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INTEREST OF *AMICI CURIAE*

Amici are legal scholars who teach, research, and publish about freedom of religion and the Religion Clauses. *Amici* have an interest in promoting a robust conception of free exercise that protects all religious individuals, including religious minorities, and in ensuring that the core guarantee of religious liberty that was central to the Framers' conception of fundamental rights is safeguarded by the courts. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In seeking relief under the First Amendment's Free Exercise Clause, the Plaintiffs-Respondents ("Plaintiffs") have asked the judiciary to fulfill "this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

The government grounds its efforts to deny Plaintiffs their day in court on the assertion that the state secrets privilege is "firmly rooted in the Constitution" and the Executive's Article II powers, seeking to shield themselves behind the patina of constitutional protections. *See*

homes, businesses, and the associations of hundreds of Muslims"—because they were Muslims. J.A. 108. The government also recorded "thousands of hours" of "conversations," as well as "public discussions, groups, classes, and lectures occurring in mosques and at other Muslim religious and cultural events"—because the targets were Muslims. *Id.* The informant was told to "gather as much information on as many people in the Muslim community as possible," and even given daily quotas for the number of Muslims from whom he should obtain contact information. J.A. 93-94, 106. If the informant happened to gather information on non-Muslims, the FBI discarded that information. J.A. 103.

These allegations, if true,[2] would represent as deep an afront to the very character of this nation as can be envisioned. This Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in the judg-

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[2] To be sure, the FBI's confidential informant has already submitted sworn declarations in this case verifying many of Plaintiffs' religious discrimination allegations. For example, the in-

ment). To specifically "single[] out for special burdens" an entire community of people "on the basis of [their] religious calling" would be a "profound" "indignity" striking at the heart of what the First Amendment was designed to prohibit. *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The Framers saw the right to practice religion freely, without government interference, as one of the most crucial rights the new nation would protect. "To them, the freedom to follow religious dogma was one of this nation's foremost blessings, and the willingness of the nation to respect the claims of a higher authority than 'those whose business it is to make laws' was one of the surest signs of its liberality." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1517 (1990). To the Framers, the right to worship freely was universal and extended to all faiths. "As John Adams put it, religious freedom 'resides in Hindoos and Mahometans, as well as in Christians; in Cappadocian monarchists, as well as in Athenian democrats; in Shaking Quakers, as well as in . . . Presbyterian clergy; in Tartars and Arabs, Negroes and Indians'—indeed in '[all] the people of the United States.'" John Witte, Jr. & Joel A. Nichols, *"Come*

which, together with the Establishment Clause, constitute our "first freedoms," taking "pride of place in our hierarchy of constitutional values." Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1243 (2000).

The Free Exercise Clause established a "guarantee that government may not unnecessarily hinder believers from freely practicing their religion" and placed "limits [on] the government's ability to intrude on religious practice." *City of Boerne v. Flores*, 521 U.S. 507, 549-50 (1997) (O'Connor, J., dissenting). This Court has embraced the Framers' vision of ensuring broad protections for the free exercise of religion, treating "our Nation's fundamental commitment to individual religious liberty," embodied in the First Amendment, as axiomatic. *See Emp. Div. v. Smith*, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in the judgment). It has made clear that this protection extends to all, regardless of their faith—but with special concern for the rights of those practicing minority or even disfavored religions, as "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Id.* at 902; *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The Court has insisted on giving the Free Exercise Clause "broad meaning" "in the light of its history and the evils it

Moreover, this Court has long noted that the Free Exercise Clause's "purpose is to secure religious lib-

Plaintiffs have cogently explained, the Foreign Intelligence Surveillance Act ("FISA") provides a ready framework with which to adjudicate their religious discrimination claims, notwithstanding the invocation of the *Reynolds* state secrets privilege. If it were otherwise, the rights so deeply enshrined in the First Amendment would be without a remedy whenever the Executive claimed the privilege, thereby reducing these fundamental freedoms—inextricable from the very Founding of the nation—to "a meaningless scholasticism." *Wood & Selick v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.).

II. To Give Full Effect To The Free Exercise Clause, Individuals Whose Religious Liberties Are Infringed Must Be Provided An Avenue To Seek Judicial Redress.

As fundamental to the nation's system of laws as the right to free exercise is the "right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); 1803); Marbur, 163 (1693),m th8n7 TCt. 792, 800.53502

that a restriction on judicial review of constitutional challenges, whereby "absolutely no judicial consideration of the issue would be available," would be "extraordinary"). Because the judiciary is the "ultimate interpreter of the Constitution," it is the judiciary's "responsibility" to review claims alleging violations of constitutional rights. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Cases concerning the Religion Clauses are no exception. By one commentator's count, since *Reynolds v. United States*, 98 U.S. 145 (1878), the Court's first Religion Clauses case,[3] this Court has decided at least "115 cases in which at least four Justices considered the Free Exercise or Establishment Clause (or both) to raise substantial issues." Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 Or. L. Rev. 563, 565 (2006).

Claimants alleging religious discrimination under the First Amendment have long been able to at least have their day in court, if not always succeed on the merits. *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 269, 272-73 (1951) (Jehovah's Witnesses successfully challenged convictions stemming from discriminatory refusal to grant park permit); *McDaniel v. Paty*, 435 U.S. 618, 621, 629 (1978) (Baptist minister won challenge of state law disqualifying ministers from hold-

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[3] An earlier case involving the Free Exercise Clause was decided in 1845, but because the Bill of Rights was only applied to the federal government at the time, the Court merely stated that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

ing certain public offices);

Put simply, the "fiat of a government official . . . cannot displace the judicial obligation to enforce constitutional requirements." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 882-83 (2d Cir. 2008), *as modified* (Mar. 26, 2009); *see also, e.g.*, *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) ("[W]e do not automatically decline to adjudicate legal questions if they may implicate foreign policy or national security."). Thus, while courts have afforded significant deference to assertions of Executive privilege, they have also maintained a critical eye over the scope and validity of such assertions. In *United States v. Nixon*, for example, this Court emphasized

Letters ("NSL") in light of the First Amendment concerns at stake. *Mukasey*, 549 F.3d at 882. NSLs are administrative subpoenas to electronic communication service providers for non-content information, typically accompanied by a nondisclosure requirement forbidding the recipient from disclosing the request on the grounds that doing so could endanger national security or cause certain other enumerated harms. *See* 18 U.S.C. § 2709. While courts "will normally defer to the Government's considered assessment of why disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, [a court] cannot . . . uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists." *Mukasey*, 549 F.3d at 881.

So, too, courts must scrutinize the Executive's assertion of the state secrets privilege. "[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States*

taining supporting witnesses against state evidentiary rules preventing defendants from introducing accomplices as witnesses. 388 U.S. 14, 22 (1967). In permitting the introduction of such accomplice testimony, the Court made clear that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23.

More recently, in *Pena-Rodriguez v. Colorado*, the Court held that the "no-impeachment rule"—which generally prohibits a juror from testifying about the jury's deliberations during an inquiry into the validity of a verdict or indictment, and with centuries-old roots in the common law—must yield to constitutional values where a "juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." 137 S. Ct. 855, 861, 864-65, 869 (2017). Citing the Fourteenth Amendment and noting that its "central purpose . . . was to eliminate racial discrimination emanating from official sources in the States," the Court held that allowing racial bias to persist in the justice system would result in "loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 867, 869. Thus, to preserve the fundamental rights enshrined by the Sixth and Fourteenth Amendments, that Court held that the no-impeachment rule must "give way" in cases of clear racial bias and permit the trial court to "consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

Here, the national "commitment" to religious freedom is no less an imperative of our "heritage" than the

Fourteenth Amendment's goal of eradicating racial bias. *Id.* at 867. And just as even centuries-old common law rules like the no-impeachment rule must "give way" when their operation would conflict with core constitutional rights, so here the state secrets privilege must not be allowed to completely foreclose

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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APPENDIX A:
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