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 *AMICI CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABONIM, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, ORTHODOX JEWISH CHAMBER OF COMMERCE, AND TORAH UMESORAH IN SUPPORT OF PETITIONERS


*Of Counsel*

DENNIS RAPPS
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
*Counsel of Record*
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

*Attorneys for Amici Curiae*


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## INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first *amicus* brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 35 *amicus* briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this *amicus* brief:

▪Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States.

▪Agudas Harabonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue

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[1]Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. Respondents have filed a blanket consent to the filing of *amicus* briefs. Petitioners have consented to the filing of this *amicus* brief.

branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

## INTRODUCTION AND SUMMARY OF ARGUMENT

To comply with the admonition in this Court's Rule 37(1) we limit this *amicus* brief to "relevant matter not already brought to its attention by the parties." The petitioners and the *amici* supporting reversal of the decision of the Third Circuit have (and will) present many legal and policy considerations that warrant overruling *Employment Division v. Smith* and the reasons why, even if *Smith* is not overruled, the Court of Appeals' decision was wrong. We will not echo these arguments although we support them.

In this brief we argue *first* that available records of this Court's consideration 30 years ago of *Employment Division v. Smith* establish conclusively that the procedure followed in that case violated the basic due process standard of this Court's very recent unanimous decision in *United States v. Sineneng-Smith*, No. 19-67, decided on May 7, 2020. Consequently, regardless of its substantive flaws, the *Smith* precedent should be overruled because it was issued after an extremely drastic and unacceptable departure by this Court from the "principle of party presentation." *Second*, we review some aspects of Jewish Law regarding foster care to illustrate why it might violate the religious observance of Orthodox Jews if they were required by law to refer foster children to same-gender couples.

## ARGUMENT

### I.

### THIS COURT'S DECISION IN *EMPLOYMENT DIVISION v. SMITH* WAS A DRASTIC DEPARTURE FROM "THE PRINCIPLE OF PARTY PRESENTATION"

In 1987 this Court first heard and considered whether the Free Exercise Clause would protect individuals whose religious observance amounted to a felony under state law. Because the Court was "uncertain about the legality of the religious use of peyote in Oregon," it vacated the initial decision of the Oregon Supreme Court and remanded the case for further proceedings clarifying Oregon's law. *Employment Division v. Smith*, 485 U.S. 660 (1988).

The *Smith* case returned to this Court in 1989 for review of the decision of the Oregon Supreme Court. The petition for a writ of certiorari filed by Oregon's Attorney General presented only one question: "Does the Free Exercise Clause of the first amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition?" Oregon's brief on the merits argued that "The Public Interest in Controlling the Use and Availability of Dangerous Drugs Is Compelling" and that "Government Cannot Accommodate Religious Use Exemptions from Criminal Laws Regulating Dangerous Drugs." No brief of any party or *amicus curiae* argued, or even discussed, whether religious observance was protected by the First Amendment if it conflicted or was otherwise burdened by a neutral ***civil*** law. Nor

was that issue raised at any time during the oral argument of the case on November 6, 1989.

The files of Justice Harry A. Blackmun, contained in the Collections of the Manuscripts Division at the Library of Congress ("Blackmun Papers"), record the progress and retain written intra-Court communications regarding *Employment Division v. Smith*, No. 88-1213.

The pre-oral-argument memoranda in Justice Blackmun's chambers prove that the case accepted for review by the Court presented no issue whatever outside the criminal context. Justice Blackmun prepared a handwritten memorandum, as was his usual custom, before the argument. It does not remotely hint that the Court might reconsider the three unemployment-compensation cases[2] that had sustained Free Exercise claims. During oral argument no counsel or Justice proposed a modification of the Free Exercise precedents or urged that the "compelling state interest" test be jettisoned or confined.

The Blackmun Papers contain Justice Blackmun's handwritten notes of the private conference of the Justices held on November 9, 1989. Six Justices voted to reverse the Oregon Supreme Court's decision, but it is clear from Justice Blackmun's notes that no Justice said that the Free Exercise Clause should not apply if religious observance conflicts with a "neutral, generally

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[2] *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987)

applicable regulatory law." The Blackmun notes reflect that Justice Scalia said he did not "believe in Sherbert," but neither he nor any other member of the Court said at the conference that the "compelling state interest" standard that governed ever since *Sherbert v. Verner* should be overruled.

Justice Scalia was assigned to write the majority opinion. His circulated draft was the subject of a memorandum dated January 3, 1990, by Martha Matthews, one of Justice Blackmun's law clerks. She said:

> I find the draft quite extreme. It casts doubt on the continuing validity of the Sherbert line of cases, and seems at times to suggest that a state need not have a compelling interest to justify refusing to recognize religious exceptions to laws of general application.
>
> The breadth of the opinion, and its cavalier attitude toward settled precedent, make me wonder how many of the justices who voted in the majority will be willing to join it. I have talked to some of the clerks. No one is sure what his or her justice will do, but there seems to be some chance that Justices White and/or O'Connor might write separately, or try to persuade J. Scalia to tone down the opinion.

In a note dated January 11, 1990, Justice White advised Justice Scalia that "[i]f there are three others with you, I could make the fifth vote for the position stated in your circulating draft." On

January 18, 1990, Justice Kennedy sent a note to Justice Scalia stating, "I would be pleased to join your opinion." A memorandum from Ms. Matthews to Justice Blackmun dated January 18, 1990, reports that Justices Kennedy and White will join the Scalia opinion "so J. Scalia will have five votes." On March 15, 1990, Justice White wrote again to Justice Scalia: "I am still with you." The decision was announced on April 17, 1990.

A petition for rehearing was filed after the *Smith* ruling by a large coalition of organizations and legal scholars. They said, "The majority opinion eschewed discussion of the question briefed, and decided the case on far-reaching grounds without the benefit of briefing or oral argument on the specific concerns raised . . . by the Court's opinion." An Op-Ed column in the Washington Post called the Court's opinion "alarming" and maintained that "so fundamental a change in First Amendment law should have been briefed and argued before the court. It was not." The petition for rehearing was denied. 496 U.S. 913 (1990).

The process followed by this Court 30 years ago in issuing a majority ruling in *Employment Division v. Smith* was a more egregious violation of the "principle of party presentation" than the appellate court's procedure unanimously condemned by this Court on May 7, 2020, in *United States v. Sineneng-Smith*.

Before it decided Ms. Sineneng's appeal, the Court of Appeals for Ninth Circuit permitted counsel for the parties and *amici curiae* to present argument on the issues that the court believed to be

dispositive. This Court failed even to take that step when it decided to issue a sweeping constitutional ruling in *Employment Division v. Smith.* The Blackmun Papers establish that the process followed by this Court in *Employment Division v. Smith* was an impermissible "takeover" of an appeal contrary to "an adversarial system of adjudication."

The appropriate remedy today is, we submit, to limit the decision in *Employment Division v. Smith* to the issue that was presented in the petition for certiorari and was actually argued and decided at the time of the Justices' conference by a majority of the 1990 Court – *i.e.*, that the Free Exercise Clause of the First Amendment does not "protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition." The more far-reaching language in Justice Scalia's opinion is, at best, *obiter dicta*.

On the merits, we agree, of course, with the powerful separate opinion of Justices O'Connor, Brennan, Marshall and Blackmun and the dissenting opinion of Justices Blackmun, Brennan, and Marshall in the *Smith* case (494 U.S. at 891-921), and with the views that *Smith* was wrongly decided that were expressed by Justices O'Connor and Breyer in *City of Boerne v. Flores*, 521 U.S. 507, 544-566 (1997). But the Court's very recent ruling demonstrates that in addition to being substantively wrong, the decision in *Employment Division v. Smith* was an impermissible procedural aberration that should now be erased.

## II.

## ADHERENCE TO JEWISH RELIGIOUS OBSERVANCE MAY JUSTIFY A REFUSAL TO PLACE A FOSTER CHILD WITH A SAME-GENDER COUPLE

This case concerns a Catholic agency that, because of its religious convictions, said it would not assist same-gender couples to become foster parents. There has been no reported instance, to our knowledge, of a Jewish-controlled entity that confronted a similar dilemma. But there is support in Jewish Law for discouraging placement of parentless Jewish children in homes that do not abide by Jewish observance.

In his comprehensive discussion of Jewish Law, the late Professor and Israeli Supreme Court Justice Menachem Elon said: "Jewish law did not recognize adoption, although there was an accepted practice, considered a *mizvah* (good deed) of rearing children who were in need, for 'whoever rears an orphan in his home is considered by Scripture as if he gave birth to him.' Legally, however, the child was not considered to be the child of the foster parents." 2 Elon, Jewish Law: History, Sources, Principles (1994) p. 827. In 1960 Israel enacted an Adoption of Children law that authorized adoptions. That law and the 1981 revised Adoption of Children Law prescribed a formal conversion ritual for infants who were adopted. *Encyclopedia Judaica*, Volume 1, p. 418 (2d ed. 2007) reports: "The Israeli rabbinical courts have avoided converting minors who are candidates for adoption when the prospective

adoptive parents will not provide him/her with an education based upon religious observance."

Rabbi Yisrael Rosen (1941-2017) was the founder and judge of the Israeli Chief Rabbinate's office for conversion. In a significant article he published in 2000 in the scholarly Hebrew-language annual *Techumim* (Vol. 20, pp. 245-250), Rabbi Rosen permitted the conversion of adopted infants in Israel even if they are raised in non-observant homes. He relied on the rabbinic court's status as an agent for the adopted child and the legal premise – endorsed by Rabbi Yitzchak Yehuda Schmelkes (1828-1905), chief rabbi of Lvov (Lemberg) and by later rabbinic authorities – that since admission to the Jewish People is a benefit, it may be presumed that Jewish observance will be followed.

Rabbi Rosen warned, however, that this presumption might not apply outside Israel, in the Diaspora. On this account, religiously observant Jews might refuse to participate on religious-principle grounds if, in the United States, a same-gender couple – not recognized by Jewish Law as an observant family unit – is a foster-parent candidate for a Jewish child.

It is impermissible to reject out-of-hand an agency's religion-based unwillingness to place a child in a foster home if the refusal would be lawful because of a similar secular reason. That would constitute discrimination against religion, which is prohibited even under *Smith. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The record in this

case indicates that the City of Philadelphia rejected summarily the petitioners' religious justification for its policy without bothering to inquire whether comparable secular policies would be legally acceptable. Accordingly, the decision below should be reversed even if the ruling in *Employment Division v. Smith* is not overruled.

## CONCLUSION

For the above-stated reasons this Court's holding in *Employment Division v. Smith* should be overruled, and the decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

*Of Counsel*

DENNIS RAPPS
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
*Counsel of Record*
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

*Attorneys for Amici Curiae*

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