FILED
22-1145
10/25/2023 9:05 AM
tex-80941351
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 22-1145

In the Supreme Court of Texas

Dianne Hensley,
Petitioner,
v.
State Commission on Judicial Conduct, et al.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
No. 03-21-00305-cv

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY AND PROFESSORS THOMAS BERG AND DOUGLAS LAYCOCK IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Secondary Authorities

ARGUMENT

The Commission disciplined Judge Hensley for determining, based on religious conscience, that she would refer same-sex couples asking her to perform their marriages to other officiants. In part I, *amici* explain why the Commission's action violated the Texas Religious Freedom Restoration Act (TRFRA) by substantially burdening Judge Hensley's religious conscience without a compelling governmental interest in doing so. In part II, we explain, based on a detailed review of the history and purpose of religious-freedom protections, why enactments such as TRFRA should be interpreted vigorously to prevent impositions on religious conscience and the suffering and conflict that such impositions cause.[1]

I. The Court Below Erred When It Failed to Apply the Texas RFRA to Exempt Judge Hensley from Discipline for Referring Same-Sex Couples to Other Officiants on the Basis of Religious Conscience.

A. The Texas RFRA Expressly Applies Strictest Scrutiny to Government Actions that Substantially Burden the Religious Free Exercise of Any Person in Texas.

This Court has previously recognized the purpose of the Texas Religious Freedom Restoration Act ("TRFRA"):

[1] The courts below erred in declining to apply TRFRA in this case for procedural reasons. As petitioner shows, her lawsuit under TRFRA is not an impermissible collateral attack on the Commission's warning sanction; she seeks damages as well declaratory and injunctive relief against future disciplinary proceedings coercing her. Petitioner's Br. 14-16; Reply Br. 1-5. And petitioner's claim is undoubtedly ripe; she faces a threat of future discipline if she resumes officiating only opposite-sex weddings, as is shown by the fact that the Commission has already disciplined her for that very action. Petitioner's Br. 35-36; Reply Br. 15-16.

> The Texas Legislature enacted TRFRA in 1999, which like RFRA provides in part, that government "may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that interest."[2]

In applying TRFRA, this Court properly has done so vigorously, looking to federal as well as Texas state cases for its interpretation so as to achieve "the same spirit of protection of religious freedom" animating TRFRA, [the federal Religious Freedom Restoration Act or] RFRA and [the federal Religious Land Use and Institutionalized Persons Act of 2000 or] RLUIPA."[3]

B. The Commission Triggered TRFRA Strict Scrutiny by Imposing a Substantial Burden on Judge Hensley's Free Exercise of Religion.

In applying TRFRA, this Court understands "substantial burden" in its ordinary parlance, as found in the dictionary:

> Thus defined, "substantial" has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.[4]

Whether or not officiating at opposite-sex weddings is central to Judge Hensley's religious faith is irrelevant in weighing how substantial a burden its deprivation

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[2] *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009).

[3] "Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute." *Barr*, 295 S.W.3d at 296. *See also Tilton v. Marshall*, 925 SW 2d 672, 678 (Tex. 1996) (applying the federal RFRA's strict scrutiny standard).

[4] *Barr*, 295 S.W.3d at 301.

would impose. TRFRA eschews that centrality consideration: "In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief."[5]

Coercing a public official to refrain from engaging in an official function based on her religious practices or conscientious beliefs is a classic burden, analogous, for burden purposes, to impermissible religious tests for office. Even though the ground for exclusion here is not facially religious as is the case with religious tests for office, the burden is the same. The Commission's warning and threat to Judge Hensley forced her to choose between solemnizing same-sex marriage rites in violation of her religious faith or forgoing a ministerial function of her job that she sincerely valued, as well as the income therefrom. See Reply Br. 30 (citing Judge Hensley's sworn declaration that she lost "well over $10,000" in income from being unable to perform weddings) (quoting Hensley Decl. at ¶ 35 (CR 535)). Hence, the Commission imposed a burden that was both "real" and "significant" for Judge Hensley. Therefore, under this Court's decision in *Barr*, it qualifies as a "substantial

[5] TEX. CIV. PRAC. REM. CODE § 110.001(1). RLUIPA and RFRA have that same expansive definition: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (RLUIPA); 42 U.S.C. § 2000bb-2(4) (incorporating the same definition into RFRA).

burden" that triggers TRFRA strict scrutiny.

C. The Commission Lacks a Compelling Interest in Forcing Judge Hensley to Choose Between Her Conscience and an Important Ministerial, Non-Adjudicatory Function of Her Office.

The Commission's action against Judge Hensley alleges violation of only Canon 4A(1) of the Texas Code of Judicial Conduct, which states:

> A judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge . . .

If TRFRA's strict scrutiny were applied, presumably this would be the government interest asserted. And it is indeed an important one.

But if the Commission's claimed interest is in assuring LGBT persons that they will receive equal justice in Judge Hensley's courtroom, the Commission's action against Judge Hensley failed to advance that interest. Declining to do a same-sex wedding does not logically indicate that she will treat LGBT persons or same-sex couples any less well in court. Rather, her creation of a quick and easy referral service to help same-sex couples marry promptly and with no additional expense indicates her recognition that they are entitled to the same right to marry as opposite-sex couples. What they are not entitled to is to force conscientious objectors to perform the ceremony.

If providing judge-officiated weddings in Texas is an interest and function of the state, it certainly cannot rise to the level of a compelling one – an interest "of the highest order." *Wisconsin v Yoder*, 406 U.S. 205, 215 (1972).

Even if it were compelling, the Commission's public warning to Judge Hensley has not advanced it. Quite the opposite, it has reduced the number of justices of the peace willing to meet that government function. And it has eliminated the public referral service that provided readily available officiants to same-sex couples.

Had the courts below considered Judge Hensley's TRFRA defense, the Commission would not have been able to carry its statutory burden to prove that denying her a right of recusal was the least restrictive means of furthering a compelling governmental interest. Tex. Civ. Prac. Rem. Code § 110.003(b).

For all these reasons, the Commission's actual and potential future discipline violated Judge Hensley's rights under a straightforward application of TRFRA. As we now show, the history and purposes of religious freedom protections require that provisions such as TRFRA be interpreted vigorously. TRFRA recognizes that even laws of general applicability can unnecessarily burden the fundamental right of religious freedom, and that exemptions from such laws—like an exemption to allow Judge Hensley to refer same-sex couples to other ready officiants—are necessary to preserve that right.

II. The History of Free Exercise Exemptions and Their Essential Role Today Both Call for Vigorous Interpretation and Enforcement of TRFRA.

A. Free Exercise Without Exemptions Did Not Work in the Eighteenth Century.

1. There were multiple reasons for the American experiment in religious liberty, some of them directly relevant to the need for religious exemptions.

First was a growing respect for individual conscience. John Locke had written that "no man can so far abandon the care of his own salvation" as to let anyone else "prescribe to him what faith or worship he shall embrace."[6] "The care, therefore, of every man's soul belongs unto himself."[7]

Over the next century, the colonists adopted, extended, and sometimes modified Locke's views.[8] In 1744 a pamphlet attributed to Elisha Williams argued that "Every man has an equal right to follow the dictates of his own conscience in the affairs of religion."[9] And because Christ alone is "Lord of the conscience," "all imposers on men's consciences are guilty of rebellion against GOD and CHRIST."[10] Williams was

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[6] John Locke, *The Second Treatise of Civil Government and A Letter Concerning Toleration* 127 (J.W. Gough, ed. 1948) (1689).
[7] *Id.* at 137.
[8] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-31, 1443-48 (1990). This and other articles cited in this brief cite historians and original sources that provide additional detail and authority for the history summarized here.
[9] Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), https://www.consource.org/document/the-essential-rights-and-liberties-of-protestants-by-elisha-williams-1744-3-30/ [https://perma.cc/E2X2-VP7X].
[10] *Ibid*.

a Congregationalist minister, legislator, and Rector (President) of Yale College.[11]

Protecting conscience was James Madison's first point in his *Memorial and Remonstrance Against Religious Assessments*. "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[12]

Second, government efforts to override conscience had led to human suffering, social conflict, and persecution. In history that was recent to the Founders, England had suffered two centuries of intermittent religious persecution, civil war, regicide, and multiple revolutions, two of them successful.[13] Protestant monarchs had executed Catholics and vice versa; Anglicans had oppressed Puritans and vice versa. Similar conflicts had plagued continental Europe.[14] As Madison summarized, "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions."[15]

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[11] Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1421-27.
[12] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶1, reprinted in *Everson v. Board of Education*, 330 U.S. 1, 64 (1947).
[13] Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1055-66 (1996); McConnell, *supra* note 8, at 1421-22.
[14] Laycock, *supra* note 13, at 1049-55.
[15] *Memorial and Remonstrance* ¶11, in *Everson*, 330 U.S. at 69.

Blood had also been shed in the colonies.[16] Massachusetts, Connecticut, and Virginia expelled religious dissenters, and the New England colonies, occasionally executed them when they returned.[17] The more common punishment was repeated whippings and renewed expulsion.[18] New England and the southern colonies taxed dissenters to support the established church.[19]

Third, persecution and religious conflict excluded or discouraged whole classes of potential settlers. When Georgia refused to enact an exemption from military service in the 1730s, the entire Moravian community moved en masse to Pennsylvania.[20] Madison argued that Virginia's proposed tax to support Christian ministers would discourage new settlers from coming and encourage existing citizens to leave.[21]

2. Over time, every colony found that the underlying purposes of religious liberty required exemptions.

The issue arose most frequently with respect to Quakers, who could not swear oaths or serve in the militia. Carolina exempted Quakers from swearing oaths in

[16] Laycock, *supra* note 13, at 1066-69; McConnell, *supra* note 8, at 1422-24.
[17] Thomas J. Curry, *The First Freedoms* 22 (1986); McConnell, *supra* note 8, at 1423.
[18] Curry, *supra* note 17, at 21-24; Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1805 & n.54 (2006).
[19] Curry, *supra* note 17, at 80.
[20] McConnell, *supra* note 8, at 1468 & n.293.
[21] *Memorial & Remonstrance* ¶¶9-10, in *Everson*, 330 U.S. at 68-69.

1669.[22] As toleration spread, the exemption from oath-taking became nearly universal.[23]

Rhode Island enacted the first exemption from military service in 1673, and after substantial debate in some colonies,[24] this too eventually became universal.[25]

The exemption issue also arose with respect to taxes to support the established church. Beginning with New Hampshire in 1692, every colony that retained such a tax eventually exempted dissenters from paying it.[26] From a modern perspective, the church tax seems not to be religiously neutral. But its supporters understood it to serve an important secular purpose like any other law—it promoted public morality.[27] They viewed the exemption for dissenters as a real and generous exemption.

3. The most revealing histories are in colonies that came to free exercise late and reluctantly. Even they soon enacted exemptions, because free exercise without exemptions didn't solve the problems they were trying to solve. Quakers could not live in Massachusetts if they were banned. But neither could they live in Massachusetts if their important religious practices were banned.

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[22] Laycock, *supra* note18, at 1804 & n.51.
[23] Curry, *supra* note17, at 81; McConnell, *supra* note 8, at 1467-68; Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630-32 (1989).
[24] Laycock, *supra* note 18, at 1808-25.
[25] *Id.* at 1806-08; McConnell, *supra* note 8, at 1468-69.
[26] McConnell, *supra* note 8, at 1469-71.
[27] *Id.* at 1441, 1470-71.

Requiring oaths or military service would override individual conscience just as banning Quakers overrode conscience. For those who succumbed to legal pressure, such requirements would cause the same guilty feelings and psychological suffering, the same disruption of their relationship with God. For those who did not succumb, criminal penalties and other efforts at enforcement inflicted loss of liberty and property, causing human suffering and social conflict. Prosecutions for religious conduct discouraged settlement and drove citizens from the colony.

It mattered not that these harms were imposed by neutral and generally applicable laws. A right to believe a religion, with no right to practice it, was not religious liberty at all. As a seventeenth-century Baptist argued, there is no freedom of conscience without freedom to act.[28]

Once a colony decided that dissenters should be allowed to live there, and that their lives should not be made miserable because of their faith, exemptions for religiously motivated conduct followed naturally. One by one, even the colonies with intolerant histories enacted exemptions from all the important legal requirements that burdened religious dissenters.

In 1708, Connecticut allowed dissenters to conduct their own worship services.[29] It exempted Quakers from swearing oaths by an eighteenth-century statute of

[28] Curry, *supra* note 17, at 15.
[29] Laycock, *supra* note 18, at 1803 & nn.46-47.

uncertain date; Massachusetts did the same in 1744.[30] Both colonies exempted dissenters from paying the church tax in a series of statutes beginning in 1727.[31] In 1757, Massachusetts exempted Quakers from military service.[32]

Virginia, which had long resisted religious liberty, followed suit. It exempted Quakers from swearing oaths in 1722.[33] It exempted Huguenots from paying the church tax in 1700, and German Lutherans in 1730.[34] Finally, in 1776, it exempted the remaining dissenters from the church tax, then suspended collection of the tax altogether,[35] and it exempted Quakers from military service.[36]

4. This lived experience is the best guide to how the Founders understood religious liberty. Once they undertook to guarantee religious liberty, whether early or late, whether enthusiastically or reluctantly, they soon exempted religious minorities from neutral and generally applicable laws that substantially burdened their exercise of religion.

These actual decisions are much better evidence of the original public meaning than the occasional quotation that arguably addresses the issue. Many such

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[30] *Id.* at 1805 & n.55.
[31] *Id.* at 1806 & n.60; McConnell, *supra* note 8, at 1469; 1 William G. McLoughlin, *New England Dissent 1630-1833*, at 221-43, 269-77 (1971).
[32] Laycock, *supra* note 18, at 1806 & n.63.
[33] Thomas E. Buckley, *Establishing Religious Freedom: Jefferson's Statute in Virginia* 16 (2013).
[34] McConnell, *supra* note 8, at 1469 & n.303.
[35] *Ibid.*; Buckley, *supra* note 33, at 56.
[36] McConnell, *supra* note 8, at 1468 & n.297.

quotations are best understood to support a right to exemptions.[37] But most, on either side, are indirect; often the speaker was addressing some other issue altogether. The biggest church-state issue in the 1780s was disestablishment and how to fund the church. A general right to exemptions was not a live issue. With much less regulation and much more religious homogeneity, exemption issues could be addressed individually.

Legislatures granted these exemptions because, in colonial courts, judicial review did not yet exist. But all the colonies, and then all the states, implemented free exercise of religion by granting exemptions. That is what they understood free exercise of religion to mean.

Another body of evidence is that state guarantees of religious liberty contained provisos: free exercise of religion but no right to breach the peace or engage in licentiousness.[38] Why were these provisos thought necessary? Because without them, guarantees of free exercise would have protected religious conduct from generally applicable laws against breach of peace and licentiousness. The scope of these provisos was debated, showing that their reach was thought to matter; they were not a textually odd way of referring to all generally applicable laws.[39]

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[37] *Id.* at 1446-49 (quoting Madison, William Penn, Presbyterian leader John Witherspoon, and Baptist leader John Leland).
[38] *Id.* at 1461-62.
[39] *Id.* at 1461-66.

The experience of protecting religious liberty in the colonies and state constitutions is the best guide to the original public meaning of the Free Exercise Clause: it provides for religious exemptions when necessary.

B. Free Exercise Without Exemptions Does Not Work Today.

Free exercise without exemptions causes the same problems today. It fails to avert the historic evils that religious liberty is meant to avert: coercion of conscience, suffering for one's faith, and social conflict.

1. Generally applicable laws without exemptions still coerce individuals and cause them to suffer for their faith. People surrender their conscience for fear of fine or imprisonment. Or they go to jail, pay the fine, or lose their social-welfare benefits or professional licenses, because of their religion.

These are the modern equivalents of the harms that so troubled the Founders. "'Neutral, generally applicable' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and in the judgment). Religious exemptions avoid violations of conscience, and they avoid suffering for the sake of conscience.

In this case, a justice of the peace has suffered a disciplinary sanction, and reasonably fears the threat of escalating penalties, for engaging in a ministerial act—

officiating weddings—in the way consistent with her faith. As with the history we have discussed, it matters not that the commission's disciplinary rule could be said to be generally applicable. Its application here still pressures petitioner to act contrary to the dictates of her religious conscience.

2. Penalties on the exercise of religion also aggravate religious, cultural, and political conflict. "A person's response to [religious] doctrine, language, and imagery … reveals a core aspect of identity—who that person is and how she faces the world." *Town of Greece v. Galloway*, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting). Substantial burdens on religious practice threaten a person's fundamental way of life, causing fear and resentment.

It may be frustrating for those on either side in a social conflict to see governments, or other citizens, legally doing things that they deeply disapprove of. But it is far worse to be told that your own religious or intimate personal practices must conform to the other side's preferences: that you must participate or assist or else surrender important activities of your own, such as helping neglected children. It is the difference between losing a political battle and being forced to surrender your own faith and identity.

Resentment and fear certainly operate in today's political and cultural environment. Americans of different political parties now distrust each other more than at any time in the last fifty years. "[P]oliticians need only incite fear and anger

toward the opposing party to win and maintain power."[40] "Confrontational politics" causes "voters to develop increasingly negative views of the opposing party."[41] Religious disagreements are an important component of this polarization.[42]

These developments make strong constitutional protections for religious liberty as important as ever. First, in an atmosphere of fear and distrust, people are especially likely to perceive threats to their religious practices as threats to their overall identity. Historic religious minorities fear that laws restricting their practices reflect the growing hostility of the majority. Conservative Christians fear that some applications of antidiscrimination laws pose existential threats to their institutions and to individuals in business and the professions.

Vigorous protection of religious liberty calms polarization by reducing people's "existential fear that a hostile majority will successfully attack their core commitments."[43] Protecting religious practice gives people space in civil society, not just to hold beliefs but to live by them. "Protecting religious liberty for all can

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[40] Alan Abramowitz & Steven Webster, *"Negative Partisanship" Explains Everything*, Politico (Sept./Oct. 2017), https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534 [https://perma.cc/H267-VRYU].

[41] Alan I. Abramowitz & Steven Webster, *The Only Thing We Have to Fear Is the Other Party*, Rasmussen Reports (June 4, 2015), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_alan_i_abramowitz/the_only_thing_we_have_to_fear_is_the_other_party [https://perma.cc/7PK8-YYXX].

[42] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 412-23 (2011).

[43] Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017-18 Cato Sup. Ct. Rev. 139, 157.

help calm fear and alienation, promoting civic peace, by providing the sense of security that one's deepest commitments will not penalized except in cases of necessity."[44]

Second, negative polarization reduces the likelihood that the political process will accommodate the needs of religious minorities. The side of the political divide that holds power often has no sympathy for the predicament the other side faces. Culturally conservative places have little sympathy for Muslims, Native Americans, or other historic religious minorities. Culturally progressive places have little sympathy for conservative Christians.[45] Thus, even when balanced solutions to religious-liberty conflicts exist, the political process doesn't reach them. In recent years, even state versions of RFRA—laws that once passed with near unanimity—have been blocked by the polarization over LGBT rights and religious liberty.[46]

Third, without exemptions, a threat to religious liberty from proposed legislation can be countered only by blocking the legislation entirely. If the choice is between a gay-rights law with no exemptions or no gay-rights law at all, then in many places there will be no gay-rights law at all. Lack of religious exemptions greatly raises the

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[44] Thomas C. Berg, *Religious Liberty in a Polarized Age* 119 (Eerdmans Publishing 2023).
[45] Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U.L.Q. 919, 943-48 (2004) (describing how different religious groups are vulnerable in different jurisdictions and settings); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839 (surveying polarization over sexual morality).
[46] Brian Miller, *The Age of RFRA*, Forbes (Nov. 16, 2018), https://www.forbes.com/sites/brian miller/2018/11/16/the-age-of-rfra/#3d9637e477ba [https://perma.cc/N6D7-S93F].

stakes in political disputes.

Religious liberty cannot solve the problems of polarization, but it can reduce them. Today as much as ever, free-exercise exemptions are needed to serve religious liberty's historic purpose of calming fear and reducing social conflicts that "can strain a political system to the breaking point." *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970) (opinion of Harlan, J.).

C. Exemptions Best Reconcile the Key Principles of America's Religious-Freedom Tradition.

America's historic commitment to religious freedom—reflected both in state guarantees and in the federal Constitution—contains multiple principles that serve the purposes discussed above. (For purposes of brevity, we mention here cases under the First Amendment's Religion Clauses.) Most obviously, religious freedom guarantees liberty with respect to choices and commitments about religion—liberty for believers in every faith and in none. E.g., *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000).

Second, the Religion Clauses generally commit the government to neutrality in matters of religion. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723-24, 1731-32 (2018).

Third, religion in America is voluntary. No one is required to support, believe, or participate in religion; people do these things in the way and to the extent that they choose. E.g., *Walz*, 397 U.S. at 694-96 (opinion of Harlan, J.). What the founding

generation called "voluntaryism" was an essential element of their church-state settlement.[47]

These principles are closely related, and despite occasional tensions, they generally cohere. Government neutrality in religious matters protects liberty and voluntarism; it leaves religion to decisions of private citizens.

The leading U.S. Supreme Court cases requiring exemptions emphasized that such exemptions preserve neutrality. *Sherbert v. Verner* said that religious exemption "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. 398, 409 (1963). *Wisconsin v. Yoder* said that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. 205, 220 (1972). TRFRA follows these federal cases in applying the compelling-interest test to laws that substantially burden religious exercise even when the law in question is facially neutral and generally applicable. Tex. Civ. Prac. Remed. Code 110.001(b), 110.003.

To understand how exemptions from generally applicable laws promote neutrality, we can distinguish two conceptions: "incentive neutrality" and "category neutrality."[48] *Amicus* Professor Laycock has labeled them "substantive neutrality"

[47] Esbeck, *supra* note 111.
[48] Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 37-38 (1989).

and "formal neutrality." Substantive neutrality requires government "to minimize the extent to which it either encourages or discourages religious belief or … practice."[49] *See also Lukumi*, 508 U.S. at 562 (Souter, J., concurring in part and in the judgment) (contrasting formal and substantive neutrality).

Regulating an activity and exempting conscientious objectors departs from neutral categories; it treats the religious objector differently. But exemption is far better at achieving neutral incentives.

When government prohibits or penalizes a practice, its purpose and effect is to discourage or eliminate that practice. If that practice is religious for some people, the penalties discourage religion. Imprisonment, fines, loss of social-welfare benefits, loss of government licenses and contracts, and loss of a discretionary judicial function that produces collateral income, are powerful disincentives.

But exemptions rarely encourage the religious practice because there is little reason to engage in religious practices apart from the religious belief that gives them meaning. No one became a Sabbatarian because Sherbert got her unemployment compensation; no parents removed their children from school because Yoder was allowed to educate his children on the farm. More precisely, no one did these things unless they already had the religious motivation to do them but had refrained because

[49] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990).

the law deterred them.

And no justice of the peace will decline to officiate same-sex weddings merely because of a religious exemption: that is, they will decline only because they already have the religious motivation but are deterred by the threat of discipline like that taken against petitioner.

Of course, there are exceptional cases. An exemption from military service, or from paying taxes, both protects conscience and confers secular benefits. Then neutral incentives are hard to achieve. But in the great bulk of cases—and in this one—regulatory exemptions for conscientious objectors provide far more neutral incentives than penalizing those who exercise their religion.

> [Requiring neutral incentives] highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice.[50]

Substantive neutrality, or incentive neutrality, better protects both liberty and voluntarism.

And this is the kind of neutrality that TRFRA provides. By enacting regulatory exemptions for religious practices, TRFRA eliminates powerful disincentives to practicing one's religion. And with the compelling-interest exception, it provides for

[50] *Id.* at 1002. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 64-68 (2007) (elaborating these connections).

the occasional cases in which a religious practice does serious harm or in which an exemption would provide incentives to become religious. This Court should continue to vigorously enforce TRFRA as it did in *Barr v. City of Sinton*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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October 25, 2023

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