No. ____

# In the Supreme Court of the United States

GEORGE Q. RICKS,

*Petitioner*,

*v.*

STATE OF IDAHO CONTRACTORS BOARD, ET AL.,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO COURT OF APPEALS*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Court should revisit its holding in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause generally requires no religious exemptions from laws that are neutral and generally applicable.

## PARTIES TO THE PROCEEDING

Petitioner George Q. Ricks was plaintiff in the Idaho District Court, plaintiff-appellant in the Idaho Court of Appeals, and petitioner in the Idaho Supreme Court.

Respondents are the Idaho Contractors Board, the Idaho Bureau of Occupational Licenses, and the Attorney General for the State of Idaho, Lawrence G. Wasden. They were defendants in the Idaho District Court, defendants-respondents in the Idaho Court of Appeals, and respondents in the Idaho Supreme Court.

## RELATED PROCEEDING

*George Quinn Ricks* v. *Idaho State Board of Contractors*, No. CV 14-7034, 1st Judicial District Court, Kootenai County, Idaho. Judgment entered on October 15, 2015.

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## INTRODUCTION

Idaho law makes it illegal, under penalty of fines and imprisonment, for petitioner George Ricks to work as a contractor unless he registers with the State. To register, he must provide contact information, proof of insurance, a self-certification of good standing, and—the crux of the matter here—his Social Security number. Ricks cannot provide his Social Security number as a condition of obtaining work without violating his religious beliefs.

In applying to register, Ricks provided all other required information and was willing to offer his birth certificate as an alternative form of identification. But although the State accepts birth certificates in place of Social Security numbers in certain circumstances under *other* licensing regimes, the statute governing contractors includes no similar exception. The State thus rejected Ricks's application. Relying on *Employment Division* v. *Smith*, 494 U.S. 872 (1990), the Idaho Court of Appeals held that the requirement to provide a Social Security number was neutral and generally applicable, foreclosing any religious accommodation under the Free Exercise Clause. The Idaho Supreme Court denied review.

This Court already addressed the need for religious exemptions on facts like these over three decades ago. *Bowen* v. *Roy* involved claims by Native Americans who, for religious reasons, could not supply a Social Security number on their welfare application. 476 U.S. 693 (1986). Applying the Court's then-prevailing precedent, five Justices agreed with the district court that denying them benefits would violate the Free Exercise Clause. *Id.* at 715-16 (Blackmun, J., concurring in

part); *id.* at 726-33 (O'Connor, J., dissenting in part); *id.* at 733 (White, J., dissenting). Though the government had a legitimate interest in preventing fraud, Justice O'Connor explained, it hadn't shown that other means of identification wouldn't suffice for the "handful" of applicants with religious objections to supplying their Social Security numbers. *Id.* at 728. And while it was surely easier to require everyone—objection or no—to supply their numbers, "administrative inconvenience is" generally "not alone sufficient to justify a burden on free exercise." *Id.* at 726, 730-31. The *Roy* Court remanded, rather than affirmed, on this question only because Justice Blackmun was concerned it had become moot. *Id.* at 714-16.

But *Roy* was not the end of the story. Four years later, in *Smith*, a 5–4 majority adopted Chief Justice Burger's minority position in *Roy* to hold that the Free Exercise Clause did not require the government to accommodate religious objectors who violated a "generally applicable criminal law" by using peyote in a religious ritual. 494 U.S. at 884.

Like the Idaho Court of Appeals here, courts have generally read *Smith* as creating a grand unified theory of the Free Exercise Clause that affords no relief from neutral and generally applicable laws that substantially burden religious exercise. App. 23a ("Generally applicable and neutral laws that incidentally burden the exercise of an individual's religion do not offend the First Amendment."). But the decision is far more nuanced. *Smith* recognized different analyses for laws regulating belief "as such," 494 U.S. at 877 (always "excluded"); laws that directly target religious practices, *id.* at 877-78 ("doubtless * * * unconstitutional"); laws regulating practices that implicate more

than one constitutional right, *id.* at 881-82 ("barr[ed]"); and laws governing "unemployment compensation," *id.* at 883 ("on * * * occasion[]" subject to strict scrutiny). And the Court was coy about what else might fall into this last category, suggesting that strict scrutiny applies at least whenever "the State has in place a system of individual exemptions" but not when it has an "across-the-board criminal prohibition," as in *Smith*. *Id*. at 884.

The broad conclusion—suggested, but not clearly adopted by the *Smith* majority, see *id*. at 885-89, yet embraced in the lower courts—that *Smith* foreclosed *any* accommodations under the Free Exercise Clause for *any* religiously motivated "physical acts" burdened by "neutral, generally applicable law," *id*. at 887, 881, is one reason the Court should revisit *Smith*. Cf. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (*Smith* does not mean that "any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause").

Another is that the decision has "harmed religious liberty." *City of Boerne* v. *Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., joined by Breyer, J., dissenting). Under the common interpretation of *Smith*, the government no longer has to treat religious objectors fairly, or even reasonably—it just has to treat them the same as non-objectors. The result—a regime in which the government is free to ignore the distinction between those who do not comply with a law because they are exercising religion and those who do not comply just because they don't want to—hits minority religious practices hardest, just as the *Smith* Court anticipated it would. 494 U.S. at 890 (agreeing that

broad application of *Smith* "will place at a relative disadvantage those religious practices that are not widely engaged in").

But *Smith* is not just problematic for launching an injurious theory of religious liberty that has been taken by the lower courts far beyond what *Smith* itself required. *Smith*'s reasoning also ignored the text and history of the Free Exercise Clause, rewrote every post-incorporation precedent favorable to exemption claimants, and reinvigorated one of this Court's most notorious First Amendment decisions—all without briefing and argument on the question. See *id.* at 879 (relying on *Minersville Sch. Dist. Bd. of Educ.* v. *Gobitis*, 310 U.S. 586 (1940), overruled by *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943)). In the name of preventing "anarchy," *id.* at 888, *Smith* in effect imposed the unanimity of the graveyard on exemptions from neutral and generally applicable laws, even where the government lacks a good reason—or indeed, any reason at all—for interfering with free exercise.

As demonstrated by this case, the problem for religious minorities persists. Petitioner George Ricks faces the same dilemma that the *Roy* plaintiffs did 33 years ago. His religion tells him one thing, but the government requires another. And because he cannot in good conscience submit his Social Security number to

the Idaho Contractors Board, Ricks is forbidden from pursuing his occupation as a contractor.[1]

The *Roy* Court would say Ricks has a claim. The *Smith* Court would seem to say he doesn't. But the Court today knows something neither of those Courts did: providing religious exemptions to dissenters does not loose anarchy upon the world, but is instead a workable solution for a religiously pluralistic nation. The experience of the federal Religious Freedom Restoration Act, state RFRAs and constitutional protections, and the federal Religious Land Use and Institutionalized Persons Act shows that governments can usually accommodate religious minorities; they just have to try. We also know more now about the Founders' understanding of the Free Exercise Clause than either the *Roy* or *Smith* Courts did.[2] That history shows that the Clause was understood not just to forbid "discrimination against religion," as *Smith* held, "but to enable citizens of many diverse creeds to live together in harmony, without violence to their conscience—even if it required" accommodations from neutral and generally applicable laws. McConnell,

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[1] Other post-*Smith* religious objectors have suffered an even worse fate. See, *e.g.*, Lund, *Martyrdom and Religious Freedom*, 50 Conn. L. Rev. 959, 974-75 & n.66 (2018) (recounting case of Mary Stinemetz, a Jehovah's Witness who in 2014 "died—a martyr for her faith in the twenty-first century"—after Kansas denied her access to a faith-compliant, transfusion-free transplant available at lower cost in a neighboring state).

[2] For example, Professor McConnell's seminal article on the history of free exercise was published in the *Harvard Law Review* in May 1990, just one month after *Smith* was decided on April 17, 1990. See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

*Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne *v.* Flores, 39 Wm. & Mary L. Rev. 819, 831 (1998).

The ill-begotten *Smith* experiment has been a failure. The Court should grant the petition to revisit *Smith* and do justice to both the Constitution and to religious dissenters like Ricks.

## OPINIONS BELOW

The opinions of the Idaho district court (App. 29a-77a) are unpublished.

The Idaho Court of Appeals' opinion (App. 2a-28a) is published at 435 P.3d 1 (Idaho Ct. App. 2018).

The Idaho Supreme Court's order denying the petition for review (App. 1a) is unpublished.

## JURISDICTION

The Idaho Court of Appeals affirmed the trial court's dismissal of Ricks's complaint on December 3, 2018. The Idaho Supreme Court denied Ricks's petition for review on March 12, 2019. Justice Kagan extended the deadline to file a petition for a writ of certiorari to July 10, 2019. This Court has jurisdiction under 28 U.S.C. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * ." U.S. Const. amend. I.

Pertinent statutory provisions are reproduced in the appendix to this petition. App. 78a-83a.

## STATEMENT OF THE CASE

### A. Ricks's religious beliefs.

Ricks has spent his entire working life—nearly 40 years—in the construction industry. He has long had concerns, based on his understanding of the Bible, that it is morally wrong to participate in a governmental universal identification system, especially to buy or sell goods and services. App. 3a, 88a-90a (citing Revelation 13:16-18). Ricks believes this applies to his participation in the United States' Social Security program, including by his use of his Social Security number to sell his labor. App. 90a. It is undisputed that Ricks's beliefs are sincere. App. 20a n.10.

### B. The State refuses to register Ricks.

In Idaho, it is illegal to work as a contractor without first registering with the State. Idaho Code § 54-5204; see also *id.* § 5217 (penalties).

In 2014, Ricks attempted to register. The registration form, however, required him to provide his Social Security number. App. 3a, 104a. Ricks has not objected to the government's use of the number for its own purposes, but, as noted, he believes that his personal use of the number to earn a livelihood is religiously impermissible. App. 85a ("[P]laintiff refused to disclose a social security Number (SSN) based on a religious objection."); App. 88a-89a ("[M]y religious objections [are] to disclosing an SSN."). Thus, rather than add the number to his form, Ricks submitted a signed statement explaining his religious objection

and attaching a copy of a notarized affidavit renouncing his Social Security benefits. App. 88a; see also App. 104a-109a.

The Idaho Contractors Board responded by instructing Ricks to submit his Social Security number pursuant to Idaho Code § 54-5210(a). App. 88a, 103a. Section 5210 is one of two relevant Idaho statutes requiring applicants for professional licenses to provide their Social Security number. While one of those statutes allows for exceptions, the other does not.

The first, Idaho Code § 73-122, requires that "[t]he social security number of an application shall be recorded on any application for a professional, occupational or recreational license." This section includes an exception for applicants who have "not been assigned a social security number"; they may "[s]ubmit a birth certificate, passport or other documentary evidence" instead. Section 73-122 was enacted in light of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 651-69, which offers federal funding to states that implement certain procedures—such as procedures for collecting citizens' Social Security numbers, see 42 U.S.C. 666(a)(13)—designed to facilitate interstate enforcement of child support decrees.

The second statute—Idaho Code § 54-5210—applies specifically to applications to become a registered contractor. Section 54-5210 was enacted as part of the Idaho Contractor Registration Act to prevent "unscrupulous or dishonest building contractors from continuing to practice in" Idaho. App. 11a; see also Idaho Code § 54-5202. Unlike § 73-122, § 54-5210 includes

no exception from the requirement to provide a Social Security number.

Other state licensing laws resemble § 73-122 in allowing alternative forms of identification if no Social Security number has been assigned. See, *e.g.*, Idaho Code § 32-403 (marriage licenses); § 49-306 (driver's licenses). Idaho law also permits state agencies that have an individual's Social Security number to share it with other agencies for government purposes. See, *e.g.*, Idaho Code § 49-203(4)(a) & (d), (6) (authorizing Idaho Transportation Department to share, without consent, "personal information" in its records "[f]or use by any government agency * * * in carrying out its functions").

Ricks responded to the Board's request by submitting a newly notarized statement reiterating his religious beliefs and identifying legal arguments why he should not be required to submit the number. App. 88a-89a, 101-102a. The next month, the Board denied his application without discussion. App. 89a.

Proceeding *pro se*, Ricks appealed the denial to state district court, arguing that being forced to provide his Social Security number violated state and federal law, including the Free Exercise Clause. App. 89a. The district court dismissed Ricks's appeal on procedural grounds. *Ibid*.

**C. The proceedings below.**

In 2016, Ricks filed this lawsuit. Again *pro se*, he sought a declaratory judgment that the State's requirement that he provide his Social Security number to register as a contractor violated, among other things, the Free Exercise Clause. App. 84a-86a, 87a-

95a. Ricks alleged the requirement was not "the least restrictive means to further the state's alleged compelling interest," since, as noted, Idaho's general statute requiring applicants for professional licenses to submit their Social Security number allows those without a Social Security number "to use alternative documentation" instead. App. 85a-86a; see Idaho Code § 73-122(3)(b) ("birth certificate, passport or other documentary evidence").

The district court rejected Ricks's claim for an accommodation and granted the State's motion to dismiss. The court held that because "§ 54-5210's requirement of providing social security numbers on contractor's license applications is a facially neutral law of general applicability," "Plaintiff's free exercise claim is precluded by * * * *Employment Division* v. *Smith*." App. 46a-47a.

Ricks, still *pro se*, appealed to the Idaho Court of Appeals. The Court of Appeals affirmed on the same grounds. App. 2a, 23a-25a.[3]

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[3] Before rejecting the free-exercise claim under *Smith*, the Court of Appeals *sua sponte* mused whether Ricks had administratively exhausted the claim under Idaho law, ultimately finding the exhaustion issue "unclear" and proceeding to the merits. App. 7a-10a. This is no obstacle to certiorari. *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985) ("the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case"). Regardless, Idaho law provides that exhaustion is not required for lawsuits seeking a declaratory judgment that agency action violated the plaintiff's rights, Idaho Code § 67-5278(1), (3)—which is presumably why the State never raised the issue at any point in the litigation.

Having retained counsel, Ricks sought discretionary review by the Idaho Supreme Court. The court declined review. App. 1a.

Without being registered, it is illegal for Ricks to work as a contractor, even though his entire career has been in construction.

## REASONS FOR GRANTING THE PETITION

*Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring). Before *Smith*, this Court interpreted that Clause as protecting an affirmative right: government could not substantially burden sincere religious practices absent a compelling interest enforced in the least restrictive way. *E.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406-07 (1963); see also *Cantwell* v. *Connecticut*, 310 U.S. 296, 301-02, 307 (1940). In *Smith*, however, the Court transformed the Clause into a nondiscrimination provision: government cannot discriminate against religion, either intentionally or in effect, but the Free Exercise Clause otherwise relieves no individuals of "the obligation to comply with a valid and neutral law of general applicability," even if that law effectively bars their religious exercise. *Smith*, 494 U.S. at 879 (internal quotation marks omitted). The *Smith* majority recognized this rule would "disadvantage" religious minorities with practices less familiar to lawmakers, but dismissed that result as simply "unavoidable" in a "democratic government." *Id.* at 890.

*Smith*'s reasoning—in a nutshell, that protecting religious pluralism is "courting anarchy," 494 U.S. at

888—"is contrary to the deep logic of the First Amendment." McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990). Moreover, the *Smith* Court reached its 5–4 result in violation of its own usual practice: it disavowed earlier precedents without any party requesting that it do so, without briefing or argument on the issue, and without considering whether a narrower holding would have reached the same result on the facts. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 571-72 (1993) (Souter, J., concurring).

Reaction to *Smith* was swift and emphatic. "[O]ne of the broadest coalitions in recent political history" coalesced around an effort to reinstate the compelling-interest standard by statute. Laycock & Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210 (1994). In 1993, that effort succeeded: Congress enacted the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq*., by overwhelming majorities in each House. *Ibid.* The last 26 years under RFRA have confirmed that courts are able to strike sensible balances in administering an exemption regime. But in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court held that RFRA constitutionally can apply only against the federal government. Many Americans are therefore left subject to *Smith*, because they live in one of the 18 states that have not enacted their own RFRA or adopted an equivalent state constitutional rule, see Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 Yale L.J. F. 369, 372-73 & n. 27 (2016); others, like Ricks, encounter *Smith* after a court holds that their state RFRA provides little protection. See

App. 20a; see also Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 467 (2010) ("[I]n many states, state RFRAs seem to exist almost entirely on the books.")

*Smith* is ripe for revisiting. *Smith* is contrary to the text and historical meaning of the Free Exercise Clause, as post-*Smith* scholarship on that Clause's "original understanding and purpose" has confirmed. *Lukumi*, 508 U.S. at 574-77 (Souter, J., concurring) (citing McConnell, 103 Harv. L. Rev. 1409); accord *City of Boerne*, 521 U.S. at 548-64 (O'Connor, J., dissenting).

Meanwhile, more recent decisions have fatally undermined *Smith*'s reasoning. For instance, *Smith* argued that its rule derived from this Court's precedents, which had, *Smith* said, "never" required religious exemptions from an "otherwise valid law." 494 U.S. at 878-79. But this Court has since recognized the obvious: that *Smith* in fact "repudiated the method of analysis" that had previously governed free-exercise cases for decades. *Holt* v. *Hobbs*, 135 S. Ct. 853, 859 (2015).

It is thus little surprise that eight different Justices have already suggested "revisit[ing]" *Smith*, over a period spanning from soon after *Smith* was decided to just last Term. *Kennedy*, 139 S. Ct. at 637 (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari); see *City of Boerne*, 521 U.S. at 566 (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided[.]"); *id.* at 544-45, 565 (O'Connor, J., joined by Blackmun, J.) ("[I]t is essential for the Court to reconsider its holding in

*Smith*[.]"); *Lukumi*, 508 U.S. at 559, 559, 571-77 (Souter, J., concurring) ("[I]n a case presenting the issue, the Court should re-examine the rule *Smith* declared."); see also *Smith*, 494 U.S. at 907-09 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) (criticizing the *Smith* rule in *Smith* itself).

This case offers an excellent vehicle for doing so. Ricks does not seek an exemption from paying any tax, Social Security or otherwise. Cf. *United States* v. *Lee*, 455 U.S. 252 (1982). Nor does he seek to stop the State from using his Social Security number for its own purposes. Cf. *Roy*, 476 U.S. at 699-701 (portion of decision rejecting attempt to stop the government "*itself*" from using Social Security number in its "internal affairs").

Instead, Ricks seeks only an exemption from the requirement that *he* provide his Social Security number to the State to register as a contractor. That is indistinguishable from the exemption a majority of the Justices in *Roy* already concluded that the Free Exercise Clause required, *supra* pp. 1-2—and the only Justices who disagreed in *Roy* did so only on a version of the theory the Court would later enshrine as law in *Smith*. *Id.* at 707 (opinion of Burger, C.J.) (government should have "wide latitude" in enforcing a "facially neutral and uniformly applicable" condition on benefits). Here, however, the courts below didn't even get past the motion-to-dismiss stage before rejecting Ricks's claim. That result could be sustained, if at all, only under *Smith*. See *Leahy* v. *District of Columbia*, 833 F.2d 1046, 1049 (D.C. Cir. 1987) (R. Ginsburg, J.) (reversing dismissal of claim seeking religious exemption from requirement to provide Social Security number and remanding for further proceedings on exemption's feasibility, because the "standard[] proposed by

Chief Justice Burger in a portion of his *Roy* opinion * * * was expressly rejected by five Justices").

## I. *Smith* was wrongly decided and *stare decisis* does not require adhering to it.

*Smith* is "demonstrably wrong." *City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting). The decision is contrary to the text and historical meaning of the Free Exercise Clause. And *stare decisis*—which "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights," *Janus* v. *American Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)—doesn't require the Court to maintain it.

### A. *Smith* contradicts the text and historical meaning of the Free Exercise Clause.

1. On its face, the Free Exercise Clause safeguards an affirmative right for believers to practice their religions—not just a negative right against governmental discrimination largely secured elsewhere by the Equal Protection and Due Process Clauses.

The Free Exercise Clause protects against government action "prohibiting the free exercise [of religion]." U.S. Const. amend. I. That language "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Rather, it protects against laws that do a particular thing, which doesn't hinge on the law's object or scope. If a law prohibits a religious practice (say, wearing a yarmulke in court), it does so regardless whether it *also* prohibits all analogous secular activities ("no

hats") or none ("no *religious* hats"). Either way, ordinary English speakers, in 1791 as today, would understand that the practice has been "prohibit[ed]."[4]

Thus, "the most straightforward, plain-meaning interpretation of the text" is that it protects an affirmative freedom from government interference, not *Smith*'s nondiscrimination rule. Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 337 (1996); accord McConnell, 57 U. Chi. L. Rev. at 1114-16 & n.28. And indeed, *Smith* didn't really even dispute the point. The *Smith* Court just said it didn't "think the words *must* be given that meaning," and that reading the text to apply only to laws "specifically directed at" religious practice is a "permissible" reading, too. 494 U.S. at 878.

But *Smith* provided no textual evidence to support this point, and again, it is inconsistent with the natural reading of the language—as the remainder of the *Smith* opinion itself demonstrates. The opinion concedes that (1) religiously motivated conduct is the "exercise of religion." 494 U.S. at 877-78. And it recognizes that (2) the *Smith* plaintiffs' religiously motivated conduct was "*prohibited* under Oregon law." *Id.*

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[4] Observers then and now would know that the wearing of hats might be a question of "religious liberty." See *Trial of Penn and Mead*, 22 Charles II (1670), reprinted in 6 How. 951 at 954, 956 (defendants held in contempt for refusing to doff their hats); Benjamin Shingler & Jonathan Montpetit, *A Guide to Quebec's New Immigration and Religious Symbols Laws: How We Got Here and What's Next*, Canadian Broadcasting Corporation (June 18, 2019, 4:00 AM), http://bit.ly/2LFu2Zd (2019 Quebec ban on religious symbols, including hats, applies to lawyers appearing in court).

at 890 (emphasis added). How it nonetheless concluded that (3) this particular prohibiting of the exercise of religion is not "prohibiting the free exercise [of religion]" under the First Amendment goes unexplained as a textual matter and contradicts the language's plain meaning. Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & Relig. 99, 103 (1990).

2. What the text reflects, history confirms. "[C]ontrary to *Smith*[,] the Framers did not intend simply to prevent the government from adopting laws that discriminated against religion." *City of Boerne*, 521 U.S. at 550 (O'Connor, J., dissenting). Rather, the Free Exercise Clause was understood to embody an affirmative freedom presumptively allowing believers to practice their faiths. Three important factors point this direction.

First, "perhaps the best evidence of the original understanding of the" federal Free Exercise Clause is the language of the Clause's state forerunners. *City of Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting); cf. *District of Columbia* v. *Heller*, 554 U.S. 600-03 (2008) (interpreting Second Amendment in light of "analogous arms-bearing rights in state constitutions" and rejecting interpretation that would "treat the Federal Second Amendment as an odd outlier"). By 1789, every state but one had incorporated some version of a free-exercise clause into its constitution. McConnell, 103 Harv. L. Rev. at 1428. "[A]lmost all of the[se provisions] had a common structure: a broad guarantee of free exercise or liberty of conscience, coupled with a caveat or proviso limiting the scope of the freedom when it conflicts with laws protecting the peace and

safety, and sometimes other interests, of the state." McConnell, 39 Wm. & Mary L. Rev. at 830.

These provisions are consistent with an exemption regime: they show that free exercise was understood to mean that believers could generally exercise their religion unless that exercise conflicted with laws advancing especially important interests. *City of Boerne*, 521 U.S. at 554–55 (O'Connor, J., dissenting). But they are inconsistent with *Smith*: a "peace and safety" proviso would make little sense in a regime where neutral and generally applicable laws overrode contrary religious exercise for that reason alone. *Id.* at 552. "[I]t is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses." *Id.* at 553. These state provisions are thus powerful historical evidence against *Smith*.

Second, *Smith* runs counter to direct evidence of how the framers themselves resolved conflicts between religious conduct and neutral and generally applicable laws. Such conflicts arose at the time of the founding, for example, when Quakers and other minority groups asserted objections to swearing oaths and carrying arms in military service. And in both situations, colonial and state governments recognized that religious liberty required exemptions from the generally applicable laws creating the conflict. *City of Boerne*, 521 U.S. at 557-59 (O'Connor, J., dissenting); McConnell, 103 Harv. L. Rev. at 1466-71.

This understanding was confirmed in the 19th century, when the Fourteenth Amendment's framers manifested a clear understanding that incorporating

the Free Exercise Clause against the states would require exemptions even from neutral and generally applicable laws. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U.L. Rev. 1106 (1994). For instance, laws across the antebellum South prohibited teaching slaves to read or write. These laws were (religion-) neutral and generally applicable: *no one* could teach slaves to read *anything*. *Id.* at 1135 n.137 (providing text of Louisiana, Virginia, and North Carolina statutes). Yet because these laws burdened the religious exercise of slaves who wanted to read the Bible, and of others who sought to teach them to do so, the Fourteenth Amendment's framers "explicitly target[ed]" these laws "as examples of what would become unconstitutional" through incorporation. *Id.* at 1131-37, 1149.

Finally, *Smith* is inconsistent with the theoretical foundations of religious liberty in founding-era thought. James Madison influentially argued that "the right of every man to exercise" his religion flowed from man's "duty towards the Creator"—a duty that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments* (ca. June 20, 1785), National Archives, Library of Congress, Founders Online, http://bit.ly/2Gj7Wrt. Madison's argument is incompatible with *Smith*: if "the scope of religious liberty is defined by religious duty," then discrimination can't be the *sine qua non* of a religious-liberty violation. McConnell, 103 Harv. L. Rev. at 1453. But his argument is "consonant with the notion that government must accommodate, where possible, those religious

practices that conflict with civil law"—that is, the interpretation of the Free Exercise Clause as protecting an affirmative right presumptively to practice one's religion. *City of Boerne*, 521 U.S. at 561 (O'Connor, J., dissenting).

On balance, then, the historical evidence provides "powerful reason to interpret the [Free Exercise] Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition." *Lukumi*, 508 U.S. at 576 (Souter, J., concurring). And indeed, in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, this Court already acknowledged that a broad reading of *Smith* doesn't cohere with history. There, the government argued that because the federal prohibition on employment retaliation was a "valid and neutral law of general applicability," no exemption was required for claims brought by ministers against religious groups. 565 U.S. 171, 190 (2012). But the Court unanimously disagreed and recognized a "ministerial exception," relying on the historical background of the Religion Clauses to conclude that "the Free Exercise Clause prevents [the government] from interfering with the freedom of religious groups to select their own" ministers. *Id.* at 184.

Despite all this, the Court has "never had" briefing and argument on *Smith*'s historical merits as a general matter—not even "in *Smith* itself." *City of Boerne*, 521 U.S. at 565 (Souter, J., dissenting). And although Justice Scalia later disputed the historical critique of *Smith*, even that opinion couldn't conclude that *Smith* was required by history, only that history "is more supportive * * * than destructive of it." *City of Boerne*, 521 U.S. at 544 (Scalia, J., concurring). Justice Scalia's

claim misreads the data. Compare, *e.g.*, *id.* at 540 (asserting that violation of *any* law would violate the public peace and thus run afoul of founding-era "peace and safety" provisos) with McConnell, 39 Wm. & Mary L. Rev. at 835-36 (Blackstone lists thirteen specific offenses as "offences against the public peace," indicating that "the words are confined to public disorder and violent or tortious injury to other persons"). But regardless, if constitutional rights are indeed "enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634-35, then the question of the Free Exercise Clause's historical scope is one that should be settled by this Court after full briefing and argument, not debated only in separate opinions and law reviews.

### B. *Stare decisis* does not pose an obstacle to revisiting *Smith*.

*Smith* "may be reexamined consistently with principles of *stare decisis*." *Lukumi*, 508 U.S. at 571 (Souter, J., concurring). That doctrine is "at its weakest" for constitutional decisions, since they "can be altered only by constitutional amendment or by overruling." *Janus*, 138 S. Ct. at 2478 (quoting *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997)). And *stare decisis* "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Ibid.* (internal quotation marks omitted).

The factors this Court has recently identified as central to *stare decisis* all point toward overruling *Smith* here: *Smith* was poorly reasoned, inconsistent

with other areas of First Amendment law, has been undermined by later legal developments, and has generated no reliance worth this Court's protection. See *Knick* v. *Township of Scott*, No. 17-647, 2019 WL 2552486, at *12 (June 21, 2019) (citing *Janus*, 138 S. Ct. at 2478-79).

1. *Smith* was poorly reasoned. As explained above, *Smith* did not even claim to be based on the text or historical meaning of the Free Exercise Clause.

Instead, *Smith* purported to choose between the nondiscrimination and accommodation interpretations of the Clause based on this Court's precedent. But nobody—*Smith* critic or *Smith* apologist—thinks *Smith* was right about the Court's prior cases.[5] Indeed, this Court has already recognized that *Smith* in fact did not apply, but rather "repudiated," precedent. *Holt*, 135 S. Ct. at 859.

Examples abound of cases demonstrating *Smith*'s incompatibility with earlier law. See *Lukumi*, 508 U.S. at 569-70 (Souter, J., concurring) (counting "more than a dozen" cases applying strict scrutiny to laws burdening religious exercise, regardless whether that

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[5] Compare*, e.g.,* Laycock, 8 J.L. & Relig. at 104 ("[L]iterally no one, including the Justices in the majority, had previously understood this Court's precedents as the opinion now interprets them.") and McConnell, 57 U. Chi. L. Rev. at 1120 (*Smith*'s "use of precedent is troubling, bordering on the shocking"), with Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991) (defending *Smith*'s "rejection of * * * exemptions" but noting that its "use of precedent borders on fiction").

was only the law's "unanticipated effect"). Two suffice to illustrate the point.

First, in *Yoder*, the Court held that the Free Exercise Clause required an exemption from a state compulsory-education law allowing Old Order Amish parents to keep their children home, in accordance with their religious beliefs. 406 U.S. 205 (1972). The Court explicitly recognized that the law was both "neutral" and "generally applicable"—yet it required the exemption anyway. *Id.* at 220, 234-36. And although *Smith* later recharacterized *Yoder* as a "hybrid" case based on the conjunction of free exercise with the substantive-due-process right of parents to direct their children's upbringing, the *Yoder* Court itself was adamant that it was applying the Free Exercise Clause alone. See *Lukumi*, 508 U.S. at 566 n.4 (Souter, J., concurring) (*Yoder* "mentioned" *Pierce* v. *Society of Sisters* "only to distinguish [it]"). Indeed, *Yoder* said it could not be "overemphasized" that the Amish defendants' conduct was "religious," and that parents seeking an exemption merely for "philosophical and personal" reasons wouldn't have received one. 406 U.S. at 216, 235.[6]

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[6] In addition to being an ineffective distinction of *Yoder* and *Cantwell*, see *Lukumi*, 508 U.S. at 566-67 (Souter, J., concurring), *Smith*'s "hybrid rights" idea has been heavily criticized, both by scholars and the lower courts ostensibly bound by it. See, *e.g.*, *Combs* v. *Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246-47 (3d Cir. 2008) (declining to follow "the hybrid-rights theory" "[u]ntil the Supreme Court provides direction"); *Leebaert* v. *Harrington*, 332

Second, in *Hobbie* v. *Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), the Court expressly considered whether to adopt *Smith*'s interpretation of the Free Exercise Clause—and expressly declined it. The state in *Hobbie* argued that no exemption was required because its law was "neutral and uniform in its application." *Id.* at 141 (internal quotation marks omitted). But the *Hobbie* Court "reject[ed] the argument." *Id.* at 141. "[S]uch a test *has no basis in precedent*," the Court explained, and "relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." *Id.* at 141-42 (internal quotation marks omitted, emphasis supplied).

Even the cases *Smith* relied on (rather than distinguished) underscore its incompatibility with the Court's better-reasoned cases. For instance, *Smith* leaned heavily on *Gobitis* and *Reynolds* v. *United States*, 98 U.S. 145 (1897). But *Gobitis*—which upheld the criminal prosecution of Jehovah's Witness schoolchildren for not reciting the Pledge of Allegiance—is one of the Court's most notorious decisions and was overruled just three years later in *Barnette*. And *Reynolds* turned on the long-discredited idea that the Free Exercise Clause protects only belief, not conduct, 98

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F.3d 134, 144 (2d Cir. 2003) ("no good reason for the standard of review to vary simply with the number of constitutional rights"); *Kissinger* v. *Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) ("illogical"). Almost no cases since *Smith* have applied it as grounds for an exemption.

U.S. at 166–67—an idea *Smith* itself rightly disavowed. 494 U.S. at 877.

"[W]hatever *Smith*'s virtues, they do not include a comfortable fit" with precedent. *Lukumi*, 508 U.S. at 570-71 (Souter, J., concurring). Since precedent was *Smith*'s purported basis, *Smith* can't be defended on "the reasoning of the opinion itself," thus clearing the way for the Court to consider for the first time whether text and history counsel maintaining it at all. *Knick*, 2019 WL 2552486, at *12.

2. In addition to being poorly reasoned, *Smith* also is an "outlier" in this Court's First Amendment jurisprudence. *Janus*, 138 S. Ct. at 2482.

First, *Smith* rejected the application of heightened scrutiny to incidental, rather than targeted, burdens on religious exercise. But both before and after *Smith*, this Court has applied heightened scrutiny to laws that burden, but are not targeted at, other First Amendment rights, like speech, *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 50, 56-57 (1988), and expressive association, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-48, 653-59 (2000). The result is a stark incongruity in the Court's treatment of incidental burdens on free exercise relative to other First Amendment rights. Indeed, *Smith*'s author later said so himself, arguing—correctly—that the Court's reaffirmance of heightened scrutiny for laws only incidentally burdening speech was inconsistent with the "regime" the Court had "adopted * * * in *Smith*." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 578-79 (1991) (Scalia, J., concurring) (*all* "general law[s] not specifically targeted at" First Amendment activity should be exempt from heightened scrutiny, no matter their incidental

effects); cf. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1505 (2019) (Breyer, J., dissenting) (overruling appropriate when decision is "a relic of an abandoned doctrine").

Second, while *Smith* concluded that giving religious objectors "a private right to ignore generally applicable laws" would be a "constitutional anomaly," 494 U.S. at 886, plaintiff-specific exemptions are the norm in other constitutional contexts. See Barclay & Rienzi, *Constitutional Anomalies or As-Applied Challenges: A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1612-31 (2018). Indeed, the familiar "concept of an 'as applied' challenge to a law is a precise parallel." McConnell, 57 U. Chi. L. Rev. at 1138. Yet rather than denigrate as-applied relief as an improper "private right to ignore generally applicable laws," *Smith*, 494 U.S. at 886, the Court has praised as-applied challenges as "modest," *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006), and "the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted).

Indeed, regarding the First Amendment in particular, this Court long ago rejected the notion that there is anything illegitimate about granting as-applied exemptions when a law burdens First Amendment rights. In *Murdock* v. *Pennsylvania*, the Court exempted Jehovah's Witness plaintiffs from a generally applicable law requiring a license for "soliciting" to the extent the law required them to obtain a license to distribute religious literature and solicit donations. 319 U.S. 105, 106-07, 110 (1943). The Court rejected the government's argument that this relief put the plaintiffs "above the law." *Id.* at 116. And while the law was

"nondiscriminatory," the Court held that "immaterial." *Id*. at 115. "Freedom of press, freedom of speech, [and] freedom of religion," the Court explained, "are in a preferred position." *Ibid*.

*Murdock* is just one of many cases granting relief tantamount to an exemption from a generally applicable law to plaintiffs asserting a burden on their First Amendment rights. In *Barnette*, for example, the Court didn't strike down the Pledge of Allegiance or prohibit flag-salute ceremonies—it "restrained enforcement" of the school's otherwise-valid policy "as to the" objecting plaintiffs "and those of that class." 319 U.S. at 630. And in *Wooley* v. *Maynard*, the Court didn't say New Hampshire couldn't generally require drivers to display the state motto on their license plates—it held that the state "may not require *appellees*" to do so, because of their "sincere religious objections" to the compelled speech. 430 U.S. 705, 717 (1977) (emphasis supplied). These cases and many others show that it is only in the free-exercise context under *Smith* that this Court has ever thought it inherently problematic to grant relief resulting in "some citizens [being] exempt from laws applied to other citizens." McConnell, 57 U. Chi. L. Rev. 1139 (collecting examples); Barclay & Rienzi, 59 B.C. L. Rev. at 1612-31 (same).

*Smith*, then, is "the true anomaly": In rejecting heightened scrutiny for incidental burdens on religion, and in treating as-applied religious exemptions as uniquely troubling, it creates a "double standard that treats religious exercise as less deserving than any other First Amendment right." Barclay & Rienzi, 59 B.C. L. Rev. at 1653; cf. *Hosanna-Tabor*, 565 U.S. at 189 ("text of the First Amendment itself * * * gives

special solicitude to the rights of religious organizations").

3. Moreover, "[d]evelopments since [*Smith*], both factual and legal, have * * * eroded the decision's underpinnings." *Janus*, 138 S. Ct. at 2482-83 (citation and internal quotation marks omitted).

Most obviously, *Smith* claimed it would "court anarchy" to have judges apply the compelling-interest test to religious burdens on a case-by-case basis. 494 U.S. at 888. Twenty-six years after federal and state RFRAs and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*, began restoring that test in many contexts, however, anarchy has yet to arrive. To the contrary, religious-freedom claims still comprise a small percentage of judicial dockets, are brought disproportionately by members of minority religions, and of course are not always successful. Goodrich & Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 360-61, 367 (2018) (percentage of docket and minority religions); Barclay & Rienzi, 59 B.C. L. Rev. at 1633-34, 1639 (government's win rate under RFRA).

When claims under these statutes *have* prevailed, however, they have allowed, for example, Sikhs to serve in the military without having to abandon their articles of faith, *Singh* v. *McHugh*, 109 F. Supp. 3d 72 (D.D.C. 2015); Native American students to attend public schools despite grooming rules that would prohibit their religiously mandated long hair, *A.A.* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010); and Christian charities to continue feeding the homeless in public parks, *Chosen 300 Ministries, Inc.*

v. *City of Philadelphia*, No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012). These are shining examples of "the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance," *Salazar* v. *Buono*, 559 U.S. 700, 723 (2010) (Alito, J., concurring)—not harbingers of anarchy. And they ought not be contingent on whether the defendant government has deigned to statutorily reinstate religious freedom alongside other First Amendment rights.

*Smith*'s concerns about the compatibility of case-specific exemptions with the judicial role have likewise been fatally undermined by the experience with RFRA and RLUIPA. *Smith* thought it was "horrible to contemplate that federal judges" would be charged, on a case-by-case basis, with balancing the need for religious exemptions against the government's interest in enforcing generally applicable laws. 494 U.S. at 888–89 & n.5. But for decades now, courts applying federal and state RFRAs, RLUIPA, and state free-exercise provisions have done just that, regularly engaging in precisely the sort of balancing *Smith* feared to imagine. And during that period, this Court has repeatedly recognized that courts are "up to the task," "reaffirm[ing] * * * 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); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-23 (2005) (there is "no cause to believe" that the compelling-interest test could "not be applied in an appropriately balanced way").

Meanwhile, the supposedly more administrable *Smith* rule has proved less a bright line than *Smith*

advertised. "Neutrality" and "general applicability" aren't self-defining terms, and this Court's most relevant precedents have involved facts at opposite ends of the spectrum—an "across-the-board criminal prohibition" in *Smith*, 494 U.S. at 884; and a law "gerrymandered with care" to apply "*only* against" religious conduct in *Lukumi*, 508 U.S. at 542-46 (emphasis supplied). The result has been a "deep and wide circuit split" in cases between those poles. Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5-6, 15 (2016); cf. *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari, in case presenting splits that have arisen under *Smith* and *Lukumi*). *Smith*, then, has not even delivered the ease of administration for which it sacrificed robust free-exercise protection.

4. "In some cases, reliance provides a strong reason for adhering to established law." *Janus*, 138 S. Ct. at 2484. This is not such a case.

For one thing, far from relying on *Smith*, many jurisdictions have rejected it. Congress and the legislatures of 21 states reacted to *Smith* by reinstating the compelling-interest test in across-the-board RFRAs. Laycock, 125 Yale L.J. F. at 372-73 & n. 27. The courts of 14 states have interpreted state free-exercise clauses post-*Smith* to require the compelling-interest test. *Id.* And RLUIPA reinstated the compelling-interest test in the specific contexts of state prisons and land-use decisions. *Holt*, 135 S. Ct. at 860.

Moreover, even the jurisdictions that haven't rejected *Smith* have long been "on notice" of its "uncer-

tain status." *Janus*, 138 S. Ct. at 2485. *Smith* was intensely controversial when it was narrowly decided by a five-Justice majority, and it "remains controversial in many quarters" today. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring). Ten different Justices have criticized it, and eight have suggested that it be revisited, beginning just three years after it was decided. Supra pp. 13-14. In any event, to whatever extent governments *have* relied on *Smith*, these reliance interests are not ones that merit this Court's protection. Even *Smith* contemplated that governments would continue "to be solicitous of" religious liberty voluntarily, 494 U.S. at 890—not that they would take *Smith* as an invitation to become accustomed to riding roughshod over religious exercise.

## II. This case presents an ideal vehicle for revisiting *Smith*.

This case presents a clean vehicle for revisiting *Smith*. Indeed, it's hard to imagine a case more clearly isolating the *Smith* issue, for three reasons.

First, *Smith* is all that stands between Ricks and a reversal of the decision below. As long as *some* level of constitutional scrutiny above rational basis is applied, the State would have to make an affirmative showing why it needs Ricks to provide his Social Security number, rather than allowing an alternative form of identification (as it does under other licensing statutes) or attempting to get Ricks's Social Security number itself from another Idaho agency (as Idaho law permits it to do). See *supra* pp. 8-9.

Here, however, the district court dismissed Ricks's complaint on a motion to dismiss—meaning the State

won below without presenting *any* evidence of any relationship between requiring Ricks to turn over his Social Security number and advancing the broad goals purportedly underlying Idaho Code § 54-5210 (of weeding out unscrupulous contractors). And although the State also asserted that its requirement was, in turn, required by a federal statute—42 U.S.C. 666—this simply begs the question. The federal government cannot "induce the States to engage in activities that would themselves be unconstitutional." *South Dakota* v. *Dole*, 483 U.S. 203, 210-11 (1987). So if Idaho's requiring Ricks to provide his Social Security number to register as a contractor imposes a burden on his religious exercise not justified by substantive interests in regulating the contractor profession, then it *ipso facto* cannot be required by Section 666.[7]

If the Court were to reverse *Smith*'s holding that the government need generally have no good reason to impose religious burdens under neutral and generally applicable laws, then, the result required here would be clear: reversal. See *Leahy*, 833 F.2d at 1049 (R.

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[7] In a footnote, the Idaho Court of Appeals stated that even if Ricks's Idaho RFRA claim, Idaho Code §§ 73-401 *et seq.*, applied, it would fail under the statute's compelling-interest, least-restrictive-means analysis. App. 20a-21a n.10. Whatever the merits of the court's reasoning as a matter of *Idaho* law, it bears no resemblance to the heightened scrutiny applied in this Court's federal Free Exercise cases (which would have applied here but for *Smith*). See, *e.g.*, *Roy*, 476 U.S. at 726-27 (O'Connor, J., dissenting in part) (even if "more difficult," other identifying information could be used to "cross-match[]" applicants to "prevent * * * fraud and abuse").

Ginsburg, J.) (reversing grant of motion to dismiss because "the District has not demonstrated that requiring a religious objector to provide his social security number in order to obtain a driver's license is the least restrictive means of achieving the concededly vital public safety objective at stake").

Second, a case involving a religious objection to providing a Social Security number is straightforward, because this Court already addressed the issue in *Roy*. There, four years before *Smith*, five Justices interpreted the Free Exercise Clause to require an exemption from a requirement to supply a Social Security number to obtain a government benefit, regardless whether the requirement was neutral and generally applicable. *Roy*, 476 U.S. at 714-16 (Blackmun, J., concurring in part); *id.* at 726-33 (O'Connor, J., dissenting); *id.* at 733 (White, J., dissenting). And the three Justices who rejected the exemption did so only on a beta version of *Smith*, arguing that conditions for government benefits that are "neutral and uniformly applicable" should be subject to lesser free-exercise scrutiny. *Id.* at 707-08 (opinion of Burger, C.J.) The only difference between Ricks's claim and the *Roy* claim that commanded the votes of five Justices is that *Smith* adopted the standard of the three-Justice opinion in *Roy* in the interim.

Finally, this case highlights *Smith*'s inconsistency with the historical understanding of the Free Exercise Clause—meaning there is no need to concoct a new grand unified theory of the Free Exercise Clause to reject *Smith*'s version and reverse the result here. See *Town of Greece* v. *Galloway*, 572 U.S. 565, 575 (2014) ("unnecessary" to turn to "formal tests" where "history" definitively resolves the constitutional issue at

hand); *Heller*, 554 U.S. at 628 (laws that contradict text, history, and tradition are unconstitutional under "any of the standards of scrutiny" that "appl[y] to enumerated constitutional rights").

At the founding, legal requirements forcing individuals to forswear their faith to obtain a license to engage in business or participate in a particular livelihood were understood as a quintessential form of free-exercise violation. For example, the English Test Acts excluded non-Anglicans from many different lines of work: medicine, law, academia, and public service among them. See 3 Douglas Laycock, *Religious Liberty: Religious Freedom Restoration Acts, Same-Sex Marriage Legislation, and the Culture Wars* 827-28 (2018). "These occupational exclusions are one of the core historic violations of religious liberty, and of course this history was familiar to the American Founders." *Ibid.* Indeed, "it was largely to escape religious test oaths that a great many of the early colonists left Europe and came here hoping to worship in their own way." *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961) (striking down religious test for the office of notary).

Many of the Court's cases have recognized the same principle. For example, in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, the Court held that Catholic schools and schoolteachers had a right "to engage in a useful business or profession." 268 U.S. 510, 532 (1925). In *Follett* v. *McCormick*, the Court held that a "license tax" could not be imposed on local evangelists who sold religious books door-to-door for a living. 321 U.S. 573 (1944) ("Freedom of religion is not merely reserved for those with a long purse"). And in *Sherbert*, this Court recognized that forcing an

individual to "abandon[] one of the precepts of her religion in order to accept work" "puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her * * * worship." 374 U.S. at 404; cf. *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981) (Thomas "was put to a choice between fidelity to religious belief or cessation of work"). That *Smith* permits such a burden to be imposed without requiring the government to provide any justification for it sharply illustrates *Smith*'s conflict with constitutional text, history, and tradition.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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