No. 23-665

IN THE
Supreme Court of the United States

TINA GOEDE,
Petitioner,
v.

ASTRAZENECA PHARMACEUTICALS, LP, ET AL.,
Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Foundation for Moral Law ("Foundation") is a 501(c)(3) non-profit, non-partisan organization dedicated to religious liberty and to the strict interpretation of the Constitution as intended by its Framers. The Foundation has received more requests for assistance on the issue of religious exemptions from COVID vaccination requirements than on any other issue since we were founded in 2003. Americans across the country have had significant concerns about the COVID vaccination, and many have come to hold sincere religious convictions against the procedure. The Foundation has been able to successfully counsel many citizens through the process of exercising their religious liberty in the workplace while maintaining their employment. However, unfortunately, many other citizens have lost their jobs for standing firm and not compromising their sincere religious beliefs. The Foundation believes that this reality is already a grave injustice, but that the facts in the present petition demonstrate an even more egregious violation of the First Amendment that this Court should remedy.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of amicus curiae's intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that 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 THE ARGUMENT

The initial public push for the COVID-19 vaccine was unprecedented for any vaccine, much less one that was as exceptionally unprecedented as the "COVID vax" is. Practically all sectors of government and industry were lockstep in the mission of administering the COVID-19 vaccine to every living person possible. Carrots were dangled, sticks were brandished, and profuse promises of medical efficacy and safety were made to ensure maximum compliance. For many individuals, weary from government mandated lockdowns that stretched from two weeks to over two years, the assurance that they would be able to participate in public life and travel again was more than enough to comply. However, the zeitgeist of the COVID-19 years—the heavy-handed response of government in closing churches and small businesses; the extensive censorship and tightly controlled mainstream narrative; and the rapid development of the COVID-19 vaccine using unprecedented mRNA technology—gave many individuals substantial pause, reasonably so.

With regard to the COVID-19 vaccine, many individuals began to question the popular culture, and, upon developing their own individual opinion on the matter, found that they could not take the vaccine in good conscience. While some of these individuals came to this conclusion based solely on secular grounds, many people, such as Petitioner Tina Goede, were also moved by sincere religious convictions to not take the COVID-19 vaccine. Unfortunately, many Americans such as Petitioner

Goede were fired or otherwise lost their job due to living out their sincerely held religious beliefs and refusing to take the COVID-19 vaccine.

The fact that Petitioner Goede has been refused state unemployment benefits after being fired for practicing her sincerely held religious beliefs makes this case an excellent opportunity to address this critical issue before another crisis like COVID-19 occurs. *See, e.g.*, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (resolving the issue of the "faithless elector" during a period of calm, without waiting for a rushed political crisis that might depend on the judicial outcome). Two factors combine to indicate that this issue will continue if not addressed now: first, the American people have widespread and sincere religious objections to the COVID-19 vaccine and those like it, and second, the Founders' understanding of sincere religious belief instructs that this religious expression must be protected.

ARGUMENT

Amicus fully supports the arguments of Petitioner Goede and will not duplicate those arguments. We fully agree that the Supreme Court of Minnesota's ruling upholding the denial of Petitioner's claim for state unemployment benefits is a wrongful injury to her right to free exercise of religion under the First Amendment and conflicts with precedents of other Circuits and of this Court. *Amicus* raises the following additional points for the Court's consideration:

I. A substantial number of Americans hold sincere religious beliefs against the COVID-19 vaccination.

While the First Amendment would protect Petitioner Goede's sincere religious beliefs against the COVID-19 vaccine even if she stood alone, she has substantial company from other Americans. The latest data from the Center for Disease Control and Prevention provides that 81.4% of the United States population had at least one dose of the COVID-19 vaccine as of May 2023.[2] While there has been limited polling on how many Americans hold religious beliefs against the vaccine, the largest poll conducted on the topic found that 13% of Americans believe getting the COVID-19 vaccine goes against their personal religious beliefs.[3]

Conducted by the Public Religion Research Institute (PRRI) and the Interfaith Youth Core (IFYC) in December 2021, the survey also found that, among unvaccinated Americans, 52% said that getting the COVID-19 vaccine violates their personal religious beliefs.[4] Based on those figures, there are approximately over 30,000,000 Americans who have refused to receive the COVID-19 vaccine on the basis of their religious belief. These unvaccinated Americans make up a larger

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[2] COVID-19 Vaccinations in the United States, Center for Disease Control, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-booster-percent-pop5

[3] Religious Identities and the Race Against the Virus, https://www.prri.org/wp-content/uploads/2021/12/PRRI-IFYC-Nov-2021-Vaccine_W3.pdf

[4] Id.

percentage of the total population than every individual religious denomination in America except for the Catholic Church.[5]

Under the First Amendment, the number of adherents to any given belief has no bearing on whether a particular one is a "sincere religious belief." *See United States v. Ballard*, 322 U.S. 78 (1944); *Thomas v. Review Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). Yet, the sheer magnitude of Americans who hold sincere religious beliefs against the COVID-19 vaccine must be acknowledged. Petitioner Goede is one of potentially millions of Americans who have suffered direct adverse consequences from the government as a result of this sincere religious belief. If the decision below is allowed to stand, then more courts will become arbiters of individual religious sincerity in direct contradiction to both this Court's own precedent and the Founders' understanding of the First Amendment and religious belief.

II. The Founders understood the First Amendment to protect the individual conscience and personal religious beliefs and practices of the citizen.

In *Kennedy v. Bremerton School District*, this Court instructed that Establishment Clause claims must be reviewed on the basis of the Founders' original understanding. 143 S. Ct. 2407, 2428

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[5] Religious Landscape Study, Pew Research, https://www.pewresearch.org/religion/religious-landscape-study/

(2022). While the present case is primarily an issue of Free Exercise, *amicus* notes that, at minimum, the Founders' understanding of religious exercise should be considered in any Free Exercise (and constitutional) analysis. But furthermore, *amicus* suggests that the Court's prevailing Free Exercise jurisprudence based on *Employment Division, Department of Human Resources of Oregon v. Smith* and *Church of Lukumi Babalu Aye, Inc. v. Lukumi* is in just as much need of clarity from the Founders' understanding as the Establishment Clause did while it suffered under the discredited *Lemon* test. *See e.g. Fulton v. City of Phila.*, 141 S. Ct. 1868, 1892-925 (2021) (Alito, J., concurring) (describing *Smith* as "displacing decades of precedent," stressing the need for the Free Exercise Clause to be reviewed on the basis of its original meaning instead, providing a detailed review on this basis, and ultimately concluding that *Smith* should be overruled).

While the petition at hand only asks the Court to clarify and correct an incorrect application of *Thomas*, the core issue in the case below—whether the state can make a subjective determination on whether a citizen's professed religious belief is sincere or not—is only a question because of the subjectivity that is present in the current Free Exercise jurisprudence. In other words, if Free Exercise jurisprudence was still properly rooted in the Founders' understanding, the answer would be a straightforward and unequivocal "no."

Indeed, under *Thomas*, the answer should still be just as unequivocally in the negative, and

Petitioner provides an excellent treatment of that argument that *amicus* will not reiterate here. Instead, *amicus* emphasizes the tensions still impeding the First Amendment's protection of the right to free exercise. As long as the Founders' understanding is overlooked, courts will continue to struggle with the subjectivity of the present Free Exercise jurisprudence, and Americans will suffer more injuries to their First Amendment rights as a result. *See e.g. Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring) ("Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties.").

So, how does the Founders' understanding inform the analysis of Petitioner's Free Exercise Clause claim? Justice Alito's recent concurring opinion in *Fulton* provides solid foundation for reviewing what the Founders understood the Free Exercise Clause to originally mean. *Id.* at 1895-912. Using definitions from the Founding, Justice Alito found that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practice or worship." *Id.* at 1896.

Digging deeper into the historical record, Justice Alito explained that the predominant model for free exercise protections leading up to and at the Founding, "extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger 'the public peace' or 'safety.'" *Id.* at 1901. Again, using the dictionary definitions of these terms,

Justice Alito found that in 1791, the Founders would have understood public peace and safety to be threatened by war, disturbances, commotion, riots, terror, danger, and hurt. *Id.* at 1904. Justice Alito also cited Sir William Blackstone's "offences against the public peace" listed within his Commentaries on the Laws of England which include

> riotous assembling of 12 persons or more; unlawful hunting; anonymous threats and demands; destruction of public floodgates, locks, or sluices on a navigable river; public fighting; riots or unlawful assemblies; 'tumultuous' petitioning; forcible entry or detainer; riding or 'going armed' with dangerous or unusual weapons; spreading false news to 'make discord between the king and nobility, or concerning any 'great man of the realm'; spreading 'false and pretended' prophecies to disturb the peace; provoking breaches of the peace; and libel 'to provoke . . . wrath, or expose [an individual] to public hatred, contempt, and ridicule.'

Id. at 1905 citing 4 Commentaries on the Laws of England 142-153 (1769). The Founders understood that there must be full protection of the free exercise of religion "except where public 'peace' or 'safety' would be endangered" in such express kinds of ways that were well known and understood at the time. *Id.* at 1903.

In fact, this Court's first cases dealing with the Religion Clauses applied this understanding. The

Court's first opinion to address religious liberty under the First Amendment, *Reynolds v. United States*, reviewed whether polygamy was protected religious exercise. 98 U.S. 145 (1878). To do so, the Court defined the term "religion" using the Founders' understanding as represented by James Madison in his Memorial and Remonstrance: "the duty we owe the Creator." *Id.* at 163. Several years later, the Court restated this definition of religion as "one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will." *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated on other grounds by Romer v. Evans*, 517 U.S. 620 (1996).

In its determination of the meaning and contours of religious liberty, the *Reynolds* Court also quoted Thomas Jefferson:

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

Reynolds, 98 U.S. at 163 (quoting Bill for Establishing Religious Freedom, 1 Jeff. Works 45; 2 Howison, History of Va. 298). The Court followed Jefferson's words by stating: "In these two

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

Continuing, the Court reviewed Jefferson's infamous letter to the Danbury Baptist Association immediately after the adoption of the First Amendment:

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties."

Id. at 164 (quoting Letter to the Danbury Baptist Association, 1 Jeff. Works 113). The *Reynolds* Court's conclusion is the key to the entire Free Exercise Clause quagmire:

> Coming as this does from an acknowledged leader of the advocates of the measure, it

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

Id. (emphasis added). The *Reynolds* Court then proceeded with a straightforward application of this principle by reviewing the historical record: finding that "polygamy has always been odious" among the English forefathers and a punishable offense against society at common law, the Court held that polygamy was an overt act against peace and good order akin to human sacrifice and self-immolation. *Id.* at 166.

In *Fulton*, Justice Alito engages with the *Reynolds* decision, where he states that *Reynolds* "rested primarily on the proposition that the Free Exercise Clause protects beliefs, not conduct." 141 S. Ct. at 1913. However, *Reynolds* does not suggest that the Free Exercise Clause does not protect *any conduct* but only conduct that is "in violation of social duties and subversive of good order." 98 U.S. at 164. This is a key distinction to recognize in order to reconcile the Free Exercise Clause with its text and the original meaning and understanding of the Founders. *Reynolds* applied the exact reasoning that the Founders understood in their time as represented by Madison: government may interfere with religion and religious exercise if and only if that religious exercise is an "overt act

against peace and good order" as historically understood. *Id.* at 163.

However, in missing this distinction, Justice Alito concludes that if *Smith* is ever overruled, the standard it is replaced with should be the rule *Smith* replaced: "A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest." *Fulton*, 141 S. Ct. at 1924. In other words, after providing an excellent explanation of the history of the Free Exercise Clause and the Founders' understanding of it, Justice Alito concludes that the "strict scrutiny" test is an acceptable return to form.

There are two issues with this conclusion. First, the Founders' understanding of the Free Exercise Clause does not indicate that any kind of balancing test is an appropriate protection for the First Amendment. As the historical record shows, and the *Reynolds* Court applied, the process to determine whether a given religious exercise is or is not protected is a straightforward yes or no inquiry: Is the religious exercise an overt act against peace and good order as historically understood?

There is substantially less subjectivity to this single question than to the strict scrutiny test. As discussed *infra* as well as by Justice Alito in *Fulton*, the phrase "overt act against peace and good order" is its own term of art that refers to offenses that have a historical record of endangering the public. *See id.* at 1901-05.

The *Sherbert* Court generalized this standard immediately before constructing the strict scrutiny test for the first time by saying, "the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (citing *Reynolds*, 98 U.S. at 145). This generalization glossed over the importance of the historical review that both the Founders and the *Reynolds* Court held necessary. In doing so, the *Sherbert* Court constructed a balancing "test" where previously there had been none.

This background matters because the second issue with a hypothetical return to the strict scrutiny test is the test's inherent subjectivity, and it is this subjectivity that initially took Free Exercise jurisprudence off course from the Founders' understanding. With the strict scrutiny test, judges can come to various subjective conclusions at every step in answering 1) what a "substantial" burden is, 2) what a "narrowly tailored law" is in any given circumstance, and 3) what a "compelling" government interest is.

The church shutdowns during COVID-19 are an illustrative example of the shortcomings of the test. Even when this Court intervened to apply strict scrutiny in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court engaged in a utilitarian balancing to determine that the restrictions were not "narrowly tailored." 141 S. Ct. 63, 67 (2020). But what if the restrictions had been tied to the size of the church or synagogue as the Court suggested for a "less restrictive rule"? *Id.* Would

this have actually been any less of an infringement on the free exercise of religion? As a matter of utilitarian balancing, perhaps.

Yet, as a matter of whether government has made a law prohibiting the free exercise of religion, the answer is unequivocally "no." The correct standard of the Founders' understanding reflects this straightforward "no" by asking whether the conduct of the religious exercise is an overt act against historical peace and good order.

Petitioner only asks this Court to apply *Thomas* and *amicus* fully agrees that Petitioner would and should win under that precedent. However, under a Free Exercise Clause jurisprudence rooted in the Founders' original understanding, the Court would ask whether the conduct being restricted or burdened is an "overt act against peace and good order" and thus within the government's power to legislate. In an unemployment benefits context, then, the question is not whether the religious belief is sincere, but whether the government may legislate the conduct.

Here, the question would be whether an individual denying to receive a vaccination is an overt act against peace and good order as historically understood. When reviewing the kinds of "overt acts" the Founders understood to compose this category, it is readily apparent that they share in common the fact of being affirmative actions that lead to a direct danger to "peace and good order" rather than mere denial to take a given action which can only have a speculative effect on the same. An individual's mere abstention from a

vaccination has an entirely speculative effect on the public. Thus, under the Founders' understanding of the Free Exercise Clause, abstaining from a vaccination on the basis of religious belief would be fully protected. The question of whether a person's religious beliefs are sincere or based on an "honest conviction" would be totally out of the government's power to ask, much less the question of whether they are independently sufficient to secular beliefs.

Under the Founders' understanding, either the government has the authority to restrict conduct that is an overt act against historical peace and good order, or it does not. An individual's religious beliefs are simply beyond the power of the government to question. As the Court said in *Ballard*, "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." 322 U.S. at 86 (1944).

Of course, under *Thomas*, the Court has no need to wade into these waters in order to reach a likewise straightforward conclusion. Nothing in First Amendment jurisprudence suggests that because a person also holds a corollary secular belief, their religious belief is insincere. For the Minnesota Court of Appeals to determine otherwise is patently beyond the bounds of judicial inquiry. *Id.*

CONCLUSION

Free exercise of religion in America has suffered for decades under a jurisprudence that is detached

from the original meaning of the First Amendment and the Founders' understanding of it. The recent controversies of the COVID-19 pandemic and vaccination program have brought these issues in stark relief as people were confronted with an unprecedented level of government intrusion into their daily lives. Petitioner Goede is one of many Americans who has suffered terribly as a result of standing firm in her religious beliefs during this time. This Court should grant this Petition for Writ of Certiorari and vindicate Petitioner Goede's right to free exercise of religion under the First Amendment.

Respectfully submitted,

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