No. 21-1143

In the Supreme Court of the United States

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., DR. S., NURSE S., PHYSICIAN LIAISON X.,

Petitioners,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. MARY T. BASSETT, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HER OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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Interest of Amicus Curiae[1]

The Jewish Coalition for Religious Liberty is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. As members of a minority faith that adheres to practices many in the majority may not know or understand, amicus has an interest in ensuring that government actors are prohibited from evaluating the validity of religious objectors' sincerely held beliefs.

Amicus is interested in restoring an understanding of the Free Exercise Clause that offers broad protection for religious liberty. Over the last thirty years, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), has presented such an obstacle to litigating Free Exercise claims that many religious adherents have not even attempted to vindicate their rights in court. When cases have been brought, *Smith* has shielded laws that impose substantial burdens on religious minorities from First Amendment review. Amicus urges this Court to reconsider *Smith* and restore robust religious liberty protections for all Americans.

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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 amicus, its members, and its 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.

Summary of Argument

Just four years ago, this Court explained that "it hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [an objector's] conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018). Unfortunately, as this case demonstrates, many government actors still refuse to follow that direction. This Court should grant certiorari to protect religious minorities by rejecting the fallacy that a person's "own interpretation of his or her own religion must yield to the government's interpretation" of his faith. *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from the denial of certiorari).

While explaining New York's refusal to include a religious exemption in its vaccine mandate, Governor Hochul "expressed her view that religious objections to COVID–19 vaccines are theologically flawed." *Dr. A v. Hochul*, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., dissenting from denial of the application for injunctive relief). She reached this conclusion based on her own beliefs regarding what "God wants" as well as her assertion that religious objectors' beliefs had not been "sanctioned" by religious organizations or leaders. *Id.* at 553-54. Governor Hochul's assertion that legitimate religious beliefs must be sanctioned by religious bodies and align with her understanding of what God wants is particularly ominous for members of minority faiths. This includes Judaism which lacks centralized authority and contains a variety of

divergent practices and beliefs—many of which differ from Governor Hochul's.

When officials cast aspersions on religious adherents' sincerely held beliefs as Governor Hochul did here, it imperils Jews and other religious minorities whose practices those officials might not recognize or understand. Consider the case of *Ben-Levi v. Brown*, in which a prison refused to let Jewish prisoners study the bible in the same manner as other inmates. The prison attempted to justify this discrimination by claiming that it was protecting Judaism by enforcing a Jewish law requiring a quorum of ten men to study bible. *Ben-Levi,* 136 S. Ct. at 933-34, (Alito, J., dissenting from the denial of certiorari). The prison was mistaken, no such requirement exists. Unfortunately, this frolic into amateur and improper theologizing led the prison to discriminate against a Jewish prisoner. The problem is not only that the prison created its own religious commandment, it's that it engaged in this impermissible theological inquiry in the first place.

Amicus assumes that this was a good-faith mistake that occurred because the prison misinterpreted Jewish law. It nonetheless highlights the danger inherent in government actors judging the validity of adherents' sincere religious beliefs. *W. Virginia State Bd. of Educ. v. Barnett*e, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

Government officials have neither the expertise nor the authority to engage in such an inquiry.

If the government can inflict tremendous harm on religious adherents by innocently misinterpreting their faith, it can do substantially worse harm when it acts intentionally. The record in this case, "gives rise to more than a slight suspicion that New York acted out of animosity [toward] or distrust of unorthodox religious beliefs and practices," and it "practically exudes suspicion of those who hold unpopular religious beliefs." *Dr. A*, 142 S. Ct. at 554. (Gorsuch, J., dissenting from the denial of the application for injunctive relief) (internal quotation marks omitted). The Court should grant certiorari to reaffirm that the First Amendment prohibits government actors from evaluating the validity of religious beliefs regardless of their intentions.

This case also presents the Court with an opportunity to reevaluate *Employment Div., Dep't of Human Res. of Oregon v. Smith*, a case that deprives religious minorities of the full protection promised by the First Amendment. In *Smith*, the Court exempted generally applicable laws from Free Exercise review. It frankly acknowledged that doing so would disproportionately harm "those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. Unfortunately, that was an accurate prediction.

This is not surprising. Government officials are more likely to inadvertently burden lesser-known religions than faiths that enjoy widespread practice and support. Under *Smith*, a hypothetical generally

applicable law that banned practices necessary for kosher slaughter or Jewish Sabbath observance would escape Free Exercise scrutiny. An interpretation of the First Amendment that leaves Jewish Americans so vulnerable betrays America's proud history of religious pluralism and is inconsistent with the original meaning and purpose of the First Amendment.

This Court should reconsider *Smith* for three reasons. First, post-*Smith* evidence confirms that a diminished Free Exercise Clause harms 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). Second, this Court now has substantial evidence that it is possible to efficiently adjudicate claims for religious exemptions from generally applicable laws. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015). Third, recent litigation demonstrates that *Smith* failed to simplify religious liberty litigation. *See, e.g., Tandon v. Newsom,* 141 S. Ct. 1294 (2021). Far from simplifying matters, *Smith*'s supposed bright-line rule distinguishing between generally applicable laws and those that single out religious practice has fostered confusion and disagreement. With *Smith*'s unintended consequences multiplying, its fears alleviated, and its alleged benefits never materializing, this Court should reconsider *Smith* and restore a more robust and historically grounded understanding of the Free Exercise Clause.

Argument

I. This Court Should Grant Certiorari in Order to Reaffirm That the First Amendment Protects Religious Minorities by Prohibiting Government Actors From Judging the Theological Validity of Their Sincerely Held Beliefs.

A. Governor Hochul's explanation regarding why New York removed the vaccine mandate's religious exemption demonstrates that the state impermissibly judged the theological merits of religious objectors' beliefs.

At a September 15, 2021 press conference, Governor Hochul explained that New York "left off" a religious exception to the vaccine mandate because the state considered religious objections theologically unfounded.[2] The Governor responded to a question regarding the missing religious exemption by stating that,

> To the extent that there's leadership of different religious organizations that have spoken, and they have, I'm not aware of a sanctioned religious

[2] *See* N.Y. State Governor's Office, *Governor Hochul Holds Q&A Following COVID-19 Briefing* (Sept. 15, 2021) https://perma.cc/5DY6-S7KM (last visited Mar. 9, 2022).

> exemption from any organized religion. In fact, they're encouraging the opposite. They're encouraging their members, everybody from the Pope on down is encouraging people to get vaccinated.

Id. In a speech she delivered later that day, the Governor asserted that religious objectors to the State's vaccine mandate "aren't listening to God and what God wants."[3]

These statements might make sense if America were religiously uniform or only recognized a small number of permissible faiths. Fortunately for religious minorities including Jewish Americans, that is not the case. As this Court has recognized, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642; *Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("the government, if it is to respect the Constitution's guarantee of free exercise, cannot . . . act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices"). That tradition has allowed America to serve as a home to adherents of minority faiths—no matter how unusual or unpopular their beliefs or practices may seem to the majority.

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[3] N.Y. State Governor's Office, *Governor Hochul Attends Service at Christian Cultural Center* (Sept. 26, 2021) https://perma.cc/KP48-4YVK (last visited Mar. 9, 2022).

The Court should grant certiorari to affirm that nothing has changed, and that it is still impermissible for government actors to reject religious exemptions "based on nothing more than fear and anger at those who harbor unpopular religious beliefs." *Dr. A,* 142 S. Ct. at 559 (Gorsuch, J., dissenting from the denial of the application for injunctive relief).

B. Governor Hochul's comments are particularly troubling for Jewish Americans and other religious minorities which do not possess a single governing body and allow for a variety of theologically valid opinions.

Governor Hochul cited the supposedly uniform position of religious leadership "from the Pope on down" in explaining the state's decision to reject a religious accommodation.[4] Obviously, Jewish Americans do not conform their faith to the Pope's teachings. However, the Governor's misconception goes well beyond that glaring faux pas. Her suggestion that, in order to be a valid theological position, there needs to be a "sanctioned religious exemption" from some kind of "organized" body highlights the dangers that the First Amendment is intended to avoid.

Judaism does not have a central authority; there is no governing body that can settle doctrinal questions. Different groups within Judaism

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[4] N.Y. State Governor's Office*, supra* note 2.

(Sephardic, Ashkenazi, and Yemenite, for example) maintain different traditions—none of them speak for the single "true Judaism." For example, there is a centuries old disagreement between Ashkenazic and Sephardic Jewish communities over which foods Jews are permitted to eat on Passover.[5] It would be unconscionable for the military to refuse to provide a Jewish soldier a meal that satisfies his religious obligations simply because a different Jewish tradition approves of other options. A minority of Jewish Americans adhere to a stringent position that forbids eating matzah that has contacted liquid.[6] If even a single Jewish soldier followed this custom, the military could not disregard his request for an accommodation simply because other Jewish authorities did not believe that Judaism required it. These hypotheticals resemble what New York did in this case. It discriminated against religious adherents who disagree with the views of religious leaders preferred by the State.

Unfortunately, Jews have already experienced the consequences of the government adjudicating the "proper" way to practice Judaism. For example, in *Ben-Levi v. Brown*, the lower courts determined that a prison did not discriminate against a Jewish prisoner when it denied Jews—and only Jews—the right to engage in bible study. 136 S. Ct. at 933-34, (Alito, J., dissenting from the denial of certiorari). The district court found that the prison's denial was

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[5] Jeffrey Spitzer, *Kitniyot: Not Quite Hametz,* MYJEWISHLEARNING.COM, https://bit.ly/3tGPjGB (last visited Mar. 9, 2022).

[6] *"Gebrokts": Wetted Matzah*, CHABAD.ORG, https://bit.ly/3tRh4wi (last visited Mar. 9, 2022).

intended to protect "the purity of the doctrinal message and teaching" of Judaism, which, according to the prison, "requires a quorum or the presence of a qualified teacher for worship or religious study." *Id.* (internal quotation marks and citations omitted). Because neither of these supposedly necessary conditions were met, the prison denied Ben-Levi's request to study the bible. *Id.* The District Court concluded that such a refusal did not burden the prisoner's religious exercise. *Id.*

> In essence, [the prison]'s argument—which was accepted by the courts below—is that Ben-Levi's religious exercise was not burdened because he misunderstands his own religion. If Ben-Levi truly understood Judaism, respondent implies, he would recognize that his proposed study group was not consistent with Jewish practice and that respondent's refusal to authorize the group was in line with the tenets of that faith.

Id. at 933 (internal quotation marks and citations omitted). The quorum requirement cited by the prison does not exist. Most likely, the district court confused the requirement of having ten adult men present to publicly read from a Torah scroll with a non-existent obligation to have ten men present to study the bible in any fashion. This religious misunderstanding, which led to discrimination against a Jewish prisoner and the deprivation of his First Amendment rights, highlights why government actors must not act as theologians.

Ben-Levi is not an isolated incident. In *Ashelman v. Wawrzaszek*, a prison unsuccessfully attempted to satisfy its religious liberty obligations by feeding Orthodox Jews "vegetarian" and "nonpork" meals rather than meals certified kosher. 111 F.3d 674, 675 (9th Cir. 1997), as amended (Apr. 25, 1997). The prison claimed that its plan was permissible because "the religious diet requirement for most inmates is met by the vegetarian or pork-free diet." *Id.* at 676. The prison's claim, that the food was kosher enough because it was sufficient for most objectors, parallels Governor Hochul's claim that objections to New York's vaccine mandate are illegitimate because most religious New Yorkers allegedly do not share them.

In another misadventure, a district court dictated to rabbis how they should atone for their sins on one of the holiest days of the year. Many Jews observe a ritual called Kapparot prior to the High Holidays. Some Jews interpret this ritual to require the ceremonial use of chickens, while others believe that it can be fulfilled by donating money to charity. Both traditions have been practiced for centuries. Nonetheless, animal rights activists have repeatedly brought lawsuits trying to prevent Jews from performing this ritual by slaughtering chickens. They have argued that banning the use of chickens does not burden Jews' faith because donating money is theologically sufficient. *See, e.g., United Poultry Concerns v. Chabad of Irvine*, No. CV 16-01810-AB (GJSX), 2017 WL 2903263, at *6 (C.D. Cal. May 12, 2017). Occasionally, courts have accepted the invitation to adjudicate this religious dispute. In one case, a judge asked, "[w]hat's the harm if the chickens

are not butchered but this evening bags of coins are used in its stead?" *See id.*, Trans. Of Prelim. Injunction Hearing at 37 (question by the Court). http://bit.ly/2Ml2TMH.

What happened next highlights why this Court has concluded that such a line of questioning is one that "federal courts have no business addressing." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). The district court enjoined the performance of this centuries-old religious tradition.[7] By the time the court dissolved the temporary restraining order, it was too late to perform the ritual that year. The rabbis suffered irreparable harm because a government actor decided to second-guess their understanding of their own faith.

The current case is even more troubling than the situations outlined above. In each of those cases, Amicus presumes that the government entity was acting in good faith and simply misunderstood the relevant Jewish law. The possibility of such confusion would be reason enough to prohibit government agents from engaging in theological disputation when formulating, enforcing, or interpreting the law. Unfortunately, the record in this case, "gives rise to more than a slight suspicion that New York acted out of animosity [toward] or distrust of unorthodox religious beliefs and practices" and "practically exudes suspicion of those who hold unpopular religious beliefs." *Dr. A*, 142 S. Ct. at 554. (2021) (Gorsuch, J.,

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[7] Josh Blackman, *Chabad's Ritual is a Clear Example of the Free Exercise of Religion*, LOS ANGELES TIMES, Oct. 20, 2016, https://lat.ms/3t7K7wh (last visited Mar. 13, 2022).

dissenting from the denial of the application for injunctive relief) (internal quotation marks and citations omitted). As much trouble as government actors can cause when they innocently misunderstand religious practices, they can do far more harm if they act out of animus as New York seemed to do here.

New York may be able to prove that it has a compelling interest in restricting exemptions to mandatory COVID 19 vaccinations. However, it cannot avoid having to justify denying religious exemptions by engaging in amateur theologizing and asserting that religious objectors are not "doing what God wants." This Court should grant certiorari to reaffirm that the Constitution protects religious minorities by prohibiting the government from parsing religious doctrine.

II. The Court Should Grant Certiorari and 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.

Petitioners have requested that this Court consider whether *Employment Division v. Smith* should be overturned. Amicus urges the Court to do so. In *Fulton v. City of Philadelphia, Pennsylvania*, a majority of the Justices on this Court questioned

Smith's continuing validity. 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring joined by Kavanaugh, J.); *Id.* at 1883 (Alito, J., concurring joined by Thomas, J., and Gorsuch, J.). This Court will likely reconsider *Smith*, and amicus urges it to do so sooner rather than later in order to restore robust and appropriate First Amendment protections to religious minorities.

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

Religious minorities have borne the brunt of *Smith*'s holding. *Smith* recognized that immunizing generally applicable laws from Free Exercise scrutiny "will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. But it claimed that such harms "must be preferred" to the difficulty of exposing generally applicable laws to Free Exercise scrutiny. *Id.* This Court should reevaluate that preference considering intervening events. This Court should reevaluate that preference considering intervening events.

The Court's prediction of harm to religious minorities has proven accurate. Cases following *Smith* involving Jews,[8] Muslims,[9] Native

[8] *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).

[9] *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).

Americans,[10] Buddhists,[11] Hmong,[12] and members of other faiths,[13] confirm that *Smith* left religious minorities vulnerable. The problem is not that the religious adherents were denied accommodations in those cases, it is that, under *Smith*, governments could deny them accommodations without satisfying strict First Amendment scrutiny.

One post-Smith study explained that "the consequences of *Smith* were swift and immediate."[14] In fact, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*."[15] Additionally, "the percentage of favorable decisions for Free Exercise cases dropped

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[10] *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)

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

[12] *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).

[13] *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).

[14] 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).

[15] *Id.* at 242.

from over 39 percent to less than 29 percent following *Smith* . . . ."[16] Referring to *Smith*, four Justices recently acknowledged that religious Americans are dissuaded from litigating Free Exercise claims "due to certain decisions of this Court." *Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019)* (Alito, J., statement respecting denial of certiorari).

Over the last thirty years, the political branches,[17] the states,[18] and this Court[19] 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*. *See Kennedy*, 139 S.Ct. at 637 (Alito, J., statement respecting denial of certiorari). Only this Court can eliminate the harms caused by *Smith*'s overly narrow interpretation of the First Amendment.

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[16] *Id.*at 248.

[17] 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").

[18] 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 Mar. 9, 2021).

[19] *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).

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 religiously neutral and generally applicable laws that unintentionally or incidentally burden religious exercise. Unfortunately for members of minority religions, governments are more likely to inadvertently burden minority religious practices than more common observances. In other words, it is more probable that a government actor will innocently pass a law that burdens a little-known Jewish practice than a well-known Christian tradition.

Consider attempts by some animal rights groups to have courts enjoin the lesser-known Jewish atonement ritual of Kapparot. *See, e.g., United Poultry*, 743 Fed. Appx. 130. When seeking injunctive relief against the performance of Kapparot, litigants do not rely on statutes overtly targeting Judaism. Rather, they 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 ritual. Unfortunately, that does not prevent such laws from being used to attack ancient Jewish practices.

Plaintiffs in these cases have bluntly stated that under *Smith*, "[t]he First Amendment does not protect [Chabad's]" acts from generally applicable laws. [20] Ironically, under *Smith*, the court could not scrutinize whether the state had a compelling reason to burden religious exercise precisely because legislators never considered that the law might impact religious conduct. One might think that judicial scrutiny would be particularly beneficial in instances where the legislature failed to fully consider the effects that a law might have on minority religious adherents. Regrettably for Jewish Americans, that is exactly the opposite of what *Smith* often requires.

In one instance, a court cited *Smith* as the reason that a Jewish police officer had no Free Exercise right to wear a traditional Jewish head covering.[21] The police department's ban on head coverings was religiously neutral and generally applicable, 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."[22] The woman simply wanted to be placed in a facility that

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

[21] *Riback v. Las Vegas Metro. Police Dep't*, No. 2:07CV1152RLHLLRL, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008).

[22] *Shagalow v. State, Dep't of Human Servs.*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006).

would enable her to observe the Sabbath and Kosher laws.[23] In a number of cases, courts have held that Jewish children could be autopsied over their parents' religious objections because the laws requiring such autopsies were immune from scrutiny under *Smith*.[24] 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.[25]

This is not to say that plaintiffs necessarily should have won each of those cases. But 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.

There are many other areas where a conflict between Jewish practices and a generally applicable law might arise in the future. Many Jews understand

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[23] *Id.* at 383.

[24] *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).

[25] *Aiello v. Matthew*, No. 03-C-0127-C, 2003 WL 23208942, at *2 (W.D. Wis. Apr. 10, 2003).

Jewish law to prohibit wearing a garment containing a mixture of wool and linen.[26] If a public school were to require students to wear uniforms made of those fabrics, that general applicable law would impose a substantial burden on Jewish students.[27] San Francisco and several European countries have discussed banning circumcision.[28] Belgium banned ritual slaughter, a process without which meat cannot be kosher.[29] *Smith* would likely prevent courts from applying strict scrutiny to similar enactments despite the fact that they would create significant burdens for American Jews.

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

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

[27] 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).

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

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

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 dissipated 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 burden religious exercise. In other words, where RFRA and RLUIPA apply, courts engage in the exact analysis that *Smith* speculated would be excessively difficult. Although, as in any other area of law, some RFRA and RLUIPA cases present challenging questions, courts have successfully distinguished between meritorious and frivolous claims.[30] *See, e.g.*, *Holt*, 574 U.S. 352 (unanimously granting a Muslim prisoner a religious exemption from a prison grooming policy); *Burwell*

[30] 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).

573 U.S. at 718 ("[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 "preference" 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*.

D. Recent COVID-related litigation and the difficulty encountered in applying *Smith* therein demonstrates that *Smith* failed to create an easy-to-apply rule that would shift religious accommodation from courts to legislatures

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) (Gorsuch, J., 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 have resulted in a significant uptick in Free Exercise 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 (Kagan, J., dissenting) ("the law does not require that the State equally treat apples and watermelons") *and Diocese of Brooklyn* 141 S. Ct. at 79 (Sotomayor, J., dissenting) (finding that the regulations were neutral because "comparable secular institutions face restrictions that are at least equally as strict").

In fact, this case itself demonstrates the difficulty of applying *Smith*. The Second Circuit held that the vaccine mandate was generally applicable even though it permitted exemptions for secular reasons and denied them for religious reasons. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 284

(2d Cir.), *opinion clarified,* 17 F.4th 368 (2d Cir. 2021).

This Court recently recognized that it had to summarily reverse 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 getting reversed for 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).

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 difficult 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.

III. The Original Public Meaning of the Free Exercise Clause Provides Robust Protection to Religious Minorities.

Nothing in the original public meaning of the Free Exercise Clause compelled the result in *Smith*. *See e.g.*, *Fulton,* 141 S. Ct. at 1882 (Barrett, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers

nothing more than protection from discrimination."). Nor did *Smith* ever claim otherwise. *Id.* at 1894 (Alito, J., concurring) ("*Smith*, however, paid shockingly little attention to the text of the Free Exercise Clause.").[31]

The original public meaning of the First Amendment was that it protected religious adherents from laws "forbidding or hindering unrestrained religious practices or worship." *Fulton,* 141 S. Ct. at 1896 (Alito, J., concurring). The Court should grant certiorari to restore that robust protection to the religious minorities who need it most.

Conclusion

This Court should grant certiorari in order to reaffirm that government actors are not permitted to judge the validity of adherents' sincere religious beliefs. Additionally, the Court should take this opportunity to reconsider *Smith* and adopt a Free Exercise test that adheres to the original public meaning of the First Amendment.

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[31] *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).

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