No. 19-123

In The
Supreme Court of the United States

SHARONELL FULTON, *ET AL.*,
Petitioners,

v.

CITY OF PHILADELPHIA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This brief addresses only the first two questions presented by the petitioners:

1. Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?

2. Whether *Employment Division v. Smith* should be revisited?

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as free exercise of religion, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because the City of Philadelphia, its administrative agencies such as the Department of Human Services and the Commission on Human Relations, and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] Petitioners and Intervenor-Respondents consented to the filing of this brief after being timely notified more than 10 days before filing. Respondents granted blanket consent on May 7, 2020. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

In this instance, NCLA is particularly disturbed by the City's and the Commission's suspending referrals of new children to Catholic Social Services (CSS) for foster placement. The City's administrative process and resulting suspension were inherently unequal and even prejudiced, thus violating the Free Exercise Clause of the First Amendment. Administrative policymaking is institutionally slanted against orthodox or traditional religion, and thus even when administrative rules or other decisions appear facially equal, one must worry that on account of the underlying process, they in fact discriminate.

SUMMARY OF THE ARGUMENT

Philadelphia is worried about what it considers CSS's discriminatory attitudes—even before CSS has discriminated against anybody. *See* J.A. 171-172. But this case turns on something else: the discriminatory attitudes inherent in all administrative decision-making and grossly displayed in Philadelphia.

Legislative and administrative lawmaking are different in kind, and the differences reveal systematic discrimination against religious Americans. Administrative rules are made by persons who are not directly accountable to ordinary Americans in elections, and because administrative policymaking is devoted to rationalism and scientism, it is indifferent and even hostile to orthodox and traditional religion. As a result, even when administrative policies are equal on their face, they are unequal because of the process by which they are made. Administrative power is a game tilted against religion.

This inequality, even prejudice, is painfully evident in Philadelphia's administrative process for making its policy governing foster care services providers. It therefore should be particularly easy for this Court to hold that this process denies the free exercise of religion.

But this is not to say that the petitioners have a free exercise right to a religious exemption. The First Amendment—both textually and historically—precludes a constitutional right of religious exemption. The problem here, moreover, is not exemption, but inequality.

This Court therefore needs to recognize the inequality of the administrative process for many religious Americans. And at least where, as here, the inequality and even prejudice are overt, the Court should hold the resulting policy unequal and therefore in violation of the free exercise of religion.

ARGUMENT

I. IF THIS COURT IS UNWILLING TO OVERTURN *SMITH*, IT COULD FOLLOW *SMITH* AND STILL HOLD PHILADELPHIA'S POLICY UNCONSTITUTIONAL

Although this Court is being asked to revisit *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), such a reconsideration is not the only possible basis for holding Philadelphia's policy unconstitutional. In *Smith*, this Court largely repudiated a free exercise right of religious exemption and recognized, instead, a free exercise right to religious equality. That holding about equality is significant here because Philadelphia engaged in prejudiced and discriminatory

treatment of religious Americans. This Court could therefore follow *Smith* by holding Philadelphia's actions unequal in violation of the Free Exercise Clause.

Even if the First Amendment guarantees a right of religious exemption, it also, more fundamentally, secures Americans in religious equality. At least, that is, it protects them from unequal constraints—those that discriminate against them on account of their religion. (*See infra* Part III) Thus, whatever one thinks of *Smith*'s rejection of a right of exemption, that opinion was surely correct in recognizing that religious Americans at least enjoy religious equality under the Free Exercise Clause.

In elevating this equality vision of free exercise and discarding the exemption vision, *Smith* "rests on the political logic that religious Americans can protect themselves from oppression under equal laws by engaging in politics." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1926 (2015). But this expectation that religious Americans can engage with their lawmakers does not reflect the current realities of American lawmaking. Law comes nowadays not so much in statutes enacted by representative legislatures as in "policies" dictated by unelected bureaucrats, and this profusion of administrative policy creates a profound inequality.

Whereas ordinary Americans can directly elect, petition, and lobby their representative lawmakers, they are excluded from choosing administrative policymakers and therefore can rarely meet them, let alone bargain with them. And unlike elected

lawmakers, who tend to be solicitous of their religious constituents, administrative policymakers tend to pursue ideals of rationalism and scientism that are indifferent and even antagonistic to religion—at least, relatively orthodox or traditional religion. (*See infra* Part II.A.)

Accordingly, if the religious equality guaranteed by the Free Exercise Clause (and recognized by *Smith*) is to be taken seriously, one cannot merely examine whether a law or policy is *facially* equal. In addition, one must ask about the equality of the underlying process by which the policy was made.

This Court therefore needs to recognize the inequality inherent in the administrative process by which Philadelphia instituted its foster care policy. The policy may seem facially equal, but that is no comfort because the entire policymaking process is tilted against petitioners and many other religious Americans.

II. NOTWITHSTANDING THE FACIAL EQUALITY OF PHILADELPHIA'S POLICY ON FOSTER CARE SERVICES, ITS ADMINISTRATIVE POLICYMAKING PROCESS IS UNEQUAL AND EVEN PREJUDICED

Philadelphia left its policy decision whether to terminate foster placement through CSS to the City's Department of Human Services—an administrative agency—and this administrative avenue for policymaking raises questions about institutionalized inequality and even prejudice. When administrative policymaking displaces lawmaking by an elected representative body, the process of making policy becomes a tilted game against religion or at least

some types of religion. Thus, although Philadelphia's policy may appear flat or equal on its surface, the administrative decisionmaking producing and effectuating the policy is slanted, rendering the superficially equal policy in fact unequal.

A. The Inequality of Administrative Policymaking

The inequality of administrative policymaking—what really is administrative lawmaking—comes in at least two layers. First, administrative power leaves ordinary Americans, including religious Americans, with no opportunity to vote for or against their administrative lawmakers, thus excluding them from their constitutionally guaranteed freedom of electing the persons who make the laws that bind them. *See* Hamburger, *Exclusion and Equality*, *supra*. Second, this exclusion from the policymaking process is especially consequential for religious Americans because administrative power and its authority based in expertise are expressions of rationalism and scientism—not necessarily reason and science, but the institutional elevation of such things—and administrative power is thus institutionally predisposed, even prejudiced, against religion, especially relatively orthodox or traditional religion. *See id.*

The overall result is that administrative governance is much less responsive to the religious needs of many Americans than elective legislative governance. Although the administrative exclusion of Americans from the rule- and exemption-making process affects Americans of all sorts, it shifts such power to administrative bodies with not necessarily personal, but certainly institutional commitments

that are distinctively indifferent and even hostile to much religion. Administrative governance thus leaves many religious Americans in a disadvantageous position when attempting to persuade their administrative lawmakers to avoid burdening their religious beliefs.

The difference between representative and administrative policymaking is painfully clear. When a legislature makes laws, the policies that bear down on religion are made by persons who feel responsive to religious constituents and who are therefore usually open to considering exemptions or generally less severe laws. In contrast, when policies come from administrative agencies, they are made by persons who are chosen or fired by the executive, not the public, and so are less responsive than legislators to the distinctive needs of a diverse people. They are expected, moreover, to maintain an ethos of scientism and rationality, which however valuable for some purposes, is indifferent and sometimes even antagonistic to relatively orthodox or traditional religion, let alone the particular needs of local religious communities.

The danger for religious Americans from the shift of policymaking out of representative legislatures is evident from the recent COVID-19-related restrictions that specifically target churches. These restrictions have almost always been imposed through administrative power—whether exercised by state or local agencies or by state governors advised by, and then interpreted and applied by their administrative experts.

This administrative indifference or hostility to at least relatively orthodox or traditional religion

reflects class distinctions between the rulemaking class and those to whom they dictate policy. Individuals who set the policies of administrative agencies tend to enjoy a higher level of education than those governed by their decisions. Although progress through educational institutions can be valuable, it tends to come with a disdain and sometimes even antipathy to relatively orthodox or traditional religion. Accordingly, when members of the knowledge class—the class of persons who have or identify with an elevated degree of education—are given policy making authority over their fellow citizens, it should be no surprise that they often act with the attitudes of their class.

In other words, the tendency of administrative decision-making to be discriminatory against relatively orthodox or traditional religion is the natural and predictable result of shifting power from elected representatives in a legislature to unelected administrators who usually are relatively well educated. Again, this is not to knock education. Rather, the point is that administrative agencies tend to be run by members of a class whose attitudes are different from those of the population at large, and whose attitudes about religion are apt to result in discrimination.

These discriminatory attitudes, incidentally, can range from a generic distaste for religion to a religious aversion for relatively orthodox or traditional religion. And either way, such attitudes often focus on the allegedly retrograde character of Catholicism. *See, e.g.*, Philip Hamburger, *Separation of Church and State* 193-251 (Harv. U. Press 2002).

That religious and class antagonisms are embedded in administrative power should be no surprise, as such animosities did much to spur its establishment and growth. Fearing that the bulk of Americans would not support progressive policies, Woodrow Wilson in 1887 urged shifting legislative power to administrative bodies. He explained that "the reformer is bewildered" by the need to persuade "a voting majority of several million heads." Philip Hamburger, *Is Administrative Law Unlawful?* 371 (U. Chicago Press 2014). He was particularly worried about the nation's diversity, which meant that the reformer needed to influence "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, of Negroes." *Id.* It was a point he elaborated at length.[2] Although Wilson was distinctively racist, he gave expression to a widely felt disdain among the knowledge class for the unwashed masses that increasingly formed the electorate. And his concern about persuading "Irishmen" (in contrast to Americans of the "older stocks") remains a potent reminder that an elevated disgust for Catholicism was a motivating factor in the development of administrative power in the United States. In other words, the disempowering of religious minorities was not a bug, but a feature.

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[2] Wilson also wrote: "The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes." And "where is this unphilosophical bulk of mankind more multifarious in its composition than in the United States?" Accordingly, "[i]n order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the histories of a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe." *Id.* at 372.

Even if these vicious motivations were merely historical—a charitable assumption that the City of Philadelphia seems determined to disprove—the structural differences between representative and administrative power make the latter systematically disadvantageous for religious minorities.

> Of course, the removal of legislative power from the representatives of a diverse people has implications for minorities. Leaving aside Wilson's overt racism, the problem is the relocation of lawmaking power a further step away from the people and into the hands of a relatively homogenized class. Even when exercised with solicitude for minorities, it is a sort of power exercised from above, and those who dominate the administrative state have always been if not white men, then at least members of the knowledge class.
>
> It therefore should be no surprise that administrative power comes with costs for the classes and attachments that are more apt to find expression through representative government. In contrast to the power exercised by elected members of Congress, administrative power comes with little accountability to—or even sympathy for—local, regional, religious, and other distinctive communities. Individually, administrators may be concerned about all Americans, but their power is structured in a way designed to cut off the political demands with which, in a

> representative system of government, local and other distinctive communities can protect themselves.

Philip Hamburger, *The Administrative Threat* 56-57 (Encounter Books 2017).

Lawmaking has been shifted away from elected representatives, from whom religious minorities can expect a sympathetic hearing and accommodation, to administrators, who are not representative of the people, who are not personally accountable to them in elections, and who qualify for their positions by virtue of being members of a class defined by education and thus typically unsympathetic or even hostile to traditional religion.

None of this is to say that government should disregard education, science, or any resulting expertise, for agency expertise can be valuable, especially if shared with elected representatives and not used to justify an "off-road" mode of legislating. Nor is it to say that reason and religion should be considered at war with one another, for that is far from the truth and all too often is an unreasonable "rationalist" canard against religion. Above all, it should not be supposed that the rationalism and scientism of administrative policymaking assures that the resulting policy is always really rational or scientific.[3]

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[3] *See*, *e.g.*, Anahad O'Connor, *How the Government Supports Your Junk Food Habit*, N.Y. Times (July 19, 2016, 11:21 AM), https://bit.ly/OConnorNYT07192016 (discussing administrative food and agricultural policies which for decades encouraged Americans to eat unhealthy foods); Caroline M. Taylor et al., *A review of guidance on fish consumption in pregnancy: is it fit for purpose?*, 21 Public Health Nutrition 2149–2159 (2018) *available at* https://bit.ly/Tayloretal2018 (noting that a 2001 U.S. Food and Drug Administration advisory notice to avoid

Rather than suggest any of these things, the point is that administrators are not representative of the people or accountable to them at elections, and that administrative power comes with a vision of rationality and scientism that, whatever its merits, is indifferent if not antagonistic to orthodox and traditional religion. The resulting policymaking process sharply disadvantages many religious minorities.

Again, a simple comparison reveals the prejudice embedded in the administrative perversion of the political process. Under a republican form of government, in which laws are made by an elected representative legislature, religious Americans, even those with unpopular beliefs, can almost always get a respectful and even sympathetic conversation about their needs as minorities, and very often can persuade lawmakers to defeat a harsh law or at least secure an exemption. But under the anti-republican administrative version of government, religious Americans must struggle to be heard by administrative policymakers, can expect contemptuous treatment, and face institutional

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predatory fish and limit consumption of all other fish failed to recognize the importance of omega-3 fatty acids for unborn children and led to an unintended reduction of omega-3 intake across the population); Liza Gross, *Flame retardants in consumer products are linked to health and cognitive problems*, Wash. Post (Apr. 15, 2013), http://wapo.st/17f7jEU?tid=ss_tw (discussing changes in administrative policy on flame retardants which ignored their effect on children's cognitive development); Sheri Fink & Mike Baker, *'It's Just Everywhere Already': How Delays in Testing Set Back the U.S. Coronavirus Response*, N.Y. Times (Mar. 10, 2020), https://bit.ly/FinkNYT03102020 (discussing administrative policy on new drugs and devices which delayed the availability of COVID-19 tests).

indifference and even outright hostility. *See* Hamburger, *Exclusion and Equality*, *supra*, at 1939-42.

Religious liberty thus comes with an unexpected slant. Courts blithely assume that America offers a flat or even legal landscape—a broad and equitable surface on which all Americans can enjoy rights equally, regardless of their religion. But the underlying inequality of the administrative rule, exemption, and other policy making process tilts the entire game, so that many apparently equal policies actually lean against religion.

This unequal process hollows out the religious equality guaranteed by the Free Exercise Clause. Even where the courts protect against facially unequal laws, the underlying inequality of the lawmaking process is apt to render laws unequal and oppressive. Put another way, the inequality built into the administrative version of the political process renders many apparently equal administrative policies unequal as to religious minorities. Thus, even when an administrative policy seems equal on its surface, it remains necessary to ask whether it disadvantages some religious Americans because of the relative indifference or even hostility of administrative policymakers to orthodox or traditional religion.

B. Philadelphia's Unequal Administrative Policymaking

The City of Philadelphia's administrative process in this case is deeply discriminatory. The City left its Department of Human Services to make the policy terminating the placement of children through

CSS.[4] The Department then displayed precisely the sort of indifference and prejudice one might expect from administrative process. The City of Philadelphia is thus an abject but not unusual example of the religious inequality inherent in administrative policymaking.

An essential element of republican government and of religious liberty is to have policies adopted in laws made by a representative body that is elected by, and thus responsive to, the people, including religious minorities. Instead, Philadelphia imposes its foster care services policy through an administrative body that is unelected and thus unresponsive, and even is institutionally prejudiced against orthodox or traditional religion—in this case, expressly prejudiced against the religion of petitioners.

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[4] The City of Philadelphia initially claimed that CSS violated the City's Fair Practices Ordinance (the "Ordinance"), Phila. Code § 9-1106 (2016), as memorialized in the City's Professional Services Contract. *See* Pet. App. 149a-152a (March 16 letter). But that ordinance does not apply to CSS, and thus not only the refusal to grant exemptions but also, more basically, the underlying policy to stop referrals to CSS and terminate CSS's contract comes from the agency. To be sure, the Fair Practices Ordinance prohibits "discriminat[ion] based on" characteristics including marital status, familial status, mental disability, and sexual orientation in "public accommodation[s]." Phila. Code § 9-1106 (2016). But Philadelphia has never treated foster care as a "public accommodation" under the Ordinance. J.A. 150-151, 183-185, 305-316. On the contrary, the City permits and even expects private agencies to take into account the marital and familial status of potential foster parents. *See* Pet'r's Br. 7-8; 55 Pa. Code § 3700.64; J.A. 98-100, 236-238. Indeed, although the Ordinance applies to "the City, its departments, boards and commissions," Phila. Code § 9-1102(1)(w), Philadelphia does not apply the Ordinance to its own foster care operations, *see* J.A. 150-151, which regularly consider disability and race when making foster placements. J.A. 305-316.

The Commissioner of the Department of Human Services gratuitously offered her opinion that the petitioner should follow "the teachings of Pope Francis" and said that "times have changed," "attitudes have changed," and it is "not 100 years ago." J.A. 182, 365-366. It hardly needs to be observed that it is not the role of government to decide which religious beliefs are right and wrong, to condemn views that do not keep up with majority sentiment, or to judge which opinions are out of date. But the underlying problem is much more serious than the Commissioner's personal bias against orthodox and traditional Catholicism.

Far more serious is the systemic indifference and even prejudice built into administrative policymaking. This danger—that administrative policymaking is systemically tilted against orthodox or traditional religion—needs to be recognized regardless of whether it comes, as here, with prejudiced expressions.

Thus, even if one were to shut one's ears to the Commissioner's comments, one must take note of Philadelphia's refusal even to consider an exemption for the petitions. Pet. App. 165a-172a. Although petitioners did not ask for an exemption, Philadelphia gratuitously declared "the Commissioner has no intention of granting an exception." Pet. App. 168a. This is exactly the sort of antagonism that is ingrained in the administrative policymaking process and that deprives even facially equal policies of their claim to equality. However flat the surface of the law, the entire game is tilted.

III. A PROPER REMEDY WOULD BE TO HOLD THE POLICY UNEQUAL AND THUS UNCONSTITUTIONAL

Notwithstanding that this Court is being asked to overturn *Smith*, it could just as well follow *Smith*—holding that the administrative process by which Philadelphia made its decision is discriminatory and unequal and therefore unconstitutional. This case, put simply, could be decided on the basis of inequality rather than exemption.

A. Taking Equality Seriously

Whatever one's view about a constitutional right of religious exemption, it is important not to let the dispute about that question distract attention from the constitutional right to religious equality. The constitutional foundation for a general right of exemption will be discussed below, but at the outset it should be undisputed that unequal religious constraints—whether against a particular type of religion or against religion as a whole—deny the free exercise of religion.[5]

Smith substantially questioned whether there is a free exercise right of religious exemption. Indeed, as will be seen, the First Amendment's text and history clearly preclude a constitutional right of

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[5] The most common demand made by religious minorities in the late eighteenth century was for equality—both against establishment privileges and more fundamentally against discriminatory constraints. *See* Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 939, 946-47 (1992). As to the point about religion as a whole, note that the First Amendment speaks generally of "religion" rather than "a religion." *See* U.S. Const. amend. I. The government thereby bars law prohibiting the free exercise of not only a particular religion but also of religion in general.

exemption. But that is all the more reason to take seriously the amendment's bar against discriminatory religious constraints and *Smith*'s reiteration of that prohibition.

Critics of *Smith* have suggested that if the First Amendment does not protect a right of exemption, it means nothing. But if it does not protect at least against inequality, then the First Amendment really will have been eviscerated. The Free Exercise Clause was adopted in response to a long history of inequality, and there is no more pervasive inequality than to have law- or policy-making power turned over to unelected administrators with institutional commitments at odds with one's religion.

Tellingly, Justice Scalia concluded his opinion in *Smith* by noting that, even without a right of religious exemption, religious Americans can always pursue a political remedy—prototypically by appealing to their elected representatives to include exemptions or other relief when they enact potentially burdensome laws.[6] That may be true enough where the laws are made by the elected legislature. But here the policy maker is an administrator, who is unelected, and who (quite apart from her personal prejudice) is selected from a class that tends to be

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[6] *Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

indifferent and even adverse to orthodox or traditional religion.

Unequal constraints are most clearly and emphatically barred by the Free Exercise Clause, and this problem is inescapably evident in Philadelphia's administrative process. This Court therefore needs to recognize the systematic discrimination of administrative power against relatively orthodox or traditional religion.

A candid recognition of the inequality would have the salutary effect of limiting the stakes in a bruising controversy over a right of exemption. Though (as will be seen below) a constitutional right of exemption has no foundation in the Constitution, the demands for such a right have increased in past decades—and not by accident. There has been a massive shift of policymaking power from representatives to administrators during recent decades, and this transfer has left traditional and orthodox religious Americans subject to ever less sympathetic responses from those who exercise legislative power over them. Whereas they once could persuade their elected servants to accommodate their needs, they now must deal with unaccommodating administrative masters.

And this expansion of administrative lawmaking explains much of the rising demand for a constitutional right of exemption. Lawmaking nowadays is more administrative than representative. And unlike representatives, who tend to be sympathetic to the religions of their constituents, the new sort of lawmakers tend to begin the conversation (as in Philadelphia) with "no intention of granting an exception." Pet. App. 168a. It

is therefore unsurprising that the call for exemption or other accommodation tends to come in response to administrative lawmaking.

Accordingly, before this Court moves toward a right of exemption that is unjustified by constitutional text or history, the Court should first live up to the free exercise right to equality. This Court has a duty to recognize the religious discrimination inherent in administrative lawmaking, and in so doing, it will alleviate the growing pressure for a right of exemption.

B. The First Amendment's Text, Drafting, and Underlying History Preclude a General Right of Religious Exemption

Far from authorizing a constitutional right of religious exemption, the First Amendment expressly precludes any such right. To be precise, the amendment makes clear that that if a law prohibits the free exercise of religion, Congress had no power to make the law in the first place. The First Amendment thus leaves no room for judicially created exemptions; instead, it requires the courts to hold any law that prohibits the free exercise of religion to be unlawful and void *ab initio*. And in addition to this clarity of text, the absence of a general right of exemption is backed up by the drafting and underlying history.

The Free Exercise Clause can be understood to prohibit a range of things—certainly laws imposing unequal or discriminatory constraints and probably also other things, such as laws interfering with religious association—but whatever its reach, the one thing the clause clearly does not guarantee is a right of exemption.

The text itself plainly bars any constitutional right of exemption. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Accordingly, if a statute prohibits the free exercise of religion, Congress had no power in the first place to make the law. Such a statute (or if severable, the relevant section) is simply unlawful and void. There is thus no room under the First Amendment for a right of exemption.[7]

This conclusion is also clear from the drafting debates, where no one—no one at all—is recorded as even having discussed a general right of exemption. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 927-28.

Nor should any of this be a surprise, as the vast majority of minority religious groups in the late eighteenth century were devoted to seeking equal rights, not exemption. Religious minorities at the time of the Revolution were often worried about special constraints on them on account of their religion. As late as the 1770s, Baptists in Virginia were imprisoned merely for meeting and preaching.

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[7] Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1266 (2010) ("If Congress violates the Free Exercise Clause by making a law prohibiting the free exercise of religion, then it must be that the violation happens when Congress makes such a law"); Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 937. ("[T]he First Amendment . . . begins, 'Congress shall make no law.' Rather than suppose that civil laws will in some respects prohibit the free exercise of religion and that exemptions will be necessary, the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise").

John Leland, *The Writings of the Late Elder John Leland* 106-07 (L.F. Greene ed., New York, 1845); Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 29, 212-14 (J.P. Bell Co., Lynchburg, Va., 1900). This seemed especially outrageous at a time when Americans were demanding equal rights in their struggle against Britain. Religious minorities in America therefore tended to demand equal rights, both against establishment privileges and more fundamentally against discriminatory constraints. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 942; Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 336-67 (1992).

Their opponents often suggested that in seeking religious liberty, religious minorities really were seeking a general right of exemption—this being an effective way to smear the minorities. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 941. Tellingly, the leaders of religious minorities repeatedly disclaimed any ambition for a general right of exemption and insisted that what they wanted was equality. *See id.* at 942; *see also* Hamburger, *Equality and Diversity*, *supra*, at 336-67.

The only denomination in the 1770s and 1780s that consistently favored a general right of exemption was the Society of Friends, and the only time they made a concerted effort to interpret a constitutional document to guarantee such a right was in 1775 in Pennsylvania. Philip Hamburger, *Religious Freedom*

in Philadelphia, 54 Emory L.J. 1603 (2005).[8] Unsurprisingly, they were resoundingly defeated. Pennsylvanians joined mass marches to protest the Quaker interpretation, *Id.* at 1615, and they then drafted the Pennsylvania Constitution to clarify its rejection of any general right of exemption. *Id.* at 1623-36. Thus, even in Pennsylvania—the Quakers' home base—they could not win. A general right of exemption was a nonstarter.

It has been suggested that the conditions recited in many state constitutional guarantees of religious liberty reveal that those guarantees extended to a general right of exemption—at least where there was no threat to the public peace. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). From this perspective, Americans could claim a religious liberty from equal laws. But this gets the history exactly backward. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 918-26. The conditions in some state guarantees cut off constitutional claims of exemption from law by reducing religious liberty to a conditional toleration. *Id.* As commentators repeatedly made clear, if one violated the underlying condition, one forfeited one's religious liberty. *Id*. at 922-23. In contrast, the First Amendment included no conditions. Rather than adopt the merely conditional toleration so common in state constitutions, the First

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[8] The Mennonites sometimes favored a general religious exemption, but not always, and perhaps especially not in alignment with the Quakers. Their piety, moreover, was of a sort that led them to eschew much public engagement in petitioning, and they therefore tended to avoid taking a public position. *See id.* at 1605-06, n. 6; 1621-22.

Amendment embraced the inalienable character of religious liberty by stating it unconditionally. It is thus utterly anti-textual and ahistorical to discern the meaning of the unconditional federal right from the conditional state versions.

In addition to these observations about the text, drafting, and underlying history, one could point to the obvious practical impediments to a free exercise right of exemption. One could, for example, worry that such a right would create moral hazard (something the founders understood) or that such a right would leave judges with dangerous discretion to define its boundaries. But it should be enough here to notice that the text, by its very words, precludes any such right, that the debates did not even discuss any general right of exemption, and that all of this makes sense in light of what religious minorities had been arguing in the 1770s and 1780s.

C. Especially When Administrators Make Statements Confirming That Their Policymaking Is Indifferent, Hostile, or Otherwise Discriminatory, the Resulting Policy Should Be Held Unequal and Unconstitutional

This Court should recognize the inequality that is ingrained in administrative power by providing a remedy for religious Americans who are burdened by it in violation of their religious beliefs—not because they have a free exercise right of exemption, but because of the inequality of the administrative policymaking process.

It should be particularly easy to reach this conclusion when—as in this case—an administrator or agency makes statements that corroborate that its

policymaking process is indifferent, hostile, or otherwise discriminatory. For example, when an administrator candidly expresses religious prejudice and bluntly refuses even to consider relief for religious Americans, it should not be difficult for a court to recognize the inequality that is ingrained in administrative power and to hold the resulting policy unequal in violation of the free exercise of religion.

The petitioners did not specifically ask for an exemption— as Philadelphia froze referrals to CSS without even the favor of a rule. Nonetheless, the Commissioner (as noted above) revealed her religious prejudice, and the City went out of its way to declare categorically that "the Commissioner has no intention of granting an exception." Pet. App. 168a.

These circumstances, in which the administrative agency cuts off any opportunity for a religious minority to explore the possibility of relief, leave no doubt about the indifference or hostility of the administrative process. The inequality of that process should therefore be recognized by holding the resulting policy unequal and unconstitutional under the First Amendment's guarantee of the free exercise of religion.

Of course, when a member of a legislature expresses religious prejudice, it is not obvious that her invidious attitudes should be attributed to the legislature as a whole. But this case involves an administrative agency headed by a single Commissioner. In such circumstances, the prejudice of that supervising administrator must be taken as the prejudice of the agency and its policymaking process.

The point is not that a facially equal policy should be considered unconstitutionally discriminatory solely on account of bad motive, but rather that the Commissioner's discriminatory expressions confirm the underlying inequality inherent in administrative policymaking. This slanted process by itself should be enough to render the policy unequal—to require that it be held void at the behest of any person adversely affected in his religion. But at the very least, when, as here, there is evidence corroborating that Philadelphia's administrative policymaking is indifferent, hostile, or otherwise discriminatory, this Court should recognize the inequality of the administrative policymaking process and hold the policy unequal and void.

D. There Are Advantages to Holding the Policy Void Rather Than Carving out an Exemption

It should not be difficult for this Court to hold Philadelphia's administrative policy unequal and thus void because the only other affected placement organization caved in, and the policy thus currently only affects one such organization, the petitioners. *See* Pet. App. 21a. The result in this case will therefore not be substantially different from if this Court were to hold the petitioners exempt. But over the long term, there is an advantage—beyond that of following the text of the First Amendment—in holding administrative policies religiously unequal and therefore void, as opposed to finding an exemption.

When the judicial response to free-exercise violations focuses on exemption, administrators can pursue regulatory projects that burden religion

without fear of more than an exemption—that is, without fear for their larger projects. Such administrators thus have every reason to regulate as harshly as they wish, reckoning that they will sometimes get away with it and that they will never suffer more than a carve out for some plaintiffs. The judiciary's exemption response thus invites administrative severity and increases the demands for exemptions.

In contrast, if the judges were to recognize the inequality of administrative policymaking and hold the resulting policies void when challenged by affected plaintiffs, administrators would have some skin in the game. They would think twice about the policies they imposed through their discriminatory process, thereby reducing the tensions with religious Americans.

IV. THIS COURT NEEDS TO CONFRONT THE RELIGIOUS INEQUALITY OF ADMINISTRATIVE POLICYMAKING

This Court needs to address the discriminatory tendencies of administrative policymaking for a host of reasons. It has already been hinted (*in supra* Part III.A) that if this Court fails to correct this inequality, it will face a constitutionally unsupportable question of exemption that will be unmanageable and divisive. In addition, the Court must consider the seriousness of the administrative inequality and the Court's role in creating it.

Systematic discrimination against religious Americans or against those who are relatively orthodox or traditional in their beliefs has no place in America—regardless of whether in the substance of a policy or in the process by which it is made. In *Smith*,

this Court recognized the importance of legislative lawmaking for religious Americans, but failed to address the reality that nowadays most "law" is made by administrative agencies, which are not as responsive to religious Americans—indeed, which are often callously indifferent and even hostile to many religious Americans. This is a fundamental inequality, which is so deeply ingrained in a pervasive mode of power that this Court may hesitate to confront the problem. But the ubiquity of administrative policymaking, and the magnitude of the resulting discrimination, require this Court to act. If it is to defend the religious liberty of Americans, it must recognize the grim realities faced by religious Americans—at least those with relatively orthodox or traditional views.

It is often assumed that religion, especially in its traditional modes, is declining in America, and that this reflects the salutary rise of rationality and science—in other words, that religion is shrinking as a natural result of its own failure to comport with realities of the modern world. This thesis is deceptively incomplete, because the retreat of churches and organized religion has been substantially accelerated by law—not least by the rise of administrative lawmaking. Over the past century, the damage done to religious liberty has eroded the cultural fabric of the nation in ways that may be permanent and that at least will take decades to redress. The subjugation of Americans to policymakers who are tilted against much religion thus deprives them of their freedom in ways that are of profound consequence.

It is especially important that this Court take action because the problem is not confined to

Philadelphia. Across the nation, relatively orthodox or traditional Americans again and again face the indifference and even hostility of administrative policymaking, in violation of their free exercise right not to be subjected to discriminatory constraints. Philadelphia's policy with respect to foster care placements is thus just the tip of the iceberg.

Judges have a special responsibility to address the administrative discrimination because they gave it constitutional legitimacy and thus, in a sense, established it. Having elevated administrative power as an acceptable mode of governance, the judges are partly responsible for its inherent inequality. It is thus partly the judges who have subjected religious Americans to a profoundly unsympathetic and even hostile class of lawmakers, who act not as servants but as masters, and who treat those whom they consider retrograde with scarcely veiled contempt. The judiciary therefore needs to recognize its responsibility for the current situation, in which religious Americans cry out for exemptions from their administrative rulers—from the rulemaking class—but have little hope because these rulemakers tend to be rigidly indifferent and even biased against them. This discriminatory process is a disgrace, and the Court needs to address it.

CONCLUSION

The shift of policymaking to administrative bodies is profoundly incompatible with religious liberty. It places many religious Americans at a permanent and systemic disadvantage, and as a result they are repeatedly deprived of their religious freedom.

Recognizing that something is deeply awry, but not fully understanding the depth of the constitutional distortions arrayed against them, religious Americans increasingly have turned to the courts for a general right of exemption—a right that the First Amendment never authorized and, in fact, textually precludes. Thus, one constitutional distortion has provoked demands for another. Having legitimized an illicit mode of power that undercuts the equality of religious Americans, judges are being asked to cure the problem with an illicit general right of exemption.

For all of this, judges are significantly to blame. They permitted the initial administrative unconstitutionality, and now must what wonder what to do with the demands for a corrective doctrine on exemption that is also unconstitutional.

The solution must be at least a recognition of the inequality inherent in administrative lawmaking. Equality is the right of all Americans, and a religious freedom from discrimination is a foundation of the First Amendment. Accordingly, even when a city such as Philadelphia is pursing equality, it cannot act through a process that is profoundly unequal for religious Americans—at least those with relatively orthodox or traditional beliefs.

The administrative lawmaking process was designed to exclude relatively orthodox or traditionally religious Americans, not least Catholics. And even if one could ignore the historical and continuing prejudices, there remains the structural problem. Administrative lawmaking displaces representative lawmaking—substituting indifference and even hostility for solicitude.

Being partly responsible, this Court has a special duty—if only on account of its reputation—to clean up the mess. It needs to recognize the profound inequality that runs through all administrative lawmaking—an inequality that bears down on many religious Americans in ways that leave them stunned and struggling, wondering what happened to their freedom and equality.

The decision below should therefore be reversed.

Respectfully submitted,

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