No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,

Respondents.

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

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

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law, Chapman University
One University Drive
Orange, CA 92886
(877) 855-3330 x2
jeastman@chapman.edu

R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, UT 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Amicus will address whether the Court should revisit and overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

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INTERESTS OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. To that end, the Center has appeared in numerous cases before this Court as *amicus curiae* defending the individual right to the Free Exercise of Religion. See, *e.g.*, *Dignity Health* v. *Minton*, No. 19-1135; *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, No. 19-267; *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Arlene's Flowers* v. *Wash.*, 138 S. Ct. 2671 (2018); and *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with Petitioners that the Court should overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Courts applying *Smith* frequently deny relief even when the law imposes a substantial burden on the exercise of religion—a situation as intolerable as if the controlling standard for free speech routinely allowed censorship. Thirty years' hardship under a faulty constitutional standard is long enough.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* states that all parties have submitted their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Without *Smith*, the Court can restore the Free Exercise Clause to its full vigor. Deciding how to do that depends on two questions. What does the Clause *mean*? And how should it be *applied*?

This brief addresses only the question of original public meaning—not the separate question of contemporary application. We argue that the Free Exercise Clause was originally understood to protect the unqualified right to exercise religion, free from government interference. Another *amicus* brief explains that the Free Exercise Clause should be applied through a combination of recognized categorical rules and strict scrutiny. See Brief of The Church of Jesus Christ of Latter-day Saints, et al. as Amicus Curiae Supporting Petitioners, *Fulton* v. *Phila.*, No. 19-123.

A serious effort to determine the meaning of the Free Exercise Clause begins with the "duty to interpret the Constitution in light of its text, structure, and original understanding." *N.L.R.B.* v. *Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in judgment). Although *Smith* is criticized for not considering the history of the Free Exercise Clause, it is hardly alone in that respect. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 575 (1993) (Souter, J., concurring in part and concurring in judgment). No opinion of the Court has explored that history since the nineteenth century, *id.* at 574, though Justices Scalia and O'Connor debated rival historical interpretations while advocating for and against *Smith*. For Justice Scalia, history denied that "accommodation was understood to be constitutionally mandated by the Free Exercise Clause." *City of Boerne* v. *Flores*, 521 U.S. 507, 541 (1997) (Scalia, J., concurring). For Justice O'Connor,

"the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes." *Id.* at 555 (O'Connor, J., dissenting).

Our review of historical evidence—including materials that are frequently overlooked—suggests a different approach. Americans in 1789 understood the Free Exercise Clause as a guarantee that the new federal government would not make laws curtailing the exercise of religion.[2] Decades later, the Fourteenth Amendment was added on the understanding that the right to exercise religion also would be unqualified against the states. Those who enshrined these provisions in our Constitution understood them as a pledge that all Americans could exercise their religion freely. It is that original understanding that ought to weigh heavily in the balance as the Court decides how to honor that pledge now—and in the future.

This reading of the Free Exercise Clause is consistent with the place that the constitutional founders assigned religious freedom. Preserving it was one of the grand aims of the Revolutionary War. Religious freedom was widely understood at the time as an inalienable right and as a condition of maintaining a republican form of government. New York and other states refused to enter the Union without an assurance that the Constitution would be amended to protect religious freedom. Every state ratifying convention that proposed a religious freedom amendment gave the free exercise of religion unqualified protection.

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[2] For a similar argument in this case, see Brief of National Association of Evangelicals, et al. as Amicus Curiae Supporting Petitioners, *Fulton* v. *Phila.*, No. 19-123.

Interpreting the Free Exercise Clause as an unqualified right is also consistent with the constitutional text and legislative history, as well as early legal treatises. A categorical right to exercise religion attracted broad consensus because none of the federal government's enumerated powers included the authority to regulate religious activity. The Fourteenth Amendment extended that unqualified right as a shield against infringement by state governments.

This interpretation holds significant implications.

First, *Smith* should be overruled as irreconcilable with the original understanding of the Free Exercise Clause. An unconditional right to exercise religion cannot be squared with *Smith*'s holding that a law is valid if it satisfies the bare-bones criteria of neutrality and general applicability. See 494 U.S. at 879.

Second, an unqualified protection of religious exercise should be the constitutional baseline from which to assess any judicial standard replacing *Smith*. Strict scrutiny looks different from that perspective: it allows the government to carry out its most essential purposes even when it imposes a substantial burden on the exercise of religion. That standard no doubt furnishes the most plausible modern solution for vindicating the Free Exercise Clause despite the manifold conflicts that arise in a society governed under today's regulatory state. See also *Bowen* v. *Roy*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part) ("The rise of the welfare state was not the fall of the Free Exercise Clause."). But the historical baseline we describe suggests that strict scrutiny is a compromise with the Constitution's pledge of religious freedom—and ought to be

acknowledged as such. Far from granting religious people and institutions a gratuitous benefit, strict scrutiny gives the exercise of religion less protection than the Constitution was originally understood to guarantee.

ARGUMENT

I. Religious Freedom Was Fundamental to the Americans Who Won the Revolution and Ratified the Constitution.

Preserving religious freedom was one of the reasons Americans fought the Revolutionary War. See Bernard Bailyn, *Ideological Origins of the American Revolution* 268 (1967) (describing "the mutual reinforcement that took place in the Revolution between the struggles for civil and religious liberty"); accord *Declaration on Taking Up Arms*, July 6, 1775, *reprinted in The Declaration of Independence in Historical Context* 278 (Barry Alan Shain ed., 2014) (reminding the British Parliament that "[o]ur forefathers * * * left their native land, to seek on these shores a residence for civil and religious freedom").

When Independence came, newly independent states immediately acted to protect religious freedom. *See* Va. Declaration of Rights § XVI (1776), *reprinted in The Complete Bill of Rights* 41 (Neil H. Cogan ed., 2d ed. 2015) ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience."). So important was the constitutional protection of religious freedom that John Adams considered that measures "giv[ing] compleat Liberty of Conscience to Dissenters" were "worth all of the Blood and Treasure which has been and will be Spent in this war." Letter from John Adams to James Warren (Feb.

3, 1777), *in* 6 *Letters of Delegates to Congress, 1774–1789*, at 202 (Paul H. Smith et al. eds., 2000).

For the founding generation, religious freedom was an inalienable right—a right one does not surrender when entering civil society. See John Leland, *The Rights of Conscience Inalienable* (1791), *in* 2 *Political Sermons of the American Founding Era, 1730–1805*, at 1079, 1085 (Ellis Sandoz ed., 1991) (denying that "a man, upon entering into social compact, surrender[s] his conscience to that society, to be controlled by the laws there"); N.H. Bill of Rights arts. 3–4 (1784) *reprinted in* 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 2454 (Francis Newton Thorpe ed., 1906) ("Among the natural rights, some are in their very nature inalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.").

The founding generation also understood religious freedom as a critical support for republican government. See generally John C. Eastman, *"Religiously Scrupulous": Freedom of Conscience at the Founding*, 17 Ave Maria L. Rev. 1, 13–17 (describing religion as a foundation of republican government). It was widely believed that a republic cannot survive without a moral and virtuous people; virtue and morality cannot be effectively inculcated without religion; and, it follows, a republic cannot survive without a religious people. See, *e.g.*, Mass. Const. of 1780, pt. I, art. III, *reprinted in The Complete Bill of Rights*, at 21 ("[T]he happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality."); accord N.H. Const. of 1783, pt. I, art. VI, *reprinted in id.* at 22 (observing that "moral and piety, rightly grounded in evangelical

principles, will give the best and greatest security to government").

II. The Free Exercise Clause Was Originally Understood as an Unqualified Right Against the Federal Government.

A. Securing religious freedom from the federal government was a condition of ratifying the Constitution.

The Bill of Rights was a condition of uniting the states under the Constitution. Recalling that political context and the reasons for and against a Bill of Rights helps to illuminate the meaning of the Free Exercise Clause.

Federalists argued that a national government of enumerated powers did not need a Bill of Rights. James Wilson laid out that case with exceptional clarity. He explained that the people delegated to state representatives "every right and authority which they did not in explicit terms reserve." James Wilson, *State House Yard Speech* (Oct. 6, 1787), *reprinted in* 1 *Collected Works of James Wilson* 171 (Kermit L. Hall & Mark David Hall eds., 2007). In Wilson's view, "it would have been superfluous and absurd to have stipulated with a fœderal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence." *Ibid.* Creating a Bill of Rights for a government of enumerated powers "would be not only unnecessary, but preposterous and dangerous." James Wilson, *Pennsylvania Ratifying Convention* (Nov. 28, 1787), *reprinted in id.* at 194. Publius further explained that a bill of rights "would contain various exceptions to powers which are not granted; and on this very account, would afford a

colourable pretext to claim more than were granted." *The Federalist No. 84*, at 579 (Jacob E. Cooke ed., 1961) (Alexander Hamilton).

Wilson disagreed with those who criticized the Constitution of having "no security for the rights of conscience." James Wilson, *Pennsylvania Ratifying Convention* (Dec. 4, 1787), *reprinted in Collected Works of James Wilson*, at 212. Since the federal government possesses only enumerated powers, he asked, "what part of this system puts it in the power of congress to attack those rights?" *Ibid.* Finding no such power, Wilson concluded that "[w]hen there is no power to attack, it is idle to prepare the means of defence." *Ibid.* Other Federalists defended the absence of express protection for religion with similar logic. See James Iredell, *North Carolina Ratifying Convention* (July 30, 1788), *reprinted in* 2 *Debate on the Constitution* 904 (Bernard Bailyn ed., 1993) ("If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass by the Constitution, and which the people would not obey."); James Madison, *Virginia Ratifying Convention* (June 12, 1788), *reprinted in id.* at 690 ("There is not a shadow of right in the General Government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.").

The Federalist case against a Bill of Rights thus rested on the conviction that "the Constitution's core, government-structuring provisions" would be effective in "preserving liberty." *Canning*, 573 U.S. at 570 (Scalia, J., concurring in judgment).

But the Antifederalists insisted on amendments to protect religious freedom and other fundamental

rights. Patrick Henry led the charge in Virginia. He mocked the Federalists' reliance on "specious imaginary balances, [their] rope-dancing, chain-rattling, ridiculous ideal checks and contrivances." Patrick Henry, *Virginia Ratifying Convention* (June 5, 1788), *reprinted in* 9 *The Documentary History of the Ratification of the Constitution* 959 (John P. Kaminski et al. eds., 1990). He contended, instead, that rights like "[t]rial by jury and liberty of the press" stood on a shaky foundation because of Congress's implied powers. Patrick Henry, Virginia Ratifying Convention (June 7, 1788), *reprinted in* 2 *Debate*, at 636. Henry perceived that the Necessary and Proper Clause enlarged the federal government's powers by implication and "[i]mplication is dangerous, because it is unbounded." *Ibid.* Implied powers, in his view, rendered Americans' "dearest rights" insecure. *Ibid.*

Henry also argued that the limitations on congressional power in Article I, Section 9 of the Constitution were "express restrictions, which are in the shape of a bill of rights." Patrick Henry, *Virginia Ratifying Convention* (June 17, 1788), *reprinted in* 9 *Documentary History*, at 1345. But Henry considered these protections "feeble and few," implying that Congress "can do every thing they are not forbidden to do." *Ibid.* This implication, he said, "reverses" the doctrine of enumerated powers by holding that "every thing is given up which is not expressly reserved." *Ibid.* For Henry, a federal Bill of Rights was "indispensably necessary." Patrick Henry, *Virginia Ratifying Convention* (June 4, 1788), *reprinted in* 2 *Debate*, at 636. Other leading Antifederalists agreed. See George Mason, *Virginia Ratifying Convention* (June 4,

1788), *reprinted in id.* at 609 (calling for "such amendments as shall * * * secure the great essential rights of the people").

Henry considered the notion of inferring religious liberty from the doctrine of enumerated powers as unsafe. "That sacred and lovely thing Religion, ought not to rest on the ingenuity of logical deduction," he asserted. Patrick Henry, *Virginia Ratifying Convention* (June 12, 1788), *reprinted in id.* at 678. Virginia's most influential Baptist minister, Rev. John Leland, likewise objected to the absence of an express protection for religious freedom. See Letter from Joseph Spencer to James Madison, Enclosing John Leland's Objections (Feb. 28, 1788), *reprinted in id.* at 268, 269 (criticizing the Constitution because it has "no Bill of Rights" and because "*Religious Liberty* is not Sufficiently Secured" (emphasis in original)). Other critics of the Constitution voiced similar concerns. See, *e.g.*, Henry Abbot, *North Carolina Ratifying Convention* (July 30, 1788), *reprinted in The Complete Bill of Rights*, at 58 (questioning "whether the general government may not make laws infringing their religious liberties").

Antifederalists won the dispute. Although Federalists continued to insist on ratifying the 1787 Constitution without amendment, Madison and others assured opponents that they would recommend a bill of rights to the states once Congress was elected. Only with that reassurance did the battle for ratification succeed in Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, and New York. See Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 508-25 (detailing the state-by-state ratification of the 1787 Constitution). Even when the

Federalist majority in the state ratifying conventions rejected amendments, those proposals are useful evidence of how the Free Exercise Clause was originally understood. While preparing amendments for consideration by Congress, Madison had at hand a pamphlet compiling the amendments offered in the state ratifying conventions. See *id.* at 526.

A juxtaposition of the language proposed by the ratifying conventions with parallel provisions from state constitutions is illuminating. Founding era state constitutions usually put conditions on the right to exercise religion. But constitutional ratifying conventions from those same states uniformly demanded amendments to the federal Constitution securing an unqualified freedom to exercise religion.

In Massachusetts, the ratifying convention considered a religious liberty amendment promising "that the said Constitution be never construed to authorize Congress to infringe * * * the rights of conscience." *Massachusetts Ratifying Convention, Minority*, *reprinted in The Complete Bill of Rights*, at 12. But the Massachusetts Constitution of 1780 protected religious freedom only if a person did not "[d]isturb the publick peace, or obstruct others in their religious Worship." Mass. Const. of 1780, pt. I, art. II, *reprinted in id.* at 20.

Maryland followed the same pattern. A minority of the ratifying convention offered an amendment providing that "all persons [are] equally entitled to protection in their religious liberty." *Maryland Ratifying Convention, Minority* (Apr. 26, 1788), *reprinted in id.* at 11. Contrast that language with the Maryland Declaration of Rights, which protected freedom based on "religious practice" *unless* a person "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." Md. Declaration of Rights, § 33 (1776), *reprinted in id.* at 17.

New Hampshire, New York, North Carolina, and Virginia likewise debated or recommended religious liberty amendments to the federal Constitution that lacked the type of conditions contained in their state constitutions. Compare *New Hampshire Ratifying Convention*, (June 21, 1788), *reprinted in id.* at 12 ("Congress shall make no laws touching religion, or to infringe the rights of conscience.") with N.H. Const. of 1783, pt. I, art. V (1783), *reprinted in id.* at 22 (protecting religious liberty if a person "doth not disturb the public peace, or disturb others in their religious worship"); compare *New York Ratifying Convention* (July 26, 1788), *reprinted in id.* at 12 (providing "[t]hat the people have an equal, natural, and unalienable right freely and peaceably[3] to exercise their religion, according to the dictates of conscience"), with N.Y. Const. of 1777, art. XXXVIII, *reprinted in id.* at 25 (the right of conscience could not "excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State"); compare *North Carolina Ratifying Convention* (Aug. 1, 1788), *reprinted in id.* at 12 ("[A]ll men have an equal, natural and unalienable right, to the free exercise of religion according to the dictates of conscience") with N.C. Const. of 1776, § XXXIV, *reprinted in id.* at 29 (protecting religious freedom but not "to exempt Preachers of treasonable or seditious Discourses from legal Trial and Punishment"); compare *Virginia*

[3] The term "peaceably" in this context is ambiguous; it could mean either "without interference" or "without disturbing the peace."

Ratifying Convention (June 27, 1788), *reprinted in id.* at 13 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience.") with Va. Declaration of Rights, § 16 (1776), *reprinted in id.* at 41 ("[I]t is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.").

Pennsylvania was an outlier. Its state constitution protected religious exercise in the same categorical terms recommended for the federal Constitution. Compare *Pennsylvania Ratifying Convention, Minority* (Dec. 12, 1787), *reprinted in id.* at 12 ("The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.") with Penn. Declaration of Rights, § II (1776), *reprinted in id.* at 31 ("Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.").[4]

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[4] Far from being limited to formal religious services in a church or synagogue, the term *free exercise of religion* "connoted various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, [and] religious education, among others." John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 395 (1996); accord Levi Hart, *Liberty Described and Recommended: In a Sermon Preached to the Corporation of Freemen in Farmington*, *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805*, 311 (Charles S. Hyneman & Donald S. Lutz eds., 1983) ("Religious

Pennsylvania is the exception that proves the rule. When states debated amendments to safeguard religious freedom under the federal Constitution, they framed those proposals in categorical terms even when their own state constitutions attached conditions to the right of free exercise.

B. Its Text and Drafting History Demonstrate That the Free Exercise Clause Grants an Unqualified Right to Exercise Religion.

The First Amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Taken at face value, these words plainly convey a right to "the free exercise" of religion without condition or qualification. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 339 (1996) ("The constitutional text is absolute; there is no textual exception in either of the Religion Clauses."). Laycock argues that "we know from experience that absolute religious liberty is unacceptable" but adds that "a strong burden of persuasion rests on those who would imply exceptions to an expressly absolute constitutional text." *Ibid.*

Drafting history confirms that Congress deliberately adopted an unqualified right to the free exercise of religion. James Madison rose to his feet in the House of Representatives on June 8, 1789 and "introduce[d] the great work" of amending the Constitution. 1 *Annals of Cong.* 427 (Joseph Gales ed., 1834). In his view, "the great mass of the people who opposed [the Constitution] disliked it because it did

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liberty is the opportunity of professing and practicing that religion which is agreeable to our judgment and consciences, without interruption or punishment from the civil magistrate.").

not contain effectual provisions against the encroachments on particular rights." *Id.* at 433. Congress could assuage that concern by "expressly declar[ing] the great rights of mankind secured under this Constitution." *Id.* at 432. Some might scorn such "paper barriers." *Id.* at 437. But Madison expressed the hope that Congress "should obtain the confidence of our fellow-citizens, in proportion as we fortify the rights of the people against the encroachments of the Government." *Id.* at 442.

Madison offered nine amendments, one of which promised broad protection for religious freedom:

> 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, or on any pretext, infringed.

Id. at 451. Madison moved for this and several other rights to be placed in Article I, Section 9.[5] See *ibid.* Putting the amendments there would have emphasized that they consist of limitations on federal power. But Congress declined, voting instead to put amendments at the end of the Constitution—as the states had done with their own declarations of rights. See *id.* at 795.

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[5] Madison also put forward a similar amendment to Article I, Section 10. It would have provided that "No State shall violate the equal rights of conscience." 1 *Annals of Cong.* at 435. He considered this "double security" essential because "every Government should be disarmed of powers which trench upon those particular rights." *Id.* at 441. But Congress rejected Madison's attempt to include in the federal Constitution a safeguard for religious freedom from state encroachment.

The House referred Madison's proposals to a Select Committee composed of eleven members, of which Madision was one. Committee members revised the proposal to read "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 757; see *id.* at 699 (report by Rep. Vining for the Select Committee).

During floor debate on that revised amendment, Madison explained that he took these words to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 758. He reminded his fellow congressmen that such protection "had been required by some of the State Conventions," who feared that the Necessary and Proper Clause "enabled [Congress] to make laws of such a nature as might infringe the rights of conscience, and establish a national religion." *Ibid.* Madison justified the amendment as a way "to prevent these effects." *Ibid.* Evidently, he feared not only the abuse of federal power, but burdens on "the rights of conscience" from the lawful exercise of federal power. *Ibid.*[6]

Daniel Carroll of Maryland defended religious freedom eloquently. He said that "the rights of conscience * * * will little bear the gentlest touch of governmental hand" and "they are not well secured under the present constitution." *Id.* at 757–58. In his opinion, adopting an amendment protecting those

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[6] Madison's concern casts doubt on *Smith*'s confident assertion that "if prohibiting the exercise of religion * * * is not the *object* of [government] but merely the *incidental effect* of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 U.S. at 878 (emphasis added).

rights "would tend more towards conciliating the minds of the people to the Government than almost any other amendment." *Id.* at 758.

Following debate, the House and Senate approved separate amendments protecting the exercise of religion. See *id.* at 796; *id.* at 129. A conference committee agreed on a single amendment containing the familiar words of the First Amendment: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof." *The Complete Bill of Rights*, at 8 (Oliver Ellsworth's handwritten notes). The requisite two-thirds majority of both houses of Congress approved the amendment in that form. See Journal of the House of Representatives, 1st Cong., 1st Sess. 121 (1826) (Sept. 24, 1789); Journal of the First Session of the Senate of the United States, 1st Cong., 1st Sess. 88 (Sept. 25, 1789).

Often overlooked is the preamble that Congress attached to the amendments when transmitted to the states. It explains the genesis and character of the Bill of Rights. The preamble describes the amendments as "declaratory and restrictive Clauses" that certain state ratifying conventions requested "in order to prevent misconstruction or abuse of [federal] Powers." *Id.* at 96 (App'x). Adding these revisions was understood to "extend[ ] the Ground of public Confidence in the Government." *Ibid.* This preamble further bolsters the reading we urge. If the Free Exercise Clause was offered to the states as a measure to prevent the "misconstruction or abuse" of federal power, then the free exercise right was originally understood as a backstop—a failsafe in the event that federal power was abused. An unqualified right to exercise religion would not be an impediment to an effective national government since the Constitution did not enumerate

the power to regulate religion in the first place. Also, the preamble suggests that it was the unqualified language of the amendments by state ratifying conventions—not the conditional language of state constitutions—that formed the model for the First Amendment.

Congress then passed a joint resolution transmitting twelve proposed amendments (including two that were rejected) for ratification by the state legislatures. See 1 Stat. 97 (1789). After that, the historical record regarding the Bill of Rights all but vanishes. "We know almost nothing about what the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent." Leonard W. Levy, *Origins of the Bill of Rights* 43 (1999). The absence of useful evidence from state legislatures considering the Bill of Rights should not be overstated. Records of the state ratifying convention proposals considering the 1787 Constitution, as well as the congressional debates on the Bill of Rights, were published and generally available. These documents offer reasonably convincing evidence the Free Exercise Clause was originally understood as an unqualified right to exercise religion.

Early treatise writers confirmed that understanding. In 1803, St. George Tucker wrote that "[l]iberty of conscience in matters of religion consists in the *absolute and unrestrained* exercise of our religious opinions and duties, in t mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever." 2 St. George Tucker, *Blackstone's Commentaries*, Eds. App'x, *Of the Right of Conscience; and of the Freedom of Speech, and of the Press* 4 (1803), *reprinted in View*

of the Constitution of the United States with Selected Writings 372 (Liberty Fund ed., 1999) (emphasis added). Tucker further explained that "[t]his liberty" is "made a part of our constitution." *Ibid.* Other early treatises explained the free exercise of religion in similar terms. See, *e.g.*, William Rawle, *A View of the Constitution of the United States of America* 116-17 (1825) ("It would be difficult to conceive on what possible construction of the constitution such a power [preventing the free exercise of religion] could ever be claimed by congress."); see also Joseph Story, *Commentaries on the Constitution of the United States* 702-03 (1833) ("[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.").

C. An original understanding of the free exercise of religion as an unqualified right takes account of historical evidence not considered by rival interpretations.

The original understanding of unqualified federal protection for the free exercise of religion differs from the historical interpretations pressed by members of this Court.

Justice O'Connor backed her argument for the mandatory judicial accommodation of religion with a survey of colonial charters, state constitutions, and the Northwest Ordinance. See *Boerne*, 521 U.S. at 550–55 (O'Connor, J., dissenting). She paid special attention to the drafting history of Virginia's Declaration of Rights. See *id.* at 555–57. And she canvassed legislative exemptions for religion, before and after adoption of the Constitution, as well as the writings of Madison,

Washington, Jefferson, Ellsworth, and Isaac Backus. See *id.* at 560–63.

Justice Scalia responded that the historical evidence cited by Justice O'Connor actually supports *Smith*. See *id.* at 538–42. He underscored the lack of "a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation." *Id.* at 542. He dismissed as "weak authority" an early state court decision concluding that the New York Constitution mandated a priest-penitent privilege to protect a Catholic priest from having to reveal the contents of a confession. See *id.* at 543 (citing *People* v. *Phillips*, Ct. Gen. Sess., N.Y.C. (June 14, 1813), excerpted in *Privileged Communications to Clergymen*, 1 Cath. Law. 199 (1955)). And he pointed to contrary decisions from the Pennsylvania Supreme Court holding that state courts could deny relief to a litigant or witness who objected to participating in judicial proceedings on his Sabbath. See *ibid.* (citations omitted).

Behind the Justices' historical arguments over the validity of *Smith* lay a rich academic debate. See *id.* at 538 (citing Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) and Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992)). This scholarship, while impressive, does not fully take into account much of the evidence surveyed here. Each author focuses on state constitutions. See McConnell, 103 Harv. L. Rev. at 1456; Hamburger, 60 Geo. Wash. L. Rev. at 926. But the roots of the First Amendment go to amendments proposed by the state ratifying conventions—not to state constitutions. And

while McConnell mentions the enumerated and limited character of the federal Constitution's powers, his interpretation of the Free Exercise Clause is not shaped with that form of government in mind. See McConnell, 103 Harv. L. Rev. at 1475–76, 1478–79, 1511–12.

This leaves early state court decisions, which both scholars discuss. See McConnell, 103 Harv. L. Rev. at 1504–11; Hamburger, 60 Geo. Wash. L. Rev. at 931–32. Those decisions hold somewhat questionable relevance. They most often applied state constitutional provisions that, as we have seen, contained express conditions on the free exercise of religion not attached to the First Amendment. Besides, asking whether founding era courts exempted religious objectors from generally applicable laws is arguably too narrow a question. What matters is what the Free Exercise Clause meant for those who wrote and ratified it—not whether Founding era courts granted judicial exemptions in the modern vein.

Federal precedent is even less helpful because it began so late. There is no question that the Constitution vests federal courts with the power to enforce enumerated rights—including the Free Exercise Clause. See 1 *Annals of Cong.* at 439 (Madison anticipated that federal courts would "consider themselves in a peculiar manner the guardians of these rights" and "resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights").[7]

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[7] Madison was not alone in this view. While debating a draft of the Establishment Clause that would have applied to the states, Rep. Benjamin Huntington predicted that state laws establishing religion would be challenged in federal court. "If an action was brought before a federal court on any of these cases, the person

But no federal court was called on to apply the Free Exercise Clause until 50 years after the adoption of the Bill of Rights. See *Permoli* v. *Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589 (1845). Maybe that delay is explained by the federal government's relative inactivity during the first decades of the nineteenth century, or maybe by the inapplicability of the First Amendment to the states. See *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). Whatever the reason, that delay reduces the persuasive authority of federal judicial decisions for an original understanding of the Free Exercise Clause.

A skeptic might pose certain historical objections to our interpretation.

The First Federal Congress reenacted the Northwest Ordinance, which confined its protection of religious freedom to those "demeaning [themselves] in a peaceable and orderly manner." Act of Aug. 7, 1789, 1 Stat. 51. Although this provision resembles state

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who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building places of worship might be construed into a religious establishment"). *The Complete Bill of Rights*, at 60. Rep. Egbert Benson understood federal judicial power in similar terms while expressing his opposition to a proposed religious exemption in the Second Amendment. "If this stands part of the constitution, it will be a question before the judiciary, on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not." *Id.* at 157. The same concept of judicial power appears in Tucker's 1803 treatise. See 1 Tucker, *Blackstone's Commentaries*, Eds. App'x, *View of the Constitution of the United States* at 357, *reprinted in View of the Constitution* at 293 (explaining that if a federal law prohibited the free exercise of religion, "it would * * * be the province of the judiciary to pronounce whether any such act were unconstitutional, or not; and if not, to acquit the accused from any penalty which might be annexed to the breach of such unconstitutional act.").

constitutional provisions that put conditions on the freedom to exercise religion, that fact is hardly surprising. The Ordinance reflects the exercise of congressional power to legislate for federal territories, akin to the exercise of police powers by the states. Also, Congress's adoption of the Ordinance predates the First Amendment. It follows that the Northwest Ordinance holds limited relevance for the original understanding of the Free Exercise Clause.

Another objection arises from Congress's debate on the Second Amendment. Madison proposed that "no person, religiously scrupulous, shall be compelled to bear arms." *The Complete Bill of Rights*, at 169–70. This provision divided Congress. *See id.* at 185–91. Surprisingly, no one participating in the debate mentioned the Free Exercise Clause as a shield from compulsory military service. That silence weighs against our interpretation of the Free Exercise Clause, though not heavily. "[R]ather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1400 (2020).

In short, interpreting the Free Exercise Clause as an unqualified right best explains the pertinent evidence. It takes account of the central importance of religious freedom for the American Revolution; the reasons for and against a Bill of Rights; the deliberate omission of caveats from the religious freedom amendments demanded by key states as the price of entry into the Union; the unconditional nature of the text; drafting history that whittled down Madison's complex language into the spare words of the First Amendment; Congress's preamble to the Bill of Rights, which recited the nature of those rights as a limitation on

federal power and as a quid pro quo for ratification; and early interpretations by prominent legal scholars. Cumulatively, this evidence demonstrates that the First Amendment was originally understood to guarantee an unqualified right to the free exercise of religion vis-à-vis the federal government.

III. An Unqualified Right to Exercise Religion Is the Constitutional Baseline to Guide the Choice of a Standard to Replace *Smith*.

A. As originally understood, the Fourteenth Amendment protects the same right to free exercise as in the First Amendment.

Adoption of the Free Exercise Clause protected the exercise of religion from interference by the federal government. But the Constitution posed no barrier to state laws restricting the exercise of religion, thanks to Congress's rejection of Madison's proposed amendment Article I § 10. See 1 *Annals of Cong.* At 435. This gap in constitutional protection for religious freedom influenced the framing of the Fourteenth Amendment. See generally Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U.L. Rev. 1106 (1994).

Unfortunately, some states exploited that gap to restrict the exercise of religion by slaves and abolitionists. In the antebellum South, some states monitored federal mail and removed letters proselytizing slaveholders. See William W. Freehling, *The Road to Disunion* 290-91 (1990). Slaves could not select their own ministers or worship without a white man present. See Lash, 88 Nw. U.L. Rev. at 1134–35. Combined with prohibitions on assembly and literacy,

these restrictions formed "a complex and highly regulated system of religious exercise—a system so abhorrent * * * that its abolition was explicitly cited as one of the purposes behind the Fourteenth Amendment." *Id*. at 1133–34.

Even before the Civil War ended, Congress identified religious freedom as a national concern. Rep. Henry Wilson decried how "[t]he bitter cruel relentless persecutions of the Methodists in the South * * * tell how utterly slavery disregards the right to free exercise of religion." *Cong. Globe*, 38th Cong., 1st Sess. 1202 (1864). Rep. Roswell Hart insisted that a condition of readmitting Southern states into the Union should include the requirement that "no law shall be made prohibiting the free exercise of religion." *Cong. Globe,* 39th Cong., 1st Sess. 1629 (1865).

Once the Fourteenth Amendment was ratified, one of its leading proponents, Rep. John Bingham, explained that the Amendment's "scope and meaning" included the right to exercise religion. *Cong. Globe*, 42d Cong., 1st Sess., app'x at 84 (1871). Rep. Henry L. Dawes agreed, explaining his view that "the free exercise of * * * religious belief" had been "secured" by the Privileges or Immunities Clause. *Id.* at 475. Under the Fourteenth Amendment as originally understood, "religious exercise was to be protected from majoritarian hostility or indifference; it was to be a substantive right affording more than simply 'equal protection'; and its protection created a zone of autonomy within which both mandatory and discretionary aspects of religious exercise were protected from government interference." Lash, 88 Nw. U.L. Rev. at 1149.

Interpreting the Fourteenth Amendment's protection of religious exercise as an unqualified right is also

consistent with an important trend in state constitutional law. In 1789, most states placed conditions on the right to exercise religion, but by 1866 the trend had reversed and most state constitutions protected religious exercise in unqualified terms. Only thirteen of the thirty-six state constitutions contained such conditions when the Fourteenth Amendment was transmitted to the states for ratification.[8] New Jersey, North Carolina, and Georgia had shed such provisos.[9] Over a dozen new states entered the union without placing qualifications on the right to free exercise. See, *e.g.*, Ind. Const. of 1851, art. I, §§ 2-3 ("All men shall be secured in the natural right to worship Almighty God, according to the dictates of their own consciences. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."). Almost two-thirds of the states to consider the Fourteenth Amendment had

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[8] See Ala. Const. of 1865, art. I, § 3; Cal. Const. of 1849, as amended in 1862, art. I, § 4; Conn. Const. of 1818, as amended through 1850, art. I, § 3; Me. Const. of 1820, art. I, § 3; Md. Const. of 1864, Declaration of Rights Art. XXXVI; Mass. Const. of 1780, as amended in 1840, Articles of Amendment, Art. XI; Minn. Const. of 1857, art. I, § 16; Miss. Const. of 1832, as amended in 1865, art. I, § 3; Mo. Const. of 1865, art. I, § 9; Nev. Const. of 1864, art. I, § 4; N.H. Const. of 1792, art. I, §§ 4–5; N.Y. Const. of 1846, art. I, § 3; and S.C. Const. of 1865, art. IX, § 8. Ohio and Texas law contained ambiguous language that could be read to mean that people are protected such that they can exercise their religion in peace, or that they are protected if they exercise their religion so as not to disturb the peace. See Tex. Const. of 1866, art. I, § 3; Ohio Const. of 1851, art. I, § 7.

[9] Compare Ga. Const. of 1777, art. LVI with Ga. Const. of 1865, art. I, § 5; compare N.J. Const. of 1776, art. XIX, with N.J. Const. of 1844, art. I, § 3; compare N.C. Const. of 1776, § XXXIV with N.C. Const. of 1776, as amended in 1856, Decl. of Rights § XIX.

constitutions protecting the free exercise of exercise of religion without qualification.[10]

Developments between the Founding and the Civil War thus accomplished a sea change. Instead of providing an unqualified right against the federal government and a conditional right against the states, the free exercise of religion increasingly came to be seen as a fundamental right requiring protection against abuse from any government—federal or state. For these reasons, the Fourteenth Amendment appears to guarantee the freedom to exercise religion in no less unconditional terms than the First Amendment.

B. The Free Exercise Clause carries the same force in claims against local, state, or federal government.

In its decision incorporating the Free Exercise Clause against the states, the Court confirmed that that right has the same force against state and federal governments. "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). This holding is consistent with the principle that "incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal

[10] Louisiana's constitution did not guarantee religious liberty until 1868. La. Const. of 1868, tit. I, art. XII ("Every person has the natural right to worship God according to the dictates of his conscience.").

government." *Ramos*, 140 S. Ct. at 1397 (footnote omitted). This principle is firmly established. See *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964).

Since *Cantwell*, leading free exercise decisions involve claims against state and local governments that turn on the same standard applied to claims against the federal government. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017) (claim against a state); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (claim against a city). The notion that a free exercise claim differs in force or effect depending on whether the defendant is a state or federal government is historically and doctrinally implausible.

C. An unqualified right to the free exercise of religion—not judicial balancing—is the constitutional baseline.

The history we have reviewed shows that *Smith* is incompatible with the Free Exercise Clause as originally understood. An unqualified right to exercise one's religion cannot be reconciled with a rule of law that allows the government to impose substantial burdens on the exercise of religion unless its action fails the de minimis standards of neutrality and general applicability. See *Smith*, 494 U.S. at 879.

History suggests other important implications for this case. Originally understood, the Free Exercise Clause formed an unqualified right against federal government interference with religious exercise—not merely a restraint on laws singling out religion or an invitation to conduct judicial balancing. Those who wrote and ratified the Free Exercise Clause understood it as a complete shield against the use of federal power to interfere with the exercise of religion.

Adoption of the Fourteenth Amendment deliberately extended that right as a protection against the states.

Original understanding thus answers the question of constitutional meaning but not the question of constitutional application. Deciding how to apply the Free Exercise Clause in this and future cases certainly should be informed by the history we recount. But an unqualified right to the free exercise of religion is *not* the correct judicial standard today. That standard would lead to intolerable results in cases ranging from an inmate's frivolous claim to be exempt from prison security restrictions to a terrorist's claim that bombing a school is constitutionally protected activity.

But knowing that the Free Exercise Clause was originally understood as an unqualified right should influence the choice of a judicial standard to replace *Smith*. Unqualified protection for the exercise of religion is the constitutional baseline. From that perspective, restoring strict scrutiny as a controlling standard for free exercise claims does not give religious freedom undeserved protection. It is a *compromise*. It allows the government to prevail when its interest is truly compelling and its chosen means are least restrictive—even if that means a substantial burden on the exercise of religion. This trade-off is necessary to reconcile the Free Exercise Clause with the realities of modern society. But in accepting the necessity for compromise, the Court should acknowledge that strict scrutiny gives the exercise of religion less protection than the Constitution was originally understood to guarantee.

CONCLUSION

The Third Circuit's judgment should be reversed.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law, Chapman University
One University Drive
Orange, CA 92886
(877) 855-3330 x2
jeastman@chapman.edu

R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, UT 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amicus Curiae

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