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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF DR. RICHARD ROGERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

At America First Policy Institute, Dr. Richard Rogers serves as Vice Chair for American Values, which focuses on defending religious liberty as one of its three policy priorities. Dr. Rogers has been a long-time advocate for policies and initiatives that preserve America's faith, freedom, and founding biblical principles. He has worked tirelessly to foster civic engagement among people of faith and is a committed proponent of religious liberty. Dr. Rogers has been a part of the Department of Justice's anti-Christian bias taskforce and has worked to promote religious liberty alongside pastors from across the world, most notably in South Korea.

Dr. Rogers believes that religion is essential to maintaining a free society and preserving our nation's moral character. He maintains that religious persons and organizations provide a variety of invaluable services to people across the nation and throughout the world and that the commitments that animate these self-giving acts of charity should not only be protected but celebrated. Dr. Rogers recognizes that, if America wants to maintain its legacy as a safe haven for democracy and freedom, it must remain committed to protecting the free exercise of religion.

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1. No counsel for a party authored this brief, in whole or in part, and no person or entity other than counsel for *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Sup. Ct. R. 37.6. All parties received timely notice of the filing of this brief.

SUMMARY OF THE ARGUMENT

One of the foundational principles of American law is that citizens have a natural right to religious liberty. So central is this right that the Founders enshrined its protection in the First Amendment to the Constitution: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses." *Zorach v. Clauson,* 343 U.S. 306, 313 (1952). Despite the vital importance of religious liberty, courts have been wary to define "religion" in the context of the First Amendment, leaving the contours of this right confusing at best. The result of this Court's avoidance strategy has been the lower courts' devising their own schemes to define religion and to determine what beliefs qualify as religious under the First Amendment. These schemes have tended either to favor public policy preferences for inclusivity[2] or to be so underinclusive as to elevate aesthetics over substance.[3]

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2. For example, *Africa v. Pennsylvania* identifies three indicia for defining religion, including whether a system of beliefs "addresses fundamental and ultimate questions having to do with deep and imponderable matters," is "comprehensive in nature," and "can be recognized by the presence of certain formal and external signs.") 662 F.2d 1025, 1032 (3d Cir. 1981). Similarly, *United States v. Meyers* identifies several "accoutrements of religion" including the presence of a founder, prophet, or teacher; important writings; gathering places; keepers of knowledge; ceremonies and rituals; structure or organization; holidays; diet or fasting; appearance and clothing; and propagation. 95 F.3d 1475, 1483-84 (10th Cir. 1996). Both of these decisions betray a preference for broad applicability of the Free Exercise Clause, regardless of the limits inherent to the text.

3. *See, e.g., Catholic Charities Bureau, Inc. v. Labor & Industry Review Commission*, which adopts a much narrower

Ultimately, this Court should reject such schemes and instead define "religion" as it was originally understood in the context of the First Amendment. Moreover, defining "religion" in this manner will ensure a robust free exercise right that accords with our nation's history and tradition of religious liberty.

While "[d]efining religion is a sensitive . . . legal duty," it nonetheless "is important to have some objective guidelines in order to avoid Ad hoc justice." *Malnak v. Yogi*, 592 F.2d 197, 210 (3d Cir. 1979) (Adams, J., concurring). Ultimately, the mere existence of the Religion Clauses necessitates that religion be defined for the clauses to be given legal effect. Judges cannot hope to restrain government interference with "religion" if they cannot identify that sphere of authority which the Religion Clauses are intended to defend.

Therefore, to overturn this Court's much-maligned decision in *Employment Division v. Smith*, the Court must define religion. To do otherwise would ensure that an heir to *Smith* would take its place. However, the Court need not establish its own definition. Rather, the Court should recognize the "normal and ordinary meaning" of religion as understood at the time of the adoption and incorporation of the First Amendment in accordance with our nation's history and tradition of religious liberty. Ultimately, the "normal and ordinary meaning" of religion refers to (1) a system (2) of sincere beliefs and practices

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approach, limiting religious activity to "corporate worship services," "pastoral counseling and comfort," "performance by the clergy of customary church ceremonies," and "a system of nurture of the young and education in the doctrine and discipline of the church." 411 Wis.2d 1, 32 (Wis. 2024).

(3) derived from duties owed (4) to a sacred authority (5) which is prior to and beyond human relations (6) and receives allegiance and worship.

ARGUMENT

I. Free Exercise Clause jurisprudence is incoherent.

The history of this Court's approaches to the Free Exercise Clause can be described in reference to four distinct eras: *Reynolds* to *Ballard* to *Yoder* to *Smith*. *See* Justin Collings & Anna Bryner, *Defining Religion and Accommodating Religious Exercise*, 99 Ind. L.J. 515, 532-48 (2024). Unfortunately, the jurisprudence of all four eras has been plagued by inconsistencies, contradictions, and half-measures and has proven woefully inadequate in protecting the free exercise of religion. *See generally* Janet L. Dolgin, *Religious Symbols and the Establishment of a National "Religion,"* 39 Mercer L. Rev. 495, 496 (1988). A major reason for this failure is that the Court has never defined religion. Instead, the Court has haphazardly relied on a handful of factors that appear to be arbitrarily emphasized to reach the preferred outcome in individual cases. *See* Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 Hous. L. Rev. 909, 910-11 (2016). The result is a jurisprudential pendulum where the Court swings wildly back and forth between narrow and broad definitions with occasional detours into outright ambivalence. Collings & Bryner, 99 Ind. L.J. at 533.

A. Religion in the *Reynolds* Era.

During the *Reynolds* era, the Court adopted a non-accommodations framework and began its gradual movement away from defining religion in accordance with narrow, theistic terms. *Id.*; *see Reynolds v. United States*, 98 U.S. 145 (1878). *Reynolds* defined religion in relation to man's duties owed to his Creator and affirmed a strong belief-action distinction, holding that the Free Exercise Clause guaranteed absolute freedom of religious thought, but it offered no shelter for religious conduct that transgressed general laws. *Id.* at 162, 167. This approach was reaffirmed in *Davis v. Beason*, 133 U.S. 333, 342 (1890), and *United States v. Macintosh*, 283 U.S. 605, 625 (1931).

B. Religion in the *Ballard* Era.

In *United States v. Ballard*, 322 U.S. 78, 86-88 (1944), the Court shifted away from an objective definition of religion toward a subjective definition, emphasizing sincerity of belief. As the definition of religion relaxed, so too did the Court's stance toward religious accommodations.

In *Fowler*, the Court explicitly declined to define religion: "it is no business of courts to say what is a religious practice or activity for one group is not religion under protection of the First Amendment." *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (holding that states could not unequally regulate religious services to the detriment of unpreferred religious sects). This declaration officially ended the stranglehold that theism had on the Court's understanding of religion. The Court would

go even further in *Torcaso v. Watkins*, declaring that philosophies like secular humanism represented "some particular kind of religious concept." 367 U.S. 488, 494, 495 n.11 (1961). Similarly, Justice Frankfurter defined religion by its relationship to "some transcendental idea," preferring a more "comprehensive sense" of the word that signified "an aspect of human thought and action which profoundly relates the life of man to the world in which he lives." *McGowan v. Maryland*, 366 U.S. 420, 461, 466 (1961) (Frankfurter, J., concurring). As he put it, "Religious beliefs pervade . . . virtually all human activity." *Id.* at 461.

This movement toward a more inclusive definition would be solidified in the conscientious objector cases of *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970).[4] In *Seeger*, the Court held that an agnostic could receive religious accommodations because "sincere and meaningful" beliefs are parallel to orthodox beliefs in God. 380 U.S. at 165-66. Under this view, only "essentially political, sociological, or philosophical views or a merely personal moral code" does not receive free exercise protections. *Id.* at 172. Therefore, a religious belief is that which subordinates all else and upon which all else is dependent. *Id.* at 176. In *Welsh*, the Court would take a similar tack, granting an atheist a religious accommodation and adopting an even more expansive definition of religion. 398 U.S. at 340, 343. The Court held that beliefs that "impose . . . a

4. *Seeger* and *Welsh* were decided on the 1951 Universal Military Training and Service Act, but they were instructive of the Free Exercise Clause. *See* Collings & Bryner, 99 Ind. L.J. at 539-41.

duty of conscience" qualify as religious no matter their source. *Id.* at 340.

Finally, in *Sherbert* the Court held that "any incidental burden" on religious exercise must be "justified by a compelling state interest in the regulation." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Unsurprisingly, a broad definition of religion paired with a broad accommodations regime would create a tension the Court would soon need to resolve.

C. Religion in the *Yoder* Era.

The solution to this tension would come via *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* upheld accommodations but significantly reigned in the Court's definition of religion:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

406 U.S. at 215-16. The Court repudiated the increasingly comprehensive and subjective definitions favored in

its earlier decisions that included personal preference and secular philosophy and, instead, emphasized the institutional, communal, and practical nature of religion. *Id.* at 216. The Court would affirm similar definitions in *Thomas v. Review Board of Independent Employment Security Division*, 450 U.S. 707, 715-16 (1981) and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833-34 (1989). Then, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court began to move away from a robust accommodations regime. 485 U.S. 439, 441-42 (1988).

D. Religion in the *Smith* Era.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court almost fully curtailed its accommodations regime. 494 U.S. 872 (1990). *Smith* held that free exercise pertained to the right to believe and profess religious doctrines, but the Court did not protect religious expression from generally applicable laws that only incidentally infringed on free exercise. *Id.* at 878, 882. The Court let its preference for judicial restraint override the longstanding practice of accommodations. *Id.* at 889-90.

In *Church of Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Court ruled that the laws in question were not neutral and generally applicable, and *Smith* did not apply. Neither wrestled with the question of defining religion. *See* Collings & Bryner, 99 Ind. L.J. at 547. Facially, the Court also avoided the question of defining religion in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity*

Commission, 565 U.S. 171 (2012). But in practice, the Court's ruling carved out a separate sphere within the broader context of the *Smith* regime that more narrowly defined and more strongly accommodated religion. *Id.*

Ultimately, these four eras demonstrate that current precedent concerning the Free Exercise Clause is muddled at best. Both *Smith* (denying religious accommodation) and *Yoder* (granting religious accommodation) retain the force of law.[5] Moreover, the conscientious objector cases — *Seeger* and *Welsh* — further contribute to a confused free exercise jurisprudence by applying an expansive definition of religion. This lack of clarity from the Supreme Court has led to disparate definitions of religion at the circuit court level. Some circuit courts have defined religion narrowly. *See Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 571-72 (4th Cir. 2013) (religion is more than a mere "way of life" produced by personal philosophical choices); *Mason v. Gen Brown Cent. Sch. Dist.*, 851 F.2d 47, 52 (2d Cir. 1988) (philosophical beliefs, deeply held personal beliefs, and beliefs that inform critical life choices are not religious). Others have defined religion broadly. *See Passarella v. Aspirus, Inc.*, 108 F.4th 1005, 1010 (7th Cir. 2024) (religious objections can be sound on religious and non-religious grounds); *Wash. Ethical Soc. v. D.C.*, 249 F.2d 127, 129 (D.C. Cir. 1957) ("religion" is a flexible concept); *Africa*, 662 F.2d at 1030 (religiosity is determined

5. After the passage of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, *Smith* still applies to the states and remains this Court's definitive statement on the limits of the Free Exercise Clause. *See Ramirez v. Collier* 595 U.S. 411, 424 (2022). The *Smith* Court distinguished *Yoder* because another right was implicated beyond free exercise. *Smith,* 494 U.S. at 881-84.

by how beliefs function within the claimant's scheme of things); *Love v. Reed*, 216 F.3d 682, 687-88 (8th Cir. 2000) (same). And other circuit courts have landed somewhere in between. *See Meyers*, 95 F.3d at 1483-84 (religious beliefs are those that concern ultimate ideas, metaphysics, moral or ethical systems and are comprehensive while religions are identifiable by certain accoutrements such as clergy, rituals, holidays, and proselytization). The result is myriad definitions and applications that shroud the Free Exercise Clause in a miasma of subjective tests and judge-made criteria, unfettered by textual fidelity or historical continuity. Free Exercise Clause jurisprudence is desperate for some much-needed clarity. The Supreme Court should provide that clarity by defining religion under the First Amendment according to its original public meaning.

II. The original meaning of "religion" guarantees broad protections for a narrowly defined class of beliefs.

"Religion" is not defined in the Constitution, so courts must consider the "history of the times in the midst of which the provision was adopted." *Reynolds*, 98 U.S. at 162. The Court should consider how "religion" was understood at the time of the First Amendment's adoption in 1791 and its incorporation to the states in 1868.

Prominent dictionaries from the 1790s and 1860s show that the definition of "religion" — and by extension its meaning within the context of the First Amendment — changed very little in the period between adoption and incorporation. In 1792, Samuel Johnson defined "religion" as "virtue, as founded upon reverence of God, and expectation of future rewards and punishments" or "a

system of divine faith and worship as opposite to others." "Religion," *A Dictionary of the English Language* (1792). Similarly, in 1868, Noah Webster defined "religion" as "recognition of God as an object of worship, love, and obedience" or "any system of faith and worship." "Religion," *A Dictionary of the English Language* (1868). There are four key factors shared between these two dictionary definitions that lend insight into the common use of "religion" during these time periods: (1) "religion" connotes systemization; (2) "religion" is oriented toward the sacred; (3) "religious" beliefs move the heart toward "reverence" and prompt "obedience;" and (4) "religion" has a belief element and an action element.

An examination of our nation's history and tradition of religious liberty establishes two camps of common understanding represented by James Madison and Thomas Jefferson, respectively. Madison defined religion as the "duty we owe to our Creator, and the manner of discharging it." James Madison, *Madison's Amendments to the Declaration of Rights, [29 May-12 June 1776]*, Founders Online.[6] While Madison's definition does not feature the systemization factor present in the dictionary definitions, it does feature an element of the sacred with its mention of "Creator." Moreover, Madison's emphasis on "discharging" duties acknowledges the action element of "religion."[7] Furthermore, Madison believed that man's

6. https://founders.archives.gov/documents/Madison/01-01-02-0054-0003 (last visited Dec. 16, 2025).

7. John Adams also conceived of religious liberty as the liberty of every man to discharge divine duties. *See* John Witte, Jr., *One Public Religion, Many Private Religions: John Adams and the 1780 Massachusetts Constitution,* in *The Founders on*

duty to his Creator was "precedent, in both order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments, [Ca. 20 June] 1785*, Founders Online.[8] In Madison's view, the necessity of religious liberty came in protecting man's allegiance to the "Universal Sovereign" as much, if not more, than protecting man's right to believe as he will. *Id.* He believed that government's demand for allegiance is not absolute. *See Girouard v. United States*, 328 U.S. 61, 68 (1946) ("the victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State").

Jefferson, on the other hand, affirmed a strong belief-action distinction, whereby religious liberty protected man's religious "opinions" but not any opposition to "social duties" caused by these "opinions."[9] Thomas Jefferson, *To the Danbury Baptist Association, 1 January 1802,* Founders Online.[10] Jefferson applied religious liberty to a broad array of beliefs: "the Jew and the Gentile, the

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God and Government 35-36 (Daniel L. Dreisbach, Mark D. Hall, & Jeffry H. Morrison, eds., 2004). *See also* Mass. Const., art. II (1780) (drafted by John Adams).

8. https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Dec. 16, 2025).

9. The peculiarity of Jefferson's beliefs on this issue should come as no surprise given his frequent antagonism toward organized religion and his belief in the tyrannical tendencies of religious institutions. Miles Smith, *Religion & Republic: Christian America from the Founding to the Civil War* 32-39 (2024).

10. https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006 (last visited Dec. 16, 2025).

Christian, and Mahometan, the Hindoo, and infidel of every denomination." Thomas Jefferson, *Autobiography Draft Fragment, January 6 through July 27, 1821*, Library of Congress.[11] But he had a much stricter application of religious liberty in practice. Jefferson's view represents the minority position among early Americans. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (Jefferson's "wall of separation" letter was a "less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment," and attributing his views to Madison and the Bill of Rights is erroneous.)

The peculiarity of Jefferson's views is further demonstrated by the language of the religious liberty clauses in various state constitutions codified during the Revolutionary period, which served as templates for the federal Bill of Rights. From 1776-1780, eleven of the thirteen newly independent states adopted constitutions, eight of which included provisions protecting religious liberty.[12] New York and South Carolina guaranteed, "The free exercise and enjoyment of religious profession and worship . . . shall forever, hereafter be allowed . . .

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11. https://www.loc.gov/resource/mtj1.052_0517_0609/?sp=22&st=text (last visited Dec. 16, 2025).

12. *See* N.Y. Const. art. XXXVIII (1777); S.C. Const. art. VIII, § 1 (1790); Ga. Const. art. LVI (1777); N.H. Const. art. 5 (1784); De. Decl. of Rights and Fundamental Rules §§ 2, 3 (1776); Md. Decl. of Rights, art. XXXIII (1776); Mass. Const., art. II (1780); N.J. Const. art. XVIII (1776); N.C. Const., art. XIX (1776); Pa. Const., art. II (1776); Va. Decl. of Rights § 16 (1776). *See also* Northwest Ordinance (1787), National Archives, https://www.archives.gov/milestone-documents/northwest-ordinance (last visited Dec. 16, 2025).

Provided, That the liberty of conscience . . . shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. art. XXXVIII (1777); S.C. Const. art. VIII, § 1 (1790). Georgia had a similar provision guaranteeing free exercise "provided it be not repugnant to the peace and safety of the State." Ga. Const. art. LVI (1777). New Hampshire likewise guaranteed that a citizen could worship God "in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace or disturb others in their religious worship." N.H. Const. art. 5 (1784). Other provisions, like those of Delaware, Maryland, and Massachusetts, along with the Northwest Ordinance, all afforded protections to worship with provisos carving out exceptions for acts that disturbed the peace, safety, or worship of others. De. Decl. of Rights and Fundamental Rules §§ 2, 3 (1776); Md. Decl. of Rights, art. XXXIII (1776); Mass. Const., art. II (1780); *Northwest Ordinance* (1787). New Jersey, North Carolina, Pennsylvania, and Virginia, on the other hand, all protected free exercise without stated exceptions. N.J. Const. art. XVIII (1776); N.C. Const., art. XIX (1776); Pa. Const., art. II (1776); Va. Decl. of Rights § 16 (1776). These state constitutions demonstrate that "religion," while related to matters of conscience, was more specifically understood in terms of affirmative duties to the sacred. Religious liberty meant, therefore, protection not just for religious opinions but also for one's ability to live out his religious beliefs.

Many early Americans, having come to the New World to escape religious persecution in Europe, understood religious liberty the same way. For instance, William Penn defined religious liberty as "not only a mere liberty

of the mind . . . but the exercise of ourselves in a visible way of worship . . . that if we neglect . . . we sin and incur divine wrath." William Penn, *The Great Case of Liberty of Conscience,* in *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* 43 (Daniel L. Dreisbach and Mark David Hall, eds., 2009). Penn had a robust understanding of how the free exercise of religion restrained government action. Specifically, he identified both the coercion of unwanted duties and the hindrance of the execution of one's duties as violative of the natural right to religious liberty. *Id.* at 44.

Similar formulations of religious liberty can be found throughout the works of philosophers that influenced the Founding era, including Thomas Hobbes, John Locke, and the authors of the influential *Cato's Letters*.[13] They can also be found in the writings of prominent Baptist minister Isaac Backus[14] and in numerous contemporaneous political sermons.[15] These sources demonstrate that the normal and ordinary meaning of religious liberty entailed two

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13. *See* Thomas Hobbes, *Leviathan*; John Locke, *A Letter Concerning Toleration*; John Trenchard and Thomas Gordon, *Cato's Letters,* "Letter 66. Arbitrary Government proved incompatible with true Religion, whether Natural or Revealed.", in *Sacred Rights of Conscience* at 41-42, 47-50, 58.

14. Isaac Backus, *An Appeal to the Public for Religious Liberty,* in *Sacred Rights of Conscience* at 206, 211. Backus was an influential Baptist minister known for his passionate advocacy for religious liberty and the disestablishment of state churches in New England.

15. *See generally Political Sermons of the American Founding Era: 1730-1805* (Ellis Sandoz, ed., 1991).

guaranties: a right to be left alone to choose one's religious beliefs *and* a right to act publicly on those beliefs. John Witte, Jr., Joel A. Nichols, & Richard W. Garnett, *Religion and the American Constitutional Experiment* 66 (5th ed. Oxford Univ. Press 2022).

Finally, the draft history of the Constitution reiterates the importance of both action and the sacred to the Constitution's conception of religious liberty. Five of the seven initial amendment proposals sent by states called for specific protections for religious liberty. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1480 (1990). Clearly, religious liberty was an issue the Framers took incredibly seriously and whose protection in the Constitution was vital.

The First Amendment's extensive drafting process illustrates the point. The initial draft by Madison stated, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretence, infringed." *1 Annals of Cong.* 451 (June 8, 1789) (proposal of James Madison, June 8, 1789). By using "full" and "equal," Madison's proposal goes beyond equal protection to an "absolute measure of protection apart from mere government neutrality." McConnell, 103 Harv. L. Rev. at 1481. Accordingly, religious liberty is protected against even incidental infringements. *Id.* at 1482.

Madison's proposal was not debated by the Select Committee, which proposed a shorter version with much of the same language: "no religion shall be established

by law, nor shall the equal rights of conscience be infringed." *1 Annals of Cong.* 757 (Aug. 15, 1789). But this proposal was rejected by the House of Representatives over concerns that it would disestablish state churches. *See* McConnell, 103 Harv. L. Rev. at 1482. Instead, the House adopted a formulation which read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *1 Annals of Cong.* 796 (proposal of Fisher Ames, Aug. 20, 1789). A slightly altered version of the amendment would be sent to the Senate, which without any record of debate, considered various versions of the Religion Clauses. *See* McConnell, 103 Harv. L. Rev. at 1483-84. The Senate ultimately adopted, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ." *2 Bill of Rights: A Documentary History* 1153 (Bernard Schwartz ed., 1971). But this version was rejected by the House. Ultimately, a Conference Committee — of which Madison was a member — proposed the version of the Religion Clauses that would finally be ratified. *See* McConnell, 103 Harv. L. Rev. at 1484.

One key takeaway from the various drafts of the Religion Clauses is that initial drafts favored "rights of conscience" instead of "free exercise" while later drafts featured both "rights of conscience" and "free exercise" before ultimately "rights of conscience" was dropped. *Id*. at 1481-84; U.S. Const. amend. I. While "rights of conscience" and "free exercise" are similar, there are differences between the two terms which should inform this Court's interpretation of how the Framers conceptualized "religion" and religious liberty. First, both Samuel Johnson's and Noah Webster's dictionaries show

that "exercise" denotes willful action while "conscience" is a faculty of the mind. *Compare* "Conscience," *A Dictionary of the English Language* (1792) ("the knowledge or faculty by which we judge of the goodness or wickedness or our own actions; private thoughts"); "Conscience," *A Dictionary of the English Language* (1868) ("the faculty which decides on the lawfulness or unlawfulness of our actions and affections) *with* "Exercise," *A Dictionary of the English Language* (1792) ("labour of the body; practice; outward performance; act of divine worship whether publick or private"); "Exercise," *A Dictionary of the English Language* (1868) ("act of exercising; exertion; application; performance; practice"). Second, it is more probable that "free exercise" would result in conflicts with the state, thereby requiring special protection; whereas, the state cannot genuinely compel a change of beliefs. Thus, the First Amendment settled on a narrower definition of "religion" instead of a broader one like that adopted, at times, by this Court.

Finally, "rights of conscience" are not limited to judgments on issues of faith, but "free exercise," in the First Amendment, specifically applies to "religion." The choice of "free exercise" was an intentional decision to grant religious beliefs special protections beyond those of other beliefs. *See Yoder*, 406 U.S. at 215-16. The Constitution says nothing of protecting the free exercise of beliefs deriving from philosophy, ideology, or core values. The sum of our nation's history and tradition demonstrates that, under the Constitution, religious liberty is for everyone, but free exercise is for the religious alone.

III. The Court should adopt a workable definition rooted in the text and our nation's history and tradition of religious liberty.

This Court should adopt as the definition of religion (1) a system (2) of sincere beliefs and practices (3) derived from duties owed (4) to a sacred authority (5) which is prior to and beyond human relations (6) and receives allegiance and worship. Parts 1 2, 4, and the second half of 6 ("worship") come from the contemporaneous dictionaries of Johnson and Webster and are reinforced by comments from the Founders. Parts 3, 5, and the first half of 6 ("allegiance") come directly from Madison.

The Court should avoid applying alternative definitions of "religion" that are less rooted in text and tradition. For example, "religion" should not be expanded to capture belief in any transcendent authority like the Platonic world of forms or the concept of "the Good" that is merely a stand-in for one's personal judgment and makes no demands on the believer.

Nor should a subjective definition be adopted that is grounded in how beliefs function in the lives of the believer. *See, e.g.,* Craig A. Mason, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to Mozert v. Hawkins County Public Schools and Smith v. Board of School Commissioners*, 63 Wash. L. Rev. 445 (1988); Ben Clements, *Defining Religion in the First Amendment: A Functional Approach*, 74 Cornell L. Rev. 532 (1989). Such functional definitions would lead to even atheistic beliefs receiving free exercise protections. Clyde E. Willis, *Atheism*, Free Speech Center

(Jan. 1, 2009).[16] If "religion" can mean "irreligion," then it means nothing at all. The history and tradition of the text of the First Amendment prove that such an overinclusive interpretation is unwarranted.

This Court should adhere to the text and original public meaning of the Free Exercise Clause when it was adopted and when it was incorporated. Only such a strict adherence will effect the Founders' decision to provide both vigorous protection of religious action and a limited range of beliefs receiving such protection.

16. https://firstamendment.mtsu.edu/article/atheism/.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant *certiorari* in this case to propound a much-needed definition of "religion" for the Free Exercise Clause.

Respectfully submitted,

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