No. 17-1035

IN THE

Supreme Court of the United States

CONRAAD HOEVER.

Petitioner,

v.

P. BELLEIS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF PROFESSORS DOUGLAS LAYCOCK AND MICHAEL W. MCCONNELL IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the First Amendment extend to a prisoner's non-mandatory religious exercise?

2. Does 42 U.S.C. § 1997e(e) permit a prisoner to recover compensatory damages against prison officials who violate the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose research and scholarly interests focus on religious liberty. Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia. Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution.[1]

SUMMARY OF ARGUMENT

This *amicus* brief explains why the Court should grant certiorari on the first question presented. The Court should clarify that the Free Exercise Clause protects "non-mandatory" religious practices such as reading the Bible. As explained in the petition, the question is not only extremely important but also the subject of a lopsided circuit split. In addition, as explained more fully below, the Eleventh Circuit's outlier rule cannot be squared with this Court's precedent or the constitutional text. It reflects a mistaken view of religious exercise that has already caused significant confusion in the lower courts, and it is likely to cause ongoing mischief unless this Court intervenes.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief as required under Rule 37. Counsel for both petitioner and respondents consented to the filing of this brief.

ARGUMENT

I. Neither the Constitutional Text Nor This Court's Precedent Supports Any Distinction Between Mandatory and Non-Mandatory Religious Exercise

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The plain text of this provision provides no basis for distinguishing between mandatory and non-mandatory religious practices. According to its ordinary meaning dating back to the 14th Century, "to exercise" simply means "[t]o make use of" or "to put into action." Black's Law Dictionary (10th ed. 2014). People thus exercise their religion whenever they choose to put their religious beliefs into action, not just when they think they *must*.

This Court's precedent confirms that religious "exercise" refers to any "religiously motivated conduct," including the "performance of (or abstention from) physical acts . . . for religious reasons." *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 875, 877 (1990). *See also, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (describing religious exercise as any "conduct prompted by religious principles"). Thus in *Smith*, for example, it was sufficient to establish the existence of a religious exercise by noting that the "sacramental use of peyote" at issue was "religiously motivated," with no consideration of whether it was religiously *mandatory*. 494 U.S. at 875. And of particular relevance here, this Court has recognized in the prison context that "the commitment of

marriage may be an exercise of religious faith," again with no consideration of whether getting married is religiously required. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

In his opinion for the Court in *Smith*, Justice Scalia provided a few other common examples of religious exercise, including "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." 494 U.S. at 877. Notably, most of these illustrative examples are non-mandatory in many circumstances. For example, there is no obligation for a Catholic to attend Mass on weekdays—or to take communion more than once a year—but that does not make these practices any less of a religious exercise.

To be sure, *Smith* held that there is typically no constitutional right to engage in a religious exercise if doing so would violate a "neutral, generally applicable law." 494 U.S. at 881. That holding overturned the prior constitutional rule that any substantial burden on religious exercise must be justified by a "compelling governmental interest." *Id.* at 883. At the same time, however, *Smith* left untouched the longstanding definition of religious exercise as including any "religiously motivated" conduct. *Id.* at 875. Indeed, the breadth of that definition was one of the main justifications for the majority's view that most substantial burdens on religious exercise should not be subject to exacting judicial scrutiny, lest each religious adherent "become a law unto himself." *Id.* at 885.

In recognition of this Court's longstanding interpretation, Congress has also taken the view that

religious exercise includes non-mandatory religious practices. In response to the *Smith* decision, a nearly unanimous bipartisan majority enacted the Religious Freedom Restoration Act (RFRA), which was expressly designed "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). While the statute enacted a new statutory standard of review, it did not alter the underlying definition of religious exercise, providing merely that "'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." When that definition generated unanticipated litigation, Congress amended it to expressly include "any exercise of religion, *whether or not compelled by*, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), incorporating the definition in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-5(7)(A) (emphasis added). *See* H.R. Rep. 106-219 at 13, 30 (explaining that this definition was "clarifying issues that had generated litigation under RFRA").

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that RFRA's heightened standard of judicial scrutiny could not be enforced against the states. It did not, however, cast any doubt on the standard definition of religious exercise, which has generally been understood to refer to all "religiously motivated conduct" before, during, and after the *Smith* decision. *Id.* at 538 (Scalia, J., concurring).

II. Limiting The Free Exercise Clause To "Mandatory" Religious Exercise Would Wrongly Exclude Many Core Religious Practices

A. The Free Exercise of Religion Requires Protecting Non-Mandatory Religious Practices

Denying protection to non-mandatory religious practices would allow the government to selectively prohibit a vast array of the most cherished religious activities without any constraint under the Free Exercise Clause. For Protestants, there is no obligation to host a Bible study in your home, teach Sunday school, or join the church choir. For Catholics, there is no obligation to pray the rosary, take daily communion, or attend vespers. For Jews, there is no obligation to recite Psalms or to eat matzah outside of the Passover Seder. For Muslims, there is no requirement to pray on a traditional "prayer rug," even though many do so as a matter of course.

Construing the Free Exercise Clause to categorically exclude such religious practices and customs would enshrine an artificially narrow, purely negative view of religion that consists of nothing more than following the rules. On this view, "[i]t is as though all of religious experience were reduced to the Book of Leviticus," which is a "view of religion held by many secularized adults, who left the church in their youth after hearing much preaching about sin and failing to experience any benefits." Douglas Laycock, 2 RELIGIOUS LIBERTY:

THE FREE EXERCISE CLAUSE, 93 (2011). In reality, however "serious believers rarely concentrate their efforts on identifying the minimum that God requires." *Id*. at 95. Instead they engage in a wide variety of "affirmative, communal, and spiritual" activities that are plainly religiously inspired, but by no means required. *Id*. at 93

Under any plausible reading of the Free Exercise Clause, the government cannot prohibit religious practices with a law that is not neutral, or that is less than generally applicable, without satisfying the most stringent constitutional scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But under a "non-mandatory" view of religious exercise, the government could prohibit all of the practices described above without giving rise to any Free Exercise claim whatsoever. Indeed, under that artificially narrow view, "no free exercise issue would be raised by a People's Bureau for the Management and Supervision of Non-Mandatory Aspects of Religious Practice." Laycock, 2 RELIGIOUS LIBERTY, at 95.

While such hypotheticals might seem far-fetched, the possibility even of targeted religious restrictions on non-mandatory religious practices is all too real. For example, some women choose to wear a veil out of a sense of religious modesty even though they do not believe the practice is strictly required by their religion. But if a state followed the example of France and banned the practice of wearing a veil in public, surely the First Amendment would recognize a Free Exercise claim.

To be sure, this Court has properly recognized that religious exercise *includes* "conduct mandated

by religious belief." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). But the Court should now take the opportunity to clarify that the Free Exercise Clause is not *limited* to that subset of religious practice. That clarification is long overdue. After *Thomas* was decided, one state Supreme Court astonishingly appeared to conclude that entering the religious ministry is not a protected form of religious exercise because it is not "conduct mandated by religious belief." *Witters v. State Comm'n for the Blind*, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1123 (1989) (quoting *Thomas*, 450 U.S. at 718).

The holding in the present case is equally alarming. In the decision below, the Eleventh Circuit applied its "non-mandatory" rule to hold that studying the Bible is not a protected religious exercise because it is "beneficial, not mandatory" under the plaintiff's religious beliefs. Pet. App. 8a. By the same logic, the Free Exercise Clause would pose no obstacle to the government's targeted prohibition of scriptural reading for virtually every religious faith, since very few religions regard the reading of scripture as mandatory in most circumstances.

B. The Same Definition of Religious Exercise Should Apply to Prisoners

Although Free Exercise claims can pose a special challenge in the prison context, the proper way to address that challenge is by taking into account the prison's legitimate penological interests, not by creating an *ad hoc* exception to the ordinary meaning of religious exercise. That is precisely the teaching of

Turner v. Safley, which recognized that prisoners retain their the right to "exercise [their] religious faith," albeit "subject to substantial restrictions as a result of incarceration." 482 U.S. at 95–96.

The workability of robust Free Exercise claims in the prison context has been strongly confirmed by nearly two decades of cases applying the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Under RLUIPA, any prison that accepts federal funds is prohibited from substantially burdening an inmate's religious exercise unless doing so is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000cc–1(a). Like RFRA, RLUIPA broadly defines "religious exercise" to include any religious practice regardless of whether it is "compelled by, or central to, a system of religious belief." *Id.* § 2000cc–5(7)(A). Accordingly, in order to qualify for protection, an inmate's religious practice need not be "mandatory" in any sense, but must only be "sincerely based on a religious belief and not some other motivation." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Despite the breadth of this protection, this Court has recognized that RLUIPA still "affords prison officials ample ability to maintain security" and protect their other legitimate interests. *Id.* at 866.

As a practical matter, recognizing non-mandatory religious exercise under the First Amendment would impose little if any additional burden on prisons, because constitutional Free Exercise claims typically trigger far less exacting scrutiny than RLUIPA claims. *See Safley*, 482 U.S. at 89 (holding that a neutral and generally applicable prison policy that restricts religious exercise is not

subject to "strict scrutiny" under the First Amendment). The only exception is when a prison discriminates by regulating religious practices and not regulating secular practices that undermine the same state interests to a similar or greater degree. *Cf. Lukumi*, 508 U.S. at 543. This type of religious discrimination triggers strict constitutional scrutiny, *id.*, thus providing a viable claim for damages that is not available under RLUIPA. [2] Accordingly, the primary result of denying First Amendment protection to inmates' non-mandatory religious practices would be to give prisons extra leeway in the discriminatory treatment of such practices.

III. Protecting Only "Mandatory" Religious Exercise Would Be Discriminatory And Intrusive

Limiting the Free Exercise Clause to "mandatory" religious practices would also raise two other fundamental problems.

First, it would have the perverse result of favoring more orthodox and rule-based religions over others. For example, it would recognize weekly churchgoing as a protected religious exercise for those who treat it as mandatory, but not for those who view it as merely beneficial. The same goes for all manner of prayer, fasting, and other religious

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[2] In *Sossamon v. Texas*, 563 U.S. 277 (2011), this Court held that RLUIPA does not allow official-capacity damages claims due to sovereign immunity. Moreover, every circuit to consider the issue has held that, unlike a § 1983 suit under the First Amendment, RLUIPA does not allow a damages claim against prison officials in their private capacities. *See, e.g., Wood v. Yordy*, 753 F.3d 899, 903 (9th Cir. 2014) (collecting cases).

observance. One of the most fundamental principles of religious liberty is that "[e]very religious society has a right to determine for itself the times for [religious] exercises, & the objects proper for them, according to their own particular tenets[.]" Letter from Thomas Jefferson to Rev. Samuel Miller, 23 Jan. 1808. But giving favorable treatment to orthodox believers who engage in more "obligatory" religious practices would violate the basic principle of equal treatment among different religious faiths.

Lower courts that have denied constitutional protection to non-mandatory religious exercise have reached precisely this type of discriminatory result. For example, the Second Circuit has held that excluding a Christian prayer group from campus during a school day does not raise any Free Exercise issue because Christians are not required to pray at any particular time. *Brandon v. Bd. of Ed. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 977 (2d Cir. 1980). The court distinguished Christian prayer from "the case of a Moslem who must prostrate himself five times daily in the direction of Mecca," which the court suggested would be entitled to greater protection. *Id.*

Second, placing dispositive weight on the "mandatory" character of religious practices would entangle the courts in the delicate task of probing the contents of private religious beliefs. Instead of asking simply whether a person's asserted religious exercise is *sincere*, courts would also need to make a further inquiry into the *content* of the person's faith, to determine whether the religious practice is truly required. Assigning this task to the judiciary is especially problematic because in many religions it is

far from clear what it means for a practice to be "required." Does the practice have to be mandated by a deity? Does the mandate have to be backed by some threat of divine sanction, or some promise of reward? What if the believer simply feels obligated to engage in a practice out of gratitude for divine providence, or due respect for religious tradition? Such questions highlight the reality that, "for many believers, the attempt to distinguish what is *required* from what grows organically out of the religious experience is an utterly alien question, perhaps a nonsensical and unanswerable question." Laycock, 2 RELIGIOUS LIBERTY, at 95 (emphasis added).

The difficulty is further compounded because beliefs about the obligatory nature of religious practice may evolve and change over time. "The dominant view of what is central to the religion, and of what practices are required by the religion, may gradually change. Today's pious custom may be tomorrow's moral obligation, and vice versa." Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1391 (1981).

Even during the same time frame, many faiths are riven by strong differences of opinion over whether certain practices are "moral obligations" or mere "pious customs." Such disputes can occur not only between competing religious authorities, but also between devout religious leaders and their wayward flock (or vice versa). Accordingly, making the protection of the Free Exercise Clause turn on the "obligatory" nature of religious activities will inevitably embroil courts in private religious

controversies. In some cases it may also distort religious doctrine by pressuring believers to cast their practices as mandatory in order to qualify for constitutional protection.

CONCLUSION

The Court should grant the petition for writ of certiorari.

MARCH 19, 2018

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