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 FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach or have taught courses in constitutional law or the First Amendment and have devoted significant attention to studying the First Amendment. A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

To fulfill its obligation to care for children in need of a home, the City of Philadelphia operates a foster care program that contracts with private agencies to recruit, screen, and certify prospective foster parents. City Opp. 1. Private agencies receive taxpayer funds to perform this public function, and they must abide by Philadelphia's nondiscrimination policy, which requires that agencies give reasonable consideration to every prospective foster parent, including foster parents who happen to be in same-sex relationships. *Id.* This requirement applies to all agencies that carry out the city's foster program. *Id.*

Petitioners are a private agency, Catholic Social Services (CSS), that previously contracted with the city to assist in certifying prospective foster parents, and two foster parents who have previously worked with CSS. CSS alleges that it cannot abide by the city's nondiscrimination policy because its religious beliefs require it to turn away any prospective foster

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

parents who are in same-sex relationships. When Philadelphia informed CSS that it would no longer contract with CSS for its services as a foster family care agency because CSS would not comply with that policy, Petitioners filed suit arguing, among other things, that the Free Exercise Clause of the First Amendment entitles CSS to a foster contract with the city while it continues to discriminate against same-sex couples.

If accepted by this Court, Petitioners' theory would result in a sea change in long-standing First Amendment principles. The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. While the Clause does not permit the government to burden religious practice without justification, this Court has never held—in fact, it has explicitly declined to hold—that individuals' religious views can provide a justification for violating neutral, generally applicable nondiscrimination provisions. To now hold otherwise would riddle such nondiscrimination provisions with exemptions, making them protections in name only, and it would force governments to permit their agents to engage in discriminatory acts.

As *amici* know, such an expansive interpretation of the Free Exercise Clause conflicts with Founding-era history, as well as decades of this Court's precedents. First, the historical evidence does not support the view that individuals' Free Exercise rights entitle them to ignore neutral and generally applicable laws. Quite the contrary. Several Founding-era state constitutions included provisions that protected the free exercise of religion but also made clear that individuals were not permitted to violate the peace and safety of other citizens in the exercise of their religion. Some of those provisions explicitly provided that free exercise

protections did not entitle individuals to violate civil laws. Moreover, during the First Congress, legislators debated whether to include provisions in the Second Amendment and the Militia Bill to provide express exemptions for conscientious objectors, suggesting that those legislators believed that exemptions were something the *legislature* could provide as a policy matter but that they were not constitutionally required. As James Madison said, Americans deserve "immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights or the public peace*." Letter from James Madison to Edward Livingston (July 10, 1822), *in* Selected Writings of James Madison 306 (Am. Heritage Series, 2006) (emphasis added).

Reflecting this history, this Court held in *Employment Division v. Smith* that if prohibiting or burdening religious exercise "is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. 872, 878 (1990). Understanding that this decision forecloses the relief they seek, Petitioners instead propose a drastic reinvention of First Amendment law, asking this Court to overturn *Smith* and replace it with some form of heightened scrutiny that might require the government to show that every law that incidentally burdens religious exercise is the least restrictive means of furthering a compelling governmental interest.

The problem for Petitioners is that for this Court to rule in their favor, it would need to overrule not only *Smith* but also decades of precedents that balance individuals' interests in exercising their religious beliefs against the government's interest in enforcing generally applicable laws. As this Court has explained, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition

relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States*, 401 U.S. 437, 461 (1971). Rather, "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *see United States v. Lee*, 455 U.S. 252, 257, 259 (1982) ("Not all burdens on religion are unconstitutional," and "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.").

Notably, two lines of pre-*Smith* precedent foreclose the result that Petitioners seek. First, this Court has explained that "[t]he Free Exercise Clause simply cannot be understood to require the Government to *conduct its own internal affairs* in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (plurality opinion) (emphasis added); *see id.* ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . ."). "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

Second, well before *Smith*, this Court repeatedly held that antidiscrimination laws can satisfy even strict scrutiny because eradicating discrimination is a compelling governmental interest that cannot be achieved without prohibiting it across the board. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[T]he government has a fundamental, overriding interest in eradicating racial discrimination in

education," and "[t]he interests asserted by [religious schools that wished to discriminate] cannot be accommodated with that compelling governmental interest."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624, 628 (1984) (regulation prohibiting sex discrimination "plainly serves compelling state interests of the highest order," and "even if enforcement of the Act causes some incidental abridgment of [a plaintiff's] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes").

Combining these two lines of pre-*Smith* cases, it is clear that regardless of whether *Smith* itself was correctly decided, Petitioners do not have a First Amendment right to obtain an exemption from Philadelphia's policy prohibiting its foster-parent contractors from discriminating against same-sex couples. First, the government has substantial latitude to conduct its internal affairs as it sees fit, and once Philadelphia has chosen to require its contractors to provide foster services to same-sex and different-sex couples alike, Petitioners have no right to a city contract if they insist on violating this requirement. The City has an overriding interest in ensuring that its agents—whatever their beliefs—do not engage in discriminatory acts when acting on the government's behalf. Second, even if there were some limitations on what the government could require of its contractors, this Court has repeatedly stated that the least restrictive means of achieving the compelling governmental interest of eradicating discrimination is prohibiting discrimination across the board.

ARGUMENT

I. FOUNDING-ERA HISTORY DOES NOT SUPPORT PETITIONERS' CLAIM THAT THE FREE EXERCISE CLAUSE ENABLES INDIVIDUALS TO VIOLATE MOST NEUTRAL AND GENERALLY APPLICABLE LAWS.

The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. According to Petitioners, evidence from the Founding era shows that "the Free Exercise Clause embodied an affirmative freedom from government interference." Pet'r Br. 44. In fact, however, the historical evidence is at best ambiguous, and more likely suggests that "late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws." Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 916 (1992). As Thomas Jefferson explained, while individuals have "rights of conscience" under the First Amendment, an individual "has *no natural right in opposition to his social duties*." Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802) (emphasis added).

First, by 1789, a number of state constitutions included provisions protecting the free exercise of religion, but most of those provisions included "caveats [that] reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions." Hamburger, *supra*, at 918. Some constitutions did so explicitly: Maryland's 1776 constitution provided that "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*." Md. Decl. of Rights of 1776, art. XXXIII (emphasis added). Thus, Maryland's constitution specifically noted that a person's religious beliefs could not be used to gain an exemption from laws protecting others' civil rights.

Similarly, both New York's 1777 constitution and South Carolina's 1790 constitution provided that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed . . . : *Provided*, That the liberty of conscience . . . shall not be so construed as to excuse *acts of licentiousness*, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. of 1777, art. XXXVIII; S.C. Const. of 1790, art. VIII, § 1 (emphasis added). An act of licentiousness meant an act in "contempt of the just restraints of law, morality and decorum," 1 Webster's An American Dictionary of the English Language (1st ed. 1828) [hereinafter "Webster's American Dictionary"], so these state provisions did not permit religious adherents to gain exemptions from "just restraints of law." *See* R.I. Charter of 1663 (providing religious freedom so long as religious adherents do not "use[] this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others").

Other constitutions emphasized that rights to religious freedom could not be used to disturb the public "peace" or "safety." *See, e.g.*, N.H. Const. of 1784, part 1, art. V ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason" and may not be "hurt, molested, or restrained in his person" for doing so,

"provided he doth not *disturb the public peace*, or disturb others, in their religious worship." (emphasis added)).[2] Though some commentators have suggested that these provisions only prevented individuals from violating "a narrower subcategory of the general laws," such as "breach[ing] public peace or safety," Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1462 (1990), that interpretation does not accord with the definition of "peace" at the time. In the legal context, "peace" meant "[p]ublic tranquility; that quiet, order and security which is guaranteed by the laws; as to keep the peace; to break the *peace*." 2 Webster's American Dictionary, *supra*; *see* Hamburger, *supra*, at 918 n.15 (quoting *Queen v. Lane*, 87 Eng. Rep. 884, 885 (Q.B. 1704)) ("[E]very breach of a law is against the peace."). As one commentator has pointed out, "the criminal offenses over which common law courts had jurisdiction were said to be 'contra pacem,'" so "the phrase 'contra pacem' became associated with the notion of violation of law." Hamburger, *supra*, at 918. By referencing "peace," then, these caveats effectively prevented individuals from using religious beliefs to gain exemptions from civil laws.

In addition, many of the caveats to state free exercise provisions made explicit that religious adherents should be treated exactly the same as others, provided

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[2] *See also, e.g.*, Ga. Const. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion; provided it *be not repugnant to the peace and safety of the State*." (emphasis added)); Del. Decl. of Rights & Fundamental Rules of 1776, § 3 (providing freedom of religion "unless, under colour of religion, any man *disturb the peace, the happiness or safety of society*" (emphasis added)); Northwest Territorial Ordinance of 1787, art. I ("No person *demeaning himself in a peaceable and orderly manner* shall ever be molested on account of his mode of worship or religious sentiments in the said territory." (emphasis added)).

that they did not disturb the peace or safety of others. For instance, New Jersey's 1776 constitution provided that "all persons, professing a belief in the faith of any Protestant sect[,] who shall demean themselves peaceably under the government, as hereby established, . . . shall fully and freely enjoy every privilege and immunity, *enjoyed by others their fellow subjects*." N.J. Const. of 1776, art. XIX (emphasis added). And Delaware's 1776 constitution provided that Christians shall "enjoy *equal rights and privileges* in this state, unless, under colour of religion, any man disturb the peace, happiness or safety of society." Del. Decl. of Rights & Fundamental Rules of 1776, § 3. They did not provide that religious adherents should be entitled to special exemptions from neutral and generally applicable laws.

To be sure, some state constitutions did not say anything about exemptions from religious freedom provisions. *See, e.g.*, Va. Bill of Rights of 1776, art. 16. However, the vast majority of state constitutions included some caveat making clear that religious adherents must comply with at least some generally applicable laws. Thus, to the extent it is "reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses," *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting), these provisions indicate the Founding generation's understanding that an individual cannot use his religious belief to avoid complying with civil laws. *See* McConnell, *supra*, at 1456 ("[S]tate constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states.").

Second, debates during the First Congress demonstrate that while some legislators believed that accommodations for religious adherents might be good policy, they largely did not believe that the Free Exercise Clause required such accommodations. For instance, when Congress was considering the Bill of Rights, it considered including a clause in the Second Amendment that would have specified that "no person, religiously scrupulous, shall be compelled to bear arms." *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 182 (Helen E. Veit et al. eds., 1991). This proposal led to considerable debate: some argued that religious objectors should be required to pay money to avoid being required to bear arms in a militia, *id.* at 183, while others suggested that any exemptions should be crafted by the legislature, not baked into the constitutional text, *id.* at 184. Rep. Egbert Benson urged that a religious exemption "is no natural right" and would thrust the courts into "every regulation you make with respect to the organization of the militia," so such exemptions "ought to be left to the[] [legislature's] discretion." 1 Annals of Cong. 780 (1789). In the end, the Senate rejected the religious exemption clause. Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause* 106-07 (June 9, 2020) (forthcoming in 23 U. Pa. J. Const. L. (Nov. 2020)), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623251.

Similarly, when the First Congress considered a bill to organize the militia, there was robust debate over whether religious minorities should be granted the right to conscientiously object to military service. *See id.* at 107. Framers like James Madison believed that the bill should include a clause exempting "persons conscientiously scrupulous of bearing arms."

James Madison, Speech in Congress (Dec. 22, 1790), *in* Selected Writings of James Madison 193 (Am. Heritage Series, 2006). As Madison argued, an important American value was "secur[ing] the rights of conscience." *Id.* Madison's proposed amendment drew criticism from several colleagues who believed that conscientious objectors should not be given any exemption from military service, and in the end, it was rejected by an overwhelming margin. Heyman, *supra*, at 108-09.

Notably, throughout these two debates, no one "suggest[ed] that the Free Exercise Clause itself would require" a religious exemption, *id.* at 110—let alone that some type of strict scrutiny would apply to generally applicable laws that impinged on religious practice. Indeed, it would have been duplicative to have proposed amendments exempting conscientious objectors from these laws if the members of the First Congress believed that the First Amendment *already* provided such protection.

* * *

In short, Founding-era history is at minimum ambiguous and more likely supports the notion that the Framers did not expect religious adherents to receive exemptions from any generally applicable law that limited their religious practice.

II. PETITIONERS' THEORY FAILS UNDER CASE LAW THAT PREDATES THIS COURT'S DECISION IN *EMPLOYMENT DIVISION V. SMITH*.

In 1990, this Court issued its decision in *Employment Division v. Smith*, holding that if prohibiting or burdening the free exercise of religion "is not the object of [a law] but merely the incidental effect of a generally

applicable and otherwise valid provision, the First Amendment has not been offended." 494 U.S. at 878. Moreover, this Court subsequently explained that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).[3] Because these precedents would not permit Petitioners to violate Philadelphia's nondiscrimination policy, Petitioners argue that *Smith* "should be revisited and replaced," Pet'r Br. 2, with some form of "strict scrutiny," *id.* at 50.[4]

Overruling *Smith* and applying strict scrutiny to every law that burdens religious practice would, as another *amicus* explains, be deeply problematic, requiring courts to "routinely and definitively second-guess legislative judgments about the normative bases for a wide range of laws, and about the laws' practical necessity." Volokh *Amicus* Br. 1-2. And doing so would open up everything from tax laws to criminal laws to

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[3] In response to these decisions, Congress passed the Religious Freedom Restoration Act (RFRA), which states that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Several States have also passed similar statutes. *See State Religious Freedom Restoration Acts*, Nat'l Conference of State Legislatures (last visited Aug. 19, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[4] As Respondent City of Philadelphia notes, Petitioners are not entirely clear about what "strict scrutiny" might mean in this context, perhaps hoping that any application of that standard would have dramatic consequences. *See* Philadelphia Resp. Br. 50-51.

health and safety regulations to myriad exemptions. The United States agrees that this Court should not reconsider *Smith* in this case. U.S. Br. 9.

But there is another serious problem with Petitioners' argument: it fails under even pre-*Smith* case law. This Court has long explained that individuals' free exercise rights must be balanced against the government's interests in enforcing public health and safety laws, and long before *Smith*, the Court routinely upheld generally applicable laws that conflicted with individual religious beliefs. Notably, even though the Court purported to apply strict scrutiny in some of those earlier cases, "strict scrutiny" in this context has never been "fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring in the judgment); *see* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1412 (1992) (explaining that before *Smith*, "the free exercise claimant . . . rarely succeeded under the compelling interest test, despite some powerful claims").

Moreover, Petitioners' argument in this case conflicts with two specific lines of pre-*Smith* case law. One line makes clear that the government has substantial latitude to conduct its internal affairs without having to conform to every individual's religious views. Another line explains that nondiscrimination laws that impinge upon an individual's religious beliefs survive even strict scrutiny because the government has a compelling interest in eradicating discrimination, and there is no less restrictive way to achieve this goal than to prohibit discrimination across the board. Taken together, these cases make clear that, regardless of whether *Smith* was correctly decided, Petitioners have no free exercise right to discriminate against gay couples wishing to foster children in Philadelphia.

For that reason, this Court has no reason to—and should not—revisit *Smith* in this case.

1. For over a century, this Court has explained that while the First Amendment does not permit the government to burden religious practice without justification, it also does not grant individuals an exemption from every law that indirectly burdens religious activities. And although the Court has enunciated the standard of review in different ways over the years, it has never in practice applied the sort of strict scrutiny that Petitioners suggest this Court should apply to all cases of religious burden.

The Free Exercise Clause "'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017)); *Gillette*, 401 U.S. at 462 ("[T]he Free Exercise Clause bars 'governmental regulation of religious beliefs as such,' or interference with the dissemination of religious ideas." (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963))). However, this Court has repeatedly explained that the government has substantial latitude to regulate conduct in a neutral fashion that might indirectly burden religious practice.

For instance, in 1944, in *Prince v. Massachusetts*, the Court held that the First Amendment does not grant religious individuals who wish their children to sell religious magazines on the street an exemption from child labor laws that prohibit that conduct. 321 U.S. 158, 168-69 (1944). The Court acknowledged the "obviously earnest claim for freedom of conscience and religious practice," *id.* at 165, but explained that the "rights of religion" are not "beyond limitation," *id.* at 166; *see id.* ("[T]he family itself is not beyond

regulation in the public interest, as against a claim of religious liberty."). And with regard to child labor laws, the Court concluded that "[i]t is too late now to doubt that legislation appropriately designed to reach [that] evil[] is within the state's police power," even against a parent's claim "that religious scruples dictate contrary action." *Id.* at 168-69.

The Court repeatedly reiterated this principle in the decades prior to its decision in *Smith*. For instance, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), a plurality of the Court upheld a local prohibition on Sunday labor even though the law economically disadvantaged individuals whose religious beliefs demanded that they observe a day of rest on Saturday. *Id.* at 609 (opinion of Warren, C.J.).[5] The plurality explained that "if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." *Id.* at 607. This rule made sense, in the Court's view, because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," so it "cannot be expected . . . that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others." *Id.* at 606. And the Court articulated a relatively lenient standard for neutral laws that impinge upon religious practice: "[t]o strike down,

[5] Justice Frankfurter wrote a concurrence also upholding the restriction, explaining that religious freedom "does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation." *McGowan v. Maryland*, 366 U.S. 420, 461 (1961) (separate opinion of Frankfurter, J., joined by Harlan, J.).

without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.* Applying this standard, the Court held that the Sunday ordinance was justified by considerations such as limiting commercial noise and activity on one day of the week and ensuring ease of enforcement of the day-of-rest ordinance. *Id.* at 608-09.

Similarly, in *Gillette v. United States*, the Court upheld the application of the military draft to individuals who had religious objections to certain wars, explaining that "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." 401 U.S. at 461. The Court explained that the conscription laws "are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position." *Id.* at 462. And any "incidental burdens" on religion are "justified by substantial governmental interests that relate directly to the very impacts questioned." *Id.*; *see Jacobsen v. Commonwealth of Mass.*, 197 U.S. 11, 29 (1905) (recognizing that a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country").

Likewise, in *United States v. Lee*, the Court held that the government could require Amish individuals to pay social security taxes even though the payment of those taxes conflicted with their religious beliefs. 455 U.S. at 254. The Court explained that "[n]ot all burdens on religion are unconstitutional," and that

"[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Id.* at 257, 259; *see id.* at 261 ("[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."). The Court suggested a relatively high standard of review: that the government can "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 257. But it readily upheld the law, reasoning with regard to social security taxes that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 260. Thus, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261.

The Court has echoed the principle that not all laws must give way to religious beliefs even when it has ruled in favor of religious individuals seeking exemptions from governmental restrictions. For instance, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court held that students who were Jehovah's Witnesses could not be required to salute the American flag. *Id.* at 631. Notably, the Court emphasized that "[t]he freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual," and that if it did, that conflict would require a more careful judgment about "where the rights of one end and those of another begin." *Id.* at 630.

And in *Wisconsin v. Yoder*, the Court held that the First Amendment required that individuals be granted an exemption from compulsory school attendance laws if their religious beliefs dictated that their children attend at-home vocational training rather than public high school. 406 U.S. at 234. Importantly, the Court acknowledged that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." *Id.* at 220. But in that case, the evidence showed that "an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve th[e] interests" of the state to "prepare citizens to participate effectively and intelligently in our open political system." *Id.* at 221-22.

In short, again and again in the decades preceding *Smith*, this Court reiterated that religious beliefs must sometimes give way to generally applicable laws when those laws further valid governmental interests.[6] Though *Smith* offered a particularly lenient formulation of the test for determining when a governmental interest suffices to overcome a person's First Amendment rights, the Court permitted neutral laws to be applied against religious adherents long before *Smith*, and the Court did not in practice apply strict scrutiny in all of those cases.

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[6] Even after *Smith*, in the cases where this Court has limited government action on Free Exercise grounds, the disputes involved explicit religious discrimination, *see, e.g.*, *Espinoza*, 140 S. Ct. at 2255; *Trinity Lutheran*, 137 S. Ct. at 2021-22, or the Court concluded that government officials expressed animus toward religious entities, *see, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

2. Petitioners' argument that they deserve an exemption from Philadelphia's prohibition on discrimination in foster-parent selection also conflicts with two specific lines of pre-*Smith* cases.

First, before *Smith*, this Court had already explained that the government has substantial latitude to administer government programs without having to accommodate individual religious beliefs. In the Court's words, "[t]he Free Exercise Clause simply cannot be understood to require the Government to *conduct its own internal affairs* in ways that comport with the religious beliefs of particular citizens." *Bowen*, 476 U.S. at 699 (plurality opinion) (emphasis added).

For instance, in *Bowen v. Roy*, the Court held that the government could use social security numbers to provide certain state benefits to individuals even if the assignment of a social security number violated those individuals' religious beliefs. *Id.* at 701. As the Court explained, "[n]ever to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699. Said another way, "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700. Because that case concerned individuals' requests that the government change its internal operation of a governmental program, the Court held that "appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter." *Id.* at 700; *see Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the

individual, not in terms of what the individual can exact from the government.").[7]

Similarly, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court held that the Free Exercise Clause does not prohibit the government from permitting timber harvesting on a portion of federal land that had traditionally been used for certain American Indian religious purposes. 485 U.S. at 441-42. The Court explained that "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs," while "[o]thers will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion." *Id.* at 452. For that reason, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* Rather, "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over *public programs* that do not *prohibit* the free exercise of religion." *Id.* (emphases added).

Second, this Court has repeatedly stated that even when it applies strict scrutiny, eradicating discrimination is a paramount governmental concern, and that

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[7] Justice Alito has noted that in *Bowen*, "the objecting individuals were not faced with penalties or 'coerced by the Governmen[t] into violating their religious beliefs.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2390 n.5 (2020) (Alito, J., concurring) (quoting *Lyng*, 485 U.S. at 449). That, of course, is true here as well. CSS is not faced with penalties or coerced by Philadelphia into violating its religious beliefs. It is simply precluded from participating in a *government* program as a contractor unless it complies with the city's nondiscrimination policy.

prohibiting it across the board is the least restrictive method of achieving that goal. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1728 ("It is unexceptional that [a state] law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("The government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."). That was true well before *Smith*.

In *Bob Jones University v. United States*, for instance, the Court held that religious schools could be denied tax-exempt status if they engaged in discrimination against racial minorities, even if they believed such discrimination was required by their religious beliefs. 461 U.S. at 604. The Court said it would apply a heightened standard of review: a "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.* at 603 (quoting *Lee*, 455 U.S. at 257-58). However, even under that standard, the Court concluded that "[t]he governmental interest at stake . . . is compelling." *Id.* at 604. "[T]he government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history." *Id.*; *see id.* at 593-94 ("[D]iscriminatory treatment exerts a pervasive influence on the entire educational process." (quoting *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973))). That interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their

religious beliefs." *Id.* at 604. Moreover, the Court concluded that "[t]he interests asserted by [the religious schools] cannot be accommodated with that compelling governmental interest . . . and no 'less restrictive means' . . . are available to achieve the governmental interest." *Id.* (quoting *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)); *see Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (treating as "patently frivolous" the notion that a nondiscrimination law is "invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion").

The Free Exercise Clause is not the only context in which this Court has insisted that eradicating discrimination is a compelling governmental interest that can be accomplished only by prohibiting it across the board. The Court has also done so in the free speech context, where the Court applies the strictest level of scrutiny to laws that prohibit free expression and association. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (provisions prohibiting discrimination in public accommodations "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

For instance, the Court has repeatedly held that the government can deny schools benefits if they engage in discrimination. In *Runyon v. McCrary*, this Court held that a federal law prohibiting racial discrimination in the making of contracts could be constitutionally applied to bar private schools from choosing students on the basis of race. 427 U.S. 160, 176-77 (1976). As the Court noted, "the Constitution . . .

places no value on discrimination," *id.* at 176 (quoting *Norwood*, 413 U.S. at 469), and it assures Congress's authority to guarantee that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man," *id.* at 179 (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968)); *id.* at 176 ("It may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."). Much of what happens at private schools involves expression protected by the First Amendment, but that does not give such schools a license to discriminate.

This Court has also upheld state public accommodations laws that prohibit gender discrimination, rejecting arguments made by private clubs that they had a First Amendment right to keep out women. In *Roberts v. U.S. Jaycees*, this Court held that a Minnesota law prohibiting places of public accommodation from discriminating on the basis of gender did not violate a private organization's First Amendment right to expressive association. 468 U.S. at 612, 615. The Court emphasized that the law was a content-neutral regulation that "eliminat[es] discrimination and assur[es] . . . citizens equal access to publicly available goods and services." *Id.* at 624. "That goal, which is unrelated to the suppression of expression, *plainly serves compelling state interests of the highest order*." *Id.* (emphasis added). Moreover, "even if enforcement of the Act causes some incidental abridgement of [the organization's] protected speech, that effect is *no greater than is necessary to accomplish the State's legitimate purposes*." *Id.* at 628 (emphasis added). As the Court

reasoned, "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to [an organization] may have on the male members' associational freedoms." *Id.* at 623; *see Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (explaining that a "slight infringement" on plaintiffs' "right of expressive association . . . is justified because it serves the State's compelling interest in eliminating discrimination against women").

Further, this Court has upheld Title VII's ban on sex discrimination in employment, rejecting a law firm's First Amendment challenge. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII's prohibition on sex-based discrimination in hiring did not "infringe" a law firm's "constitutional rights of expression or association"). The work of law firms and other legal organizations often involves core First Amendment speech, *see Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963), but that does not mean lawyers can discriminate in hiring.

Notably, in none of these cases did the Court ever suggest that although the government can lawfully restrict the freedoms of expression and association when applying viewpoint-neutral antidiscrimination laws, the cases would have been decided differently if the plaintiffs had just included a free exercise claim as well. And that would have made no sense: incursions on the freedom of expression or association are subjected to at least as much, if not more, scrutiny than incursions on the free exercise of religion.

III. PETITIONERS HAVE NO FIRST AMENDMENT RIGHT TO DEMAND PARTICIPATION IN A GOVERNMENT CONTRACT DESPITE REFUSING TO COMPLY WITH THE GOVERNMENT'S NONDISCRIMINATION POLICY.

Applying these pre-*Smith* cases, it is clear that regardless of whether *Smith* was correctly decided, Petitioners do not have a First Amendment right to obtain an exemption from Philadelphia's policy prohibiting discrimination against same-sex couples in its own foster program.

First, this case concerns Philadelphia's operation of a government program in which the city contracts with third-party agencies to place children with foster families. As part of that program, the city has chosen to require that entities provide those services to same-sex and different-sex couples alike consonant with its constitutional obligations under the Equal Protection Clause. The government has significant latitude to conduct its program as it sees fit, and Petitioners are not entitled to an exemption from the nondiscrimination requirements of this government program in which they have chosen to participate. After all, even regarding commercial activity more generally, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. This is especially true when followers of a particular sect enter into a contract with the government to provide a *government* service. "The Free Exercise Clause simply cannot be understood to require the Government to *conduct its own internal affairs* in ways that comport with the religious beliefs of

particular citizens." *Bowen*, 476 U.S. at 699 (emphasis added).

Petitioners argue that Philadelphia's nondiscrimination rule "demands" that they "speak and act according to Philadelphia's beliefs," Pet'r Br. 17, or—even more outlandishly—that Philadelphia "is attempting to interfere with the internal decision-making of a church by instructing it how to interpret Catholic doctrine," *id.* at 22. This is wrong. Petitioners can speak or act in any way they want, and they can run their church affairs as they see fit. However, if they wish to contract with the government to carry out the *government's* foster care services, they must follow neutral rules prohibiting discrimination against potential foster families. "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over *public programs* that do not *prohibit* the free exercise of religion." *Lyng*, 485 U.S. at 452 (emphasis added); *see Bowen*, 476 U.S. at 700 ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."). Just as the government cannot "interfere with 'an internal church decision that affects the faith and mission of the church itself,'" Pet'r Br. 19 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)), an individual cannot interfere with a government decision about how to run a neutral and generally applicable government program.

Even if there were some limitations on what rules the government could impose on entities carrying out its own neutral and generally applicable programs, the government can surely impose a nondiscrimination provision under even strict scrutiny. This Court has repeatedly stated that "[t]he Government has a

fundamental, overriding interest in eradicating . . . discrimination." *Bob Jones Univ.*, 461 U.S. at 604; *see Roberts*, 468 U.S. at 628 (recognizing that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent"). "It is too late now to doubt that legislation appropriately designed to" prevent discrimination "is within the state's police power," even against a claim "that religious scruples dictate contrary action." *Prince*, 321 U.S. at 168-69. This interest is at its apex where, as here, the government insists that its own agents, including government contractors, respect the fundamental equality of all persons. Philadelphia has an interest of the highest order in ensuring that those it contracts with act, as the city must, consistent with the Constitution's promise of "equal dignity in the eyes of the law," *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

Petitioners' only response is to suggest that "strict scrutiny requires more than just asserting a non-discrimination interest," Pet'r Br. 34, but the only case it cites is *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). That case permitted an exemption to New Jersey's public accommodations law, which required the Boy Scouts, an "expressive association," *id.* at 653, to accept a gay man as a scoutmaster. But the Court upheld that exemption because the New Jersey law was "extremely broad," covering not only commercial entities providing a service to the public, but also "membership organizations such as the Boy Scouts." *Id.* at 657. The Court never suggested that preventing discrimination does not qualify as a compelling governmental interest in the provision of commercial services, let alone in the context of the government *itself*

providing a service like placing children with foster parents.

Moreover, this Court has repeatedly affirmed that prohibiting discrimination across the board is the least restrictive means available to further its interest in eradicating discrimination. *See, e.g.*, *Roberts*, 468 U.S. at 628 ("[E]ven if enforcement of the Act [prohibiting sex discrimination] causes some incidental abridgment of [the organization's] protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."). Petitioners suggest that it would be a less restrictive alternative for Philadelphia to permit Petitioners to discriminate against same-sex couples and then send them to another contracting foster agency that would not discriminate against them. Pet'r Br. 36. But this would have been true in every case in which the Court has refused to permit exemptions to nondiscrimination provisions. In *Bob Jones University*, racial minorities could have applied to other schools that did not discriminate against Black applicants. In *Roberts*, women could have joined social clubs that did not discriminate against women. Yet the Court upheld the application of those nondiscrimination provisions because prohibiting discrimination "vindicate[s] the deprivation of *personal dignity* that surely accompanies denials of equal access." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (emphasis added); *see Roberts*, 468 U.S. at 625 (discrimination is a "stigmatizing injury").

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In short, Petitioners fare no better under pre-*Smith* case law than they do under *Smith*. The First Amendment does not permit them to avoid complying with a nondiscrimination policy that Philadelphia has

imposed on agencies that wish to carry out the government's foster care program.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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