No. 00-1737

IN THE
Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and WELLSVILLE, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC.,

Petitioners,

v.

VILLAGE OF STRATTON, OHIO, and JOHN M. ABDALLA, Mayor of the Village of Stratton, Ohio, in his official capacity,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Church of Jesus Christ of Latter-day Saints ("the Church") hereby moves, pursuant to Rule 37.2(b), for leave to file a brief *amicus curiae* in support of petitioners. *Amicus* is filing this motion because Respondents have withheld their consent.* A copy of the proposed brief is attached.

As more fully explained at page 1 of the attached brief under "Interest of the *Amicus Curia*e", the Church conducts perhaps the largest, full-time missionary program in the United States. The decision of the Court regarding the constitutionality of the solicitation ordinance at issue in this case will significantly impact the Church's missionary work. Church missionaries are routinely burdened by similar ordinances as they attempt to share their religious message through door-to-door proselyting.

The Church believes that its brief will assist this Court in adjudicating the question on which *certiorari* was granted because it is uniquely positioned to inform the Court about (1) the practical impact on religious speech of municipal ordinances limiting religious solicitation; (2) similar ordinances across the nation that impose onerous and arbitrary burdens on religious speech; and (3) the need to clarify certain aspects of First Amendment law that government officials consistently invoke to justify laws that unconstitutionally burden religious proselyting.

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* In response to a request for consent to file an *amicus curiae* brief, counsel for Respondents replied by letter dated November 26, 2001 that the Church should make application to the Court for leave to file such a brief. Petitioners' letter of consent is on file with the Clerk of the Court.

Accordingly, the Church respectfully requests that the Court grant leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The Church of Jesus Christ of Latter-day Saints is a worldwide religious association with more than eleven million members.[1] More than five million of those members live in the United States. The doctrine of the Church enjoins its members to share the gospel of Jesus Christ with the world. To that end, the Church operates perhaps the largest full-time program of religious proselyting in the nation. In the United States alone, over 17,000 full-time missionaries serve in more than one hundred missions covering every state in the Union. These dedicated men and women — the vast majority between the ages of nineteen and twenty-five — make tremendous personal sacrifices to share their faith. Leaving behind their homes, families, and educational pursuits for up to two years, and at their own expense, Church missionaries work long hours each day teaching others about the Church's beliefs. Much of this occurs in the context of door-to-door proselyting.

As a result, the Church has extensive experience with local laws, such as the one at issue here, that restrict religious evangelism. Church missionaries have encountered such laws numerous times, especially in recent years. The Court's decision in this case will potentially have far-reaching impacts on the Church's missionary program.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief in whole, and that no person or entity, other than *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The right to express religious beliefs to others is fundamental to the American tradition of liberty. Under the First Amendment, religious expression enjoys the highest constitutional protections. Accordingly, this Court has long afforded vigorous protections to the right to engage in religious proselyting, including the venerable practice of door-to-door evangelism. While government may impose appropriate time, place, and manner restrictions on proselyting, this Court's decisions make clear that such restrictions must withstand exacting judicial scrutiny to ensure that they do not unduly burden or limit religious expression.

As mandated by its doctrine and out of concern for the spiritual welfare of all people, The Church of Jesus Christ of Latter-day Saints conducts a vast missionary program with tens of thousands of missionaries and hundreds of missions. The purpose of this work is literally to share the restored gospel of Jesus Christ with all the world. One of the principal means the Church uses to accomplish this end is door-to-door contacting by dedicated missionaries. Missionaries are assigned to geographically defined missions for the duration of their service. Within a mission, missionaries work in pairs in assigned areas, as directed by Church authorities. Such assignments often change according to the spiritual needs of the mission, allowing a missionary to evangelize in many different locales and with many different companions over a period of eighteen to twenty-four months. Consequently, in order for the Church to carry out its religious mission, it is critical that missionaries be able to proselyte in many different municipalities, as directed by ecclesiastical leaders or divine guidance, without first having to comply with burdensome regulations that impose prior restraints on religious expression.

For many years, the Church experienced few attempts by municipalities to restrict the door-to-door evangelism of its missionaries. This Court's religious solicitation cases were widely understood to provide broad protections against regulations limiting proselyting. However, the last decade has witnessed a dramatic surge in the number and severity of anti-solicitation laws that are being applied to religious proselyting. Many of these laws contain onerous registration requirements that are nothing more than prior restraints on speech, imposing lengthy waiting periods and severely limiting the hours when religious contacting can occur, often excluding Sundays, holidays, and times when people are generally home from work. Because of such laws, a number of which are reviewed in greater detail below, the Church's missionary efforts have frequently and increasingly been hindered.

In interacting with officials from many municipalities, the Church has learned that a pervasive misunderstanding exists as to whether the rule announced in *Employment Division v. Smith*, 494 U.S. 872 (1990) — that the Free Exercise Clause does not require strict scrutiny of neutral laws of general application that incidentally burden religious excercise — applies in cases involving religious speech. Many municipal officials think that *Smith* essentially eliminated First Amendment protections for religious proselyting, despite the fact that *Smith* itself reaffirmed the strong First Amendment protections announced in the Court's religious solicitation cases. A number of lower courts have engaged in their own variation of this mistaken application. The result is that municipal officials increasingly believe there are few if any constraints on their ability to severely limit door-to-door evangelism in their jurisdictions. This case presents an excellent opportunity for the Court to end this confusion and clarify that the deferential rule in *Smith* has no application in cases involving religious expression.

ARGUMENT

I. THE FREE SPEECH CLAUSE PROTECTS THE RIGHT OF RELIGIOUS EXPRESSION, INCLUDING RELIGIOUS PROSELYTING.

No right is more fundamental — nor dearer to the heart of the believer — than the right to express oneself on matters of religion. Religious expression, be it speech or some other form, is inextricably bound up with religious exercise and belief. Each week, in tens of thousands of churches, synagogues, mosques, and other places of worship, Americans offer prayers, read holy texts, expound religious doctrines, discuss the great questions of life, and share and reaffirm sacred experiences and narratives. Perhaps in most religions, and certainly in the monotheistic faiths that are most prominent in the United States, the word of God is a core focus of religious life. It is preached, explicated, shared, discussed, debated, ritualized, dramatized, sung, and chanted. Religious expression takes many other forms, even silence. Because religion addresses intractable and inescapable questions – including the nature of good and evil, and the meaning of life, death, and suffering — the need to express oneself on religious topics (even if only to dismiss them) is deeply embedded in the human conscience.

For many religions, knowledge of God or the truth entails a solemn obligation to share that knowledge with others. Religious expression serves not only to deepen and enrich the faith of the converted, but also as a means of bringing new adherents into the fold. In the Christian tradition, for instance, the Great Commission enjoins believers to take to all the world the good news that salvation is through Jesus Christ. *Matthew* 28:19; *Mark* 16:15. Evangelism has always

been a constant and defining feature of Christianity and what it means to be a Christian. So weighty has been the injunction to spread the gospel that thousands have risked and ultimately given their lives to carry it out. Tens of thousands more have been persecuted and suffered great hardships while preaching Christianity. Faithful adherents of many other religious traditions have made (and are now making) the same types of personal sacrifices as they share their beliefs with others. The imperative to share religious beliefs has been one of the most powerful, undeniable, and consequential forces in human history, and it remains so. Denial of the right to freely engage in religious expression is a hallmark of tyranny that tends to have revolutionary consequences, as this nation's own founding and many other conflicts attest.

Freedom of religious expression is as core to the First Amendment as political speech, and thus is afforded the highest constitutional protections. More than sixty years ago, in striking down specific constraints on religious expression, this Court concluded: "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). It is axiomatic that "religious worship and discussion" are "forms of speech and association protected by the First Amendment." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). Accordingly, this Court's "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995) (plurality opinion) (citing *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools*

(Dist. 66) v. Mergens, 496 U.S. 226 (1990); *Widmar*, *supra*, 454 U.S. 263; *Heffron v. International Soc. for Krishna Consciousness, Inc*., 452 U.S. 640 (1981)). "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760 (emphasis in original). Perhaps for that very reason "religious speech [is not] simply *as* protected by the Constitution as other forms of private speech" *Id*. at 767 (emphasis in original). "[P]rivate religious expression receives *preferential* treatment" under the First Amendment. *Id.* (emphasis in original).

The First Amendment protects more than just religious expression that occurs within the confines of homes, churches, synagogues, or other sanctuaries. It also protects religious expression in far more public settings, such as traditional public forums, *Pinette*, 515 U.S. 753, university facilities generally open for use by student groups, *Widmar*, 454 U.S. 268-71, school facilities open after hours, *Lamb's Chapel*, 508 U.S. 393-97, and to some extent even nonpublic forums such as airports, *Lee v. International Society for Krishna Consciousness*, 505 U.S. 830 (1992) (invalidating ban on distribution of religious literature in airport).

Of particular relevance here, the Court has long afforded generous First Amendment protections to religious evangelism, including leafleting and door-to-door proselyting. In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), a woman was sentenced to imprisonment for fifty days for distributing religious tracts without prior city approval. This Court invalidated the ordinance, holding that the First Amendment protects the "essential liberty" to publish *and*

distribute "every sort of publication" — including religious publications — "which affords a vehicle of information and opinion." *Id.* at 452.

Similarly, in *Cantwell* this Court struck down a Connecticut law banning solicitation of money for religious causes without prior governmental approval. Applying strict judicial scrutiny, the Court held that the statute was not "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." 310 U.S. at 311. The state's licensing scheme for "the solicitation of aid for the perpetuation of religious views or systems" placed "a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307.

Likewise, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), several Jehovah's Witnesses brought a First Amendment challenge to an ordinance that made it a crime to distribute religious literature or solicit people to purchase religious books and pamphlets without a license. *Id.* at 106-07. Voiding the ordinance, this Court held "that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as more orthodox types." *Id.* at 110. This Court equated the right to engage in proselyting with the fundamental right to worship in a church or preach a sermon: "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. . . . It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press." *Id.* at 109.

It is noteworthy that this Court in *Murdock* flatly rejected any suggestion that the general applicability of a law constraining religious proselyting suffices to satisfy the First Amendment. "The fact that the ordinance is 'nondiscriminatory' is immaterial," this Court held. *Id*. at 115. A statute "does not acquire constitutional validity because it classifies the privileges protected by the First Amendment with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance." *Id*. That is because "[t]he constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protections afforded commercial handbills." *Id.* at 111. In brief, "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." *Id.* at 115.

This Court reached the same conclusion in *Martin v. City of Struthers*, 319 U.S. 141 (1943), where a door to door evangelist was convicted of violating an ordinance prohibiting the distribution of "'handbills, circulars or other advertisements.'" *Id.* at 142. This Court acknowledged that the dissemination of "novel and unconventional ideas might disturb the complacent" or create a "minor nuisance." *Id.* at 143. Nevertheless, the First Amendment protects the venerable practice of distributing literature, including religious literature, door to door:

> While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread

> use of this method of communication by many groups espousing various causes attests its major importance. . . . Many of our most widely established religious organizations have used this method of disseminating their doctrines. . . .

Id. at 145. Invalidating the ordinance, this Court held that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Id.* at 146-47.

In addition to protecting the rights of the religious speaker, these decisions also protect the rights of the prospective listener. They reflect the deeply rooted liberty of Americans to decide for themselves, free from governmental constraint, whether to entertain a person who has come to their door seeking to share a message.

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.

Id. at 143; *see also id.* at 148 ("[W]hether distributers of literature may lawfully call at a home" properly "belongs . . . with the homeowner himself," not the government.).

Because the "dangers of distribution [of literature] can so easily be controlled by traditional legal methods" (such as the law of trespass) which allow "each householder the full right to decide whether he will receive strangers as visitors," stringent prohibitions on door-to-door distribution of literature "can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id*. at 147.

These and many other federal court decisions have firmly established that the First Amendment protects religious expression, including the right of proselyters to go door to door distributing religious literature and providing a religious message.[2] If homeowners do not wish to receive the message offered, they have every right to ask the person to leave, or even to post a sign informing proselyters that they do not wish to be disturbed in the first place. That is clearly the homeowner's choice, and the law can justly punish the proselyter who fails to respect it. The First Amendment, however, denies the government the authority to make that choice for the homeowner, thereby precluding the homeowner from hearing what may be a desired religious message and

2. *See, e.g., Follett v. Town of McCormick*, 321 U.S. 573, 578 (1944) (evangelist distributing books cannot "be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege"); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Petersen v. Talisman Sugar Corporation*, 478 F.2d 73, 83 (5th Cir. 1973); *Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 604 (N.D. Texas, 1984); *Conlon v. City of North Kansas City*, 530 F. Supp. 985, 989-90 (W.D. Missouri 1981); *Erskine v. West Palm Beach*, 473 F. Supp. 48, 50-51 (S.D. Fla. 1979); *Weissman v. City of Alamogordo*, 472 F. Supp. 425, 429-31 (D.N.M. 1979); *Love v. Mayor, City of Cheyenne*, 448 F. Supp. 128, 133 (D. Wyo. 1978); *International Society for Krishna Consciousness, Inc. v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973).

preempting the believer from expressing his religious views. Mitigating whatever minor inconveniences or risks arguably might arise because of door-to-door proselyting is not a sufficient justification for prior restraint of religious speech.

II. THE DOCTRINE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS OBLIGATES EVERY MEMBER OF THE CHURCH TO PARTICIPATE IN MISSIONARY WORK.

No church values the First Amendment right to proselyte more than The Church of Jesus Christ of Latter-day Saints. The most fundamental doctrine of the Church is that Jesus is the Christ, the Savior of the world, and that only by and through Him can mankind be saved. The Church also teaches that all persons are children of a loving God, and thus are part of a spiritual family. The confluence of these two doctrines gives impetus to the fundamental purpose of the Church: to bring souls to Christ. Latter-day Saints believe that they are under a solemn obligation — a duty born of love and covenants with God — to share the saving truths of the gospel of Jesus Christ with every one of their spiritual brothers and sisters. Thus, a principal and defining mission of the Church is literally to preach the gospel to every person on the earth.

These beliefs are rooted in the teachings of biblical Christianity. The Bible teaches that at the end of his earthly ministry, the Lord Jesus Christ commanded his disciples, "Go ye therefore, and teach all nations." *Matthew* 28:19 (King James). The Gospel of Mark reports this as a command to go "into all the world, and preach the Gospel to every creature," and promises that "[h]e that believeth and is baptized shall be saved; but he that believeth not shall be damned."

Mark 16:15-16. To Latter-day Saints, "this Great Commission is obligatory. . . . It imposes a sacred duty to witness 'among all nations, kindreds, tongues, and people' (*Doctrine and Covenants* 112:1)." Dallin H. Oaks & Lance B. Wickman, *The Missionary Work of The Church of Jesus Christ of Latter-day Saints*, *in* SHARING THE BOOK: RELIGIOUS PERSPECTIVES ON THE RIGHTS AND WRONGS OF PROSELYTISM 247, 248 (John Witte Jr. & Richard C. Martin, eds., 1999).[3]

Church doctrine holds that these ancient biblical injunctions have been reaffirmed in latter times through modern revelation.

> One of the Church's teachings is that those who are desirous to come into the fold of God have the duty "to stand as witnesses of God at all times, and in all things, and in all places that ye may be in, even until death" (Book of Mormon, *Mosiah* 18:9).

Id. at 249. Missionary work is therefore a defining attribute of a Latter-day Saint:

> For Latter-day Saints, who believe that God has restored vital additional knowledge and power to bless the lives of all his children and who believe that they have a duty to share these

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3. Dallin H. Oaks is a member of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, the second highest governing body in the Church. Lance B. Wickman is a member of the First Quorum of the Seventy, another of the Church's governing bodies. The *Doctrine and Covenants* is a book of Church scripture containing modern revelation.

> treasures with all humankind, the command to witness is fundamental to all their belief and practice. It is a vital part of what it means to be a Latter-day Saint. *To all who hold these convictions, the duty to witness and to share is a fundamental matter of conscience.*

Id. at 250 (emphasis added).

To carry out the Great Commission, young men and women of the Church (usually between the ages of nineteen and twenty-five) are encouraged to serve as unpaid missionaries for eighteen to twenty-four months. Retired adult couples and singles may also serve. These dedicated individuals are "more than volunteers"; under Church doctrine, they are "called to service by a prophet [the president of the Church], and the place and duration of their labors [are] given to them by that same authority." *Id.* at 253. Typically paying their own way, they devote themselves full time to sharing the gospel of Jesus Christ, completely abstaining from such things as dating, movies, and even popular music. *Id*. at 263-64. In the United States, the Church currently has 17,239 full-time missionaries serving in over one hundred missions.[4]

As in biblical times, going two-by-two, door to door, is one important way to spread the gospel. When someone expresses interest in learning more, the missionaries meet with him or her for a series of discussions to present the basic doctrines of the Church. This door-to-door evangelism is a vital aspect of the Church's missionary program, with Church missionaries in their dark suits and white shirts an easily identifiable symbol of the Church throughout the world.

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4. Worldwide, the Church has over 60,000 missionaries serving in 333 missions.

To understand the impact of restrictive ordinances on the Church's missionary program, it is important to understand the basic organization and operation of missionary work. Missionaries are assigned to specific geographical regions known as "missions" and are supervised by a mission president who provides spiritual and temporal direction for their actions. Each missionary is in turn assigned to a specific area within the mission as well as to a specific companion with whom he or she will live and work for a time. Periodically, the mission president will transfer a missionary to a new locale or assign him or her a new companion.

Sometimes a missionary's area of service is a single large city; other times a missionary is assigned to proselyte in several small towns. A missionary will serve with a particular companion anywhere from a few weeks to many months. From time to time missionaries trade companions for a day or two so that more senior missionaries can provide training, or to allow a particular missionary with special skills or insight to teach a particular potential convert, or sometimes just for a change of pace. Thus, the freedom of missionaries to preach and teach without first having to comply with municipal registration or permit schemes in each new town or borough they enter is vital to the Church's missionary program. Given how often missionaries move around, and the fact that missions often encompass scores of municipalities, such schemes can be extremely disruptive to the Church's missionary work, tying up its missionaries in bureaucratic red tape in town after town when they should be free to preach the gospel. Moreover, missionaries are taught to go where they are led by the Holy Spirit. The prior restraint these laws impose on religious expression often prevents missionaries from following a spiritual prompting to proselyte door to door on a particular day in a particular town.

In short, Church missionaries are ministers of the gospel who, in fulfillment of the Great Commission and at great personal sacrifice, are engaged in religious expression that is entitled to the highest degree of protection under the First Amendment. These missionaries are not mere "hucksters and peddlers" of "wares and merchandise," 319 U.S. at 115, and under the First Amendment, municipalities cannot licence and regulate them as if they were. Yet, as seen next, increasing numbers of cities and towns have enacted ordinances that attempt to do just that.

III. MUNICIPALITIES ARE INCREASINGLY REGULATING DOOR-TO-DOOR PROSELYTING, OFTEN IN WAYS THAT PLACE SIGNIFICANT BURDENS ON RELIGIOUS EXPRESSION.

The Church has absolutely no objection to appropriate time, place, and manner restrictions on religious proselyting. The Church has never maintained that its missionaries have the right to make nuisances of themselves while preaching the gospel, or otherwise to ignore fair restrictions adopted by local government to protect its citizenry. Indeed, to disregard these reasonable restrictions is to act contrary to Church teachings. Missionaries are taught to show respect for the laws, customs, and sensibilities of those they seek to teach, including leaving the premises promptly at the request of a homeowner. The Church's doctrine of respect for moral agency, as well as common human decency, require no less.

However, time, place, and manner restrictions can go too far. They can be used to create a tangled web of ostensibly innocuous requirements that individually or collectively make vital forms of religious expression practically impossible. The Constitution forbids government from using

time, place, and manner restrictions as a surreptitious means of suppressing expression. Time, place, and manner restrictions pass First Amendment muster only when they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983) (citation and quotation marks omitted).

In the last decade, the Church has witnessed a substantial increase in both the number of laws regulating proselyting and in the burden such laws impose on religious expression. Municipal officials in particular frequently conclude that so long as an ordinance is neutral and generally applicable with respect to all those going door to door, government may regulate the bearers of religious messages in the same way it regulates "hucksters and peddlers." Accordingly, many municipalities are imposing burdensome registration schemes and fees on proselyters, as well as limiting door-to-door contacting to hours that often preclude effective evangelism. Church missionaries are frequently and increasingly hindered by such constraints. A few of many possible examples illustrate the problem.

Mundelein, Illinois. In the Village of Mundelein, Illinois (a suburb of Chicago), Ordinance 93-4-14, which has been interpreted to apply to Church missionaries, requires that a proselyter submit an application to engage in door-to-door ministry. This application must be submitted thirty days in advance of the intended proselyting, and it must be accompanied by a $10 processing fee. Among other information, the application — made "under oath" — must contain a "statement of the purpose of the applicant"; the "most recent financial statement of the applicant, indicating

the disbursement of the gross and net proceeds of its solicitations"; and the "period of time and area of solicitation within the Village of Mundelein, which shall be not more than seven (7) days (including one weekend) in any year." Village of Mundelein, Ordinance 93-4-14, § 6.A. The application must also include the "[n]ame, present residence address, telephone number, social security number, and driver's license number" of each applicant; the address of his or her past residences during the last three years; two photographs taken in the last sixty days; and the names and addresses of at least two references "in Illinois who can give accurate information as to the applicant's reputation for moral character, honesty, and integrity." *Id*.

If the Village decides to approve the permit application, it issues the missionary what is essentially a license to preach, consisting of "a certificate of registration bearing his name, address, and dates covered by such registration." *Id*. § 7.D. The registration card contains a photo of the applicant. *Id*. However, as noted, the permit is valid for "not more than seven (7) days (including one weekend)." *Id*. § 7.B. And even for missionaries with the necessary government papers, door-to-door proselyting can occur only between the hours of 9:00 a.m. and 8:00 p.m. or sunset, whichever comes first, with two exceptions. On Sundays, the hours are further restricted to the time period of noon to 6:00 p.m. or sunset, whichever comes first. On national holidays, when Americans celebrate the blessings of living in a free land, religious proselyting is totally forbidden. *Id.* § 15.

Watervliet, New York. The City of Watervliet, New York has a solicitation ordinance that applies to door-to-door evangelism. It requires that missionaries apply for a license to proselyte that is valid for only two-months, at which time it must be renewed. The license is not transferable and thus cannot be used by a fellow missionary in town just for the day.

Missionaries must give prior notice to the police department of the location in which proselyting will occur. The "hours of operation" are limited to Monday through Friday, 9:00 a.m. to 7:00 p.m. Religious contacting on Saturdays and Sundays is prohibited.

Dover, New Jersey. Church missionaries in the Town of Dover, New Jersey have been required to obtain a "solicitor permit" before engaging in door-to-door proselyting. *See* Dover Code § 273-1. Obtaining such a license costs $25 and can take up to ten days after filling out and submitting a detailed application, complete with fingerprints. *Id*. § 273-3, -4, -6. The license is not transferable from one missionary to another, it must be carried while proselyting, and contacting is permitted only between the hours of 10:00 a.m. and 5:00 p.m., when most people are away at work, except on Sundays or holidays, when contacting is banned entirely unless specially authorized by the Mayor and Board of Aldermen. *Id.* § 273-7.[5]

Round Lake Beach, Illinois. Police in the Village of Round Lake Beach, Illinois have informed Church missionaries that under the Village's code (Title III, Chapter 6, § 3-6.13-1 *et seq*.) they need a permit to conduct door-to-door evangelism. As part of the application for the permit, the missionary applicant must provide information on fifteen different topics, including all addresses and employers during the last three years and "[a]ny additional information as deemed necessary by the chief of police or his representative. . . ." *Id.* § 3-6.13-12. The fee for processing each application is $25. The permit must be renewed every ninety days.

5. The code provides that a religious organization can apply for a special permit to solicit donations or to distribute literature for which a fee is charged, but other than waiver of the $25 license fee, there appears to be no substantive advantage to a special permit. *Id*. § 273-9.

The above ordinances are examples of a much larger problem. In the Church's experience, these are not isolated incidents; rather, they are representative of a pattern which is developing across the country in which numerous other municipalities are seeking to severely curtail all forms of door-to-door contacting, including religious proselyting.[6] Extremely burdensome regulations — ranging from lengthy advance notice requirements, to costly and time-consuming application procedures, to strict time-of-day and day-of-week limitations on when proselyting may occur — all substantially infringe on the sacred duty of Church missionaries to contact residents door to door and invite them to listen to the Church's religious message. These restrictions treat those who wish to engage in pure religious expression — expression which is entitled to "*preferential* treatment" under the First Amendment, *Pinette*, 515 U.S. at 767 (plurality opinion) (emphasis in original) — no better than the door-to-door salesman of vacuums and brushes, no better than the solicitor seeking to sell household cleaning supplies, and no better than the traveling peddler of trinkets and baubles.

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6. In conversations with Church counsel, Church mission presidents report encountering such ordinances on scores of occasions. For example, just in the mission covering upstate New York, there are twelve different restrictive door-to-door ordinances currently being enforced against Church missionaries.

IV. SIGNIFICANT CONFUSION EXISTS IN THE LOWER COURTS AND AMONG MUNICIPAL LAWMAKERS REGARDING THE SCOPE OF *EMPLOYMENT DIVISION v. SMITH*; THE COURT SHOULD CLARIFY THAT THE RULE ANNOUNCED IN *SMITH* HAS NO BEARING IN CASES INVOLVING FREEDOM OF EXPRESSION, INCLUDING RELIGIOUS EXPRESSION.

For many decades, this Court's decisions in cases like *Lovell*, *Cantwell*, and *Murdock* seemed to have settled the issue of whether a municipality could constitutionally ban or severely restrict religious proselyting. In the past, at least in the Church's experience, cities and towns generally had few if any restrictions on evangelism; or if they did, such restrictions were generally not enforced.

However, in the last decade things have changed dramatically. Since this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), municipalities have been emboldened to impose ever-more onerous restrictions on proselyting. Many municipal officials now believe that *Smith* essentially overruled, or at least drastically curtailed, this Court's earlier religious solicitation cases and replaced them with the blanket rule that the First Amendment does not shield religious expression from "generally applicable" or "neutral" regulations. This misreading of *Smith* is, to say the least, baffling given the express limitations in the decision itself. But it is nonetheless pervasive, especially at the local level.

This Court in *Smith* held that the Free Exercise Clause standing alone does not require strict scrutiny of religiously neutral laws of general application that have the incidental

effect of burdening religious exercise. *Id*. at 880-85. But this holding provides absolutely no support for the now-prevalent misconception that municipalities can bar or severely limit religious proselyting by a generally applicable or neutral ordinance banning or severely restricting all types of soliciting. Indeed, this Court's analysis in *Smith* is precisely to the contrary. That analysis specifically singled out the religious solicitation cases discussed above as examples of where "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . ." *Id.* at 881. This Court explained that in such cases free exercise norms "in conjunction with other constitutional protections, such as freedom of speech and of the press," combined to protect the religious activity from government suppression. *Id*. The holding in *Smith* itself was limited to an entirely different set of facts which did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity. . . ." *Id*. at 882. *Smith*'s own limitation on its "generally applicable and neutral" analysis could not have been more clear: when "communicative activity" is involved, like the religious expression in the *Lovell-Cantwell-Murdock* line of cases, *Smith*'s relaxed standard of judicial review simply does not apply. *Id*.

It follows that any reliance on the rule in *Smith* to uphold municipal ordinances of the sort described above is plainly erroneous. Unfortunately, this misreading of *Smith* has nevertheless become widespread. Municipalities now routinely invoke *Smith*'s general applicability rule in response to any suggestion that a restriction involving a church might violate First Amendment freedoms. Under this increasingly common misconception, the rule in *Smith* has not only swallowed all of free exercise jurisprudence (a gross over reading in itself), it also threatens to consume much of free speech and free press law, at least where religious expression is involved.

For their part, the lower courts have often adopted their own variations on this mistaken reading of *Smith*. The court below, for instance, labeled as mere dicta this Court's own articulation of the limitations of the *Smith* rule on religiously motivated conduct when the constitutionally protected areas of speech or press are also in play. 240 F.3d at 561 ("That language was dicta and therefore not binding."). Other lower courts have expressed similar views, adopting in full force *Smith*'s relaxed form of judicial scrutiny, while ignoring or minimizing the analysis contained in *Smith* on the limited application of that relaxed form of scrutiny.[7]

This case presents the Court with an excellent opportunity to eliminate the confusion that exists over the

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7. *See, e.g., New York State Employment Relations Board v. Christ the King Regional High* School, 90 N.Y.2d 244, 249, 682 N.E.2d 960, 964, 660 N.Y.S.2d 359, 363 (1997) ("as we analyze the matter, the Supreme Court in *Smith* did not intend its hybrid exception to turn back on itself in circumstances such as this singularly generic First Amendment setting and circumstance"); *McCready v. Hoffius*, 459 Mich. 1235, 593 N.W.2d 545 (1999) ("However, there is a clear split in the circuits regarding how courts should follow the dicta contained in the *Smith* decision.") (Cavanagh, J. *dissenting*) (Table); *See also Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993):

> We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights. . . .[T]herefore, at least until the Supreme Court hold that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.

application of *Smith*'s general applicability rule. The limited scope of the question upon which this Court granted *certiorari* makes clear that this case will be decided under free speech and/or free press norms, not free exercise principles. The First Amendment right to engage in religious solicitation or evangelism is governed by the *Lovell-Cantwell-Murdock* line of cases as supplemented by free speech decisions like *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). *Smith* itself specifically excepted this line of cases from its holding, stating that they were different because they involved "communicative activity". 494 U.S. at 882. That difference means everything when it comes to preserving the right to proselyte religiously door to door. If the "generally applicable and neutral" rule of *Smith* controls in such a situation, then by definition personal religious expression can be subjected to the same rules and regulations as sales pitches made by commercial salesmen and peddlers. Religious expression will not retain its preferred status under the First Amendment; to the contrary, it will become routinely subjected to the lowest common denominator of regulations, with door-to-door proselyting treated and regulated just like every other form of commercial soliciting and sales.

The Church respectfully submits that this Court should put an end to the confusion and misapplication that surrounds the *Smith* rule in the area of religious speech and expression. As it did over a decade ago when it clearly set out the limitations of *Smith*, this Court should reaffirm that *Smith*'s general applicability rule has no place in the adjudication of rules regulating door to door proselyting, and that instead the time-tested rules set out in the *Lovell-Cantwell-Murdock* line of cases continue to govern.

CONCLUSION

For the reasons stated herein, and those contained in the brief of Petitioners, the decision below should be reversed.

Respectfully submitted,

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