

IN THE SUPREME COURT OF PENNSYLVANIA

No. 150 EAL 2025

FRED DiMEO AND NANCY DiMEO

v.

PETER GROSS, D.O. AND G.S. PETER GROSS, D.O., P.C., PENNSYLVANIA HOSPITAL
OF THE UNIVERSITY OF PA HEALTH SYSTEM, UNIVERSITY OF PENNSYLVANIA
HEALTH SYSTEM, TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA

Petition of Peter Gross, D.O., and G.S. Peter Gross, D.O., P.C.
for Allowance of Appeal from the April 2, 2025 Order of the Superior Court at No.
280 EDA 2024, affirming the November 27, 2023 Order of the Philadelphia
County Court of Common Pleas, Hon. Carmella G. Jacquinto, October Term 2019,
No. 3447

**Brief of Amicus Curiae Independence Law Center in Support of the Petition
for Allowance of Appeal**

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INTEREST OF AMICUS CURIAE¹

Independence Law Center is a Pennsylvania-based public interest and civil rights law firm focusing on religious liberty and other public policy priorities necessary for a free and thriving society. It is becoming too common for civil authorities to make decisions that callously hinder or punish the religious exercise of devout observers. It is particularly concerning when those decisions affect minority religions historically targeted by persecution. Amicus curiae has an interest in ensuring that government actors, including courts, do not interfere with the religious exercise rights of litigants. Courts have an historic duty to provide judicial access, even if that means making special efforts to accommodate religious practice. When either free exercise of religion or judicial access is compromised for any litigant, the substantive and procedural rights of all of us are jeopardized. Amicus curiae's expertise regarding the history and formation of religious liberty in colonial America will aid the Court's consideration of this case.

SUMMARY OF THE ARGUMENT

Colonial Pennsylvania had a distinct heritage of welcoming religious minorities and tolerance of religious differences. While religious adherence was the

¹ No party's counsel authored any part of this brief. No person other than amicus and their counsel contributed any money intended to fund the preparation or submission of this brief.

goal in other colonies, William Penn and his new colony set forth religious freedom as the ideal, which enabled colonists to be faithful to both the laws of civil government as well as the divine sovereign. The exemptions that facilitated religious liberty were particularly important for minority religions that suffered persecution in Europe where conformity with the state was required. Pennsylvania demonstrated that this innovative approach to valuing religious liberty over the unyielding demands of the state could lead to human flourishing.

Later, the framers of the Constitution were heavily influenced by Pennsylvania's example and provided broad protection for the freedom of conscience through the Free Exercise Clause. These protections, however, were denied to Dr. Gross when he was placed by the trial court in the untenable position of having to choose between two constitutional rights: the right to worship according to his conscience or the right to be present at his trial to aid in his defense. Allowing civil authorities to abuse their power by squelching religious freedom increases the likelihood that other freedoms will be compromised as well. We are a nation founded on the principles of "liberty and justice for all," but Dr. Gross was wrongly forced to sacrifice justice *for* liberty when he was deprived of the requested one-day postponement of his trial to worship on Yom Kippur, and he consequently suffered irreparable harm.

ARGUMENT

- I. The History of Religious Liberty in Colonial America Demonstrates that the Framers Intended Liberal Accommodations to Protect Religious Liberty and Freedom of Conscience Specifically in the Context of Judicial Access.

America began as a nation of immigrants, who brought with them diverse religious convictions that ultimately necessitated the Free Exercise Clause that we cherish today. The early American colonists grappled with the conflicts they had seen in Europe where loyalties were demanded by two sovereigns: the state and the “universal sovereign.” Many individuals — especially those with minority beliefs — came to America precisely because they sought to follow their convictions regarding the duties owed to the divine sovereign without risking persecution by the state. Their adverse experiences in Europe led many settlers to immigrate here with a clear desire for religious liberty where they could express their faith in a greater sovereign without punishment from the government. A national identity consequently emerged from this religious diversity that has set America apart from other nations, and our respect for religious liberty has served for centuries as our greatest strength.

Experiments started early in the colonies over what kind of religious experiences would be permitted. The concept of religious freedom gained popularity as people with diverse religious backgrounds managed to live in measured harmony by making accommodations for others’ religious practices. Michael W. McConnell,

The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1430 (May 1990) (hereinafter, “*The Origins of Free Exercise*”). In particular, the Commonwealth of Pennsylvania, founded by William Penn as a sanctuary for Quakers and other religious minorities, led this movement, practicing the novel concept of religious liberty for groups other than one preferred denomination. *Id.* at 1425, 1430. Pennsylvania singled itself out by dedicating its colony to this ideal of religious freedom described by William Penn as a “Holy Experiment.” It was Pennsylvania’s promise of religious tolerance that led “to the highest level of immigration of any of the colonies, and with immigration, prosperity.” *Id.* at 1430. Pennsylvania was the first colony in our nation to recognize that we could actually benefit from our religious differences, because providing space for those differences created an attractive haven for settlement and human flourishing.

Later, the framers of the Constitution offered varying approaches to address the occasional tension that arose for religious observers as civil governments developed. James Madison’s writings, however, encapsulated the prevailing values of the period that served as the foundation for what later became the Free Exercise Clause: obligations to civil government must yield when those loyalties conflict with one’s duty owed to God — a superior sovereign. *See id.* at 1453. Madison reflected this concept in *Memorial and Remonstrance*:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

James Madison, Memorial and Remonstrance against Religious Assessments (1785), *reprinted in* 8 The Papers of James Madison, 10 March 1784-28 March 1786, 295-306 (Robert A. Rutland and William M.E. Rachal eds., Univ. of Chicago Press 1973), ¶ 1. Madison understood that mankind submits first to God before government, and for civil government to succeed, it must provide room for persons to submit to a greater sovereign. The belief that no duty is more sacred than the duty which citizens and society owe to God led to liberal accommodations made to protect the freedom of conscience.

With this hierarchy of authorities in mind, religious exemptions were the most widely used method to accommodate the conflict between the two competing loyalties of an earthly and spiritual sovereign. Religious minorities faced many difficulties earlier in our colonial experience, often involving conscientious objection to military service and the taking of oaths. *See The Origins of Free Exercise*, at 1466-1468. Conscientious objectors to military service, such as Quakers and Mennonites, were punished on account of their refusal to bear arms. *See id.* at 1468. The motivation for punishment by the majority was great because if those like

the Quakers and Mennonites refused to do their share, others needed to take their place, risking their lives in military service. *See id.* Likewise, those refusing oaths were particularly harmed by that requirement because they could not put on evidence in court. Thus, they could neither benefit from the judicial process nor defend themselves if they were sued. *See id.* at 1467. Yet from the standpoint of the majority, the refusal to take oaths undermined a key component at that time in ensuring truthful testimony. *See id.* Eventually, rather than making either oaths or military service voluntary for everyone, or coercing those with religious convictions to comply, the colonies and later the states wrote special exemptions into their laws that enabled those with a religious objection to comply with these greater allegiances. *Id.* at 1472.

The model of religious toleration and freedom that was exemplified in Pennsylvania during the early colonial period affected thinking more broadly. By the time the Continental Congress called on the colonists to take up arms, the Continental Congress recognized an important truth — it is better to benefit from our diversities than to needlessly create conflict:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo, reprint 1968). In contrast to the European view that required uniformity — even as to core religious practices — America embraced a liberal form of toleration that recognized the rights of persons with disfavored religious beliefs.

It is out of this history of respecting the consciences of religious minorities and majorities alike that the Free Exercise Clause was born. It is a protection — not designed by either modern liberals or modern conservatives — but recognized as unalienable because of the core principle of conscience that it protects for everyone. The universality of the principle is like that of speech. One may not agree with another's speech, but the protection of speech creates a free society for everyone — regardless of whether particular speech is popular, offensive, or even carries a cost. The same is true for religious freedom, or as Madison often described it, freedom of conscience. If government can manipulate persons to violate their most fundamental convictions — or punish them if they do not — there is no stopping tyranny. Without this firewall against oppression, none of our other freedoms are safe. Indeed, our freedoms travel together — a government that is willing to trample the one will quickly trample the other.

This lesson in freedom appears to be one that each generation must learn afresh. Just four years after the United States Supreme Court in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940), allowed Jehovah's Witnesses to be punished for refusing to salute the flag in school, the case was effectively overruled in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Barnette* described the danger of uniformity: "[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641. The Supreme Court — like the framers of our Constitution — recognizes that the strength of our nation is not undermined by our differences, and therefore in a free society liberal accommodations for those differences must be readily observed. Government authorities that "struggle to coerce uniformity of sentiment" by denying religious accommodations weaken our society and divide our nation. *See id.* at 640.

Our history has proven that we can respect religious liberty without compromising social order. We should not assume that if the Court limits religious freedom, we can ensure that everyone will cooperate in reaching what the majority believes to be society's noble goals. Instead, many will refuse to surrender their principles no matter what. Neither can we nor should we force compliance. "We set up government by consent of the governed, and the Bill of Rights denies those in

power any legal opportunity to coerce that consent.” *Id.* Otherwise, we only engage in meaningless punishments that hurt the society as a whole and not just the religious objector.

Any effort made by a civil authority to marginalize a minority religious sect such as the Jewish faith of Dr. Gross would be an anathema to the framers of the Constitution as well as Pennsylvania’s distinct heritage of religious liberty. Robust religious liberty is indispensable to a free society. Dr. Gross was not asking to continue his trial to another term; he simply wanted a one-day postponement to worship on the holiest day of the Jewish calendar according to his conscience. By failing to provide a religious exemption for Yom Kippur, Dr. Gross was given the Hobson’s choice of choosing between an earthly or spiritual sovereign with either choice carrying with it great punishment: refuse to submit to civil government with the devastating consequence of losing at trial for being unable to exercise his constitutional right to aid in his defense, or violate his conscience and refuse to submit to God. By following his conscience and submitting instead to the greater “universal sovereign,” Dr. Gross sacrificed his constitutional right and indeed lost at trial, suffering catastrophic damage to his reputation, career, and financial well-being.

Dr. Gross’ absence from the first day of his trial with the purported remedy of exposing his religious beliefs to the jury made him vulnerable to antisemitism, and

the outcome of the jury verdict awarding disproportionate damages to the plaintiff only validates that concern. The “choice” offered to Dr. Gross was no choice at all, because *any* punishment attached to the free exercise of religion is not liberty. It should go without saying that Jews have historically been targets of extreme hatred, violence, and oppression, and such hostility has only intensified in the last few years. By forcing Dr. Gross to choose between two undesirable options, the trial court unnecessarily burdened Dr. Gross’ religious exercise.

Americans in the early days of our Republic had a vision for a government that would offer the most robust protection for the liberty of one’s conscience that any country before had ever known. Dr. Gross, however, was denied that protection. The religious exemption requested by Dr. Gross would have allowed allegiance to both competing sovereigns without the unnecessary abuse from civil government. The lower courts forgot that religious tolerance can still be achieved, allowing our obligations to be paid both to our earthly and spiritual sovereigns. Dr. Gross suffered loss because of his faith, and the erosion of religious liberty for him weakens the expectation of liberty for us all.

CONCLUSION

The trial court erred in failing to accommodate Dr. Gross’ religious observance. Therefore, this Court should grant review to this important matter.

Respectfully submitted,



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Dated: May 2, 2025

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CERTIFICATE OF WORD COUNT

I certify pursuant to Pa.R.A.P. 531 that this brief does not exceed 4,500 words.

CERTIFICATE OF COMPLIANCE WITH RULE 127

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

Respectfully submitted,

/s/Lauren L. Hackett

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