral law*, effectively censures the viewpoint of many counselors, a religious viewpoint consistent with their conscience and inherent in their personal religious identity. Moreover, the SOGI censorship law seeks to compel

these professionals to engage in expression conflicting with it. The disturbing diminishment of First Amendment religious conscience and expression, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of State power.

2. Significance of Obergefell

In *Obergefell v. Hodges*, this Court found in the Constitution a right of personal identity for all citizens. 135 S. Ct. 2584 (2015). The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. at 1727. *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 135 S. Ct. at 2589. If this Court meant what it said in *Obergefell*, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens

who define and express their identity via their religious beliefs.

Christian people like Petitioner find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. The appellate court grievously erred suggesting otherwise. Concluding the State "intended to regulate health care providers only to the extent they act in a licensed and non-religious capacity, 'only within the confines of the counselor-client relationship.'" cancels petitioner's humanity, dignity, and autonomy, demanding that he abandon his identity when expressing principles that are so central to his life and faith. *Brian Tingley v Ferguson,* No. 21-35815; 21-35856 (slip op. 9/6/2022); Pet.App. 52a

There can be no doubt that this Court's recently identified substantive due process right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people. Indeed, government must not use its power, irrespective of whether neutrally applied, in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 138 S. Ct. at 1731. Certainly, government ought to protect, not impede, the free exercise of religious conscience. *See, e.g.,*

Trinity Lutheran Church of Columbia, Inc. v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally-protected freedoms, not grant special protections for some, while coercing others to engage in conduct or expression contrary to their religious identity and conscience.

Contrary to *Obergefell's* holding, *Smith* eviscerates the constitutional right to one's religious identity and free exercise, enabling States to subjectively deem infringement on religious conscience as neutral and generally applicable (as it always does when it imposes special SOGI preferences). This Court should revisit *Smith's* diminishment of religious liberty, especially in light of *Obergefell's* recognition of constitutional protection afforded to personal identity, liberty, and equal protection. And especially in light of *Kennedy's* recognition that the Constitution requires that the First Amendment Clauses be read together – doubly protecting religious expression.

This Court has already ruled that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop,* 138

S. Ct. at 1727, (citing *Obergefell* 135 S. Ct. at 2607 and holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

For Christian people in the *Smith* environment, though, that right continues to manifest as a mirage. In practice, state and local government authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special preferences embodied in government SOGI classifications, and the SOGI conversation censorship law in the case at bar, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity, expression, and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop* 138 S. Ct. at 1731 (internal quotations and citations omitted).

As this Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to

> the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Masterpiece Cakeshop, 138 S. Ct. at 1731 (citing *Lukumi,* 508 U.S. at 534, 547) (internal quotes omitted).

While the Court here characterized its analysis as addressing a lack of neutrality in the government's action, government imposition of SOGI preferences is unavoidably *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like the SOGI conversation censorship law here, *necessarily* require Christian people to relinquish their religious identity and the freedom to express and exercise their religious conscience. For the First Amendment to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

The government enforced SOGI conversation censorship law in the case at bar substantially interferes with Petitioner's religious identity and exercise of his religious conscience. Washington ought

not require Petitioner to disavow his sincerely held religious beliefs to stay licensed. Here Washington expressly requires Petitioner to renounce his religious character, identity, and sincerely held religious conscience, or face professional discipline. When a government action imposes a penalty on the free exercise of religion, that government action must face the "most rigorous" scrutiny. *Fulton*, 141 S. Ct. at 1881; *Trinity Lutheran,* 137 S. Ct. at 2016; *Lukumi*, 508 U.S. at 546. "Under that stringent standard, only a state interest 'of the highest order' can justify the government's discriminatory policy." *Trinity Lutheran,* 137 S. Ct. at 2024 (citing *McDaniel v. Paty*, 435 U.S. 618 at 628 (1978) (internal quotation marks omitted); *Fulton*, 141 S. Ct. at 1881. And as *Masterpiece Cakeshop* recognized, "these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs," and without subjecting persons living a gay lifestyle to indignities "when they seek goods and services in an open market." 138 S. Ct. at 1732.

The expression of one's religious identity, and exercise of religious conscience is not invidious discrimination. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus would, therefore, ever willfully discriminate against another person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected religious identity and free exercise of religious conscience. *Amicus Curiae* condemns

invidious discrimination and holds no animus toward anyone. We seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry.

Kennedy explains that the First Amendment Clauses "have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. 142 S. Ct. 2407, 2421, 2426. *Obergefell* teaches that beyond the First Amendment's double protection for religious expression, a substantive due process right to personal identity also compels this Court to always provide religious people with the highest standard of constitutional protection.[4] Government action not only must avoid interfering with a citizen's religious expression and free exercise of religious conscience, protected by the First Amendment, it must also refrain from violating their personal religious identity rights. In this light, therefore, *Smith's* low-level judicial review for neutral and generally applicable laws can no longer stand. If it remains, government authorities will continue using such laws to oppress religious people like Petitioner and other professionals under the guise professional misconduct regulation. Moreover, only if

[4] While *amici* question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell,* it expects government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

this Court restores full protection for First Amendment freedom of conscience, will other constitutional freedoms remain secured. This Court should, therefore, revisit *Smith* and restore the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

CONCLUSION

For the reasons provided in this brief, *Amicus Curiae* urges this Court to grant certiorari, revisit *Smith*, and restore the right of all persons to exercise fundamental freedoms under the First Amendment.

Respectfully submitted,

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