
No. 25-1210

In the Supreme Court of the United
States

DAVID PETERSEN, ET AL.,
PETITIONERS,

v.

SNOHOMISH REGIONAL FIRE AND RESCUE,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

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

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STATEMENT OF INTEREST OF AMICUS¹

Amicus Curiae Foundation for Moral Law is a nonprofit organization based in Montgomery, Alabama, to promote strict interpretation of the Constitution as intended by its Framers, including full protection for the First Amendment right of free exercise of religion.

SUMMARY OF ARGUMENT

At first glance, this Court might be inclined to dismiss this Petition as “just another Covid vaccination case, important in 2020 but no longer relevant today.”

But time of crisis are not ideal for setting lasting precedents. And a major issue involving employees who held religious objections to Covid vaccinations – whether the Title VII “undue hardship” requirement means actual undue hardship or only reasonable concern that there will be undue hardship – not only remains unresolved but is the subject of a

¹ Pursuant to Rule 37.6, *Amicus Curiae* certifies that all parties have received at least ten (10) days’ notice of the Foundation’s intent to submit this amicus brief and that no party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amicus Curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

3-3 circuit split. Now is the time to resolve this issue.

Petersen and his fellow firefighters brought their action under Title VII of the Civil Rights Act of 1964, and most of the legal argumentation on both sides has therefore centered on the interpretation of Title VII and the “undue burden” requirement.

The Foundation agrees with Petitioners that earlier jurisprudence focusing on *de minimus* burdens failed to capture the true force and effect of the undue burden requirement and that *Groff v. DeJoy*, 600 U.S. 447 (2023), came much closer to expressing the true meaning of the clause.

The Foundation further agrees with Petitioners that a 3-3 circuit split exists over the undue hardship standard; the Third, Seventh, and Eighth Circuits have interpreted it as requiring actual hardship, while the First, Sixth, and Ninth Circuits require only a reasonable concern that the employer will suffer an undue hardship. The Foundation also agrees with Petitioners that the issue is important, recurring, and clearly presented in this case, and that this Court should grant certiorari to resolve this split so that employers and employees across the nation will know their rights and responsibilities.

Rather than restating Petitioners’ arguments, the Foundation will focus upon an essential underlying fact: The purpose of the religion provisions of Title VII is to apply the protection of the Free Exercise Clause of the First Amendment to employer/employee situations, Title VII jurisprudence therefore cannot be separated from Free Exercise jurisprudence, and the Free Exercise Clause is the

most fundamental right given to us by God and guaranteed to us by the U.S. Constitution. These considerations weigh directly on the proper interpretation of undue burden.

ARGUMENT

I. The Framers held a jurisdictional view of Church and State.

It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

James Madison, *A Memorial and Remonstrance*, 1785, Works 1:163

As Jefferson recognized in the Declaration of Independence, this nation is founded on the "laws of nature and of nature's God," and the "unalienable" rights to "life, liberty, and the pursuit of happiness" are "endowed by [the] Creator."

The Framers viewed church and state as separate institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and state," he meant a jurisdictional separation.

II. The Framers derived their understanding of church/state relations from the Bible and the Judeo-Christian tradition.

The Framers did not view Church and State simply as man-made institutions. They did not accept Rousseau's notion that the State is above the Church and above all other institutions.² Like the people of their time and those of preceding generations, they understood Church and State as divinely-established institutions, each with distinctive authority and distinctive limitations.

This institutional separation goes back to the ancient Hebrews. Going back to the time of Moses and perhaps further back to the time of Jacob's sons Judah and Levi, the Levites (descendants of Levi, the Tribe of Levi) served as Israel's religious authority, the priests. From the time of King David onward, Israel's kings came out of the tribe of Judah. These were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the functions of the priesthood. For

² Dr. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, 189 (1984) 189-97, studied citations of European thinkers by American writers 1760-1805 and demonstrated that American writers most frequently cited Montesquieu (8.3%), Blackstone (7.9%), and Locke (2.9%), and cited much less frequently (0.9%). John Adams wrote, "If ever there existed a wise fool, a learned idiot, a profound deep-thinking coxcombe, it was David Hume. As much worse than Voltaire and Rousseau as a sober decent libertine is worse than a rake."

John Adams, handwritten notes on his copy of *Historical and Moral View of the Origin and Progress of the French Revolution*, reprinted in Zoltan Haraszti, *John Adams and the Prophets of Progress* (Cambridge: Harvard University Press, 1952), p. 187.

example, when King Saul offered sacrifices instead of waiting for Samuel the priest, God cut off his descendants from the kingship forever. When King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, eighty "valiant" priests withstood him, saying

"It appertaineth not to thee, Uzziah, to burn incense to the Lord, but to the priests the sons of Aaron, that are consecrated to burn incense: go out of the sanctuary; for thou hast trespassed." (II Chronicles 26:16-18). When Uzziah persisted, God smote him with leprosy, and he remained a leper all the days of his life (II Chron 2:19-23).

This institutional separation continued in the New Testament. When the Pharisees asked Jesus about paying taxes to the Roman government, He pointed to Caesar's image on a coin and answered, "Render therefore to Caesar the things which are Caesar's; and to God, the things that are God's." (Matthew 22:21). Lord Acton said of Christ's answer,

It was left for Christianity to animate old truths, to make real the metaphysical barrier which philosophy had erected in the way of absolutism. The only thing Socrates could do in the way of a protest against tyranny was to

die for his convictions. The Stoics could only advise the wise man to hold aloof from politics and keep faith with the unwritten law in his heart. But when Christ said "Render unto Caesar the things that are Caesar's and unto God the things that are God's," He gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but He also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.³

It is neither surprising nor unreasonable to conclude that the Framers derived their understanding of church / state relations from religious sources. On October 4, 1982, Congress passed and the President then signed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening clause of the bill reads:

Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of

³ Lord Action, quoted by Gertrude Himmelfarb (London, 1955) p. 45; in EIL. Hebden Taylor, *The Christian Philosophy of Law, Politics, and the State* (Nutley, NJ: Craig Press, 1966) pp. 445-46.

Independence and the Constitution of the United States...

The Bible, coupled with Church and Jewish tradition, is therefore relevant to the Framers' understanding of Church and State.

From the beginning, Church scholars understood that Church and State were distinct kingdoms, but they sometimes differed as to the relationship between them. Some, like the North African lawyer and Church Father Tertullian (c. A.D. 200), asked, "What concord hath Athens with Jerusalem?" Augustine of Hippo (AD 356-430), whose *Civitas Dei* "set the very course of Western Civilization,"⁴ wrote of the City of God and the City of Man, although he did not precisely identify the City of God as the Church or the City of Man as the State.

Still others, such as John of Damascus (ca. 670 -- ca. 750), declared that

Kings have no right to make laws for the church. As the apostle says, "God has appointed in the church first apostles,

⁴ Martin Luther, quoted at www.augnet.org/http://grantian.blogspot.com/2006/11/tale-of-two-men.html.

Encyclopedia Britannica, <https://www.britannica.com/topic/The-City-of-God>, describes Augustine's masterpiece as "one of the most influential works of the Middle Ages" and says it "would be read in various ways, at some points virtually as a founding document for a political order of kings and popes that Augustine could hardly have imagined. Indeed, his famous theory that people need government because they are sinful served as a model for church-state relations in medieval times. He also influenced the work of St. Thomas Aquinas and John Calvin and many other theologians throughout the centuries."

second prophets, third pastors and teachers" (I Cor. 12:28) "for the equipment" of the church (Eph 4:12). No mention of kings!

...Saul tore the cloak of Samuel, and what became of him? God tore the kingdom from him, and gave it to David, a man of self-restraint. Jezebel pursued Elijah, and the swine and dogs licked up her blood, and the prostitutes washed in it. ... Herod destroyed John, and was eaten by worms and perished.

...[H]e said, "Give to Caesar what is Caesar's, and to God what is God's (Matthew 22:15-21). We defer to ou, o king, in the affairs of life, in tax and revenue and privileges, and in all of our affairs that are your responsibility. In the management of the church we have pastors who have spoken the word of God to us, and have given form to the law of the church.⁵

The Protestant Reformation flourished in Northern Europe in the 1500s, a century before the settlement of the English colonies in North America. The Reformers' understanding of the Two Kingdoms of Church and State is therefore instrumental in understanding the views of the Framers. Most of them were children of the Reformation,⁶ and as such

⁵ John of Damascus, *Second Speech against Those Who Reject Images*, reprinted in O'Donovan, 213-15.

⁶ As Dr. M.E. Bradford established in *A Worthy Company: Brief Lives of the Framers of the United States Constitution*

they understood that God had established two kingdoms, Church and State, each with distinctive authority. As Luther said,

...these two kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other.⁷

(Marlborough, ND: Plymouth Rock Foundation, 1982) pp. iv-v, the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. And as Dr. Loraine Boettner observed in *The Reformed Doctrine of Predestination*,

It is estimated that of the 3,000,000 Americans at the time of the American Revolution, 900,000 were of Scotch or Scotch-Irish origin, 600,000 were Puritan English, and 400,000 were German or Dutch Reformed. In addition to this the Episcopalians had a Calvinistic confession in their Thirty-nine Articles, and many French Huguenots also had come to this Western world. Thus we see that about two-thirds of the colonial population had been trained in the school of Calvin. (p. 382)

Yale History Professor Sydney E. Ahlstrom places the figure even higher: "If one were to compute such a percentage on the basis of all the German, Swiss, French, Dutch, and Scottish people whose forebears bore the 'stamp of Geneva' in some broader sense, 85 or 90 percent would not be an extravagant estimate." Sydney E. Ahlstrom, *A Religious History of the American People* (Garden City, NY: Doubleday & Co., Image Books, 1975) I:169.

⁷ Martin Luther, "Secular Authority: To What Extent It Should Be Obeyed," 1523, reprinted in *Works of Martin Luther* (Grand Rapids: Baker Book House, 1982), III:237.

And as John Calvin stated in his *Institutes of the Christian Religion*,

Let us first consider that there is a twofold government in man: one aspect is spiritual, whereby the conscience is instructed in piety and in reverencing God; the second is political, whereby man is educated for the duties of humanity and citizenship that must be maintained among men. These are usually called the 'spiritual' and the 'temporal' jurisdiction (not improper terms) by which is meant that the former sort of government pertains to the life of the soul, while the latter has to do with the concerns of the present life - not only with food and clothing but with laying down laws whereby a man may live his life among other men holily, honorably, and temperately. For the former resides in the inner mind, while the latter regulates only outward behavior. The one we may call the spiritual kingdom, the other, the political kingdom. Now these two, as we have divided them, must always be examined separately; and while one is being considered, we must call away and turn aside the mind from thinking about the other. There are in man, so to speak, two worlds, over

which different kings and different laws have authority.⁸

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the legal and political thinking of the Reformers, of the colonists, and of the Framers of the Declaration of Independence, the Constitution, and the Bill of Rights. As Yale History Professor Sydney E. Ahlstrom has noted,

No factor in the "Revolution of 1607-1760" was more significant to the ideals and thought of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church. Just as Protestant convictions were vitally related to the process of colonization and a spur to economic growth, so the churches laid the foundations of the educational system, and stimulated most of the creative intellectual endeavors, by nurturing the authors of most of the books and the faculties of most of the schools. The churches offered the best opportunity for architectural expression and inspired the most creative productions in poetry, philosophy, music, and history.⁹

⁸ John Calvin, *Institutes of the Christian Religion*, 1537, III:19:15.

III. The Framers' statements and actions reflect the Bible's jurisdictional understanding of Church/State relations.

Long before Jefferson would speak of the "wall of separation between church and state," Rhode Island founder Roger Williams wrote of a "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world,"¹⁰ and George Washington declared to the General Committee of United Baptist Churches in Virginia that "no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution."¹¹

Reflecting this same jurisdictional view of Church and State, James Madison as President vetoed "an Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia":

Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions,

⁹ Sydney E. Ahlstrom, *A Religious History of the American People* (Doubleday, 1975), I:423.

¹⁰ Roger Williams, quoted by Lynn R. Buzzard and Samuel Ericsson, *The Battle for Religious Liberty* (Elgin, Illinois: David C. Cook, 1982), 51.

¹¹ George Washington, May 1789; quoted by Paul F. Boller, Jr., *George Washington and Religion* (Dallas: Southern Methodist University Press, 1963) 169-70.

and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics, as the regulations established are generally unessential and alterable according to the principles and canons by which churches of that denomination govern themselves, and as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences

applicable to a violation of them according to the local law.¹²

Madison's veto was consistent with his jurisdictional view of Church and State. In his "Memorial and Remonstrance Against Religious Assessments" (1785), he objected to a proposed tax for the support of Christian churches and pastors, not because he opposed the Church, but because Christianity is "the Religion which we believe to be of divine origin." Christianity, he said, is a religion of "innate excellence" and a religion that enjoys the "patronage of its Author." Christianity therefore does not need the aid of the State:

...the establishment proposed by this Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself: for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid [the New Testament period and shortly thereafter], but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a religion not invented by

¹² James Madison, Veto Message, February 21, 1811, <http://baptiststudiesonline.com/wp-content/uploads/2018/03/Madison-VetoMessageCongress.pdf>

human policy, must have pre-existed and been supported, before it was established by human policy.¹³

Jefferson's "wall of separation" must be viewed in this context, as a jurisdictional separation between the two kingdoms, Church and States. As he wrote in 1808,

I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must rest with the States, as far as it can be in any human authority.¹⁴

¹³ James Madison, "Memorial and Remonstrance Against Religious Assessments," 1785, reprinted in Norman Cousins, *"In God We Trust"* (New York: Harper & Brothers, 1958) 308-14. <https://founders.archives.gov/documents/Madison/01-08-02-0163>

¹⁴ Thomas Jefferson, Letter to Samuel Miller, January 23, 1808; "Thomas Jefferson on Separation of Church and State," <https://candst.tripod.com/tnppage/qjeffson.htm>. Jefferson's closing statement that authority over churches "must rest with the States, as far as it can be in any human authority," reflects

The first Supreme Court Establishment Clause case, *Everson v. Board of Education*, 330 U.S. 1 (1947), is consistent with this jurisdictional understanding of the kingdoms of Church and State. As the Court explained at 18 (emphasis added):

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.*

his belief that the First Amendment restricts only the federal government and not the States. Rightly or wrongly, the Supreme Court has incorporated the First Amendment and applied it to the States in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Everson v. Board of Education*, 330 U.S. 1 (1947), and subsequent cases.

Everson did not address issues of strict scrutiny, compelling interest, or rational basis. Nor did the Court discuss specific types of state regulation of churches. Rather, the Court stated as an absolute that "neither a state nor the Federal Government" can "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."

After providing that "Congress shall make no law respecting an establishment of religion," the First Amendment adds an equally important clause, "or prohibiting the free exercise thereof."

Like the Establishment Clause, the Free Exercise Clause is also jurisdictional, because there is a jurisdiction -- "our duty to God and the manner of discharging it" -- that is beyond the jurisdiction of government.

IV. This jurisdictional understanding of church/state relations also applies to the Free Exercise Clause.

The Framers held a jurisdictional understanding of Free Exercise. Certainly, foremost among the rights included in the term "liberty" in the Declaration of Independence is the right to free exercise of religion.

As the Declaration makes clear, this nation was founded upon Higher Law. The Supreme Court said in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being." The Court found that recognition completely compatible with statements

such as "We guarantee the freedom to worship as one chooses" (314), and "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal" (312).

And in *McGowan v. Maryland* (1961), Justice Douglas, the author of the *Zorach* opinion, stated in dissent:

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

This is entirely consistent with Madison's understanding of free exercise. As he said in the Remonstrance,

We remonstrate against the said Bill,

Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [quoting from

Article XVI of the Virginia Declaration of Rights of 1776]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True

it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.¹⁵

Establishment and Free Exercise go together. In the term "free exercise thereof," the word "thereof" refers back to "religion" in the Establishment Clause. The very punctuation of the First Amendment sets these clauses apart from the rest. There are three parts to the First Amendment, separated by semicolons, and each of these parts consists of two clauses, separated by commas:

"Congress shall make no law"

- (1) "respecting an establishment of religion, or prohibiting the free exercise thereof;"
- (2) "or abridging the freedom of speech, or of the press;
- (3) "or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Note, also, that the one verb "abridging" introduces the last two parts and sub-parts, thus further setting these last four clauses from the first two, the religion

¹⁵

Madison, Remonstrance,
<https://founders.archives.gov/documents/Madison/01-08-02-0163>

clauses which contain the verbs "respecting" and "prohibiting."

Jefferson's words, quoted earlier, pertain to both establishment and free exercise:

I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or *exercises*. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. *Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government.* It must rest with the States, as far as it can be in any human authority.
(emphasis supplied)

In *United States v. Macintosh*, 283 U.S. 605, 633-35 (1931), the Court

recognized in a case involving a person seeking citizenship who held conscientious

objections to military service:

Much has been said of the paramount duty to the state, a duty to be

recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637: 'The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is

axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has

the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence.

The Court said the conflict between the power of the state and what the person believes to be his duty to God must be resolved on jurisdictional grounds. In areas in which the state has jurisdiction, its needs must take precedence, but in areas in which the state does not have jurisdiction, the individual conscience must take precedence.

In 2020 and 2021, the Supreme Court decided three cases which involved the closure of churches because of COVID-19, and ruled in all three cases that the Governors of New York and California violated the free exercise clause: *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 63 (Nov. 25, 2020), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 719 (Feb. 5, 2021), and *Tandon v. Newsom*, 141 S. Ct. 1294, 1294 (April 9, 2021).

This is not surprising. Over the years, the courts have wrestled with what practices are protected by the Free Exercise Clause. But one thing has been clear from the beginning: If the Free Exercise Clause protects nothing else, it protects both the right to go to church and worship and the right to believe and speak in accordance with one's religious convictions.

Even the concurrence in *Smith* recognized that

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁶

V. The same considerations that govern judicial interpretation of the Free Exercise Clause also govern the interpretation of the religion clauses of Title VII.

When Congress passed Title VII of the Civil Rights Act of 1964, it included a prohibition against religious discrimination, but it did not define “religion” or “religious discrimination.” The EEOC issued guidelines defining religious discrimination as failing to accommodate an employee’s religious practices. But in *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971), this Court affirmed without opinion a Sixth Circuit opinion that seemed to undercut the EEOC guidelines by holding that Title VII prohibited only intentional discrimination and did not require employers to make special concessions for employees because of their religious beliefs, *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 328, 334.

¹⁶ *Id.* at 903 (O’Conner, J., concurring).

In 1972, directly responding to *Dewey*, Congress amended Title VII. The amendments included Section 701(j) which provides that

'[r]eligion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

As Congressman Carl Perkins (D-KY) explained, "The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion because of religion such as those challenged in *Dewey v. Reynolds Metals Company*."¹⁷

The congressional amendment came while the Supreme Court was applying the compelling interest test to free exercise cases as in *Sherbert v. Verner*, 374 US. 398 (1963)¹⁸ and in the same year the Supreme Court applied the compelling interest test to the free

¹⁷ Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 1845.

¹⁸ *Sherbert* was decided in 1963, one year before the adoption of the Civil Rights Act of 1964. The case held that South Carolina violated the Free Exercise Clause of the First Amendment by denying unemployment benefits to a Seventh-Day Adventist who was fired for refusing to work on Saturday. The Free Exercise Clause applied based upon its incorporation by the Due Process Clause of the Fourteenth Amendment, because the case involved "state action" as South Carolina was a party.

exercise case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) does not change the intent of Congress in 1972.

Although the Foundation is skeptical of court-created “tests,” we present these cases as evidence that Congress intended a strong interpretation of the religion clauses of Title VII and intended that Free Exercise jurisprudence be the basis for interpreting the religion clauses of Title VII. Indeed, it would not be too strong to say that Congress intended that the full force and effect of the Free Exercise Clause should apply to religious discrimination in employment under Title VII.

CONCLUSION

Across the nation, millions of employers and employees, as well as courts at many levels, are confused about their rights and responsibilities under Title VII because of this circuit split. People’s jobs, as well as their lives and religious liberties, could turn upon whether Title VII requires “actual hardship” or only “reasonable concern.”

Although the issue of Covid vaccination seems (for now) relegated to the past, this lingering case presents the Court with an ideal opportunity to resolve this dispute. Times of crisis are not the ideal time to make hasty lasting precedents. The ideal time is now, when the issue is relatively calm for the present.

The Foundation urges this Court to grant this petition for writ of certiorari.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the foregoing Brief of *Amicus Curiae* Foundation for Moral Law in Support of Petitioners contains 5,944 words, excluding the parts of the document exempted by Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ____ day of _____,
20__.

Respectfully submitted,

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