No. 22-204

In the

Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

Statutes

Rules

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual rights of Free Exercise of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022); *Carson v. Makin*, 142 S.Ct. 1987 (2022); *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021); *Espinoza v. Montana Dept. of Rev.*, 140 S.Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018), to name just a few.

SUMMARY OF ARGUMENT

"It is high time for [this Court] to take a fresh look at what the Free Exercise Clause demands." *Fulton v. City of Philadelphia*, 141 S.Ct. at 1889 (Alito, J., concurring in the judgment). This case presents an opportunity to undertake that "fresh look." As the past three decades have made clear, the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton School Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas,

---

[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Gorsuch, and Kavanaugh, concurring in the denial of certiorari). The *Smith* decision accomplished this "drastic" curtailment of constitutionally protected rights in an analysis that was unmoored from the original understanding of the Free Exercise Clause. As Justice Barrett recognized, "the textual and structural arguments against *Smith* are … compelling." *Fulton*, 141 S.Ct. at 1882 (Barrett, J., concurring). *Smith*'s ahistorical nature puts it in deep tension with this Court's recent trend in cases involving the Religion Clauses of interpreting those clauses according to their original understanding.

The Free Exercise Clause holds a unique place in the Constitution. It guarantees more than freedom of belief, freedom of worship, or freedom of religious speech (although the Oregon Bureau of Labor and Industries (hereafter Oregon Bureau) sought to punish speech that included biblical quotations). It is a freedom to *exercise* one's religion. *Espinoza*, 140 S.Ct. at 2276 (Gorsuch, J., concurring). It is the freedom to be free of state interference in carrying out one's obligations to the Creator. In short, it is a guarantee of "freedom to do what we ought as human beings created by God." Address of His Holiness John Paul II to President Reagan, September 10, 1987.[2] This Court's decision in *Smith* destroyed this unique right. It is time for this Court to correct its error.

---

[2] Available at https://www.vatican.va/content/john-paul-ii/en/speeches/1987/september/documents/hf_jp-ii_19870910_reagan-museo.html (last visited October 5, 2022).

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review to Reexamine its Decision in *Smith*.

As Justice Alito recently noted, this Court "should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend." *Fulton*, 141 S.Ct. at 1888 (Alito, J., concurring in the judgment). *Smith* was not, by any means, the first such Free Exercise Clause case that could not be defended on the basis of history and original understanding. The Court's First Amendment religious liberty jurisprudence has experienced major shifts in what the Court views as protected by the First Amendment. In *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878), the Court adopted what it believed was the Jeffersonian position that the Free Exercise Clause protected only "mere opinion," but left the legislature free "to reach actions which were in violation of social duties or subversive of good order."

A century later, this Court ruled that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). In other cases, this Court ruled that a state must prove a "compelling state interest," and demonstrate that its regulation is narrowly tailored to further that interest, to defeat a religious conscience claim. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

Less than two decades after the decision in *Yoder*, however, this Court retreated from the position that

the Free Exercise Clause protects the individual liberty to live out one's faith, to a position closer to its opinion in *Reynolds*. In *Smith*, the Court ruled that a state law does not implicate the Free Exercise Clause so long as the law is facially neutral and does not specifically target religion. Yet in the same term that *Smith* was decided, this Court cited *Yoder* for the proposition that "'[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 384 (1990). In 2002, this Court struck down a licensing ordinance that restricted door-to-door canvassing, recognizing that exercise of religion requires action beyond the four walls of a house of worship. This Court noted: "It is more than historical accident that most of these cases [striking down restrictions on door-to-door canvassing] involved First Amendment challenges brought by Jehovah's Witnesses, *because door-to-door canvassing is mandated by their religion*." *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 160 (2002) (emphasis added).

In 2010, this Court seemingly switched directions again and upheld a state university rule interfering with the Christian Legal Society's membership and officer selection because the university rule was one of "general application." *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010).

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2011), however, the Court rejected the idea that a rule of "general applicability"

could be applied against a church to force it to rehire a teacher. The Court held that, although the Americans with Disabilities Act was undoubtedly a neutral law of general applicability, "government interference with an internal church decision" was unconstitutional. *Id.* at 190.

The problem is that the analysis in *Smith* was not based on history or original understanding of the First Amendment. As Justice Souter noted: "There appears to be a strong argument … that the [Free Exercise] Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State." *Church of the Lukumi Babalu Aye*, 508 U.S. at 575-76 (Souter, J., concurring). Justice Alito took up this issue and clearly demonstrated that *Smith*'s interpretation of the Free Exercise Clause could not be justified by either the text of the First Amendment or history. *Fulton*, 141 S.Ct. at 1888-1906 (Alito, J., concurring in the judgment). It is time to reconsider the ruling in *Smith* and return to the original understanding of the Free Exercise Clause. This case presents an appropriate vehicle to do so.

II. The Original Understanding of the Free Exercise Clause at the Time of the Ratification of the First Amendment Was a Broad Prohibition of Government Compulsion to Violate Religious Beliefs.

Important clues to the scope of religious liberty the Founders recognized and intended to protect in the First Amendment can be found in the writings of James Madison, the records of the First Congress, the

1787 Constitution, and the actual practices of state governments at the time of the founding.

A. The higher duty rationale supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The Free Exercise of Religion contained in the First Amendment reflects a pre-governmental natural right to fulfill a higher duty to the Creator without state interference. Because this fundamental right pre-existed the Constitution, the Court should broadly accommodate Free Exercise claims. James Madison articulated the principal religious argument for the right to accommodation of religion in his famous attack on Patrick Henry's general assessment bill, *Memorial and Remonstrance*.

Madison defined religion as "the duty we owe to our Creator." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), ¶ 11 reprinted in 5 The Founders Constitution 83 (Phillip Kurland and Ralph Lerner, eds.) (Univ. of Chicago Press 1987). Because beliefs cannot be compelled, he wrote, the "[r]eligion … 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." *Id.* According to Madison, the free exercise of religion is, by its nature, an inalienable right because a person's beliefs "cannot follow the dictates of other men" and because religion involves a "duty towards the Creator." *Id.* He went on to explain: "This duty [towards the Creator] is precedent both in order of time and in degree of obligation, to the claims of Civil Society" and, therefore, "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." *Id.*

The right to Free Exercise of Religion, Madison reasoned, precedes civil society and is superior even to legitimate government. In *City of Boerne v. Flores*, Justice O'Connor pointed out that "Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law." *City of Boerne v. Flores*, 521 U.S. 507, 561 (1997) (O'Connor, J., dissenting).

The Founders appealed to "the Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders likely operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in William Penn, The Political Writings of William Penn, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

Madison, therefore, did not likely conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather he conceived of

a society in which citizens have the individual liberty under the Free Exercise Clause to live out their faith. Madison anticipated the *Smith* Court's insistence (494 U.S. at 890) that those who seek protection for religious exercise must do so through the majoritarian political process. Madison observed that in matters of religion, a man "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 The Founders Constitution 83. Such trespasses on the actual Free Exercise of Religion by the majority are an illegitimate interference with that inalienable right and would effectively write the Free Exercise Clause out of the Constitution.

B. The records of the First Congress support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

There was only one treatment of accommodation of religion from generally applicable laws in the records of the First Congress. A special committee had proposed a provision on religion declaring "no person religiously scrupulous shall be compelled to bear arms." 1 Annals of Cong. 749 (J. Gales ed. 1834) (Aug. 17, 1789). The discussion that followed tends to show that the Founders recognized, as part of their legal landscape, broad accommodation of religion.

Representative Jackson proposed to modify the provision to accommodate people who were religiously scrupulous against bearing arms to require that those individuals pay for a substitute. 1 Annals of Cong. 750 (J. Gales ed. 1834) (proposal of Rep. Jackson, Aug. 17, 1789). Representative Sherman objected to Jackson's "upon paying an equivalent" modification, however. Sherman reminded his colleagues "those who

are religiously scrupulous at bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other." 1 Annals of Cong. 750 (J. Gales ed. 1834) (remark of Rep. Sherman, Aug. 17, 1789).

In Sherman's view, a separate provision like Jackson proposed was not absolutely necessary to protect religious conscience because our national charter was unlike the seventeenth-century governments that arbitrarily threatened the liberty of conscience and other inalienable rights. *Id.* On the contrary, Sherman stated, "[w]e do not live under an arbitrary Government." *Id.* The implication of Sherman's remarks is that no express, textual protection was needed in the Bill of Rights over and above the Free Exercise Clause for those situations where the Founders predicted potential conflicts between a common, secular task and a religious belief because refusing to accommodate pacifist sects like the Quakers and Moravians from military service would be the very definition of arbitrary government.

Sherman's view that Congress had nothing to do with religion was very common at the time the First Amendment was ratified. The views of representatives who believed the provision was essential to Free Exercise, like Elias Boudinot who hoped the new government would show the world that the United States would not restrict anyone's religious exercise, "strongly suggests that the general idea of free exercise exemptions was part of the legal culture." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1501 (1990). That the Founders recognized and intended to protect the importance of religious

conscience, which may sometimes conflict with federal practice, is further supported by the noticeable parallel between that proposal and the Oath Clause, which ended up in the 1787 Constitution.

C. The Oath Clause supports an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

The 1787 Constitution contained an express recognition of religious exercise. The Oath Clause contemplated a protection for Free Exercise of Religion for those situations in which the Founders foresaw a potential conflict between federal practice and individual liberties.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or affirmation*, to support this Constitution.

U.S. Const., Art. VI (emphasis added). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*)…."

The exception for "affirmations" was an important addition to preserve free religious exercise. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the founding was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife

where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. Letter from James Madison to Edmund Pendleton, 8 The Documentary History of the Ratification of the Constitution, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?").

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing that public office holders could swear an oath *or* give an affirmation. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

D. Historical practices at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious beliefs.

All the early state constitutions sought to guarantee the Free Exercise of Religion. In every state the government had no power to prohibit peaceful religious exercise. Although some state constitutions included the pragmatic Jeffersonian provision permitting governmental interference with religiously motivated acts against public peace and good order, those state constitutions challenge the *Smith* Court's holding that religiously informed conduct as opposed to mere beliefs is not protected against generally applicable laws. *E.g.*, N.Y. Const. (1777), section 38; Mass. Const. (1780), art. II. Rather, in recognizing exceptions to Free Exercise even where the individual's acts are religiously motivated, those provisos tend to confirm that the founding generation understood "free exercise" to mean "freedom of action" and to include conduct as well as belief. What was prohibited was a breach of the public peace, not the religious conduct per se.

State efforts to ensure religious liberty focused on preventing government compulsion of ordinary citizens to violate their religious beliefs. Thus, some state constitutions contained religious conscience exemptions. The constitution of New Jersey, for example, excused any person from paying religious taxes. Const. of N.J. (1776), art. 18. Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, Jailed for Peace, The

History of American Draft Law Violators 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, The Quakers in Peace and War, (Garland 1972) at 331, 396-97. These early protections acknowledged the Quakers' higher duty to their Creator and accepted that Quaker religious belief forbade the use of arms and chose to honor religious liberty even at the expense of additional soldiers.

This protection of religious liberty is most clearly illustrated during the Revolutionary War where the religious consciences of pacifists were treated with great delicacy. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Indeed, when some Quakers were forced to march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id.* at 396.

Washington's commitment to this accommodation of religious conscience was also demonstrated in his orders issued to towns that were in the path of the British army's march. In January 1777, as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as are Conscientiously scrupulous against in every case*) should give their personal service." George Washington, Letter of January 19, 1777, in Jailed for Peace, *supra* at 10 (emphasis added). The call for every man to "stand ready…against hostile invasion" was not a simple request. The order included the injunction

that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great Britain, and treated as common enemies of the American states." Proclamation issued January 25, 1777 in George Washington, A Collection, W. B. Allen (Liberty Classics 1988) at 85. Again, however, the order expressly excused those "conscientiously scrupulous against bearing arms." *Id.* Even in the face of the most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate their religious beliefs.

These examples demonstrate that the founding generation understood religious liberty to mean that even generally applicable laws do not permit government to compel a citizen to violate his religious beliefs. The original understanding of the Free Exercise Clause thus forbids the State of Oregon from compelling petitioners to take action contrary to their religious beliefs.

CONCLUSION

At the time of the founding, religious liberty was one of the most precious freedoms the founding generation sough to protect. Under *Smith*, that is no longer the case. States like Oregon, and even some courts "persist in the repeated denigration of those who continue to adhere" to traditional religious beliefs. *Espinoza*, 140 S.Ct. at 2266 (Thomas, J. concurring). But the First Amendment was meant to protect "not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly." *Id.* at 2276 (Gorsuch, J., concurring). This case presents the Court the opportunity to correct the error occasioned by the decision in *Smith*. The Court should grant the petition.

October 2022 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
174 W. Lincoln Ave. #620
Anaheim, CA 92805
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae