No. 24-319

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,

Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK DEPARTMENT OF FINANCIAL SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

BRIEF OF *AMICI CURIAE* SEVEN LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

THOMAS G. HUNGAR
MATT GREGORY
Counsel of Record
M. CHRISTIAN TALLEY
ALY COX
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
mgregory@gibsondunn.com

ALLYSON N. HO
ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, Texas 75201
(214) 698-3100

Counsel for Amici Curiae

QUESTION PRESENTED

Whether this Court should reconsider, and overrule, *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases (continued)

Page(s)

Cases (continued)

Page(s)

Constitutional Provisions

Statutes

Other Authorities

Page(s)

Other Authorities (continued)

Page(s)

Other Authorities (continued)

Page(s)

Other Authorities (continued)

INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who teach, research, and publish in the field of freedom of religion.[2] *Amici* are committed to a view of free exercise that protects religious individuals and minorities and seek to reconcile this Court's jurisprudence with the original meaning and purpose of the Free Exercise Clause. Legal scholarship published after the Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), including works authored by *amici*, has demonstrated that *Smith*'s novel holding that neutral laws of general applicability are exempt from rigorous scrutiny under the Free Exercise Clause suffers from fundamental flaws. Those flaws range from its abrupt departure from well-settled law to the absence of any careful analysis of the original meaning and purposes of the Clause. *Amici* seek to inform the Court of aspects of this scholarship that confirm the need for the Court to reconsider *Smith*.

SUMMARY OF ARGUMENT

Since its announcement, the Court's decision in *Smith* has been criticized from every side. *Smith* has faced unequivocal calls for reexamination by many members of the Court in concurring or dissenting opinions; widespread condemnation in the legal academy; attacks from Congress and state legislatures; and contemporary censure by the public. *Smith* is

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice of the filing of this brief.

[2] Individual *amici* are identified in the Appendix.

ripe for reconsideration, and this case presents an excellent opportunity to do so.

Smith itself was a departure from this Court's previously settled requirement that the government demonstrate a compelling interest before imposing a substantial burden on the free exercise of religion. The question of the proper interpretation of the Free Exercise Clause was not briefed in *Smith*, but it has been substantially elucidated by subsequent academic work. That scholarship reveals that the Framers understood the Clause not merely as embodying an equal protection principle that prohibits targeting or discriminating against religion, but also as a substantive protection against government coercion or penalty that safeguards religious practices even in some circumstances where the government may prohibit similar secular conduct. The *Smith* Court's undue contraction of the protections afforded by the Free Exercise Clause inevitably falls hardest on adherents of minority religions—the very people that the Clause was adopted to protect.

The *Smith* Court defended its holding, in part, based on the supposed unworkability of the traditional compelling-interest test. But subsequent history has shown that concern to be baseless. Legislative rebellion against *Smith* led to application of a compelling-interest test similar to the pre-*Smith* regime in the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state counterparts to RFRA, all without generating the problems predicted by the *Smith* Court.

Stare decisis presents no obstacle to reconsidering *Smith* and conforming free exercise law to the original meaning of the Clause and to this Court's pre-*Smith*

precedents. A consistent undercurrent of resistance to *Smith* has resulted in a set of free exercise cases from this Court that avoids giving full rein to *Smith*'s rationale. In fact, the Court has never applied *Smith* to reject another fully briefed free exercise claim. But lower courts regularly apply *Smith* in a manner that fails to fulfill the promise of the Free Exercise Clause, sustaining coercive restrictions on free exercise that would have made the Framers blush.

Moreover, numerous viable alternatives to *Smith* are available, including the pre-*Smith* compelling-interest test and a historically grounded approach. Any of these alternatives would be dramatic improvements compared to current doctrine.

The Court should grant certiorari to reconsider, and overrule, *Smith*.

ARGUMENT

I. THE COURT SHOULD RECONSIDER *SMITH* IN LIGHT OF SUBSEQUENT DEVELOPMENTS HIGHLIGHTING CRITICAL FLAWS IN THAT DECISION AND ITS UNDERSTANDING OF THE FREE EXERCISE CLAUSE.

In *Employment Division* v. *Smith*, the Court departed from the original meaning of the Free Exercise Clause and abandoned decades of its own precedent to hold that a prohibition on religious exercise that is "merely the incidental effect of a generally applicable and otherwise valid provision" does not violate the First Amendment. 494 U.S. 872, 878 (1990). The Court embarked on this dramatic course reversal without the benefit of briefing from the parties or *amici* about this newly minted standard.

Academic and political criticism was swift and widespread. *E.g.*, Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DePaul L. Rev. 263, 294 & n.140 (1992) ("Several commentators have noted egregious flaws in the Court's opinion.") (collecting articles); *Horvath* v. *City of Leander*, 946 F.3d 787, 794 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("Civil rights leaders and scholars have derided * * * *Smith* * * * as 'the *Dred Scott* of First Amendment law.'") (citing authorities). Subsequent scholarship has highlighted substantial evidence that the original meaning of the Free Exercise Clause is irreconcilable with *Smith*'s rule. Granting certiorari will permit the Court to reconsider *Smith* in light of that evidence, which the *Smith* Court did not have before it and thus did not consider.

Smith has also been proven wrong in its prediction that applying a compelling-interest standard "would be courting anarchy." 494 U.S. at 888. Shortly after *Smith* was decided, Congress adopted RFRA to provide by statute the religious-liberty protections this Court abandoned in *Smith*—and numerous States across the country passed similar laws. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4); see Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 845 n.26 (collecting state RFRAs). Application of these laws for nearly three decades has demonstrated that the compelling-interest test is susceptible of principled, sensible application. Experience has thus disproven a fundamental premise underlying *Smith*.

A. *Smith* Was A Major Departure From Precedent.

Before *Smith*, the compelling-interest test was a central component of Free Exercise Clause jurisprudence. Under that framework, coercive government regulations that substantially burdened religious exercise could not pass muster unless the burden was narrowly tailored to serve a compelling governmental interest. See *Sherbert* v. *Verner*, 374 U.S. 398, 406-07 (1963). The Court emphasized that, "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at 406 (quotation marks and alteration omitted).

The Court reaffirmed that standard in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), in which even the State's "high responsibility for education of its citizens" was not a sufficiently compelling interest to require Amish parents "to cause their children to attend formal high school to age 16." *Id.* at 213, 234. Other cases were to the same effect. *E.g.*, *Frazee* v. *Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 835 (1989); *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 719 (1981).

When *Smith* came before the Court, the parties litigated under the compelling-interest test, debating whether Oregon's interest in prohibiting the consumption of peyote was sufficiently compelling to justify applying that prohibition to individuals who "ingested peyote for sacramental purposes at a ceremony of the Native American Church." 494 U.S. at 874. Despite the parties' embrace of that framework, the Court departed from it, rejecting the idea that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct

that the State is free to regulate." *Id.* at 895 (O'Connor, J., concurring in the judgment) (quotation marks omitted).

The Court did not explicitly overrule *Sherbert*, but recast it as limited to cases where "the State has in place a system of individual exemptions." *Smith*, 494 U.S. at 884. As for *Yoder*, the Court dismissed it as involving a "hybrid situation," where more than simply free exercise rights were at stake. *Id.* at 882. Where, as in *Smith*, free exercise rights alone were at stake, the Court replaced the *Sherbert* test with a new rule upholding neutral and generally applicable laws even when they substantially burden a particular religious practice, without regard to the justification for such burdens. *Id.* at 878, 882, 885.

In so holding, *Smith* relied on cases that the Court had previously eschewed, at least by implication. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 569 (1993) (Souter, J., concurring in part and concurring in the judgment). For example, *Smith* borrowed heavily from *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940), which held that public schools could compel students to participate in a daily ceremony of saluting the American flag and reciting the Pledge of Allegiance over the students' religious objections. But *Gobitis* had been renounced by three Justices who originally joined the opinion, see *Jones* v. *City of Opelika*, 316 U.S. 584, 623-24 (1942) (opinion of Black, Douglas, and Murphy, JJ.), and was overruled on the basis of the Free Speech Clause in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

In short, *Smith* breathed new life into precedents that were already on their last legs—and deservedly so, given their hostility to religious freedom. In *Smith*

itself, Justice O'Connor criticized the majority's opinion as "dramatically depart[ing] from well-settled First Amendment jurisprudence." 494 U.S. at 891 (concurring in the judgment). Justice Blackmun viewed the majority opinion as "effectuat[ing] a wholesale overturning of settled law." *Id.* at 908 (dissenting).

Justices joining the Court after *Smith* have echoed these criticisms, explaining that *Smith* was at odds with the Court's previous free exercise jurisprudence. In a unanimous opinion authored by Justice Alito, for example, the Court recognized that *Smith* "largely repudiated the method of analysis used in prior free exercise cases." *Holt* v. *Hobbs*, 574 U.S. 352, 357 (2015). Justice Alito later explained that *Smith* "abruptly pushed aside nearly 30 years of precedent," with "a devastating effect on religious freedom." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 545 (2021) (concurring in the judgment, joined by Gorsuch and Thomas, JJ.).

Legal scholars and practitioners have similarly observed that *Smith* reflects an unjustified departure from settled law. *E.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 2-3; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1120-28 (1990); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 114 (1991); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 Harv. J. L. & Pub. Pol'y 627, 627-28 (2003); Branton J. Nestor, *Revisiting* Smith: *Stare Decisis and Free Exercise Doctrine*, 44 Harv. J. L. & Pub. Pol'y 403, 415-26 (2021).

B. *Smith* Is Contrary To The Original Meaning Of The Free Exercise Clause.

Far from dictating *Smith*'s departure from prior law, "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause." *City of Boerne* v. *Flores*, 521 U.S. 507, 549 (1997) (O'Connor, J., dissenting, joined by Breyer, J.); see also *Fulton*, 593 U.S. at 553 (Alito, J., concurring in the judgment) (explaining that *Smith* "can't be squared with … the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption"). As post-*Smith* scholarship establishes, the Free Exercise Clause embodies a substantive right to religious exercise, not merely a right to nondiscrimination.

1. Shortly after *Smith*, Professor Michael McConnell published a seminal article on the original understanding of free exercise. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). Professor McConnell argued that religious exemptions were widely granted in the founding generation and thus are likely a part of the right enshrined in the Free Exercise Clause.[3] The article traced the term "free exercise" back to 1648, to a legal document containing a promise that Maryland's Protestant government would not "disturb Christians ('and in particular no Roman Catholic') in the 'free exercise' of their religion." *Id.* at 1425. Other colonies, such as the

---

[3] Professor Douglas Laycock has since shown that there is no evidence that the Founders viewed religious exemptions as constitutionally prohibited or part of an establishment of religion. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2006).

Province of Carolina, included provisions expressly permitting "indulgences and dispensations" from laws requiring "the people and inhabitants of the said province" to "conform" to the established state religion, the Church of England. *Id.* at 1428 (quotation marks omitted). By 1776, nearly every colony granted religious exemptions from oath-taking, military service, and paying the surviving church taxes. *Id.* at 1467-71; Laycock, 81 Notre Dame L. Rev. at 1803-08.

After the American Revolution, every State except Connecticut had a constitutional provision protecting religious exercise. McConnell, 103 Harv. L. Rev. at 1455. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." *Id.* at 1456. Most of these state constitutional provisions protected free exercise of religion unless it was contrary to the "'peace'" and "'safety'" of the State. *Id.* at 1457 & nn.241-42 (quoting various state constitutions). If free exercise clauses created no claim to exemption from generally applicable laws, these peace-and-safety provisos would have been unnecessary—religious practices endangering peace and safety would simply have been illegal, without further inquiry.

Justice O'Connor reviewed this and other historical evidence in reaching much the same conclusion in her *Boerne* dissent. The evidence suggests that the Founders "more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence." 521 U.S. at 549 (O'Connor, J.,

dissenting). She saw the historical state religious liberty statutes as "parallel[ing] the ideas expressed in [the Court's] pre-*Smith* cases—that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest." *Id.* at 552.

Justice Gorsuch similarly explained that the Clause "guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2026 (2017) (concurring in part). "At the time of the First Amendment's adoption, the word 'exercise' meant (much as it means today) some '[l]abour of the body,' a '[u]se,' as in the 'actual application of any thing,' or a '[p]ractice,' as in some 'outward performance.'" *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring). The Clause thus "protects the right to *act* on those beliefs outwardly and publicly." *Ibid.*

Most recently, Justice Alito comprehensively demonstrated that *Smith* lacks a plausible historical foundation. See *Fulton*, 593 U.S. at 575-79 (concurring in the judgment). Surveying "early colonial charters," early state constitutions, and the Northwest Ordinances of 1787 and 1789, Justice Alito explained that a "predominant model" was readily apparent from these sources: "broad protection for the free exercise of religion," subject to a narrow carveout for "public 'peace' or 'safety.'" *Id.* at 575-78.

The historical evidence thus indicates "that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." McConnell, 103 Harv. L. Rev. at 1512; see

also James C. Phillips & John Yoo, *On Religious Freedom, Madison Was Right*, Nat'l Rev. (Nov. 30, 2018), https://tinyurl.com/y4hlk8kv.[4]

2. The logical conclusion from this evidence is that *Smith* overlooks a central focus of the Free Exercise Clause. "The right to free exercise was a substantive guarantee of individual liberty," *Boerne*, 521 U.S. at 563 (O'Connor, J., dissenting), and thus it is essential for courts to examine whether the government has a sufficiently important interest in constraining that liberty to justify application of the law at issue. Under *Smith*, in contrast, the importance of the government's interest matters little, if at all, and courts need only "locate the boundary line between neutral laws of general applicability and those that fall short of this standard." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 851 (2001). *Smith*'s standard is thus flawed and incomplete because it fails to ask the crucial question and places dispositive weight on considerations that do not reflect the full scope of the Constitution's free exercise protections.

In particular, the only "right" that *Smith* construes the Free Exercise Clause to confer is "a right to equal protection"—not the "substantive right to be left alone by government" that the Framers sought to protect. Laycock, 1990 Sup. Ct. Rev. at 10. The plain language of the Free Exercise Clause, "[o]n its face,"

---

[4] Other scholars have a different perspective on the original understanding of the Free Exercise Clause. *E.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). But reconsideration of *Smith* will permit the Court to perform the analysis of original understanding that the *Smith* Court did not.

"creates a substantive right" by forbidding Congress from prohibiting or penalizing religious exercise. *Id.* at 13.

A "neutral[ity]" principle requiring facially equal treatment of religious activity is certainly one element of the Clause's protections, as subsequent cases have reaffirmed. *E.g.*, *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296-97 (2021) (per curiam). But facially equal treatment, standing alone, does not adequately protect the substantive right that the Clause embodies. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220; *Lukumi*, 508 U.S. at 561 (Souter, J., concurring in part and concurring in the judgment). That is why the Constitution mandates *substantive* neutrality, meaning that government should create religiously neutral incentives that "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." Laycock, 1990 Sup. Ct. Rev. at 16 (quotation marks omitted).

Similarly, *Smith*'s safe-harbor for neutral laws of general applicability has reduced a substantive free exercise right to a mere specialized form of equal protection. See Lund, 26 Harv. J. L. & Pub. Pol'y at 637. In other words, "as long as a law remains exceptionless, then it is considered generally applicable, and religious claimants cannot claim a right to be exempt from it," but "[w]hen a law has secular exceptions, * * * a challenge by a religious claimant becomes possible." *Ibid.* This understanding of the Free Exercise Clause means that if religious groups are unsuccessful at lobbying for a religious accommodation,

see *Smith*, 494 U.S. at 890, they may only "'piggyback'" on the successes of secular interests in the political branches, Lund, 26 Harv. J. L. & Pub. Pol'y at 637.

This perverse outcome undermines the Constitution's ban on laws "prohibiting the free exercise" of religion. U.S. Const. amend. I. In essence, the *Smith* test means that the constitutionally enshrined substantive right to free exercise turns essentially on fortuity: the dispositive question is whether there happens to be some group that desires to engage in analogous secular conduct and possesses sufficient political clout to persuade the government to create exceptions, a question that has nothing to do with the extent of the burden on free exercise or the strength of the government's justifications. See Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 24-26 (2016). *Smith* thus creates an arbitrary regime in which government may substantially burden religious exercise even when it has no significant need to do so.

C. *Smith* Undermines A Key Purpose Of The Free Exercise Clause.

Smith is not only inconsistent with the original understanding of the Free Exercise Clause, it also undermines a key purpose of the Clause—protecting minority religions. See Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919 (2004). The Court in *Smith* acknowledged that its approach of "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," and chalked that up as the "unavoidable consequence of democratic government." 494 U.S. at 890. But a key purpose of the Free Exercise Clause, like the rest of

the Bill of Rights, was to ensure that minorities "[a]void[ ] certain 'consequences' of democratic government." McConnell, 57 U. Chi. L. Rev. at 1129.

This is not a hypothetical concern. *Smith* itself allowed the government to bar members of a Native American religion from receiving unemployment compensation simply because they participated in a Native American worship service. See 494 U.S. at 874. Similarly, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), members of a minority religious sect sought a religious exemption for the church's use of a hallucinogenic tea in religious ceremonies. But for RFRA's "statutory rule comparable to the constitutional rule rejected in *Smith*," *id.* at 424, they likely would have faced the same fate as the petitioners in *Smith*.

Other victims of generally applicable laws have suffered more severe consequences. Mary Stinemetz, a Jehovah's Witness on Medicaid who resided in Kansas, required a liver transplant to survive. Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 Conn. L. Rev. 959, 974 (2018). Stinemetz's faith, however, prohibited blood transfusions. Fortunately, a Nebraska hospital offered liver transplants without transfusions. *Ibid*. But because Kansas had a policy that it would not reimburse out-of-state procedures, it refused to pay for the procedure in Nebraska. *Ibid*. Under *Smith*, Kansas officials believed that they had no obligation to consider religious exceptions or take Stinemetz's religious needs seriously. And they didn't. The Kansas Court of Appeals ultimately overturned the decisions rejecting her challenge, but by then it was too late, leaving Stinemetz to die for her faith. *Stinemetz* v. *Kan. Health Pol'y Auth*., 252 P.3d

141 (Kan. Ct. App. 2011); Brad Cooper, *Jehovah's Witness Who Needed Bloodless Transplant Dies*, Kan. City Star (Oct. 25, 2012), https://tinyurl.com/y5bwfwus.

By leaving the protection of religious minorities to the vicissitudes of majority rule, *Smith* undermines a core purpose of the Free Exercise Clause: protecting the exercise of minority religions. A reading of the Clause that fails to protect the free exercise rights of the least popular and powerful religious adherents among us offends one of the Clause's original purposes, cf. *Lukumi*, 508 U.S. at 576 (Souter, J., concurring in part and concurring in the judgment), and should be reexamined and rejected.

D. *Smith*'s Factual And Legal Premises Have Proved Wrong.

The *Smith* Court premised its unwillingness to accommodate religious exemptions on a fear that a compelling-interest test would be unworkable in a religiously pluralistic society. 494 U.S. at 888. The Court predicted that this concern would only increase as America grew more religiously diverse. *Ibid.* But the Court's prediction was wrong. Because of RFRA, RLUIPA, and similar state laws, the compelling-interest test now applies to the entire federal government and over half of the States. In most of these places, it has been the law for decades.

Yet none of the anarchy the *Smith* Court predicted has come to pass, even though American society has become significantly more pluralistic over the past 30 years. See Sarah Pulliam Bailey, *Christianity Faces Sharp Decline as Americans Are Becoming Even Less Affiliated with Religion*, Wash. Post (May 12, 2015), https://tinyurl.com/zpns2j2; Pew Rsch. Ctr., *Religious*

Landscape Study, https://tinyurl.com/y6ttqm72 (last visited Oct. 17, 2024).

Smith also cautioned that calling on judges to balance the competing interests of religious exercise and government's need for regulation would be "a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." 494 U.S. at 889 n.5. But the *Smith* regime "still involves balancing" because now "the judiciary measures the religious and the state interests indirectly—by looking at the presence or absence of secular exceptions as indicative of the religious and state interests—and then tries to compare secular exceptions with a possible religious exception." Lund, 26 Harv. J. L. & Pub. Pol'y at 664. Balancing still occurs, but it "pays no attention" to the most important concern: "the governmental and religious interest in granting or denying an exception." *Ibid.*

Smith was thus based in large part on incorrect premises and unrealized fears.

II. *STARE DECISIS* DOES NOT BAR RECONSIDERATION OF *SMITH*.

Considerations of *stare decisis*, which is "not an inexorable command," *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (quotation marks omitted), do not justify adhering to *Smith*'s flawed framework. "[*S*]*tare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

Several justices have expressed "doubts about whether the *Smith* rule merits adherence" virtually since its adoption. *E.g.*, *Lukumi*, 508 U.S. at 559, 571

(Souter, J., concurring in part and concurring in the judgment); *Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting) ("*Stare decisis* concerns should not prevent us from revisiting our holding in *Smith*."); *Fulton*, 593 U.S. at 594-95 (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.) ("No relevant [*stare decisis*] factor, including reliance, weighs in *Smith*'s favor."). In fact, "[a]t least ten members of the Supreme Court have criticized *Smith*." *Horvath*, 946 F.3d at 794 & n.2 (Ho, J., concurring in the judgment in part and dissenting in part) (collecting cases).

The passage of time has only further eroded *Smith*'s foundation. See John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 Minn. L. Rev. 485, 499 (2014). Not only has *Smith*'s reasoning been undermined, but its framework has proven unworkable. Moreover, the Court has generally avoided embracing or building upon *Smith*'s narrow view of free exercise rights in subsequent cases, preventing it (thankfully) from becoming embedded into the larger body of religious liberty jurisprudence. These factors all weigh heavily against retaining *Smith*. Cf. *Janus*, 138 S. Ct. at 2478-79.

A. Nearly All Of This Court's Recent Free Exercise Precedents Were Decided Without Reliance On *Smith*'s Crabbed View Of The Free Exercise Clause.

Over the past 31 years, this Court has decided several major cases raising substantial free exercise con-

cerns. Yet this Court has never relied on *Smith*'s deferential standard to uphold a law against a fully briefed free exercise challenge.[5]

In *Espinoza*, the Court upheld the free exercise rights of parents to send their children to religious schools. The Court held that the challenged provision "bar[red] religious schools from public benefits solely because of the religious character of the schools," thus punishing the free exercise of religion. 140 S. Ct. at 2254-55. Similarly, in *Trinity Lutheran*, the Court upheld the free exercise rights of a church to compete for a grant to resurface playgrounds. The Court did so by finding "express discrimination against religious exercise here" from the State's "refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." 137 S. Ct. at 2022.

Other recent decisions are similar. In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, the Court held that New York "single[d] out houses of worship for especially harsh treatment." 141 S. Ct. 63, 66 (2020) (per curiam); see also *Tandon*, 141 S. Ct. at 1296. The results would have been the same under *Sherbert*'s and *Yoder*'s compelling-interest test. So too with *Fulton*, 593 U.S. 522. There, the Court found a lack of general applicability based on a never-used exemption mechanism in Philadelphia's adoption process. *Id.* at 537.

In other cases, the Court has simply sidestepped *Smith* altogether. In *Locke* v. *Davey*, 540 U.S. 712

---

[5] In *Christian Legal Society* v. *Martinez*, 561 U.S. 661, 697 n.27 (2010), the Court cited *Smith* in rejecting—in a footnote—a "briefly argue[d]" free-exercise claim.

(2004), for example, the Court held that the Free Exercise Clause does not require a State to pay for theology education when it provides funding for secular education. That holding, while not protective of free exercise rights, did not rest on *Smith*, as the challenged law was neither neutral nor generally applicable. The Court instead concluded that funding the training of clergy raised different questions from non-neutral regulation. *Id.* at 722 n.5, 725.

Nor did the Court rely on *Smith* in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), in which the Court recognized a "ministerial exception" that prevents the government from interfering with the internal governance of a church by regulating the hiring and dismissal of ministers or similar employees. *Id.* at 188; see also *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020). Even though the federal law at issue was "a valid and neutral law of general applicability," the Court declined to follow *Smith*, instead holding that *Smith* should be limited to laws regulating "only outward physical acts." *Hosanna-Tabor*, 565 U.S. at 190; see also Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1192 (2014) (noting tension between reasoning of *Smith* and *Hosanna-Tabor*); Nestor, 44 Harv. J. L. & Pub. Pol'y at 445-48 (arguing *Hosanna-Tabor* undermined *Smith*'s *stare decisis* weight).

In several of the Court's other post-*Smith* cases, the petitioners have rested their claims on RFRA or RLUIPA—not on *Smith* or the Free Exercise Clause. In *Holt*, 574 U.S. at 356, the Court held that a state department of corrections' grooming policy violated

RLUIPA by substantially burdening an inmate's religious practice of growing a half-inch beard. A year before, in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Court determined that the Department of Health and Human Services' contraceptives mandate violated RFRA's prohibition on federal government "action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest." *Id.* at 690-91. The Court similarly struck down under RFRA the federal government's ban on all uses of a hallucinogen that was used in a sacramental tea by members of a minority religious sect. *O Centro*, 546 U.S. at 439.

This litany comprises the Court's significant free exercise decisions since 1990, none of which applied *Smith*'s novel rule to reject a fully presented free exercise claim, and each of which would have come out the same way under the compelling-interest test. Considerations of *stare decisis* thus provide no basis for resisting reconsideration (and rejection) of the rule announced in *Smith*.

B. Lower Courts Have Struggled To Apply *Smith*'s Framework.

Exactly how far *Smith* intended to go in departing from the Court's prior precedent is not disclosed in *Smith* itself. And this Court's general reluctance to fully embrace *Smith* in subsequent free exercise cases has muddled the law even further, leading to confusion in the lower courts. In particular, "*Smith*'s rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing." *Danville Christian Acad., Inc.* v. *Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay).

This Court's experience with COVID-19 restrictions illustrates the problem. Around the country, "[a]t the flick of a pen," state governments "asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring). Yet lower courts struggled to apply *Smith* in this context, even for laws that overtly discriminated against religious activity. In California alone, this Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" five times. *Tandon*, 141 S. Ct. at 1297-98.

New York similarly enacted "very severe restrictions on attendance at religious services" in high-risk areas, *Roman Catholic Diocese*, 141 S. Ct. at 65-66, which "all but closed" houses of worship, *id.* at 69 (Gorsuch, J., concurring). Yet the Second Circuit held that New York's restrictions were likely permissible under *Smith* even though they "singl[ed] out 'houses of worship' for unfavorable treatment." *Agudath Israel of Am.* v. *Cuomo*, 980 F.3d 222, 228 (2d Cir. 2020) (Park, J., dissenting).

Lower courts' inability to reach consistent results on issues as fundamental as the right to attend religious services illustrates, if it had not been clear already, that something has gone seriously awry in this Court's First Amendment jurisprudence. Reconsideration of *Smith* would allow the Court to ensure that all religious minorities are protected by a compelling-interest standard that gives effect to the substantive protection that the Framers sought to afford for free exercise rights.

III. THERE ARE NUMEROUS VIABLE ALTERNATIVES TO *SMITH*.

In *Fulton*, Justice Barrett (joined by Justices Breyer and Kavanaugh) raised the natural follow-on question to overruling *Smith*—what should replace it? 593 U.S. at 543 (concurring). That overarching inquiry entails "a number of issues to work through," including the applicable tier of scrutiny, whether indirect religious burdens should be cognizable, and whether juridical persons should enjoy identical protections to individuals. *Id.* at 543-44.

The Court need not sort through these questions in a vacuum. Much like *Smith* provoked a flurry of academic analysis about the Free Exercise Clause's original meaning, so too did *Fulton* prompt scholars to explore the questions raised by Justice Barrett—and to illustrate why they should not pose any obstacle to this Court's review of *Smith*.

Most obviously, the Court could return to the pre-*Smith* compelling-interest test described in *Sherbert* and *Yoder* and later codified in statutes such as RFRA and RLUIPA. That "test sets a strong but workable standard." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 Cato Sup. Ct. Rev. 33, 44. Indeed, as RFRA, RLUIPA, and analogous state statutes have shown, the familiar pre-*Smith* "compelling-interest standard has not come close to producing the 'anarchy' of which *Smith* warned." *Ibid.*; *supra* at 4, 15-16. Nor is there any reason to believe a return to the pre-*Smith* regime would conflict with post-*Smith* precedents such as *Hosanna-Tabor*. *Cf. Fulton*, 593 U.S. at 544 (Barrett, J., concurring). Although certain forms of governmental interference with religious exercise

are "absolutely" (and justifiably) "barred"—such as interference with *internal* church governance—the compelling-interest test addresses different factual circumstances outside the areas justifying a categorical rule. Laycock & Berg, 2020-2021 Cato Sup. Ct. Rev. at 45.

Moreover, the Court could refine the pre-*Smith* regime to eliminate certain "concerns identified in *Smith*." Stephanie H. Barclay, *Replacing* Smith, 133 Yale L.J. Forum 436, 440 (2023). To curtail the perceived subjectivity of the compelling-interest test, for instance, the Court could direct judges to "identify specific government interests that were viewed at the Founding as inherent limitations on natural rights related to religious liberty," which could result "in a smaller and more determinate set of interests" than what lower courts frequently deem "compelling" under RFRA and RLUIPA. *Id.* at 460. This historically grounded approach to strict scrutiny would help discipline the doctrine and align it with the Court's recent decisions protecting other fundamental rights.

Some of these alternatives are no doubt better than others. But any of them "would be a dramatic improvement" to "*Smith*'s total abdication of review." Christopher C. Lund, *Answering* Smith*'s Questions*, 108 Iowa L. Rev. 2075, 2092 (2023); Laycock & Berg, 2020-2021 Cato Sup. Ct. Rev. at 50. Whatever questions may arise in future cases, reconsidering *Smith* now will ensure that courts answer those questions in a manner more consistent with the Constitution's promise of free exercise and religious liberty.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

THOMAS G. HUNGAR
MATT GREGORY
Counsel of Record
M. CHRISTIAN TALLEY
ALY COX
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
mgregory@gibsondunn.com

ALLYSON N. HO
ASHLEY E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, Texas 75201
(214) 698-3100

Counsel for Amici Curiae

October 21, 2024

APPENDIX

Table of Contents

LIST OF *AMICI CURIAE*[*]

Thomas C. Berg, James L. Oberstar Professor of Law and Public Policy, University of St. Thomas (Minnesota) School of Law

Teresa Stanton Collett, Professor of Law, University of St. Thomas (Minnesota) School of Law

Richard F. Duncan, Sherman S. Welpton, Jr. Professor of Law and Warren R. Wise Professor of Law, University of Nebraska College of Law

John D. Inazu, Sally D. Danforth Distinguished Professor of Law and Religion, Washington University in St. Louis School of Law

Douglas Laycock, Robert E. Scott Distinguished Professor of Law Emeritus, University of Virginia School of Law; Alice McKean Young Regents Chair Emeritus, University of Texas School of Law

Christopher C. Lund, Professor of Law, Wayne State University Law School

Michael W. McConnell, Richard and Frances Mallery Professor of Law, Stanford Law School; Director, Stanford Constitutional Law Center; Senior Fellow, Hoover Institution

---

[*] Institutional affiliations are provided for identification purposes only. Opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.