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 THE FREEDOM FROM RELIGION FOUNDATION, CENTER FOR INQUIRY, AND THE AMERICAN HUMANIST ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE[1]

Amici are national nonprofit organizations dedicated to promoting freedom of conscience. Amici work to protect the First Amendment and its core principles, which prohibit preferential treatment of religious organizations by the government.

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has more than 32,000 members, including members in every state and the District of Columbia. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state-church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is "Freedom depends on freethinkers," works to uphold the values of the Enlightenment.

The Center For Inquiry is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI

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[1] Rule 37 statement: All parties have consented to the filing of this brief by amici. No party's counsel authored any part of this brief. Amici alone funded this brief's preparation and submission.

encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and over 242 local chapters and affiliates across the country. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in this Court.

## SUMMARY OF ARGUMENT

This case concerns whether a religious organization that contracts with the government to provide public services may become easily exempt from neutral rules if the group claims a religious justification for failing to comply. To become exempt from otherwise applicable policy, Catholic Social Services (CSS) argues that this Court should overturn *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* is a continuation

of more than a century of Supreme Court decisions finding that neutral, and generally applicable laws apply to all citizens, including religious adherents.

CSS's attack on *Smith* is not just an attack on over a century of precedent, but also an attack on the rule of law itself. Allowing any individual or group to circumvent neutral and generally applicable laws on the basis of religious belief would harm the integrity of both our system of government and the American legal system.

What CSS really seeks is a system of judicially-created religious favoritism. This case does not come to this Court in a vacuum. It comes at a time when this Court has expanded privileges to churches and church-affiliated schools. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Any readily available exemptions from the laws governing these programs for religious groups would put them in a favored position and create an imbalance in constitutional rights. In keeping with bedrock principles underlying the Free Exercise Clause and the Establishment Clause, the appropriate standard in this case is religious neutrality.

## ARGUMENT

### *Employment Division v. Smith* should not be overturned.

The principles of *stare decisis* weigh strongly against overruling precedent where the departure from precedent is not supported by "special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations omitted). Because *Smith*, 494 U.S. 872, is the culmination of important precedent, supports the rule of law, and overturning it would harm religious liberty, *Smith* should not be overturned.

#### A. *Smith* is a continuation of important precedent that holds citizens equally accountable under neutral and generally applicable laws.

Overturning *Smith* would not merely overturn a single decision made in the 1990s, as its opponents claim; but would also destroy 112 years of precedent that makes up a significant portion of Free Exercise doctrine.

*Smith* is the culmination of over a century of Free Exercise cases that signify that religious belief does not readily exempt individuals or institutions from complying with the law. *Smith*'s critics—mostly religious organizations—argue that *Smith* radically departed from precedent that had applied strict scrutiny in Free Exercise cases. This is simply not true. A holistic examination of precedent leading up to *Smith* reveals two competing doctrinal threads used by this

Court when considering Free Exercise questions. One thread leads to the strict scrutiny approach that is advocated for by critics of the *Smith* decision. The *Smith* decision, however, traces back to a separate thread of Free Exercise doctrine, which embraced the notion that everyone is subject to the law. Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 Cardozo L. Rev. 1671, 1675 (2011).

The line of cases that led to the *Smith* decision begins as early as 1878, and continues through most of the 20th century in the lead-up to *Smith*. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Court first ruled that religiously-motivated behavior does not excuse a citizen from a generally applicable law—in that case, the practice of polygamy. Since then, this rationale has regularly applied to uphold a range of government actions that impact adherents of various religious beliefs. In 1944, this Court ruled that religion does not exempt parents from child labor laws, stating: "neither rights of religion nor rights of parenthood are beyond limitation." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In 1969, this Court ruled that a civil court can make determinations of a religious group's legal claims, so long as it does not attempt to be a church administrator, and instead applies general and religiously neutral legal principles. *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). Just two years later, the Selective Service registration requirement was upheld, regardless of certain sects' sincere religious

objection to acts of war. *Gillette v. United States*, 401 U.S. 437, 449–50 (1971). This ruling relied on the purpose of the Free Exercise clause being defined as government neutrality in matters of religion. *Id*. The government fails to fulfill that purpose by permitting a certain religious group exemptions to the law not available to other religious groups, or nonbelievers. *Id.* The same principles of government involvement in church affairs on a neutral basis as described in *Mary Elizabeth Blue Hull Memorial Presbyterian Church* were then reemphasized in a 1979 case, *Jones v. Wolf*. 443 U.S. 595 (1979) ("[A] State is constitutionally entitled to adopt a 'neutral principles of law' analysis involving consideration of the deeds, state statutes governing the holding of church property, the local church's charter, and the general church's constitution.").

These rationalizations for holding all citizens equally accountable under generally applicable laws continued into the 1980s, when a rapid sequence of cases all applied this logic in the decade leading up to *Smith*. In *United States v. Lee*, 455 U.S. 252 (1982), a member of the Old Order Amish was not permitted an exemption from paying social security and unemployment taxes. Despite the challenger's sincerely held religious objection, this Court was concerned that an excess of religious objections would make a religiously neutral law operationally defunct. *Id.* at 258.

In 1983, this Court upheld the denial of tax-exempt status to Bob Jones University due to its policy of racial discrimination. *Bob Jones University v. United*

*States*, 461 U.S. 574 (1983). This Court stated that even though racial discrimination may be a sincerely held religious belief, because the anti-discrimination laws in question were not targeted at those beliefs, but rather reflected a general change in public policy based on the protection of individual liberty, they were not in violation of the Free Exercise clause. *Id.* at 593–95.

This Court's trend of upholding generally applicable and neutral laws continued. In 1985, a religious ministry serving homeless individuals was held to the standards of the Fair Labor Standards Act of 1938 § 3(a), despite its work with the homeless being considered religious ministry. *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985). Since those involved in the ministry were considered employees under the same standards as if they worked for a secular employer, the employees were entitled to the same rights and protections. *Id*. In 1986, just four years before *Smith*, the government's power to regulate certain aspects of American children's lives for their safety and welfare once again came into play when the Court ruled that a child could not be exempted from being assigned a social security number based on the parents' religious beliefs. *Bowen v. Roy*, 476 U.S. 693 (1986).

All of these cases are tied together by the basic principle that the right to the free exercise of religion is not a reasonable defense for violating general and neutrally applicable laws. *Smith* is the end result of each of those cases building upon that foundational principle.

In cases that ask whether there should be an exception made to the law, the real question is what is the principle being promoted by the Court? Critics of the *Smith* decision point to a line of unemployment cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert*, as well as subsequent cases, all involved individuals who were terminated for religiously-motivated behavior and subsequently denied unemployment benefits. Such behavior included attending church on Saturdays (*Sherbert*, 374 U.S. at 399), objecting to participating in the manufacture of weapons (*Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981)), refusing to work certain hours for religious reasons (*Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987)), and refusing to work on Sundays in accordance with a sincerely held religious belief, even without belonging to a particular sect of any religion (*Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989)).

The claimants in *Smith* were denied unemployment benefits because they were fired for using peyote, an illicit substance, as a part of a religious ceremony. *Smith*, 494 U.S. at 874. The critical distinction between *Smith* and *Sherbert, Thomas, Hobbie*, and *Frazee* is that these earlier cases were not based on behavior that was, on its own, unlawful. There is no law prohibiting individuals from going to church on Saturdays, and any law that would do so would be clearly unconstitutional because it would be targeting a specific religion. The religiously-motivated behavior in *Smith*, in contrast, violated Oregon's drug laws, which broadly

criminalized the use of certain illicit substances. This distinction is important because, while *Smith* may share similar facts to these unemployment cases, the underlying principle the decision represents aligns much more precisely with the thread of cases beginning with *Reynolds*. Opponents of *Smith* additionally point to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which provided the Amish church with an exception to Wisconsin's compulsory education laws as an example of the application of strict scrutiny to a generally applicable law. This argument, however, ignores the broader history of Free Exercise doctrine that this Court has applied for over a century. Hamilton, *Employment Division v. Smith at the Supreme Court, supra*, at 1676.

The popular narrative surrounding *Smith* over the past three decades has made it out to be some sudden, terrifying, and radical shift away from an American legal tradition that almost always exempts any and all illegal behavior so long as it is based in religious belief. This is a false narrative that disregards a substantial line of judicial history. Justice Scalia wrote in his concurrence in *City of Boerne v. Flores*, in response to the dissent's criticism of *Smith*:

> The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. . . . The historical evidence put forward by the dissent does nothing to undermine the

> conclusion we reached in *Smith*: It shall be by the people.

521 U.S. 507, 544 (1997). An honest and complete look at the judicial history leading up to the *Smith* decision demonstrates that it has a strong basis in the American legal tradition and should continue to operate as such when the principles of a case align with the *Smith* thread.

### B. The rule of law requires all persons with religious beliefs to comply with neutral and generally applicable laws.

The rule of law is the cornerstone of American democracy and legal culture. The idea that no person is above the law is what has separated the United States from various monarchies and dictatorships since the country's inception. It has empowered Americans of all backgrounds to advocate for their own rights and allowed us to progress into a more equitable society where people can place their trust in the judicial system to produce fair results, regardless of the power or influence of their opponent. Allowing any individual or institution to claim broad exemptions from the law on the basis of religious belief has the potential to destroy the integrity of the American legal system as we know it, as well as to create a hierarchy of citizens whereby those who profess religious beliefs are granted more rights and privileges than those who do not.

In *Smith*, Justice Scalia highlighted this very principle:

> "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145 (1878)).

It is not difficult to conceptualize the impact of religion being a way for citizens to become this "law unto themselves." A church that practices the use of recreational opioids would likely have a strong appeal in areas heavily impacted by the opioid crisis. Children facing abuse or neglect could lose the protection of child services on the basis that their parents are raising them in line with the teachings of their faith. A church or mosque could receive government loans and refuse to pay interest on such loans because of the doctrines of their faith. A church could even potentially go so far as to criminally harass and abuse its former adherents, while claiming that such behavior is constitutionally protected.

These hypotheticals are not without basis in reality. Members of New York's ultra-orthodox Jewish community have been shamed, intimated, and harassed in order to prevent them from reporting cases of sexual

assault to the police.[2] Former members of the Church of Scientology have come forward with their accounts of abuse and harassment after leaving the church.[3] Without a consistent application of the rule of law, these, along with any number of historical atrocities committed in the name of religion, have the potential to occur with no legal repercussions or justice available for the victims.

From the beginning of American legal history, respect for the rule of law has not only withstood the test of time, but also, for the most part, withstood over two centuries of political polarization. By overturning *Smith*, and adopting an overarching doctrine that would permit widespread religious exemptions to the law, the Court would open a door to disastrous consequences. To uphold *Smith* is to uphold the rule of law, and to uphold the rule of law is to maintain the integrity of the American judiciary.

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[2] Sharon Otterman & Ray Rivera, *Ultra-Orthodox Shun Their Own For Reporting Child Sexual Abuse*, N.Y. Times (May 9, 2012), https://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html.

[3] Erin Jensen, '*Leah Remini: Scientology' Accuses Church of Harassment*, USA Today (Dec. 7, 2016), https://www.usatoday.com/story/life/2016/12/07/leah-remini-scientology-and-aftermath-episode-2-fair-game/95045858/.

### C. Overturning *Smith* would establish judicially-created religious favoritism, which would create a harmful redefinition of "religious liberty."

This case will be decided in the wake of this Court's recent expansion of privileges for churches and church-affiliated schools. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). This context is crucial to understanding the far-reaching redefinition of "religious liberty" that CSS and its supporting amici are seeking. Following this Court's expansion of privileges for religious organizations, religious groups now seek religious favoritism, which is contrary to bedrock First Amendment principles.

#### 1. This case coincides with recent demands for public funding of religious institutions.

Religious organizations have ushered in a wave of recent claims seeking direct access to government funding. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017), this Court ruled that Missouri could not exclude a church from a program that provided public funds for the resurfacing of children's play areas, despite that state's No Aid provision. In *Espinoza*, this Court mandated that Montana allow religious schools to receive money from a state voucher program, despite the No Aid clause in Montana's Constitution. 140 S. Ct. 2246 (2020). Churches and religious organizations have brought numerous other claims seeking payments from government

programs. *See*, *e.g.*, *Harvest Family Church v. Fed. Emergency Mgmt. Agency*, No. 4:17-cv-02662, 2017 WL 6060107, at *1 (S.D. Tex. Dec. 7, 2017), *order vacated, appeal dismissed*, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018) (Church suit seeking FEMA funding); *Ark Encounter, LLC v. Parkinson*, 152 F. Supp. 3d 880, 889 (E.D. Ky. 2016) (Holding that religious organization was entitled to tourism incentives); *Our Peculiar Family v. Inspire Charter Sch.*, No. 2:20-cv-00331, 2020 WL 3440562, at *1 (C.D. Cal. June 23, 2020) (Religious art instruction group sued charter school organization for declining to contract with the organization).

While *Espinoza* prohibited status-based exclusions of religious groups, the decision appears to permit exclusions of religious groups that fail to comply with program rules. The Court determined that "religious status" could not be used as a reason for excluding religious schools from the state's tax credit program. *Id.* at 2255. The Montana Department of Revenue had asserted that its denial of funding to religious schools actually promoted religious freedom. *Id.* at 2260. Montana's position was consistent with a historic understanding of the benefits of the separation between church and state.[4] A majority of this Court disagreed, finding that such a justification could not be used to exclude religious schools. *Id.* at 2261. The Court also noted, "A school, concerned about

[4] "[The First Amendment's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

government involvement with its religious activities, might reasonably decide for itself not to participate in a government program." *Id.*

The fact that some religious organizations may be unable or unwilling to participate in some government programs is not surprising. The Court recognized such a scenario in *Espinoza* by noting that a church-run school might not participate in a program if it was concerned about "government involvement" with its religious activities. *Id.* The Court's decisions in *Espinoza* and *Trinity Lutheran* provide an important backdrop to the claims by CSS in this case. Religious organizations are claiming extensive entitlements, which must be taken into account when determining whether they must be exempted from neutral and generally applicable rules within government programs.

### 2. CSS seeks religious favoritism, which harms religious liberty under the Free Exercise Clause and the Establishment Clause.

CSS claims it is entitled to a city contract to provide government services despite its discrimination against prospective foster parents and children in violation of the contract. CSS argues that it must be allowed to discriminate because its contract with the government involves religious activities. Brief for Petitioners, 22. This absurd position becomes a nationwide nightmare if the Court, in the aftermath of *Espinoza*, overturns *Smith* and finds that program regulations

simply do not apply to religious organizations if the organization says so. When the party to whom a rule applies decides whether the rule applies, there is no rule.

Requiring governments to fund religious organizations that fail to abide by program rules would be a disastrous one-two punch for religious liberty. If that happens, this Court would effectively mandate that religious organizations be allowed to participate in certain government programs (*Espinoza*) and also that religious institutions may easily violate program rules if they have a religious justification for doing so (CSS). The fundamental purposes of government programs and any underlying protections for service recipients would be thwarted. The rights of religious minorities and nonreligious service recipients would be significantly curtailed if religious actors may disregard discrimination rules.

Neutral laws that relate to a person's actions have long been understood to comport with both the Free Exercise Clause and Establishment Clause. Thomas Jefferson, in a letter to the Danbury Baptist Association in 1802—the letter in which he famously invoked the concept of a "wall of separation between Church & State"—wrote that the religious freedom principles enshrined in the newly penned Bill of Rights are premised in part on the idea "that the legitimate powers of government reach actions only, & not opinions. . . ." In *Reynolds*, the Supreme Court approvingly cited Jefferson's letter and remarked:

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

98 U.S. at 164. This Court has thus recognized a religious "neutrality" requirement in First Amendment cases that is inconsistent with a program of religious favoritism. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) ("'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion,' . . . favoring neither one religion over others nor religious adherents collectively over nonadherents.") (citing *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

If the Court ignores neutrality principles in favor of religious favoritism, it will be eviscerating religious liberty and harming persons who do not practice within the favored religious groups. One does not have to look past this case for an example of the injury caused by a government-contracted religious organization that plays by its own rules. In the past, CSS sought not only to exclude prospective LGBTQ foster parents, but also prospective parents lacking a "pastoral reference." JA 169-170; JA 215-216. CSS officials

testified that it would exclude families who were unable to obtain a "pastoral reference" letter proving that they are observant in a religion. *Id*. It was only after this requirement was revealed in court that CSS wrote a letter to the district court stating that it agreed to suspend the practice "in order to eliminate any potential issue regarding how the parties would operate under a preliminary injunction." JA 715.

In practice, CSS has instituted a policy of "religious liberty for me, but not for thee." If CSS prevails in this suit, it is possible that it would reinstitute the letter requirement, which presents a religious test for prospective foster parents. Not all religions have "pastors" or the equivalent, as this Court has recognized. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) ("[A]ttaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal."). It is also true that many persons who consider themselves religious do not regularly attend religious worship services. A recent PEW study found that 54 percent of adult Americans attend religious worship services a few times a year or less.[5] Hence, obtaining a letter from a pastor is not a straightforward task. More importantly, a significant portion of the population does not identify with any religion. The percentage of "religious unaffiliated"

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[5] *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CENTER (Oct. 17, 2019), *available at* https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

Americans, those who describe their religious identity as atheist, agnostic, or "nothing in particular," now stands at 26 percent. *Id.* A huge portion of the population (and prospective parents) would be excluded from a government foster care program if its contractors require pastoral references in order to participate.

It is antithetical to the concept of religious liberty to allow a government contractor that serves the public to discriminate on the basis of religion. The government itself perpetuates discrimination when it allows an organization that carries out essential social services with its backing to implement the organization's religious orthodoxy. This Court has not approved of such invidious discrimination through preferential treatment of religious actors. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Further, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431. If CSS is permitted to discriminate in this case, the rights of religious minorities and the nonreligious would be put in peril.

## CONCLUSION

For the above reasons, this Court should affirm the judgment of the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

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