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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* OLD ORDER AMISH BISHOP ELMER STOLTZFUS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is Old Order Amish Bishop Elmer Stoltzfus. He has served as a bishop for decades, both in Pennsylvania and later in Missouri. In his role, he shepherds multiple congregations in the faith. He also works to steward and preserve a way of life that has been peacefully practiced in this nation for three centuries.

His duty is to guide his community in a manner that is faithful to God and separate from the modern world. Central to this duty is the education of their children in their own small, church-run schools, where they pass down the beliefs necessary for them to remain a part of their community.

Amicus curiae understands the burden the vaccine requirement places on the Amish community. It creates an impossible choice where community members and their schools must choose between their faith and continuing to operate the religious schools that are central to their community. This threat to the Amish way of life is akin to what was faced by the Amish parents in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Amicus offers this brief to provide the perspective of a leader within the Amish community.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amicus curiae* or its counsel contributed money intended to fund preparation or submission of this brief. Counsel for all parties received timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

Amish petitioners, punished by New York law for maintaining their religious convictions, face a grave infringement of their religious freedom. From the earliest days of the Republic, luminaries such as James Madison championed religious liberty as an inalienable cornerstone of a free society, essential for fostering harmony among diverse communities. Historical practice, such as exemptions for conscientious objectors during the Revolutionary War, underscores that religious liberty strengthens the nation. Religious exemptions preserve individual conscience, allowing religious minorities to thrive and society to benefit from their contributions.

Employment Division v. *Smith*, 494 U.S. 872 (1990), eroded this robust tradition by holding that neutral, generally applicable laws do not require strict scrutiny when burdening religious exercise. This departure from precedent has left religious minorities vulnerable to the caprices of political majorities, resulting in a fragmented landscape of protections where fundamental rights hinge on geography.

Smith's framework also fails to account for the modern regulatory state's vast reach, where neutral laws can inadvertently devastate minority communities. Without the rigorous safeguard of strict scrutiny, administrative enforcement trumps conscience, reducing religious liberty to a matter of bureaucratic discretion. The Amish, whose centuries-long commitment to peaceful separation from worldly mandates has enriched America's pluralistic fabric,

now confront an intolerable dilemma: violate their sacred duties or face the inevitable destruction of their schools and communities.

This Court should grant certiorari to reconsider *Smith's* flawed paradigm. Restoring strict scrutiny as the standard for free exercise would ensure that religious minorities, and indeed all Americans, enjoy the full measure of liberty promised to a free people. Such a course honors the historical and philosophical foundations of religious freedom, safeguarding it as a vital pillar of our constitutional order.

ARGUMENT

I. Our history demonstrates that we benefit when diverse communities are free to live according to their conscience.

The State of New York asked the Amish petitioners to do an act that their conscience forbids. In doing so, it departs from our history of religious accommodation, where government recognizes that it should refrain from forcing its citizens to choose between violating their conscience and facing punishment. The Amish and other religious minorities like them came to these shores seeking freedom from the religious conflicts of Europe. America largely honored the ideal of accommodation. This tradition is not a legal loophole; it is the practical wisdom that provides a pressure relief valve for religious minorities—in the face of the demands of the majority—allowing them to live in harmony with their neighbors.

Despite this history, many view their favored policy preferences as uniquely enlightened and claims of conscientious objection as mere manipulation or, worse, weaponization of religion. Our founders had a different view. Madison understood religious objectors to be caught, by no fault of their own, between the claims of competing sovereigns—the state and, as he described it, the "Universal Sovereign." James Madison, Memorial and Remonstrance against Religious Assessments (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON, 10 March 1784-28 March 1786, 295-306, at ¶ 1 (Robert A. Rutland and William M.E. Rachal eds., Univ. of Chicago Press 1973). Rather than concluding these competing allegiances are contrary to good order, he described our duty toward our Creator as "precedent, both in order of time and in degree of obligation, to the claims of Civil Society" and, thus, "unalienable." *Ibid*. To take a contrary view is to understand civil society and religion more like the European societies the colonists fled than the America of our founders.

Early in our history, most colonial governments gave no quarter to dissenting religious conduct. As a result, religious minorities faced many difficulties, often involving conscientious objection to military service and the taking of oaths. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466 (May 1990). Conscientious objectors to military service, such as Quakers, Mennonites, and Amish, were punished on account of their refusal to bear arms. *Id.* at 1468. The burden motivating that punishment by the majority was

manifest, because if the religious objectors refused to bear arms, others needed to take their place. *Ibid.*

Those refusing oaths were particularly harmed by that requirement, because they could not put on evidence in court. Thus, they could neither benefit from the judicial process nor defend themselves if they were sued. *Id.* at 1467. Yet from the standpoint of the majority, the refusal to take oaths undermined a key component at that time in ensuring truthful testimony. *Ibid.*

Eventually, the model of religious toleration and freedom, which was exemplified in Pennsylvania, *id.* at 1430, affected thinking more broadly so that by the time the Continental Congress called on the colonists to take up arms, the Continental Congress recognized an important truth—it is better to protect religious conscience and benefit from our religious diversities than to create unresolvable conflict.

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

Resolution of July 18, 1775, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo, reprint 1968). In contrast to the European view that required conformity, even as to core religious practices, America embraced an expansive form of toleration that recognized the rights of persons with disfavored religious beliefs.

It is out of this history—one that respects the consciences of religious minorities and majorities alike—that the Free Exercise Clause was born. It is a protection—not designed by either modern liberals or modern conservatives—but recognized as unalienable because of the core principle of conscience that affords protection for all. It may be that conservatives are more likely to recognize the value when liberals have the upper hand, and vice versa.

The universality of the principle is like that of speech. One may not agree with another's speech, but the protection of speech creates a free society for everyone—regardless of whether particular speech is popular, offensive, or even carries a cost. The same is true for religious freedom, or as Madison often described it, freedom of conscience.

If government can manipulate persons to violate their most deeply held convictions—or punish them if they do not—there is no stopping tyranny. Without this firewall against oppression, none of our other freedoms are safe. Indeed, our freedoms travel together—a government that is willing to trample one will quickly trample another. The freedom of the press and assembly depend on the freedom of speech,

and the freedom of speech depends on the freedom of religious conscience.

We should not assume that if the Court continues to limit religious freedom, we can ensure that everyone will cooperate in reaching what the majority believes to be society's noble goals. Instead, many will refuse to surrender their principles no matter what. Neither can we, nor should we, force compliance. "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943). Otherwise, we only engage in meaningless punishments that hurt society as a whole and not just the religious objector.

Consider the Amish petitioners and their schools. The Amish have been educating their own children and equipping them to own farms or engage in trades since settling in America three centuries ago. Shutting down their schools or even forcing them to leave the state does not serve society. Instead, we all suffer.

It is only by acknowledging that the primary duty of many citizens is to God, not the state, and striving to be accommodating when conflicts arise that we all thrive.

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . .

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.

Id. at 641-42. Indeed, if the leaders of our nation could find a way to accommodate conscientious objectors to warfare during the grave years of our revolution when we were already badly outgunned in our fight against the military superpower of that day, we can certainly accommodate lesser threats in our time.

Far from religious liberty being a tool for the manipulative, it is a principle benefiting society as a whole regardless of whether the religious practice in question may be described as conservative, liberal, or neither. When political winds change, practices that are well accepted now may later be in jeopardy. Moreover, robust religious liberty protects the social fabric from being torn up by majoritarian demands that can never be fulfilled by religious minorities. It is no wonder, then, that the principle of religious liberty appears as the first in the list of fundamental rights enumerated in the Bill of Rights.

II. Because of *Smith*, a sacred right is now subject to a chaotic patchwork of inconsistent protections and the constantly changing whims of politics.

Smith did not establish a clear and stable legal standard. Instead, by weakening our conscience protections against generally applicable laws, it left our fundamental rights to the mercy of the political

process. The result is a chaotic landscape where our ability to live out our faith is contingent on geography and legislative whim. This case is a stark illustration of that chaos.

After *Smith*, Congress acted with near unanimity to restore the protections that had been lost by passing the Religious Freedom Restoration Act (RFRA). But after this Court's later decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), that protection was limited to the federal government, leaving the states to fashion their own responses.

The result is a chaotic patchwork of protections. The Amish petitioners face a reality where their fundamental right to educate their children according to their faith—a right protected just across the border in Pennsylvania—is extinguished in New York. A right so essential to human dignity cannot, and should not, depend on which side of a state line a person happens to live. This state-by-state inconsistency is a direct and damaging consequence of *Smith*'s failure to provide a uniform constitutional guarantee of religious freedom.

Worse, *Smith* demeans the sanctity of a constitutional right by subjecting it to the political process. The Bill of Rights was intended to place certain truths beyond the reach of majorities and government officials. *Smith* does the opposite. It forces this particular religious minority, who by faith and tradition live apart from the world of political power, to plead for what the Constitution should already guarantee.

New York's repeal of a 50-year-old protection is a case study in this danger. A long-standing covenant was broken when the political winds changed, and their beliefs were dismissed as "garbage." This political framing and subsequent punishment inevitably breeds division. When the Constitution's protections are removed, a conflict of conscience is no longer treated as a matter of liberty, but as a contest of raw political will—a contest that small, peaceful communities are destined to lose. This is not the system of ordered liberty the framers designed.

III. *Smith* fails to shield our communities from the tyranny that sometimes results from even good intentions.

Even when a law is passed without hostility, the Free Exercise Clause must still serve as a shield against its unforeseen and devastating applications. Legislators, no matter how well-intentioned, cannot possibly anticipate every way a neutral law will burden our nation's diverse religious practices. This is even truer today than it was at our nation's founding because as the size and reach of government increases, along with its laws and regulations, there is increasing opportunity for conflict with religious practice. The pre-*Smith* compelling interest test provided the necessary constitutional backstop for these situations. By removing it, *Smith* has left religious minorities vulnerable to the unintended yet catastrophic consequences of neutral laws, a flaw that is dangerously magnified by the modern administrative state.

When the New York legislature repealed the religious exemption in 2019, it did not specifically envision that its action would authorize the New York Department of Health ("DOH") to levy crippling penalties totaling $118,000 against small, self-funded Amish schools, threatening their very existence. This is precisely the kind of unforeseen conflict that judicial scrutiny is meant to resolve. As in *Yoder* where the legislators who passed the state's compulsory attendance law decades earlier never contemplated its effect on the Amish, New York's law has been applied with a devastating force that was likely not contemplated at the time of its passage. *Smith* offers no remedy for such a severe, yet unintended, burden on religious practice.

This problem is magnified by the modern administrative state, which gives agencies like the DOH broad authority to enforce the law. It was the DOH, not the legislature, which made the specific choice to pursue ruinous fines. The agency zealously advocated for fines because the Amish petitioners admitted "that they violated the statute and their promise to continue violating the law of man" would mean that the absence of a penalty "would amount to administrative nullification of a duly enacted law." App. 34a. This is the inevitable result of the *Smith* framework. A conflict of conscience is transformed into a simple matter of enforcement, and an agency's interest in compelling compliance overrides a community's fundamental rights.

Without the judicial backstop of strict scrutiny, religious minorities are left defenseless against this kind of unforeseen and aggressive regulatory action.

Smith is a rule unfit for our time, as it is incompatible with the reality of both a diverse society and a powerful administrative state, leaving a fundamental right perilously exposed.

CONCLUSION

For three centuries, Amish communities have lived simply, peaceably, religiously, and separately from the world. The founders, in their wisdom and guided by our colonial experience, created a system of accommodation that allowed this peaceable life to flourish. They understood that a government does not gain strength by forcing its citizens into a conflict with their Creator.

Smith dismantled this wise tradition. It replaced a covenant of respect with a rule of coercion. The decision below is the direct result of that error. It sanctions a law that forces upon Amish petitioners an impossible choice: to violate their sacred duty to God or to see their schools shuttered and their communities punished with ruinous fines.

Amicus asks this Court to grant certiorari so that the religious conscience of Amish petitioners may be protected.

DATED this 3rd day of September, 2025.

Respectfully submitted,

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