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 AMICI CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

HOWARD SLUGH
Counsel of Record
2400 Virginia Ave N.W.
Apt. C619
Washington, D.C., 20037
(954) 328-9461
Hslugh@JCRL.ORG

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Interests of Amici Curiae[1]

The Jewish Coalition for Religious Liberty is an incorporated organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. Amicus has an interest in restoring an understanding of the Free Exercise Clause that offers broad protection for religious liberty. That provision is uniquely important for the flourishing of minority faiths in America. Over the last thirty years, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), has presented such a substantial obstacle to successfully litigating Free Exercise claims that many religious adherents have not even attempted to vindicate their rights in court. When such cases have been brought, *Smith* has shielded numerous laws that impose substantial burdens on religious minorities from First Amendment review. Amicus urges this Court to reconsider *Smith* in order to help ensure religious liberty for all Americans.

Amicus Union of Orthodox Jewish Congregations of America ("Orthodox Union") represents nearly 1,000 synagogues in the United States and is the nation's largest Orthodox Jewish umbrella organization. As a minority faith community in the United States, the legal protections for the free

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

exercise of religion are of existential importance to the Orthodox Union's constituents. Thus, the Orthodox Union has advocated for the reconsideration and reversal of *Employment Division v. Smith* since that harmful decision was rendered.

Summary of Argument

Thirty years ago, this Court inflicted lasting harm on religious minorities by deciding that it "preferred" not to determine whether religiously neutral laws unconstitutionally interfere with Americans' religious exercise. *Smith*, 494 U.S. at 890. In *Smith,* this Court held that generally applicable laws that substantially burden religious exercise are usually immune to judicial review under the Free Exercise Clause. 494 U.S. at 876. The Court acknowledged the likely consequences of its decision; exempting generally applicable laws from Free Exercise review would disproportionately harm religious minorities. *Id.* at 890. Unfortunately, that was an astute prediction. The last three decades have demonstrated that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (Alito, J., statement respecting denial of *certiorari*).

As *Smith* foresaw, a diminished Free Exercise Clause disproportionately harms "those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. This is not surprising. Generally applicable laws are more likely to inadvertently burden lesser-known religions than faiths that enjoy

widespread practice and support. This is true even though such laws may severely burden Judaism's sacred practices. Under *Smith*, a hypothetical "generally applicable" law that banned practices necessary for kosher slaughter or Jewish Sabbath observance would escape Free Exercise Clause scrutiny. An interpretation of the First Amendment that leaves Jewish Americans' religious liberty so vulnerable betrays America's proud history of religious pluralism and is inconsistent with the original meaning and purpose of the First Amendment.

Fortunately, the weight of the evidence that has accumulated over the last thirty years, undermines *Smith*'s foundations and reveals its conclusion to be untenable. This Court should grant certiorari and use the knowledge that it has acquired over the past thirty years to reconsider *Smith*'s conclusion that applying the Free Exercise Clause to generally applicable laws would be prohibitively difficult.

This Court should reconsider that conclusion for three reasons. First, post-*Smith* evidence demonstrates that a diminished Free Exercise Clause imposes significant harm on religious minorities. *See. e.g.*, *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (discussing the emotional pain caused by deprivations of religious liberty). This burden has fallen heavily on minority religious faiths and is likely to continue doing so unless this Court changes course.

Second, this Court now has substantial evidence that it is possible to efficiently adjudicate whether to

grant religious exemptions to generally applicable laws. The experience of deciding religious liberty claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), *see e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015), should allay concerns that doing so is inordinately difficult.

Third, *Smith* purported to provide an easy-to-apply rule that would simplify if not eliminate most litigation surrounding religious liberty. Recent litigation regarding COVID-related restrictions on religious exercise has shown that *Smith* did not achieve this purpose. *See, e.g., Tandon v. Newsom,* 141 S. Ct. 1294 (2021). Far from simplifying matters, *Smith*'s supposed bright-line rule distinguishing between laws that are generally applicable and those that are not has led to confusion and disagreement. With *Smith*'s fears alleviated, its alleged benefits never materializing, and it having generated significant harms, this Court should reconsider *Smith* and restore a more robust and historically grounded understanding of the Free Exercise Clause.

Even if this Court chooses not to reevaluate *Smith*, it should review the New York Supreme Court's interpretation of *Smith*. *Smith* suggested that political accommodation should replace judicial protection. 494 U.S. at 490. The lower court's ruling would allow state legislatures—and in this case a governor—to divide and conquer religious objectors by granting exemptions to favored groups while denying them to less popular faiths or subgroups within faiths. Allowing legislatures to discriminatorily exempt

favored religious groups, threatens to leave minority religious groups utterly vulnerable, without either legal or political recourse.

One does not have to be a believer to recognize that faith has played an important role in American life. Faith was essential to the lives of founders, abolitionists, suffragettes, civil rights leaders, Republicans, and Democrats. In George Washington's farewell address, he stressed religion's importance to the Republic that America was creating. He referred to religion as an "indispensable support" to "political prosperity" and a "great pillar of human happiness."[2] John Adams similarly noted that our Constitution was "made only for a moral and religious people."[3] More recently, President Obama "pray[ed] that we will uphold our obligation to be good stewards of God's creation," and that "we answer Scripture's call to lift up the vulnerable, and to stand up for justice, and ensure that every human being lives in dignity."[4]

Thirty years ago, the *Smith* Court underestimated the importance of religion in American life when weighing it against the presumed difficulty in adjudicating religious accommodations. It "preferred" to diminish the Free Exercise Clause to a

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[2] Transcript of President George Washington's Farewell Address (1796), Ourdocuments.gov, https://bit.ly/3cNSOBh (last visited May 9, 2021).

[3] From John Adams to Massachusetts Militia, 11 October 1798, Founders Online, https://bit.ly/2WLfOeQ (last visited May 9, 2021).

[4] Simone Leiro, *President Obama: "Faith Is the Great Cure for Fear,"* Feb. 4, 2016, https://bit.ly/2XeF4Jl (last visited May 9, 2021).

shell of its former self, doing so (by its own admission) at the expense of minority faiths. *Smith*, 494 U.S. at 890. This case represents an opportunity to restore the Free Exercise Clause's protection to generally applicable laws that impose burdens on American's faith. This Court should grant certiorari and reevaluate *Smith* in light of the substantial evidence that has accumulated over the intervening years.

Argument

I. The Court Should Grant Certiorari In Order To Reconsider *Smith*'s Harsh Rule Considering the Hardships That *Smith* Has Imposed On Religious Minorities, The Fact That Adjudicating Religious Liberty Cases Has Proven Easier Than *Smith* Anticipated, And *Smith*'s Failure To Provide A Useful Framework For Deciding Cases.

A. *Smith*'s legacy is a diminished Free Exercise Clause that imperils religious minorities the most.

Religious minorities have borne the brunt of *Smith*'s holding. The *Smith* Court acknowledged that, under its new rule, harms to religious Americans were "unavoidable." *Smith*, 494 U.S. at 890. But it claimed that such harms "must be preferred" to the difficulty of reviewing generally applicable laws to Free Exercise scrutiny. *Id. Smith* also recognized that immunizing generally applicable laws from Free Exercise Clause scrutiny "will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.*

Those predictions have proven accurate. *See e.g., City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting) ("[L]ower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably

accommodating religious practice."). *Smith* "drastically cut back on the protection provided by the Free Exercise Clause;"[5] as was its inevitable and intended effect.

Cases following *Smith* involving Jews,[6] Muslims,[7] Native Americans,[8] Buddhists,[9] Hmong,[10] and other faiths,[11] all confirm that *Smith* left religious minorities vulnerable. The problem is not simply that the religious adherents were denied accommodations in those cases, it is that, under *Smith*, governments could deny them accommodations without satisfying

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[5] *Id.*

[6] *See, e.g.*, *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd* 940 F.2d 661 (6th Cir. 1991) (compelling an autopsy despite Jewish religious beliefs opposing it).

[7] *Valdes v. New Jersey*, 313 F. App'x 499 (3d Cir. 2008) (denying a Muslim corrections officer trainee an accommodation to wear religiously required facial hair).

[8] *Apache Stronghold v. United States*, No. CV-21-00050-PHX-SPL, 2021 WL 535525 (D. Ariz. Feb. 12, 2021) (declining to protect an Apache holy site from governmental destruction); *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996) (holding that requiring uprooting a grave did not violate a Native American and Quaker couple's First Amendment rights)

[9] *Tran v. Gwinn*, 262 Va. 572, 580, 554 S.E.2d 63 (2001) (denying a Buddhist the accommodation necessary to build a temple).

[10] *Yang v. Sturner*, 750 F. Supp. 558, 559 (D.R.I. 1990) (denying damages to parents of a child who, against the commands of their Hmong faith, had an autopsy performed on him by the state).

[11] *Mefford v. White*, 770 N.E.2d 1251 (2002) (denying adherent an accommodation that would have allowed him to avoid using a social security number in a way that he considered religiously impermissible); *Nenninger v. U.S. Forest Serv.*, No. CIV. 07-3028, 2008 WL 2693186 (W.D. Ark. July 3, 2008), *aff'd*, 353 F. App'x 80 (8th Cir. 2009) (Denying Rainbow Family members an accommodation to Forest Services laws they found religiously objectionable).

strict First Amendment scrutiny. It is possible that the government could have met strict scrutiny in one or more of the cases cited, but under the *Smith's* narrow interpretation of the First Amendment, we will never know.

One post-Smith study explained that, "the consequences of *Smith* were swift and immediate."[12] In fact, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*."[13] Additionally, "the percentage of favorable decisions for Free Exercise cases dropped from over 39 percent to less than 29 percent following *Smith* . . . ."[14] As four Justices recently acknowledged, religious Americans are dissuaded from litigating Free Exercise claims "due to certain decisions of this Court." *Kennedy*, 139 S.Ct. at 637 (Alito, J., statement respecting denial of *certiorari*).

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[12] Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. Church & State 237, 248 (2004).

[13] *Id.* at 242.

[14] *Id.*at 248. Given the precipitous decline in the number of cases, it seems likely that people with weaker claims were dissuaded from pursuing their cases. That makes the decline in success rate—for what were presumably the most promising cases—even more troubling.

Over the last thirty years, the political branches,[15] the states,[16] and this Court[17] have attempted to ameliorate *Smith*'s harsh consequences. However, those efforts have failed to restore the robust Free Exercise protection that existed prior to *Smith* and is required by the First Amendment. *See Kennedy*, 139 S.Ct. at 637 (Alito, J., statement respecting denial of *certiorari*). Only this Court, by reconsidering *Smith* in its entirely, can eliminate the harms caused by *Smith*'s overly narrow interpretation of the First Amendment.

B. Members of minority faiths such as Judaism are the most likely to suffer under *Smith* because they adhere to relatively unknown religious practices that government officials might incidentally burden.

Under *Smith*, the First Amendment offers religious Americans no protection against generally applicable laws that unintentionally or incidentally burden religious exercise. Unfortunately for members

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[15] The Religious Freedom Restoration Act was primarily aimed at mitigating the harms caused by *Smith*. 42 U.S.C.A. § 2000bb (acknowledging that "'Laws neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").

[16] Twenty-one states have passed their own laws similar to the federal Religious Freedom Restoration Act. *Religious Freedom Restoration Act Central*, BecketLaw.org, https://bit.ly/2ygdumx (Last visited May 9, 2021).

[17] *See e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (creating an exception to *Smith* for generally applicable laws motivated by anti-religious animus).

of minority religions, legislators are more likely to inadvertently burden minority religious practices than more common religious observances. In other words, a government actor is more likely to innocently pass a law that burdens a little-known Jewish practice than to unintentionally or incidentally prohibit a well-known Christian practice. This happens not necessarily as a result of political actors harboring animus towards their minority constituents, but rather as a result of a lack of familiarity with how those constituents practice their faith.[18] The purpose of the Bill of Rights, as acknowledged by James Madison, is the protection of minority rights against "the greatest danger . . . the body of the people, operating by the majority against the minority."[19] For members of minority faiths who find their sacred practices and beliefs curtailed by the "superior force of an interested and overbearing

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[18] A particularly illuminating example of a government actor lacking awareness of a Jewish tradition occurred during a Fifth Circuit oral argument. One of the panel judges thought a hypothetical law requiring Americans to turn "on a light switch every day" was a prime example of a rule unlikely to substantially burden anyone's religious liberty. *See* Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. April 7, 2015). But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of the prohibition contained in Exodus 35:3. Certainly, this judge did not intend to demean Orthodox Jews or to belittle Jewish Sabbath observance. He simply, and understandably, was unaware of how some Jews understand the Commandment to guard the Sabbath.

[19] James Madison, Madison Speech Proposing the Bill of Rights (June 8, 1789). https://bit.ly/3hdcfbL (last visited May 9, 2021).

majority,"[20] it is of small comfort that the majority may have been motivated by justifiable ignorance or indifference rather than hostility.

Take for example the attempts by some animal rights groups to have courts enjoin the lesser-known Jewish practice of Kapparot. Kapparot is an atonement ritual conducted on the eve of Yom Kippur. Many Jews believe the requirement can be satisfied by donating money to charity, but some Jews interpret Kapparot to require the ceremonial use and slaughter of chickens. Animal rights activists have repeatedly filed lawsuits attempting stop this ritual. *See, e.g., United Poultry Concerns v. Chabad of Irvine*, 743 Fed. Appx. 130 (9th Cir. 2018).

When seeking injunctive relief against the performance of Kapparot, opponents of the practice do not rely on statutes overtly targeting Judaism. Rather, opponents cite generally applicable laws such as those regulating business practices. *Id.* at 130. Lawmakers did not have Kapparot in mind when they passed these laws; after all, most of them probably had never even heard of the practice. Given the neutrality of the laws on which they base their challenges, opponents of Kapparot have cited *Smith* as the reason why Chabad rabbis are not entitled to a religious accommodation.[21] In fact, plaintiffs in these cases have bluntly stated that under *Smith*, "[t]he First Amendment does not protect [Chabad's]" acts

[20] The Federalist No. 10, at 51 (James Madison) (Bantam Books 2003).

[21] *United Poultry Concerns v. Chabad of Irvine*, Appellant's Opening Br. at 25. (Nov. 22, 2017) 2017 WL 5663672 (C.A.9).

from generally applicable laws.[22] Unfortunately for Jewish Americans, numerous courts have understood *Smith* similarly.

In one instance, a court cited *Smith* as the reason that a Jewish police officer had no Free Exercise right to wear a yarmulke, a traditional Jewish head covering.[23] The police department's ban on head coverings was religiously neutral, and therefore, *Smith* immunized it from Constitutional scrutiny. In a second case, a court determined that a state agency did not have to place an Orthodox woman with developmental disabilities in a "habilitation" program compatible with her faith because "in accordance with *Smith*," the state agency's "decision was religiously neutral."[24] The woman simply wanted to be placed in a facility that would enable her to observe the Sabbath and Kosher laws.[25] Under *Smith*, the state could deny her such basic religious accommodations without facing constitutional scrutiny. In yet another case, a court ruled that a prison could deny a Jewish prisoner access to a prayer shawl, head covering, and prayer book without having to justify the prohibitions, because the ban on such items was religiously neutral.[26] This is not to say that these plaintiffs necessarily should have won each of

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[22] *Id.*
[23] *Riback v. Las Vegas Metro. Police Dep't*, No. 2:07CV1152RLHLLRL, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008).
[24] *Shagalow v. State, Dep't of Human Servs.*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006).
[25] *Id.* at 383.
[26] *Aiello v. Matthew*, No. 03-C-0127-C, 2003 WL 23208942, at *2 (W.D. Wis. Apr. 10, 2003).

their cases. But, at the very least, the government should have been required to prove that it had a compelling need to impose such significant burdens on Jewish Americans' exercise of their faith. Because of *Smith*, the government faced no such obligation.

To give another example, many Jews understand Jewish law to prohibit wearing a garment made from a mixture of wool and linen.[27] If a public school were to require students to wear uniforms made of wool and linen, that religiously neutral law would impose a substantial burden on Jewish students. Yet, *Smith* would immunize such a rule against Free Exercise review.[28]

There are many other areas of Judaism where a conflict between Jewish practices and a generally applicable law might arise. For instance, San Francisco and several European countries have discussed banning circumcision.[29] Belgium banned ritual slaughter, a process without which meat cannot be kosher.[30] *Smith* would prevent this Court from

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[27]*Shatnez-Free Clothing*, Chabad.org, goo.gl/RZRcSm (last visited May 9, 2021); Leviticus 19:19; Deuteronomy 22:9-11.

[28] The issue of Shatnez has arisen in the context of prison uniforms, but the court did not reach the merits of the issue. *Smith v. Drawbridge*, No. CIV-16-1135-HE, 2018 WL 3913175, at *4 (W.D. Okla. May 22, 2018), report and recommendation adopted, No. CIV-16-1135-HE, 2018 WL 2966946 (W.D. Okla. June 13, 2018), *aff'd*, 764 F. App'x 812 (10th Cir. 2019).

[29] Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California,* NYTimes.com, June 4, 2011. https://nyti.ms/2WJmDNM (last visited May 9, 2021)

[30] Milan Schreuer, *Belgium Bans Religious Slaughtering Practices, Drawing Praise and Protest,* NYTimes.com, Jan. 5, 2019, https://nyti.ms/2WK6nMx (last visited May 9, 2021).

applying strict scrutiny to such enactments despite the fact that they would create significant burdens for American Jews.

Other religious minorities have also suffered under *Smith*. *Yang v. Sturner*, "one of the saddest cases since *Smith*," demonstrates this point. *See* Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 226 (1993) (citing 750 F.Supp. 558 (D.R.I. 1990)). In *Yang*, a Hmong family brought a Free Exercise challenge to a state law mandating autopsies for accident victims. The family was haunted by the conviction that their son, who had been killed in an automobile accident and subsequently autopsied without his family's consent, would never enter the afterlife due to the autopsy. *Id.* Before *Smith* was decided, the district judge ruled that the forced autopsy violated the family's Free Exercise rights. But *Smith* was decided before the judgment became final, prompting the district court to reverse its prior ruling.

In a moving tribute to the harm done to the plaintiffs by a neutral, generally applicable law, the district court concluded:

> It is with deep regret that I have determined that the [*Smith*] case mandates that I recall my prior opinion.
>
> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on

> damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the [*Smith*] decision.

Yang, 750 F. Supp. at 558. Thus, although the court recognized that "[t]he law's application did profoundly impair the Yang's religious freedom[,]" under *Smith*, "this impairment [did not] rise[] to a constitutional level." *Id.* at 560. The Yang's' agony demonstrates that *Smith*'s burden on minority religious adherents can prove staggeringly high.

Many Jews also believe that autopsies are generally religiously prohibited, and Jewish families have suffered the anguish of failing, given the strictures of *Smith*, to prevent autopsies from being performed on their loved ones. *See, e.g.*, *Montgomery v. Cty. of Clinton, Mich.,* 743 F. Supp. 1253, 1259 (W.D. Mich. 1990), *aff'd,* 940 F.2d 661 (6th Cir. 1991) (finding that, because of *Smith*, a Jewish mother could not require the government to demonstrate a compelling need before performing an autopsy on her son)*; Thompson v. Robert Wood Johnson Univ. Hosp.*, *No.* CIV.A. 09-00926 JAP, 2011 WL 2446602, at *8 (D.N.J. June 15, 2011) (autopsy performed on a

Jewish child did not violate his mother's Free Exercise rights because, even if her "ability to exercise her religious beliefs was disturbed," the government action that did so was religiously neutral).

This Court should reconsider *Smith* in order to prevent future religious Americans from suffering such harm without even having the opportunity to explain why the First Amendment should protect them.

C. *Smith*'s assumption regarding the difficulty of administering religious accommodations has proven unfounded, and thus its justification for the harm it inflicted upon religious minorities has been eliminated.

While *Smith* has proven at least as harmful as this court predicted, its justification—the allegedly prohibitive difficulty of applying the Free Exercise Clause to generally applicable laws—has been discredited over the last thirty years. During that time, courts have successfully decided many cases under statutes like the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.§ 2000cc-2. These statutes subject laws, including generally applicable ones, to strict scrutiny whenever they substantially impinge on religious exercise. In other words, where RFRA and RLUIPA apply, courts engage in the exact analysis that *Smith* determined would be excessively

difficult. Although, as in any other area of law, some RFRA and RLUIPA cases present challenging questions, overall, courts have successfully distinguished between meritorious and frivolous claims.[31] *See, e.g.*, *Holt*, 574 U.S. 352 (unanimously granting a Muslim prisoner a religious exemption from a prison grooming policy); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718 (2014) ("[T]he scope of [RLUIPA] shows that Congress was confident of the ability of the federal courts to weed out insincere claims."); *United States v. Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010) (finding a claimed religious belief insincere after examining substantial evidence that it was specifically fabricated as a legal defense); *State v. Cordingley*, 302 P.3d 730, 734 n.3 (Ct. App. 2013) (describing tests that state courts have applied in administering state RFRA laws).

Regardless of whether *Smith*'s calculation was justifiable based on the information before the Court in 1990, that information has changed and so must the calculation. This Court should grant certiorari in order to reconsider *Smith*.

[31] A study of the Tenth Circuit's docket found that, over a five-year period, religious liberty claims made up less than 1% of the cases, and that fewer than half of the plaintiffs obtained any form of relief. See Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 380 (2018).

D. While *Smith* intended to create an easy-to-apply rule that would shift religious accommodation from courts to legislatures, the recent COVID-related litigation and the difficulty encountered in applying *Smith* therein indicates that it did not accomplish that task.

While courts have proven themselves capable of applying the pre-*Smith* rule embodied in statutes like RFRA, they have proven less adept at applying *Smith* itself. *See e.g.*, *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (J. Gorsuch dissenting) ("Smith's rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing."). Recent attempts by state governments, which are not covered by RFRA, to curb religious exercise in response to the COVID 19 pandemic has resulted in a significant uptick in Free Exercise Clause litigation. Contrary to *Smith*'s expectation, adopting such a restrictive rule has not made it easier for courts to decide these cases.

Smith's rule that neutral and generally applicable laws are immune from First Amendment review has led to confusion and uncertainty concerning which laws qualify for that safe harbor. *Compare Tandon*, 141 S. Ct. at 1294 (holding that "regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise") *and Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct.

63, 66 (2020) ("regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.") *with Tandon, 141 S. Ct.* at 1298 (J. Kagan dissenting) ("the law does not require that the State equally treat apples and watermelons") *and Diocese of Brooklyn* 141 S. Ct. at 79 (J. Sotomayor dissenting) (finding that the regulations were neutral because "comparable secular institutions face restrictions that are at least equally as strict").

This Court recently recognized that it had to summarily reject the Ninth Circuit's Free Exercise jurisprudence five times in a brief period. *Tandon*, 141 S. Ct. at 1294. And the Ninth Circuit is by no means alone in recently misapplying *Smith*'s rule. *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 63 (reversing the Second Circuit); *Robinson v. Murphy*, 141 S. Ct. 972, 208 L. Ed. 2d 503 (2020) (reversing the Third Circuit); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (reversing the Tenth Circuit).

Litigation surrounding state responses to the COVID 19 pandemic has exposed yet another way in which *Smith* did not provide the benefits that it promised. Applying *Smith* is at least as difficult as applying traditional strict scrutiny to laws that burden religious exercise. If this Court is going to have to continue deciding Free Exercise cases even with *Smith* left intact, there is no reason for it to continue doing so from a starting point that is so prejudicial to the rights of religious minorities.

II. The Original Meaning Of The Free Exercise Clause Requires Robust Protection Of Religious Minorities.

Smith is not faithful to the original meaning of the Free Exercise Clause. Nothing in the original understanding of the Free Exercise Clause compelled the result in *Smith*—nor did *Smith* ever claim otherwise.[32]

Smith runs contrary to extensive precedent, and it does not make a compelling historic case, or indeed any historic case, explaining why it is appropriate to do so. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ("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."); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (recognizing that the Free Exercise Clause applies to burdens arising as "an indirect result of welfare legislation within the State's general competence to enact"); *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in

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[32] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116-19 (1990) (analyzing the history of the Free Exercise Clause and criticizing *Smith* for "rendered[ing] a major reinterpretation of the Free Exercise Clause without even glancing in" the direction the clause's history); *Id.* at 1152-53 (concluding that the better reading of the Free Exercise Clause's history indicates that it should apply to generally applicable laws).

attaining a permissible end, unduly to infringe the protected freedom.").

Smith's a-historic interpretation of the Free Exercise Clause is further demonstrated by the lengths to which the *Smith* court went in seeking to reconcile its holding with the Court's existing First Amendment precedents. In order to create its harsh new rule without overruling prior cases, *Smith* created the novel doctrine of hybrid rights. 494 U.S. at 882. The Court retroactively announced that prior decisions that purported to apply strict scrutiny to a generally applicable law were actually applying a never before articulated doctrine of "hybrid rights." Under this doctrine, the Free Exercise Clause can somehow piggyback on another Constitutional right in order to allow a plaintiff to challenge a statute that is otherwise immune from Free Exercise Clause scrutiny. The specifics of how this works has never been satisfactorily explained.

Not only does the creation of a hybrid rights doctrine demonstrate *Smith's* ad hoc reasoning, but it has also proven unworkable. The doctrine has almost never resulted in a strict scrutiny analysis of a hybrid rights claim.[33] Some circuits have explicitly rejected

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[33] *Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008) ("No published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim."); *see also, Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 764–65 (7th Cir.2003) (refusing to conduct a hybrid rights analysis because none of the other constitutional claims could independently pass summary judgement); *Henderson v. Kennedy,* 253 F.3d 12, 19

the hybrid rights doctrine. *See, e.g., Leebaert v. Harrington,* 332 F.3d 134, 143–44 (2d Cir.2003); *Kissinger v. Bd. of Trs.,* 5 F.3d 177, 180 (6th Cir.1993). The test has been characterized as "ultimately untenable," *Lukumi*, 508 U.S. 520, 567 (J. Souter concurring), and "illogical," *Kissinger,* 5 F.3d 177, 180 (6th Cir.1993). The fact that Smith needed to invent a new doctrine to accommodate cases that were previously part of this Court's free exercise jurisprudence, *see Smith*, 494 U.S. at 882 (J. O'Connor concurring) ("[W]e have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence."), and that this doctrine has proven unworkable, is further evidence that Smith should be revisited.

(D.C.Cir.2001) (questioning the tenability of a hybrid rights claim because "in law as in mathematics zero plus zero equals zero"); *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999) ("[T]he Court has been somewhat less than precise with regard to the nature of hybrid rights.") (quotation omitted); *but see*, *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019) (allowing a hybrid rights claim to proceed despite noting that "it is not at all clear that the hybrid-rights doctrine will make a real difference"). *See generally* David L. Hudson, Jr. & Emily H. Harvey, *Dissecting the Hybrid Rights Exception: Should It Be Expanded or Rejected?,* 38 U. Ark. Little Rock L. Rev. 449 (2016) (explaining the failure of the hybrid rights doctrine and documenting how lower courts have struggled to create workable approaches to applying hybrid rights).

III. Even If The Court Declines To Reconsider *Smith*, It Should Grant Certiorari To Reaffirm That Laws That Prefer One Religious Group Over Another Are Subject To Strict Scrutiny.

The New York Supreme Court's holding that a law is generally applicable even if it contains "narrowly tailored religious exception[s]" that privilege some religious groups over others, *Roman Catholic Diocese of Albany v. Vullo*, Supreme Court, Appellate Division, Third Department, New York 185 A.D.3d 11 (2020), exacerbates the harms caused by *Smith*.

Smith recognized that insulating neutral and generally applicable laws that burden religious practice from strict scrutiny would relegate accommodation to the political process. *Smith* admitted that this would inevitably "place at a relative disadvantage those religious practices that are not widely engaged in." 494, U.S. at 890. The decision below exacerbates that problem by allowing legislatures—or even governors acting unilaterally—to take steps to prevent religious minorities from binding together with other religious groups to combine their political power in seeking accommodation. Under the lower court's understanding of neutrality, legislatures can isolate disfavored religious groups or denominations by subjecting them to laws that burden their faith while

simultaneously exempting other more popular or politically powerful faiths.

Legislatures could even further isolate disfavored religious beliefs by dividing between different religious organizations within the same faith. Under the narrow religious exemption upheld by the New York Supreme Court, synagogues may qualify for the abortion mandate exemption while other devout Jewish organizations would not. For example, Hatzalah—the largest non-profit ambulance service in the U.S. which was founded by orthodox Jew with religious motivations—would not be covered by the exemption because its purpose is not the inculcation of religious values.[34] *Smith* should not be interpreted to allow legislatures to devise discriminatory religious exemptions that would further divide the already diminished power of minority faiths.

Smith acknowledged that "a nondiscriminatory religious-practice exemption is permitted," 494 U.S. at 890, but a law, such as the one at issue here, that contains exceptions that privilege certain religions that practice their faith in the state's preferred manner is anything but "nondiscriminatory." *See e.g.*, *Larson v. Valente*, 456 U.S. 228 (1982); *Tandon*, 141 S. Ct. 1294. Even under *Smith*, if a state wants to discriminate between different faiths, it is obligated to demonstrate that doing so is necessary to further a compelling government interest. If the State cannot make such a showing, it cannot adopt a divide and

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[34] Chevra Hatzalah. https://hatzalah.org/about/ (last visited May 9, 2021).

conquer approach that will ultimately further "disadvantage those religious practices that are not widely engaged in." *Id.*

Conclusion

This Court should grant certiorari to reconsider *Smith* and adopt a Free Exercise test that is in line with the original public meaning of the First Amendment and more protective of religious minorities. Even if it does not do so, it should grant certiorari to clarify that the decision below misapplied *Smith* in a manner even more disadvantageous to religious minorities than is justified by that case.

Respectfully submitted,

HOWARD SLUGH
Counsel of Record
2400 Virginia Ave N.W.
Apt. C619
Washington, D.C., 20037
(954) 328-9461
Hslugh@JCRL.ORG

Counsel for Amici Curiae

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