No. 19-123

In The

Supreme Court of the United States

SHARONELL FULTON, et al.,

Petitioners,

v.

CITY OF PHILADELPHIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* FORMER ATTORNEY GENERAL EDWIN MEESE III IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Honorable Edwin Meese III served as the Seventy-Fifth Attorney General of the United States. Previously, Mr. Meese was Counselor to the President. He is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation.

During Mr. Meese's tenure as Attorney General, the Department of Justice's Office of Legal Policy prepared a report titled "Religious Liberty Under the Free Exercise Clause," which has been described as one of "[t]he best historical examination[s] of free exercise exemptions."[2]

When this analysis was published in 1986, Mr. Meese observed that "[t]here are, perhaps, few topics in modern American constitutional thought that have occasioned as much discussion as the subject of Church and State."[3] So too, now. As questions regarding the proper application of the Free Exercise Clause

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[1] Pursuant to Rule 37.2(a), all parties were timely 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. No person or entity other than the undersigned counsel contributed to the costs associated with the preparation and submission of this brief.

[2] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1989) [hereinafter McConnell, *Origins*].

[3] OFFICE OF LEGAL POLICY, DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986) [hereinafter REPORT TO THE ATTORNEY GENERAL].

return to the Court, Mr. Meese offers the following to aid the Court's review.

SUMMARY OF THE ARGUMENT

In *Employment Division v. Smith*, the Court, by a 5-4 vote, held that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). In other words, so long as a law stops short of singling out religious conduct for worse treatment than secular conduct, *see id*. at 877, the rule from *Smith* is that the Free Exercise Clause provides the believer no heightened protection, even if the law flatly prohibits conduct deemed necessary by faith (e.g., a criminal law forbidding sacramental peyote, *see Smith*, 494 U.S. at 876), or if it commands behavior irreconcilable with dogma (e.g., a regulation mandating the provision of health-insurance coverage for certain methods of contraception, *see Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016); *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 689 (2014)). Under *Smith*, then, "one renders unto Caesar whatever Caesar demands and to God whatever Caesar permits." W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 38, 43-44 (1985).

In fashioning this rule, the Court in *Smith* declined to undertake any examination of the history surrounding religious liberty (in general) or the Free Exercise Clause (in particular) during this Nation's infancy. And the history reads like an indictment of *Smith*'s rule. James Madison, long recognized by this Court as " 'the leading architect of the Religion Clauses of the First Amendment,'"[4] rejected the idea that, although religious conduct must be "tolerated," it remains intractably subordinate to the secular law. He was of the opinion that, "[b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe," and, accordingly, "every man who becomes a member of any particular Civil Society" must "do it with a saving of his allegiance to the Universal Sovereign." James Madison, *Memorial and Remonstrance* § 1 (1785)*, reprinted in Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947).

In deciding whether the City of Philadelphia may exile Catholic Social Services from participation in the City's foster-care system unless it engages in conduct incompatible with its religious convictions, the Court should take up the task that *Smith* eschewed and consider the history behind the Free Exercise Clause. And the history is illuminating; the text of the First Amendment's Religion Clauses, the practice of the States

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[4] *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012) (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011) (quoting, in turn, *Flast v. Cohen*, 392 U.S. 83, 103 (1968))).

before, during, and immediately after ratification, and the prevailing political philosophy at the time of the Founding, all coalesce around the principle that religious obligations enjoy general precedence over the civil law, both in time and authority. Accordingly, civil law, even when generally applicable and neutral, must yield to religious obligation, save for rare occurrences when a government interest escalates to the compelling level. And because the rule in *Smith* has become all the more problematic as the modern administrative state expands (and is a poor candidate for salvage under principles of *stare decisis* anyway), the Court should dispense with it and bring Free Exercise jurisprudence into alignment with the understanding of the Framers.

ARGUMENT

I. The Free Exercise Clause should be analyzed in accordance with its original meaning.

Smith is perhaps most remarkable for what it omitted. By declining to examine in any way the original meaning of the Free Exercise Clause while demarcating its scope, *Smith* bucked a burgeoning trend in which the original meaning of the First Amendment's Religion Clauses (particularly the Establishment Clause) was considered, if not dispositive, predominantly relevant in resolving questions about their applicability.[5]

[5] "This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning." Michael W. McConnell,

Pre-*Smith* examples, some dating to the World War II era, abound throughout the Court's reporters.[6]

Since *Smith*, this Court has emphasized the importance of original meaning when analyzing both Religion Clauses. With regard to the Free Exercise Clause, Justice Souter's concurrence in *Church of Lukumi Babalu Aye v. City of Hialeah*, previewed the Court's focus on original meaning, *see* 508 U.S. 520, 575 (1993) (Souter, J., concurring in part and concurring in the judgment), and the Court began debating the Clause's original meaning in earnest a mere seven years after *Smith* when Justice O'Connor's dissent in *City of Boerne v. Flores* "examine[d] . . . the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause." 521 U.S. 507, 548 (1997) (O'Connor, J., dissenting). Justice O'Connor's dissent prompted a counter-analysis of the Clause's history by Justice Scalia (*Smith*'s author), and although he disputed the accuracy of his colleague's historical examination, he did

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Free Exercise Revisionism and the Smith *Decision*, 57 U. CHI. L. REV. 1109, 1116-17 (1990).

[6] *See*, *e.g.*, *Engel v. Vitale*, 370 U.S. 421, 425-36 (1962); *McGowan v. Maryland*, 366 U.S. 420, 431-43 (1961); *Everson*, 330 U.S. at 8-16; *see also*, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 612-16, 622-26 (1992) (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring); *McGowan*, 366 U.S. at 459-95 (Frankfurter, J., concurring); *Everson*, 330 U.S. at 31-43 (Rutledge, J., dissenting).

not deny the interpretive relevance of history. *See id.* at 537 (Scalia, J., concurring).[7]

This trend continues unabated. In *Hosanna-Tabor*, Chief Justice Roberts's opinion for a unanimous Court began its assessment of both Religion Clauses by examining the history of free exercise, beginning with the Magna Carta and ending with the adoption of the First Amendment and events shortly after. 565 U.S. at 182-85. Two years later, the Court pronounced, in *Town of Greece v. Galloway*, that "the Establishment Clause must be interpreted by reference to historical practices and understandings," 572 U.S. 565, 576 (2014), and that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change," *id*. at 577. Most recently, in *American Legion v. American Humanist Association*, the Court examined the prevalent "philosophy at the time of the founding [a]s reflected in . . . prominent actions taken by the First Congress." 139 S. Ct. 2067, 2087 (2019).

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[7] Justice Scalia's *City of Boerne* concurrence is discussed more fully below. *See also* Michael W. McConnell, *Reflections on* City of Boerne v. Flores*: Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998) [hereinafter McConnell, *Reflections*]; McConnell, *Free Exercise Revisionism and the* Smith *Decision*, *supra* note 5.

Time has transformed *Smith*'s history-free analysis into a First Amendment outlier. In recent years, this Court has returned, time and again, to the Framers' understanding of the First Amendment as the definitive guide when it is tasked with ascertaining the scope of either Religion Clause. The time has come to revisit *Smith* by doing the same in this case.

II. As originally understood, the Free Exercise Clause mandates exemptions for sincerely held religious beliefs from neutral and generally applicable laws.

The Free Exercise Clause, when viewed in its proper historical context, guarantees the protection that *Smith* mistakenly rejected: *any* "governmental action[] that substantially burden[s] a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. Adopting this rule harmonizes (1) the text of the Free Exercise Clause, as it was understood by the generation that ratified it; (2) the history, both pre- and post-ratification, surrounding the Clause's development; and (3) the political philosophy fueling the adoption of the First Amendment. Taken together, the text, history, and philosophy establish the principle that "the government has no right to interfere with the free exercise of religion" unless the "government action is necessary to prevent manifest danger to the existence of the state; to protect public peace, safety, and order; or to secure the religious liberty of others" and, then, only if the government deploys "the least restrictive means

necessary to protect these interests." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at v.

A. The text of the Free Exercise Clause, informed by historical practice, requires accommodations for religious exercise.

In relevant part, the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The term "religion," the phrase "free exercise," and the structure of First Amendment, are particularly significant for purposes of Clause's original understanding.

1. Although "[t]he recorded debates in" both chambers of Congress "cast little light on the meaning of the free exercise clause," McConnell, *Origins*, *supra* note 2, at 1481, 1483, the use of the term "religion" in the First Amendment appears to have been deliberate. Earlier drafts of the Clause would have offered protection for "rights of conscience." *Id.* at 1488. But the final, as-ratified version of the First Amendment opted instead to enshrine the right to "free exercise of religion." *Id*.[8]

"Belief in a Supreme Being was . . . prominent in the [Founders'] references to religion." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 9. Indeed, "[t]he historical materials uniformly equate 'religion' with

[8] *See also* McConnell, *Origins*, *supra* note 2, at 1489 ("The choice of the words 'free exercise of religion' in lieu of 'rights of conscience' is . . . of utmost importance.").

belief in God or in gods, though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms." McConnell, *Origins*, *supra* note 2, at 1493. Examples abound, including in the Virginia Declaration of Rights ("the duty we owe to our Creator") and in Madison's *Memorial and Remonstrance* ("the duty of every man to render to the Creator such homage . . . .").

"[R]eligion," in other words, "exists precisely because people believe that there is some connection between extra temporal realities and this life." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 27. Religion, then, for purposes of the Founders' understanding, is most appropriately defined as "a system of beliefs, whether personally or institutionally held, prompted by the acceptance of transcendent realities or acknowledging extratemporal actions." *Id*. (citing 8 NEW ENGLISH DICTIONARY 410 (S. Murray, ed. 1914); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1212 (1966); WEBSTER'S NEW INTERNATIONAL DICTIONARY 2105 (2d ed. 1958); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1755)).

Understanding religion as fealty to a "transcendent reality" necessarily disentangles religion from other moral and ethical codes that, while sincerely held, find their bases in either temporal philosophy or

(as is relevant here) civil law.[9] In other words, defining religion this way implies dual jurisdiction; i.e., "God and Caesar operate in different realms," and although "each must be respected within its sphere," *id*., the "duty" owed to "the Creator" takes "preceden[ce] both in order of time and degree of obligation, to the claims of Civil Society." Madison, *Memorial and Remonstrance* § 1, reprinted in *Everson*, 330 U.S. at 64.[10] Given this order of priority, the definition of religion suggests that "the state should not interfere with the fulfilling of that duty unless and until that duty becomes an overt act against the rights of others." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 26.

2. The least controversial point about the phrase "free exercise" is that, "by definition, the words denote action or activity." *Id*. at 19; *see also Smith*, 494 U.S. at 877-78 ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts . . . ."); McConnell, *Origins*, *supra* note 2, at 1489 (collecting dictionary

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[9] In addition to the historical accuracy of this definition, it also makes it easier to apply the Free Exercise Clause's protection to nontheistic and non-traditional religions while proving workable for use in applying both the Free Exercise Clause and the Establishment Clause. *See* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 28.

[10] McConnell, *Origins*, *supra* note 2, at 1490 ("Conflicts arising from religious convictions were conceived not as a clash between the judgment of the individual and of the state, but as a conflict between earthly and spiritual sovereigns. The believer was not seen as the instigator of the conflict; the believer was simply caught between the inconsistent demands of two rightful authorities, through no fault of his own.").

definitions from Founding era). Precisely what it means to be "free" to "exercise" religion, however, has been enriched with deep context that was familiar to the Founding generation. Of primary importance is the notion that "free exercise," naturally, "is more likely than mere liberty of conscience to generate conflicts with, and claims for exemption from, general laws and social mores." *Id*. at 1490.

As early as the 1660s, several colonies (led by Rhode Island, and followed by Carolina and New Jersey) began, via charter or agreement, to enshrine religious-freedom protection for their inhabitants. According to Professor McConnell, "three features of these early provisions warrant attention." *Id*. at 1427. First, they "expressly overrode" any "[l]aw, [s]tatute or clause, usage or custom of this realm of England to the contrary." *Id*. (citation omitted). Next, they applied to *all* "judgments and contiences in matters of religion." *Id.* (citation omitted). Finally, they restricted free religious exercise "only as necessary for the prevention of 'Lycentiousnesse' or the injury or 'outward disturbance of others,' rather than by reference to all generally applicable laws." *Id*. (citation omitted).

The Revolution electrified the interest in religious liberty, and by 1789, every State (save for Connecticut) had a constitutional provision guaranteeing some degree of religious freedom. Some tracked closely the language that would eventually find its way into the Free

Exercise Clause.[11] New York's 1777 Constitution, for example, provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind," so long as religion was not used to "excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. CONST. of 1777, art XXXVIII. New Hampshire's provision is similar: "[e]very individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason," and "no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience," so long as "he doth not disturb the public peace, or disturb others, in their religious worship." N.H. CONST. of 1784, pt. 1, art. V. And Georgia provided that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." GA. CONST. of 1777, art. LVI. Most of the original State constitutions are in accord.[12]

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[11] *See* McConnell, *Origins*, *supra* note 2, at 1490 ("[T]he free exercise clause at the federal level was itself modeled on free exercise provisions in the various state constitutions . . . .").

[12] *See* McConnell, *Origins*, *supra* note 2, at 1457 n.242 (reprinting DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RIGHTS of 1776 §§ 2, 3; MD. DECLARATION OF RIGHTS of 1776, art. XXXIII; MASS CONST. of 1780, art. II; N.C. CONST. of 1776, art. XIX; PA. CONST. of 1776, art. II; R.I. CHARTER of 1663; S.C. CONST. of 1790, art. VIII, § I; VA. DECLARATION OF RIGHTS of 1776, § 16); *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 3, app. B.

Every one of these free-exercise provisions (1) articulated a broad vision of what it meant to freely exercise one's religion while (2) including provisos that cabined free exercise only to the extent necessary to ensure public peace, safety, and the rights of others. Although Justice Scalia believed that these provisos stood for the unremarkable proposition that "the Religious exercise shall be permitted *so long as it does not violate general laws governing conduct*," *City of Boerne*, 521 U.S. at 539 (Scalia, J., concurring) (emphasis in original), the historical context suggests otherwise. As noted above, New York's Constitution forbade the use of free exercise to excuse *only* those acts of "licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. CONST. of 1777, art XXXVIII. But it also provided the New York legislature with much broader authority to enact, for example, laws advancing far less pressing State interests such as "good government, welfare, and prosperity." *Id.* art. XIX. And that William Blackstone only identified thirteen offenses as those "against the public peace,"[13] each of which relate to violence, public disorder, or tortious injury to a neighbor, suggests that the term "free exercise" means that exercise of sincerely held

[13] These include "riotous assemblies of twelve persons or more"; "poaching"; "anonymous threats"; "damage or destruction of public locks, sluices, or floodgates on a navigable river"; "public brawling"; "riots or unlawful assemblies of three persons or more"; "tumultuous petitioning"; "forcible entry or detainer"; "carrying dangerous weapons"; "spreading false news to provoke public disorder"; "spreading false prophecies"; "incitements to breach of the peace"; and "libel." 4 WILLIAM BLACKSTONE, COMMENTARIES *142-51 (1769).

religious beliefs takes precedence over all but the most serious (i.e., compelling) governmental interests. *See* McConnell, *Reflections*, *supra* note 7, at 835-37. That not all laws constitute a breach of peace has become all the more apparent given the rise and expansion of the modern administrative state. *See* discussion, *infra* at 26-29.

3. The final relevant textual indication is the structure of the First Amendment itself. The other Amendments that comprise the Bill of Rights (save for the Ninth and Tenth) are phrased in a way that protect people from certain kinds of actions (e.g., "people" shall not be subject to "unreasonable searches and seizures" under the Fourth Amendment, and no "person" shall "be subject for the same offense to be twice put in jeopardy of life or limb" under the Fifth). REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 15.

The First Amendment is unique. It "is not stated as a right, privilege, or immunity *granted* to 'people,' a 'person,' an 'owner,' or an 'accused'"; rather, "it is a disability on Congress." *Id*. (emphasis added). Instead of prohibiting certain actions, it bars certain kinds of law. In so doing, it *recognizes* and *acknowledges* (rather than grants) a preexisting "immun[ity]" from certain "legislative action." *Id*. at 16. This, in turn, implies that "the rights of religion, speech, press, and assembly are pre-existent rights—inalienable rights—and not mere civil privileges conferred by a benevolent sovereign." *Id*. at 16. And this leads to the conclusion that, when

one of the inalienable rights listed in the First Amendment conflicts with an otherwise generally applicable and neutral civil law, the civil law must, barring a compelling governmental interest, yield.

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The foregoing analysis supports the conclusion that the First Amendment protects sincere religious exercise from otherwise neutral and generally applicable laws, and that it does so best by granting religious exemptions when civil law and religious creed collide (unless a compelling government interest prevents the religious accommodation). "Religion," as understood by the Framers, means faith and obedience to transcendent reality, the neglect of which triggers "extratemporal consequences" that, by definition, far transcend the outer boundary of government jurisdiction. REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 29. "Free exercise," as understood by the Framers, means the right to practice (not just adhere to) a religion entirely unmolested by the government, unless and until government interference becomes "necessary to prevent manifest danger to the existence of the state; to protect public peace, safety, and order; or to secure the religious liberty of others." *Id*. at v. And the structure of the First Amendment itself, insofar as it disables the government rather than confers protection on individuals, underscores that these principles were understood to be part of the natural, inalienable rights that preceded the existence of the Nation itself.

In *Smith*, Justice Scalia posited that "[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. at 878 (emphasis added). A better reading, one that more faithfully applies the original understanding of the Free Exercise Clause, is that if an "individual claimant . . . prove[s] that the state has interfered[14] with the exercise of a sincerely[ ] held religious belief," then "the government must . . . prove its regulation is the least restrictive means necessary to achieve a compelling state interest." REPORT TO THE ATTORNEY GENERAL,

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[14] Although the Report to the Attorney General opined that "prohibiting," as used in the Free Exercise Clause, meant only "forbidd[ing]" or "prevent[ing]" the free exercise of religion, REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 17, its authors were "not entirely comfortable with the idea that the Free Exercise Clause" might allow "purposeful discrimination against religion that *burdens*" but stops short of forbidding or preventing "free exercise," *id*. at 47 n.84 (emphasis added). Subsequent research into usage of the word "prohibit" at the time of the Founding suggests that it was synonymous with "hinder." *See* McConnell, *Origins*, *supra* note 2, at 1486 (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1755)). In any event, ten years after the ratification debate, James Madison stated that "the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States." Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800) (emphases in original). For this reason, scholars believe that the term "prohibiting" should "be read as meaning approximately the same" as the other verbs used in the First Amendment—i.e., "infringing" or "abridging." *See* McConnell, *Origins*, *supra* note 2, at 1488.

supra note 3, at 37 (citing *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd.*, 450 U.S. 707, 714-18 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1963)). The Court should use this occasion to enshrine this principle.

B. The broader historical record suggests that religious exemptions from generally applicable legal duties are required by the Free Exercise Clause.

Although the Free Exercise Clause received little attention from the Courts around the time of the Founding (and was not interpreted by this Court until 1879,[15] *see Reynolds v. United States*, 98 U.S. 145, 164 (1879)), the granting of government exemptions

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[15] As Justice Scalia observed in his *City of Boerne* concurrence, early state court opinions do not form a consensus. 521 U.S. at 543 (Scalia, J., concurring). In *People v. Philips*, a New York court held that the First Amendment protected a Catholic priest from being compelled to provide criminal information he learned while administering the Sacrament of Confession. Court of General Sessions, City of New York (June 14, 1813), excerpted in Privileged Communications to Clergymen, 1 Cath. Lawyer 199 (1955). Conversely, the same judge in two separate Pennsylvania state cases held that the First Amendment did not force the State to hold a trial on a non-Sabbath day, *Simon's Executors v. Gratz*, 2 Pen. & W. 412 (Pa. 1831), or to refrain from swearing in a witness on the Sabbath, *Stansbury v. Marks*, 2 U.S. 213, 2 Dall. 213, 1 L. Ed. 353 (Pa. 1793). For a discussion of these early cases, see McConnell, *Origins*, *supra* note 2, at 1503-11.

for sincerely held religious beliefs occurred regularly at the legislative level. These early legislative enactments are particularly instructive, because "[t]he early state constitutions, on which the First Amendment was patterned, uniformly applied their versions of the Free Exercise Clause to all branches of government." *Shrum v. City of Coweta*, 449 F.3d 1132, 1141 (10th Cir. 2006) (McConnell, J.). Several examples are worth noting.

A particularly common source of friction between some religious adherents and the secular authorities around the time of the Founding was the oath requirement. McConnell, *Origins*, *supra* note 2, at 1467. In those days, an oath was considered the primary way to certify honest testimony and to formalize obligations, but several Christian sects believed that taking an oath would violate the Gospel of Matthew.[16] *Id*. In response, most colonies before the Revolution, and virtually all States by 1789, allowed religious objectors to testify by affirmation, rather than oath. *Id*.

Military conscription posed another conflict between the government at the time of the Founding and the dogma of certain denominations, like the Quakers

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[16] *See Matthew* 5:33-37 ("Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil.").

and Mennonites, that prohibited their adherents from bearing arms. *Id*. at 1468. But during a time when wartime exigency reached its apex, and the very existence of the Nation depended on intensifying the military effort, the First Continental Congress proclaimed that, "[a]s there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences." Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress, 1774-1789. Instead, the Continental Congress "earnestly recommend[ed] it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies," and, critically, "to do all other services to their oppressed Country, which they can *consistently with their religious principles*." *Id*. (emphasis added).

Other examples pepper the historical record. For example, the Rhode Island colonial legislature, in 1764, statutorily waived the laws governing marriage ceremonies for "any persons possessing the Jewish religion who may be joined in marriage, according to their own usages and rites." McConnell, *Origins*, *supra* note 2, at 1471. Both Maryland and North Carolina exempted Quakers from the requirement that they remove their hats in court. *Id*. And the trustees of Georgia went so far as to allow certain groups of Protestant refugees from the European Continent to create their own quasi-theocracy, "a form of wholesale exemption that enabled these dissenters from the Church of England to organize themselves in accordance with their own faith." *Id*.; *see also id.* n.312

("These groups were required to obey the colonial laws regarding military service, 'property, place and good government,' but were otherwise free to govern themselves." (citation omitted)).

According to Justice Scalia, "that legislatures sometimes (though not always) found it 'appropriate' . . . to accommodate religious practices does not establish that accommodation was understood to be constitutionally mandated by the Free Exercise Clause." *City of Boerne*, 521 U.S. at 541. This Court, however, has since re-endorsed the notion that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *See NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). And in any event, the Court need not (and should not) view these early religious accommodations in a vacuum. Their utility, instead, is to reinforce a tradition that the American People consistently understood religious liberty to embody—accommodation from generally applicable and otherwise neutral laws, barring a compelling interest in peace or public safety. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) ("constitutional adjudication necessarily involves not just history but judgment," and a "weighty" aspect of that judgment is "the widespread and longstanding traditions of our people").

C. The prevailing political philosophy at the time of the Founding suggests that the Free Exercise Clause compels religious exemptions.

Finally, it bears noting that, at the time of the Founding, a unique (and uniquely American) shift in political thinking was underway, specifically with regard to the proper relationship between religion and government. McConnell, *Origins*, *supra* note 2, at 1430. Understanding this shift clarifies why the Founders chose the words that formed the Free Exercise Clause and why religious exemptions were commonplace during our Nation's early years.

Of all the philosophers who contributed to the intellectual experiment of the United States, John Locke provided the "most extensive" discussion of the religion question and influenced most directly the Framers of the First Amendment. *Id*. On a theoretical ground, Locke was one of the earliest and most influential advocates of religious liberty. *Id*. at 1431. In his view, "[r]eligious intolerance was inconsistent both with public peace and with good government." *Id*. In other words, "[i]t is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion." JOHN LOCKE, A LETTER CONCERNING TOLERATION, at 53.

Even so, Locke believed that "the private judgment of any person concerning a law enacted in political matters, for the public good, *does not* take away the obligation of that law, nor deserve a dispensation." *Id*. at 43 (emphasis added). Under Locke's view, then, "[w]hen individual conscience conflicts with the governmental policy, the government will always prevail and the individual will always be forced to submit or suffer the punishment." McConnell, *Origins*, *supra* note 2, at 1435. "This understanding of religious toleration expressly precludes free exercise exemptions." *Id*.

Locke's notion of religious "toleration," however, is not what made its way into the First Amendment.[17] This was not happenstance. The American Revolution upended church/government relations, particularly in states where the Anglican Church featured prominently. *Id*. at 1436. Across the nascent country, "America was in the wake of a great religious revival" that powered a fervent "drive for religious freedom," *id.* at

[17] Some scholars have cautioned against overestimating Locke's influence, observing that the Revolution was based on "a variety of motives and [was] influenced by different intellectual traditions," of which Locke's philosophy was only one. *See*, *e.g.*, MARK DAVID HALL, FORMATION OF AMERICA'S CONSTITUTIONAL ORDER 101, GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY (Daniel L. Dreisbach and Mark David Hall eds. 2019). For instance, despite Locke's decision to subordinate religion below civil law, the Bible was cited more in revolutionary literature than *all* Enlightenment thinkers combined, including Locke. *See* Daniel Dreisbach, *The Bible Was America's Guide from the Start*, INSTITUTE FOR FAITH, WORK AND ECONOMICS (Feb. 27, 2017), https://tifwe.org/dreisbach-the-bible-was-americas-guide-from-the-start/.

1437-38, so much so that even King George III referred to the American Revolution as "a Presbyterian Rebellion." Hall, FORMATION OF AMERICA'S CONSTITUTIONAL ORDER 101, *supra*, note 17 (citation omitted). According to Professor McConnell, "[t]he greatest support for disestablishment and free exercise . . . came from evangelical Protestant denominations, especially Baptists and Quakers, but also Presbyterians, Lutherans, and others." McConnell, *Origins*, *supra* note 2, at 1439. And these "religious supporters of disestablishment and free exercise" were the ones who "supported adoption of constitutional protections" regarding religion "at the federal level." *Id*.

For that reason, when George Mason proposed using Locke's vocabulary ("toleration of religion") during the debate over the free exercise provision of the 1776 Virginia Declaration of Rights, James Madison objected, first, on the ground that the "word 'toleration' implies an act of legislative grace" (which, according to Locke, it was). *Id*. at 1443. Madison's repudiation of Locke's stance resonated with many; George Washington, for example, opined that "[i]t is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." *Id*. at 1444. Thomas Paine, for his part, commented: "Toleration is not the opposite of intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it." *Id*.

Madison's substitution made it into the Virginia Declaration of Rights. As ratified, Virginia's religious-freedom guarantee proclaimed "[t]hat religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence," and promised that "all men are equally entitled to the *free exercise of religion*, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 102-03 (emphasis added). Subsequently, the "Virginia 1776 Declaration of Rights was widely distributed among the states and served as a model for other declarations of religious free exercise." *Id*. at 5.

In other words, where Locke saw conflicts between Church and State as a political issue that could be solved by toleration, McConnell, *Origins*, *supra* note 2, at 1445, the prevailing American view among the Founding generation was that "[f]ree exercise must be defined, in the first instance, by what matters God is concerned about, according to the conscientious belief of the individual," *id*. at 1446. This sentiment permeates Madison's *Memorial and Remonstrance*, a work in which he decreed that "[t]he Religion then of every man must be left to the conviction and conscience of every man," and it is not only "the right of every man to exercise it as these may dictate" but also "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." Madison, *Memorial and Remonstrance* § 1, reprinted

in *Everson*, 330 U.S. at 64. In Madison's view, this duty to the Creator "is precedent both in order of time and 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." *Id*. In other words, freedom of religion is "in its nature an unalienable right." *Id*. Such rights, being inalienable, must, as a matter of logic, prevail when they conflict with otherwise generally applicable and neutral laws.

Although Madison's *Memorial and Remonstrance* is not law, a point that Justice Scalia highlighted in his *City of Boerne* concurrence,[18] it "is as clear a statement as can be found of the theory underlying the freedom-protective interpretation of the Free Exercise Clause," McConnell, *Reflections*, *supra* note 7, at 824, and it was spoken by "'the leading architect of the Religion Clauses of the First Amendment,'" *Hosanna-Tabor*, 565 U.S. at 184 (citations omitted). Moreover, it provides a unifying principle that harmonizes the text of the First Amendment's Religion Clauses (*see supra* at 8-17) with the Nation's history of providing religious exemptions from otherwise generally applicable and neutral laws (*see supra* at 17-20). More fundamentally, it furnishes a reason why the Founding generation found it so necessary to enshrine freedom of religion in the First Amendment. And most critically for present

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[18] *See City of Boerne*, 521 U.S. at 541 (Scalia, J., concurring) ("There is no reason to think [comments from the Framers] were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable.").

purposes, it underscores the error in *Smith*'s holding that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879.

III. The need to revisit *Smith* has become more imperative over time.

Given *Smith*'s declination to undertake an original-meaning analysis and its resulting stray from a constitutional rule that most faithfully animates the Free Exercise Clause, a course-correction is warranted. Given the ever-increasing encroachment of the modern administrative state into daily life, a course-correction becomes more vital to preserve the Framers' intent that religious duties will take precedence over the demands of the government. And because the typical reasons why the Court would adhere to a constitutional rule on grounds of *stare decisis* do not apply to *Smith*, the time for a course-correction is now.

1. When the Office of Legal Policy published its report on "Religious Liberty Under the Free Exercise Clause" in 1986, Mr. Meese commented that "the expansion of the role of government in the past few decades" over "community, commercial, educational, and family affairs" has "heightened the need for continued discussion . . . regarding the influence of religion in government and the role of government in religion."

REPORT TO THE ATTORNEY GENERAL, *supra* note 3. Nearly thirty-five years have passed, and during that span, the "so-called 'Affirmative Age' of government" continues to "transform[] the way in which we approach constitutional rights by emphasizing entitlements over responsibilities, equality over liberty, and positive over natural law." *Id*. As the modern administrative state continues to swell, government control encroaches ever further into areas of life once reserved to civil society, including the manifestation of religion.

This increasing risk is neither hypothetical nor hyperbole; indeed, members of this Court have recognized, as a general matter, that the "danger posed by the growing power of the administrative state cannot be dismissed." *See*, *e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). And it becomes much more acute when religious liberty collides with comprehensive, generally applicable regulatory schemes that, by their nature, "continue[] to displace religion in areas such as employment and education." REPORT TO THE ATTORNEY GENERAL, *supra* note 3, at 36. "[I]n a society where governmental regulation is pervasive and individual freedom generally limited, religious interests must make special claims vis-à-vis the state if they are to enjoy an equally wide ambit of action." Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1388 (1967).

To be certain, the meaning of the First Amendment's Free Exercise Clause has not changed. The principle that religious liberty, if it is to have any

practical effect, necessitates fealty first to the Creator and second to Caesar is as true now as it was at the Founding. Resuscitating that principle, however, is "necessary to preserve religious liberty as a meaningful reality against the extensive and ever-expanding claims of the modern affirmative state." REPORT TO THE ATTORNEY GENERAL, *supra* n.2, at 32.[19] Indeed, Justice Scalia has explained that, despite their shortcomings, tests like strict scrutiny "are essential to evaluating whether . . . new restrictions that a changing society constantly imposes upon private conduct comport with" "constant and unbroken national traditions." *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

This case is a paradigm of the administrative state's encroachment on American life, and the consequential danger inflicted on religious liberty by neutral and generally applicable laws. The Catholic Church has been serving Philadelphia's needy children since 1796, *see* Pet'rs' Br. 3, and Catholic Social Services has been doing so for over a hundred years. "Over the course of the twentieth century," a time period commensurate with the enlargement of government regulation as a general matter, the State has "increased its involvement in (and regulation of) care for abused and neglected children." *Id*. at 4 (citations omitted). As

[19] *See also* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 23 (1985) ("[T]o maintain vitality and independence of religious life as it was in 1789 in light of modern welfare-regulatory state requires, even more clearly than it did at that time, a recognition of the special character and needs of religion.").

government regulation reaches a summit, Catholic Social Services has been banished from Philadelphia's foster-care system on the basis of a (purportedly) neutral and generally applicable non-discrimination policy.

The First Amendment was ratified to prevent this.[20] Because these conflicts will occur more frequently as regulation expands, revisiting *Smith* has never been more vital. The Court should take this opportunity to do so in this case.

2. *Stare decisis*, which is "at its weakest when [the Court] interpret[s] the Constitution," *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020), especially with regard to "decisions that wrongly den[y] First Amendment rights," *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018),[21] should provide no additional obstacle. In *Ramos*, this Court identified four considerations that aid its decision to overturn a case or to leave

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[20] *See Yoder*, 406 U.S. at 217 (Free Exercise Clause protects against religious "mode[s] of life [that have] come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards").

[21] *See also Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted) ("This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."); *see*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 348-49, 363 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *W.V. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

it be: "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." 140 S. Ct. at 1405. As was the case in *Ramos*, "each factor points in the same direction." *Id*.

First, as discussed above, the analytical reasoning behind *Smith* has a conspicuous void—it is missing any attempt to ascertain the original meaning of the Free Exercise Clause. Because the Court's more recent precedent shows that even those "who believe that the historical meaning is not dispositive ordinarily agree that it is a relevant consideration," McConnell, *Free Exercise Revisionism and the* Smith *Decision*, *supra* note 5, at 1117, the absence of any historical analysis calls into question *Smith*'s reasoning.[22]

Second, (and again, as discussed above), *Smith* is "not consistent with related decisions." *Ramos*, 140 S. Ct. at 1405. As Catholic Social Services has rightly noted, it remains "a law unto itself." Pet'r's Br. 47-49. Indeed, shortly after its decision, Justice Souter observed that it "seems . . . difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law." *Church of Lukumi Babalu Aye*, 508 U.S. at 570-71 (1993) (Souter, J., concurring); *see also Kennedy v. Bremerton Sch.*

[22] This would also satisfy Justice Kavanaugh's first inquiry: whether "the prior decision [is] not just wrong, but grievously or egregiously wrong." *Ramos*, 140 S. Ct. at 1414; *see also id* ("In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors.").

Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., respecting the denial of certiorari) (noting that, in *Smith*, "the Court drastically cut back on the protection provided by the Free Exercise Clause. . . .").

Third and *fourth*, "legal developments since the decision" have all but eliminated any "reliance on" *Smith*. 140 S. Ct. at 1405. Shortly after *Smith* was decided, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. The congressional findings accompanying RFRA indicate that it was intended to be a direct repudiation of *Smith*.[23]

Finally, it bears noting that *Smith* has indeed "caused significant negative . . . real-world consequences." *Ramos*, 140 S. Ct. at 1415 ((Kavanaugh, J., concurring). RFRA only protects individuals from federal government intrusions into free exercise rights, *see City of Boerne*, 521 U.S. at 536, and not all states have passed their own. And in one particularly heartwrenching case, a Hmong family sued the Chief Medical Examiner for the State of Rhode Island after he conducted an autopsy on their son. *Yang v. Sturner*, 750

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[23] *See* 42 U.S.C. § 2000bb ("The Congress finds that . . . in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and the "purpose[ ] of this Act" is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

F. Supp. 558, 558 (D.R.I. 1990). As Hmongs, the Yangs "believe that autopsies are a mutilation of the body and that as a result 'the spirit of'" their son "would not be free, therefore his spirit will come back and take another person in his family." *Id*. Constrained to rule against the family by virtue of *Smith*, the district court judge found himself unable to do so "without expressing [his] profound regret and [his] own agreement with Justice Blackmun's forceful dissent," which the order quoted:

> [*Smith* considered] strict scrutiny of a state law burdening the free exercise of religion . . . a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance.

Id. at 559-60 (quoting *Smith*, 494 U.S. at 909 (Blackmun, J. dissenting)).

For these reasons, *stare decisis* should not impede this Court's replacement of the *Smith* rule with one more consonant with the text, history, purpose, and philosophy behind the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted.

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