No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL., *Petitioners,*
v.
CITY OF PHILADELPHIA, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE BRUDERHOF, UNITED SIKHS, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS (ISKCON), THE ISLAM & RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE, AND ASMA UDDIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are a group of religious and civil rights organizations with a strong interest in preserving and protecting religious liberty in the United States.[1]

The Bruderhof is a Christian community stemming from the Anabaptist tradition. The Bruderhof was founded in 1920 in Germany in the aftermath of World War I. During Hitler's reign, the Bruderhof was targeted for its conscientious refusal to support Hitler's militaristic and genocidal policies. Eventually, the Bruderhof left their homes in Germany and fled to England before immigrating to Paraguay and later to the United States, attracted by this nation's founding principles of tolerance and liberty. Most of the 3,000 members of the Bruderhof live in rural communities of 200-300 people where they work and worship together, sharing all property in common.

The Bruderhof recognizes that government has the authority to maintain peace and basic justice. "We respect the authority of the state as appointed by God to protect the innocent and to restrain evil. We pay our taxes and obey the laws of the land, so long as these do not conflict with obedience to Christ." Bruderhof, *Foundations of Our Faith & Calling* § 12 (2012). The Bruderhof's interest in this case arises from its belief that religious vocation should be completely voluntary, *see id.* § 35, and therefore, freedom from government coercion in matters of

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[1] Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

religious practice is essential for people of all faiths. From its own experience, the Bruderhof knows the value of court-enforced standards for religious freedom that offer protection from the vagaries of political majorities.

United Sikhs is a U.N. affiliated, international non-profit, non-governmental, humanitarian relief, human development and advocacy organization, aimed at empowering those in need, especially disadvantaged and minority communities across the world. United Sikhs believes that faith based groups throughout history—often in partnership with government—have lived out religious and moral values in concrete ways that have embodied the common good, through educational institutions, health care services, and community organizing for structural change.

The International Society for Krishna Consciousness, Inc. ("ISKCON") is a monotheistic, or Vaishnava, faith within the broader Hindu tradition. As part of the practice of their faith, ISKCON members engage in large scale distribution of free vegetarian food, and in sharing ISKCON's spiritual message as presented in the *Bhagavad-gita* and other sacred texts. ISKCON has found that robust First Amendment protections have been essential for them to practice their faith in the United States.

The Religious Freedom Institute's Islam and Religious Freedom Action Team ("IRF") amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like freedom of religion, and the freedom to live out one's

faith, including in the workplace and at school. IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partnering with the Institute's other teams in advocacy.

Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Her most recent book is *When Islam is Not a Religion: Inside America's Fight for Religious Freedom* (2019).

SUMMARY OF ARGUMENT

One question here presented is whether *Smith* should be revisited. *Amici* write to address that issue and it alone. *Amici* believe that this Court should indeed revisit *Smith*—and overrule it.

Since it was decided, many have criticized *Employment Division v. Smith*, 494 U.S. 872 (1990), as being inconsistent with the basic principles of constitutional interpretation, like respect for the text, its original meaning, and case precedent.[2] *Amici* second those criticisms, understanding they will be the subject of other amicus briefs, but will focus

[2] For what *amici* believe to be the strongest criticisms of *Smith*, see *Employment Div. v. Smith*, 494 U.S. 872, 891-903 (1990) (O'Connor, J., concurring in the judgment); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2-3, 7-39; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114-52 (1990).

principally on our core concern—*Smith*'s impact on the lives of religious minorities.

When it abandoned constitutionally required exemptions, *Smith* abandoned the mission of protecting equally the religious liberty of minority faiths. Since *Smith*, religious minorities have had some real successes with the federal Religious Freedom Restoration Act (RFRA) and state-law analogues. But those successes are mixed with defeats—and in many places, where there are no protections beyond *Smith*, religious minorities find themselves in a difficult situation.

Smith acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but saw this an "unavoidable consequence of democratic government." *Id*. at 890.

Amici implore the Court to reconsider this claim and the opinion in which it was made. Avoiding certain consequences of democratic government is the very point of having a First Amendment. And nothing is unavoidable, if this Court will simply take up again the role it long played in enforcing the Constitution's promise of religious liberty and in defending the minority faiths who cling to it.

ARGUMENT

I. EMPLOYMENT DIVISION V. SMITH SHOULD BE OVERRULED.

A. Religious Minorities and Religious Exemptions.

The Constitution protects the free exercise of religion. And in a religiously pluralistic and highly

regulated society like ours, there can be no free exercise of religion for minority faiths without religious exemptions. In pursuit of the common good, government regulation now touches on matters of almost every conceivable kind. But this means even sympathetic governments cannot accommodate in advance—or even foresee—the burdens that will end up being imposed on minority faiths. After all, Congress apparently did not appreciate in advance how its employment-discrimination laws, read naturally, would incidentally threaten the Catholic Church's male-only priesthood. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). Congress certainly will not appreciate in advance how its regulation of DMT might incidentally threaten the unconventional religious practices of a tiny and obscure Brazilian religious group. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

Much of the problem would be solved if religious people would be satisfied with the bare right to believe in their faiths. But few would really defend an attitude that carries such a myopic conception of religious life. On any realistic understanding, religion involves more than abstract belief in creedal propositions. It involves living one's life in accordance with those beliefs—in accordance with what many religious people see as God's will. This Court has had no trouble recognizing that religious believers are burdened when they are forced to "engage in conduct that seriously violates [their] religious beliefs." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (concluding that such a plaintiff "easily satisfie[s]" RLUIPA's requirement of a substantial burden); *cf. Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (noting that

the First Amendment "safeguards the free exercise of the chosen form of religion," and thus "embraces two concepts—freedom to believe and freedom to act"). Even *Smith* saw this clearly. *See Smith*, 494 U.S. at 877 (describing the exercise of religion as involving "acts or abstentions . . . [that] are engaged in for religious reasons").

Religious minorities want to practice their faiths. And when laws forbid their religious practices, it does not matter whether the law in question is "neutral" or "generally applicable," *see Smith*, 494 U.S. at 879. Actually it does matter—it is the difference between the dog "'being stumbled over and being kicked.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (quoting Oliver Wendell Holmes, *The Common Law* 3 (1881)). But the point is that religious minorities in America do not deserve to be treated like Holmes's proverbial dog—if religious liberty and equality are to be genuine, religious minorities must have rights against being stepped on as well.

To be unable to freely practice one's faith creates a grim set of choices for religious minorities. They can move, leaving the neighborhood, the state, or the country—hoping that the next place will be better than the last. They can fight, facing whatever state punishment comes in response. But because both of these are so difficult, a third possibility—abandoning the faith or elements of it—becomes the most likely. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717–18 (1981) (noting how the most modest of things, like the mere denial of a discretionary government benefit, can put "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

Sometimes religious minorities face outright persecution. This Court has seen that. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); see also U.S. Department of Justice, *Update on the Justice Department's Enforcement of RLUIPA, 2010-16*, at 6, *available at* https://www.justice.gov/crt/file/877931/download (documenting the "particularly severe discrimination faced by Muslims in land use"). America is large and diverse—and heterogeneous as well. Evangelical Christians have special trouble on the coasts; nonbelievers have special trouble in the South; others, like Sikhs, Muslims and Hare Krishnas, can have trouble anywhere they go.

Yet even putting aside all the hostility, religious minorities also face a lack of awareness, combined with the almost reflexive hesitation many officials have about making "exceptions" to the "rules." This too the Court has seen. Indeed, this Court has diagnosed the problem well, pointing out how "argument[s] for uniformity" can arise "in response to *any* [] claim for an exception to a generally applicable law." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–36 (2006) (emphasis added). This visceral antipathy toward exemptions, the Court said, is the "classic rejoinder of bureaucrats throughout history." *Id* at 436. Encountering the same sort of argument in another case a decade later, this Court repeated the lament about bureaucrats and dismissively rejected the government's rationales as "hard to take seriously." *Holt v. Hobbs*, 574 U.S. 352, 363 (2015).

The indifference to religious needs in these cases is palpable, and *amici* appreciate this Court's

firm and unanimous rebuke of it. And *Gonzales*, *amici* note, involved the federal government, whose action tends to be far more friendly to religious minorities and more visible than that of state and local governments. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("[S]mall and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account."). Reflexive hostility toward religious exemptions, *amici* submit, is everywhere—one vivid display, as we shall discuss, came in Kansas and involved the death of a Jehovah's Witness. *See infra* p. 9-10 (discussing *Stinemetz*).

B. *Smith* and Its Effects on Religious Minorities

Before *Smith*, this Court required burdens on religious liberty to be justified—the government had to show the burden in question was backed by a compelling governmental interest and pursued by the least restrictive means. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith* changed that. *Smith* held that burdens on religion no longer required justification, as long as the laws in question were neutral and generally applicable. *See Smith*, 494 U.S. at 879.

It is hard to overstate the significance of this change. After *Smith*, burdens on religious exercise need not be supported by any evidence or logic. They do not need to be reasonable; they do not need to be rational. As one district court put it in rejecting a Seventh-Day Adventist's claim: "For [a rule] to be neutral and generally applicable, Defendants need not make, or even try to make, a reasonable

accommodation for Plaintiff's religious practice." *Filinovich v. Claar*, No. 04 C 7189, 2006 WL 1994580, at *5 (N.D. Ill. July 14, 2006).

That accurately depicts the *Smith* rule. Governments no longer have any constitutional obligation to accommodate the religious practice of minority faiths. They do not even have an obligation to try. They need not waste time bargaining with religious minorities or listening to their complaints. They need not care about them at all, and they need not pretend otherwise.

Given these realities, abuses of the government's discretion are to be expected. Take one case from Kansas. *See Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011). There Mary Stinemetz was a Medicaid patient who needed a liver transplant. A Jehovah's Witness, she had religious objections to the blood transfusion that an ordinary liver transplant required. But in Nebraska, there was a hospital that had begun doing new bloodless liver transplants, which did not involve any transfusion and which were actually cheaper than ordinary liver transplants.

Yet unfortunately for Stinemetz, Kansas's Medicaid had a policy against reimbursing out-of-state procedures beyond a 50-mile limit without a waiver. And for reasons unknown, Kansas refused to give Stinemetz a waiver. This was hard to understand—again the bloodless liver transplant Stinemetz wanted would actually have been *cheaper* for the state. Indeed, the Kansas Court of Appeals later remarked that Kansas had "failed to suggest *any* state interest, much less a compelling interest, for denying Stinemetz's request." *Id.* at 161 (emphasis added). But the district court, operating under *Smith*,

denied Stinemetz's constitutional claims in less than a paragraph. *See id*. at 146.

Now Stinemetz ultimately won her legal case. The Kansas Court of Appeals went out of its way for her, accelerating the case, generously interpreting the Kansas state constitution to create a compelling-interest standard for free exercise, and broadly construing the language in *Smith* about individualized assessments. *See id*. at 154-62. But the whole story reflects an unrelenting hostility to religious exemptions, *see Gonzales*, 546 U.S. at 436 ("classic rejoinder of bureaucrats throughout history"), and it does not end happily. By the time litigation ended, Stinemetz's problems had progressed to the point that she was no longer eligible for a transplant. She died of liver failure the year after her victory in the Kansas Court of Appeals. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165-71 (2016) (discussing *Stinemetz* and other examples in detail).

C. The Responses to *Smith* and Their Effects.

Smith's rule is harsh for religious minorities. Yet at the same time, *Smith* has been tempered in various ways. *Smith*'s requirements of neutrality and general applicability have sometimes been interpreted vigorously, which has led to some genuine successes for religious minorities. The federal Religious Freedom Restoration Act (RFRA) and its state-law analogues (state RFRAs) have brought back the compelling-interest for the federal government and many states. Finally, legislatures can create

targeted religious exemptions—specific statutory exemptions remedying particular conflicts between legal obligation and religious practice. Yet while all of these things help to soften *Smith*, they all have serious limits. They are valuable. But they are not enough.

1. Neutrality and General Applicability

We start with neutrality and general applicability—*Smith*'s two master concepts.[3] In *Lukumi*, this Court exempted the Santeria from Hialeah's ordinances forbidding animal sacrifice because Hialeah had exempted various kinds of nonreligious conduct (fishing, hunting, rodent extermination) posing the same threat to Hialeah's stated interests. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing

[3] We set aside certain other doctrines associated with *Smith*, like hybrid rights and individualized assessments. The whole concept of hybrid rights has been heavily criticized, *see, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., dissenting) (calling the doctrine "ultimately untenable"), and it has rarely been dispositive, *see Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) ("[N]o court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner . . . We decline to be the first.").

Individualized assessments has mattered, but merges with the notion of general applicability. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10 (2016) ("Individualized exemptions are one way in which a law can fail to be generally applicable.").

by judging them to be of lesser import than nonreligious reasons.").

Since *Lukumi*, robust conceptions of the general-applicability requirement have sometimes come to the aid of religious minorities. The best example is probably *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3d Cir. 1999), where two Muslim officers risked losing their jobs because of their religious obligations to wear beards. Although the Police Department refused to accommodate their religious needs, it did accommodate officers with a medical condition—a skin condition, *pseudo folliculitis barbae*—allowing those officers to go unshaven. This, the Third Circuit concluded, violated *Smith*—as in *Lukumi*, the Court said, the requested religious exemption threatened the government's interest no more than the preexisting secular exception. *Id.* at 366.

Newark's interpretation of *Lukumi* makes sense and it was certainly invaluable to the Muslim officers in that case. And such a vigorous conception of general applicability has other virtues too: It can give religious minorities a kind of vicarious protection in the legislative process. The legislative process is full of compromise: "[N]o legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). Religious interest groups can piggyback on battles fought by secular interest groups in the political branches. When a secular interest group negotiates an exemption to some law, it creates the possibility of a religious exemption as well.

But all this can be easily overstated. Secular exceptions to a rule do not come from nowhere. They arise because some secular need demands it. So to the

extent the Free Exercise Clause creates religious exemptions out of preexisting secular exceptions, the whole thing depends on there being overlap between religious and secular needs. But whether there is any such overlap is unpredictable—it is largely a matter of luck.

Take *Newark* again. The Muslim officers there won because the Police Department earlier had medically exempted officers with that skin condition, *pseudo folliculitis barbae*. But what if the officers with that skin condition had not needed a medical exemption? Or what if the skin condition had simply never existed? Then the Muslim officers would have lost. Neutrality and general applicability create religious exemptions only when the needs of religious minorities just happen to overlap with other peoples' non-religious needs. But religious liberty should not depend on whether enough people have skin conditions or whether enough animals are killed in enough secular contexts sufficiently analogous to Santeria sacrifice.[4]

Neutrality and general applicability make religious exemptions a matter of luck. And this is likely to be particularly hard on small religious minorities with idiosyncratic religious practices, because they are the ones most likely to be burdened by laws that burden no one else. To put it slightly differently, we can expect statutes burdening small

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[4] This argument was first made in Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 629 (2003) (arguing that "getting an exemption . . . has become a matter of constitutional luck: it depends on random, arbitrary factors, and the protection it provides is sporadic, idiosyncratic, unprincipled, and unpredictable").

religious minorities to be disproportionately uniform and thus immune to challenge under *Smith*. This too is part of why *Smith* is so difficult for religious minorities. And no conception of general applicability, however expansive, can fix it.

2. RFRA and State RFRAs.

Another development moderating *Smith* has been the legislative restoration of the compelling-interest test at both the state and federal levels. This Court has vigorously interpreted the federal Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act. *See Holt v. Hobbs*, 574 U.S. 352 (2015) (RLUIPA); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (RFRA); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (RFRA). Two of these decisions were unanimous. And more than half the states now apply the compelling-interest test to their own laws, either through state RFRAs or through interpretations of relevant state constitutional provisions.[5]

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[5] *Amici* count twenty-one states with state RFRAs. *See* ALA. CONST. AMEND No. 622; ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02; ARK. CODE ANN. §§ 16-123-401 *et seq.*; CONN. GEN. STAT. ANN. § 52-571b; FLA. STAT. ANN. §§ 761.01-.05; IDAHO CODE §§ 73-401 to -404; IND. CODE ANN. § 34-13-9-1, et seq.; 775 ILL. COMP. STAT. ANN. 35/1-99; KAN. STAT. ANN. §§ 60-5301 to 60-5305; KY. REV. STAT. § 446.350; LA. REV. STAT. ANN. §§ 13:5231-5242; MO. ANN. STAT. §§ 1.302-.307; N.M. STAT. ANN. §§ 28-22-1 to 28-22-5; MISS. CODE ANN. § 11-61-1; OKLA. STATE ANN. TIT. 51, §§ 251-258; 71 PA. CONS. STAT. ANN. §§ 2401-2407; R.I. GEN LAWS §§ 42-80.1-1 to -4; S.C. CODE ANN. §§ 1-32-10 to -60; TENN. STAT. § 4-1-407; TEX CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012; VA. CODE ANN. §§ 57-1 to -2.02. A less certain number of other states have state constitutional provisions interpreted along

These provisions too have helped religious minorities. Male Muslim firefighters, for example, have won the right to wear beards pursuant to religious obligation, after demonstrating they did not create real safety concerns. *See Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009). Incarcerated Muslim women have won the right to avoid unnecessary cross-gender pat-down searches. *See Forde v. Baird*, 720 F.Supp.2d 170 (D. Conn. 2010).[6] Sikhs have been able to keep sheathed kirpans, *see Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013), Amish pretrial detainees have been able to avoid unnecessary photographs, *see United States v. Girod*, 159 F.Supp.3d 773 (E.D. Ky. 2015), the Santeria have been able to continue their practices of animal sacrifice, *see Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009), and Native American schoolchildren have been able to keep their hair long, *see A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010); *Gonzales v. Mathis Indep. Sch. Dist.*, No. 2:18-CV-43, 2018 WL 6804595 (S.D. Tex.

Sherbert/Yoder lines. *See Larson v. Cooper*, 90 P.3d 125 (Alaska 2004); *State v. Adler*, 118 P.3d 652 (Hawaii 2005); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *St. John's Lutheran v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Door Baptist Church v. Clark County*, 995 P.2d 33 (Wash. 2000); *State v. Miller*, 549 N.W.2d 235 (Wisc. 1996).

[6] In a related context, female Muslim pretrial detainees have been allowed to pursue a right to only unveil in front of female photographers, although the source of this right is less clear. *See J.H. v. Bratton*, 248 F.Supp.3d 401 (E.D.N.Y. 2017), *Soliman v. City of New York*, No. 15CV5310PKCRER, 2017 WL 1229730 (E.D.N.Y. Mar. 31, 2017).

Dec. 27, 2018). *See also* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165-171 (2016) (examining these cases and others); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 479-96 (2010) (same).

And in so many of these cases, judges make cutting comments questioning why a religious exemption was ever denied in the first place. *See Needville*, 611 F.3d at 272 ("[W]hile a school may set grooming standards for its students, when those standards substantially burden the free exercise of religion, they must accomplish *something*.") (emphasis in original); *Merced*, 577 F.3d at 593-94 ("The city has absolutely no evidence that Merced's religious conduct undermined any of its interests . . . Merced has performed these sacrifices for sixteen years without creating health hazards or unduly harming any animals."); *Forde*, 720 F.Supp.2d at 178 ("[The government has] offered no evidence establishing a compelling governmental interest in permitting male correctional officers to pat search Forde" and, in fact, "there may be penological disadvantages to cross-gender pat searches").

These cases illustrate the need minority faiths have for a compelling-interest test. All these results were sensible in context. They were reached under the compelling-interest test, and they probably would not have been reached without it.

Yet RFRA and state RFRAs too have their limitations. While RFRA applies only to federal law after *City of Boerne v. Flores*, 521 U.S. 507 (1997), most regulation burdening religious groups comes from state and local laws. And while some states have adopted the compelling-interest test as a matter of

state law, others have not. California and New York are two of the country's most populous states. Neither has a state RFRA or a compelling-interest interpretation of its state constitution.

There is also tremendous variation among existing state RFRAs. Some states have interpreted their state RFRAs powerfully, akin to the strong interpretation this Court gave RFRA in *Gonzales*; other states have almost nullified their state RFRAs through hostile judicial interpretation. *See* Lund, 55 S.D. L. REV. at 485 (explaining that "[c]ourts often interpret state RFRAs in an incredibly watered down manner that does not resemble *Gonzales*-style review or even *Sherbert/Yoder*-style review" and giving examples). Some state RFRAs have carve-outs that limit the scope of the compelling-interest test, or onerous notice or exhaustion provisions that trip up religious claimants. *Id*. at 490-93.

Finally, RFRA and state RFRAs—like all legislation—can be repealed or cut back. RFRA has not yet been cut back. But such cut backs have happened to state RFRAs. Illinois amended its state RFRA to wipe out challenges by religious cemeteries to the expansion of the Chicago O'Hare airport. And Florida amended its state RFRA to pull the rug out from a lawsuit on behalf of Muslim women seeking to remain veiled in drivers' license photographs. *Id*. at 493-96 (discussing these developments).

Perhaps after hearing all the evidence, courts would have found compelling interests in these cases. But the evidence was not heard because base power and baseless fears drove the decisions. There are solid points here about institutional capacity that caution against this kind of legislative supremacy:

> Legislators . . . face constant fundraising, constituent service, importuning by lobbyists, political posturing and spin control, and thousands of bills in every session on every conceivable topic . . . Most of the real discussions in which legislators "find" facts occur ex parte and off the record . . . [Sometimes] legislators are free to investigate the public good and to vote their consciences . . . But often they are locked into positions by ideology or political pressure before the hearing ever begins. Then the hearing is a charade.
>
> Judicial decision-making is also highly imperfect. But when a question of fact can be stated with some specificity in an adversarial format, I have no doubt that judicial fact finding is more reliable than legislative fact finding. A claim to religious exemption addresses a specific religious practice, to be performed under specific circumstances, recognizing that any exemption will extend to all similar practices and circumstances that cannot be honestly distinguished. The question whether such an exemption will do any harm, and how much, is reasonably focused and well suited to adversary presentations.

Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1175–76 (2007).

For all these reasons, while RFRA and state RFRAs blunt the effects of *Smith*, their protection too is limited in significant ways. The need remains for a uniform standard that protects the religious freedom

of all faiths equally. Only this Court can meet that need.

3. Targeted Religious Exemptions.

Finally, legislatures can accommodate religious needs in yet a different way—they can create specific, tailored religious exemptions around particular legal obligations. *See, e.g., Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (addressing the scope of ERISA's exemption for church plans).

Yet here too there is concern. If it is true that legislators respond best to votes and campaign contributions, then large and wealthy faiths can sometimes expect to get these kinds of religious exemptions. But the small and poor ones—the discrete and insular ones—will have a harder time. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting "more searching judicial inquiry" as an appropriate solution).

Many small religious communities, of course, are removed from the political process. It is not merely that they are small, or that they are organized as non-profit organizations that cannot directly participate in politics because of the strictures of federal tax law. *See, e.g.*, 26 U.S.C. § 501(c)(3) (limiting the ability of tax-exempt non-profit organizations to influence legislation and participate in political campaigns). It is also that many religious organizations remove themselves from the political process out of sincere religious obligation. Members of the Bruderhof, one *amici* on this brief, all take a vow of poverty and commit all their property to their religious community. Thus, not only are the Bruderhof (as well as similarly structured

organizations such as Catholic monastic orders) severely restricted in their ability to make campaign contributions and participate in lobbying collectively, their members do not do so (and cannot do so) individually either. Some religious groups, including many Amish and Hutterite congregations, hold to religious principles that even forbid voting in secular elections. Telling these groups that they must protect their religious beliefs through the political process is really telling them they must violate their religious beliefs to preserve them.

One concern with the compelling-interest test has been that it may not be applied in a denominationally neutral way—that courts might play favorites in "approving some religious claims while deeming others unworthy of accommodation." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 771 (2014) (Ginsburg, J., dissenting). *Amici* share this concern. "Free exercise thus can be guaranteed only when legislators [and] voters"—and, *amici* would add, judges—"are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson v. Valente*, 456 U.S. 228, 245 (1982).

But another thing must be said too. The more this Court is concerned with denominational neutrality, the more unattractive *Smith* becomes. From the standpoint of denominational neutrality, *Smith* is the worst-case scenario. The compelling-interest test at least *tries* to be denominationally neutral—it is denominationally neutral as a formal matter, of course, and thus it imposes the obligation on courts to be denominationally neutral in substance. *See Smith*, 494 U.S. at 918 (Blackmun, J., dissenting) ("Though the State must treat all religions equally,

and not favor one over another, this obligation is fulfilled by the uniform application of the 'compelling interest' test to all free exercise claims, not by reaching uniform results as to all claims."). But legislatures are entirely different. They are free to accommodate the religious practices of popular groups and to leave the unpopular ones out.

Even a legislature scrupulously devoted to protecting religious exercise would find it difficult to do so. Again America is too religiously diverse to make such a thing feasible—even if legislatures knew of every religious belief and practice, each of those beliefs and practices can intersect with a variety of different laws in a variety of ways, making targeted exemptions for many faiths almost impossible in practice. See Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 171-73 (2016) (discussing how difficult it would be to draft a statute dealing with the rights of Jehovah's Witnesses regarding blood transfusions, because the issue can come up in all kinds of different postures).

One must also constantly keep federalism in mind. Religious minorities are burdened by every level of government, and exemptions from one level do not bind any other. Almost fifteen years ago, this Court exempted a Brazilian religious group from the federal prohibition on hoasca. *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). But *Gonzales* was a RFRA case, and so naturally the religious exemption granted there extends only to federal law. Yet 48 states still forbid hoasca. Some of them may have state RFRAs, which could be construed in protective ways. But none of them have any specific statutory exception for

religious use of hoasca. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 473-74 (2010) (making this point).

Hosanna-Tabor is another example: While there was a federal statute partially exempting religious institutions from the federal employment-discrimination laws, *see* 42 U.S.C. § 2000e–1(a), only the Constitution could protect the church from the state-law claims brought in the case. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 180 (2012) (noting the state-law claim).

D. *Smith* Has Already Been Fatally Undermined.

Finally, many of the reasons given in *Smith* have come apart in the decades after it. *Smith*, for example, thought that the compelling-interest test would inevitably be "courting anarchy," given our "society's diversity of religious beliefs." *Smith*, 494 U.S. at 888. Even at the time, this statement was overwrought—the compelling-interest test had long been the nationwide rule. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

But however plausible such a statement was at the time, it has been further undercut by experience. The compelling-interest test is now the rule with regard to the federal government and more than half the states. It has been that way in most places for decades. "If the compelling-interest test caused anarchy, we would know it by now." Christopher C. Lund, *The Propriety of Religious Exemptions: A*

Response to Sager, 60 ST. LOUIS U. L.J. 601, 603 (2016).

And this Court itself does not believe any such claims. When faced with similar fears, this Court rejected them out of hand: "We reaffirmed just last Term [in *Cutter v. Wilkinson*, 544 U.S. 709 (2005)] the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

Smith's arguments about precedent and constitutional text too have been undercut by the Court's more recent decisions. As regards precedent, *Smith* claimed that its rule was somehow consistent with *Sherbert* and *Yoder*, even though those cases applied a compelling-interest test. *Smith* claimed that its rule had always been the rule, and that both *Sherbert* and *Yoder* were really consistent with it. *See Smith*, 494 U.S. at 878-89, 882 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . We first had occasion to assert that principle in *Reynolds* . . . [and] the rule to which we have adhered ever since *Reynolds* plainly controls [this case]."). This struck some at the time as hard to believe. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (*Smith*'s "use of precedent is troubling, bordering on the shocking"). But in *Holt v. Hobbs*, in a unanimous opinion, this Court abandoned *Smith*'s account of the history, treating *Smith* not as continuous with earlier precedent but as a fundamental departure from it. *See Holt v. Hobbs*, 574 U.S. 352, 357 (2015) ("*Smith* largely repudiated the method of analysis used in

prior free exercise cases like *Wisconsin v. Yoder* . . . and *Sherbert v. Verner* . . .").

But probably most damaging is this Court's tacit acknowledgment that *Smith* cannot be squared with the constitutional text. In *Hosanna-Tabor*, this Court again had to consider *Smith*'s core claim—that religious exemptions are not required by the Free Exercise Clause. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). This Court unanimously rejected that claim. To be sure, this Court distinguished *Smith*; it did not overrule it. *Id.* at 190 (carving out an exception to *Smith* for "internal church decisions"). But in doing so, this Court deemed *Smith*'s rule utterly incompatible with the constitutional text:

> The EEOC and Perich thus see no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

Id. at 189.

Hosanna-Tabor is absolutely correct regarding all of this, but this logic completely undermines *Smith*. The text of the First Amendment does indeed give special solicitude to religious organizations. But it does so, *amici* note, by giving special solicitude to religion generally. "Religion" is the word given in the

constitutional text, which means that all forms of religious exercise—whether done by individuals or organizations—are all equally entitled to that same special solicitude. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1192 (2014) (making this point).

Hosanna-Tabor takes as axiom what *Smith* denied: That religion is singled out by the constitutional text, and that it deserves distinctive constitutional treatment as a result.

Thus the work has already been done; this Court repudiated the core of *Smith* in *Hosanna-Tabor*, and it did so unanimously. The ax lies ready at the root of the tree. *Smith* was wrong the day it was decided. It should be overruled now.

II. STARE DECISIS SHOULD NOT SAVE SMITH.

Amici have focused on the problems *Smith* created for religious minorities. Other kinds of criticisms of *Smith* have been made over the years. Many, for example, have pointed out ways in which *Smith* does not accord with traditional principles of constitutional interpretation—like respect for constitutional text, historical practice, and case precedent. *See supra* p. 3 n.2. *Amici* understand that other briefs in this Court will focus on such issues. *Amici* second these criticisms, but will leave it at that.

Yet having criticized *Smith* directly, *amici* feel obliged to say at least something about *stare decisis*. *Amici* certainly understand that "[o]verruling precedent is never a small matter" and that "*stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409

(2015). But when one takes seriously what this Court has said about *stare decisis*, it only confirms that *Smith* should be overruled.

Stare decisis is important, of course, but it is "not an inexorable command" and its strength is "weakest when we interpret the Constitution." *Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485, 1499 (2019). For all the reasons given above and in other places, *amici* submit that *Smith* was "not *just* wrong"—"[i]ts reasoning was exceptionally ill founded." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2178 (2019) (emphasis added). Indeed, there would be something deeply ironic if *Smith* were given *stare decisis* respect, when *Smith* gave no such respect to either *Sherbert* or *Yoder*. And unlike both *Sherbert* and *Yoder*, *Smith* was a bare 5-4 decision in its rejection of the compelling-interest test—the broadest of holdings supported "by the narrowest of margins, over a spirited dissent[] challenging [its] basic underpinnings." *Payne v. Tennessee*, 501 U.S. 808, 828–29 (1991) (suggesting *stare decisis* is especially unwarranted in such situations).

Moreover, there are no appreciable "reliance interests at stake" here. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). This Court has recently overruled decisions even though it would mean retrials of criminal defendants, see *Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545 (U.S. Apr. 20, 2020), civil plaintiffs losing successful judgments, *see Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485 (2019), and the upsetting of privately negotiated agreements, *see Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). This is an easier case than those. Here we are only talking principally about prospective liability of state

and local governments, and almost exclusively for injunctive and declaratory relief (rather than damages).

No one is asking this Court to overrule "numerous major decisions of this Court spanning 170 years." *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019). *Smith* is barely three decades old—younger than apparently all of the decisions this Court has overruled in the last few terms. *See, e.g., Ramos*, 2020 WL 190654 (overruling case from 1972); *Knick*, 139 S.Ct. at 2162 (case from 1985); *Hyatt*, 139 S.Ct. at 1485 (case from 1979); *Janus*, 138 S.Ct. at 2448 (case from 1977).

Moreover, only a single decision here needs to be reconsidered. To be sure, decisions like *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) assumed *Smith*'s framework. But they did not endorse or affirm *Smith*. They would have almost surely been decided the same under the compelling-interest test of *Sherbert* and *Yoder*—indeed both claims treated *Smith* more as an obstacle than a means.

And crucial again here is *Hosanna-Tabor*. Not only did *Hosanna-Tabor* undercut *Smith*'s precedential force by undercutting its logic, it demonstrated *Smith* to be fundamentally unworkable. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."). Applied in the most straightforward manner, *Smith*'s rule would have forced the Catholic Church to ordain women. Refusing to accept such a wild conclusion, this Court sensibly carved out an

exception to *Smith*. But the point remains: The first time this Court came face-to-face with *Smith*'s real implications, it ran screaming the other way. *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("Revisiting precedent is particularly appropriate where . . . experience has pointed up the precedent's shortcomings."). *Hosanna-Tabor* "render[ed] [*Smith*'s] regime workable only by effectively overruling [it] without saying so." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 501 (2007) (Scalia, J., concurring). In this situation, the argument for *stare decisis* is weak indeed.

Finally, everyone has "been on notice for years regarding this Court's misgivings" about *Smith*. *Janus*, 138 S. Ct. at 2484. Justices have flagged their doubts about *Smith* virtually every time such doubts would have been relevant. *See Masterpiece Cakeshop*, 138 S.Ct. at 1734 (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters."); *City of Boerne v. Flores*, 521 U.S. 507, 544–45 (1997) (O'Connor, J., concurring) ("I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there."); *Lukumi*, 508 U.S. at 559 (Souter, J., concurring) ("[I]n a case presenting the issue, the Court should re-examine the rule *Smith* declared."). Consideration of this Court's principles of *stare decisis* only serves to confirm that it should be overruled.

CONCLUSION

For the foregoing reasons, *Employment Division v. Smith* should be overruled, the judgment of the Court of Appeals reversed, and the case remanded to the lower courts for further consideration.

Respectfully submitted,

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June 2, 2020