No. 19-66

IN THE

Supreme Court of the United States

GEORGE Q. RICKS,

Petitioner,

v.

STATE OF IDAHO CONTRACTORS BOARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the Idaho Court of Appeals

BRIEF OF AMICI CURIAE JEWISH COALITION FOR RELIGIOUS LIBERTY AND ASMA T. UDDIN IN SUPPORT OF PETITIONER AND REVERSAL

WILLIAM J. HAUN
Counsel of Record
SHEARMAN & STERLING LLP
401 9th Street, NW
Suite 800
Washington, D.C. 20004
(202) 508-8156
william.haun@shearman.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes & Rules

Other Authorities

INTEREST OF *AMICI CURIAE*

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence.[1] The Coalition aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. To that end, the Coalition has submitted *amicus* briefs in this Court and the lower federal courts, written op-eds, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership.

Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Her most recent book is WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM (2019).

Both the Jewish Coalition and Ms. Uddin are adherents to minority religious practices—those this Court "preferred" to "disadvantage" by reinterpreting the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). The 29 years since *Smith* have borne out real-world harms to unpopular religious practices that *Smith* chose to

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and no one other than *amici curiae* or their counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a) of the Rules of this Court, counsel for all parties received timely notice of the intent to file this brief and all parties have consented to its filing.

"disadvantage," and the need for this Court to provide the free exercise relief *Smith* denied. Because this case presents an excellent opportunity to revisit *Smith*, adherents to unpopular religious practices have an acute interest in this case.

SUMMARY OF ARGUMENT

Amidst the New Deal's expansion of federal power, Justice Robert Jackson authored a prescient assessment of this Court's role in securing fundamental rights. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943). Widely regarded as one of this Court's finest opinions,[2] *Barnette* acknowledges that modern government power may increase conflicts with religious liberty—and, correspondingly, increase pleas that this Court protect Bill of Rights guarantees. *See id.* at 640. These "changed conditions" may "cast us more than we would choose upon our own judgment." *Id.* "But," *Barnette* confidently concludes, this Court "act[s] in these matters not by authority of [its] competence but by force of [its] commissions. [It] cannot, because of modest estimates of [its] competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." *Id.*

Smith rendered *Barnette*'s ringing phrases hollow—and the practitioners of unpopular and unfamiliar religious views have reaped the consequences. These consequences are unfortunate,

---

[2] Even *Barnette*'s only dissenter commended the opinion as "really worth reading." *See* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 699 (M. Freedman ann. 1967) (reprinting letter of May 3, 1943).

see infra pp. 5-12, but unsurprising. Indeed, *Smith* expected them.

By repudiating the Free Exercise Clause's ability to mandate religious-based exemptions to neutral laws of general application, *Smith* doubted "that the appropriate occasions for [the] creation" of such exemptions "can be discerned by the courts." 494 U.S. at 890. And, *Smith* admitted that leaving such requests solely to the political process "will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.* Although *Smith* speculated that the political process would be "solicitous" of accommodation requests, *id.*, *Smith* minced no words as to its view of such requests. It called them a "luxury," capable of "courting anarchy," and especially "danger[ous]" given American "society's diversity of religious beliefs." *Id.* at 888; *see also* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 659 (2016) ("With [*Smith*], free exercise immediately became more of a collective right, protected so long as the legislature deemed that it served some higher purpose. . . .").

Unsurprisingly, *Smith* chills religious accommodation—as "[a] body of research in sociology, political science, and legal studies" observes. Robert R. Martin, *Compelling Interests and Substantial Burdens: The Adjudication of Religious Free Exercise Claims in U.S. State Appellate Courts*, SAGE Open, at *2 (2019). Politically-crafted accommodations, like the federal or state-level Religious Freedom Restoration Acts ("RFRA"), though helpful, have not resolved this problem.

Smith's only attempt to assuage the religious practitioners it "disadvantage[d]" is that their pain is the "unavoidable consequence of democratic government"—a consequence that "*must be preferred* to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." 494 U.S. at 890 (emphasis added). But, as the scholar who made perhaps the foremost originalist *defense* of *Smith* recently concluded, "[t]his logic, however, breaks down when Americans are systemically barred from political participation," as advocates of unpopular religious views often are when contending with administrative agencies. Phillip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1938 (2015). When that happens, those Americans "cannot find much consolation in the political logic of the Free Exercise Clause and *Smith*." *Id.*

A better way exists. This Court's Religion Clause jurisprudence increasingly incorporates our founding's appreciation for religious pluralism and the practical role the Judiciary possesses in safeguarding it. By granting review, the Court may again safeguard religious liberty from government's ever-growing enroachments on areas of life once left to civil society. Review is warranted.

ARGUMENT

I. *Smith* Has Harmed Practitioners of Unpopular Religious Views

"When a court, especially the Supreme Court, pronounces in the name of the Constitution upon . . . any . . . subject, a cultural lesson is taught." ROBERT BORK, THE TEMPTING OF AMERICA 137-38 (1990). This Court taught a lesson in *Smith* too: It is acceptable to "disadvantage" citizens who practice unpopular religious views when laws or regulations diverge from those views. *See* 494 U.S. at 890. The effect has been to confirm the existence of a pre-existing trend—one at odds with our founding: there is "an implicit ranking of constitutional values in which protection of religious freedom does not enjoy high standing." Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 545-46 (1991). *Smith*'s quick dismissal of the "disadvantage" it inflicted on unpopular religious practices "has harmed religious liberty." *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting).

There are various ways to catalogue *Smith*'s harms. Two are employed below. The first reviews *Smith*'s judicial effects—i.e., its effect on free exercise claims. The second reviews *Smith*'s political effects—i.e., the efficacy of its presumption that democracy will be "solicitous" toward religious-exemption requests. Under either measure, *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring).

a. Smith's Judicial Effects

Smith immediately—and detrimentally—affected free exercise decisions. *See* 521 U.S. at 547 (O'Connor, J., dissenting) (discussing four free exercise cases, all decided within one year of *Smith*, "demonstrat[ing] that lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice"). Cases in *Smith*'s wake affecting the Amish,[3] Christians,[4] Hmong natives,[5] Jews,[6] Native Americans,[7] Muslims,[8] and Quakers[9] all

---

[3] *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (rejecting Amish claimants' free exercise claim against state requirement to display a bright orange triangle on buggies, even with evidence of adequate alternatives).

[4] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278-80 (Alaska 1994) (landlord held in violation of state fair housing law because of religiously-motivated refusal to rent to an unmarried couple).

[5] *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (discussed *infra* pp. 10-12).

[6] *See, e.g.*, *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990) (compelling autopsy despite Jewish religious beliefs opposing it).

[7] *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Ind. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (disciplining Texas public school students who refused to cut their hair in conformance with school policy).

[8] *United States v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 884 (3d Cir. 1990) (Muslim substitute teacher prohibited from teaching in her religiously-required clothing).

[9] *United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (compelling Quakers to enforce IRS levy against two employee-members

evidence Justice O'Connor's point. Religious organizations were also immediately subjected to disparate treatment by zoning and landmark designation laws that likely would have been resolved differently before *Smith*.[10] One city's landmark designation law "drastically restricted [a] Church's ability to raise revenues to carry out its various charitable and ministerial programs," but no religious exemption was warranted because the law met the requirements *Smith* ossified into the Free Exercise Clause.[11]

As one study put it, "the consequences of the *Smith* decision were swift and immediate." Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & ST. 237, 248 (2004). Beyond reducing successful free exercise claims, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*." *Id.* at 242. "This suggests that if religions were burdened by laws of general applicability, the courts would not know about it because so few religious groups would come requesting an exemption." *Id.* at 251.

---

who refused, on religious grounds, to pay part of their federal taxes).

[10] *See, e.g.*, *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991) (application of city zoning laws that limited an area to commercial use prevented church services, even as the city authorized secular non-profits to operate in the same area).

[11] *St. Bartholomew's Church v. New York*, 914 F.2d 348, 354-55 (2d Cir. 1990).

Even with RFRA's passage, *Smith*'s chilling effects continued. After this Court—"premised on the assumption that *Smith* correctly interpret[ed] the Free Exercise Clause," *City of Boerne*, 521 U.S. at 546 (O'Connor, J., dissenting)—invalidated the federal RFRA's application to the states, "free exercise claimants today confront a patch-work legal opportunity structure at the state level, the shape of which varies by state and by the nature of the claim." Martin, *The Adjudication of Religious Free Exercise Claims in U.S. State Appellate Courts*, SAGE Open, at *3. In states possessing a RFRA statute, "[t]here is reason to doubt whether" they "truly provide meaningful protections for religious believers." Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010). And in the states lacking a RFRA or a state constitutional standard broader than *Smith*, the federal Free Exercise Clause provides a hollow hope.[12]

---

[12] Twenty-one states have statutes that mirror the federal RFRA, but whether a state has a RFRA statute is only the beginning of the morass. Some states interpret their constitutions to require, effectively, the compelling interest test *Smith* displaced. *See, e.g.*, *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000). Other states, like California, decline to decide the question. *See, e.g.*, *North Coast Women's Medical Group, Inc. v. Superior Court*, 189 P.3d 959, 968 (Cal. 2008). Other states, like Kentucky (discussed *infra* pp. 9-10), have narrowed their state's constitutional protections of religious liberty to accord with *Smith*. Still other states, like Kansas, embrace *Smith* in their state constitutions but with disputed interpretations. *See Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141, 155-56 (Kan. Ct. App. 2011).

For example, the lesser-known Jewish practice of Kapparot is an atonement ritual conducted every year on the eve of Yom Kippur. Some Jews believe the requirement can be satisfied by donating money to charity, but many Jews interpret Kapparot to require the ceremonial use and slaughter of chickens. Animal rights activists routinely sue such Jews to stop this ritual.[13] *See United Poultry Concerns v. Chabad of Irvine*, 743 Fed. Appx. 130 (9th Cir. 2018). The Ninth Circuit ruled for the Orthodox Jewish defendants on procedural issues, *see id.* at 131, but whether or not they would have received a religious exemption from a legislative ban on chicken slaughter remains open. *See* Emma Green, *Animal-Rights Groups Are Targeting a Jewish Ritual on Yom Kippur*, THE ATLANTIC, Oct. 11, 2016, https://www.theatlantic.com/politics/archive/2016/10/animal-rights-groups-are-targeting-jews-on-yom-kippur/503690/.

Another example speaks to the little those with unpopular religious views can do about their religious practices being illegal in one state and legal in another. In multiple jurisdictions, the Amish are required to display a brightly colored triangular emblem on their horse-drawn buggies, indicating that they are slow-moving vehicles. *See, e.g.*, *State v. Miller*, 549 N.W.2d 235, 237 (Wis. 1996); *Gingerich v. Commonwealth*, 382 S.W.3d 835, 837 (Ky. 2012). Because their religious beliefs reject flashy colors,

---

[13] Indeed, the question is back again. *See* Alejandra Reyes-Velarde, *Jewish Center Sued Over Controversial Chicken-Killing Ritual*, L.A. TIMES, Jul. 26, 2019, https://lat.ms/33yXmr8.

the Amish prefer to equip their buggies with red lanterns and outline the edges of the vehicle with white or silver reflective tape. *See, e.g.*, *Miller*, 549 N.W.2d at 237; *Gingerich*, 382 S.W.3d at 837. In *Miller*, the Supreme Court of Wisconsin declined to apply either *Smith* or RFRA and ruled that the Wisconsin state constitution's free exercise provision provided more protection than the federal regime. *Miller*, 549 N.W.2d at 239. The slow-moving vehicle regulations failed strict scrutiny, and the Amish were permitted to use their religiously acceptable alternative. *Id.* at 73. But in *Gingerich*, the Supreme Court of Kentucky decided its state constitution did not provide more protection than the federal Free Exercise Clause. 382 S.W.3d at 844. It thus incorporated *Smith*'s standard into its state constitution and denied the Amish an exemption. *Id.*

Smith gave these kinds of religious claims the proverbial shoulder shrug. Such religious burdens, *Smith* concluded, are merely "incidental," and therefore do not justify courts providing exemptions. *See* 494 U.S. at 878; *see also City of Boerne*, 521 U.S. at 530-31 ("the persons affected have [not] been burdened any more than other citizens, let alone burdened because of their religious beliefs"). But "unlike the world of judicial semantics," what a court considers an "incidental" burden can, for the religious claimant, be devastating. Craig Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS 149, 159 (1997).

Yang v. Sturner, "one of the saddest cases since *Smith*," tragically exemplifies the point. *See* Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*,

1993 B.Y.U. L. REV. 221, 226 (1993). In *Yang*, a family of Hmong believers—"an immigrant population from Laos" that "believe if an autopsy is performed, the spirit of the deceased will never be free," *id.*—brought a free exercise claim against a state law mandating autopsies for accident victims. This family was haunted by the conviction that their son, who had been killed in an automobile accident and subsequently autopsied without his family's consent, would, now, never have his soul enter the after-life. Before *Smith* was decided, the district judge granted the family's claim that the forced autopsy violated their free exercise rights. But *Smith* was decided before the district court determined the family's damages. Because of *Smith*, the district court felt forced to reverse its prior ruling.

As the district court movingly concluded:

> It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion.
>
> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in

> the still courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the *Employment Division* decision.

Yang, 750 F. Supp. at 558. Thus, although "[t]he law's application did profoundly impair the Yang's religious freedom[,]" under *Smith*, "this impairment [does not] rise[] to a constitutional level." *Id.* at 560. The Yang family's agony is lasting proof that *Smith*'s burden on those with unpopular religious views is hardly "incidental."

b. *Smith*'s Political Effects

Despite *Smith*'s presumption that democracy would be "solicitous" of religious exemptions, experience teaches a different lesson. For three principal reasons, *Smith*'s decision to leave unpopular religious practices at the mercy of politics threatens to exclude them from public life:

> (1) There is no level playing field. Any support for accommodating unpopular religious practices depends on widespread political support—which means any support for accommodation depends on adherents to unpopular religious practices securing alliances with popular groups;
>
> (2) Support for religious accommodation in the abstract falls apart in the context of accommodating particular, unpopular religious practices. Indeed, particular

contexts may even erode support for religious accommodation in general; and

(3) Outsourcing many democratic decisions to regulatory agencies, along with pre-existing limitations on religious political participation, frustrates the ability of unpopular religious practitioners to influence lawmaking.

i. No Level Playing Field

It may be tempting to say—as some have—that *Smith*'s "faith in the ability of the ordinary democratic process to protect vulnerable religious minorities seems in fact to have been vindicated by" RFRA. *See, e.g.*, Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035, 1038 (1994). And indeed, a motley crew successfully advocated for RFRA—"a coalition of religious and civil liberties groups" spanning "the religious and political spectrum from left to right: evangelicals and mainline Protestants, Jews and Muslims, Roman Catholics and Lutherans, Sikhs and Scientologists, and the ACLU and the Traditional Values Coalition." J. Brent Walker, *Remembering the Origins of RFRA*, REPORT FROM THE CAPITAL, Oct. 2013, at 3. It is also true that, before *Smith*, Congress occasionally responded to this Court's refusal to afford religious exemptions with legislative relief.[14]

---

[14] *Compare Goldman v. Weinberger*, 475 U.S. 503 (1986) (upholding Air Force headgear regulations over religious objection from Jewish Air Force officer) *with* National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086-87 (1987) (providing a

But "[t]ellingly," as Professor Phillip Hamburger explained, "these were situations in which religious objections to law enjoyed widespread sympathy from both right and left." Hamburger, *Exclusion and Equality*, 90 NOTRE DAME L. REV. at 1932 & n.33. This cannot be consistently expected when the "religious practices" *Smith* explicitly "disadvantage[d]" are "not widely engaged in." *See* 494 U.S. at 890. Indeed, the diversity of these religious practices means legislatures will routinely miss them.[15]

More fundamentally, America's "pluralistic and fragmented landscape of religions" makes case-by-case political accommodation of religious "minorities"—in the way that politics typically understands that term—very difficult. *See* Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS at 153 (explaining that, because there is not, in fact, a religious "majority" in America, "the data" evaluating *Smith* "establish that *all* types of religions

---

statutory accommodation); *compare also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upholding plan to build on federal land that objecting Native Americans considered sacred) *with* Smith River National Recreation Area Act, 16 U.S.C. § § 460bbb-460bbb-11 (2012) *and* Wilderness Act, 16 U.S.C. § § 1131-1136 (affording that land protection).

[15] "During oral argument [in *Smith*], Justice Stevens asked if the state could 'outlaw totally the use of alcohol, including wine, in religious ceremonies.' The attorney for Oregon answered, 'there might be a religious accommodation argument of an entirely different order than is presented here.' Justice Stevens responded, 'You mean, just a better-known religion?'" RANDY E. BARNETT & JOSH BLACKMAN, AN INTRODUCTION TO CONSTITUTIONAL LAW: 100 SUPREME COURT CASES EVERYONE SHOULD KNOW 295-96 (2019).

are burdened") (emphasis added). To be sure, "some religious groups are relatively powerless minorities everywhere," but few (if any) religious groups have sufficient power to ensure they can consistently obtain political accommodations—"the status varies according to context." Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103, 112 (2015).[16]

In some contexts, a given religion's view on a particular issue may be politically powerful, while in other contexts, that same religion's practices have little or no political potency. *See* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. REV. 920, 947 (2004). For example, 39% of New York's population identifies as Roman Catholic and 9% as Jewish. *See* WORLD POPULATION REVIEW, New York Population 2019, http://worldpopulationreview.com/states/new-york-population/. But this combined 48% of New York's population did not stop the New York State Commissioner of Education from empowering local public school boards to determine whether private schools' curricula were "substantially equivalent" to those in public schools—an analysis including review of daily lesson plans and teaching hiring, while authorizing the state to shut down any private school

---

[16] *See also* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 723, 729-30 (2019) (demonstrating that it is somewhat misleading to refer to "Christians" as a majority religious bloc when "[n]ones," those who do not identify with any particular religious faith, "now qualify as the second largest 'religious' group in the country, after Protestants and ahead of Catholics.").

that is not "substantially equivalent" with public schools, including Yeshiva schools and Catholic schools.[17] The issue remains unresolved.[18]

Thus, for *Smith*'s political remedy to have any viability in particular cases, unpopular religious believers must be careful to avoid being *too* theologically unique, *too* politically unconventional, or *too* few in number, lest those with political power—who actually decide the fate of free exercise—see no value in allying with them. If they cannot satisfy those strictures, *Smith* leaves them "excluded from the political process that makes equal laws." Hamburger, *Exclusion and Equality*, 90 NOTRE DAME L. REV. at 1931. "It therefore must be asked how the Free Exercise Clause and the doctrine in *Smith* should be applied where the courts are open [to any justiciable case or controversy] but the political process is not." *Id.* at 1926.

ii. Politics Will Not Always Treat Religion With Solicitude

One may respond to the aforementioned political challenges by concluding that America simply needs more RFRAs—more broad, generalized commitments to religious liberty that cannot become hung up on particular, unpopular religious

---

[17] *See* Elya Brudny & Yisroel Reisman, *New York State Targets Jewish Schools*, WALL ST. J., Dec. 13, 2018.

[18] *See* May 30, 2019 Memo from Elizabeth R. Berlin, Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students, http://www.regents.nysed.gov/common/regents/files/619p12d2.pdf (announcing a notice of proposed rulemaking).

accommodation requests. As *Smith*'s author rhetorically asked, "Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice?" *City of Boerne*, 521 U.S. at 544 (Scalia, J., concurring). Many people, it turns out. Confining protection of that "abstract proposition" solely to the political process makes its continued viability contingent upon whether its particular applications are politically popular.

The ACLU, for example, was a leading RFRA champion, and wanted to overrule *Smith*. Nadine Strossen—president of the ACLU for over 17 years—said the following:

> [N]o legislation can ever completely 'fix' a Supreme Court decision that cuts back on constitutional protections, and no legislation can ever fully 'restore' constitutional rights that have been judicially diminished. Because legislation can always be repealed through ordinary legislative processes, it does not afford the security and stability for rights that the Constitution does.

Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L. J. 427, 464 (1997). She was right, of course. But in 2015, the ACLU decided she was wrong; it ceased supporting the federal RFRA that *it helped pass*. *See* Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, WASH.

POST June 25, 2015. It did so precisely because the ACLU disagrees with some of the unpopular religious practices RFRA protects. *See id.* Indeed, even the religious practices the ACLU was willing to defend in court suffered from this change in political wind.

Recall *Gingerich*, discussed *supra* pp. 9-10. *The ACLU represented the Amish claimants*, and the claimants' loss in court prompted the Kentucky legislature to enact a state RFRA. But, the RFRA only took effect over the Kentucky Governor's veto—because the ACLU, along with others, applied political pressure to oppose the RFRA. *See* Heather Greene, *Looking Closer at Kentucky's New Religious Freedom Restoration Act*, THE WILD HUNT (Apr. 7, 2013), https://wildhunt.org/2013/04/looking-closer-at-kentuckys-new-religious-freedom-restoration-act.html. In short, because the ACLU disagreed with how "solicitous" the democratic process would be to certain, unpopular religious practices, it sought to deny that solicitude to *everyone*—even the Amish claimants it represented.[19] *See id.* (the Kentucky

[19] Nor is the ACLU alone in souring on RFRA. Not a single jurisdiction has passed a RFRA-like law since 2015. In 2016, the U.S. Commission on Civil Rights, a federal government agency, encouraged jurisdictions to adopt religious liberty laws that build on *Smith* by "protect[ing] religious beliefs rather than conduct." United States Commission on Civil Rights, SUMMARY OF PERFORMANCE AND FINANCIAL INFORMATION FOR FISCAL YEAR 2016, at *7, https://www.usccr.gov/pubs/congress/FY2016-Performance-and-Financial-Info.pdf. Such a distinction fundamentally misunderstands "the world of the religious believer," where "there are no bright line boundaries between belief and practice (or action). Real belief is belief that one lives out." Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS at 159;

Governor "cites various areas where problems could arise including: civil rights, school curriculum standards, economic development efforts, public health initatives, and drug enforcement.").

Smith provides no remedy to adherents of unpopular religious views that see their religious liberty blown away by changing political winds. *See, e.g.*, Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y at 729-30 ("Nones," the fastest growing "religious" group, who prefer no religion in particular, "are unlikely to respond sympathetically when the Traditionally Religious seek exemptions from legal requirements."). "It therefore offers no solace to relatively orthodox or other nonconforming religious Americans to tell them that more liberal religious groups, or those with beliefs more aligned with popular views, have found broad political support." Hamburger, *Exclusion and Equality*, 90 NOTRE DAME L. REV. at 1933. What the democratic process giveth, the democratic process taketh away.

iii. The Political Process Increasingly Is Not The Lawmaking Process

Finally, no part of *Smith* contended with modern administrative power. *Smith*'s free exercise revisionism is, if nothing else, an ode to the *democratic* process and *political* remedies. But "the danger posed by the growing power of the

---

see also Everson v. Board of Education, 330 U.S. 1, 64 (1947) (quoting James Madison's *Memorial and Remonstrance Against Religious Assessments* to explain that religious exercise is unalienable "because what is here a right towards men, is a duty towards the Creator.").

administrative state cannot be dismissed." *E.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Indeed, the growth of federal regulatory power underlied *Barnette*'s discussion of the "changed conditions" facing religious liberty. *See* 319 U.S. at 639-40.

As government grows to standardize the "right" way to address questions, especially those previously left to civil society, unpopular religious practices—particularly rituals or institutional ministries—become easy targets. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2137-38 (2019) (Gorsuch, J., dissenting) (discussing how a family of "Kosher butchers" were "apparently singled out . . . as a test case" involving a "lengthy fair competition code" regarding customer chicken selection); *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) ("the Government now confirm[s]"—after years of rulemaking and litigation stating the opposite—it is "feasible" to achieve the government's regulatory objective without the conduct that petitioners considered a substantial religious burden). The growth of federal regulation into previously-private spheres relates closely "to government incentives to exploit and control religious institutions for public purposes." Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS at 158. Modern expectations for government action force it to rely upon religious groups to meet those expectations. In doing so, the government "imposes a variety of conditions that tend to secularize the groups" and "sap from [them] the key element that makes them more successful than secular programs: spiritual ministry." *Id.*

The pretense of "expertise" underlies outsourcing democratic decisions to administrative agencies, and that itself has profound consequences for *Smith*. "It is doubtful whether [administrative] rulemaking is merely rational or really very scientific, and it is open to question whether rationality and science are really at odds with religious belief. But the administrative idealization of scientism and centralized rationality usually renders administrative acts—compared with acts of Congress—relatively indifferent and even antagonistic to religion and religious concepts." Hamburger, *Exclusion and Equality*, 90 NOTRE DAME L. REV. at 1939-40; *see also* Kelsey Dallas, *The long road to a religious freedom victory for Sikhs in the U.S. Army*, DESERT NEWS, Feb. 23, 2017, https://www.deseretnews.com/article/865673967/The-battle-between-Sikh-soldiers-and-the-US-Army-over-religious-rights.html ("Before Army directive 2017-03 was signed on Jan. 3, accommodation requests from soliders . . . who sought permission to wear a turban and beard in observance of the Sikh faith, required input from the Pentagon and took several months to resolve."). This reality—acknowledged by *Smith*'s leading originalist academic champion—puts *Smith*'s viability into question. *See* Hamburger, *Exclusion and Equality*, 90 NOTRE DAME L. REV. at 1940.

II. *Smith* Is Antithetical To The Judicial Role In Securing Religious Liberty For All

Smith turned its back on *Barnette*'s conception of the judicial role by relying—twice—on "the long-since discredited decision" that *Barnette* overruled: *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). *See* Strossen, *A Reply to Justice*

Antonin Scalia, 24 FORDHAM URB. L. J. at 470. *Gobitis* rejected the claim of two school-aged Jehovah's Witnesses that the requirement to pledge allegiance to the United States violated their freedoms of speech and religious exercise. *See* 310 U.S. at 594-95. It said that "possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities," *id.*—a, to use *Smith*'s word, "succint[]" description of what it would hold, *see* 494 U.S. at 879.

Setting aside how misleading it is to rely on *Gobitis* without even mentioning it being overruled by *Barnette*,[20] re-founding free exercise doctrine on *Gobitis* is an ominous sign.

Gobitis was overruled a mere three years after its issuance partly because it produced "systematic, legal persecution of a small religious minority." KEVIN SEAMUS HASSON, BELIEVERS, THINKERS, AND FOUNDERS: HOW WE CAME TO BE ONE NATION UNDER GOD 26-27 (2016). Americans took *Gobitis* as a license to accuse their Jehovah's Witness neighbors of being Nazi sympathizers. *Id.* at 26. Jehovah's Witnesses were rounded up and sent out of town in Odessa, Texas. *Id.* In Kennebunkport, Maine, citizens burned a Kingdom Hall to the ground. *Id.* "When the flames went out, the crowd relit them. Then they piled the Witnesses' possessions on the

---

[20] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990) ("Relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Education*.").

front lawn and burned those for good measure. In Wyoming, a Jehovah's Witness was tarred and feathered." *Id.*; *see also Jones v. City of Opelika*, 316 U.S. 584, 623-24 (1942) (Murphy, J., dissenting) (three justices who joined *Gobitis* calling for its reversal, "fear[ing]" what it portended for religious liberty).

Nothing in the original understanding of the Free Exercise Clause compelled *Smith*—nor did *Smith* ever purport otherwise. In fact, when finally wrestling with the Clause's original meaning, the *most* that *Smith*'s author would say is that the decision's originalist support is "eminently arguable." *City of Boerne*, 521 U.S. at 539 (Scalia, J., concurring). To be sure, even some who oppose *Smith* have criticized the subjectivity of the compelling interest test that *Smith* superseded. *See* McConnell, *Free Exercise Revisionism*, 57 U. CHI. L. REV. at 1144. But, *Smith* "proposes to solve this problem by eliminating the doctrine of free exercise exemptions rather than by contributing to the development of a more principled approach," *id.*

There are ways to refine the compelling interest test while not disadvantaging unpopular religious views.[21] For example, a revised test could

---

[21] Indeed, when faced with "ambiguous constitutional texts," this is what the Court *should* do. *See United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("the function of this Court is to *preserve* our society's values . . . not to *revise* them . . . . For that reason . . . whatever abstract tests we may chose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

appreciate—as *Barnette* did—the "changed conditions" in the exercise and expansion of government power that increases conflicts with religious liberty. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) ("The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."). Doing so would account for the myraid problems of political exclusion faced by those with unpopular religious views, as well as the value that diverging religious practices evidence to society by showing how they—distinctly but congruently—achieve compelling interests. *See id.* at 228-29 (finding "Wisconsin's interest in compelling the school attendance of Amish children to age 16 . . . somewhat less substantial than requiring such attendance for children generally" because Amish practices prepare children for gainful employment and life, even if not in ways the state prefers). Elucidating these lessons is most naturally achieved in case-by-case adjudication, which results in those with unpopular religious views having a "stake" in a conversation over our national values before a tribunal disposed to resolve issues of principle. *See, e.g.*, ALEXANDER BICKEL, THE MORALITY OF CONSENT 105-106 (1975).

Moreover, revisiting *Smith* in this way could bring this Court's religious exemption cases back in line with the rest of Religion Clause jurisprudence. This body of law increasingly appreciates that subjecting religious liberty to "'grand unified theor[ies],'" *Am. Legion v. Am. Humanist Ass'n*, 139

S. Ct. 2067, 2087 (2019) or "rigid formula[s]," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012), belies religious pluralism. Indeed, as *Smith* was so keen to avoid "constitutional anomal[ies]," *see* 494 U.S. at 886, it makes little sense to trade in the practical accommodation that governs other Religion Clause doctrines for abstract theorizing in religious exemption cases.

Finally, a revised test would appreciate what the founders understood as religious liberty's distinctive characteristic—a manifestation of, as James Madison called them in his *Memorial and Remonstrance*, "obligations" to divine power, not mere "choices" to do whatever one wants. *Smith* missed this distinction completely. Indeed, it is premised upon the acceptability of separating this "'proper'" understanding of religious liberty from "the constitutionally required" understanding. *See City of Boerne*, 521 U.S. at 542 (Scalia, J., concurring). Modern society needs no help forgetting the distinction between a freedom to do what one wants and a freedom to do what one must. The Court does not need to continue harming unpopular religious duties by "preferr[ing]" that the two be conflated. *See Smith*, 494 U.S. at 890.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

WILLIAM J. HAUN
Counsel of Record
SHEARMAN & STERLING LLP

401 9th Street, NW
Suite 800
Washington, D.C. 20004
(202) 508-8056
william.haun@shearman.com

August 2019