No. 22-942

In the Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR STATE OF WASHINGTON, ET AL.,

Respondents.

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

BRIEF OF AMICI CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY AND ISLAM & RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

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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.

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute serves as a Muslim voice for religious freedom grounded in the traditions of Islam. To this end, the IRF engages in research and education, and advocates for the right of everyone to believe, speak, and live in accord with their faith.

Amici have an interest in restoring a robust understanding of the Free Exercise Clause. That provision is uniquely important to members 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 an obstacle to litigating Free Exercise claims that many religious adherents have not even attempted to vindicate their rights. When such cases have been brought, *Smith* has shielded numerous laws that impose substantial burdens on religious minorities from First Amendment review. Amici urge this Court to reconsider *Smith* in order to help ensure religious liberty 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 *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.

Summary of Argument

Thirty years ago, this Court decided that it "preferred" to leave religious Americans vulnerable rather than to apply rigorous scrutiny to every law that burdened religious exercise. *Smith*, 494 U.S. at 890. In order to avoid having to decide such cases, this Court held that generally applicable laws that substantially burden religious exercise usually do not implicate the First Amendment. 494 U.S. at 876. This "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*).

The *Smith* Court acknowledged that its decision would disproportionately harm religious minorities. 494 U.S. at 890. Unfortunately, that was the one prediction that *Smith* got right. As *Smith* foresaw, its holding has disproportionately harmed "those religious practices that are not widely engaged in." *Id.* at 890. In other words, religious minorities' practices.

This is not surprising. Generally applicable laws are more likely to burden lesser-known religions than faiths that enjoy widespread practice and support. Under *Smith*, a hypothetical "generally applicable" law that banned practices necessary for Jewish Sabbath observance would escape Free Exercise Clause scrutiny. A law prohibiting burial without a casket or burial vault would prevent Muslims from laying their loved ones to rest in accord with Islam's requirements. Laws prohibiting ritual slaughter or the circumcision of infant males would render key

aspects of both Jewish and Muslim religious practice impossible. And yet, all of those laws might be insulated from constitutional scrutiny under *Smith*. An interpretation of the First Amendment that leaves Jewish and Muslim 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 evidence that has accumulated over the last thirty years undermines *Smith*'s foundations and rebuts its conclusion. This Court should grant certiorari in order to 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). 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.

The lower court's decision in this case highlights *Smith*'s harms. Washington imposed a substantial

burden on the plaintiff's religious exercise related to sexuality and identity. Similar claims could have been brought by a Jewish or Muslim plaintiff. *E.g.,* Complaint, *Dr. David Schwartz v. The City of New York,* 1:19-CV-00463 (E.D.N.Y. Jan. 23, 2019) ECF No. 1. (An Orthodox Jewish psychotherapist sued to enjoin a law that restricted his ability to provide counseling related to same-sex attraction or gender identity.).

Nonetheless, the lower court ruled against the plaintiff after a perfunctory review of his Free Exercise Claim. Once the lower court found that Washington's law was generally applicable, *Smith* allowed the state to continue imposing a substantial burden on the plaintiff's religious exercise without having to justify that burden under strict constitutional scrutiny.

The lower court refers to the plaintiff's Free Speech claim as his "primary challenge." But why should that be the case? Why should his Free Exercise challenge get second billing? It's because that is what *Smith* does, it turns the Free Exercise Clause into a second class right compared to the other rights that Americans enjoy. Under *Smith*, the Free Exercise Clause is effectively reduced to a mere nondiscrimination provision rather than a robust protection of every American's right to practice his or her faith. That situation is not demanded by the text, history, or tradition of the First Amendment. This Court should take the opportunity to correct the mistake that it made in *Smith*.

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.

Petitioner has requested that this Court consider whether *Employment Division v. Smith* should be overturned. Amici urge 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* eventually, and amici urges it to do so sooner rather than later in order to restore 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." 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.

The prediction of harm to religious minorities has proven accurate. Cases following *Smith* involving Jews,[2] Muslims,[3] Native Americans,[4] Buddhists,[5] Hmong,[6] and members of other faiths,[7] confirm that *Smith* left religious minorities vulnerable. The problem is not that the religious adherents were

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[2] *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).

[3] *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).

[4] *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)

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

[6] *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).

[7] *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).

denied accommodations in those cases, it is that, under *Smith*, governments could deny accommodations without satisfying strict First Amendment scrutiny. Perhaps the government could have demonstrated a compelling need to burden religious adherents' exercise of their faith in some of the cases cited, but under *Smith*, it succeeded without even having to try.

One post-Smith study explained that, "the consequences of *Smith* were swift and immediate."[8] In fact, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*."[9] Additionally, "the percentage of favorable decisions for Free Exercise cases dropped from over 39 percent to less than 29 percent following *Smith* . . . ."[10] 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*, 139 S.Ct. at 637 (Alito, J., statement respecting denial of certiorari).[11]

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[8] 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).

[9] *Id.* at 242.

[10] *Id.*at 248.

[11] Rene Reyes, *The Fading Free Exercise Clause*, 19 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 725 (2011) ("decision to downplay the Free Exercise Clause was perfectly understandable [since] the Clause no longer carries much doctrinal weight and would likely not have lent much help to [the petitioner's] cause ... Such is the state of contemporary Free Exercise Clause jurisprudence [after *Smith*]. Unless the controversy could be

Over the last thirty years, the political branches,[12] the states,[13] and this Court[14] have attempted to ameliorate *Smith*'s consequences. However, those efforts have failed to restore the 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 *Smith's* harms by directly reconsidering its holding.

B. Members of minority faiths such as Judaism and Islam are 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

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characterized as a speech case, the government had substantial freedom to discriminate against religious groups and activities ... In short, the Free Exercise Clause may well have become doctrinally otiose").

[12] 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").

[13] 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 Apr. 25, 2023).

[14] *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).

neutral and generally applicable laws that burden religious exercise. Legislators are more likely to pass generally applicable laws that inadvertently burden minority religious practices than more common religious observances. In other words, it is more probable that a government actor will innocently pass a law that burdens a little-known Jewish or Muslim practice than a well-known Christian practice.

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, 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.

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* requires. Plaintiffs in these Kapparot cases have bluntly stated that under *Smith*, "[t]he First Amendment does not protect [Chabad's]" acts from such generally applicable laws.[15]

We could offer many similar examples. A court once cited *Smith* as the reason that a Jewish police officer had no Free Exercise right to wear a traditional Jewish head covering.[16] 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."[17] The woman simply wanted to be placed in a facility that would enable her to observe the Sabbath and Kosher laws.[18] 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 under

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

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

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

[18] *Id.* at 383.

Smith.[19] 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.[20]

Perhaps the most shocking example comes from Yeshiva University's ongoing litigation. Emergency Application for Stay Pending Appellate Review, *Yeshiva University v. YU Pride Alliance*, 2022 WL 4287266 (U.S., Aug. 29, 2022). Yeshiva University ("YU") is the most prominent Modern Orthodox Jewish college in the United States. It is dedicated to teaching Judaism to the next generation to ensure the continuity of Orthodox Judaism in America. Plaintiffs currently suing the university claim that New York's Human Rights Law requires the school to officially recognize their gay pride club. Because of *Smith*, the school's response that doing so would burden its religious exercise has fallen on deaf ears.

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[19] *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).

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

The plaintiffs are attempting to use the lawsuit to transform the core of the Free Exercise of Judaism— teaching the precepts of the faith to the next generation—and they are not shy about it. The plaintiffs are attempting to force YU to send a message that their views on Judaism and Sexuality are consistent with the school's teachings. *Id.* at 13. The plaintiffs admit that they hope to use the lawsuit to cause "cultural changes" within YU and the larger Orthodox Jewish community in America. *Id.* at 13, 24-25.

This case is a clear example of a deliberate attempt to use the state's power to undermine religious exercise. One might expect that the Free Exercise Clause would play a central role in helping the Orthodox Jews who run YU rebuff such an attack on their faith. Unfortunately, under *Smith*, that is not necessarily the case.

The trial court ruled in favor of the Plaintiffs without applying exacting First Amendment scrutiny. It did not require the plaintiffs to show that the government had a compelling need to intervene in how rabbis run a religious school. No, the court simply cited *Smith*, and noted that "the First Amendment does not protect an individual from valid and neutral laws of general applicability, even when those laws forbid or compel conduct which goes against the grain of a religion." *Alliance v. Yeshiva University*, No. 154010/21, 2022 WL 2158381, at *6 (N.Y. Sup. Ct. June 14, 2022). The appellate court similarly ruled against Yeshiva University because New York's statute was "both neutral and generally applicable."

YU Pride All. v. Yeshiva Univ., 211 A.D.3d 562, 564, 180 N.Y.S.3d 141, 145 (2022). Because of *Smith*, plaintiffs faced minimal judicial scrutiny while wielding the law as a bludgeon to force an Orthodox Jewish college to override Rabbinic decisions regarding how best to teach the faith to Jewish students. Even the *Smith* court could not possibly have "preferred" such an outcome.

This is not to say that religious adherents 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 religious Americans' exercise of their faith. Because of *Smith*, the government faced no such obligation.

There are many other areas of Judaism where a conflict between Jewish practices and a generally applicable law might arise in the future. Many Jews understand Jewish law to prohibit wearing a garment containing a mixture of wool and linen.[21] If a public school were to require students to wear uniforms made of those fabrics, that religiously neutral law would impose a substantial burden on Jewish students.[22] San Francisco and several European

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[21] *Shatnez-Free Clothing*, Chabad.org, goo.gl/RZRcSm; Leviticus 19:19; Deuteronomy 22:9-11.

[22] 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).

countries have discussed banning circumcision.[23] Belgium banned ritual slaughter, a process without which meat cannot be kosher.[24] *Smith* might prevent courts from applying strict scrutiny to such enactments despite the fact that they would create significant burdens for American Jews.

Bans on circumcision and ritual slaughter would inflict devastating harm on Muslims just as they would on Jews. There are other examples of laws on the books now that impinge on Muslim religious practice but, if subject to a constitutional challenge, would elude strict scrutiny because they are arguably generally applicable.

For example, Islamic religious practices proscribes laying Muslim dead to rest in coffins, and this proscription extends to burial vaults and grave liners. Yet, dozens of local jurisdictions around the country mandate that all bodies must be buried with grave liners.[25] This forces Muslims to bury their dead under conditions that do not conform to their religious practices.[26]

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[23] Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California,* NYTimes.com, June 4, 2011. https://nyti.ms/2WJmDNM.

[24] Milan Schreuer, *Belgium Bans Religious Slaughtering Practices, Drawing Praise and Protest,* NYTimes.com, Jan. 5, 2019, https://nyti.ms/2WK6nMx.

[25] CANTON, ILL, CITY CODE Ch. 8, §8-8-4 (1975); SAPULPA, OAK., CODE OF ORDINANCES, § 11-382 (2019); WAYLAND, MASS., RULES AND REGULATIONS #8 (2014).

[26] Ko Lyn Cheang, *After Life: Muslim Deathcare in New Haven*, YALEDAILYNEWS.COM, Nov. 22, 2019, tinyurl.com/hw7tav9h.

Islamic rules of modesty require observant Muslim women to dress in clothing that covers parts of their body that non-relatives are not allowed to see. This includes hijab but also, according to mainstream interpretation, the entire body except for face and hands. The same principle of modesty also prevents Muslim women from wearing tight-fitting clothing that reveals the shape of their bodies, even if it nominally covers them.[27] However, countless municipalities have passed ordinances requiring patrons of public swimming pools to wear clothing that exposes parts of the body that Muslim women are prohibited by their religion from exposing. This prevents Muslim women not only from swimming, but from taking their children to public swimming pools, since such regulations apply to anyone who even steps on the pool deck.[28]

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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[27] Mufti Muhammad ibn Adam, *A Detailed Exposition of the Fiqh of Covering One's Nakedness (awra),* SEEKERSGUIDANCE.ORG, Sept. 19, 2010, https://tinyurl.com/4je86pmk.

[28] *See*, Michael Gaio, *Muslim Woman Denied Access to Public Pool Due to Attire*, ATHLETIC BUSINESS, Oct. 9, 2014, https://tinyurl.com/mr3wcacu.

C. *Smith*'s assumption regarding the difficulty of administering religious accommodations has proven unfounded, and thus its justification for the harm *Smith* 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.[29] *See, e.g.*, *Holt*, 574 U.S. 352 (unanimously granting a Muslim prisoner a religious

[29] 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).

exemption from a prison grooming policy); *Burwell* 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").

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 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.

II. The Original Meaning Of The Free Exercise Clause Requires Robust Protection Of Religious Minorities, And It Is Not Merely A Non Discrimination Provision.

"As interpreted in *Smith*, the [Free Exercise] Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct." *Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring). Contrary to *Smith*, however, "the Framers did not intend simply to prevent the government from adopting laws that discriminated against religion … [T]he historical record indicates that they believed that the Constitution affirmatively

protects religious free exercise and that it limits the government's ability to intrude on religious practice." *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting).

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.").

The original public meaning of the First Amendment was that it protected religious adherents from laws "forbidding or hindering unrestrained religious practices or worship." *Id.* at 1896 (Alito, J., concurring); 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 of 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).

There are some who argue that exempting religious practices from generally applicable laws

amounts to unjustifiably "privileging" people of faith. However, as a unanimous Court noted in *Hosanna-Tabor*, "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189. This applies with equal force to the rights of religious individuals. *See Smith*, 494 U. S. at 901-02 (O'Connor, J., concurring) ("As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity."). Hence, there is nothing unjust or even unusual about a court's recognition that an otherwise sound law violates the Constitution in certain circumstances. As Justice Alito has pointed out, "[t]he granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, and cases holding generally applicable laws unconstitutional as applied are unremarkable." *Fulton*, 1916-17 (Alito, J., concurring) (citation omitted).

The Court should grant certiorari to restore robust protection to the religious minorities who need it most.

III. *Smith*'s Harms Are On Display In This Case; *Smith* Prevented The Lower Court From Applying Strict Scrutiny To A Law That Burdens The Faith Of Millions Of Americans Belonging To Diverse Faiths.

The lower court cited *Smith* in explaining why Washington could burden Tingley's religious exercise without having to prove that its law is necessary to

further a compelling governmental interest. The plaintiff in this case happened to be a Christian, but Jews and Muslims also have substantial religious interests in matters concerning sexuality, identity, and the family.

An Orthodox Jewish psychotherapist, Dr. David Schwartz, recently challenged a New York City ordinance similar to the one at issue in this case. He sought to continue serving religious patients who sometimes request counseling regarding lessening same-sex attraction or strengthening opposite-sex attraction. *Schwartz Complaint*, 1:19-CV-00463, ECF No. 1 at 13-15, 19. Dr. Schwartz explained that his patients' "personal goals relating to sexuality, marriage, and family … as well as their views about morality, human nature, and the possibility of change, are often deeply informed by their religious beliefs." *Id.* at 3. "The majority of patients who seek Dr. Schwartz's assistance to reduce unwanted same-sex attraction and develop or increase opposite-sex attraction" are Jews who are "motivated at least in part by a desire to live in accordance with the teachings of their faith." *Id.* at 19. That lawsuit ended when New York repealed its ordinance. But, if it had not, *Smith* would have been an obstacle for Schwartz in much the same manner that it is for Tingley in this case.

While New York City repealed its law, Jewish doctors might face a similar situation in the future. The first commandment in the Torah is to "be fruitful and multiply" which is traditionally interpreted as a commandment to have at least two children. Genesis 1:28, 9:7. This obligation is supposed to be fulfilled in

the context of opposite-sex marriage, which is also seen as a religious obligation.[30] And as one Jewish women's organization put it, Jewish laws mandating marriage in addition to an obligation to have children, are "the paradigm *mitzvot* (commandments) because they reflect the uniquely Jewish approach to sanctifying the physical world through *mitzvah* observance."[31] They "are the most dramatic examples of the phenomenon of elevating the physical world to the heights of the spiritual."[32] Because same-sex attraction or a lack of opposite-sex attraction is in tension with a successful opposite-sex marriage, it is very possible that a Jewish person would seek counsel and advice aimed at bolstering opposite-sex attraction and diminishing same-sex attraction.

The same concern exists when it comes to observant Muslims. In mainstream Islam, sexual activity with members of the same sex is sinful.[33] Moreover, the Prophet Muhammad emphasized procreation as a foundational aim of marriage, and he urged believing men to "marry women who are loving

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[30] Yisroel Dovid Klein, *"Be Fruitful and Multiply" – The Commandment to Raise Children*, Chabad.org, https://tinyurl.com/3y67xvej.

[31] Rabbi Avraham Peretz Friedman, *Martial Intimacy*, YOATZOT.ORG, https://www.yoatzot.org/intimacy/648/.

[32] *Id.*

[33] M. Vaid, *Can Islam Accommodate Homosexual Acts? Qur'anic Revisionism and the Case of Scott Kugle*, 34(3) AMERICAN JOURNAL OF ISLAM AND SOCIETY, 45–97 (2017).

and fertile."[34] The seminal theologian and jurist Abu Hamid al-Ghazali (d. 1111) explained:

> The first advantage of marriage is procreation: it is its foundation, and marriage was instituted on its account. The aim is to sustain posterity so that the world would not want for humankind… Everyone who refrains from marriage neglects tilling, wastes away (his) seed, does not use the prepared instruments which God has created, and violates the aim of nature and the wisdom implied in the evidence of creation written upon the organs…[35]

As a result, many Muslims who experience sexual attraction to members of their own sex seek to curb such impulses.[36] One online forum dedicated to helping Muslims do this currently has 1077 members.[37] As a result, Muslim mental health professionals have been put in the position of having to advise other Muslims how to live with their

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[34] Abu Dawud Sulayman Ibn Al-Ash'ath Al-Sijistani, Sunan Abu Dawud, *2:* 51, (editor Hafiz Abu Tahir Zubair 'Ali Za'I) (translator Yaser Qadhi) (Riyadh: Darussalam, 2008).

[35] Abu Hamid Muhammad al-Ghazali, 2 Ihya Ulum ad-Din, 24 (Beirut: Dar al-Marifah).

[36] Brother Yousef, *From a Same-Sex Attracted Muslim: Between Denial of Reality and Distortion of Religion,* MUSLIMMATTERS.ORG, (Aug. 22, 2016) https://tinyurl.com/44st7rd7.

[37] Straight Struggle, http://www.straightstruggle.com (last visited Apr. 24, 2023)

struggles with same-sex attraction.[38] If a Muslim client were to ask a Muslim mental health professional for counsel regarding coping with same-sex attraction, the law at issue in this case would force him or her to choose between obeying God and obeying the state. Such a law should therefore be subject to strict scrutiny.

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.

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[38] Sadia Jalali. *What's the Matter? Attracted to the Same Sex*, MUSLIMMATTERS.ORG, (Jan. 9, 2014) https://tinyurl.com/bddef7br .

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April 2023