No. 21-144

In the

Supreme Court of the United States

SEATTLE'S UNION GOSPEL MISSION,
Petitioner,

v.

MATTHEW S. WOODS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

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

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INTEREST 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, including the individual right of Free Exercise of Religion. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021); *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 565 U.S. 171 (2012), this Court ruled that *both* the Free Exercise Clause *and* the Establishment Clause prohibit the government from interfering with a religious group's decision to fire one of its ministers. *Id*. at 181. This ruling was followed by the decision in *Our Lady of Guadalupe School v. Morrissey-Beru*, where the Court held that the title of an employee's

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

position is neither necessary nor sufficient to invoke the "ministry exception" recognized in *Hosanna-Tabor*. 140 S.Ct. at 2064. "What matters, at bottom, is what an employee does." *Id*. Yet that still leaves the courts in the position of judging whether a particular practice or position is "religious." This invites judicial interference with religious belief and practice.

The Free Exercise Clause protects a right to practice one's religion. This right extends beyond mere worship. The founders understood this right to protect individuals in the performance of their duties to God. Protection of this right cannot be accomplished solely by the ministry exception. That exception is only required because earlier decisions of this Court demoted the Free Exercise of Religion to a right that only protects against discrimination against religion. *See Fulton v. City of Philadelphia*, 141 S.Ct. at 1877; *Masterpiece Cakeshop*, 138 S.Ct. at 1730-31; *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). But the right, as understood by the founding generation, protects the right to practice one's faith in daily life. Review should be granted in this case to reexamine the holding in *Employment Division v. Smith* and to return to protection of the free *exercise* of religion as originally understood.

REASONS FOR GRANTING THE WRIT

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

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").

It comes as no surprise, therefore, that the Free Exercise Clause, as understood by the founders, was meant to protect both religious conduct and belief. Michael W. McConnell, *The Origins and Historical*

Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488 (1990). At the time of the founding, belief in God also meant that one believed that he owed a duty to God that extended beyond worship. Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 B.Y.U.L. Rev. 163, 170 (1993). Examples of this understanding are found in the 1776 Virginia Declaration of Rights and the Oath Clause of the 1787 Constitution.

In the debate over the Virginia Declaration of Rights, James Madison argued that religion included the "duty we owe our Creator." Based on Madison's arguments, the thrust of the Virginia Declaration shifted from guarantying "tolerance" to instead recognizing a right to "free exercise of religion." *City of Boerne v. Flores*, 521 U.S. 507, 556 (1997) (O'Connor, J., dissenting). The founders expected religion to govern *conduct* in civil society. Mercy Otis Warren, History of the Rise, Progress and Termination of the American Revolution at 12 (1808) (Liberty Fund 1988).

The Oath Clause of the 1787 Constitution also shows that the Framers and Ratifiers expected citizens to carry their religion into their civic life. Mere private belief was not enough. Civil institutions relied on citizens acting on their beliefs.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of

> the several states, shall be bound by oath *or* affirmation, to support this Constitution.

U.S. Const., Art. VI.

Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or* Affirmation:--'I do solemnly swear (or affirm) ….'" U.S. Const. Art. II, §1.

The exception for affirmations in the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths. Matthew 5:34-37, The New Oxford Study Bible, (Michael D. Coogan, ed.) (Oxford 2007) at New Testament 15; James 5:12, The New Oxford Study Bible, *supra*, New Testament at 392. In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. *See Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia, J., dissenting). Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion.

Thus, this provision was an important addition to preserve religious liberty. Oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the 1787 Constitution was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. James Iredell, Debate in North Carolina Ratifying Convention, reprinted in 5 The Founder's Constitution (Phillip Kurland and Ralph Lerner, eds.) (Univ of

Chicago Press (1987)) at 89; Letter from James Madison to Edmund Pendleton, 8 The Documentary History of the Ratification of the Constitution, (John P. Kaminski, et al. eds.) (Univ. of Virginia Press (2009)) at 125. Only those individuals that adhered to this religious belief system were allowed to swear an oath. James Iredell, Debate in North Carolina Ratifying Convention, *supra*. *See United States v. Kennedy*, 26 F. Cas. 761 (D. Ill. 1843); *In re Williams*, 29 F. Cas. 1334, 1340 (E.D. Penn. 1839); *In re Bryan's Case*, 1 Cranch C.C. 151; 4 F. Cas. 506 (D.C. Cir. 1804).

The oath was an explicitly religious requirement and the exception providing for affirmations was to accommodate those who believed their religion prohibited them from swearing an oath. This requirement of an oath relied on an understanding that citizens would act, in their civic lives, consistently with their religious beliefs. Indeed, the Oath Clause presumed a constitutional requirement that individuals entering government service would affirmatively "exercise" their religion by swearing an oath. Yet, those whose religion prohibited the swearing of oaths would be excluded from public office under the new Constitution if there was no exception to the Oath Clause.

The Constitution, however, resolved this concern by permitting public office holders to swear an oath or give an affirmation. This provision was specifically targeted at the religious sects "conscientiously scrupulous" of swearing oaths. In the words of Justice Scalia, it exemplified "the best of our traditions." *Kiryas Joel*, 512 U.S. at 744 (Scalia, J., dissenting). This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable

with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

The Oath Clauses contained *specific* exceptions to protect the known religious dissenters at the time of the Framing. This does not mean that the failure to include other specific exemptions is evidence that the Framers only meant to protect Quakers and Mennonites (trusting to the political process to protect other Christian sects). There is no evidence to support that theory. Indeed, one argument supporting the call for a bill of rights was predicated on the need for a more general protection of religious liberty. "It is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as part of the national compact." Federal Farmer, Letters to the Republican, November 8, 1787, reprinted in 19 The Documentary History of the Ratification of the Constitution, *supra*, at 235.

II. The Court Should Grant Review to Reexamine the Holding in *Employment Division v. Smith*.

The Court's decision in *Employment Division v. Smith* rejected the founding generation's view of free exercise. The right to Free Exercise of Religion, Madison argued, precedes civil society and is superior even to legitimate government. Taking issue with *Smith* in

City of Boerne v. Flores, Justice O'Connor pointed out that

> Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.

City of Boerne v. Flores, 521 U.S. at 561 (O'Connor, J., dissenting).

The Founders appealed to "the Laws of Nature and Nature's God" to justify signing the Declaration of Independence. Decl. of Independence, ¶ 1, 1 Stat. 1. Free Exercise claims likewise entail duties to a higher authority. Because the Founders operated on the belief that God was real, the consequence of refusing to exempt Free Exercise claimants from even facially benign laws would have been to unjustly require people of faith to "sin and incur divine wrath." William Penn, *The Great Case for Liberty of Conscience* (1670) in WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN, introduction and annotations by Andrew R. Murphy (Indianapolis: Liberty Fund, 2002).

The founding generation did not conceive "of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law," *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting), but rather they understood the Free Exercise Clause as preserving a liberty for citizens to live out their faith. Madison observed that

a man's religion "cannot follow the dictates of other men." *Memorial and Remonstrance*, 5 THE FOUNDERS CONSTITUTION 83. Such trespasses on the actual Free Exercise of Religion by the majority are an illegitimate interference with that inalienable right and would effectively write the Free Exercise Clause out of the Constitution.

The Free Exercise Clause is meant to protect religious exercise, not just religious belief. Religion is not confined to mere belief or worship – it is how we live our lives. Christians and Jews believe that the Ten Commandments set out rules from God dictating their faith. Yet only the first three commandments are related to worship. The remaining seven inform faithful Jews and Christians how they are to live their lives and relate to each other. There is nothing in the original understanding of the Free Exercise Clause that would allow secular authorities to prohibit adherence to those commandments.

The "ministry exception" is only necessary because this Court decided in *Employment Division v. Smith* that laws of general applicability overrule the right of free exercise of religion. *Smith*, 494 U.S. at 882. Under *Smith* a pharmacist can be required to sell abortifacients, although such an action violates his religious beliefs. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2433 (2016). But for a statute enacted by Congress in reaction to the *Smith* decision, religious organizations could be compelled to provide insurance coverage for contraceptives and abortions – in violation of their religious doctrine. *Little Sisters of the Poor*, 140 S.Ct. at 2383.

The rule of *Smith* departs radically from the original understanding of the Free Exercise Clause. It is time that this Court reconsider that ruling.

CONCLUSION

Under *Smith*, the actual exercise of religion is limited to that ever-shrinking universe of activities not included within the sweep of a "generally applicable law." But religion is not something confined to mere private belief or a single day of worship. The founders understood that religion informs the way we live our lives. It reaches into just about every activity of our daily existence including the foods we eat, how we treat other people, how we raise our children, and the nature of our commitment to our spouses.

The Court should grant review in order to reconsider its holding in *Employment Division v. Smith* and to return the protection of Free Exercise of Religion that was enshrined in the First Amendment.

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