No. 19-1413

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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303 CREATIVE, LLC, and LORIE SMITH,
Plaintiffs-Appellants,
v.
AUBREY ELENIS, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:16-cv-02732-MSK-CBS (before the Hon. Marcia S. Krieger)

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national nonprofit public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation is interested in this case because it believes Lorie Smith and 303 Creative LLC have a right to free exercise of religion under the First Amendment to the United States Constitution, that this is the first and foremost right granted by God and protected by the Constitution, that this right includes the right to design websites that promote the traditional Christian view of marriage as between one man and one woman, and that this right includes the right to refuse to design websites that promote a view of marriage that is contrary to the traditional Christian view of marriage.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Foundation hereby discloses that it is a nonprofit corporation and that it has no parent corporations. Because the Foundation is a nonprofit corporation, no corporation holds 10% or more of an ownership interest in the Foundation.

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[1] All parties have consented to the filing of this brief. Rule 29, FRAP. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In the case below, the trial court turned a deaf ear to the impassioned pleas of a Christian artist, who objects to designing websites that promote same-sex marriage because of her sincere and fundamental religious beliefs. In so doing, the court neglected the rich history of religious liberty that underlies the First Amendment and instead misapplied a discredited case that denies petitioners the free-exercise protection they deserve.

Although the Foundation supports all of Lorie Smith's arguments, we will focus upon free exercise of religion and involuntary servitude.

ARGUMENT

I. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded the highest protection.

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

The foundational document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and says the rights of human beings are "unalienable" because they are "endowed by their Creator." Justice Douglas wrote in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952)

that "We are a religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

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

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

(A) The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentences of the statute stated:

> Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States....

Professors Donald S. Lutz and Charles S. Hyneman conducted a thorough search of the writings of leading American political figures from 1760-1805 and found that 34% of all quotations in the Framers' writings came from the Bible.[2]

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

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

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[2] Donald S. Lutz, "The Relative influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review* 189 (1984), 189-97; see also, Charles S. Hyneman and Donald S. Lutz, *American Political Writing during the Founding Era,* Vols. I & II (Liberty Press 1983); Eran Shalev, *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War* (Yale University Press 2013).

"Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage" (Galatians 5:1).

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

(B) The Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave some recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it stood against the power of the State.[3]

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[3] See generally, Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999); James

Martin Luther (1483-1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[4]

In his letter "Temporal Authority: To What Extent It Should Be Obeyed," Luther declared, "The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul."[5]

Calvinists (who constituted a strong majority of America's early settlers and the founding generation[6]) likewise believed in liberty of conscience. The Westminster Confession of Faith, drafted by the Westminster Assembly in 1643 at the call of the Long Parliament, declares in Chapter XX, Section 2:

> II. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience:

J. Walsh, *The Thirteenth, Greatest of Centuries* 2nd ed., Catholic Summer School Press 1909), 338-91.

[4] Martin Luther, 1521;

[5] Martin Luther, "Temporal Authority: To What Extent It Should Be Obeyed," reprinted in Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999) 591.

[6] Dr. Loraine Boettner, *The Reformed Doctrine of Predestination* (Presbyterian and Reformed 1972) 382.

> and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[7]

The following year (1644) John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholics, Anglicans, and Royalists, but he defended freedom of conscience, and he declared in a speech for Parliament:

> What should ye do then, should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this city? ... Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[8]

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

> ...a man's religious views -- or lack of them -- are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[9]

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[7] Westminster Confession of Faith (1643), Chapter XX, Section II; reprinted in *Trinity Hymnal* (Great Commission Publications 1990, 1999) 860.
[8] John Milton, *Areopagitica* (1644); reprinted in The Online Library of Liberty; https://oll.libertyfund.org/quotes/51
[9] John Bunyan, October 3, 1660; Transcript of Trial before Judge Wingate; reprinted in *John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty

John Locke (1632-1704), a major influence on the American founding generation,[10] wrote that "religion is the highest obligation that lies upon mankind,"[11] that "there is nothing in the world that is of any consideration in comparison with eternity,"[12] that "the care of each man's salvation belongs only to himself,"[13] and that no life lived "against the dictates of his conscience will ever bring him to the mansions of the blessed."[14] The son of a Puritan lawyer, Locke was very much influenced by the Puritan tradition.

(C) The Colonial Foundations of Religious Liberty

Van Til says "Liberty of conscience triumphed in America, while it failed in England."[15] The colonial charters and constitutions at the time of the American War for Independence clearly recognize and protect liberty of conscience, although some do so within the bounds of Christian orthodoxy:

Pennsylvania:

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[10] See Lutz and Hyneman, n. 2. Lutz and Hyneman concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone.
[11] John Locke, *A Letter Concerning Toleration* (1688-89), Patrick Romanell, ed. (1955) p. 46.
[12] Locke, p. 46.
[13] Locke, p. 46.
[14] Locke, p. 34.
[15] Van Til 128.

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding….[16]

Maryland:

> XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty....[17]

New Jersey:

> XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience...[18]

North Carolina:

> XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[19]

Georgia:

> 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

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

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

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

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

State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.[20]

South Carolina:

XXXVII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.[21]

Massachusetts:

Part the First, Declaration of Rights:

Article II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[22]

New York:

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

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

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

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

> authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[23]

Virginia:

> Declaration of Rights, Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[24]

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

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

Because there was no verbatim transcript of the first session of Congress, it is unclear exactly how or why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise"

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

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

because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Otherwise, religious liberty is meaningless. So long as there is no machine that can read the thoughts of the heart, there is liberty of conscience everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

The Free Exercise Clause is violated, not only when a person is forbidden from doing what his religious beliefs require, but also when a person is required to do what his religious beliefs forbid. The religious persecution faced by the early Church in Rome consisted, not in being forbidden to worship Christ, but in being forced to worship the Roman gods. For the most part, the Roman authorities had no objection to Christians worshipping Christ or to other religions worshipping their gods, so long as they were willing to do their "civic duty" by worshipping the Roman gods. Their refusal to do so was considered to be a crime against the Roman state, because worship of the Roman gods was considered essential to the

well-being of Rome as it would incur the wrath of those gods.[25] In the same way, Lorie Smith is not forbidden to produce websites for Christian marriages, but she is being forced to produce websites that violate her religious convictions. This is a violation of religious liberty.

This violation of Lorie's religious liberty cannot be dismissed with the suggestion that she is not really being forced to produce same-sex wedding sites because she is not forced to produce wedding sites at all. In other words, she could avoid the free exercise violation by going out of business. However, as the Supreme Court noted in *Sherbert v. Verner,* 374 U.S. 309 (1963), this presents an unconstitutional dilemma. Ms. Sherbert was forced to either (1) violate her religious convictions by working on Saturdays, or (2) give up her right to a substantial state benefit, unemployment compensation. Rejecting the argument that "liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege," *Id.* at 404, the Court said, "... to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

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[25] *Roman Empire and Christianity*, in 4 *International Standard Bible Encyclopedia* 2598-2611 (1986); *see also* 2 John Eidsmoe, *Historical and Theological Foundations of Law* 529-33, 558-66, 590-605 (2016).

And in *Thomas v. Review Board,* 450 U.S. 707, 716-18 (1981), Chief Justice Burger wrote for an 8-1 majority,

> The respondent Review Board argues, and the Indiana Supreme Court held, that the burden upon religion here is only the indirect consequence of public welfare legislation that the State clearly has authority to enact. "Neutral objective standards must be met to qualify for compensation." 271 Ind. at ___, 391 N.E.2d at 1130. Indiana requires applicants for unemployment compensation to show that they left work for "good cause in connection with the work." *Ibid.*
>
> A similar argument was made and rejected in *Sherbert,* however.
>
> ...
>
> Here as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert,* where the Court held:
>
> > [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.
>
> 374 U.S. at 404. Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Just as a "Hobson choice" between violating one's religious convictions and giving up a substantial state benefit constitutes a free exercise violation, so a Hobson choice between violating one's religious convictions and giving up a basic

constitutional right is also a free exercise violation. For example, in *Nicholson v. Board of Commissioners of the Alabama State Bar,* 338 F.Supp. 48 (M.D. Ala. 1972), Nicholson faced a similar choice between violating his religious convictions by taking an oath that included "So help me God" for admission to the Bar, or giving up his right to practice law. Citing *Sherbert,* the court noted that "Plaintiff has been forced to the same Hobson-like choice. He must either forego the practice of law or violate his religious beliefs." *Id.* at 57. The court then concluded that "plaintiff has adequately demonstrated a violation of his first amendment rights...." *Id.* at 58. Likewise, forcing Lorie to choose between violating her religious beliefs and giving up her right to practice her profession is a free exercise violation.

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal consequences; J. Howard Pew has noted, "From Christian freedom comes all other freedoms."[26]

II. *Employment Division v. Smith* does not do justice to the Framers' vision of religious liberty, especially as applied by the District Court below.

[26] J. Howard Pew, quoted by Van Til 3.

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

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

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view, writing in *Meek v. Pittinger,* 421 U.S. 349 (1975), "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion...." *Id.* at 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise

principle should be dominant in any conflict with the anti-establishment principle." Lawrence H. Tribe, *American Constitutional Law* 833 (1978).[27] Voluntarism is central to the case at hand, for Maryland Code § 1-212.1 has the effect of prohibiting Dr. Doyle from following his most basic beliefs. This is a violation of the right to free exercise at its very core.

This Court appeared to accord strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court held:

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

310 U.S. at 303-04. The Court seems to say even as early as *Cantwell* that infringements on free exercise are subject to some higher standard than only reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to cases in which either (1) the law was directly

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[27] *Cf.* 2d ed. at 1160.

aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, which was an almost-unanimous decision,[28] *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from the strict scrutiny test but concurred because she believed there was a compelling interest in regulating controlled substances that could not be achieved by less restrictive means.

Smith received harsh criticism from the beginning. A massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious

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[28] Only Justice Douglas dissented, and he dissented only in part. He did not dispute the tripartite strict scrutiny test but dissented only because he felt there might be a conflict between the rights of the parents and those of the child which had not been fully articulated in the case.

Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3, in the House by a voice vote and in the Senate 97-3, which was signed into law by President Clinton, and which was struck down as applied to the states by a vote of 6 to 3 in *City of Boerne v Flores*, 521 U.S. 507 (1997), but unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

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

Twenty-one states have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to apply the compelling-interest/less-restrictive-means test, and ten additional states have incorporated the principles of the Act by state court decision.[29]

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[29] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4,

Scholars have likewise criticized *Smith.* One of the most noteworthy is Professor Michael McConnell, who cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case.[30] Jane Rutherford, writing in the *William and Mary Bill of Rights Journal,* argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[31] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review,* demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[32]

2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

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

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

[32] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1996).

Aden and Strang document the failure of lower federal courts to follow *Smith* by routinely ignoring the "hybrid rights" exception.[33] According to Aden and Strang,

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*--that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*--is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[34]

After discussing numerous federal circuit court cases in which hybrid rights claims have been denied, Aden and Strang suggest reasons the circuit courts have not followed the *Smith* rationale: (1) the fact that the hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent; (2) the compelling interest test in the realm of free exercise jurisprudence was never "compelling," and hybrid claims simply suffer a continuation of that reluctance to excuse conduct because of religious belief; (3) the difficulty in determining the proper burdens and procedures to assert a hybrid claim-the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and (4)

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

[34] *Id.* at 587.

growing hostility to exemptions from state anti-discrimination laws with ever increasing numbers of protected classes.[35]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims,"[36] "a more 'progressive' attitude toward persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings,"[37] and "the increasing regulation of private life by state governments through anti-discrimination statutes."[38]

Furthermore, *Smith* as applied by the court below results in a logical and practical absurdity. The *Smith* majority said the *Yoder/Sherbert* compelling interest analysis applies to free exercise cases only if (1) the statute is directly aimed at religion, either expressly or by implication,[39] or (2) the free exercise claim is asserted alongside another claim of constitutional right. This conclusion is erroneous because the Supreme Court in *Smith* never said the "other" asserted right must be a "fundamental" or "upper tier" right.

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[35] *Id.* at 602.

[36] *Id.* at 602-03.

[37] *Id.* at 604.

[38] *Id.*

[39] *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

Holding that the other asserted right must be fundamental results in a logical and practical absurdity. If the other right is fundamental, then it is entitled to strict scrutiny by itself and the free exercise claim becomes superfluous. Lorie Smith could then prevail on her free speech claim alone.[40] And *Smith* never said the other right must be fundamental, only that the free exercise claim must be asserted alongside another right, although *Smith's* discussion concerning assertion alongside another right is *dicta* rather than holding.

In summary, *Employment Division v. Smith*:

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

* Is partially dicta rather than holding.

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

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

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[40] Please note that the District Court's analysis of *Smith* utterly ignored the fact that Lorie is asserting her right to free exercise of religion alongside her right to free speech, due process, and equal protection. Not only is *Smith* a flawed decision; the District Court did not even apply *Smith* correctly.

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

* Was criticized by a wide spectrum of constitutional scholars.

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

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

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

* Has resulted in bewildering application, such as lower court holdings that the right asserted alongside free exercise must be a fundamental right, which is an absurdity because the other fundamental right is entitled to strict scrutiny by itself.

* Has proven unfair and unworkable in practice.

* Is manifestly contrary to the Framers' elevated view of religious liberty because it downgrades this most-cherished right to mere lower-tier status.

Because of all of these factors, it is clearly time for the courts to reconsider *Employment Division v. Smith.* But does this Court have the authority to reconsider a Supreme Court decision? Understandably, many believe a lower

court may not reconsider a high court precedent. But no less an authority than Judge Learned Hand argued:

> It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not chose to appeal. In either event the actual decision will be one which the judges do not believe to be that which the higher court would make. ... Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.

Spector Motor Service v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Learned Hand, J., dissenting). Significantly, the Supreme Court vacated the Second Circuit majority's decision and remanded the case to the District Court; *vacated sub nom. Spector Motor Service v. McLaughlin,* 323 U.S. 101 (1944).

Judge Hand seems to suggest that the lower court may overrule a higher court precedent if the lower court reasonably believes the higher court might decide the case differently today. This is sometimes called "anticipatory overruling," "anticipatory action," or "anticipatory review," see Professor C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39, 84 (1990). *See also* Professor Margaret N. Kniffen, *Overruling Supreme Court Precedents:*

Anticipation Action by United States Courts of Appeals, 51 Fordham L. Rev. 53 (1982) (discussing common reasons for anticipatory review, including belief that the precedent has been eroded, changes in Supreme Court membership, and practical, application of the precedent, and discussing cases in which anticipatory review has taken place).

Because of the shaky basis for the *Smith* decision, because of the strong dissents to that decision, because of the decision's inconsistency with the clear intent of the Framers to recognize religious freedom as the highest of all unalienable rights, because of the rejection of the decision by Congress and by many state legislatures and state courts, because the decision has proven problematic in application, of subsequent problems in application of the, and because of important recent changes in the Supreme Court's membership, the Foundation urges this Court to reconsider *Smith.*

If this Court does not believe it has the authority to reconsider *Smith,* we urge this Court to ask the Supreme Court to reconsider *Smith* at the earliest possible opportunity.

III. Forcing an artist to put her artistic talents to work against her will raises Thirteenth Amendment concerns.

The Thirteenth Amendment states, in relevant part, "Neither slavery *nor involuntary servitude* … shall exist within the United States ….." U.S. Const. amend. XIII § 1 (emphasis added). This Amendment does not prohibit only the

institution of slavery that plagued the United States before the mid-nineteenth century. It also prohibits the forcible labor for another against one's will. In 1988, this Court held that "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United States v. Kozmiski*, 487 U.S. 931, 953 (1988).

In this case, the State of Colorado seeks to force Lorie Smith to serve clients against her will by the threat of coercion through law or the legal process. Thus, under *Kozmiski*, we have a *prima facie* case of involuntary servitude.

Such a holding in this context would certainly have drastic implications for public accommodation laws. It would be easier to resolve the case on First Amendment grounds, and therefore *Amicus* would encourage the Court do so -- especially when, as here, Colorado seeks to compel Lorie Smith to work for clients not only against her will but also in a way that forces her to engage in speech she does not believe in and forces her to violate her religious beliefs.

CONCLUSION

This case involves a clash between the most fundamental of all rights, the God-given right to free exercise of religion which is explicitly protected by the First Amendment and the "right" to same-sex marriage which was only recently

created by the courts. In *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015), Justice Kennedy wrote for the majority at 2607:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Unless Justice Kennedy's words were mere hollow rhetoric, Lorie Smith's right to free exercise of religion and free speech deserve protection.

The Foundation therefore urges this Court to reverse the District Court and hold that Colorado Revised Statute § 24-34-601 is unconstitutional on its face or unconstitutional as applied to 303 Creative and Lorie Smith.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,499 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of December, 2019, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

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