

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 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 CURIAE¹

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.

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.

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 in the First Amendment strong protections for religious liberty *for the benefit* of religion. The liberal, free exercise of religion and the independence of religious institutions were priorities for a “religious people” who “presuppose[d]” the existence of a “Supreme Being” and were concerned with “[g]uarantee[ing] the freedom to worship as one chooses.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Such a religio-centric conception of religious liberty has frequently been recognized by this Court. *See Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892) (“[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people.”); *Zorach*, 343 U.S. at 313-14 (“When the state encourages religious instruction or cooperates with religious authorities. . .it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 213 (1963) (“The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.”).

[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any. . .Anything less would require the ‘callous

indifference’ we have said was never intended by the Establishment Clause. . . Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.

Lynch v. Donnelly, 465 U.S. 668, 673, 675 (1984) (Burger, C.J., delivered the opinion of the Court holding a small town’s display of the nativity did not offend the Constitution). *See also* Warren E. Burger, BYU Forum Address, Oct. 30, 1979 (published by Brigham Young University Press) (“Religious liberty is not a gift of government. It is a condition government must respect and protect, for it predates the state and gives life to the very freedoms the Constitution secures.”); Warren E. Burger, *The Bill of Rights—A Charter for Freedom*, ABA Bicentennial Series (1987) (“The First Amendment was framed not to drive religion out of public life but to ensure that the state would never command the conscience or prescribe the articles of a citizen’s faith.”).

Despite the vital importance of religious liberty, this Court has been wary to define “religion” in the context of the First Amendment, leaving the contours of this right confusing at best. As a result, the lower courts have devised 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 inclusivity² or to be so

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

underinclusive as to elevate aesthetics over substance.³ 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

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 & Indus. Rev. Comm’n*, which adopts a much narrower 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), *overruled by Catholic Charities Bureau, Inc. v. Wis. Labor & Indus. Rev. Comm’n*, 605 U.S. 238 (2025).

cannot identify that sphere of authority which the Religion Clauses are intended to defend.

Therefore, the Court must define religion. 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 (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. The State of the Free Exercise Clause.

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. *Id.* at 78, 81-82, 86-88. 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). As to what distinguished religious concepts from nonreligious concepts, the Court did not say. In *McGowan v. Maryland*, Justice Frankfurter similarly 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.” 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”

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

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 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 the Indiana 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 substantially 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. EEOC*, 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”

5. After the passage of RFRA (Religious Freedom Restoration Act) and RLUIPA (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. *See also Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025).

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’y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (“religion” is a flexible concept); *Africa*, 662 F.2d at 1030 (religiosity is determined 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. Original Meaning of Religion Under the First Amendment.

“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. History and tradition have always played an especially important role in shaping this Court’s understanding of religious liberty because “[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 33-34 (Rutledge, J., dissenting). See also *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet, an unbroken practice. . .[undertaken] openly and by affirmative state action. . .is not something to be lightly cast aside.”); *Marsh v. Chambers*, 463 U.S. 783, 787 (1983) (held prayers opening legislative sessions do not violate the Establishment Clause because it is deeply embedded in history and tradition); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (held “the Establishment Clause must be interpreted by reference to historical practices and understandings”); *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 57 (held “[t]he passage of time gives rise to a strong presumption of constitutionality” in Establishment Clause context). Such deference to our national religious traditions is therefore no less appropriate in the instant case. Therefore, this 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 1867, 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* (1867).

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. Undoubtedly, these dictionary definitions are not dispositive. Yet, while dictionary definitions are not the final word on how a particular word or phrase is deployed in the Constitution, they still attest to a word’s common use, providing a starting point from which courts may evaluate how the Founders likely understood and used the word.

An examination of our nation’s history and tradition of religious liberty further 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

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

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 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) (“[t]he 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,

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 God and Government* 35-36 (Daniel L. Dreisbach, Mark D. Hall, & Jeffrey 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

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 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,

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).

11. https://www.loc.gov/resource/mtjl.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);

“The free exercise and enjoyment of religious profession and worship . . . shall forever, hereafter be allowed . . . 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,

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).

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 Backus¹⁴ and in numerous contemporaneous political

13. See Thomas Hobbes, *Leviathan* (1651); John Locke, *A Letter Concerning Toleration* (1689); 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 *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (Daniel L. Dreisbach and Mark David Hall, eds.,

sermons.¹⁵ These sources demonstrate that the normal and ordinary meaning of religious liberty entailed two 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 (proposal of James Madison, June 8, 1789). By using "full" and "equal," Madison's proposal goes beyond equal protection to

2009). 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).

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* (1867) (“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* (1867) (“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. Finally, while “rights of conscience” are not limited to judgments on issues of faith, “free exercise” specifically applies to “religion” in the First Amendment. Meaning, 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. Thus,

the First Amendment settled on narrower definitions of religion and religious liberty instead of the broader ones adopted, at times, by this Court.

The emphasis on a particular and narrow understanding of religion demonstrated by the presence of “free exercise” over “rights of conscience” in the final draft of the First Amendment accords with the sum of our nation’s history and tradition of religious liberty. Namely, that while religious liberty is for everyone, free exercise is for the religious alone. Therefore, if the Religion Clauses of the First Amendment are to be given their full effect this Court must recognize the category of behavior which the Framers aimed to protect by defining religion accordingly.

III. A Workable Definition Rooted in the Text and our Nation’s History and Tradition of Religious Liberty.

This Court should adopt the following as the definition of “religion” in interpreting the First Amendment: (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. Ultimately, this definition most accurately melds together the Framers’ understanding of “religion” at the time the First Amendment was conceived and ratified.

The Court should avoid applying alternative definitions of “religion” that are less rooted in text and tradition. The

basic function of written law is to conform present-day and future decision-making to the law as written, requiring interpretation by reference to the text. Joel Alicea, *Originalism and the Rule of the Dead*, National Affairs (Spring 2015).¹⁶ Ignoring the text of the Constitution would render it impotent. *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter.”); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.”). Prioritizing the text of the Constitution also accords with well-established rules of constitutional interpretation and construction,¹⁷ helps to

16. <https://nationalaffairs.com/publications/detail/originalism-and-the-rule-of-the-dead>.

17. See *United States v. Fisher*, 6 U.S. 358, 390 (1805) (“where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects”); *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (“. . . [the] Constitution [is] intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs”); *Lake County v. Rollins*, 130 U.S. 662, 671 (1889) (“Words are the common signs that mankind make use of to declare their intention to one another; and, when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation”); *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 387 (1926)

ensure consistent application of the law across new cases and controversies,¹⁸ and maintains separation of powers.¹⁹

Where the full meaning of the constitutional text remains underdetermined, history and tradition provide important context for understanding how legal provisions are to be given legal effect. *See Rhode Island*, 37 U.S. at 658 (holding “[i]n construction of the constitution [sic]

(“ . . . the meaning of constitutional guaranties never varies”); *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (“constitutional rights are enshrined with the scope they were understood to have when the people adopted them”); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 34 (2022) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 235 (2022) (“Constitutional analysis must begin with the language of the instrument which offers a fixed standard for ascertaining what our founding document means”). *See also Sturges v. Crowninshield*, 17 U.S. 122 (1819); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Rhode Island v. Massachusetts*, 37 U.S. 657, 658 (1838); *Woodson v. Murdock*, 89 U.S. 351, 369 (1874); *United States v. Classic*, 313 U.S. 299, 316 (1941); *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991); *Gibbons v. Ogden*, 22 U.S. 1, 71 (1824); *Ogden v. Saunders*, 25 U.S. 213, 302-03 (1827); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 326 (1816).

18. *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting) (“[T]he recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application.”).

19. *Griswold v. Connecticut*, 381 U.S. 479, 530-31 (1956) (Stewart, J., dissenting) (“We are here to decide cases ‘agreeably to the Constitution and laws of the United States.’ It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not.”).

we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief, and the remedy”); *Bruen*, 597 U.S. at 35-36 (“a regular course of practice can liquidate & settle the meaning of disputed or indeterminate terms & phrases”) (quoting *Chiafalo v. Washington*, 591 U.S. 578, 593 (2020)) (internal quotations omitted).

In the free exercise context, the Court should continue the trend of leaning on the text in conjunction with history and tradition to define “religion” as it is used in the First Amendment so that the Religion Clauses are given the same legal effect today that they had at the time they were ratified. Accordingly, “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. Such usage has no grounding in the Founders’ usage of the term and therefore strays from the original meaning of the First Amendment. While the Founder’s frequent invocation of terms like “Universal Sovereign” or “Providence” as opposed to “God” reflects a common trend to use non-theistic terms, it was by no means an attempt to secularize the religious underpinnings that were the driving forces behind the Founders’ conception of religious liberty. *See McConnell, supra*, at 1493 n.430. Interpreting the First Amendment to the contrary would remove the very protections it promises to enshrine in the Constitution.

Additionally, a subjective definition that is grounded in how beliefs function in the lives of the believer also deviates from the Framers’ intent and understanding.

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).²⁰ And if “religion” can mean “irreligion,” then it means nothing at all. Moreover, 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 by the Founders. Only such strict adherence will give effect to the Founders’ decision to provide both vigorous protection of religious action and a limited range of beliefs receiving such protection.

20. <https://firstamendment.mtsu.edu/article/atheism/>.

CONCLUSION

For the foregoing reasons, the Supreme Court should use this case to provide a much-needed definition of “religion” for the Free Exercise Clause.

Respectfully submitted,

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