No. 20-1501

In The

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, *ET AL.*,
Petitioners,

v.

LINDA A. LACEWELL, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New York, Appellate Division, Third Department

BRIEF OF AMICUS CURIAE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN SUPPORT OF THE PETITIONERS

Richard M. Esenberg
Counsel of Record
Katherine D. Spitz
Wisconsin Institute for Law & Liberty
330 East Kilbourn Ave., Suite 725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities iii

Interest of Amicus 1

Summary of Argument 1

Argument 6

I. The *Smith* Court Premised Much of its Decision on Concerns that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice Risked "[A]narchy." 6

II. Experience in Wisconsin Demonstrates that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice is Highly Workable 11

A. Modern free exercise case law in Wisconsin before *Smith* 11

i. State v. Yoder 11

ii. *Development of the* Yoder *Standard* 14

B. The Wisconsin Supreme Court's rejection of *Smith*'s rule 17

C. Free exercise case law in Wisconsin after *Smith* 19

D. Courts apply strict scrutiny to free exercise claims quite comfortably 22

III. That the Court Erred in its Assessment of the Workability of Strict Scrutiny in this Context Relates to Several of the Factors this Court Considers When Deciding Whether to Overrule a Case 25

Conclusion 27

TABLE OF CITED AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 24

Braunfeld v. Brown, 366 U.S. 599 (1961).................10

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) 22

Church of the Lukumi Babalu Aye, Inc., 508 U.S. 520 (1993) 7

Cty. of Jackson v. Borntreger, No. 2012AP162, 2012 WL 2924067 (Wis. Ct. App. July 19, 2012) 19-20

Eau Claire Cty. v. Borntreger, No. 2012AP1973, 2013 WL 322907 (Wis. Ct. App. Jan. 29, 2013) 20

Employment Division v. Smith, 494 U.S. 872 (1990) .. ..*passim*

Fond du Lac Cty. v. Manke, No. 2012AP516, 2012 WL 4898037 (Wis. Ct. App. Oct. 17, 2012)......... 20-21

Fullilove v. Klutznick, 448 U.S. 448 (1980) 24

Interest of Jonathan S., No. 98-0790, 1998 WL 734475 (Wis. Ct. App. Oct. 22, 1998)..................19, 21

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012)...............................24

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, ___ U.S. ___, 138 S. Ct. 2448 (2018) 4-5, 26

Kollasch v. Adamany, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) 15

Kollasch v. Adamany, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980) 15-16

Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd., 2008 WI App 52, 311 Wis. 2d 237, 751 N.W.2d 385 ....19, 21
Peace Lutheran Church & Acad. v. Vill. of Sussex, 2001 WI App 139, 246 Wis. 2d 502, 631 N.W.2d 229 .. ..19, 21
Sherbert v. Verner, 374 U.S. 398 (1963) 6-7, 13
State v. Caminiti, No. 2013AP730-CR, 2014 WL 1059175 (Wis. Ct. App. Mar. 20, 2014) 20-21
State v. Caminiti, Nos. 2015AP122-CR, 2015AP123-CR, 2016 WL 1370164 (Wis. Ct. App. Apr. 7, 2016) 20-21
State v. Driessen, No. 2010AP1050-CR, 2011 WL 978241 (Wis. Ct. App. Mar. 22, 2011) 19, 21
State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Ct. App. 1978) 14-16
State v. Miller, 202 Wis. 2d 56, 549 N.W.2d 235 17-19
State v. Peck, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988)...16
State v. Yoder, 406 U.S. 205 (1972)................... 11-14
State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971) ....*passim*
United States v. Lee, 455 U.S. 252 (1982) 2, 6
United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010) 25

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. amend. I 2
Wis. Const. art. I, § 18 17

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* 22-23
Wis. Stat. § 809.23(3) 20
Supreme Court Rule 37.3 1
Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Catholic Church, *Catechism of the Catholic Church* (2d ed. 2000)...3
James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr (last visited May 13, 2021) 3-4
Juliet Eilperin, *31 states have heightened religious freedom protections*, The Washington Post (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/.........22
Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243 (2000) . 1-2

INTEREST OF AMICUS[1]

The Wisconsin Institute for Law & Liberty, Inc. ("WILL") is a public interest law firm dedicated to promoting the public interest in individual liberty, and a robust civil society. WILL advocates for religious liberty, and its founder, Richard M. Esenberg, has written extensively on First Amendment topics.

As part of its mission, WILL engages in litigation involving the application of federal and state guarantees of religious liberty. For example, WILL previously filed an amicus brief in this Court in *Fulton v. City of Philadelphia*, No. 19-123, currently pending before this Court, addressing legal issues similar to those the Roman Catholic Diocese of Albany ("Diocese") presents in this case.

SUMMARY OF ARGUMENT

Religious liberty is one of the most essential of those freedoms protected by the federal constitution. *See, e.g.*, Michael W. McConnell, *Why Is Religious*

---

[1] As required by Supreme Court rules 37.3 and 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or their counsel made such a monetary contribution. Counsel of record received timely notice of the intent to file this brief and consent has been given by all counsel of record for this brief.

Liberty the "First Freedom"?, 21 Cardozo L. Rev. 1243, 1244 (2000) ("defend[ing] the idea of religious freedom as our first freedom—both in chronological and logical priority"); *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539 (1971) (opinion of Hallows, C.J.) ("No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment."), *aff'd*, 406 U.S. 205 (1972).

Yet, for the past thirty years, substantial burdens on religious practice have attracted only deferential scrutiny. In *Employment Division v. Smith,* this Court famously concluded that, *contra* the express terms of the Free Exercise Clause that "Congress shall make no law . . . prohibiting the free exercise [of religion]," U.S. Const. amend. I, those who object to the dictates of law on grounds of sincere religious scruple will find no recourse in the courts so long as the law is "valid," "neutral," and "of general applicability." *Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

In numerous instances the results of *Smith* have been disastrous. Under its rule, religious liberty is afforded no special protection. One need go no further for disturbing examples than this case, in which the State of New York seeks to require the Diocese to affirmatively fund abortions contrary to

two thousand years of church doctrine which unequivocally says that the practice of abortion constitutes a mortal sin that risks damnation of the eternal soul. Since the first century, the Roman Catholic Church "has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. . . . Formal cooperation in an abortion constitutes a grave offense." Catholic Church, *Catechism of the Catholic Church* (2d ed. 2000), §§ 2271-2272.

The Petitioners have expressed a religious objection to funding a practice that contravenes fundamental aspects of their faith, and should the Petitioners fail to provide the required health insurance, the State would fine them thousands of dollars per employee. Pet. at 11. Are the Petitioners, which include religious-based service organizations and orders of priests and nuns, required to make the choice between employing individuals to carry out their charitable missions and abiding by their belief in the sacred nature of all human life?

The time has come for this Court to grant Petitioners' petition, overrule *Smith*, and reinvigorate those religious liberty rights that are the birthright of all Americans not only by virtue of the federal constitution but because "the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him . . . 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* (1785), Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr (last visited May 13, 2021). For too long *Smith* has denied what no civil authority may take away: "the right of every man to exercise [religion] as [conviction and conscience] dictate." *Id.*

In deciding whether to overrule *Smith* this Court will no doubt conduct the now-familiar analysis of whether *Smith* was correctly decided and whether *stare decisis* concerns nevertheless support maintaining the precedent. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2478-79 (2018). Drawing on the Wisconsin experience, this brief addresses a specific portion of that analysis: whether it is actually workable for courts to apply strict scrutiny to laws that substantially burden religious practice.

The reason for this focus is twofold. First, the *Smith* Court itself was significantly preoccupied with that question. It feared that adopting a true rule of strict scrutiny for free exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," risking "anarchy." *Smith*, 494 U.S. at 888. And a close reading of the *Smith* decision shows that this concern formed much or even most of the basis for the Court's ultimate

holding. Whether the Court's concern was well-founded is thus highly relevant to whether the case was "the quality of its reasoning," an "important factor in determining whether a precedent should be overruled." *Janus*, 138 S. Ct at 2479.

The passage of time has demonstrated that the Court's fears were overstated. Wisconsin, like many states, has long applied a rule of strict scrutiny for conscience claims, yet the feared parade of claims for religious exemption has not ensued.

As will be discussed below, the development of free exercise case law in Wisconsin demonstrates that applying strict scrutiny to laws that substantially burden religious practice is workable. Shortly after this Court decided *Smith*, the Wisconsin Supreme Court concluded that the Free Exercise Clause's analogue in the Wisconsin Constitution provided those protections that this Court had rejected. Since that time, the floodgates have not opened in Wisconsin. And Wisconsin courts, like courts in many other jurisdictions, have quite comfortably resolved what conscience-exemption claims have been brought. Consequently, if this Court grants the petition and considers *Smith*'s fate, it should not base its decision on unproven—if not disproven—fears about the feasibility of applying to free exercise claims a standard frequently applied to claimed violations of other essential constitutional rights.

ARGUMENT

I. The *Smith* Court Premised Much of its Decision on Concerns that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice Risked "[A]narchy."

In *Smith*, this Court was asked to determine whether Oregon could apply its criminal ban on the use of the hallucinogenic drug peyote to two former employees who had taken the drug for religious purposes and, after being fired for doing so, were denied unemployment compensation for their putative misconduct. *Smith*, 494 U.S. at 874.

Although the ex-employees asked the Court to analyze the drug law under strict scrutiny pursuant to its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court declined the request and ruled that no exception to the law could be had. *See Smith*, 494 U.S. at 882-890. In so doing the Court set forth what is now black letter law in federal free exercise cases: "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"

Id. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment)).[2]

The Court's rejection of "established free exercise jurisprudence," *id.* at 903 (O'Connor, J., concurring in the judgment), rested on relatively few grounds. For instance, the Court did not base its decision on the text of the Free Exercise Clause, which it indicated was ambiguous. *See id.* at 878-79. Nor did the Court examine the original meaning of the Clause. The Court's examination of its own precedent likewise disclosed that its cases at the very least pointed in both directions. *See, e.g.*, *Smith*, 494 U.S. at 884-885 (admitting that the Court had "sometimes used the *Sherbert* test to analyze free exercise challenges" to "across-the-board criminal prohibition[s] on . . . particular form[s] of conduct" but distinguishing those cases on the basis that the Court "ha[d] never applied the test to invalidate one [of those laws]"); *Church of the Lukumi Babalu Aye, Inc.*, *v. City of Hialeah*, 508 U.S. 520, 565, 571 (1993) (Souter, J., concurring in part and concurring in the judgment) (characterizing language in case law of the Court as "hard to read as

---

[2] In choosing this standard, the majority ignored what Justice O'Connor pointed out in her concurrence: that the Court could have reached precisely the same result under the strict scrutiny standard theretofore typically applied in First Amendment jurisprudence. *Employment Division v. Smith*, 494 U.S. 872, 900, 903-907 (1990) (O'Connor, J., concurring in the judgment).

not foreclosing the *Smith* rule" and concluding that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law").

With text, history, and precedent unavailable (or unexamined), the Court turned to something it called "constitutional tradition," explaining that while it applies the "'compelling government interest' requirement" in areas like racial discrimination and speech regulation, "[w]hat it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Smith*, 494 U.S. at 885-886. However, strict scrutiny applied to substantial burdens on free exercise can also be said to serve a constitutional norm—unfettered freedom of religion.

But even were this not so, the Court's "norms"-based approach fails to explain why the analysis pertaining to dissimilar constitutional rights must (or even should) be the same. *Id.* at 1139 (observing that "the ideal of racial nondiscrimination is that individuals are fundamentally equal and must be treated as such" whereas "[t]he ideal of free exercise of religion . . . is that people of different religious convictions are different and that those differences are precious and must not be disturbed"). The Framers certainly had the *ability* to afford special protection to rights of conscience; and, as noted, *Smith* did not examine the

history of the Clause. Hence, "constitutional tradition" does little or no work here.

The Court's actual concern seems to have been that a religious freedom that protected practice as well as belief would be unworkable:

> If the "compelling interest" test is to be applied at all . . . it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . .

Smith, 494 U.S. at 888-89 (citation omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). Responding to a separate writing, the Court also clarified in a footnote its view that it was "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

Stripped down to its essentials, then, the *Smith* decision rested on little more than the Court's apprehensions that strict scrutiny could not practicably be applied and thus simply was not an option. It was that concern that led the majority to conclude that the First Amendment's protection of free exercise does not apply to what most religious adherents would see as an essential part of their faith—the duty to live in accord with its mandates.

While the Court's concern about a slippery slope was understandable, whether that slope exists is a different question entirely. And, as will now be discussed, the Court erred in concluding that it does.

II. Experience in Wisconsin Demonstrates that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice is Highly Workable.

Wisconsin provides an excellent case study for what life looks like in a world where religious adherents are offered the ability to argue that they should be exempted from generally applicable laws. Wisconsin has never operated under *Smith*'s weak protection of religious freedom, and yet *Smith*'s concerns of widespread self-exemption from civic obligations or persistently subjective and intrusive decision-making by judges have never come to fruition here, demonstrating that the fundamental premise justifying the *Smith* decision is flawed.

A. Modern free exercise case law in Wisconsin before *Smith*

i. State v. Yoder

The landmark pre-*Smith* free exercise decision in Wisconsin was also a landmark for this Court: *State of Wisconsin v. Yoder*, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 406 U.S. 205 (1972). There followers of the Old Order Amish religion—which "requires as a part of the individual's way of salvation a church community separate from the world"—argued that Wisconsin's compulsory

education laws violated their religious beliefs insofar as they would require Amish children to attend two years of high school. *Yoder*, 49 Wis. 2d at 434-36, 447 (opinion of Hallows, C.J.).

Although the lead opinion written by Chief Justice E. Harold Hallows failed to garner the support of the Chief Justice's colleagues, the Wisconsin Supreme Court nevertheless ruled 6-1 that it was unconstitutional to force the Amish objectors to comply with the law, with five justices briefly concurring in the result. *Yoder*, 49 Wis. 2d at 447-48.

Before conducting any constitutional balancing, Chief Justice Hallows first examined whether there was actually any infringement of the federal Free Exercise Clause at all. *Id.* at 434. In so doing he sketched out a limited role for courts in conducting the analysis. The Chief Justice remarked that it was "of no concern" that the Amish faith was not codified, as, "[f]or its purpose, religion defines itself and binds the individual conscience." *Id.* at 435. Similarly, he noted that the court was "prohibited from evaluating[] a religious belief for ecclesiastical purposes" and added that the court's view "of the validity, the reasonableness, or the merits" of Amish beliefs was irrelevant. *Id.* at 436. Finally, the Chief Justice rejected out of hand the State's argument that the Amish's "refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life," given that

"[t]he Free Exercise Clause is not restricted in its protection to formal ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience." *Id.* at 436-37. Chief Justice Hallows concluded that the compulsory education law intruded upon the objectors' First Amendment rights. *Id.* at 437.

Citing *Sherbert*, the Chief Justice then proceeded to weigh the interests of the Amish against those of the state. *Id.* at 434, 437. The compulsory education law imposed a "heavy . . . burden" on the Amish because complying with the compulsory education law was "repugnant to their religion" and forced them to choose between "risk[ing] the loss of . . . salvation" and "disobey[ing] the law and invit[ing] criminal sanctions." *Id.* at 437. Indeed, in other states, the opinion noted, the Amish sold their farms and moved rather than comply with similar laws. *Id.*

On the other hand, the State could not point to any serious ill effect resulting from allowing the Amish to live consistent with their faith, nor a substantial benefit from forcing them to follow the compulsory education law. *See id.* at 439-443. "Granting an exception from compulsory education to the Amish," the Chief Justice wrote, "will do no more to the ultimate goal of education tha[n] to dent the symmetry of the design of enforcement." *Id.* at 443.

On appeal, this Court affirmed, confirming that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

ii. *Development of the* Yoder *Standard*

In the 18 years between *Yoder* and *Smith*, there was no deluge of free exercise cases in Wisconsin (or, for that matter, anywhere else) under either the federal constitution or its state counterpart. What cases did arise were generally dispatched by the Wisconsin Courts with relative ease.

For example, in *State v. Kasuboski*, members of the Life Science Church argued that *Yoder* permitted them to withdraw their children from public school as well—a perfect illustration of the potential slippery slope later sketched out by the *Smith* Court. *State v. Kasuboski*, 87 Wis. 2d 407, 411, 275 N.W.2d 101 (Ct. App. 1978). The Kasuboskis objected to the putative fact that the local public schools taught "humanism and racial equality and are influenced by communists and Jews." *Kasuboski*, 87 Wis. 2d at 413.

The Wisconsin Court of Appeals, acknowledging that what constitutes a "'religious' belief or practice entitled to constitutional protection may present a most delicate question," concluded that the Kasuboskis had "removed their children from the public schools on the basis of ideological or philosophical beliefs rather than fundamentally religious beliefs," and rejected the Kasuboskis' claim for a religious exemption. *Id.* at 417-18. Because the claim was not "rooted in religious belief" but a "personal, philosophical choice," the Kasuboskis' decision to pull their children from the school was not entitled to First Amendment protection. *Id.* at 417.

Kollasch v. Adamany, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980) provides another example of what the *Smith* Court might have conceived as a "hard case"—a request for exemption from general taxation. There Catholic Benedictine sisters asked not to pay sales tax on the meals they sold to visitors and provided "substantial evidence at trial to prove that all of the work which they do is religiously, rather than commercially, motivated." *Kollasch*, 99 Wis. 2d at 538-39, 548. But even though the Wisconsin Court of Appeals "accept[ed] as a given that the sisters are engaged in the exercise of religion when they serve meals to their guests and join them in dining," *id.* at 551, it concluded the sisters could simply collect the taxes

from the consumer, which imposed little or no burden on their religious exercise, *id.* at 557.[3]

Finally, just two years before *Smith*, the Court of Appeals decided a case that is striking in its similarity to *Smith*. *See State v. Peck*, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988). In *Peck* a priest of the Israel Zion Coptic Church, whose "doctrine dictates the use of marijuana as a 'religious sacrament,'" was charged with and convicted of manufacturing controlled substances when County sheriffs discovered around 1,600 marijuana plants on his property. *Peck*, 143 Wis. 2d 624, 629-31, 422 N.W.2d 160 (1988).

There was no dispute that Peck's religious beliefs were both sincere and burdened by the criminal law; unlike the *Smith* Court, however, the Court of Appeals applied strict scrutiny and concluded that the state's interest in "[p]reservation of the public health and safety" was "of sufficient magnitude to override Peck's first amendment interest in using the drug as a daily continual sacrament." *Id.* at 631-35.

Kasuboski, *Kollasch*, and *Peck* are illustrative examples in that they demonstrate three obstacles to

---

[3] On appeal, the decision was reversed on other grounds. *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) (concluding the sisters were not "retailers" within the meaning of the sales tax and thus not subject to it).

the vindication of any free exercise claim and thus present three reasons to doubt pandemonium upon the reinvigoration of the Free Exercise Clause.

First, per *Kasuboski*, the claimant must demonstrate a sincere religious belief. Second, per *Kollasch*, the challenged law must actually significantly burden the exercise of that belief. And third, per *Peck*, the law must flunk strict scrutiny. To the complaint that in judicial analysis of these three steps—which admittedly can involve close questions—there is a risk of erroneous denial of a free exercise claim, the answer is that a jurisprudence that offers religious adherents at least a fighting chance to vindicate their consciences is preferable to one in which the adherents are given no chance at all.

B. The Wisconsin Supreme Court's rejection of *Smith*'s rule

Following *Smith*, Wisconsin, which has its own free exercise clause, *see* Wis. Const. art. 1, § 18, needed to determine whether it was appropriate to adopt *Smith*'s test for state constitutional claims or to continue applying the test from *Yoder* and its progeny.[4] In *State v. Miller*, another case involving

[4] Article 1, § 18 reads in relevant part: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . .."

the Amish, the Court unanimously chose the latter course. 202 Wis. 2d 56, 549 N.W.2d 235 (1996).

The question in *Miller* was whether Wisconsin could force the Amish to display "the red and orange triangular slow-moving vehicle (SMV) emblem on their horse-drawn buggies." *Miller*, 202 Wis. 2d at 59. While recognizing that the Supreme Court of the United States had recently eschewed the application of strict scrutiny to conscience claims, the Wisconsin Supreme Court explained that the state constitution guaranteed broader protections "best . . . furthered through continued use" of the "time-tested [strict scrutiny] standard." *Id.* at 64-66, 69.

Analyzing the traffic law at issue turned out to be an especially easy task in light of the State's concession that the law burdened sincerely held religious beliefs and the Amish's concession that highway safety was a compelling state interest. *Id.* at 69-71. On the question of narrow tailoring the Amish proffered unrebutted expert evidence that their use of reflective white tape was superior to the method mandated by the State, which in turn failed to support its contention that uniformity was required, given exceptions for various types of vehicles and similar-looking symbols required for other purposes. *Id.* at 70-73. On these showings, the Wisconsin Supreme Court ruled for the Amish. *Id.* at 59.

Miller is no less than a charter for religious liberty in Wisconsin. *See, e.g.*, *id.* at 65 ("[T]he drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise the dictates of their religious beliefs.").[5]

C. Free exercise case law in Wisconsin after *Smith*

Post-*Miller* experience in Wisconsin suggests this Court's concerns of anarchy, as expressed in *Smith*, were overblown. Wisconsin courts were not inundated with conscience exemption claims under the state constitution; research discloses perhaps around a dozen appellate cases in twice as many years.

And despite the fact that this collection of cases concerned a variety of challenged laws or government actions ranging from the significant to the mundane, *see, e.g.*, *Interest of Jonathan S.*, No. 98-0790, 1998 WL 734475 (Wis. Ct. App. Oct. 22,

---

[5] Although the text of the Wisconsin Constitution's religious liberty provision is more broadly worded than its federal counterpart, that fact alone proves little with respect to the issue of whether *Smith* was correctly decided. The *Miller* Court, after all, decided to continue applying a test originally drawn from federal free exercise case law. Even if strict scrutiny has a firmer basis in the text of the Wisconsin Constitution, the impact—or, more accurately, the lack of impact—of adopting the test is instructive.

1998) (corporal punishment prohibition); *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, 246 Wis. 2d 502, 631 N.W.2d 229 (automatic fire sprinkler requirement); *Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd.*, 2008 WI App 52, 311 Wis. 2d 237, 751 N.W.2d 385 (pharmacist's refusal to dispense oral contraceptives); *State v. Driessen*, No. 2010AP1050-CR, 2011 WL 978241 (Wis. Ct. App. Mar. 22, 2011) (per curiam) (criminal marijuana ban); *Cty. of Jackson v. Borntreger*, No. 2012AP162, 2012 WL 2924067 (Wis. Ct. App. July 19, 2012) (permit for saw mill); *Fond du Lac Cty. v. Manke*, No. 2012AP516, 2012 WL 4898037 (Wis. Ct. App. Oct. 17, 2012) (speeding citation); *Eau Claire Cty. v. Borntreger*, No. 2012AP1973, 2013 WL 322907 (Wis. Ct. App. Jan. 29, 2013) (building code requirements); *State v. Caminiti*, No. 2013AP730-CR, 2014 WL 1059175 (Wis. Ct. App. Mar. 20, 2014) (child abuse statute); *State v. Caminiti*, Nos. 2015AP122-CR, 2015AP123-CR, 2016 WL 1370164 (Wis. Ct. App. Apr. 7, 2016) (same), Wisconsin's courts have shown themselves "quite capable of applying [strict scrutiny] to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).[6]

---

[6] Under Wisconsin law, the unpublished opinions cited in this brief are generally not citable as precedent or authority in Wisconsin courts, subject to certain exceptions. *See* Wis. Stat. § 809.23(3). *Amicus* does not necessarily endorse the outcome in each of the many free exercise cases cited herein. They are

Notably, a trend in the post-*Smith* Wisconsin cases is rejection of claims for religious exemptions. The *Smith* Court apparently would find fault with such a state of affairs, *see Smith*, 494 U.S. at 889 n.5 ("[T]he cases we cite have struck 'sensible balances' only because they have all applied the general laws, despite the claims for religious exemption."), but it is unclear why.

If the implication is that Wisconsin courts have "water[ed] . . . down" the strict scrutiny standard, *Smith*, 494 U.S. at 888, that is not borne out by the facts. In most cases, the Court of Appeals concluded on the evidence before it that the claimant had failed to demonstrate the threshold requirement that the government was actually burdening a religious belief. *See Jonathan S.*, 1998 WL 734475, at *3; *Peace Lutheran Church & Acad.*, 246 Wis. 2d 502, ¶¶20-21; *Noesen*, 311 Wis. 2d at 252; *Driessen*, 2011 WL 978241, at *2; *Borntreger*, 2012 WL 2924067, at *5; *Manke*, 2012 WL 4898037, *2; *Borntreger*, 2013 WL 322907, at *4.

On the other hand, in those few cases where strict scrutiny was actually applied, the State arguably possessed truly compelling interests that could not be served by less restrictive alternatives. *See Peace Lutheran Church & Acad.*, 246 Wis.2d

---

presented simply to show the workability of the strict scrutiny standard in the free exercise context.

502, ¶22 (state had compelling state interest in requiring installation of sprinkler system in church); *Driessen*, 2011 WL 978241, at *2 (ban on use of marijuana justified because of the "serious problems" marijuana "causes . . . for society"); *Caminiti*, 2014 WL 1059175, at **6-7 (defendant who instructed church attendees to apply harsh physical discipline to "infants starting as young as two or three months of age" lawfully convicted of conspiracy to commit child abuse given compelling state interest in "preventing child abuse"); *Caminiti*, 2016 WL 1370164, at **6-10 (similar).

Of course, free exercise claimants are sometimes successful. That possibility is necessary in a country that values religious liberty. Each time a court rules that the state may not substantially burden a sincerely held religious belief because it lacks adequate justification, the social compact is strengthened, not weakened; these conscience exemptions are the price paid to maintain the allegiance of those citizens whose primary allegiance is to their Creator.

D. Courts apply strict scrutiny to free exercise claims quite comfortably.

As this Court is well aware, Wisconsin is by no means the only jurisdiction that applies strict scrutiny to free exercise claims. Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*,

which restored by statute the application of strict scrutiny in free exercise cases. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-94 (2014). And a relatively recent tally places the number of states providing "heightened religious freedom protections" via either legislation or state court decision at 31. Juliet Eilperin, *31 states have heightened religious freedom protections*, The Washington Post (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/ (last visited May 13, 2021). Put differently, although the country remains riddled with inconsistency on this issue, the majority of jurisdictions offer religious adherents robust free exercise protections. This is strong evidence of workability.

It is worth examining why *Smith*'s concerns about chaos—whether due to widespread rule by individual conscience or to inappropriate judicial decision-making on matters of religion—have not come to pass in these states. There are a few possible answers, each focusing on a different branch of government.

The first is the likelihood that where strong free exercise protections exist, legislatures, by and large, actually attempt to draft laws that will not infringe upon religious belief or that permit exceptions when infringement is likely. This proposition need not rest on unqualified confidence

that legislators will always do the right thing (although the broad esteem in which the value of religious liberty is held in America should not be underestimated—it is worth recounting that RFRA passed Congress with near-unanimity). Even viewed from the perspective of legislators' incentives and self-interest, it is perfectly logical that, in jurisdictions where conscience exemptions are already required by law, legislators will hash out potential problems in advance and adjust their proposals accordingly to avoid findings of unconstitutionality.

The second consideration is that the executive branch—the law enforcer—possesses both prosecutorial discretion and little motivation to squelch the peaceful dissenter *except* where a compelling governmental interest is truly present.

Third, the balancing-of-interests that strict scrutiny requires is a test that the judicial branch applies in any number of circumstances. They are capable of doing it here. It is true that religious claims can present especially sensitive questions given the inability of civil courts to inquire into ecclesiastical matters, but those waters have proven navigable as well. Civil deference to a religious determination is not equivalent to judicial abdication; on the contrary, it represents a civil court's understanding of its proper role. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

The old lawyer's adage that strict scrutiny is "strict in theory, but fatal in fact" is simply not true. *Cf. Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). Courts need not question or evaluate the worth of religious beliefs. They are able to assess the degree of burden on the adherents' terms. Nor have they proven incapable of weighing that burden against the governmental interest in enforcement.

Finally, we may consider the American people themselves. While there can be little doubt that strong free exercise protections will at times be abused by citizens who in fact lack moral scruple, periodic mendacity in the court room is (unfortunately) nothing new. Here, too, in Wisconsin and elsewhere, courts have shown that they can separate the wheat from the chaff. *See, e.g.*, *United States v. Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010) (per Gorsuch, J.) (examining evidence in the record and affirming district court's conclusion that the defendants' "marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction").

That religious liberty is often respected and that adherents are unlikely to bring marginal cases does not mean that constitutional safeguards ought

not be scrupulously respected. Our Constitution says that religion is a fundamental liberty. State actions that substantially burden that fundamental liberty ought to attract heightened scrutiny.

III. That the Court Erred in its Assessment of the Workability of Strict Scrutiny in this Context Relates to Several of the Factors this Court Considers When Deciding Whether to Overrule a Case

Pursuant to the policy of *stare decisis*, the Court's "cases identify factors that should be taken into account in deciding whether to overrule a past decision." *Janus*, 138 S. Ct. at 2478. These include "the quality of [the decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79.

Most obviously, for the reasons already discussed, the force of *Smith*'s reasoning is substantially lessened if what formed the primary basis for the decision is untrue. If providing robust protections to religious adherents who sincerely object to complying with a generally applicable law on religious grounds is in fact highly feasible and would *not* lead to "each conscience [becoming] a law unto itself," then *Smith* has neither text, nor history, nor precedent, nor "constitutional tradition" to fall back on.

Second, the "workability of the rule [*Smith*] established" can only fairly be judged when considered with reference to other available rules. *Smith*'s rule—under which conscience exemptions simply do not exist for most laws (and therefore under which many are forced to violate their consciences)—appears more workable if it is the only possible option. If, on the other hand, a regime of strict scrutiny is easily administrable, *Smith*'s restrictive doctrine takes on a different color.

Third, given that this Court may reconsider a decision based on subsequent developments, post-*Smith* practice in the states with respect to more generously affording religious exemptions and the consequences of their having done so are matters highly relevant to *Smith*'s viability. Proof that the Court's initial concerns were unfounded, which was unavailable at the time *Smith* was decided, weighs heavily in favor of reconsidering (and overruling) the decision.

Finally, the fact that the federal government and the majority of states already successfully apply heightened standards to conscience claims via legislation and case law suggests that reliance interests are substantially lessened. Whether a conscience claim will be entertained in court is now merely an accident of one's geographic location.

In sum, in weighing whether to overrule *Smith*, this Court's time is well-served dissecting whether the *Smith* Court's anxiety about the practical effects of its decision was ultimately justified. As this brief has demonstrated, it was not, so *stare decisis* concerns are substantially lessened.

CONCLUSION

If the Court grants the Petitioners' petition, many voices will attempt to warn it that should it overrule *Smith* it will unleash a Pandora's box of irresolvable religious exemption claims. These voices will encourage the Court to bow to inertia and refrain from revisiting *Smith*.

The Court should resist these arguments because they are based on false assumptions. Over half of the states have already rejected *Smith*'s rule. And, as Wisconsin's history shows, courts in these jurisdictions have had little trouble adjudicating free exercise claims under a rule of strict scrutiny.

This Court has a valuable opportunity to reconsider *Smith* in light of the text and history of the Free Exercise Clause as well as its own precedents in the area. Consequently, Amicus respectfully requests that this Court grant the Petitioners' petition and consider whether to overrule its decision in *Employment Division v. Smith*.

Respectfully submitted,

Richard M. Esenberg
Counsel of Record
Katherine D. Spitz
Wisconsin Institute for Law & Liberty
330 East Kilbourn Ave., Suite 725
Milwaukee, WI 53202
(414) 727-9455 / rick@will-law.org
Counsel for Amicus

May 24, 2021