No. 25-133

In the Supreme Court of the United States

JOSEPH MILLER, *et al.*,

Petitioners,

v.

JAMES V. MCDONALD, Commissioner,
New York State Department of Health, *et al.*,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Jewish Coalition for Religious Liberty (JCRL) is an incorporated organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty.

JCRL has an interest in restoring a robust understanding of the Free Exercise Clause. That provision is important to members of all faiths in America, including Judaism. Over the last thirty years, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), has presented such an obstacle to litigating free exercise claims that many religious adherents have not even attempted to vindicate their rights. When such cases have been brought, *Smith* has shielded numerous laws that impose substantial burdens on religious exercise from First Amendment review. JCRL urges this Court to overrule *Smith* to help ensure religious liberty for all Americans.

SUMMARY OF ARGUMENT

A famous definition of "insanity" is "doing the same thing over and over and expecting different results." Under that definition, this Court's post-*Smith* free exercise jurisprudence stands ready to be committed. Since *Smith*, this Court has (i) consistently taken free exercise cases, (ii) issued decisions cabining *Smith* in an attempt to preserve a modicum of protection for religious liberties in the face of purportedly neutral

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

state laws, (iii) hoped that the lower courts would get the message, (iv) watched as they did not, and (v) restarted the cycle by taking yet another free exercise case. Wash, rinse, repeat. It is time to end this loop and overrule *Smith*.

This case provides an ideal vehicle. After New York revoked its religious exemption to its vaccine requirement for schoolchildren, it is threatening to shut down three Old Order Amish schools for failing to abide by the requirement. Petitioners, in the Old Order Amish tradition, have a sincere and abiding religious objection to vaccination. JCRL, as a Jewish organization, understands what it means to be confronted with these kinds of choices. Thus, although JCRL does not object to New York's vaccination requirement on religious or other grounds, it strongly supports the general right of the Amish to live in accordance with the dictates of their faith. At the very least, New York should be required to demonstrate that it has a compelling interest in enforcing the law before it is allowed to burden Petitioners' sincerely held religious beliefs.

Religious liberty is a keystone of the American identity. Since even before its founding, Jews and millions of people of all faiths have come to this country for the promise of being able to practice their religion free from the governmental harassment and restrictions that were widespread in the Old World. Until this Court's decision in *Smith*, that promise was honored and safeguarded by the Free Exercise Clause. Unlike the King, Sultan, or Tsar, the government could not impose a substantial burden on religious practice unless that burden was "justified by a compelling state interest." *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963)

(quotations omitted). After hundreds of years of such protection, *Smith*, out of the blue, "swept aside" precedent, history, tradition, and the text of the Free Exercise Clause to strip the Clause of its force. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 553 (2021) (Alito, J., concurring).

Because of the wealth of scholarship analyzing *Smith*'s legal flaws,[2] this brief will focus on the actual impact *Smith* has had on America and on Americans seeking to practice their faith.

First, the stated motive driving the *Smith* decision was that maintaining religious exemptions to generally applicable laws would make this country ungovernable. 494 U.S. at 888. But decades of post-*Smith* experience have proven this false. In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*—in a near-unanimous vote—to restore the compelling interest test that *Smith* abrogated. After this Court struck down RFRA as applied to the States in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), many States adopted (constitutionally, legislatively, or judicially) their own RFRA-type regimes. Today, 39 States are governed by such regimes.[3] Moreover, even though the U.S.

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[2] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J. L. & Religion 99 (1990).

[3] *See Federal & State RFRA Map*, Becket Fund, available at https://becketfund.org/research-central/rfra-info-central/map (last accessed Aug. 29, 2025).

population has become more secular since *Smith*,[4] it has also become more religiously diverse,[5] and, contrary to *Smith*'s concerns, we do not have anarchy in those 39 States or the country writ large. *See Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

Second, Smith asserted that its effect on religious freedom would be limited. 494 U.S. at 890. But within the States that have not adopted their own RFRAs, *Smith*'s effects have been widespread and increasingly extend to all religious communities, large and small. This downward spiral will only accelerate in sections of the country that become more secular and less concerned about free exercise—or simply less concerned about the rights of religious minorities. Indeed, the legacy of *Smith* is a Free Exercise Clause on life support in those areas. Today, lower courts frequently rely on *Smith* to dismiss free exercise claims in cases—such as this case—that could never clear strict, or even intermediate, scrutiny. The message of *Smith* to state and local governments, as well as to lower courts, is that "the Free Exercise Clause ha[s] been generally repealed," and that "the operative rule [is] that free exercise claims should be

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[4] *See In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Research Center (Oct. 17, 2019), available at https://www.pewresearch.org/religion/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace.

[5] *See* Daniel A. Cox, *Religious Diversity and Change in American Social Networks: How Our Social Connections Shape Religious Beliefs and Behavior*, Survey Center on American Life (Dec. 15, 2020), available at https://www.americansurveycenter.org/research/religious-diversity-and-change-in-american-social-networks.

rejected." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 216 (1994).

New York—one of the States that does not have its own RFRA—has gotten that message. Indeed, this case is just one of several recent cases that reflect New York's hostility to free exercise. *See infra* Section I.C.3. As those cases show, *Smith* is incapable of and uninterested in protecting religious liberty. And as long as *Smith* is on the books, states like New York will continue to pass laws that substantially burden religious freedom. The Free Exercise Clause will provide no protection from those statutes, both because lower courts continue to apply *Smith* to free exercise claims, and because many would-be plaintiffs, knowing the deck is stacked against them, never even attempt to bring those claims. *See Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring).

Smith started out by goring the ox of a little-known Native American religious practice that involved using a banned narcotic. Predictably, it is now on its way to goring the ox of standard religious practices and beliefs of the major world religions. It should not matter whose ox is being gored. It is time for the Court to overrule *Smith*.

ARGUMENT

I. This Court Should Grant *Certiorari* To Overrule *Employment Division* v. *Smith*.

A. *Smith* Is Inconsistent With This Nation's History as a Haven of Religious Liberty.

Even before its founding, the United States was a haven of religious liberty and tolerance. That history

dates back to the founding of the colonies, which were themselves "established as sanctuaries for particular groups of religious dissenters" and, unusually for that time, "extended freedom of religion to groups … beyond their own." *City of Boerne*, 521 U.S. at 551 (O'Connor, J., dissenting). The colonies enshrined the right to free exercise in their individual charters beginning in the mid-1600s. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1425 (1990). By 1789, every State but one had a constitutional provision guaranteeing the right to free exercise in one form or another. *Id.* at 1455. Moreover, the colonial and state legislatures backed up these constitutional guarantees by granting religious exemptions to generally applicable laws involving oaths, military conscription, and religious assessments. *See id.* at 1466–69. Those exemptions applied even to laws that were clearly justified by a significant state interest. *See id.* at 1468; *Fulton*, 593 U.S. at 583 (Alito, J., concurring).

Thus, by the time the federal Free Exercise Clause was ratified in 1791, the American commitment to free exercise had a rich history—one which made clear that the Clause operates as "an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application." *City of Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting).

Smith disregarded this history in holding that the Clause does not excuse compliance with a "valid and neutral law of general applicability." 494 U.S. at 879. And, as subsequent experience has shown, *Smith* was

not only at odds with history, it also was premised on incorrect assumptions, and its impact on religious liberty in this country was immediate and extensive.

B. Overruling *Smith* Would Not Create Anarchy.

Central to *Smith*'s reasoning was the concern that allowing individual religious exemptions would make the country ungovernable. *See* 494 U.S. at 888. But experience with RFRA, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, and state RFRA-like statutes—all of which "impose essentially the same requirements as" *Sherbert*'s compelling interest test that *Smith* rejected—proves otherwise. *Fulton*, 593 U.S. at 612 (Alito, J., concurring).

In response to the *Smith* decision, Congress enacted RFRA specifically to "restore[] the compelling governmental interest test previously applicable to First Amendment Free Exercise cases." H.R. Rep. No. 103-88, at 6 (1993). RFRA was astoundingly popular, passing the Senate by a vote of 97-3, and the House of Representatives by a unanimous voice vote. Laycock & Thomas, *supra*, at 210. In 2000, after this Court struck down RFRA as applied to state and local governments, *see City of Boerne*, 521 U.S. at 536, Congress enacted RLUIPA, which applied the RFRA standard to prison and land-use cases against state and local governments. And, in the decades since *Smith*, many States have adopted RFRA statutes or RFRA-like protections in their state constitutions, with 39 States now governed by such regimes.[6]

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[6] *See Federal & State RFRA Map*, Becket Fund, available at https://becketfund.org/research-central/rfra-info-central/map (last accessed Aug. 29, 2025).

Federal and state courts have been applying these statutes for decades now, and "[n]o serious claim can be made that these systems have produced anarchy, or anything close to it." Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion Is Special Or Not*, 127 Harv. L. Rev. 1395, 1411 (2014). Indeed, this Court has twice affirmed the "feasibility of case-by-case consideration of religious exemptions to generally applicable rules" under RFRA and RLUIPA, expressing confidence that courts are "up to the task." *Gonzales*, 546 U.S. at 436 (RFRA); *see Cutter* v. *Wilkinson*, 544 U.S. 709, 722–23 (2005) (RLUIPA). Retaining the *Smith* framework is flatly inconsistent with that recognition.

C. *Smith's* Legacy Is Diminished Free Exercise in The States That Have Chosen Not To Implement Their Own RFRAs.

1. *Smith* Caused Immediate Harm To Minority Religious Practices, Which Was Bad Enough.

Smith caused significant harm to practitioners of minority religions almost as soon as it was decided. As *Smith* rightly predicted, by stripping religious exercise of the "compelling interest test" it left open to governmental regulation "those religious practices that are not widely engaged in." 494 U.S. at 890. Cases in the months and years following *Smith* included:

- allowing the autopsies of religious Jews and Hmong against their religious practices,[7]

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[7] *Montgomery* v. *County of Clinton*, 743 F. Supp. 1253, 1257–60 (W.D. Mich. 1990), *aff'd* 940 F.2d 661 (6th Cir. 1991); *Yang* v. *Sturner*, 750 F. Supp. 558, 559–60 (D.R.I. 1990).

- removal of a burial site contrary to Native American and Quaker beliefs,[8]
- denying a zoning ordinance accommodation to establish a Buddhist temple,[9] and
- prohibiting Jewish police officers from wearing religiously required head coverings or beards.[10]

For these Americans and their co-religionists, these cases confirmed that *Smith* had transformed the Free Exercise Clause into "an unfulfilled and hollow promise." *Smith*, 494 U.S. at 921 (Blackmun, J., dissenting). In fact, one post-*Smith* study explained that the "percentage of favorable decisions for free exercise cases dropped from over 39 percent to less than 29 percent following *Smith*." Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. Church & State 237, 248 (2004). Moreover, *Smith* caused an overnight chilling effect on free exercise claims, with "the rate of free exercise cases initiated by religious groups dropp[ing] by over 50 percent immediately after *Smith*." *Id.* at 242. Four Justices of this Court recently acknowledged that chilling effect, writing that religious Americans are dissuaded from litigating free exercise claims "due to certain decisions of this Court," including *Smith*. *Kennedy* v. *Bremerton Sch. Dist.*, 586 U.S. 1130, 1133 (2019) (Alito, J., statement respecting denial of *certiorari*).

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[8] *Thiry* v. *Carlson*, 78 F.3d 1491, 1496 (10th Cir. 1996).

[9] *Tran* v. *Gwinn*, 262 Va. 572, 580 (2001).

[10] *Riback* v. *Las Vegas Metro. Police Dep't*, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008) (relying on *Smith* to hold that Jewish police officer had no free exercise right to wear a Yarmulke).

2. But *Smith*'s Impact Quickly Spread.

The early free exercise doctrines developed largely through cases brought by plaintiffs from minority faiths.[11] But those cases were important to the protection of religious liberty for everyone because they were "the canary in the coal mine"—"the test case[s] for the nation's tolerance and commitment to pluralism." Sarah Barringer Gordon, The Spirit of the Law: Religious Voices and the Constitution in Modern America 43 (2010). Where the Court provided robust protection to minority faiths, religious liberty flourished everywhere. Where the Court did not, the effects were felt across all religious communities in the nation.

The data bear this out. Only a few years after *Smith*, "all types of religions [were] burdened" by generally applicable laws, not just minority religions. *See* Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 Nexus J. Op. 149, 152–56 (1997) (compiling cases). As one article explained just a few years after *Smith*, the "symbolic effect" of the *Smith* decision meant that governments were less solicitous of religious claims overall. Laycock & Thomas, *supra* at 216. "Government bureaucrats, their lawyers, and many lower court judges took *Smith* as a signal that the Free Exercise Clause had been generally repealed, that whatever clever argument a church lawyer might make about *Smith*'s exceptions, the operative rule was

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[11] *See* Maureen Groppe, *From marginal religious groups to mainstream Christians, there's a shift in Supreme Court cases,* USA Today (Aug. 19, 2025), available at https://www.usatoday.com/story/news/politics/2025/08/02/rastafarian-supreme-court-religious-liberty/85423199007.

that free exercise claims should be rejected." *Id.* Thus, as cases following *Smith* showed, "not even evangelical or mainline churches could count on sympathetic regulation under *Smith*." *Id.* at 217.

A review of this Court's recent free exercise cases confirms this conclusion, as the number of merits cases involving mainstream practices from large or well-known religions has been on the rise in recent years.[12] Indeed, many of the most prominent free exercise cases in the last several years were brought by such plaintiffs. In *Mahmoud* v. *Taylor*, for example, Muslim, Catholic, and Ukrainian Orthodox parents brought a combined challenge to the curriculum in their children's school as violating their free exercise rights to direct the religious upbringing of their children. 145 S. Ct. 2332, 2347–49 (2025). And, in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, Jewish synagogues and the Roman Catholic Diocese of Brooklyn sued to block enforcement of the New York governor's executive order restricting attendance at religious services while allowing secular businesses to remain open without similar restrictions. 592 U.S. 14, 15–16 (2020). *See also Tandon* v. *Newsom*, 593 U.S. 61, 62–64 (2021) (Protestant Christian plaintiffs sought to enjoin California from enforcing restrictions on private gatherings for worship); *Fulton*, 593 U.S. at 526–28 (Catholic Social Services sued the City of Philadelphia for barring it from the city's foster care system unless it agreed to certify same-sex couples).

If *Smith* is not overruled, the need for a revived Free Exercise Clause will only become greater with time. As the nation's demographics shift to become

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[12] *See* Groppe, *supra* note 11.

less religious overall, the nation's "wider social sympathy for traditional religion is fading." Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 Harv. J. L. & Pub. Pol'y 711, 728-729 (2019). Regardless of what the Court may have thought in 1990, Americans will not always be able to rely on the political process to protect even the largest religious groups, let alone the smaller ones.

Today, as a result of the Court's "studious indecision" regarding *Smith*'s viability, *Fulton*, 593 U.S. at 627 (Gorsuch, J., concurring), lower courts continue to apply *Smith* to concerning result. Take *Taylor* v. *Southeastern Pennsylvania Transportation Authority*, 2024 WL 3203318 (E.D. Pa. June 27, 2024). In *Taylor*, a practicing Muslim employee of the Southeastern Pennsylvania Transportation Authority ("SEPTA") was forced, at risk of losing his job, to break his fast by drinking water during Ramadan—"one of the holiest months for Muslims"[13]—so that he could provide a urine sample for drug testing required by Department of Transportation ("DOT") regulations. *Taylor*, 2024 WL 3203318, at *1–6. Despite SEPTA's equal employment opportunity director stating that the incident "should not have happened," the DOT providing specific guidance that SEPTA could schedule Taylor's future drug tests outside of required fasting times, and Taylor's lawyers notifying SEPTA that any future testing of Taylor during Ramadan "would constitute a further violation of his rights," SEPTA forced Taylor to break his fast on two more

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[13] Mohammad Mamun, *What is Ramadan? A Complete Guide to the Holy Month in Islam*, Islamic Info Center (Oct. 8, 2024), available at https://islamicinfocenter.com/what-is-ramadan.

occasions during the following year's Ramadan. *Id.* at *5–6. Nevertheless, the district court found that Taylor could not state a free exercise claim because SEPTA's testing policies were neutral and generally applicable under *Smith*. *Id.* at *28–34.[14]

Taylor is by no means an outlier. In *Christian Medical & Dental Ass'n* v. *Bonta*, 625 F. Supp. 3d 1018 (C.D. Cal. 2022), for example, the court rejected a free exercise challenge to a law that required physicians to facilitate assisted suicide, such as by documenting a patient's request for aid-in-dying drugs, despite religious objections to doing so. The plaintiffs sought a preliminary injunction, arguing that failing to comply with the statute would subject them to serious disciplinary action, and even civil or criminal penalties, and that the statute was "impermissibly gerrymandered against religious individuals." *Id.* at 1030–33. The court denied relief, concluding that "the statute is facially neutral" under *Smith* because its requirements "apply to all non-participating providers, regardless of the reasons the provider chooses not to participate." *Id.* at 1033.

And in *Olympus Spa* v. *Armstrong*, 138 F.4th 1204 (9th Cir. 2025), the Ninth Circuit cited *Smith* in upholding a Washington State public accommodations law as enforced against a women-owned and operated Korean spa with a "biological women"-only entry policy, to require entry to pre-operative transgender women. *Id.* at 1212, 1218. This was despite the spa's assertion that the law "requir[ed] the Spa 'to renounce its [Christian] faith by its deeds' by permitting 'the

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[14] The district court granted Taylor partial relief under Title VII. *Taylor*, 2024 WL 3203318, at *17–28.

mixing of nude persons of the opposite sex who are not married to one another,'" *id.* at 1218, and by "compel[ling] their female employees to give full-body massages to individuals with exposed male genitalia," *id.* at 1224 (Lee, J., dissenting).

In another case, a New York district court upheld a school district policy permitting students to use their self-identified name and pronouns at school while forbidding school employees from notifying parents of their child's choice, reasoning that the policy was neutral and generally applicable. *Vitsaxaki* v. *Skaneateles Cent. Sch. Dist.*, 771 F. Supp. 3d 106, 116–20 (N.D.N.Y. 2025).

In still more cases, courts have relied on *Smith* to reject free exercise challenges to laws requiring a Christan church to dismantle a homeless encampment voluntarily hosted on its property without a permit,[15] and Christian photographers to photograph same-sex weddings.[16] Others have cited *Smith* to uphold laws denying a Christian youth organization access to state grants because it required employees and volunteers to subscribe to a "statement of Christian faith,"[17] and a Buddhist group an accommodation necessary to build a meditation center.[18]

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[15] *Miller* v. *City of Burien*, 2025 WL 371874, at *8 (W.D. Wash. Feb. 3, 2025).

[16] *Emilee Carpenter, LLC* v. *James*, 107 F.4th 92, 109–11 (2d Cir. 2024).

[17] *Youth 71Five Ministries* v. *Williams*, 2024 WL 3183923, at *1–2 (D. Or. June 26, 2024) (denying preliminary injunction), *aff'd in relevant part*, 2025 WL 2385151 (9th Cir. Aug. 18, 2025).

[18] *Thai Meditation Ass'n of Ala., Inc.* v. *City of Mobile*, 83 F.4th 922, 928–29 (11th Cir. 2023).

That is not to say that these plaintiffs necessarily should have won each of those cases. But the government should have been required to prove that it had a compelling need to impose such significant burdens on Americans' exercise of their faith. Because of *Smith*, the government faced no such obligation.

3. Recent State Actions in New York Demonstrate *Smith*'s Insufficiency.

New York in particular has shown unfortunate disregard for the beliefs of religious New Yorkers. *See, e.g.*, *Roman Cath. Diocese of Albany* v. *Vullo*, 42 N.Y.3d 213 (2024) (holding that state definition of "religious employer," which excluded some religious employers, was valid under *Smith* despite the regulation mandating abortion coverage in violation of employer's religious beliefs), *cert. granted, judgment vacated*, 2025 WL 1678991 (U.S. June 16, 2025); *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 15–16 (granting injunctive relief from New York's COVID-related "restrictions on attendance at religious services" that "treat[ed] houses of worship much more harshly than comparable secular facilities").

A recent example concerning Yeshiva University ("YU") brings together almost all of the problems *Smith* created. YU is the most prominent Modern Orthodox Jewish college in the United States. It is dedicated to teaching Judaism to the next generation to ensure the continuity of Orthodox Judaism in America. In 2021, certain students sued YU claiming that the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-107, required the university to officially recognize a gay pride club, contrary to the millennia-old tenets of Orthodox

Judaism and the rulings of YU's rabbinical leadership. *See Alliance* v. *Yeshiva Univ.*, 2022 WL 2158381, at *2 (N.Y. Sup. Ct. June 14, 2022); *Yeshiva Univ.* v. *YU Pride All.*, 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting). Yet the trial court did not require the plaintiffs to show that the government had a compelling need to intervene in how rabbis run a religious school. Instead, the trial court relied on *Smith* to order YU to "immediately" recognize the group because "the First Amendment does not protect an individual from valid and neutral laws of general applicability, even when those laws forbid or compel conduct which goes against the grain of a religion." *Alliance*, 2022 WL 2158381, at *6–8.

YU quickly sought a stay of the trial court's decision pending appeal, which was rejected by the trial court, the Appellate Division, and the Court of Appeals. *See Yeshiva Univ.*, 143 S. Ct. at 2 (Alito, J., dissenting).

YU then sought a stay from this Court, which was denied on procedural grounds. *Id.* at 1. Four Justices dissented, noting that YU "would likely win if its case came before us." *Id.* at 2 (Alito, J., dissenting). Those Justices found that New York's "imposition of its own mandatory interpretation of scripture is a shocking development that calls out for review" given that "[t]he Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith." *Id.* They reasoned that the NYCHRL could not survive even under *Smith*, as "[r]estrictions on religious exercise that are not 'neutral and of general applicability' must survive strict scrutiny, and the NYCHRL treats a vast category of secular groups more favorably than religious schools like Yeshiva." *Id.* (citation omitted).

Despite this guidance, and demonstrative of the difficulty courts have in applying *Smith*, the New York Appellate Division shortly thereafter upheld the dismissal of YU's free exercise claim because the NYCHRL was "both neutral and generally applicable." *YU Pride All.* v. *Yeshiva Univ.*, 180 N.Y.S.3d 141, 145 (1st Dep't 2022). As a result, and in the face of New York lawmakers threatening YU's state funding in light of its "discriminatory behavior and claimed status,"[19] YU reached a settlement in the case in March 2025 in which it was forced to recognize the Pride Alliance.[20] That settlement fell apart within two months, landing the litigants back where they started after four years of expensive litigation.[21]

Thus, because of *Smith*, YU's religious practices were given no judicial protection, and New York State was given a bludgeon to force an Orthodox Jewish college to override rabbinic decisions regarding how best to teach the faith to Jewish students. Despite four Justices of this Court finding that YU's case was a "shocking development that calls out for review," *Yeshiva Univ.*, 143 S. Ct. at 2 (Alito, J., dissenting), the case may never have the chance to get that review from this Court—just like the many free exercise cases across the country that are summarily dismissed under

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[19] Liam Stack, *Yeshiva University's Ban on L.G.B.T.Q. Club Leads to Scrutiny of Funding*, N.Y. Times (Apr. 3, 2023), available at https://www.nytimes.com/2023/04/03/nyregion/yeshiva-university-ny-public-funds.html.

[20] Liam Stack, *Yeshiva University Reverses Itself and Bans L.G.B.T.Q. Club*, N.Y. Times (May 12, 2025), available at https://www.nytimes.com/2025/05/12/nyregion/yeshiva-university-lgbtq-club-ban.html.

[21] *Id.*

Smith, or more likely never filed in the first place. *See Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring) ("[T]hose who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects.").

4. As Parts of the Country Grow More Secular, *Smith* Is Incapable of Protecting Against Future Laws That Would Impose Intolerable Burdens on Religious Practice.

There are many other areas where a conflict between religious practices and a generally applicable law will arise in the future. Whether through carelessness, veiled hostility, or earnest secular values that conflict with religious views, neutral laws that pass *Smith*'s test could lead to extreme impositions on religious Americans.

San Francisco and several European countries have discussed banning circumcision, an important Jewish and Muslim practice.[22] In Belgium, for example, which imposes strict restrictions on circumcision, police have raided the homes of several *mohels*—individuals who perform circumcision in the Jewish tradition.[23] If a

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[22] *See* Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. Times (June 4, 2011), available at https://nyti.ms/2WJmDNM; Christina Caron, *Bill Banning Circumcision in Iceland Alarms Religious Groups*, N.Y. Times (Feb. 28, 2018), available at https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html ("The push to curb circumcision has been brewing in parts of Europe for several years.").

[23] *See* Ailin Vilches Arguello, *Belgian Police Raid Mohels' Homes in Antwerp, Sparking Outrage in Jewish Community*,

State were to pass a law banning circumcision, its purpose would not necessarily be anti-religious, and the law would be equally applicable to circumcisions for non-religious reasons. However, *Smith* would prevent courts from applying strict scrutiny despite the real threat the law would pose to Jewish and Muslim free exercise. The same is true for laws banning ritual slaughter—a process without which meat cannot be kosher or halal—which many European countries have already enacted.[24]

Or imagine a law that required Catholic priests to break the seal of confession to report any instance of child abuse they became aware of—forcing them to choose between breaking the law or excommunication from the Catholic Church.[25] Such a law was recently passed in Washington State, but was preliminarily enjoined because the law improperly targeted priests and provided a secular exception. *See Etienne* v. *Ferguson*, 2025 WL 2022101 (W.D. Wash. July 18,

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The Algemeiner (May 14, 2025), available at https://www.algemeiner.com/2025/05/14/belgian-police-raid-mohels-homes-antwerp-sparking-outrage-jewish-community.

[24] *See* Karen Zraick, *Is Stunning an Animal Before Slaughter More Humane? Some Religious Leaders Say No*, N.Y. Times (Jan. 9, 2019), available at https://www.nytimes.com/2019/01/09/world/europe/halal-kosher-humane-slaughter.html (discussing such bans in Belgium, Sweden, Norway, Iceland, Denmark, and Slovenia).

[25] *See The Seal of Confession and Priest-Penitent Privilege*, U.S. Conference of Catholic Bishops, available at https://www.usccb.org/committees/religious-liberty/religious-liberty-backgrounder-seal-confessional ("The Code of Canon Law forbids priests from divulging information received in confession. The penalty for a priest who directly violates the seal of confession is excommunication.") (last accessed Aug. 28, 2025).

2025). With slight modification, however, that law would be perfectly acceptable under *Smith*. Likewise, if the Volstead Act, which implemented Prohibition, were modified to remove the exception for sacramental wine, it "would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States." *Fulton*, 593 U.S. at 545 (Alito, J., concurring) (citing Pub. L. 66, § 3, 41 Stat. 308–309).

Such "startling consequences" are par for the course as long as *Smith* remains good law. *Id.*

D. *Smith* and Its Exceptions Are Difficult To Apply and Do Not Adequately Protect the Religious Liberties Guaranteed by the Constitution.

Given *Smith*'s "severe holding," *Fulton*, 593 U.S. at 545 (Alito, J., concurring), this Court has applied increasingly tortured readings of *Smith* and its exceptions in an attempt to preserve religious freedoms while nominally adhering to *Smith*. Those exceptions are difficult to apply and afford insufficient protection regardless. *See, e.g.*, *id.* at 603–11 (Alito, J., concurring) (discussing "serious problems" that "continue to plague courts when called upon to apply *Smith*"). Three examples are illustrative.

First, this Court has stretched *Smith*'s rule requiring strict scrutiny of laws that are not neutral and generally applicable to avoid the hard question of overruling *Smith*. *Id.* at 624 (Gorsuch, J., concurring) ("Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs."). When to apply

that rule has often to led to disagreement within the Court. *Compare Roman Cath. Diocese of Brooklyn*, 592 U.S. at 17 ("[T]he regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."), *with id.* at 39 (Sotomayor, J., dissenting) (concluding the regulations were neutral because "comparable secular institutions face restrictions that are at least equally as strict").

Unsurprisingly, lower courts are no better at applying the standard. *See, e.g.*, *Danville Christian Acad., Inc.* v. *Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting) ("*Smith*'s rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing."). This Court recently recognized that it had to summarily reverse the Ninth Circuit's free exercise jurisprudence five times in a brief period. *Tandon*, 593 U.S. at 64. And the Ninth Circuit is by no means alone in getting reversed for misapplying *Smith*. *See Roman Cath. Diocese of Brooklyn*, 592 U.S. at 21 (granting preliminary injunction on appeal from Eastern District of New York); *Robinson* v. *Murphy*, 141 S. Ct. 972 (2020) (vacating District of New Jersey); *High Plains Harvest Church* v. *Polis*, 141 S. Ct. 527 (2020) (vacating District of Colorado); *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n*, 584 U.S. 617 (2018) (reversing Colorado Court of Appeals).

Second, the Court has applied the "ministerial exception," under which religious employers are exempt from certain neutral and generally applicable employment laws with respect to their ministers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012). The Court grounded its reasoning on the important interest of religious

groups in "choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* Such an interest is undoubtedly important, but it is in tension with *Smith*'s reasoning. *See Fulton*, 593 U.S. at 601 n.77 (Alito, J., concurring) ("Our strained attempt to square the ministerial exception with *Smith* highlights the tension between the two decisions.").

Third, the *Smith* majority itself recognized a "hybrid"-rights exception, which ostensibly required more exacting scrutiny when a claim implicated the Free Exercise Clause in conjunction with other constitutional protections, in order to side-step its prior holdings such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *See Smith*, 494 U.S. at 881–82. Yet the Court has "never once accepted a 'hybrid rights' claim in the more than three decades since *Smith*," and the exception has "baffled the lower courts." *Fulton*, 593 U.S. at 600, 603–04 (Alito, J., concurring).

That bafflement is evident in the instant case, where the Second Circuit rejected Plaintiffs' hybrid-rights argument out of hand because "[t]his Court has characterized that language describing so-called 'hybrid rights claims' as dicta, and has declined to apply a heightened standard of review." Pet. App. 20a (citation omitted). This Court likewise took pains to avoid invoking the exception in its recent decision in *Mahmoud*, sparking sharp disagreement in dissent. *Compare* 145 S. Ct. at 2361 ("[I]n *Smith*, we recognized *Yoder* as an exception to the general rule that governments may burden religious exercise pursuant to neutral and generally applicable laws. … [T]he burden in this case is of the exact same character as the burden in *Yoder*."), *with id.* at 2400 (Sotomayor, J., dissenting) ("The problem for the majority is that this

is not what *Smith* said. ... Only in such 'hybrid situation[s]' does the Court set aside its neutral and generally applicable inquiry.").

In sum, applying *Smith* is at least as difficult as applying traditional strict scrutiny to laws that burden religious exercise. Indeed, "the fact that a decision has proved unworkable is a traditional ground for overruling it." *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009) (quotations omitted). And the Court is not capable of policing the many wrong decisions applying *Smith* to burden religious liberty. If this Court will have to continue deciding difficult free exercise cases, there is no reason for it to continue doing so from a starting point that is so prejudicial to the rights of religious minorities. The Court should therefore not wait any longer to "wrestle with the[] question[]" of "what should replace" *Smith*. *Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring). Instead, it should set itself "back on the correct course" by overruling *Smith*. *Id.* at 627 (Gorsuch, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* and overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

Respectfully submitted.

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