No. 25-581

IN THE

Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO, ET AL.,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD, ET AL.,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a nonprofit 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 modern religious liberty jurisprudence has strayed far from the Founders' original understanding and lost its way in the tangled path of judge-made doctrine. While the Court has begun to return to the Founder's understanding in the Establishment Clause context, until Free Exercise doctrine is likewise returned to its original meaning, the Foundation believes that religious liberty jurisprudence will continue to be a stumbling block

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae's* intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

upon which the religious liberty of all Americans is at risk of being dashed. The Foundation hopes this brief will be helpful in clarifying the Founders' intent.

SUMMARY OF THE ARGUMENT

For the better part of a century, religious liberty jurisprudence has been entangled in all manner of judge-made doctrine which, rather than serving the intended effect of simplifying the analysis of Establishment and Free Exercise claims, has led to more confusion, more contention, and ultimately more injury to religious liberty. Though this Court recently declared in *Kennedy v. Bremerton School District* that Establishment Clause claims must be analyzed in "accord with history and faithfully reflect the understanding of the Founding Fathers,"[2] Free Exercise jurisprudence remains unmoored from its original meaning, and religious liberty in America will continue to be subject to blatant infringement until this is remedied.

However, the Founders' understanding of the both the Establishment and Free Exercise Clauses—that they enshrine a jurisdictional separation between Church and State—alleviates these issues. To modern minds, the Founders' understanding can seem no less confusing. However, both the Founders' own words and actions as well as this Court's early religious liberty jurisprudence provide picture-perfect clarity of the Founders' intent and understanding of the Religion Clauses.

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[2] 142 S. Ct. 2407, 2448 (2022).

As this Court affirmed in 1878 upon striking down polygamous marriage in *Reynolds v. United States*, the Founders recognized, understood, and enshrined a jurisdictional separation between Church and State, such that the only time that the State has any authority at all over the Church is if and when the Church's actions, as phrased by Thomas Jefferson, are "overt acts against peace and good order."[3]

In the present case, Colorado excludes Catholic preschools from its Universal Preschool Program unless they agree to operate on terms that conflict with Catholic doctrine regarding marriage, sex, and gender. Catholic preschools cannot accept those conditions without altering religious formation and internal governance—matters the Founders understood to lie beyond civil authority. Colorado does not justify its exclusion as necessary to prevent disorder, coercion, violence, or any "overt act against peace and good order." Instead, the State seeks to leverage a public program to pressure religious schools to conform to state orthodoxy. Under the Founders' jurisdictional framework, that is the beginning and end of the Free Exercise violation: civil authority is exercising power where it has none and has thus violated the Constitution.

Returning to the Founders' framework of jurisdictional separation would reorient religious liberty jurisprudence to the original meaning of the Religion Clauses. Doing so would harmonize this Court's modern Free Exercise cases while also

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[3] *See* 98 U.S. 145 (1878).

correcting *Smith's* defects. The case at hand is a clear example of both how the current Free Exercise framework fails at protecting religious liberty as well as how the Founders' original understanding would remedy the central issue and provide clarity moving forward.

ARGUMENT

The Founders understood the Religion Clauses to enshrine a jurisdictional separation of Church and State, and that understanding provides the essential starting point for a Free Exercise analysis rooted in the original meaning of the First Amendment.

I. The Founders adopted a jurisdictional boundary between Church and State.

A proper understanding of the Free Exercise Clause must begin where the Founders themselves began: with the recognition that religion and civil government occupy distinct and non-overlapping jurisdictions. This constitutional structure was not speculative political philosophy but rather the direct solution to the centuries-long pattern of civil rulers supervising, licensing, reshaping, or punishing religious life. In rejecting these abuses, the Founders embraced a jurisdictional model in which the State governs only civil peace and order, while the Church governs matters of religious doctrine, worship, internal discipline, religious formation, and membership.

This dual-jurisdiction framework appears repeatedly across the Founders' writings. James Madison stated this principle with unrivaled clarity in his 1785 *Memorial and Remonstrance Against*

Religious Assessments wherein he defined "religion" as "the duty which we owe to our Creator and the manner of discharging it, [which] can only be directed by reason and conviction, not by force or violence."[4] Madison further explained that the right of free religious exercise is a "duty towards the Creator" that is "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[5] Because of this precedence, "in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."[6]

Likewise, Thomas Jefferson affirmed a jurisdictional separation of Church and State most famously in his 1802 letter to the Danbury Baptists:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should "make no law respecting an establishment of religion, or prohibiting the

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[4] James Madison, Memorial and Remonstrance Against Religious Assessments ¶1 (1785), *Founders Online*, Nat'l Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163

[5] *Id.*

[6] *Id.*

> free exercise thereof," thus building a wall of separation between Church & State.[7]

Jefferson did not mean a one-sided limitation on the Church in public life and civil society, but rather he understood that the "wall of separation" was meant to protect the Church from the State. Writing in 1808, Jefferson said, "I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. . . ."[8]

However, these letters only re-affirmed what Jefferson had made clear years earlier during the 1780s effort to establish religious freedom in Virginia. During the Oct. 1785 legislative session, Madison's Remonstrance served its aim and helped to defeat the "Bill for establishing a provision for the teachers of the Christian religion." In its place, the Virginia Legislature passed a "Bill for Establishing Religious Freedom," authored by Thomas Jefferson.

This Court expressly adopted Jefferson's formulation in its first major Free Exercise decision, *Reynolds v. United States*, wherein the Court quoted Jefferson's Bill for Establishing Religious Freedom at length,

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[7] Thomas Jefferson, Letter to the Danbury Baptist Association (Jan. 1, 1802), *Founders Online*, Nat'l Archives, https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006

[8] Thomas Jefferson, Letter to Samuel Miller (Jan. 23, 1808), *Founders Online*, Nat'l Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-7257

> In the preamble of this act religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[9]

The Court punctuated Jefferson's words: "In these two sentences is found the true distinction between what properly belongs to the church and what to the State."[10] In doing so, the *Reynolds* Court reaffirmed the jurisdictional separation of Church and State as understood by the Founders and held that religious exercise may be regulated only when the actions are "in violation of social duties or subversive of good order."[11]

The Founders' jurisdictional understanding of Church and State therefore presupposed that all aspects and functions of religion—modes of worship, church governance, teaching, doctrine, sacraments, religious formation, membership, and every other facet of religious exercise—are outside the power and authority of the State. Far from mere religious toleration, the Founders enshrined a structural limit

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[9] 98 U.S. at 163.

[10] *Id.*

[11] *Id.* at 164.

on the scope of civil authority. Thus, the State cannot regulate religion "equally," "neutrally," or with "general applicability" if the State lacks jurisdiction to regulate the religious activity in the first place. The Establishment Clause forbids the State from prescribing "the duties which we owe to our Creator and the manner of discharging them" while the Free Exercise Clause forbids the State from proscribing any such duty that is not an "overt act against peace and good order." Both Clauses reflect a single jurisdictional division between Church and State.

II. Free Exercise claims must be analyzed in accordance with the Founders' understanding.

Recovering the Founders' jurisdictional boundary is essential to applying the Free Exercise Clause according to its original meaning. The Founders did not approach religious liberty through balancing tests, tiers of scrutiny, comparable secular activities, or the vocabulary of neutrality and general applicability that dominates modern Free Exercise jurisprudence. Instead, they began from a structural premise: civil authority extends only to the regulation of acts that threaten the peace and safety of society; it does not extend to the governance, practice, or exercise of religion. Madison's *Memorial and Remonstrance* declared that "the Religion then of every man must be left to the conviction and conscience of every man," and because the duty to God is "precedent" to civil society, religious exercise is "exempt from the

authority of the Society at large." [12] Jefferson, likewise, insisted that civil authority encompasses "such acts only as are injurious to others."[13]

From this premise, the Founders' Free Exercise analysis flows naturally. The threshold question is not whether the State acted neutrally, whether others received comparable treatment, or whether the law contains exemptions. The threshold question is *whether the government is acting within its jurisdiction.* If a law or regulation intrudes upon matters that belong exclusively to the religious sphere, the inquiry is over: the action exceeds the authority granted to civil government. Only where religious conduct escalates into "overt acts against peace and good order" may civil power intervene.[14]

A. The Founders' framework rejects secular comparison based analysis.

The Founders' jurisdictional model stands in sharp contrast to the framework introduced in *Employment Division v. Smith*, where the Court held that neutral and generally applicable laws do not violate the Free Exercise Clause even if they substantially burden religious exercise. [15] *Smith* substitutes a *comparative* test—focusing on how the State treats secular conduct relative to religious conduct—for the Founders' *jurisdictional* test—

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[12] Madison, Memorial and Remonstrance, *supra* at ¶¶2-3.
[13] Thomas Jefferson, Notes on the State of Virginia (1787), *Library of Congress*, https://tile.loc.gov/storage-services/service/gdc/lhbcb/04902/04902.pdf
[14] *Reynolds*, 98 U.S. at 163-64.
[15] 494 U.S. 872, 879 (1990).

focusing on whether the State has authority to regulate the conduct at all.

Under the Founders' understanding, neutrality and general applicability do not authorize state intrusion into religious life. A law may be perfectly neutral and perfectly general, but if it regulates matters of doctrine, worship, or internal ecclesial governance, the State has still violated the First Amendment. Neutrality does not grant jurisdiction; only the Constitution does.

Jefferson's writings make this point explicit. In explaining that civil government has no authority over natural rights except what the people submit to, Jefferson declared that "[t]he rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others."[16] Laws that are uniform and neutral nevertheless infringe religious liberty if they prohibit acts that are not "overt acts against peace and good order." The question is whether the act is harmful to civil society, not whether the regulation is equally burdensome.

B. The Founders' framework cleanly distinguishes what is within and beyond civil power.

The Founders' approach provides a bright-line distinction: religious exercise cannot be regulated unless it is an "overt act against peace and good order" as understood by the Founders. As Jefferson

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[16] Jefferson, Notes on the State of Virginia, *supra*.

remarked, "it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[17] Where religious exercise does cause such injury, only then does it enter the State's jurisdiction and authority to regulate.

This "peace and good order" distinction was not unique to Jefferson or Madison, but was present in virtually every constitution of the thirteen original states.

- The 1784 Statute Laws of Connecticut guaranteed equal protection of law to all Christians who "demean[ed] themselves peaceably, and as good Subjects of the State."[18] In 1818, Connecticut's first state constitution guaranteed free exercise of religion to all, "provided, that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State."[19]
- In 1790, Rhode Island ratified the U.S. Constitution on the condition that there

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[17] Id.

[18] "An Act securing the Rights of Conscience in Matters of Religion, to Christians of every Denomination in this State," Acts and laws of the state of Connecticut, in America (1784), available at: https://archive.org/details/bim_eighteenth-century_acts-and-laws-of-the-sta_1784.

[19] Conn. Const. (1818), art. I, sec. 3. https://www.cga.ct.gov/asp/Content/constitutions/1818_Constitution.pdf

would be a guarantee of free exercise of religion using Madison's definition: "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence. . ."[20]

- The 1777 Georgia Constitution guaranteed free exercise of religion "provided it be not repugnant to the peace and safety of the State."[21]
- The 1784 New Hampshire Constitution guaranteed free exercise of religion to every individual "provided he does not disturb the public peace, or disturb others in their religious worship."[22]
- The 1776 North Carolina Constitution guaranteed free exercise "provided that nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses from legal trial and punishment."[23]

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[20] Ratification of the Constitution by the State of Rhode Island, art. IV (May 29, 1790), *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/ratri.asp

[21] Ga. Const. (1777), art. LVI, *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/ga02.asp

[22] N.H. Const. (1784), art. I para. 5., https://csac.history.wisc.edu/wp-content/uploads/sites/281/2024/05/DC10-01-05-08_New-Hampshire.pdf

[23] N.C. Const. (1776), art. XXXIV., *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/nc07.asp

- The 1780 Massachusetts Constitution protected religious freedom so long as a person "doth not disturb the public peace or obstruct others in their religious worship."[24]
- The 1776 Maryland Constitution provided that "no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights"[25]
- The 1776 Constitution of New Jersey guaranteed free exercise of religion for Protestants "who shall demean themselves peaceably under the government."[26]
- The 1777 New York Constitution guaranteed free exercise of religion "Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[27]

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[24] Mass. Const. (1780), pt. I, art. II., *Avalon Project*, Yale Law Sch., https://www.nhinet.org/ma-1780-mob.htm
[25] Md. Const. (1776), *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/17th_century/ma02.asp
[26] N.J. Const. (1776), art. XIX, *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/nj15.asp
[27] N.Y. Const. (1777), art. XXXVIII, *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/ny01.asp

- The 1778 South Carolina Constitution guaranteed free exercise of religion provided that "No person shall disturb or molest any religious assembly; nor shall use any reproachful, reviling, or abusive language against any church, that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors, and that profession which otherwise they might be brought to assent to."[28]

- In 1788, Virginia ratified the U.S. Constitution on the condition that there would be a guarantee of free exercise of religion using Madison's definition.[29] And, as mentioned *supra*, Virginia's 1785 Bill for Establishing Religious Freedom declares that the only "rightful purpose" for civil government to interfere with religious exercise is when "principles break out into overt acts against peace and good order."[30]

The States of Vermont and Pennsylvania are the only exceptions, both of whom defended free exercise even further. Vermont guaranteed free exercise of religion to all, declaring in its 1786 Constitution that: "no authority can . . . interfere with, or in any

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[28] S.C. Const. (1778), art. XXXVIII, *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/sc02.asp#1

[29] Ratification of the Constitution by the State of Virginia (June 26, 1788), *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/ratva.asp

[30] *See Reynolds*, 98 U.S. at 163.

manner controul, the rights of conscience, in the free exercise of religious worship." [31] Likewise, Pennsylvania's 1790 Constitution contains near identical language.[32]

The thirteen original States confirm that the Founders' understanding of the jurisdictional separation of Church and State was ubiquitous. The Founding era provisions above confirm that mere offense, disagreement, or divergence from prevailing norms cannot justify State regulation of religion.

Modern doctrine, by contrast, requires courts to perform complex analysis between comparable secular activities, exemptions, and legislative purposes—leaving far too much room for inconsistent judicial discretion. The design and intent of the Founders' framework renders such complexity unnecessary. Judges analyzing Free Exercise Clause claims according to the Founders' understanding only have to ask one question—the only one that the First Amendment permits: *is the State exercising power over something that lies outside of its constitutional jurisdiction?*

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[31] Vt. Const. (1786), ch. 1, sec. 3, *Avalon Project*, Yale Law Sch., https://avalon.law.yale.edu/18th_century/vt02.asp.

[32] Pa. Const. (1790), art. IX, sec. 3, https://www.paconstitution.org/texts-of-the-constitution/1790-2/

C. *Reynolds v. United States* provides the template for how to analyze more difficult Free Exercise cases using the Founders' framework.

The Founders understood that the State only had jurisdiction to interfere with religious exercise if that exercise was an "overt act against peace and good order." Thus, religious acts which are violent and injurious to persons—cannibalism, torture, human sacrifice, etc.—clearly fall within the State's jurisdiction. However, there are many religious acts that are not immediately clear-cut. The very first Free Exercise case before this Court, *Reynolds v. United States* in 1878 presented such an issue with the question of religious polygamy.

The *Reynolds* Court recognized Madison's definition of religion as the duties which we owe to our Creator and the manner of discharging those duties. [33] The Court also recognized Jefferson's declaration that civil government only has jurisdiction to interfere with religious exercise *if and when* such practices are "overt acts against peace and good order." [34] Applying this framework, the Court upheld criminal laws against polygamy.[35]

In answering whether the State had the jurisdiction to regulate polygamy at all under the Founders' framework, the Court analyzed whether the practice was "in violation of social duties or subversive of good order," i.e. an overt act against

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[33] *Reynolds*, 98 U.S. at 163.

[34] *Id.*

[35] *Id.* at 166.

peace and good order, by reviewing the history of the practice.[36] The Court found that "polygamy has always been odious in the Western world" and noted that Virginia made polygamy a capital crime punishable by death in 1788 notwithstanding both its 1785 Bill for Establishing Religious Freedom as well as the State's recommendation for the U.S. Constitution to include an amendment guaranteeing religious freedom.[37]

Ultimately, the *Reynolds* Court held that "there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity."[38] The Court reasoned that because marriage, "while a sacred obligation," is also a civil contract "upon which society may be said to be built," the allowance of polygamous marriage would fundamentally upend American society.[39]

The *Reynolds* Court, having found that the State had jurisdiction to regulate polygamy, made clear that this is the end of the inquiry required of the Founders' framework by asking and answering the rhetorical question of "whether those who make polygamy a part of their religion are excepted from the operation of the statute."[40] The Court recognized that such an exception "would be introducing a new

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[36] *Id.* at 164-65.
[37] *Id.* at 165.
[38] *Id.*
[39] *Id.* at 166.
[40] *Id.*

element into the criminal law" under which "[g]overment could exist in name only."[41]

To illustrate its point, the Court provided the hypotheticals of ritual human sacrifice and self-immolation and declared that "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[42] The Court then contrasted a case where parents of a sick child were found not guilty of manslaughter when they acted on the religious belief that their attempted treatment was sufficient rather than call for medical help, while "the contrary would have been the result if the child had been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food."[43]

Where the criminal law forbids an act that the State has jurisdiction to regulate, i.e., an overt act against peace and good order, the offender "cannot escape punishment because he religiously believed that the law which he had broken ought never to have been made."[44] "No case," the Court said, "can be found that has gone that far."[45]

According to *Reynold's* application of the Founders' framework, a court asks whether the

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[41] *Id.* at 167. *See also Davis v. Beason*, 133 U.S. 333, 341-42 (1890): "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind."

[42] *Id.* at 166-7.

[43] *Id.*

[44] *Id.*

[45] *Id.*

State has jurisdiction to regulate the act at all, whereby the State's jurisdiction reaches *only overt acts against peace and good order*.[46] If the religious exercise is not such an act—whether an act of violence such as human sacrifice, self-immolation, etc., or a practice which is so subversive that it fundamentally upends society such as polygamy—then the State has no jurisdiction, no power, and no authority whatsoever to interfere with the religious exercise.

III. The Founders' Free Exercise framework reconciles modern doctrines which are unworkable and harm religious liberty.

In contrast to the straightforward framework of the Founders, modern Free Exercise doctrine suffers from deep fragmentation. *Smith* introduced a rule that neutral and generally applicable laws do not trigger heightened scrutiny even when they substantially burden religious exercise.[47] Later decisions have attempted to fill *Smith's* doctrinal gaps. Yet these cases often depend on narrow reasoning that does not sit comfortably within *Smith's* framework and have resulted in a

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[46] The Court re-affirmed this standard twelve years later in *Davis*: "It was never intended or supposed that the [First] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, *passed with reference to actions regarded by general consent as properly the subjects of punitive legislation*." 133 U.S. at 342-43 (emphasis added).

[47] 494 U.S. 872, 879 (1990).

patchwork of exceptions that obscure rather than clarify the meaning of Free Exercise.

The Founders' jurisdictional approach solves this problem. It explains the results in the Court's best Free Exercise decisions, reveals why *Smith* is fundamentally at odds with the Constitution's original structure, and offers a stable basis for future cases. Most importantly, it avoids the doctrinal and practical harms that arise when courts neglect the Founders' boundary between religious and civil authority.

A. *Smith's* comparison based framework conflicts with the Founders' structural understanding of civil power and the jurisdictional separation of Church and State.

Smith assumes that neutral, generally applicable laws may regulate religious exercise. [48] But neutrality does not create jurisdiction. The Founders would consider even a neutral and generally applicable law to be nevertheless illegitimate if the government has no authority in the first place to regulate the matter.

The Founders' understanding of this jurisdictional dynamic is clear. As Madison recognized, "[r]eligion is wholly exempt from [the State's] cognizance," and Jefferson affirmed, "[t]he legitimate powers of government extend to such acts only as are injurious to others," so, too, did every State at the ratification of the First Amendment Religion Clauses. Under this framework, the State

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[48] *Id.*

may not regulate religious exercise simply by treating it "equally" to secular activity. The State must possess constitutional authority in the first instance to regulate the act at all.

In *Church of Lukumi Babalu Aye v. City of Hialeah*, this Court recognized this principle implicitly by striking down ordinances that were ostensibly neutral but functionally targeted Santería religious exercise.[49] Yet *Lukumi* had to rely on an intricate search for discriminatory intent and selective exemptions to build on *Smith's* holding because *Smith* had already stripped away the Founders' jurisdictional rule. Under *Lukumi*, the Court held that the constitutional defect was in the ordinances' lack of neutrality and general applicability.[50] Because Hialeah permitted many forms of secular animal killing while prohibiting only Santería sacrifice, the Court concluded the ordinances were targeted at religious exercise and therefore invalid.[51]

Under the Founders' framework, however, the analysis would proceed on entirely different grounds. The Founders did not examine whether a law treated religious conduct less favorably than its secular counterparts. They did not inquire into neutrality, general applicability, or animus. Instead, the controlling question was jurisdictional: Does the civil authority possess power to regulate this conduct at all? And to answer that question, the

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[49] 508 U.S. 520, 542–46 (1993).

[50] *Id.*

[51] *Id.* at 546.

Founders looked not to the religious character of the act, but to whether the conduct constituted an "overt act" injurious to the peace and good order of society.[52]

Applying that framework to the conduct at issue in *Lukumi*, the proper inquiry is not whether secular slaughter was permitted while religious slaughter was prohibited. Rather, the correct question is whether the religious animal sacrifice itself constituted an "overt act" against peace and good order. This brief does not opine on an ultimate answer due to space limitations, but Founding-era practice does suggest that it did not automatically do so: Animals were property under the common law and could be treated as the owner willed.[53] Regulation was permissible only when the conduct created a civil nuisance or public danger. A civil authority could regulate slaughterhouse waste or the spread of disease, but could not regulate religious sacrifice merely because it disapproved of the religion or its rituals.

Thus, while the result in *Lukumi* may well have been the same under the Founders' framework, the constitutional analysis would be categorically different. Under the Founders' view, the ordinances would not be found invalid because they lacked neutrality or general applicability, but only if they exceeded the civil authority's jurisdiction by

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[52] *Reynolds*, 98 U.S. at 164.

[53] Leavitt, E. S. & Halverson, D. (Eds.), Animals and their legal rights: A survey of American laws from 1641 to 1990 (4th ed.) (1990). However, the Massachusetts Bay Colony did enact in 1641 the first law aimed to protect animals from cruelty and abuse in the world. Id.

regulating religious exercise in the absence of demonstrable civil harm. The Free Exercise Clause, understood in its original meaning, forbids the State from intruding upon religious conduct that poses no threat to the civil order. It is this structural limit—not *Smith's* comparison analysis or earlier judicial weighing of least restrictive means and state interests—that preserves the boundary between church and state.

B. The COVID-19 worship restrictions expose the failures of modern Free Exercise doctrine.

The starkest evidence of *Smith's* doctrinal failure arose during the COVID-19 pandemic. Numerous lower courts upheld sweeping restrictions on religious worship on the theory that churches were treated "equally" to certain secular venues—despite the fact that worship was banned or severely curtailed while liquor stores, abortion clinics, and big-box retailers remained open.

For example, the Ninth Circuit upheld California's total ban on indoor worship in *South Bay United Pentecostal Church v. Newsom*, relying heavily on the State's claim that churches were treated the same as other "large gatherings."[54] The First Circuit upheld Maine's restrictions on worship in *Calvary Chapel of Bangor v. Mills*.[55] The Sixth Circuit did likewise in *Maryville Baptist Church, Inc. v. Beshear*.[56] Each of these decisions relied on

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[54] 985 F.3d 1128 (9th Cir. 2021).

[55] 984 F.3d 21, 31–32 (1st Cir. 2020).

[56] 957 F.3d 610, 612–14 (6th Cir. 2020).

the *Smith*-derived idea that equal suppression is constitutionally sufficient.

The Founders did not imagine that civil authorities could prohibit worship so long as they prohibited enough secular activities alongside it. Worship, even during epidemics, did not meet the standard of an "overt act against peace and good order." Colonial America endured pandemics far deadlier than COVID—smallpox, yellow fever, cholera—and yet civil authorities did not prohibit worship as such. They regulated sanitation and public nuisances, but they did not presume jurisdiction over religious assembly.

This Court's own emergency decisions during COVID underscore this point. When the Court granted relief in *Roman Catholic Diocese of Brooklyn v. Cuomo*[57] and *Tandon v. Newsom*[58], it emphasized that worship is not constitutionally equivalent to secular assembly.[59] Yet those decisions had to fit within a doctrinal landscape in which lower courts had been told that what matters is not whether the government has jurisdiction to regulate worship, but whether churches are treated "equally."

Under the Founders' framework, the analysis becomes clear: equal suppression cannot cure unconstitutional jurisdictional overreach.

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[57] 592 U.S. 14 (2020) (per curiam).

[58] 593 U.S. 61 (2021) (per curiam).

[59] *Id.* at 63-4.

Though the COVID regulations were directed towards public health, "peace and good order" as the Founders understood it did not mean any conduct that poses a risk to health or safety. The Founders were concerned with either concrete injurious acts or acts that destabilized the structure of civil society. Thus, in *Reynolds*, the Court upheld anti-polygamy laws not because polygamy might be unhealthy or unwise for individuals, but because it was held to be a civilizational threat to the "social obligations and duties" of monogamous society and thus lead to "despotism."[60]

The risk of viral infection—even significant infection or death—does not fall into this category. This is why, throughout early American history, even severe epidemics did not prompt governments to prohibit religious worship. Civil authorities addressed public nuisances and sanitation dangers, but they did not claim jurisdiction over religious assemblies. Thus, the COVID-era decisions that upheld worship bans illustrate the precise doctrinal error that arises when courts rely on *Smith*. Under the Founders' framework, worship is not a structural threat to civil peace, and the State has no jurisdiction over it.

C. The Founders' framework explains and harmonizes the Court's modern cases.

The Founders' jurisdictional approach clarifies the logic behind the Court's best modern Free Exercise cases. In *Trinity Lutheran*, *Espinoza*, and *Carson*, the Court held that the State may not

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[60] 98 U.S. at 165-66.

exclude religious schools from public benefits because such exclusions penalize religious exercise.[61] These decisions are consistent with the Founders' principle that the State may not use civil power to reshape religious identity or governance.

Similarly, the ministerial exception recognized in *Hosanna-Tabor* and expanded in *Our Lady of Guadalupe*, reflects the same structural limit.[62] These cases hold that civil government has no authority to interfere with internal church decisions about who may teach the faith.[63] The Founders' framework unifies these cases while highlighting *Smith* as the outlier.

IV. This case demonstrates why a return to the Founders' Free Exercise framework is critical for the protection of religious liberty and constitutionally necessary

This case illustrates with exceptional clarity why Free Exercise jurisprudence must return to the Founders' jurisdictional framework. Colorado's Universal Preschool Program ("UPK") is a generally available public benefit designed to expand educational access. But the State excludes Catholic preschools because they cannot—consistent with Catholic doctrine—abandon belief-based admissions

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[61] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Espinoza v. Mont. Dep't of Revenue,* 591 U.S. 464 (2020); *Carson v. Makin*, 596 U.S. 767 (2022).

[62] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 464 (2020).

[63] *Hosanna-Tabor*, 565 U.S. at 188–90.

standards or compromise their religious mission regarding marriage, sex, and gender. This exclusion is not a neutral application of civil regulation. It is a direct attempt to impose a state-defined orthodoxy in place of religious doctrine.

Under the Founders' framework, civil authorities may regulate religious conduct only where it constitutes an "overt act against peace and good order." [64] Nothing in this case approaches that standard. Colorado does not claim that Catholic schools' admissions practices cause public disorder, violence, or other threats to civil society. To the contrary, Colorado concedes that Catholic preschools have zero history of discrimination complaints and serve their communities without incident. The State's objection is ideological, not civil. It believes its moral commitments regarding nondiscrimination should override the schools' religious commitments regarding family structure and sexual morality.

This case requires no elaborate comparison analysis or multi-factor scrutiny. The Founders would ask: Does the State have authority to regulate internal religious governance? It does not. Religious formation, admissions criteria that reflect doctrine, and decisions about who may participate in religious community life all lie beyond the reach of civil authority.

Colorado's policy is therefore an unconstitutional invasion of Church jurisdiction. Conditioning public benefits on surrender of religious autonomy is a

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[64] *Reynolds*, 98 U.S. at 164.

constitutional violation because civil government lacks such authority in the first place and may not force a person to make the "Hobson's choice" of either violating his or her religious convictions or giving up a substantial state benefit.[65]

CONCLUSION

Colorado's actions show why *Smith* and its doctrinal descendants must give way to the Founders' original understanding of jurisdictional separation of Church and State. Under *Smith*, Colorado argues that its policy is neutral and generally applicable. But neutrality is irrelevant where civil authority lacks jurisdiction. Equal treatment among secular categories cannot justify intruding into the governance of a religious community.

When Free Exercise analysis departs from its original meaning, religious liberty suffers. Catholic schools lose eligibility for public programs; families lose access to institutions that reflect their faith; and civil authorities gain unwarranted power over internal religious life. This is the very outcome the Founders designed the Religion Clauses to prevent.

A return to the Founders' jurisdictional framework for Free Exercise is therefore not merely doctrinally sound—it is constitutionally necessary. *Amicus* urges this Court to grant the petition for writ of *certiorari*.

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[65] *See Sherbert v. Verner*, 374 U.S. 398 (1963).

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