No. 19-66

IN THE

Supreme Court of the United States

GEORGE Q. RICKS,

Petitioner,

v.

IDAHO CONTRACTORS BOARD, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the Idaho Court of Appeals

BRIEF OF *AMICI CURIAE* TEN LEGAL SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici are legal scholars who teach, research, and publish in the field of freedom of religion.[2] *Amici* are committed to a view of free exercise that protects religious individuals and minorities and reconciles the original meaning and purpose of the Free Exercise Clause with this Court's jurisprudence. Legal scholarship published after the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), including works authored by *amici*, has demonstrated that *Smith*'s novel holding that neutral laws of general applicability are exempt from rigorous scrutiny under the Free Exercise Clause suffers from fundamental flaws. Those flaws range from its abrupt departure from well-settled law to the absence of any careful analysis of the original meaning and purposes of the Clause. *Amici* seek to inform the Court of aspects of this scholarship that confirm the need for the Court to reconsider *Smith*.

SUMMARY OF ARGUMENT

Since its announcement, the Court's decision in *Smith* has been criticized from every side. *Smith* has faced unequivocal calls for reexamination by many members of the Court in concurring or dissenting

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief 's preparation or submission. All parties have received timely notice and consented to the filing of this brief.

[2] Individual *amici* are identified in the Appendix.

opinions; widespread condemnation in the legal academy; attacks from Congress and state legislatures; and contemporary censure by the public.

Smith is ripe for reconsideration, and this case presents an excellent opportunity for the Court to engage in that endeavor. *Smith* itself was a departure from this Court's previously settled requirement that the government demonstrate a compelling interest before imposing a substantial burden on the free exercise of religion. The question of the proper interpretation of the Free Exercise Clause was not briefed in *Smith*, but it has been substantially elucidated by subsequent academic work. That scholarship reveals that the Framers understood the Clause not merely as embodying an equal protection principle that prohibits targeting or discriminating against religion, but also as a substantive protection granted to religious practices even in some circumstances where similar secular conduct can be prohibited. The *Smith* Court's undue contraction of the protections afforded by the Free Exercise Clause inevitably falls hardest on adherents of minority religions—the very individuals that the Clause was adopted to protect.

The *Smith* Court defended its holding, in part, based on the supposed unworkability of the traditional compelling-interest test. But subsequent history has shown the Court's fear to be baseless. Legislative rebellion against *Smith* led to application of a compelling-interest test similar to the pre-*Smith* regime in the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state counterparts to RFRA, all without generating the problems predicted by the *Smith* Court.

Stare decisis presents no obstacle to reconsidering *Smith* and conforming free exercise law to the original meaning of the Clause and to this Court's pre-*Smith* precedents. A consistent undercurrent of resistance to *Smith* has resulted in a post-*Smith* set of free exercise cases from this Court that avoid giving full rein to *Smith*'s rationale and in fact have never applied *Smith* to reject another fully briefed free exercise claim. This reluctance to fully embrace or elaborate on *Smith* has left lower courts confused and prevented *Smith* from becoming embedded in free exercise jurisprudence. Accordingly, *amici* submit that certiorari should be granted so the Court may reconsider, and overrule, *Smith*.

ARGUMENT

I. THE COURT SHOULD RECONSIDER *SMITH* IN LIGHT OF POST-*SMITH* DEVELOPMENTS HIGHLIGHTING CRITICAL FLAWS IN THAT DECISION AND ITS UNDERSTANDING OF THE FREE EXERCISE CLAUSE.

In *Smith*, the Court departed from the original meaning of the Free Exercise Clause and abandoned decades of its own precedent to hold that a prohibition on religious exercise that is "merely the incidental effect of a generally applicable and otherwise valid provision" does not violate the First Amendment. *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990). And the Court embarked on this dramatic course reversal without the benefit of briefing from the parties or *amici* regarding the correctness of its newly minted standard.

Academic and political criticism was swift and widespread. *E.g.*, Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DePaul L. Rev.

263, 294 (1992) ("Several commentators have noted egregious flaws in the Court's opinion.") (collecting articles); Editorial, *The Necessity of Religion: The High Court Says Religious Freedom Is a Luxury—Wrong*, L.A. Times (Apr. 19, 1990), https://tinyurl.com/yyz34bkw; Nat Hentoff, *Is Religious Liberty a Luxury?*, Wash. Post (Sept. 15, 1990), https://tinyurl.com/y3kgtqvs. Subsequent scholarship has highlighted substantial evidence that the original meaning of the Free Exercise Clause is irreconcilable with the rule announced in *Smith*. Granting certiorari will permit the Court to reconsider *Smith* in light of that evidence, which the *Smith* Court did not have before it and thus did not take into account.

Smith has also been proven wrong in its prediction that consistent application of a compelling-interest standard "would be courting anarchy." 494 U.S. at 888. Shortly after *Smith* was decided, Congress adopted RFRA to provide statutory religious liberty protection based on the standard that this Court abandoned in *Smith*; numerous States across the country also passed similar laws. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4); *see* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 845 (2014) (collecting state RFRAs). Over two decades of application of these laws has demonstrated that the compelling-interest test is susceptible of principled, sensible application. Now that actual experience has disproven this fundamental premise underlying *Smith*, reconsideration is warranted.

A. *Smith* Was A Major Departure From Precedent.

Prior to the Court's decision in *Smith*, the compelling-interest test was a central component of judicial application of the Free Exercise Clause. Under that framework, government regulatory schemes that substantially burdened religious exercise could not pass muster unless the burden was narrowly tailored to serve a compelling governmental interest. *See Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963). The Court emphasized that "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at 406 (internal quotation marks and alteration omitted).

The Court reaffirmed that standard in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which even the State's "high responsibility for education of its citizens" was not a sufficiently compelling interest to require Amish parents "to cause their children to attend formal high school to age 16." *Id.* at 213, 234. Other cases were to the same effect. *E.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 719 (1981) (claimant could not be denied unemployment benefits when "[n]either of the interests advanced [was] sufficiently compelling to justify the burden upon [claimant's] religious liberty"); *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 835 (1989) ("[T]here may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.").

When *Smith* came before the Court, then, the parties litigated under the compelling-interest test, debating whether Oregon had a sufficiently compelling interest in its prohibition of the consumption of peyote to justify application of that prohibition to individuals who "ingested peyote for sacramental purposes at a ceremony of the Native American Church." *Smith*, 494 U.S. at 874. Despite the parties' embrace of the compelling-interest framework, however, the Court departed from it, rejecting the idea that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878–79. The Court did not explicitly overrule *Sherbert*, but recast it as limited to "the unemployment compensation field" and "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." *Id*. at 884. As for *Yoder*, the Court dismissed it (and similar applications of the compelling-interest test) as involving a "hybrid situation," where more than simply free exercise rights were at stake. *Id.* at 882. Where, as in *Smith*, free exercise rights alone were at stake, the Court replaced the *Sherbert* test with a new rule upholding neutral and generally applicable laws even when they substantially burden a particular religious practice, without regard to the justification for such burdens. *Id.* at 878, 882, 885.

In so holding, *Smith* relied on cases that the Court had previously eschewed, at least by implication. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 569 (1993) (Souter, J., concurring) (arguing that the "subsequent treatment by the Court" of "cases on which *Smith* primarily relied as

establishing the rule it embraced" "would seem to require rejection of the *Smith* rule"). *Smith* borrowed heavily from *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940), which held that public schools could compel students to participate in a daily ceremony of saluting the American flag and reciting the Pledge of Allegiance despite the students' religious objections. But *Gobitis* had been renounced by three justices who originally joined the opinion, *see Jones v. City of Opelika*, 316 U.S. 584, 623–24 (1942) (opinion of Black, Douglas, and Murphy, JJ.), and was overruled on the basis of the Free Speech Clause in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Smith* also approvingly cited *Reynolds v. United States*, 98 U.S. 145 (1879), which held that Mormons could be prosecuted for polygamy, even though *Reynolds* had been read narrowly in *Sherbert* to allow for government regulation of religious beliefs *only* when the conduct "pose[s] some substantial threat to public safety, peace or order." *Sherbert*, 374 U.S. at 403. In short, *Smith* abandoned more recent precedent requiring a compelling interest in favor of breathing new life into precedents that were hostile to religious exemptions and had been clearly disfavored in later years.

In *Smith* itself, Justice O'Connor criticized the majority's opinion as "dramatically depart[ing] from well-settled First Amendment jurisprudence." 494 U.S. at 891 (O'Connor, J., concurring). Justices Brennan, Marshall, and Blackmun joined her elaboration of this point. *Id.* Justice Blackmun similarly viewed the majority opinion as "effectuat[ing] a wholesale overturning of settled law." *Id.* at 908 (Blackmun, J., dissenting).

Legal scholars and practitioners have similarly observed that *Smith* reflects an unjustified departure from settled law. *E.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 2–3 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1120–28 (1990); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 114 (1991); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J. L. & Pub. Pol'y 627, 627-28 (2003). And Justices joining the Court after *Smith* have echoed their predecessors, remarking that *Smith* was at odds with the Court's previous free exercise jurisprudence. Justice Souter, for example, examined *Smith*'s reasoning at length in his separate opinion in *Lukumi*, and concluded that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law." 508 U.S. at 571. Indeed, Justice Alito more recently stated, "*Smith* largely repudiated the method of analysis used in prior free exercise cases like [*Yoder*] and [*Sherbert*]." *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

B. *Smith* Is Contrary To The Original Meaning Of The Free Exercise Clause.

Far from dictating *Smith*'s departure from prior law, "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause." *City of Boerne v. Flores*, 521 U.S. 507, 549 (1997) (O'Connor, J., dissenting). As post-*Smith* scholarship establishes, this evidence supports the view that the Free Exercise Clause embodies a substantive right to religious exercise, not merely a right

to nondiscrimination.

1. Shortly after the Court decided *Smith*, Professor Michael McConnell published a seminal article on the original understanding of free exercise in the founding generation. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Professor McConnell argued that religious exemptions were widely granted in the founding generation and thus are likely supported by the right enshrined in the Free Exercise Clause.[3] The article traced the term "free exercise" back to 1648, in a legal document containing a promise that Maryland's Protestant governor and councilors would not "disturb Christians ('and in particular no Roman Catholic') in the 'free exercise' of their religion." *Id.* at 1425. Other colonies, such as Carolina, included provisions expressly permitting "indulgences and dispensations" from laws requiring "the people and inhabitants of the said province" to "conform" to the established state religion, the Church of England. *Id.* at 1428. By 1776, nearly every colony granted religious exemptions from oath-taking, military service, and paying the surviving church taxes. *Id.* at 1467–71; Laycock, 81 Notre Dame L. Rev. at 1803–08. These were all the recurring religious-exemption issues facing the country at the time, and American legislatures overwhelmingly recognized

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[3] Professor Douglas Laycock has since shown that there is no evidence that the Founders viewed religious exemptions as constitutionally prohibited or part of an establishment of religion. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2006).

that protection for religious minorities required exemptions.

After the American Revolution, every State except Connecticut had a constitutional provision protecting religious exercise. McConnell, 103 Harv. L. Rev. at 1455. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." *Id.* at 1456. Most of these state constitutional provisions protected free exercise of religion unless it was contrary to the "peace" and "safety" of the State. *Id.* at 1457 (quoting various state constitutions). If free exercise clauses created no claim to exemption from generally applicable laws, these peace and safety provisos would have been unnecessary; religious practices endangering peace and safety would simply have been illegal, without further inquiry. There is some evidence that early courts "evaluated the strength of the government's interest in enforcing" general laws "under the 'peace or safety' standard[, which] confirms that such state provisos were understood to limit legislative authority from encroaching on religious liberty even through generally applicable laws." *Id.* at 1505 (citing *People v. Philips*, Ct. Gen. Sess., City of New York (June 14, 1813)).

Justice O'Connor reviewed this and other historical evidence in reaching much the same conclusion in her dissent in *Boerne*. The evidence suggests that the Founders "more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-

Smith jurisprudence." 521 U.S. at 549 (O'Connor, J., dissenting). She saw the historical state religious liberty statutes as "parallel[ing] the ideas expressed in [the Court's] pre-*Smith* cases—that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest." *Id.* at 552.

The historical evidence thus indicates "that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." McConnell, 103 Harv. L. Rev. at 1512; *see also* James C. Phillips & John Yoo, *On Religious Freedom, Madison Was Right*, Nat'l Review (Nov. 30, 2018), https://tinyurl.com/y4hlk8kv (arguing that the original meaning of the Free Exercise Clause likely requires religious accommodation).[4]

2. The logical conclusion from this evidence of original meaning is that *Smith*, in inquiring only whether the law at issue is neutral and of general applicability, overlooks a central focus of the Free Exercise Clause. "The right to free exercise was a substantive guarantee of individual liberty," *Boerne*, 521 U.S. at 563 (O'Connor, J., dissenting), and thus it is essential for courts to examine whether the government has

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[4] Other scholars have a different perspective on the original understanding of the Free Exercise Clause. *E.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (arguing that widespread religious exemptions in the founding generation are irrelevant to how that generation understood the right to free exercise). But reconsideration of *Smith* will permit the Court to perform the analysis of original understanding that the *Smith* Court did not have before it and did not perform.

a sufficiently important interest in constraining that liberty to justify application of the law at issue. Under *Smith*, in contrast, the importance of the government's interest matters little, if at all, and courts need only "locate the boundary line between neutral laws of general applicability and those that fall short of this standard." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 851 (2001). *Smith*'s standard is therefore flawed and incomplete, because it fails to ask the crucial question, and places dispositive weight on considerations that do not reflect the full scope of the Constitution's protections for free exercise.

In particular, the only "right" that *Smith* construes the Free Exercise Clause to confer is "a right to equal protection"—not the "substantive right to be left alone by government" that the Framers sought to protect. Laycock, 1990 Sup. Ct. Rev. at 11. But the plain language of the Free Exercise Clause, "[o]n its face," "creates a substantive right" by forbidding Congress from prohibiting religious exercise. *Id.* at 13.

A "neutrality" principle that requires facially equal treatment of religious activity is certainly one element of the Clause's protections, but standing alone it does not adequately protect the substantive right that the Clause embodies. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220. Justice Souter made the same point in his *Lukumi* concurrence. 508 U.S. at 561. That is why the Constitution mandates *substantive* neutrality, meaning that government should

create religiously neutral incentives that "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Laycock, 1990 Sup. Ct. Rev. at 16.

Similarly, *Smith*'s safe-harbor for neutral laws of general applicability has reduced a substantive free-exercise right to just a specialized form of equal protection. *See* Lund, 26 Harv. J. L. & Pub. Pol'y at 637. In other words, "as long as a law remains exceptionless, then it is considered generally applicable, and religious claimants cannot claim a right to be exempt from it," but "[w]hen a law has secular exceptions, . . . a challenge by a religious claimant becomes possible." *Id.* This understanding of the Free Exercise Clause means that if religious groups are unsuccessful at lobbying for a religious accommodation, *see Smith*, 494 U.S. at 890, they may only "piggyback" on the successes of secular interests in the political branches, Lund, 26 Harv. J. L. & Pub. Pol'y at 637.

This perverse outcome undermines the Constitution's ban on laws "prohibiting the free exercise" of religion. U.S. Const. amend. I. In essence, the *Smith* test means that the constitutionally enshrined substantive right to free exercise turns essentially on fortuity: the dispositive question is whether there happens to be some group that desires to engage in analogous secular conduct and possesses sufficient political clout to persuade the government to create exceptions, a question that has nothing to do with the extent of the burden imposed on free exercise or the strength of the government's justifications for imposition of that burden. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise*

of Religion, 95 Neb. L. Rev. 1, 24–26 (2016). *Smith* creates an arbitrary regime in which government may substantially burden religious exercise even when it has no significant need to do so, as long as it has not had occasion to adopt any secular exceptions.

C. *Smith* Is Inconsistent With A Key Purpose Of The Free Exercise Clause.

Smith is not only inconsistent with the original understanding of the Free Exercise Clause, it also undermines a key purpose of the Clause—protecting minority religions. *See generally* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919 (2004). The Court in *Smith* acknowledged that its approach of "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but chalked that up as the "unavoidable consequence of democratic government." 494 U.S. at 890. But a key purpose of the Free Exercise Clause, like the rest of the Bill of Rights, was precisely to ensure that minorities "[a]void[ ] certain 'consequences' of democratic government." Michael W. McConnell, 57 U. Chi. L. Rev. at 1129; *see also* Nadine Strossen, *Religion and the Constitution: A Libertarian Perspective*, 2006 Cato Sup. Ct. Rev. 7, 27 (2006) ("The *Smith* Court's sterile view of the Free Exercise Clause eliminates that clause's historical role as a safety net for members of minority religious groups, whose beliefs are the most likely to be burdened by laws enacted through our majoritarian political processes."); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 117 (1992) ("[T]he purpose of the Religion Clauses is to protect the religious

lives of the people from unnecessary intrusions of government.").

This is not a hypothetical concern. *Smith* itself proves the point by shutting out members of a Native American religion from the ability to receive unemployment compensation because they participated in a Native American worship service. *See* 494 U.S. at 874. Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418 (2006), members of a minority religious sect sought a religious exemption from the Controlled Substances Act for the church's use of a hallucinogenic tea in religious ceremonies. Were it not for RFRA, "which adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*," *id.* at 424, the members of the religious sect may well have faced the same fate as the petitioners in *Smith*.

Other victims of generally applicable laws have suffered more severe consequences. Mary Stinemetz, a Jehovah's Witness on Medicaid who resided in Kansas, required a liver transplant in order to survive. Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 Conn. L. Rev. 959, 974 (2018). Ms. Stinemetz's faith, however, prohibited blood transfusions. Fortunately, a Nebraska hospital offered liver transplants without transfusions. *Id*. But because Kansas had a policy that it would not reimburse out-of-state procedures, it refused to pay for the procedure in Nebraska. *Id*. *Smith* taught Kansas officials that they had no obligation to consider religious exceptions or take Ms. Stinemetz's religious needs seriously. And they didn't.

The Kansas Court of Appeals ultimately overturned the administrative and trial court decisions rejecting her challenge, but by then it was too late for the needed transplant, and Ms. Stinemetz died for her faith. *Stinemetz v. Kan. Health Pol'y Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011); Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, Kan. City Star (Oct. 25, 2012), https://tinyurl.com/y5bwfwus [https://perma.cc/6CCN-7VU6].

By leaving protection of religious minorities to the vicissitudes of majoritarian rule, the *Smith* rule undermines a core motivation for adoption of the Free Exercise Clause: protection of the religious exercises of minority religions. A reading of the Clause that fails to protect the free exercise rights of the least popular and least powerful religious adherents among us offends one of the Clause's original purposes, *cf. Lukumi*, 508 U.S. at 576 (Souter, J., concurring), and should be reexamined.

D. *Smith*'s Factual And Legal Premises Have Proved Wrong.

The *Smith* Court premised its unwillingness to accommodate religious exemptions on a fear that a compelling-interest test would be unworkable in a religiously pluralistic society. 494 U.S. at 888. The Court predicted that this perceived danger of lawlessness flowing from religious accommodation would only increase as America grew more religiously diverse. *Id.* But the Court's prognostication was wrong. Because of RFRA, RLUIPA, and similar state laws, the compelling-interest test now applies with regard to the entire federal government and more than half of the

States—and in most of these places, it has been the law for decades.

Yet none of the anarchy the *Smith* Court predicted has resulted, despite the fact that American society has become significantly more religiously pluralistic over the past 30 years. *See* Sarah Pulliam Bailey, *Christianity Faces Sharp Decline as Americans Are Becoming Even Less Affiliated with Religion*, Wash. Post (May 12, 2015), https://tinyurl.com/zpns2j2 (between 1990 and 2008, the percentage of American adults identifying as Christian declined from 86 percent to 76 percent); Pew Research Ctr., *Religious Landscape Study,* https://tinyurl.com/y6ttqm72 (by 2014, 71 percent of Americans identified as Christian, and 6 percent identified as non-Christian faiths) (last visited Aug. 9, 2019).

The *Smith* Court also cautioned that calling on judges to balance the competing interests of religious exercise and government's need for regulation would be "a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." 494 U.S. at 889 n.5. But the *Smith* regime "still involves balancing" because now "the judiciary measures the religious and the state interests indirectly—by looking at the presence or absence of secular exceptions as indicative of the religious and state interests—and then tries to compare secular exceptions with a possible religious exception." Lund, 26 Harv. J. L. & Pub. Pol'y at 664. Balancing still occurs, but it "pays no attention" to the most important concern: "the governmental and religious interest in granting or denying an exception." *Id.*

Smith's unprotective rule was thus based in significant part on premises that are simply incorrect. Reconsideration of *Smith* in light of those now disproven premises is necessary.

II. *STARE DECISIS* DOES NOT BAR RECONSIDERATION OF *SMITH*.

Considerations of *stare decisis*, which is "not an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), provide no justification for adhering to *Smith*'s flawed framework. As this Court recently observed, "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus v. State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

Justices of this Court have expressed "doubts about whether the *Smith* rule merits adherence" virtually since its adoption. *Lukumi*, 508 U.S. at 559, 571 (Souter, J., concurring); *Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting) ("*Stare decisis* concerns should not prevent us from revising our holding in *Smith*."). The ensuing years have continued to degrade the foundation supporting *Smith*. *See* John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 Minn. L. Rev. 485, 499 (2014) (*Smith*'s "doctrinal implications are so striking that the Supreme Court has subsequently sought to limit them."). Not only has *Smith*'s reasoning been undermined, *supra* Part I.A–D; but its framework has proven unworkable, *infra* Part II.B. Moreover, the Court has generally avoided embracing or building upon *Smith*'s narrow view of free exercise rights in subsequent cases, preventing it from becoming em-

bedded into the larger body of religious liberty jurisprudence. *See infra* Part II.A. These factors all weigh heavily against retaining *Smith*. *Cf. Janus*, 138 S. Ct. at 2478–79.

A. Nearly All Of This Court's Major Free-Exercise Precedents Were Decided Without Reliance on *Smith*'s Crabbed View of Free Exercise Rights.

Over the past 29 years, this Court has decided several major cases raising substantial free exercise concerns. Yet only in *Lukumi* and, derivatively, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), has the Court provided further exposition of *Smith*'s safe-harbor for neutral laws of general applicability. Neither case applied that framework to uphold the burden at issue. In general, the Court has largely sidestepped *Smith* in addressing free exercise claims in subsequent cases.

In *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), for example, the Court upheld the free exercise rights of a church to compete for a grant to resurface playgrounds. The Court did so by finding "express discrimination against religious exercise here" from the State's "refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id.* at 2022. The result in *Trinity Lutheran* would have been the same under the compelling-interest test of *Sherbert* and *Yoder*.

In *Locke v. Davey*, 540 U.S. 712 (2004), the Court held that the Free Exercise Clause does not require a State to pay for theology education when it provides

funding for secular pursuits. That holding, while not protective of free exercise rights, did not rest on *Smith*; the challenged law was neither neutral nor generally applicable. The Court instead concluded that funding the training of clergy raised different questions from non-neutral regulation. *Id.* at 722 n.5, 725.

Nor was *Smith* relied on in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), in which the Court recognized a "ministerial exception" that prevents the government from interfering with the internal governance of a church by regulating the hiring and dismissal of ministers or similar employees. *Id.* at 188 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."). Even though the federal law at issue was "a valid and neutral law of general applicability," the Court declined to follow *Smith*, instead holding that *Smith* should be limited to laws regulating "only outward physical acts." *Id.* at 190; *see also* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 Nw. U. L. Rev. 1183, 1192 (2014) (noting tension between reasoning of *Smith* and *Hosanna-Tabor*).

In several of the Court's other high-profile religious exception cases post-*Smith*, the petitioners have rested their claims on federal religious liberty legislation—not on *Smith* or the Free Exercise Clause. In *Holt*, 135 S. Ct. at 859, the Court held that a state department of corrections' grooming policy violated RLUIPA by substantially burdening an inmate's religious practice of growing a half-inch beard. A year

before, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Court determined that the Department of Health and Human Services' contraceptives mandate violated RFRA's prohibition on federal government "action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." *Id.* at 690–91. The Court similarly struck down under RFRA the federal government's ban on all uses of a hallucinogen that was used in a sacramental tea by members of a minority religious sect. *O Centro*, 546 U.S. at 439.

This litany comprises the Court's significant free-exercise decisions since 1990, none of which applied *Smith*'s novel rule to reject a fully presented free exercise claim.[5] Considerations of *stare decisis* thus provide no basis for resisting reconsideration of the rule announced in *Smith*.

B. Lower Courts Have Struggled To Apply *Smith*'s Framework, Creating Differences Across Jurisdictions.

Exactly how far *Smith* intended to go in overturning precedent is not specified in the opinion. And this Court's general reluctance to fully embrace *Smith* in subsequent free exercise cases has further confused matters. The result is a circuit conflict concerning the significance of secular exceptions in determining whether a law is generally applicable. This continu-

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[5] In *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010), the Court cited *Smith* in rejecting—in a footnote—a "briefly argue[d]" free-exercise claim.

ing confusion over the standards governing free exercise rights is an additional justification for reconsidering *Smith* in order to give the lower courts the clear guidance that *Smith* has failed to provide.

In *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016), the owner of a pharmacy and two individual pharmacists challenged a rule promulgated by the Washington Pharmacy Quality Assurance Commission. 794 F.3d at 1071. The rule required "the timely delivery of all prescription medications by licensed pharmacists," but allowed "pharmacies to deny delivery for certain business reasons." *Id.* The rule did not contain a religious exemption for owners of pharmacies who had religious objections to dispensing particular medications, such as emergency contraceptives. *Id.*

The Ninth Circuit reversed the district court's detailed findings that the rules were not neutral or generally applicable. 794 F.3d at 1074–75, 1085. As to whether the rules were neutral, the Ninth Circuit held that they were both "facially neutral" ("[b]ecause [they] make no reference to any religious practice, conduct, belief, or motivation"), and "operat[ionally] neutral" (because they "appl[y] to all prescription products"). *Id.* at 1076–79. The Court concluded that the "possibility that pharmacies whose owners object to the distribution of emergency contraception for religious reasons may be burdened disproportionately does not undermine the rules' neutrality." *Id*. at 1077.

As to whether the rules were generally applicable, the Ninth Circuit construed *Smith* as holding that individualized exemptions for secular or business rea-

sons did not necessarily mandate an exemption for religious conduct. 794 F.3d at 1081. Because the *Smith* "Court explained that the individual exemption test was 'developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct,'" and "because the exemptions at issue [in *Stormans*] . . . do not create a regime of unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct," the Ninth Circuit concluded that the Commission's rules were constitutional under the Free Exercise Clause. *Id.* at 1081–82 (quoting *Smith*, 494 U.S. at 884).

The Ninth Circuit's interpretation of the *Smith* rule stands in sharp contrast to decisions of the Third, Sixth, Tenth, and Eleventh Circuits. After *Lukumi*, panels in each of those circuits have held that a law is not generally applicable when it exempts secular conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." 508 U.S. at 543; *see Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (police department grooming policy that exempted beards grown for medical reasons but not for religious reasons was not generally applicable and was therefore subject to strict scrutiny); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (policy that limited ability of counselors to refer clients to other counselors was not generally applicable—and therefore was subject to strict scrutiny—when it permitted referrals for secular, but not religious, reasons); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (discretionary system of individualized exemptions from university curricular policy was constitutionally suspect when student who

objected on religious grounds to reading a script was denied exemption); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (zoning code that limited uses in a business district and exempted nonprofit clubs and lodges but not religious buildings violated the principles of neutrality and general applicability).

"[T]he denial of certiorari in *Stormans* leaves a deep and wide circuit split that the Court will eventually have to resolve." Laycock & Collis, 95 Neb. L. Rev. at 15. The rights protected by the Free Exercise Clause cannot mean that "an exception-ridden policy [that] takes on the appearance and reality of a system of individualized exemptions . . . must run the gauntlet of strict scrutiny" in Michigan, *Ward*, 667 F.3d at 740, but only rational basis review in Washington, *Stormans*, 794 F.3d at 1084. Reconsideration of *Smith* would provide the opportunity to ensure that *all* religious objections are judged against a compelling-interest standard that gives effect to the substantive protection that the Framers sought to afford for free exercise rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 12, 2019

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