No. 19-66

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

BRIEF FOR AMICI CURIAE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, CHURCH OF GOD IN CHRIST, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ETHICS AND RELIGIOUS LIBERTY COMMISSION, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONER

DANIEL P. KEARNEY, JR.
Counsel of Record
KEVIN GALLAGHER
MATTHEW E. VIGEANT
LYDIA LICHLYTER
ANDREW MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 21 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. In the United States, the work of the church is divided between 51 conferences, eight union of conferences, the North American Division and finally the General Conference itself. The General Conference of Seventh-day Adventists has a long history of working to protect religious liberty and insuring that the Free Exercise Clause of the First Amendment fully protects all Americans.

Church Of God In Christ, Inc. ("COGIC") is a Pentecostal Christian church with more than 10,000 congregations in the United States and other congregations in over 100 countries worldwide. COGIC believes that its local churches and adherents should be free to express their faith and the traditions of our church without governmental interference.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over 16 million members worldwide. Religious liberty is an essential Church doctrine: "We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them

---

[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

worship how, where, or what they may." Art. of Faith 11. And we believe that "governments . . . are bound to enact laws for the protection of all citizens in the free exercise of their religious belief." Doctrine and Covenants 134:4. This brief reflects the Church's determination to strengthen religious liberty as a fundamental constitutional right.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The Lutheran Church—Missouri Synod ("the Synod") has more than 6,000 member congregations with 2 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. The Synod fully supports and promotes religious liberty and the preservation of all First Amendment protections, including in particular the Free Exercise Clause.

Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before the federal courts which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. The Orthodox Union has, for years, persistently advocated for judicial and legislative responses to this Court's ruling in *Smith* which set back religious freedom in the United States of America.

SUMMARY OF ARGUMENT

The Free Exercise Clause, "by its terms, gives special protection to the exercise of religion." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981). As broadly understood and consistently interpreted from the founding, the Clause protected religious exercise from any substantial burden, unless a practice interfered with "interests of the highest order." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). This heightened scrutiny of laws burdening religious practice safeguarded the rights of individuals and ensured that minority religious practices were not subject to either discrimination or governmental interference more generally. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1118 (1990).

This well-established Free Exercise framework was unexpectedly discarded by *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, the Court swept aside text, history, and precedent and transformed the Free Exercise Clause from a guarantee of affirmative pro-

tection for religious practice to a mere nondiscrimination requirement. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 564 (1993) (Souter, J., concurring). Religious practice was no longer subject to special protection from government interference: under *Smith*, as long as the law is "neutral and generally applicable," the Constitution requires no accommodation, no matter how great the burden on religious practice or how insubstantial the government's interest. 494 U.S. at 890. This sudden transformation of the Free Exercise Clause "harmed religious liberty," *City of Boerne* v. *Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting), especially for those practicing minority faiths—as even the *Smith* majority acknowledged might happen, *Smith*, 494 U.S. at 890; *see also infra* Section I.A.

As revolutionary as the decision was, *Smith* did not purport to announce a comprehensive framework for all Free Exercise questions. Yet that is how many lower courts have applied the decision, disclaiming any constitutional requirement to accommodate religious practice burdened by "neutral" and "generally applicable" laws. But *Smith*'s reliance on the "political process" to protect religious exercise has little purchase where a law applies only to certain classes of individuals or allows the relevant conduct in some circumstances but not others. Lower courts thus have understandably struggled with *Smith*'s criteria of "neutrality" and "general applicability." Moreover, asking merely whether a law is "neutral" or "generally applicable" impoverishes the Free Exercise analysis: it fails to properly account for *both* the extent of the burden on religious exercise *and* the weight of the government's interest.

Smith abandoned the compelling-interest analysis in part because, the Court thought, it was "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. That fear was exaggerated when it was first uttered, and since *Smith*, has proven to be very much overblown. Federal and state courts have shown themselves, in applying statutory protections, to be entirely capable of balancing claims for religious accommodation against governmental interests. This is not surprising, as courts have long undertaken the task of balancing claims for constitutional protection against the weight of governmental interests in a variety of contexts. *Smith*'s premise that the courts are ill-suited for such constitutional balancing remains unfounded.

Smith therefore should be revisited, as four Justices recently suggested would be warranted. *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari).

ARGUMENT

I. *SMITH* UNDERMINED THE FREE EXERCISE CLAUSE AND SHOULD BE RECONSIDERED

Smith was an unwelcome revolution in this Court's Free Exercise Clause jurisprudence. Before *Smith*, the Court consistently applied the Free Exercise Clause to protect religious practice from any substantial government interference that could not be justified by a compelling state interest. *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989). The Free Exercise Clause embodied not merely a non-discrimination principle, but rather "withdr[ew] from legislative power, state and federal,

the exertion of any restraint on the free exercise of religion." *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 222-223 (1963). Even "neutral" and "general" laws warranted strict scrutiny if they interfered with religious practice. This affirmative protection from state interference has been critically important to religious minorities throughout our nation's history, guaranteeing them the ability to freely practice their faith. *See* McConnell, 57 U. Chi. L. Rev. at 1118 ("It is noteworthy that from the beginning [of the nation] it was thought that the solution to the problem of religious minorities was to grant exemptions from generally applicable laws.").

Smith abandoned those protections, transforming the Free Exercise Clause from an affirmative protection into a basic nondiscrimination requirement. Its reasoning "largely repudiated the method of analysis used in prior free exercise cases." *Holt* v. *Hobbs*, 135 S. Ct. 853, 859 (2015). Under *Smith*'s approach, interference with religious exercise is generally permissible so long as it stems from a "neutral law of general applicability." 494 U.S. at 879. Laws targeting religious exercise remained impermissible, but most free-exercise accommodations from "neutral and generally applicable" laws would have to be won from the "political process." *Id.* at 890.

In many circumstances, *Smith* effectively stripped the Free Exercise Clause of constitutional force. In relegating the protection of religious practice to the political process, the Court treated the Free Exercise Clause differently from all other protections of the First Amendment and the Bill of Rights more generally. The Court's Fourth Amendment jurisprudence, for example, does not protect against only discriminatory searches and seizures while leaving the rest to the po-

litical process; rather, it protects against unreasonable searches and seizures and elucidates that prohibition through careful case law development based on the text and history of the constitutional provision.

Smith itself predicted that "leaving [religious] accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. This was, the Court wrote, just the "unavoidable consequence of democratic government." *Id.* And that is exactly what has come to pass, as many instances of government interference with religious practice since *Smith* attest. *See* Section I.B, *infra*. The First Amendment was not intended to be so limited. The time has come for the Court to revisit *Smith* and to restore the Free Exercise Clause to its original meaning.

A. *Smith* Is Contrary To The Text And Historical Meaning Of The Free Exercise Clause

Smith is contrary to the text, original understanding, and historical interpretation of the Free Exercise Clause. *See Lukumi*, 508 U.S. at 559-560, 564 (Souter, J., concurring).

The Free Exercise Clause provides that Congress shall "make no law … prohibiting the free exercise" of religion. U.S. Const. amend I. On its face, the provision creates "an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law." *City of Boerne*, 521 U.S. at 546 (O'Connor, J., dissenting); *see also* Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 337 (1996) ("[T]he most straightforward, plain-meaning interpretation of

the text" is that it protects an affirmative freedom from government interference.). The First Amendment is expressed in "absolute terms." McConnell, 57 U. Chi. L. Rev. at 1116. The Clause "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). Accordingly, "the more natural reading of the [Free Exercise Clause] is that it prevents the government from making a religious practice illegal," regardless of a law's neutrality or general applicability. McConnell, 57 U. Chi. L. Rev. at 1115.

Smith also runs counter to the historical interpretation and understanding of the Free Exercise Clause. This Court has "recognized the importance of interpreting the Religion Clauses in light of their history." *City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting); *see also District of Columbia* v. *Heller*, 554 U.S. 570, 634-635 (2008) (constitutional rights are "enshrined with the scope they were understood to have when the people adopted them"). The term "free exercise" first appeared in an American legal document as early as 1648, and early state charters in the colonies contained provisions protecting religious freedom, even for minority sects. *City of Boerne*, 521 U.S. at 551 (O'Connor, J., dissenting). "These documents suggest that, early in our country's history, several Colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty" and "government should interfere in religious matters only when … important state interests militated otherwise." *Id.* at 552.

By the time the Framers drafted the Constitution, every state except for Connecticut "had a constitutional provision protecting religious freedom." McConnell, *The Origins and Historical Understanding of Free Ex-*

ercise of Religion, 103 Harv. L. Rev. 1409, 1455 (1990). These early state constitutions—which were contemporaneous with the federal Constitution and had many of the same drafters—"are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty." *City of Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting). "Although the precise language of these state provisions varied, almost all of them 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, *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, 830 (1998). These "peace and safety" provisos reflect a legal regime where the imperative of protecting religious exercise could override even neutral and generally applicable laws. *City of Boerne*, 521 U.S. at 559 (O'Connor, J., dissenting); *see also* McConnell, 103 Harv. L. Rev. at 1462 (same). "Translated into modern constitutional doctrine," the backdrop of the Free Exercise Clause "supports the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state." McConnell, 39 Wm. & Mary L. Rev. at 832.

This Court's approach before *Smith* broadly reflected this historical understanding of the Free Exercise Clause. Yet *Smith* "disregard[ed]" the Court's "consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." 494 U.S. at 892 (O'Connor, J., concurring). A slew of prior cases had considered religious accommodations from generally applicable laws

without adopting *Smith*'s rule—thus demonstrating the novelty of *Smith*'s analysis. *See*, *e.g.*, *Hernandez*, 490 U.S. at 699 ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); *Frazee* v. *Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 835 (1989) (same); *Thomas*, 450 U.S. at 717 ("In a variety of ways we have said that '[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.'"). *Smith* did not meaningfully reckon with this precedent.

Instead, *Smith* relied on just two cases—*Reynolds* v. *United States*, 98 U.S. 145 (1879) and *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940)—neither of which can sustain the rule announced in *Smith*. *Gobitis* was overruled by *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). And while *Barnette* was a free speech case, *Smith*'s "[r]el[iance] on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*." McConnell, 57 U. Chi. Law Rev. at 1124. Further, *Reynolds*, an 1879 polygamy case, "was decided on the theory that the Free Exercise Clause protects only beliefs and not conduct—a premise that the Court repudiated in 1940." *Id.* These two deeply flawed cases were the meager substance from which *Smith* built its new constitutional rule. *See Lukumi*, 508 U.S. at 569 (Souter, J., concurring) (the "subsequent treatment by the Court" of *Gobitis* and *Reynolds* would "require rejection of the *Smith* rule").

B. The Need To Protect Religious Exercise Remains And The "Political Process" Is No Solution

Since *Smith*, the need to accommodate religious practice has not abated, and minority religious communities have struggled to protect their religious practices from government interference.

One common area where *Smith* has failed to adequately protect religious practice is in the application of uniform and grooming requirements to religious minorities, where *Smith* provides no room for a court to consider the strength of the government's interest in any requirement or the burden that a requirement impost on adherents of a minority religion. For example, in *Gonzales* v. *Mathis Independent School District*, 2018 WL 6804595 (S.D. Tex. Dec. 27, 2018), the parents of two students brought suit against the local school district for not allowing the boys to participate in any extra-curricular activities or sports unless they conformed to the district's hair grooming policy by cutting a long braid of hair, which they kept as a representation of their faith in God. *Id.* at *2. Even though "[t]he policy is only about appearances in representing the school, rather than incorporating any safety concerns," because the law was neutral and generally applicable, the court found that it did not infringe on the student's free exercise of religion and granted the school district's motion for summary judgment as to the free exercise claim. *Id.* at *3-4. This type of result has been all too common since *Smith*. *Id.* at *3; *see also Fairbanks* v. *Brackettville Bd. of Educ.*, 2000 WL 821401, at *3 (5th Cir. May 30, 2000) (school board's refusal to hire plaintiff solely because he kept his hair long, in conformance with his Native American religious heritage, did not violate Free Exercise Clause since grooming policy was

neutral and generally applicable); *Riback* v. *Las Vegas Metro. Police Dep't*, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008) (department's headgear policy, which required plaintiff police officer to remove his yarmulke indoors, did not violate plaintiff's free exercise rights because the regulation had no individualized exemptions and was thus neutral and generally applicable); *Robinson* v. *District of Columbia*, 1999 WL 420298, at *13 (D.D.C. Mar. 31, 1999) (supervisor's order to plaintiff police officer to cut his dreadlocks, which he maintained due to his Nazarite religious beliefs, did not violate the Free Exercise Clause because the regulation was neutral and generally applicable).

Courts also routinely find that general zoning laws may restrict where and how churches and affiliated services operate, without any consideration of the significance of the government's interest. *See*, *e.g.*, *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church* v. *City of N.Y.*, 914 F.2d 348, 354 (2d Cir. 1990) (city Landmarks Law, preventing alterations to an auxiliary structure next to a church's main house of worship, was not an unconstitutional burden on the church's free exercise of religion because the law was neutral and generally applicable); *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (city's zoning laws, which prevented a church from conducting services in an area zoned for commercial uses, raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area); *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 653-655 (10th Cir. 2006) (municipality's refusal to permit church to operate day care facility with component of religious instruction in residential neighborhood did not violate the church's free

exercise rights since the code was neutral and generally applicable).

In other areas, churches and their affiliates routinely face restrictions on their ability to freely practice their faith. *See, e.g.*, *Archdiocese of Wash.* v. *Washington Metro. Area Transit Auth.*, 897 F.3d 314, 331-333 (D.C. Cir. 2018) (city's prohibition of Archdiocese's Christmas advertisement on public transportation did not violate the Free Exercise Clause since it did not target religion or exclude the Archdiocese from a generally available benefit), *petition for cert. filed*, No. 18-1455 (U.S. May 20, 2019); *Fulton* v. *City of Phil.*, 922 F.3d 140, 147 (3d Cir. 2019) (closing intake of new foster care referrals to Catholic Social Services because it did not comply with the city's fair practices ordinance did not violate Free Exercise Clause because the law is neutral and generally applicable), *petition for cert. filed*, No. 19-123 (U.S. July 22, 2019).

In extreme cases, the lack of accommodation can cause serious emotional and physical harm. As Justice O'Connor noted in her *City of Boerne* dissent (521 U.S. at 547), in *You Vang Yang* v. *Sturner*, 750 F. Supp. 558 (D.R.I. 1990), the district court dismissed a Hmong family's emotional distress action against the state's chief medical examiner after a coroner conducted an unauthorized autopsy of the plaintiffs' son. The family "believe[d] that autopsies are a mutilation of the body and that as a result" the spirit of their son could not rest—but because the law was neutral and generally applicable, no accommodation was required. *Sturner*, 750 F. Supp. at 558.

In short, as these cases demonstrate, reliance on the "political process" has not worked to protect free religious exercise. This should come as no surprise, for

where a law is deemed "neutral" and "generally applicable," *Smith*'s framework accords religious exercise the same weight as any mundane political goal—say, for example, convenient parking or efficient garbage collection—rather than the special solicitude appropriate to a foundational constitutional right.

II. *SMITH* HAS NOT PROVEN MORE ADMINISTRABLE THAN THE PROPER HEIGHTENED SCRUTINY ANALYSIS

A. *Smith*'s Singular Focus On "Neutrality" And "General Applicability" Has Proven Difficult For Lower Courts

Lower courts have frequently understood *Smith* to foreclose *any* constitutional requirement to accommodate religious practice burdened by neutral, generally applicable laws. But *Smith* did *not* outline a framework designed to answer *all* Free Exercise questions, and its rationale has proven inadequate to many Free Exercise issues.

Even by its own terms, *Smith* was not intended to apply in cases involving other constitutional rights, or the rights of parents to educate their children, or laws that impose special disabilities on religious practices. 494 U.S. at 881-882. *Smith* also was arguably intended to apply only to broadly applicable *criminal* laws. *See id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal* law." (emphasis added)). And even where *Smith*'s framework arguably does apply, recent decisions confirm that *Smith* did not, and could not, announce a uniform standard for resolving Free Exercise challenges. *See*,

e.g., *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (noting that *Smith* does not say "any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause").

Rather, *Smith*'s framework was a product of the facts that were before the Court. Its basic requirement—that the challenged law must be "neutral" and "generally applicable"—was easy to satisfy: the case concerned religious use of a Schedule I drug with hallucinogenic effects. 494 U.S. at 874. The controlled-substance law at issue was broadly applicable across all of society, facially neutral toward religion, devoid of anti-religious intent, and offered neither secular nor religious exemptions. It was a perfect paradigm for the *Smith* framework, because there was no question about the neutrality or general applicability of the challenged law. But that meant the hard question of defining "neutral" and "generally applicable" was left for another day. This has led to significant uncertainty in lower courts' application of *Smith*.

For example, one court recently upheld a law that effectively applied only to pharmacists and prohibited them from refusing to stock certain drugs for religious reasons, while permitting the same act for business reasons. *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064 (9th Cir. 2015). Despite the secular exemptions, the court found that the law was neutral and generally applicable and thus not subject to religious accommodation. *Id.* at 1071. On the other hand, in *Rader* v. *Johnston*, another court held that a University of Nebraska rule requiring all freshmen to live on campus was not a neutral rule of general applicability because it provided exceptions to students who lived with parents, were above a certain age, and were married, along with ex-

ceptions generously given for other reasons. 924 F. Supp. 1540, 1553 (D. Neb. 1996); *see also, e.g.*, *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (holding that a law requiring a permit to keep wild animals is not generally applicable because it allowed for "individualized, discretionary exemptions" that create the possibility for religious discrimination); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012) (holding that an ordinance barring use of steel-cleated wheels was facially neutral, but was not generally applicable because of exceptions for non-religious reasons).

The criteria of "neutrality" and "general applicability" become far murkier when applied outside *Smith*'s context. When a law provides general criminal liability and prohibits certain conduct in all circumstances, the political process provides at least some protection against religious persecution and some assurance that the law reflects an important public interest.[2] But *Smith*'s rationale crumbles when a law (like many laws) applies expressly or effectively only to certain classes of individuals or allows the relevant conduct in some circumstances but not others. In these situations, the democratic process offers insufficient refuge: favored groups (and favored motivations) can win exemptions while religious minorities are disproportionately burdened.

---

[2] *Smith* itself expressly contrasted "generally applicable" laws such as antitrust prohibitions and "the collection of a general tax," *Smith*, 494 U.S. at 878, with narrower laws—such as a "license tax applied only to newspapers with weekly circulation above a specified level," *see id.* (citing *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250-251 (1969), and *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983)).

For this reason, the *Lukumi* Court set a high bar for application of *Smith*'s neutrality and general applicability rule. The Court held that official action "cannot be shielded [from rigorous First Amendment scrutiny] by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Courts instead must look beyond a law's superficial neutrality and assess the actual operation of the law. *See id.* at 535 ("[T]he effect of a law in its real operation is strong evidence of its object."). But lower courts have nevertheless struggled with the distinction. That is in part because a bare focus on neutrality and general applicability impoverishes the Free Exercise analysis: *Smith* and *Lukumi* provide conflicting guidance regarding how lower courts are to approach free exercise cases and give proper weight to the constitutional values inherent in the Free Exercise Clause.

B. The Compelling Interest Framework Is Workable And Protective of Religious Freedom

Smith justified its atextual, ahistorical, and antiprecedential approach based on a "parade of horribles." 494 U.S. at 888-889 & n.5. The opinion argued that any other framework "would be courting anarchy" by opening "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* According to *Smith*, the problem lay with courts "constantly" being in the business of determining whether the "severe impact of various laws on religious practice" or the "constitutional significance of the burden on specific plaintiffs" justifies an exemption. *Id.* at 889 n.5 (internal quotation marks and alterations omitted). And it was "horrible to contemplate that federal judges will regularly balance against the

importance of general laws the significance of religious practice." *Id.*

Despite these concerns, the fear that judges would have an impossible time assessing claims for accommodation turned out to be groundless. Since *Smith*, in the context of statutory protections, federal and state courts have proven entirely capable of balancing claims for religious accommodation against governmental interests. Following *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA") and many states passed RFRA-like statutes that require exactly this type of balancing. *See, e.g.*, 42 U.S.C. § 2000bb(a) ("[T]he Congress finds that [] the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."). The courts tasked with administering these federal and state regimes have shown themselves to be more than capable of handling claims for religious accommodation. *See Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (affirming "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules"). For instance, in *Singh* v. *McHugh*, a member of the Sikh faith brought a federal RFRA claim against the U.S. Army for refusing to allow him to dress and groom as required by his Sikh religious beliefs, which required him to wear a turban along with unshorn hair and a beard. 185 F. Supp. 3d 201 (D.D.C. 2016). The Court considered the arguments and sustained the RFRA claim, holding that the policy was a substantial burden on Singh's religious exercise and that the Army had failed to demonstrate that applying the restriction to Singh furthered its compelling interests by the least restrictive means. *Id.* at 232. This Court, too, has had

little trouble conducting a compelling-interest analysis of a religious exemption claim when necessary. *See, e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015).

Further, courts have long undertaken, in a variety of contexts, to weigh the significance of claims for constitutional protection against the weight of the government's interests. This form of analysis is not inordinately difficult, and even when a case is unusually challenging, that difficulty is not a reason to avoid constitutional responsibility. *Cf. Department of Transp.* v. *Association of Am. Railroads*, 135 S. Ct. 1225, 1237, (2015) (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."). Courts regularly apply heightened scrutiny to laws that burden—but do not target—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, 647-648, 653-659 (2000). And of course, the balancing of burdens on individuals against the interests of the state is at the core of this Court's Equal Protection jurisprudence, *see, e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) and *United States* v. *Virginia*, 518 U.S. 515 (1996), as well as both procedural and substantive Due Process cases, *see, e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) and *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). The interests invoked in Free Exercise cases are not so categorically distinct as to warrant abandonment of the compelling interest framework.

Further, contrary to *Smith*'s concern that an as-applied challenge would create a "private right to ignore generally applicable laws," 494 U.S. at 886, as-applied challenges are "the basic building blocks of constitutional adjudication," *Gonzalez* v. *Carhart*, 550 U.S. 124, 168 (2007) (internal quotation marks omitted). Ex-

amples abound of courts successfully analyzing as-applied challenges under the First Amendment. *See, e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *United States* v. *Grace*, 461 U.S. 171 (1983). This approach accords well with the careful balancing the Free Exercise Clause requires, given the highly fact-specific nature of the inquiry. *See* 494 U.S. at 899 (O'Connor, J., concurring) ("[T]he First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.")

While there is "no cause to pretend that the task … is an easy one," *O Centro*, 546 U.S. at 439, there is every reason to believe that courts are "quite capable of … strik[ing] sensible balances between religious liberty and competing state interests," *Smith*, 494 U.S. at 902 (O'Connor, J., concurring). And in any event, *Smith*'s promise to free judges from this sometimes difficult task was illusory. The fundamental question of religious accommodation remains and is made no easier by falling back on the barren criteria of "neutrality" and "general applicability." In truth, courts are well-suited to balance claims for religious protection against the significance of the government's interests. They should do so under a framework that, unlike *Smith*, recognizes the full depth of the constitutional values inherent in the Free Exercise Clause.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted.

DANIEL P. KEARNEY, JR.
Counsel of Record
KEVIN GALLAGHER
MATTHEW E. VIGEANT
LYDIA LICHLYTER
ANDREW MILLER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

AUGUST 2019