No. 24-427

IN THE
Supreme Court of the United States

RONALD HITTLE,
Petitioner,
v.

CITY OF STOCKTON, CALIFORNIA, ET AL.,
Respondents.

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

---

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

John A. Eidsmoe*
**Counsel of Record*
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com
talmadge@morallaw.org

Nov. 15, 2024

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Executive Orders

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists or files *amicus* briefs in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because the Foundation believes that believes the firing of Chief Hittle is clear religious discrimination in violation of the Free Exercise Clause of the First Amendment.

SUMMARY OF THE ARGUMENT

Petitioner Ronald Hittle ("Hittle") served the City of Stockton, California ("the City") for 24 years, including service as Fire Chief from 2005-2011. The City wanted Hittle as Fire Chief to attend leadership

---

[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.

training but was strapped for funds to pay for such training. Hittle learned of the Global Leadership Summit which was being conducted by a local church, so he attended the Summit at his own expense, although he drove a city vehicle to the event and attended the event on City time.[2] Hittle's attendance at this Global Leadership Summit is the primary if not the exclusive reason the City fired Hittle.[3]

Hittle sued in Federal District Court, alleging among other things a violation of Title VII. The Foundation argues that Hittle has a stronger claim under the First Amendment than under Title VII,

---

[2] Hittle's use of the City vehicle and attendance on City time should not be an issue, because he would have been entitled to attend a secular leadership training program in a City vehicle and on City time. Allowing him to attend a secular leadership training event in a City vehicle and on City time but forbidding him to attend a religious leadership training event on similar terms is discrimination against religion which violates the First Amendment as interpreted by this Court in *Shurtleff v City of Boston*, 596 U.S. __ (2022), and in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). As to whether Hittle's attendance at the Global Leadership Summit was of value to the City in that it improved his leadership skills, the City and the lower Court seems to have looked no further than the fact that the Summit was held at a church and was in some respects "religious." This shows a distinct hostility toward religion.

[3] As Judge Van Dyke noted in dissent on the motion for *en banc* hearing, the City's other grounds for firing Hittle seem contrived, inconsequential, and insubstantial. The primary motiving factor driving Hittle's firing is his attendance at this "religious" event.

and that because Title VII was enacted to protect religious liberty as guaranteed by the First Amendment, the history and interpretation of the First Amendment must govern the application of Title VII.

The Petitioner has effectively and persuasively argued that Chief Hittle was fired because of his attendance at a so-called "religious event," that his firing violated Title VII of the Civil Rights Act as well as California state law, that the decision below fails to give proper weight to the evidence Hittle presented, that the decision below conflicts with precedents of this Court and of other Circuit Courts, and that the decision wrongly denied Hittle a jury trial. The Foundation fully supports Hittle in these arguments.

Rather than duplicate those arguments, the Foundation will argue that Chief Hittle is entitled to the protection of the First Amendment. Our examination of the history and meaning of the religious liberty clauses of the First Amendment establish that the First Amendment provides even stronger protection to Hittle than does Title VII. Title VII was enacted to provide a practical mechanism for enforcing free exercise of religion in the workplace and to extend the protection of religious liberty to employment in the private sector. The interpretation and application of Title VII must be governed by the interpretation and application of the Free Exercise Clause of the First Amendment—especially because Hittle's employment as fire chief was in the public sector and therefore already

protected by the First Amendment regardless of Title VII.

Although Chief Hittle's attendance at a Global Leadership Summit held at a church in no way violates the Establishment Clause of the First Amendment and is fully protected by the Free Exercise Clause, the City of Stockton apparently believes his very presence at this event during work hours and with a city vehicle violates the City's understanding of separation of church and state and must therefore be prohibited and punished by firing. This constitutes blatant discrimination against religion and is motivated by hostility toward religion, which is prohibited by the First Amendment.

ARGUMENT

I. The City's firing of Hittle violates Hittle's First Amendment rights to free exercise of religion and freedom of speech.

Let us consider the high value the Framers of our Constitution placed upon religious freedom.

A. The Framers held a high view of religious liberty.

> *It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.*

James Madison, *A Memorial and Remonstrance*, 1785, Works 1:163.

As Jefferson recognized in the Declaration of Independence, this nation is founded on the "laws of nature and of nature's God," and the "unalienable" rights to "life, liberty, and the pursuit of happiness" are "endowed by [the] Creator."

The Framers viewed church and state as separate institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and state," he meant a jurisdictional separation.

B. The Framers derived their understanding of Church/State relations from the Bible and Judeo-Christian tradition.

The Framers did not view Church and State simply as man-made institutions. They did not accept Rousseau's notion that the State is above the Church and above all other institutions.[4] Like the people of their time and those of preceding generations, they understood Church and State as divinely-established institutions, each with distinctive authority and distinctive limitations.

This institutional separation goes back to the ancient Hebrews. Going back to the time of Moses and perhaps further back to the time of Jacob's sons

---

[4] Dr. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, 189 (1984) 189-97, studied citations of European thinkers by American writers 1760-1805 and demonstrated that American writers most frequently cited Montesquieu (8.3%), Blackstone (7.9%), and Locke (2.9%), and cited much less frequently (0.9%).

Judah and Levi, the Levites (descendants of Levi, the Tribe of Levi) served as Israel's religious authority, the priests. From the time of King David onward, Israel's kings came out of the tribe of Judah. These were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the functions of the priesthood. For example, when King Saul offered sacrifices instead of waiting for Samuel the priest, God cut off his descendants from the kingship forever. When King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, eighty "valiant" priests withstood him, saying, "It appertaineth not to thee, Uzziah, to burn incense to the Lord, but to the priests the sons of Aaron, that are consecrated to burn incense: go out of the sanctuary; for thou hast trespassed." (II Chronicles 26:16-18). When Uzziah persisted, God smote him with leprosy, and he remained a leper all the days of his life (II Chron 2:19-23).

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

> It was left for Christianity to animate old truths, to make real the metaphysical barrier which philosophy had erected in the way of absolutism. The only thing Socrates could do

> in the way of a protest against tyranny was to die for his convictions. The Stoics could only advise the wise man to hold aloof from politics and keep faith with the unwritten law in his heart. But when Christ said "Render unto Caesar the things that are Caesar's and unto God the things that are God's," He gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but He also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.[5]

It is neither surprising nor unreasonable to conclude that the Framers derived their understanding of Church/State relations from religious sources. On October 4, 1982, Congress passed, and the President then signed, Public Law 97-280, declaring 1983 the "Year of the Bible." The opening clause of the bill reads:

> Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States...

---

[5] Lord Acton, quoted by Gertrude Himmelfarb (London, 1955) p. 45; in ElL. Hebden Taylor, *The Christian Philosophy of Law, Politics, and the State* (Nutley, NJ: Craig Press, 1966) pp. 445-46.

The Bible, coupled with Church and Jewish tradition, is therefore relevant to the Framers' understanding of Church and State.

From the beginning, Church scholars understood that Church and State were distinct kingdoms, but they sometimes differed as to the relationship between them. Some, like the North African lawyer and Church Father Tertullian (c. A.D. 200), asked, "What concord hath Athens with Jerusalem?" Augustine of Hippo (AD 356-430), whose Civitas Dei "set the very course of Western Civilization,"[6] wrote of the City of God and the City of Man, although he did not precisely identify the City of God as the Church or the City of Man as the State.

The Protestant Reformation took force in Northern Europe in the 1500s, a century before the settlement of the English colonies in North America. The Reformers' understanding of the Two Kingdoms of Church and State is therefore instrumental in understanding the views of the Framers. Most of

---

[6] Martin Luther describes Augustine's masterpiece as "one of the most influential works of the Middle Ages" and says it " would be read in various ways, at some points virtually as a founding document for a political order of kings and popes that Augustine could hardly have imagined. Indeed, his famous theory that people need government because they are sinful served as a model for church-state relations in medieval times. He also influenced the work of St. Thomas Aquinas and John Calvin and many other theologians throughout the centuries." quoted at http://grantian.blogspot.com/2006/11/tale-of-two-men.html; James, O'Donnell, Encyclopedia Britannica, https://www.britannica.com/topic/The-City-of-God

them were children of the Reformation,[7] and as such they understood that God had established two kingdoms, Church and State, each with distinctive authority. As Luther said,

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

And as John Calvin stated in his Institutes of the Christian Religion,

> Let us first consider that there is a twofold government in man: one aspect is spiritual, whereby the conscience is instructed in piety

---

[7] As Dr. M.E. Bradford established in *A Worthy Company: Brief Lives of the Framers of the United States Constitution* (Marlborough, ND: Plymouth Rock Foundation, 1982) pp. iv-v, the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. And as Dr. Loraine Boettner observed in *The Reformed Doctrine of Predestination*,

> It is estimated that of the 3,000,000 Americans at the time of the American Revolution, 900,000 were of Scotch or Scotch-Irish origin, 600,000 were Puritan English, and 400,000 were German or Dutch Reformed. In addition to this the Episcopalians had a Calvinistic confession in their Thirty-nine Articles, and many French Huguenots also had come to this Western world. Thus, we see that about two-thirds of the colonial population had been trained in the school of Calvin. 382.

> and in reverencing God; the second is political, whereby man is educated for the duties of humanity and citizenship that must be maintained among men. These are usually called the 'spiritual' and the 'temporal' jurisdiction (not improper terms) by which is meant that the former sort of government pertains to the life of the soul, while the latter has to do with the concerns of the present life - not only with food and clothing but with laying down laws whereby a man may live his life among other men holily, honorably, and temperately. For the former resides in the inner mind, while the latter regulates only outward behavior. The one we may call the spiritual kingdom, the other, the political kingdom. Now these two, as we have divided them, must always be examined separately; and while one is being considered, we must call away and turn aside the mind from thinking about the other. There are in man, so to speak, two worlds, over which different kings and different laws have authority.

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the legal and political thinking of the Reformers, of the colonists, and of the Framers of the Declaration of Independence, the Constitution, and the Bill of Rights. As Yale History Professor Sydney E. Ahlstrom has noted,

> No factor in the "Revolution of 1607-1760" was more significant to the ideals and thought

> of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church. Just as Protestant convictions were vitally related to the process of colonization and a spur to economic growth, so the churches laid the foundations of the educational system, and stimulated most of the creative intellectual endeavors, by nurturing the authors of most of the books and the faculties of most of the schools. The churches offered the best opportunity for architectural expression and inspired the most creative productions in poetry, philosophy, music, and history.[8]

C. The Framers held a jurisdictional understanding of Church/State relations.

Long before Jefferson would speak of the "wall of separation between church and state," Rhode Island founder Roger Williams wrote of a "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world," and George Washington declared to the General Committee of United Baptist Churches in Virginia that "no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution."[9]

---

[8] Sydney E. Ahlstrom, *A Religious History of the American People* (Doubleday, 1975), I:423.

[9] George Washington, May 1789; quoted by Paul F. Boller, Jr.,

Reflecting this same jurisdictional view of Church and State, James Madison as President vetoed "an Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia":

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics, as the regulations

---

George Washington and Religion (Dallas: Southern Methodist University Press, 1963) 169-70.

> established are generally unessential and alterable according to the principles and canons by which churches of that denomination govern themselves, and as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences applicable to a violation of them according to the local law.[10]

Madison's veto was consistent with his jurisdictional view of Church and State. In his "Memorial and Remonstrance Against Religious Assessments" (1785), he objected to a proposed tax for the support of Christian churches and pastors, not because he opposed the Church, but because Christianity is "the Religion which we believe to be of divine origin." Christianity, he said, is a religion of "innate excellence" and a religion that enjoys the "patronage of its Author." Christianity therefore does not need the aid of the State.[11]

Jefferson's "wall of separation" must be viewed in this context, as a jurisdictional separation between the two kingdoms, Church and States. As he wrote in 1808,

---

[10] James Madison, Veto Message, February 21, 1811, http://baptiststudiesonline.com/wp-content/uploads/2018/03/Madison-VetoMessageCongress.pdf

[11] James Madison, "Memorial and Remonstrance Against Religious Assessments," 1785, reprinted in Norman Cousins, "*In God We Trust*" (New York: Harper & Brothers, 1958) 308-14. https://founders.archives.gov/documents/Madison/01-08-02-0163

> I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must rest with the States, as far as it can be in any human authority.[12]

The first Supreme Court Establishment Clause case, *Everson v. Board of Education*, 330 U.S. 1 (1947), is consistent with this jurisdictional understanding of the kingdoms of Church and State. As the Court explained at 18 (emphasis added):

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to*

---

[12] Thomas Jefferson, Letter to Samuel Miller, January 23, 1808; "Thomas Jefferson on Separation of Church and State," https://candst.tripod.com/tnppage/qjeffson.htm. Jefferson's closing statement that authority over churches "must rest with the States, as far as it can be in any human authority," reflects his belief that the First Amendment restricts only the federal government and not the States.

> *remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.*

Everson did not address issues of strict scrutiny, compelling interest, or rational basis. Nor did the Court discuss specific types of state regulation of churches. Rather, the Court stated as an absolute that "neither a state nor the Federal Government" can "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."

After providing that "Congress shall make no law respecting an establishment of religion," the First Amendment adds an equally important clause, "or prohibiting the free exercise thereof."

Like the Establishment Clause, the Free Exercise Clause is also jurisdictional, because there is a jurisdiction—"our duty to God and the manner of discharging it"—that is beyond the jurisdiction of government.

D. This jurisdictional understanding of Church/State relations applies to the Free Exercise Clause.

The Framers held a jurisdictional understanding of Free Exercise. Certainly, foremost among the rights included in the term "liberty" in the Declaration of Independence is the right to free exercise of religion.

As the Declaration makes clear, this nation was founded upon Higher Law. The Supreme Court said in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being." The Court found that recognition is completely compatible with statements such as "We guarantee the freedom to worship as one chooses" *id.* at 314, and "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal" *id.* at 312.

And in *McGowan v. Maryland* (1961), Justice Douglas, the author of the *Zorach* opinion, stated 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.

This is entirely consistent with Madison's understanding of free exercise. As he said in the Remonstrance,

> We remonstrate against the said Bill,
>
> Because we hold it for a fundamental and undeniable truth, "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." [quoting from Article XVI of the Virginia Declaration of Rights of 1776]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General

> Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.[13]

Establishment and Free Exercise go together. In the term "free exercise thereof," the word "thereof" refers back to "religion" in the Establishment Clause. The very punctuation of the First Amendment sets these clauses apart from the rest. There are three parts to the First Amendment, separated by semicolons, and each of these parts consists of two clauses, separated by commas:

> "Congress shall make no law"
>
> (1) "respecting an establishment of religion, or prohibiting the free exercise thereof;"
>
> (2) "or abridging the freedom of speech, or of the press;

---

[13] Madison, Remonstrance, https://founders.archives.gov/documents/Madison/01-08-02-0163.

> (3) "or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Note, also, that the one verb "abridging" introduces the last two parts and sub-parts, thus further setting these last four cluses from the first two, the religion clauses which contain the verbs "respecting" and "prohibiting."

Professor Leo Pfeffer called the free exercise clause the "favored child" of the First Amendment.[14] Lawrence H. Tribe argued that the religion clauses of the First Amendment embody two concepts, i.e., separation, roughly embodied in the Establishment Clause, and voluntarism, roughly embodied in the Free Exercise Clause. Of these, 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."[15]

Jefferson's words, quoted earlier, pertain to both establishment and free exercise:

> I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or *exercises.* This results not only from the provision that no law shall be made respecting the establishment or free

---

[14] Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1953) p. 74

[15] Laurence H. Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1978) s.14-3, p. 818, 833.

> exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. *Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government.* It must rest with the States, as far as it can be in any human authority.

(Emphasis added). The Court's explanation of the Establishment Clause in *Everson* applies in part to Free Exercise as well:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

(Emphasis added).

In *United States v. Macintosh,* 283 U.S. 605, 633-35 (1931), the Court recognized in a case involving a person seeking citizenship who held conscientious objections to military service:

> The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342: 'The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for

> enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power.

The Court said the conflict between the power of the state and what the person believes to be his duty to God must be resolved on jurisdictional grounds. In areas in which the state has jurisdiction, its needs must take precedence, but in areas in which the state does not have jurisdiction, the individual conscience must take precedence.

The Court has sometimes recognized the power of the State to regulate certain arguably religious practices. But at least within the area of church doctrine and church worship and attendance, the Court has recognized a jurisdictional limit to the Free Exercise Clause. In *Unemployment Division v. Smith,* 494 U.S. 872 (1990), Justice Scalia recognized that jurisdictional limit in his majority opinion 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." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, 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.
>
> (Internal citations omitted).

In 2020 and 2021, the Supreme Court decided three cases which involved the closure of churches because of COVID-19, and ruled in all three cases that the Governors of New York and California violated the free exercise clause: *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 63 (Nov. 25, 2020), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 719 (Feb. 5, 2021), and *Tandon v. Newsom*, 141 S. Ct. 1294, 1294 (April 9, 2021).

This is not surprising. Over the years, the courts have wrestled with what practices are protected by the Free Exercise Clause. But one thing has been clear from the beginning: If the Free Exercise Clause protects nothing else, it protects the right to go to church and worship, and the right to believe and speak in accordance with one's religious convictions. Even the concurrence in *Smith* recognized that

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may

> not be submitted to vote; they depend on the outcome of no elections.

Smith, 494 U.S at 903 (O'Conner, J., concurring).

II. Title VII must be interpreted to provide broad protection to religion in light of the First Amendment.

Now that this Court has effectively overruled the "Lemon test" of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in *American Legion v. American Humanist Association,* 139 S. Ct. 2067 (2019), and *Kennedy v. Bremerton School District,* 597 U.S. 507 (2022), the Court should now look to the historical context in interpreting the religious liberty clauses of the First Amendment.

And likewise, the Court should give a similar interpretation to Title VII. As Executive Order No. 13798, S. 4, 82 Fed. Reg. 21675 (May 4, 2017) states, "Religious Liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law."[16]

The Order continues:

> Statutory Protections
>
> Recognizing the centrality of religious liberty to our nation, Congress has buttressed these constitutional rights with statutory protections for religious observance and practice. These protections can be found in, among other statutes, the Religious Freedom

[16] Executive Order No. 13798, S. 4, 82 Fed. Reg. 21675 (May 4, 2017) p. 1.

> Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.; the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; and the American Indian Religious Freedom Act, 42 U.S.C. § 1996. Such protections ensure not only that government tolerates religious observance and practice, but that it embraces religious adherents as full members of society, able to contribute through employment, use of public accommodations, and participation in government programs. The considered judgment of the United States is that we are stronger through accommodation of religion than segregation or isolation of it.[17]

Because Title VII and other statutory protections were enacted to protect First Amendment rights, they should be interpreted in light of the First Amendment.

CONCLUSION

Interpreting Title VII consistently with the religious liberty clauses of the Frist Amendment, it is clear that the lower courts have misinterpreted Title VII and not applied the facts of this case to the law. The City has discriminated against Chief Hittle, firing him for attending leadership training, solely because that leadership training took place at a church. There appears to be no suggestion that this training was in any way substandard or

---

[17] *Id.* P. 5a.

unhelpful, much less that it was harmful, in training Chief Hittle to be a better leader and serving the City and his Department better than before. This is blatant discrimination against religion as prohibited by *Shurtleff* and *Kennedy.*

The Foundation urges this Court to grant Chief Hittle's Petition for a Writ of Certiorari.

Respectfully submitted,

John A. Eidsmoe*
**Counsel of Record*
Talmadge Butts
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
talmadge@morallaw.org
Counsel for *Amicus Curiae*

Nov. 15th, 2024