No. 16-1274

In the Supreme Court of the United States

TING XUE,
Petitioner,
v.

JEFFERSON B. SESSIONS,
Respondent.

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

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

KRISTEN K. WAGGONER
DAVID A. CORTMAN
ERIK W. STANLEY
ALLIANCE DEFENDING FREEDOM
15100 North 90th St
Scottsdale, AZ 85260
(480) 444-0020

M. MILLER BAKER
Counsel of Record
MCDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Counsel for Amicus Curiae *Alliance Defending Freedom*

Additional Counsel Listed On Inside Cover

EVAN D. PANICH
ALEXANDER J. KRITIKOS
MCDERMOTT WILL & EMERY LLP
28 State Street, Suite 3400
Boston, MA 02109
(617) 535-4000

Counsel for Amicus Curiae *Alliance Defending Freedom*

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT.. 2

ARGUMENT 5

I. Religious Refugees Played A Major Role In Founding Colonial America 5

II. The Refugee Act Reaffirmed America's Traditional Role As A Religious Safe Haven........................... 8

III. This Court's Free Exercise Jurisprudence Confirms That Barring Someone From Practicing Their Religion Is Religious Persecution 11

CONCLUSION.. 17

TABLE OF AUTHORITIES

Page(s)

Cases

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014)......................................1, 14

Canas-Segovia v. INS,
902 F.2d 717 (9th Cir. 1990)................................11

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993)..11, 12

Emp't Div., Dep't of Human Res. of Or. v. Smith,
494 U.S. 872 (1990)..16

Kazemzadeh v. U.S. Att'y Gen.,
577 F.3d 1341 (11th Cir. 2009)..........12, 14, 15, 16

Kunz v. People of State of N.Y.,
340 U.S. 290 (1951)..12

Sherbert v. Verner,
374 U.S. 398 (1963)..13, 14

Trinity Lutheran Church of Columbia, Inc. v. Comer,
No. 15-577 1

Wisconsin v. Yoder,
406 U.S. 205 (1972)..13, 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Zubik v. Burwell,
136 S. Ct. 1557 (2016) 1

Statutes

Immigration Act of 1917, 39 Stat. 877 10

Refugee Act of 1980, 8 U.S.C. § 1101 *et seq.* .... *passim*

Other Authorities

125 Cong. Rec. H11969 (Dec. 13, 1979) 8

125 Cong. Rec. H11971 (Dec. 13, 1979) 8

125 Cong. Rec. S12006 (Sept. 6, 1979) 8, 9

125 Cong. Rec. S12010 (Sept. 6, 1979) 9

125 Cong. Rec. S12012 (Sept. 6, 1979) 9

125 Cong. Rec. S12013 (Sept. 6, 1979) 9, 10

125 Cong. Rec. S12022 (Sept. 6, 1979) 9

Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (1990) 5, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Francis J. Bremer, *John Winthrop: America's Forgotten Founding Father* (2005) 5

Jon Butler, *Becoming America: The Revolution Before 1776* (2001) 7

Paul Finkelman, *Religion and American Law: An Encyclopedia* (2003) 7

David L. Holmes, *The Faiths of the Founding Fathers* (2006) 6

James H. Hutson, *Religion and the Founding of the American Republic* (1998) 5, 6, 7, 8

Andrew R. Murphy, *The Political Writings of William Penn* (2002) 7

Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755 (2000) 9, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

John Parkinson & Benjamin Siegel, *President Obama Compares Syrian Refugees to Mayflower Pilgrims, Administration Says States Can't Block Them*, ABC News, (Nov. 26, 2015, 11:44 AM) 8

S. Ct. R. 37.6 1

Ian K. Steele & Nancy L. Rhoden, *The Human Tradition in Colonial America* (1999) 7

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom ("ADF") is a nonprofit, public interest legal organization devoted to the defense and advocacy of religious freedom. ADF regularly serves as counsel or amicus curiae before this Court in cases concerning religious liberties. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, No. 15-577 (oral argument heard Apr. 19, 2017); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

ADF also regularly advocates for religious freedom before international institutions. ADF International has been involved in more than 50 cases before the European Court of Human Rights and has argued cases before the Inter-American Court of Human Rights, and a number of United Nations bodies. Moreover, ADF International has consultative status with the United Nations, accreditation with the European Commission and Parliament, the Organization for Security and Co-operation in Europe, and the Organization of American States.

---

[1] The parties have consented to the filing of this brief. Additionally, counsel for the petitioner submitted a letter granting blanket consent, which is on file with the Clerk. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is about whether banning someone from practicing his religion constitutes religious persecution, as three courts of appeals—the Seventh, Ninth, and Eleventh Circuits—have held, in contrast to the Tenth Circuit below. The Court should grant Ting Xue's petition for certiorari in order to address that circuit conflict. America's history as a refuge for people persecuted because of their religion, Congress's intent that the Refugee Act of 1980 ("Refugee Act"), 8 U.S.C. § 1101 *et seq.*, preserve America's heritage as a religious refuge, and this Court's Free Exercise Clause jurisprudence all indicate that a ban on religious practice is persecution.

During an illegal worship service at a parishioner's home on a fall night, Chinese authorities raided the house and arrested Mr. Xue. Pet. App. at 2a-3a. Police officers interrogated, hit, jailed, and humiliated Mr. Xue, mocking his faith by encouraging him to call on Jesus to save him. *Id.* at 3a-4a. Chinese authorities released Mr. Xue after four days on the condition that he pay an exorbitant fine, sign a guarantee to stop attending outlawed worship services, and check in weekly with the police officials monitoring his compliance with the guarantee. *Id.* at 4a. Despite serious danger, Mr. Xue returned to worshipping in his house church two weeks after his release. *Id.* A couple of months later, the house church was raided again and all repeat offenders were denied bail and sentenced to a year in prison. *Id.* But for the happenstance of working

overtime in a shoe factory on that Friday night, Mr. Xue would have been arrested at the house church and locked away for a year. *Id.*

Mr. Xue's experience is reminiscent of the first settlers of colonial America. During the seventeenth century, America was a refuge for the religiously persecuted. The Pilgrims that settled Massachusetts were the first of tens of thousands of Puritans who came to the colonies in the early 1600s to escape persecution in England for the practice of their faith. Rhode Island, Pennsylvania, and Maryland were expressly founded to provide religious liberty to residents in those states. William Penn and Lord Baltimore even advertised among persecuted groups in Europe that their colonies afforded religious liberty to settlers.

Drawing on this deeply rooted tradition as a religious safe harbor, Congress enacted the Refugee Act to protect refugees fleeing religious persecution. During debates on the law, Congressional members invoked the example of the Pilgrims and other early settlers who came to America fleeing religious persecution. This reliance on America's colonial past was nothing new. In 1917, for instance, even as it was enacting stiff immigration restrictions, Congress carved out special exemptions for religious refugees.

America's tradition of providing safe haven from religious persecution should therefore inform the meaning Congress ascribed to that term in the Refugee Act. A seventeenth-century colonist would have immediately recognized a prohibition on religious practice as the very prototype of Old World

religious persecution. The fact that conduct was considered persecution in the seventeenth century but isn't designated so today—under a statute that draws on that seventeenth-century history—suggests that something is seriously awry with the Tenth Circuit's decision below.

Because religious liberty provisions were enacted in the American colonies to guard against religious persecution, federal Free Exercise jurisprudence further informs what constitutes persecution on the basis of faith. Barring someone from practicing their religion, even in the privacy of a friend's home, self-evidently violates Free Exercise principles. The core of the Free Exercise Clause's protection is that the government cannot prescribe what is orthodox in matters of faith, and yet that is what China does. Even just one type of the several punishments that Mr. Xue suffered should satisfy the persecution standard. For instance, this Court has stated that fining someone for attending a worship service would clearly violate the Free Exercise Clause, and that is exactly what happened here.

In China, there is no safe harbor for religious practice by staying out of sight. Whether Mr. Xue suffered religious persecution should not be determined by how likely he is to avoid detection for practicing his faith. That he is treated as a fugitive for simply praying with friends in the privacy of their own homes should be sufficient to qualify as religious persecution if that concept is to retain any meaning.

ARGUMENT

I. Religious Refugees Played A Major Role In Founding Colonial America

Persecuted groups settled portions of colonial America as a "religious refuge." James H. Hutson, *Religion and the Founding of the American Republic* 3 (1998). Political and religious strife in seventeenth-century England "caused the Puritan migration [and] also inspired dissenters to look to America as a place for carrying out colonial experiments predicated on religious freedom." Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 5 (1990).

The Pilgrims who settled Massachusetts, for instance, fled an Anglican church that teamed up with civil authorities to torture and imprison them, resulting in 20,000 Puritans sailing for the Colonies by 1642. Hutson, *supra*, at 3-7. Out of a mix of desperation and hope, the refugees saw Providence guiding them to the American wilderness. John Winthrop summarized that sentiment in a short pamphlet where he laid out the reasons for settling New England and argued that America was the place God had prepared as "a refuge for many whom he meaneth to save." Francis J. Bremer, *John Winthrop: America's Forgotten Founding Father* 157 (2005).

Yet New England Puritans themselves engaged in the same type of sectarian persecution that caused them to flee England in the first place, which

in turn generated even more religious refuges. For example, the Puritans expelled Roger Williams for espousing unorthodox views. Hutson, *supra*, at 8. Shaped by that experience, Williams and Baptist minister John Clarke founded Rhode Island as a "shelter for persons distressed for conscience," *id.*, and "to hold forth a lively experiment, that a most flourishing civil state may stand and best be maintained with a full liberty in religious concernments," Adams & Emmerich, *supra*, at 6. Colonial Rhode Island's religious diversity was astounding—it included Antinomians, Anabaptists, Antisabbatarians, Arminians, Socinians, Quakers, Ranters, Baptists, Anglicans, and Congregationalists. David L. Holmes, *The Faiths of the Founding Fathers* 9 (2006). Christians weren't the only beneficiaries of the Rhode Island experiment, though, as Jews were also provided sanctuary there. Hutson, *supra*, at 8.

New Jersey and Pennsylvania were also settled by people who repudiated rather than repeated the evils they suffered. By 1680, 10,000 Quakers had been imprisoned in England and several hundred more were killed by the Crown. *Id.* at 10. That persecution drove them to settle in New Jersey and as many as 8,000 settled in Pennsylvania in the few years after William Penn obtained a charter for that land in 1681. *Id.* at 11. "[A]n indulging of Dissenters," Penn argued, "is not only most Christian and Rational, but Prudent also" because the contrary is "most injurious to the Peace, and destructive of that discreet Ballance, which the Best and Wisest States, have ever carefully Observ'd."

Andrew R. Murphy, *The Political Writings of William Penn* 80 (2002). Penn's forceful expression of religious liberty immediately attracted oppressed religious minorities from Europe, including Swiss and German Mennonites, German Dunkers, Schwenkfelders, and Moravians, and several thousand French Huguenots. Hutson, *supra*, at 12; Jon Butler, *Becoming America: The Revolution Before 1776* 21 (2001).

Another colony expressly founded as a sanctuary for the religiously persecuted was Maryland. George Calvert sought to establish "a refuge" for his "Roman Catholic brethren." Hutson, s*upra*, at 12. Maryland's Toleration Act of 1649 permitted Catholics, in the words of Charles Calvert, the "Liberty to worship God in such manner as was most agreeable with their respective Judgments and Consciences." *Id.* at 12-13.

Lord Baltimore used the Toleration Act to attract English Catholics to Maryland after Parliament enacted penal laws that forced English Catholics to worship in secret. Ian K. Steele & Nancy L. Rhoden, *The Human Tradition in Colonial America* 100 (1999). One of Lord Baltimore's selling points to persecuted Catholics was the Toleration Act's express codification of religious freedom, which protected the "free exercise" of Christian Marylanders' religion. Paul Finkelman, *Religion and American Law: An Encyclopedia* 299-300 (2003). It was the first public act to use that phrase and "was intended only to protect trinitarian Christians in their *public* worship." *Id.* at 300 (emphasis added).

While not every colony was founded to provide refuge to those escaping religious persecution—for instance, Virginia's settlers were motivated by more worldly interests, *see* Hutson, *supra*, at 16—America's tradition of welcoming aliens persecuted for their religion is deeply embedded in our nation's values. That's why 400 years later President Barack Obama could invoke the example of the "small band of pilgrims [who in 1620] came to this continent [as] refugees who had fled persecution and violence in their native land" to defend his policy of accepting Syrian refugees. John Parkinson and Benjamin Siegel, *President Obama Compares Syrian Refugees to Mayflower Pilgrims, Administration Says States Can't Block Them*, ABC News, (Nov. 26, 2015, 11:44 AM), http://abcnews.go.com/Politics/president-obama-compares-syrian-refugees-mayflower-pilgrims-states/story?id=35431907.

II. The Refugee Act Reaffirmed America's Traditional Role As A Religious Safe Haven

Congress enacted the Refugee Act to "reaffirm America's historic[ally] proud role as haven for the oppressed and the persecuted." 125 Cong. Rec. H11969 (daily ed. Dec. 13, 1979) (statement of Rep. Fisher). "[F]rom the time of the pilgrims," Congresswoman Barbara Mikulski asserted, "[what] we have always stood for in this Nation [is] being a haven for people escaping persecution from foreign countries." *Id.* at H11971. Senator Edward Kennedy—the author of the Act—repeatedly referred to America's unique historical genesis as a basis for protecting refugees. *See, e.g.*, 125 Cong. Rec. at S12006 (daily ed. Sept. 6, 1979) (asserting

that the Refugee Act "deals with one of the oldest and most important themes in our Nation's history: Welcoming homeless refugees to our shores"); *id.* at S12010 (passing the Act will help America "live up to the humanitarian principles on which our Nation was founded").

Those same sentiments were echoed across party lines. *See, e.g.*, *id.* at S12012 (statement of Sen. Thurmond) (protecting persecuted individuals "is inherent in the fabric of American history"); *id.* at S12013 (statement of Sen. Thurmond) (noting that protecting refugees is "true to our heritage as a people and a Nation"); *id.* at S12022 (statement of Sen. Dole) (declaring that "[t]hroughout our history," America "as a people [has] benefit[ed] from our reception of refugees").

In addition to the humanitarian aims of the Act, lawmakers intended to provide a systematic procedure to replace the ad hoc legislation Congress periodically passed to deal with individual world crises as they arose. Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 765 (2000). Yet both before and after the Act, the goal of uniformity was often pushed to the background in order to provide special protection for two groups: (1) individuals persecuted by Communists; and (2) groups persecuted on the basis of their religion—

though there was obvious overlap between the two groups.[2]

The Refugee Act continued a congressional tradition of special solicitude for victims of religious persecution. The Immigration Act of 1917, for example, imposed a literacy test on all aliens seeking admission to the U.S., with one exception: people seeking to "avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith." The Immigration Act of 1917, ch. 29, § 3, 39 Stat. 877.

The Refugee Act codifies that special concern for religious refugees that was evident in the Immigration Act of 1917, which in turn reflected Congress's awareness of the American tradition of providing refuge for victims of religious persecution.

---

[2] For instance, the 1965 Immigration and Nationality Act Amendments expressly afforded people fleeing persecution from Communist-dominated countries protection as refugees; and legislation in 1990 allowed certain religious minorities under Soviet regimes to get refugee status under a relaxed standard. *Id.* at 765-66; *see also* 125 Cong. Rec. at S12013 (statement of Sen. Thurmond) ("The United States should support efforts to help refugees around the world, especially those fleeing Communist-backed dictatorships[.]").

III. This Court's Free Exercise Jurisprudence Confirms That Barring Someone From Practicing Their Religion Is Religious Persecution

The Constitution's Free Exercise Clause was not created *ex nihilo*. Instead, it was the product of American colonial experience. The two earliest, roughly analogous religious liberty protections in the colonies were the free exercise provision of Maryland's Toleration Act of 1649 and the guarantee of "full liberty in religious concernments" in Rhode Island's Charter. Both of those protections were enacted in response to religious persecution—the former aimed to provide refuge to persecuted English Catholics, while the latter offered a safe haven for any and all religious refugees.

In view of the religious persecution concerns that animated the enactment of both colonial and later federal Constitutional free exercise protections, this Court's Free Exercise Clause jurisprudence should inform the meaning of religious persecution for purposes of federal immigration law. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[I]t was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." (internal quotation marks omitted)). Indeed, lower courts have already made this connection. *See, e.g.*, *Canas-Segovia* v. *INS*, 902 F.2d 717, 723 (9th Cir. 1990), *judgment vacated on other grounds*, 502 U.S. 1086 (1992) ("While we do not suggest that United States constitutional law is binding upon the Salvadoran government, we do

believe that United States jurisprudence is relevant to analysis of new issues of United States refugee law."); *Kazemzadeh* v. *U.S. Atty. Gen.*, 577 F.3d 1341, 1358-60 (11th Cir. 2009) (Marcus, J., concurring) ("Although I do not presume to superimpose our Free Exercise Clause jurisprudence onto asylum law, the suggestion implicit in the BIA's findings and in the government's argument contradicts both the values of our founders and the values that the drafters of the Refugee Act of 1980 [wrote into law.]").

This Court would summarily nix a law requiring secret worship. The lack of such cases indicates as much. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 523 ("The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."); *Kunz* v. *People of State of N.Y.*, 340 U.S. 290, 295 (1951) (holding that "suppression" of public religious worship violates First Amendment). Few Free Exercise Clause cases are solved by the plain meaning of the phrase, but this one would be—by its plain terms, "free exercise" of religion encompasses a right to "open and visible worship" as a "de minimus requirement." *Kazemzadeh*, 577 F.3d at 1358 (Marcus, J., concurring) (internal quotation marks omitted).

It is undoubtedly true that not every Free Exercise Clause violation constitutes religious persecution under the Refugee Act, yet it must also be that violating the core interest protected by that clause—the "fundamental nonpersecution principle," *Church of the Lukumi Babalu Aye*, 508 U.S. at 523—

constitutes religious persecution. *See also Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (holding that forcing Amish to "abandon belief and be assimilated into society at large" is "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent"). Nothing is more essential to exercising one's religion than practicing it—to state as much is a tautology. Unfortunately for Mr. Xue, China doesn't respect religious liberty, even at the most basic level of leaving people to worship in the privacy of their own homes.

To demonstrate how drastic the differences are between America's and China's respect for religious liberty, one need only look at one aspect of Mr. Xue's experience. Though being fined was just one kind of harm he suffered, that alone is conduct this Court has regarded as simply beyond the pale of legitimate government action. In *Sherbert* v. *Verner*, for instance, being fined for attending a Saturday worship service was the absurd hypothetical offered as proof of the self-evident unconstitutionality of the challenged law. 374 U.S. 398, 404 (1963). Yet that is precisely what happened to Mr. Xue, except the service he was fined for attending was on a Friday and he suffered additional forms of egregious punishment.

In addition to being fined, Mr. Xue was imprisoned, assaulted, humiliated, and made to report to the authorities weekly. Pet. App. 2a-4a. Despite such demeaning treatment, the Board of Immigration Appeals and the Tenth Circuit both emphasized the lack of physical harm Mr. Xue

suffered. *Id.* at 15a-17a. But *Sherbert* and *Yoder* show that being forbidden to live out one's faith is a serious harm even when no physical injury occurs. *See also Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring) ("In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts."). As such, the suffering experienced when one is barred from practicing one's faith is no less than physical suffering—the two types of harm are simply incommensurable. The countless martyrs over the millennia of recorded history disprove the assumption made by the BIA and the Tenth Circuit that being forced to give up one's faith is a lesser harm than being maimed. Because "religion pervades and determines virtually [a person's] entire way of life," *Yoder*, 406 U.S. at 216, courts should recognize the unique harm caused by suppressing one's faith and demand less of the traditional markers of persecution, like suffering permanent physical injury.

The proposition—accepted by the Tenth Circuit—that being barred from secretly practicing one's religion is not persecution does not pass the smell test. The holding below fails to take seriously the *secret* part of secret worship. As shown here (where harsher penalties, such as a year in prison, would be levied were Mr. Xue caught again) and in *Kazemzadeh* (where being caught meant being

executed) practicing in secret does not mean that authorities allow someone to freely practice as long as he keeps his voice down and closes his blinds. 577 F.3d at 1349. Rather, clandestine practice means one can practice as long as the authorities don't catch you. That "it's not illegal unless you get caught" logic is circular reasoning masquerading as evidence of leniency—of course practicing in secret reduces the chance of detection, but that doesn't mean authorities aren't vigilantly attempting to stamp out religious activity that isn't state approved, or benignly looking the other way. Mr. Xue's church went to exceptional lengths to avoid being caught, as they only worshipped in parishioners' own homes and moved the location every week. Pet. App. 2a-3a. And yet they were still caught twice in the span of a couple of months. *Id.* at 2a-4a. Instead of asking how likely Mr. Xue is to stay one step ahead of Chinese police trying to hunt him down, the focus should be on the fact that Mr. Xue had to practice secretly in the first place, because "[f]orced clandestine practice amounts to religious persecution all by itself." *Kazemzadeh*, 577 F.3d at 1358 (Marcus, J., concurring).

It's been centuries since America's colonial antecedents experienced the level of religious persecution that happens daily in China. Perhaps that skewed the BIA and Tenth Circuit's perception by minimizing just how degrading it is to have one's religious faith suppressed by the state. Fortunately, debates concerning religious liberty in our country tend to involve a generally applicable law that only incidentally burdens a certain religious practice. *See,*

e.g., *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872 (1990). While such burdens on religious practice are serious and can be crippling, American legislators rarely intend to target religious groups. This case, however, reminds us that "[t]he right to practice one's faith and to do so in public stands at the heart of free exercise." *Kazemzadeh*, 577 F.3d at 1358 (Marcus, J., concurring).

* * *

A person barred from practicing their religion is precisely the type of person protected by the Refugee Act. Colonial history and federal Free Exercise Clause jurisprudence confirm that denying someone the ability to practice their religion is textbook religious persecution. This Court should grant review and reject the Tenth Circuit's cramped view that persecution has not occurred if one can sneak a secret prayer in with only intermittent assaults, imprisonments, and humiliations.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KRISTEN WAGGONER
DAVID A. CORTMAN
ERIK STANLEY
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260

M. MILLER BAKER
Counsel of Record
MCDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

EVAN D. PANICH
ALEXANDER J. KRITIKOS
MCDERMOTT WILL & EMERY LLP
28 State Street, Suite 3400
Boston, MA 02109
(617) 535-4000

Counsel for Amicus Curiae *Alliance Defending Freedom*