No. 18-547

In The
Supreme Court of the United States

MELISSA ELAINE KLEIN, *ET VIR*,

Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Oregon

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amicus Curiae

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The question presented is:

Whether the Court should overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), or at least, resolve the circuit split over the doctrine's precedential value.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 42 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Minority TV Project v. FCC*, 134 S. Ct. 2874 (2014); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Bennie v. Munn*, 137 S. Ct. 812 (2017).

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from expressing his or her religious beliefs. SLF is profoundly

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[1] *Amicus curiae* notified the parties 10 days before the filing of this brief of their intent and request to file it. All parties consented to the filing of briefs in blanket consent letters on file with this Court. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

SUMMARY OF ARGUMENT

Nearly three decades ago, this Court created the hybrid rights theory when it held that courts should only apply strict scrutiny to free exercise claims when they are accompanied by another fundamental constitutional claim. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879-80 (1990). Or said another way, the Court held that when a plaintiff only alleges that the government violated the Free Exercise Clause, the reviewing court should apply rational basis review. *Id.* at 886-89. This new theory ignores the true origin of strict scrutiny review, contradicts nearly 80 years of First Amendment jurisprudence, and has created so much confusion in both federal and state courts that a deep circuit split now exists.

The hybrid rights theory disregards the very reason strict scrutiny review exists in the first place. Despite the common belief that strict scrutiny review developed within equal protection jurisprudence, its origin actually dates back to some of this Court's earliest First Amendment cases. More specifically, strict scrutiny review grew largely out of recognition that the Constitution demanded the highest level of protection for our First Amendment freedoms. Withholding strict scrutiny review unless a plaintiff also asserts a claim

alleging violation of another fundamental right ignores this Court's various references to freedom of religion as a "preferred" or "fundamental" freedom. Even worse, it ignores this Court's Free Exercise Clause jurisprudence which, since the 1940s, has demanded a higher level of scrutiny for free exercise claims. Because *Smith*'s hybrid rights theory is inconsistent with this Court's First Amendment jurisprudence, it has proven difficult to apply and thus, resulted in a circuit split that warrants the attention of this Court.

This case provides the Court with an opportunity to revisit *Smith*, and in doing so, ensure that all First Amendment freedoms receive the highest level of protection the Constitution affords.

ARGUMENT

I. The Court should grant certiorari to revisit *Employment Division v. Smith*.

In holding that Oregon's prohibition on sacramental peyote use did not violate the Free Exercise Clause, the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. While the Court in *Smith* ultimately applied rational basis review to the asserted free exercise claim, the majority stopped short of invalidating prior decisions where it applied strict scrutiny to such claims. Instead, in writing for the majority, Justice Scalia distinguished those cases as ones where the

plaintiff challenged the "application of a neutral, generally applicable law to religiously motivated action . . . in conjunction with other constitutional protections" such as freedom of speech, freedom of press, right of parents to educate their children, freedom from compelled expression, and freedom of association. *Id*. at 881-82. In doing so, *Smith* created the hybrid right theory and held that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id*. at 878.

Smith's hybrid right theory cannot be squared with this Court's development of strict scrutiny or its First Amendment jurisprudence. And as Petitioners note, multiple Justices have pointed out as much, going so far as to call to overrule *Smith*. Pet. 30-31. This case provides the Court with the opportunity to do so.

A. The Supreme Court developed strict scrutiny to protect all First Amendment freedoms, including the Free Exercise Clause.

Many regard Justice Stone's footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938), and equal protection cases as the catalysts for creating strict scrutiny review. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 496-503 (2004); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15

San Diego L. Rev. 1041, 1068 (1978). However, the truth is that the origins of strict scrutiny review can be traced back to this Court's early First Amendment cases.[2]

Not unsurprisingly, repeated threats to free speech led the Court to first recognize that we as a country need to guard First Amendment rights "with a jealous eye[.]" *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 325 (1941). One of the earlier references to a higher level of scrutiny appears in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616 (1919), where he explained that the First Amendment mandates a "sweeping command[ ] [that] 'Congress shall

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[2] Nevertheless, *Carolene Products'* footnote four supplemented the earlier developed jurisprudence stringently guarding First Amendment freedoms. *See United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 140-41 n.18 (1948) (citing *Carolene Products* in support of the proposition that, though "[legislative] judgment is always entitled to respect[ ] [a]s the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity[ ] when the legislation on its face *or in specific application* restricts the rights of *conscience*, expression, and assembly protected by the Amendment. . . .") (emphasis added). *See also Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (citing *Carolene Products* for the proposition that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of "the indispensable democratic freedoms secured by the First Amendment") (citations omitted); *Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940) (citing *Carolene Products* and concluding that "[m]ere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions").

make no law . . . abridging the freedom of speech[,]'" but the legislature could push against this constitutionally established boundary when compelled by an "immediate" and "imminent[ ] threat[ ]." *Id*. at 630-31 (Holmes, J., dissenting). Notably, Justice Holmes wrote the *Abrams* dissent only eight months after penning the majority opinion in *Schenck v. United States*, 249 U.S. 47 (1919), which deferred to legislative judgment and rejected a First Amendment challenge to the Espionage Act of 1917's prohibition on the distribution of leaflets. *Id*. at 52-53. In his *Abrams* dissent, Justice Holmes maintained that *Schenck* was correctly decided, but expressed concern about the consequences of allowing Congress to abrogate a fundamental aspect of the Constitution. *See Abrams*, 250 U.S. at 627-28, 630. The esteemed Justice succinctly explained why he would hold differently despite the two nearly identical fact patterns:

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. at 630. Whereas Justice Holmes, in *Schenck*, focused the analysis on the aggravating circumstances justifying governmental intrusion of a fundamental right, *see Schenck*, 249 U.S. at 52, his *Abrams* dissent stressed the importance of free speech. *See Abrams*,

250 U.S. at 629-30 (warning that even if "the creed that they avow – a creed that I believe to be the creed of ignorance and immaturity when honestly held, [and] which, although made the subject of examination at the trial, no one has a right even to consider . . . "). So, while the *Abrams* majority steadfastly adhered to its most recent precedent, for Justice Holmes, the *Abrams* dissent served as an important addendum to his majority opinion in *Schenck*.

Though not the exact verbiage, the "immediate" and "imminent[ ] threat" language would evolve over the years into the more refined requirement for a "compelling governmental interest." While *Carolene Products'* footnote four cryptically intimated that "there may be a narrower scope for operation of the presumption of constitutionality when legislation . . . [concerns] the first ten amendments," 304 U.S. at 152 n.4, the Court had already embraced the various First Amendment rights as a fundamental liberty interest. For example, by 1931, the Court had acknowledged free speech as "a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). And in 1937, the Court noted that "[t]he power of a state to abridge freedom of speech and of assembly is the exception rather than the rule. . . ." *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). Similarly, a month before the Court decided *Carolene Products*, it described the freedom of speech and press as "fundamental personal rights and liberties." *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). Finally, though written after *Carolene Products*, Justice Black, in a dissenting

opinion swiftly adopted by the majority of the Court in a similarly named case the following term, referred to the freedom of speech and religion as "in a preferred position." *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Black, J., dissenting), *overruled by Jones v. Opelika*, 319 U.S. 103, 104 (1943) ("For the reasons stated . . . in the dissenting opinions filed in the present cases after the argument last term, the Court is of opinion that the judgment in each case should be reversed.").

Interestingly, the majority in *Smith* suggested that it was merely following established case law that free exercise claims only warrant strict scrutiny when brought in conjunction with other particular constitutional claims. 494 U.S. at 881. However, as the previously discussed cases highlight, the various First Amendment rights are inextricably intertwined. The Founders did not group the First Amendment freedoms together merely to save space. Indeed, this Court has referred to the "freedom of thought[] and speech" as "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). And in first discussing why "the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action" the Court noted it was "not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Id.* at 326 n.4. This case presents an opportunity to revisit *Smith* and return to this Court's prior, historically accurate understanding of

the interplay between the Free Exercise Clause and other fundamental freedoms.

B. *Smith* contradicts this Court's First Amendment jurisprudence.

While the Court addressed a number of First Amendment cases during the 1900's, it was not until 1878 that it ruled on a free exercise claim. *See generally Reynolds v. United States*, 98 U.S. 145 (1878). At issue in *Reynolds* was the constitutionality of a federal statute outlawing bigamy and polygamy. *See id.* at 153. The *Reynolds* Court expressed concern that granting an exemption from the law due to a man's religious belief would "make the professed doctrines of religious belief superior to the law of the land." *Id.* at 166-67. The Court also distinguished between holding a religious belief and engaging in religious practices. *See id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). Ultimately upholding the law, the Court effectively subjected the free exercise claim to rational basis review, as would be done over 100 years later by the majority in *Smith*. *See id.* at 161-68. But, the guarantee of religious freedom *is* the law of the land. Further, given the Court's various references to First Amendment freedoms generally, and the freedom of religion specifically, as a "fundamental" and "preferred" freedom, the Court should be hesitant to revert to a "standard [that] was an easy one for the government to satisfy, and *every*

Supreme Court application of rational basis review in a Free Exercise Clause case over the next sixty years resulted in a win for the government." John Witte, Jr. & Joel A. Nichols, *Religion and the American Constitutional Experiment* 135 (3d ed. 2011).

As time marched on and the Court further developed its First Amendment jurisprudence, the effects of applying only rational basis review to free exercise claims became apparent. As a result, the Court began to refine strict scrutiny review and its applicability to free exercise claims. For example, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court unanimously held a state statute requiring a permit to solicit for religious or charitable purposes unconstitutional. The Court explained that the statute violated the Free Exercise Clause because the State took on the role of determining religious truth, *see id.* at 310-11, and discussed those similar concerns and considerations as would emerge within free speech, and other First Amendment, jurisprudence[3] – providing the government leeway to prevent any immediate and serious harm to the public.[4] In considering such harm, the

[3] *See, e.g.*, *Abrams*, 250 U.S. at 630 (free speech); *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) (free press).

[4] The Kleins' case also presents the Court an opportunity to consider whether offending another individual's moral sensibilities amounts to such an immediate and serious harm that deserves regulation. This Court has already acknowledged that "the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government." *Minersville Sch. Dist.*

Court broke the long chain of free exercise cases that proved futile given *Reynolds*.

The *Smith* majority conveniently ignored *Cantwell* and this historical background, and instead relied on the reasoning of the *Minersville* Court. In *Minersville*, the Court rejected a free exercise claim challenging a law requiring citizens to salute the flag, reasoning that "national unity" was a sufficient reason to abrogate the Free Exercise Clause. 310 U.S. at 595-96. The *Smith* majority cited to *Minersville* and its supporting decisions for the proposition that the Court had consistently rejected religious scruples as excusing compliance with general, neutral laws. *See Smith*, 494 U.S. at 879.

However, the Court overruled *Minersville*. *See Barnette*, 319 U.S. at 642. Not only was the holding of *Minersville* itself overruled,[5] but the key cases that decision cited are either defunct or an anomaly. In *Minersville*, the Court cited to *Reynolds*, 98 U.S. 145, *Davis v. Beason*, 133 U.S. 333 (1890), *overruled by Romer v. Evans*, 517 U.S. 620 (1996) (reversing the choice to not apply strict scrutiny), and *Selective Draft Law Cases*, 245 U.S. 366 (1918), as notable free exercise cases challenging general laws where the court refused to apply the Free Exercise Clause. Again, the *Reynolds* decision

v. Gobitis, 310 U.S. 586, 593 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (citation omitted).

[5] *Barnette* held that "national unity" was not a sufficient basis to abrogate a core First Amendment freedom, in turn refusing to equate national unity as "the basis of national security." *See Barnette*, 319 U.S. at 640.

was the first time this Court addressed a Free Exercise Clause issue and contradicts not only current day Free Exercise Clause jurisprudence but First Amendment jurisprudence generally. *Romer*, in overruling *Beason*, emphasized that courts need to apply strict scrutiny review to free exercise and voting cases. *Romer*, 517 U.S. at 634. The *Smith* majority distinguished cases like *Romer* because it involved two different fundamental liberty claims. As noted in the prior section, First Amendment claims often arise together because of their interrelated nature. Finally, the *Selective Draft Law Cases* concerned a matter of national security – falling within that imminent and immediate harm to the public that would justify government intrusion on a fundamental right to the extent necessary to remedy the harm. 245 U.S. at 375.

This Court's cases addressing religious exemptions also support applying strict scrutiny review to Free Exercise claims generally. More specifically, stressing its concern with granting exemptions from laws for religious reasons at the cost of the general population, the Court has, at times, applied a lower level of scrutiny to so-called exemption cases. For example, the Court has rejected religious exemption claims when the law implicated matters of national security. *See Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 266-67 (1934) (Cardozo, J., concurring); *Gillette v. United States*, 401 U.S. 437 (1971) (sustaining military Selective Service System against free exercise challenge). In doing so, the Court described national security as "an interest inferior to none in the hierarchy of

legal values." *Minersville*, 310 U.S. at 595. Another area where the Court has been heavy-handed in dealing with free exercise claims is when claimants seek an exemption from tax laws. *See, e.g.*, *Opelika*, 319 U.S. 103; *United States v. Lee*, 455 U.S. 252 (1982). Similarly, where the right of the parent has ceded control to the power of the State over the child, the Court has noted that, "as is true in the case of other freedoms . . . the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

In 1963, having distinguished the various fact patterns that posed an imminent and immediate threat to the public,[6] and after refining (and officially naming) strict scrutiny review,[7] the Court formally applied strict scrutiny to review free exercise cases. *See Sherbert v. Verner*, 374 U.S. 398 (1963). This Court's opinion in *Sherbert* was the culmination of four decades of not only free exercise analysis, but also First Amendment cases and the birth and refinement of the strict scrutiny test. In *Sherbert*, a Seventh-Day Adventist challenged the government's denial of her compensation claim after she was fired for refusing to work on Saturday in accord with her religious beliefs. *See* 374 U.S.

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[6] Whereas the *Lee* decision, which was heavily relied on by the *Smith* majority for how tax laws and the Free Exercise Clause intersect, came after *Sherbert*, the *Opelika* cases were from the 1940s.

[7] *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (first use of the term "strict scrutiny"); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (referencing the phrase "most rigid scrutiny").

at 399-401. Consistent with its jurisprudence over the prior four decades, the Court found that any regulation of religious *beliefs* was untenable without resort to even strict scrutiny,[8] but that religious *conduct* was "not totally free from legislative restrictions." *Sherbert*, 374 U.S. at 403 (citation and internal quotations omitted). Thus, religiously motivated *actions* that posed a "substantial threat to public safety, peace or order" could be subjected to government regulation but only if there existed a compelling enough interest. *Id.* at 403, 406-07.[9]

While it remains no secret that the chosen level of scrutiny has tended to "effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny)," *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting), the *Sherbert* precedent avoided being outcome-determinative – only six of ten free exercise claimants won between *Sherbert* establishing strict

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[8] This should be considered the equivalent of the Court's analysis regarding viewpoint discrimination in the context of free speech claims. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). So, similar to how a regulation with viewpoint discrimination is automatically unconstitutional without even being subjected to strict scrutiny review, so too are regulations of religious *beliefs*.

[9] Interestingly, the Court also found that "appellant's conscientious objection to Saturday work *constitutes no conduct* prompted by religious principles of a kind within the reach of state legislation." *Id.* at 403 (emphasis added). The Kleins' objection to baking the wedding cake presents the Court an opportunity to reaffirm that conscientious objections do not rise to that level of substantial threat to the public, which justify some governmental regulation.

scrutiny and the *Smith* decision. *See* Witte, Jr. & Nichols, at 137. More importantly, *Sherbert* was the culmination of this Court's meticulous consideration of free exercise claims. In contrast, the *Smith* decision either ignores or contradicts the history of the Free Exercise Clause. The Kleins' case provides the Court with an opportunity to reassert *Sherbert*'s compelling interest and realign free exercise jurisprudence with the historical development of the Free Exercise Clause.

II. This Court should revisit *Smith* to resolve the circuit split.

Despite agreeing with the outcome in *Smith*, Justice O'Connor remained concerned by the majority opinion's choice to ignore the history of Free Exercise jurisprudence, which "not only [gave] a strained reading of the First Amendment but [] also disregard[ed] [the Court's] consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). Recognizing these concerns, Congress passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb – 2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the applicability of the Act to the States and States' subdivisions). In *Flores*, Justice O'Connor warned that "[s]tare decisis concerns should not prevent us from revisiting our holding in *Smith*." *Flores*, 521 U.S. at 547 (O'Connor, J., dissenting). However, once the RFRA was found inapplicable to the States in *City of Boerne*, three standards

emerged in the appellate courts for applying the hybrid rights theory to state and local laws. The state and lower federal appellate courts diverged on applying the *Smith* holding because of its inconsistency with the rest of this Court's free exercise jurisprudence.

The Second, Third, and Sixth Circuits have interpreted the hybrid rights doctrine as dicta, analyzing all free exercise claims under rational basis, largely because these courts "can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated." *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003). *See also Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008); *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993). Though the ultimate choice to apply only rational basis review is inconsistent with free exercise jurisprudence, this can be attributed to the confusion created by the *Smith* decision as the Courts wait for "the Supreme Court [to] provide[] direction." *Combs*, 540 F.3d at 247; *see also Kissinger*, 5 F.3d at 180 (stating that hybrid claims are "completely illogical" and not applying a stricter standard than that used in *Smith* until the Supreme Court clarifies its holding). Justice Souter supported the treatment of hybrid rights claims as dicta because:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation

> exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). Thus, the dicta approach successfully avoids the contradictions presented by *Smith*'s hybrid rights theory. Nevertheless, the courts applying the dicta approach still had to follow *Smith* as it remains this Court's controlling precedent on the Free Exercise Clause. As such, these courts apply rational basis review to *all* free exercise claims, a result that is untenable for a First Amendment freedom.

The approach adopted by the First and District of Columbia Circuits treats hybrid claims as deserving strict scrutiny *only when* the non-Free Exercise Clause claim can win independently – i.e., the independent-claims approach. *See Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001). The Tenth Circuit has best characterized the problem with the independent-claims approach: "[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296-97 (10th Cir. 2004). Similarly, Justice Souter noted that "if a hybrid claim is one in which a litigant would actually obtain an exemption . . . under another constitutional provision, then there would have been no reason for the Court . . . to have mentioned the Free Exercise Clause

at all." *Church of Lukumi*, 508 U.S. at 567 (Souter, J., concurring). Further, free exercise claims – whether ultimately successful or unsuccessful – are entitled to strict scrutiny on an independent basis.

The last approach to the hybrid rights theory is the colorable claim approach, followed by the Ninth and Tenth Circuits. *See Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998). Under this approach, a hybrid claim is entitled to strict scrutiny because the non-Free Exercise Clause claim has an independently probable – i.e., colorable – chance of success on the merits. The Tenth Circuit clarified that "colorable" means "a fair probability or likelihood, but not a certitude, of success on the merits." *Axson-Flynn*, 356 F.3d at 1297. Further, this process is intended to be "very fact driven" and undertaken on a "case-by-case basis." *Id.* This case-by-case approach would consider the importance of the law at issue as well as the centrality of the practice at issue, in direct opposition to the requirements mandated by the majority in *Smith*, 494 U.S. at 887 n.4 (rejecting the consideration of the centrality of the practice at issue). Consequently, even though the colorable claim approach appears the most sound, it centrally requires the consideration of factors explicitly rejected by the *Smith* majority.

All three interpretations of the hybrid rights theory violate this Court's strict scrutiny doctrine and First Amendment jurisprudence. As a result, they are

unworkable and cannot be applied consistently because they attempt to rationalize an unconscionable dilemma – requiring a separate constitutional claim in order to resolve a question involving a fundamental First Amendment right.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and this *amicus curiae* brief, this Court should grant the Petition and reverse the judgment of the Oregon Supreme Court.

Respectfully submitted,

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amicus Curiae

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