No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,
v.
CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities in pursuing that mission.

SUMMARY OF ARGUMENT

This Court should grant the petition because the holding below threatens to undermine the "'scrupulous policy of the Constitution in guarding against a political interference with religious affairs.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909)). The City of Philadelphia's (the "City") policy violates the First Amendment in at least two ways. First, by displaying hostility to Catholic Social Services' ("CSS") religious beliefs. And second, by attempting to impose its own understanding of the Catholic religion on CSS.

The Third Circuit erred regarding both of these constitutional violations. First, it held that the City's

[1] Pursuant to SUP. CT. R. 37.2, amicus certifies that all parties were timely notified of the *amicus's* intent to file and consented to such filing. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel has made such a monetary contribution.

hostility, absent a showing of disparate treatment, was insufficient to violate the Constitution. Second, it excused the City's attempt to impose its own religious understandings on CSS as harmless. Both errors conflict with this Court's precedent and risk imposing unique harms on religious minorities.

While *Amicus* does not share CSS's relevant "religious [and] philosophical premises", *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), *Amicus* agrees that "the [City's] treatment of [CSS's] case violated [it's] duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The rights of all religious adherents are at stake here. Should the Court deny review, the denial will reverberate far beyond this case. The Third Circuit's approach and holding present an especially acute threat to Jews and other religious minorities who engage in many practices that government actors might misunderstand or misapply. Government actors repeatedly commit errors in interpreting Jewish religious practices and customs, such errors often lead to the unwarranted abridgment of Jews' religious liberty. Understanding the history of interaction between Judaism and the state gives *Amicus* a particular insight into the constitutional issues raised by this case, as well as the hazards that would result from permitting the decision below to stand. For these reasons, this Court should grant *certiorari* and reverse the judgment below.

ARGUMENT

I. The Third Circuit Misapplied This Court's First Amendment Holdings in a Manner that Threatens Religious Minorities.

A. The Test Adopted by the Third Circuit for Determining Whether a Government Official Participated in Impermissible Anti-Religious Conduct is Less Protective Than the Test Mandated by This Court.

The court below misapplied this Court's First Amendment jurisprudence by requiring CSS to demonstrate disparate treatment in addition to anti-religious hostility.

In *Masterpiece Cakeshop*, just as in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, this court held that "even 'subtle departures from neutrality' on matters of religion" are prohibited by the Free Exercise Clause. 138 S.Ct. 1719, 1731 (2018) (quoting *Lukumi,* 508 US 520 at 534). The government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* This Court disapproved of the blinkered view taken by the Third Circuit here, holding instead that courts must consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the

decisionmaking body" when assessing government neutrality. *Id.*

The Third Circuit erred by requiring CSS to show that it "was treated differently because of its religious beliefs." *Fulton*, 922 F.3d at 156. Under the Third Circuit's view, in order to prevail, CSS had to show that the City "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs." *Id.* In other words, CSS could only demonstrate that its Free Exercise Rights were violated by showing that other organizations with different religious beliefs who engage in the same practices were not affected by the City's ban.

First, this standard is too narrow. The Third Circuit essentially held that the First Amendment would only be implicated by the sort of overt "legal gerrymandering" that was present in *Lukumi*. As this Court made clear in *Masterpiece Cakeshop*, governmental expressions of hostility or non-neutrality to religion made in the course of enforcing regulations violate the First Amendment. *Masterpiece*, 138 S.Ct. at 1731. Nothing more than that is required.

Not only is this standard impossibly narrow, it is nonsensical. It is therefore not surprising that it conflicts with the Court's holding in *Masterpiece Cakeshop*. A discriminatory policy is not saved merely because it discriminates against *all* and not just *some* religions. A statute that, for example, prohibits parents from allowing their teenage children to fast on appropriate religious occasions is not in compliance

with the First Amendment merely because it is enforced against both Jews and Muslims, rather than only one or the other group. The Court should grant certiorari in this case to reaffirm that it meant what it said in *Masterpiece Cakeshop*: lower courts must make a holistic assessment of a government actor's neutrality to *religion* generally and not merely avoid exhibiting hostility to a particular faith.

B. The City Unconstitutionally Suggested that the Religious Ground for CSS's Conscience-Based Objection was Illegitimate.

The statements made by City officials second-guessed the legitimacy of CSS's beliefs in the same manner that doomed the state action in *Masterpiece Cakeshop*. First, a Commissioner told CSS to follow the teachings of Pope Francis. *Fulton*, 922 F.3d at 148. Such a quip evinces disrespect for CSS's understanding of its own faith. This statement violates *Masterpiece Cakeshop's* dictate that "government has no role in deciding or even suggesting whether the religious ground for [plaintiff's] conscience-based objection is legitimate or illegitimate," and is hardly "neutral and tolerant of [. . .] religious beliefs," as that decision requires. ." *Masterpiece*, 138 S.Ct. 1719 at 1731. The Third Circuit mistakenly dismissed this remark as "made during a negotiation attempting to find a mutually agreeable solution to this controversy" and "an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition." *Fulton*, 922 F.3d at 157. But, of course, this Court's jurisprudence flatly precludes a government

actor from determining which religious view is correct. There are no exceptions for "settlement negotiations" or cases of a "shared religious tradition." Here, a government actor stated that one religious view is correct, while another is wrong, and the City acted on that belief.[2]

Moreover, the record contains an even-more-troubling statement. When the City Council passed a resolution requiring the investigation of social service contractors' policies regarding LGBTQ applicants, it noted that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the *guise* of religious freedom." *Fulton*, 922 F.3d at 149 (emphasis added). This statement was not idle chatter. CSS's contract was terminated as a direct result of this resolution. The government's charges that CSS was motivated by prejudice are inextricably linked to the government's assertion that CSS's religious motivation is merely a smoke screen. This smear unfairly "tar[red]" religious charities with the "brush of bigotry." *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting).

This comment does not fall under a "grey zone," as the Third Circuit found. To the contrary, the state-

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[2] Incidentally, the Commissioner's statement appears to be based on a possible misunderstanding of Pope Francis' statements on homosexuality, *see* Jamie Mason, *So, what are 'deep-seated homosexual tendencies' anyway?*, NATIONAL CATHOLIC REPORTER, (Dec. 7, 2018), https://www.ncronline.org/news/opinion/grace-margins/so-what-are-deep-seated-homosexual-tendencies-anyway. Of course, governmental misunderstanding and misapplication of religious doctrine is an important reason to enforce the proper understanding of the First Amendment.

ment is indistinguishable from the Colorado commission's statement that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination." *Masterpiece Cakeshop*, 138 S.Ct. at 1729. This Court has noted that it "hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a] conscience-based objection is legitimate or illegitimate." *Id.* at 1731. Unfortunately, the opinion below demonstrates that this proposition must be restated once again. This Court should grant *certioriari* in order to do so.

II. Jews and Other Religious Minorities Are Particularly Threatened by the Third Circuit's Disregard for First Amendment Precedent.

The Third Circuit's willingness to allow the City to substitute its religious views for those of CSS poses a particular risk to Jews. Judaism does not have a central authority; there is no body that can settle doctrinal questions. Different groups within Judaism (Sephardic, Ashkenazi, and Yemenite, for example) maintain different traditions—none of them can speak for the "true Judaism." The First Amendment prohibits the government from treading where even religious authorities often don't dare set foot. The state's power to differentiate between the one "true faith" and heresy went out with the Inquisition. If the Third Circuit's contrary rule prevails, Jews who find

themselves on the wrong side of the government's definition of "true Judaism" will, like CSS, be unable to exercise their faith without risking the government's wrath. Such a result is untenable in a free society.

Unfortunately, Jews have already experienced the problem of the state dictating the "proper" way to practice their faith. For example, in *Ben-Levi v. Brown*, the lower courts determined that a prison did not discriminate against a Jewish prisoner when it denied Jews—and only Jews—the right to engage in prison bible study. *See* 136 S. Ct. 930 (2016) (Alito, J., dissenting from the denial of certiorari). The district court found that the prison's denial was intended to protect "the purity of the doctrinal message and teaching" of Judaism, which, according to the prison, "requires a quorum or the presence of a qualified teacher for worship or religious study." *See id.* at 933 (internal quotation marks and citations omitted). Because neither of these supposedly necessary conditions were met, the prison denied Ben-Levi's request to study the Scriptures. *See id.* The District Court concluded that such a refusal did not burden the prisoner's religious exercise. *See id.*

> In essence, [the prison]'s argument—which was accepted by the courts below—is that Ben-Levi's religious exercise was not burdened because he misunderstands his own religion. If Ben-Levi truly understood Judaism, respondent implies, he would recognize that his proposed study group was not consistent with Jewish practice and that respondent's refusal to authorize the group was in line with the tenets of that faith.

Id. (internal quotation marks and citations omitted). The prison should have left the interpretation of Jewish law to rabbis.

As it happens, the quorum requirement cited by the prison in *Ben-Levi* does not exist in Judaism. Most likely, the lower courts confused the requirement of having ten adult men present in order to read certain prayers with a non-existent obligation to have ten men present to study the Bible. Whether the mistake was understandable or made in good faith is beside the point. Rather, the mistake highlights why government actors should not act as theologians—and why the First Amendment, properly understood, ensures they do not even attempt it.

Ben-Levi is not an isolated incident. For instance, many Jews observe a ritual called Kapprot prior to the High Holidays. Some Jews interpret this ritual to require the ceremonial use and slaughter of chickens, while others believe that it can be fulfilled by donating money to charity. Both traditions are well-established and have been practiced for centuries. Nonetheless, animal rights activists have repeatedly brought lawsuits trying to prevent Jews from performing this ritual by slaughtering chickens. They have argued the theological position that donating money would serve just as well. *See, e.g., United Poultry Concerns v. Chabad of Irvine*, No. CV 16-01810-AB (GJSX), 2017 WL 2903263, at *6 (C.D. Cal. May 12, 2017). Occasionally, courts have accepted the invitation to adjudicate questions of faith. In one case, a judge pursued this line of questioning by asking, "[w]hat's the harm if the chickens are not butchered

but this evening bags of coins are used in its stead?" *See id.*, Trans. Of Prelim. Injunction Hearing at 37 (question by the Court). http://bit.ly/2Ml2TMH. Once the court started down this road, a bad outcome was almost inevitable. Assuming to itself the power to dictate to rabbis how they should properly atone of their sins on one of the holiest days of the year, the district court enjoined the performance of a centuries-old religious tradition. By the time the court dissolved the temporary restraining order, it was too late to perform the ritual.

Consider one final example in which a government actor misapprehended the requirements of a Jewish religious tradition. During a Fifth Circuit oral argument, one of the panel judges commented that turning "on a light switch every day" was a prime example of an activity unlikely to constitute a substantial burden on a person's religious exercise. *See* Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. April 7, 2015). But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of Exodus 35:3, which explains that lighting a flame violates the injunction to keep the Sabbath in the Ten Commandments. Certainly, this judge did not intend to demean Orthodox Jews or belittle central Jewish practices. He simply, and understandably, was unaware of how some Jews understand the Commandment to guard the Sabbath.

These incidents illustrate, with precision, why government entities do not and should not determine the doctrines of a faith; instead, the judicial function is limited to ascertaining whether a certain belief is sincerely held and whether the denial of the ability to

practice one's faith satisfies the strict scrutiny standard. The Constitution sensibly placed religious dogma far beyond the courts' remit.

Amicus recognizes that "[t]he interest of society in the enforcement of [] discrimination statutes is undoubtedly important[.]" *Hosanna-Tabor* at 196. But the courts must also weigh "the interest of religious groups in choosing" how to "preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor* at 196. This precept is especially important for members of minority religions that lack a central interpretive authority. The Jewish people, who have varied views, are thus especially vulnerable to government officials who think they know what is best for the Jewish people in their relationship with the divine.

Because the City is attempting to compel CSS to subscribe to the City's understanding of Catholic teachings rather than letting the practitioners of the faith determine for themselves what their religion requires, the City has violated the First Amendment. The Third Circuit's failure to recognize this should not be allowed to stand.

CONCLUSION

"[I]n a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785 (Kennedy, J., concurring). But this difficulty is all the more reason to guard against the government inserting itself into the debates over and the application

of church doctrine. Because the City of Philadelphia disregarded every measure of constitutional caution, and in light of the threat such overreach poses to Jews and all minority faiths, this Court should grant *certiorari* and reverse the judgment below.

Respectfully submitted,

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August 2019