No. 18-547

IN THE
Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
Petitioners,
v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

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

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes that Petitioners' case is an example of a recurring problem in the clash between religious liberty and same-sex relations and that religious liberty should prevail.

SUMMARY OF ARGUMENT

Melissa and Aaron Klein operated a bakery, Sweetcakes by Melissa, in Gresham, Oregon, until they were forced to close rather than violate their religious convictions by designing and preparing a cake to celebrate a same-sex wedding.

Rachel Cryer and her mother came to Sweetcakes to order a wedding cake.[2] After being informed that

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] In January 2013, when the incident that underlies this case occurred, gay marriage was banned in Oregon by constitutional amendment, and neither *United States v.*

the wedding involved two brides, Aaron Klein explained politely that because of their religious convictions they could not design and prepare a cake for a same-sex wedding. Shortly thereafter, Rachel's mother returned alone and initiated a discussion with Aaron about the Bible and same-sex marriage. She said she had once shared his beliefs but "her truth had changed" and she now believes the Bible is silent about same-sex relationships. Aaron responded by quoting *Leviticus* 18:22: "Thou shalt not lie with a male as one lies with a female; it is an abomination." Rachel's mother ended the conversation, returned to the car, and told Rachel that Mr. Klein had called her an "abomination." In fact, Mr. Klein had only quoted the Bible in response to the mother's statement that the Bible is silent about same-sex relations. The passage he quoted called same-sex relationships an abomination, not those who engage in such relationships. Even though acknowledging that the mother had misquoted Aaron and the Bible, the Oregon Bureau of Labor and Industries (BOLI) penalized Sweetcakes by Melissa $135,000 for the trauma allegedly caused to the same-sex couple.

Penalizing the Kleins for simply quoting the Bible in a conversation that Rachel's mother had initiated and in response to her statement that the Bible is silent about same-sex relationships, and after the mother had distorted Mr. Klein's statement and

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Windsor, 570 U.S. 744 (2013), nor *Obergefell v. Hodges*, 135 U.S. 2017 (2015), had been decided. This Court noted the significance of parallel facts in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

the Bible passage when she conveyed the conversation to her daughter, is an unconscionable infringement on free exercise of religion and free speech.

In fairness to BOLI and to the Oregon Court of Appeals, their failure to protect the Kleins' constitutional rights in part attributable to this Court's downgrade of the free exercise of religion in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990). Subsequently, the Court has further jeopardized free exercise by ignoring the refusal of some lower courts to apply *Smith's* hybrid rights test. This Court should grant the petition for a writ of certiorari to restore religious liberty to its rightful place as the first and foremost of our freedoms.

ARGUMENT

I. The traditional Judeo-Christian view of marriage has occupied a favored position in American law.

The traditional view of marriage as between one man and one woman has been so ensconced in American law that American courts have, until recently, refused to even recognize alternatives. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court held that the Free Exercise Clause does not protect the right to engage in polygamous marriage. In *Davis v. Beason,* 133 U.S. 333 (1890), the Court affirmed its holding in *Reynolds,* saying polygamy is not protected by the Free Exercise Clause because it

is a crime "by the laws of all civilized and Christian countries." *Id.* at 341. The right to engage in other forms of marriage is not recognized because the Judeo-Christian view of marriage between one man and one woman is firmly part of our legal system, and "Christianity is part of the common law[.]" Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law at Harvard University* 20 (1829); *cf.*, *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394, 400 (Pa. 1824); *People v. Ruggles,* 8 Johns. 290, 294-95 (N.Y. 1811) (opinion by Chancellor Kent); *Vidal v. Girard's Executors,* 43 U.S. 127, 2 How. 127, 198 (1844) (opinion by Justice Story).

II. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded "strict scrutiny."

Religious liberty is the first of all human rights because rights themselves are the gift of God, and because religious liberty involves matters eternal rather than merely matters temporal.

The inaugural document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and that all people possess "unalienable" rights that are "endowed by their Creator." As Justice Douglas wrote for the Court in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952): "We are a religious people whose institutions presuppose a Supreme Being." In *McGowan v*

Maryland, 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Freedom of religion and freedom of expression were not given to us by the government through the First Amendment; they are, as the Declaration of Independence says, "endowed by [the] Creator." Government through the Constitution only "secures" the rights that God has already granted. The recognition of those rights predates the Constitution by centuries if not millennia.

A. The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The statute recognizes that "Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States."

Professors Donald S. Lutz and Charles S. Hyneman, after conducting a thorough search of the writings of leading American political figures for the period 1760-1805, found that 34% of all quotations in the Framers' writings came from the Bible.[3]

Liberty of conscience is a central principle the Framers derived from the Scriptures. In 1751 the Pennsylvania Assembly commissioned a bell to commemorate the 50th anniversary of the Charter of Privileges of 1701 and inscribed on the bell *Leviticus* 25:10: "Proclaim liberty throughout all the land unto all the inhabitants thereof." They well knew the words immediately preceding this verse: "And ye shall hallow the fiftieth year," the year of jubilee. The bell rang again in July 1776 to celebrate the Declaration of Independence and is now known as the Liberty Bell.

The Hebrews observed the Passover to commemorate Moses leading the people out of bondage in Egypt into liberty in the Promised Land. Christians also cite these passages as well as New Testament verses such as "If the Son, therefore, shall make you free, ye shall be free indeed" (*John* 8:36), and "Stand fast, therefore, in the liberty with which

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[3] Donald S. Lutz, *The Relative influence of European Writers on Late Eighteenth Century American Political Thought*, Amer. Pol. Sci. Rev. 189 (1984); *see also* Charles S. Hyneman and Donald S. Lutz, *American Political Writing during the Founding Era* (1983); Eran Shalev, *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War* (2013).

Christ hath made us free, and be not entangled again with the yoke of bondage" (*Galatians* 5:1).

The Bible values liberty of conscience so highly that duty to obey God is placed above duty to obey civil government, and at times disobedience to tyrants is obedience to God. Jesus told the Pharisees: "Render to Caesar the things that are Caesar's, and to God the things that are God's" (*Mark* 12:17). When the apostles were prohibited from preaching the Gospel, they answered, "We must obey God rather than men" (*Acts* 5:29). *Exodus* 1:17 states that the Hebrew midwives "feared God, and did not as the king of Egypt commanded them [to kill the male Hebrew infants]." Daniel faced execution in a den of lions because he prayed to God in violation of King Darius's command (*Danie*l 6). His companions, Shadrach, Meshach, and Abednego, faced execution in a fiery furnace rather than worship a graven image as commanded by King Nebuchadnezzar (*Daniel* 3). The early Christians and Christians throughout the centuries into the present have faced "dungeon, fire, and sword" rather than compromise their consciences.

B. The Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave some recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it

stood against the power of the State.[4] Martin Luther (1483-1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[5]

In his letter "Temporal Authority: To What Extent It Should Be Obeyed" he declared, "The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul."[6]

Calvinists (who constituted a strong majority of America's early settlers and also of the founding generation[7]) likewise believed in liberty of conscience. The Westminster Confession of Faith, drafted by the Westminster Assembly in 1643 at the call of the Long Parliament, declares in Chapter XX, Section 2:

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[4] *See generally* Oliver O'Donovan & Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (1999); James J. Walsh, *The Thirteenth, Greatest of Centuries* 338-91 (2nd ed. 1909).

[5] *Reply to the Diet of Worms* (Apr. 18, 1521), quoted in Roland Bainton, *Here I Stand: A Life of Martin Luther* 184-85 (1950).

[6] Reprinted in O'Donovan & O'Donovan, *From Irenaeus to Grotius* 591 (1999).

[7] Loraine Boettner, *The Reformed Doctrine of Predestination* 382 (1972).

> God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[8]

John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholic, Anglican, and Royalist doctrines. Nonetheless, in 1644 he defended freedom of conscience in an address to Parliament:

> What should ye do then, should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this city? Should ye set an oligarchy of twenty engrossers over it, to bring a famine upon our minds again, when we shall know nothing but what is measured to us by their bushel? … Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[9]

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[8] Westminster Confession of Faith (1643), Chapter XX, Section II; reprinted in *Trinity Hymnal* 860 (1999).

[9] Reprinted in *The Portable Library of Liberty;* files.libertyfund.org/pll/qotes/51.html

John Bunyan (1628-1688), the Puritan author of *Pilgrim's Progress,* was convicted in 1660 of unauthorized preaching and failure to attend the Church of England. He declared before the court that

> a man's religious views—or lack of them—are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[10]

Cambridge Puritan theologian William Perkins (1558-1602) declared that "God hath now in the New Testament given a liberty of conscience."[11] He added that God sometimes requires us to disobey, because sometimes "men are bound in conscience not to obey."[12]

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[10] Transcript of Trial of John Bunyan before Judge Wingate (Oct. 3, 1660), reprinted in *John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty

[11] I William Perkins, *Works* 529 (1612-1618), quoted in L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea* 4, 21 (1992).

[12] I Perkins, *Works* 530; quoted in Van Til, *Liberty of Conscience* 23.

Bishop Joseph Hall (1574-1656) insisted that "Princes and churches may make laws for the outward man, but they can no more bind the heart than they can make it."[13] Bishop George Downame (1560-1634) stated: "The conscience of a Christian is exempted from human power, and cannot be bound but where God doth bind it."[14]

John Locke (1632-1704), a major influence on the American founding generation,[15] wrote that "religion is the highest obligation that lies upon mankind," that "there is nothing in the world that is of any consideration in comparison with eternity," that "the care of each man's salvation belongs only to himself," and that no life lived "against the dictates of his conscience will ever bring him to the mansions of the blessed."[16] The son of a Puritan lawyer, Locke was very much influenced by the Puritan tradition.

C. The Colonial Foundations of Religious Liberty

While much of the groundwork for liberty of conscience was laid by the Puritans in England, Van Til asserts that "[l]iberty of conscience triumphed in

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[13] VI Bishop Joseph Hall, *Works* 649 (1863), quoted in Van Til, *Liberty* 41.

[14] Bishop George Downame, *The Christian's Freedom* 102, 104ff (1635), quoted in Van Til 41.

[15] *See* Hyneman and Lutz, *supra* n. 2. Lutz and Hyneman concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone.

[16] John Locke, *A Letter Concerning Toleration* 34, 46 (1688-89) (Patrick Romanell, ed. 1955).

America, while it failed in England."[17] As evidence for that proposition, colonial charters and constitutions at the time of the American War for Independence strongly recognized and protected liberty of conscience, although some did so within the bounds of Christian orthodoxy:

Pennsylvania:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: 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: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[18]

Maryland:

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[17] Van Til 128.

[18] Pennsylvania Constitution of 1776, Declaration of Rights, Sec. II, avalon.law.yale.edu/18th_century/pa08.asp

> That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights....[19]

New Jersey:

> That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be

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[19] Maryland Constitution of 1776, Article XXXIII, avalon.law.yale.edu/17th_century/ma02.asp

> right, or has deliberately or voluntarily engaged himself to perform.[20]

North Carolina:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[21]

Georgia:

> All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.[22]

South Carolina:

> That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and

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[20] New Jersey Constitution of 1776, Art. XVIII, avalon.law.yale.edu/18th_century/nj15.asp

[21] North Carolina Constitution and Declaration of Rights of 1776, Article XIX, avalon.law.yale.edu/18th_century/nc07.asp

[22] Georgia Constitution of 1777, Article LVI, avalon.law.yale.edu/18th_century/ga02.asp

declared to be, the established religion of this State.[23]

Massachusetts:

> It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[24]

New York:

> And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this

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[23] South Carolina Constitution of 1778, Article XXXVIII, avalon.law.yale.ed/18th_century/sc02.asp. Article XXXVIII continues with provisions as to what constitutes orthodoxy.

[24] Massachusetts Constitution of 1780, Declaration of Rights, Article II, www.nhinet.org/ccs/docs/ma-1780.htm

> State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[25]

Virginia:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[26]

In light of this Biblical, Reformation, and colonial background, it is understandable that James Madison submitted the religious liberty article of the Bill of Rights with this original wording:

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[25] New York Constitution of 1777, Article XXXVIII, avalon.law.yale.edu/18th_century/ny01.asp

[26] Virginia Constitution of 1776 and Declaration of Rights, Sec. 16, https://law.gmu.edu/assets/files/academic/founders/VA-Constitution

> 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 pretext infringed.[27]

Because there was no verbatim transcript of the first session of Congress, it is unclear exactly how or why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise" because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Religious freedom is meaningless without the right to act on one's beliefs. So long as no machine can read the thoughts of the heart, liberty of conscience exists everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal

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[27] Lib. of Cong., *Religion and the Founding of the American Republic*, https://www.loc.gov/exhibits/religion/rel06.html

consequences. As J. Howard Pew has noted: "From Christian freedom comes all other freedoms."[28]

III. *Employment Division v. Smith* does not do justice to the Framers' vision of religious liberty.

The Framers might well view with skepticism the preoccupation of today's courts with tiers and tests. But they would be utterly incredulous that the Court in *Employment Division v. Smith* would downgrade the Free Exercise Clause to a "lower tier" right that, unlike other rights, can be infringed with merely a rational basis.

The Foundation questions whether even strict scrutiny is sufficient to protect this first and foremost of our liberties. But unless and until the Court is willing to reconsider the whole issue of tiers and tests, at the very least Free Exercise should be given the strict scrutiny protection it rightfully deserves.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view. He stated: "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion...." *Meek v. Pittinger,* 421 U.S. 349, 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

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[28] J. Howard Pew, quoted in Van Til 3.

Professor Laurence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle."[29] Voluntarism is central to the case at hand, for the Oregon Court of Appeals ruling has the effect of compelling the Kleins to act in contravention of their most basic beliefs, thus violating the right of free exercise at its very core.

This Court appeared to employ strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut*, the Court held that

> the [first] amendment raises two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

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[29] *American Constitutional Law* 833 (1978). *Cf.* 2d ed. at 1160.

310 U.S. 296, 303-04 (1940). *Cantwell* seems to say that infringements on free exercise are subject to higher scrutiny than a mere reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to cases in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, which was an almost-unanimous decision,[30] *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent. She excoriated the majority for departing from the strict scrutiny test but concurred because she believed the state had a compelling interest in regulating controlled substances that could not be achieved by less restrictive means.

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[30] Only Justice Douglas dissented, and only in part. He did not dispute the strict scrutiny test but dissented because he noted a potential conflict between the rights of the parents and those of the child that had not been fully articulated in the case.

Smith received harsh criticism from the beginning. A massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-3, in the House by a voice vote and in the Senate 97-3, President Clinton added his signature but this Court struck down the law as applied to the states by a vote of 6 to 3 in *Boerne v Flores*, 521 U.S. 507 (1997). The Court unanimously upheld RFRA as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Following *Boerne,* in 2000 the American Civil Liberties Union joined with other organizations to secure passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). 42 U.S.C. §§ 2000cc *et seq*. RLUIPA prohibits the imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states have adopted versions of RFRA that require application of the compelling-interest/less-restrictive-means test. Ten additional

states have incorporated the principles of the Act by state court decision.[31]

Many legal scholars have criticized *Smith*. Professor Michael McConnell, who later served on the Tenth Circuit, cogently observed that the Court effectively decided *Smith* on its own initiative, as none of the parties had asked the Court to abandon the *Yoder* test.[32] Jane Rutherford, Professor at DePaul University College of Law, argued that *Smith* subjects minority faiths to the power of the majority and decreases the rights of minorities to express their individual spirituality.[33] John Witte, Jr., Professor of Law at Emory University, demonstrated that *Smith* is at odds with the basic principles that underlie the

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[31] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have judicially adopted the principles of the Act. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[32] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also noted that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[33] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[34]

Lower federal courts routinely ignore *Smith*'s "hybrid rights" exception.[35] According to Stephen Aden and Lee Strang:

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*--that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*—is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[36]

After discussing numerous federal circuit court cases in which hybrid rights claims have been denied, Aden and Strang explain why the lower courts have not followed this Court's guidance:

1. The hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent;

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[34] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1999).

[35] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).

[36] *Id.* at 587.

2. The compelling interest test in the realm of free exercise jurisprudence was never "compelling," and hybrid claims simply suffer a continuation of the reluctance to excuse conduct because of religious belief;

3. Difficulty in determining the proper burdens and procedures to assert a hybrid claim, namely the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and

4. Growing hostility to exemptions from state anti-discrimination laws which have ever increasing numbers of protected classes.[37]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims," "a more 'progressive' attitude toward persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings," and "the increasing regulation of private life by state governments through anti-discrimination statutes."[38]

In summary, *Employment Division v. Smith*:

- Was adopted *sua sponte* without request, argument, or briefing from the parties.

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[37] *Id.* at 602.
[38] *Id*. at 602-04.

- Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.

- Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.

- Was sharply criticized by a wide spectrum of the legal and religious community of the nation.

- Was criticized by a wide spectrum of constitutional scholars.

- Was repudiated by an overwhelming vote of Congress in adopting the Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores*.

- Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes, state constitutional amendments, or state court decisions.

- Has been ignored, strained, or limited by many circuit courts and other courts.

- Has proven unfair and unworkable in practice.

- Is manifestly contrary to the Framers' elevated view of religious liberty by reducing this most-cherished right to mere lower-tier status.

Because of all of these reasons, it is clearly time for this Court to reconsider *Employment Division v. Smith.*

Further, a court-created right such as same-sex marriage should not take precedence over the sacred rights of religious conscience enshrined in the First Amendment. As this Court stated in *Bowers v. Hardwick*: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." 478 U.S. 186, 194 (1986) (*overruled on other grounds* by *Lawrence v. Texas*, 539 U.S. 558 (2003)). Neomi Rao, Associate Professor of Law at Antonin Scalia Law School, questions whether the importation of expansive and subjective notions of "dignity" into the Constitution comports with the Founders' design.[39]

IV. This case clearly qualifies as a hybrid-rights exception to *Smith.*

If the Court is not going to reconsider *Smith* at this time, then the Court should put some "teeth"

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[39] Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 Va. L. Rev. Online 29 (2013); *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183 (2011); *On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 201 (2008).

into *Smith's* hybrid-rights doctrine and apply that doctrine to this case.

Smith's hybrid-rights doctrine asserts that strict scrutiny must be applied to a free exercise of religion claim when that claim is raised in tandem with a claimed violation of another constitutional right.

The Kleins assert that their artistic expression in preparing wedding cakes is protected free speech. And what could be more protected First Amendment expression than Mr. Klein's quotation from the Bible in response to the brash assertion that the Bible is silent about same-sex relationships?

Even if cake-decorating is only middle-tier speech, the *Smith* hybrid-rights doctrine never said the hybrid right must be an upper-tier fundamental right. If it did, the doctrine would make no sense, because such rights can stand on their own independent of a free exercise claim. As Justice Souter stated concerning the hybrid-rights doctrine:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a

> litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring in part and concurring in judgment).

While the Foundation strongly disagrees with any assertion that free exercise of religion is anything less than a fundamental right, we suggest that when a free exercise claim is asserted in tandem with a non-fundamental right, the combined weight of the two rights requires that they be treated together as a fundamental right entitled to strict scrutiny.

CONCLUSION

This case presents the Court with a special opportunity to correct an egregious Free Exercise and Free Speech violation and also to revisit *Smith* and clarify the true meaning of religious liberty. We urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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