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* FOOTHILLS CHRISTIAN CHURCH IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does a law which categorically disallows religious exemptions but permits secular exemptions and other comparable secular activity violate the Free Exercise Clause as applied to the petitioner Amish parents and schools?

2. Should this Court reconsider *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)?

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INTEREST OF AMICUS CURIAE[1]

Foothills Christian Church is a nondenominational Christian church dedicated to reaching people with the truth of Jesus, being a family that encourages one another to follow Him, building the Kingdom of God on earth, and raising up the next generation to continue the work. They declare the Lordship of Christ in every sphere through the preaching of His Word, through prayer, and the lifestyle of the believer.

SUMMARY OF ARGUMENT

Smith accommodates the suppression of religion as readily as it accommodates the free exercise of religion. The overwhelming weight of *Smith*'s deficiencies falls on adherents to minority religions and on small religious groups.

New York has had a religious exemption to its school vaccine requirement starting in modern times from 1966. In 2019, it became one of only four states to abolish its religious exemption. Sponsors of the legislation characterized religious objection to vaccination as "fake," "selfish and misguided," and "utter garbage."

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1. Under Rule 37(2), *amicus curiae* gave 10 days notice of its intent to file this brief to all counsel. *Amicus curiae* states further that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

The motivated overreach in New York's enforcement of the law against religious objectors was comparably disdainful. It imposed ruinous fines on three Amish community schools located on Amish-owned land, attended only by Amish students, all of whom hold the same beliefs against vaccination, all of whom for the same religious reasons.

The Second Circuit found under *Smith* that the enforcement of the religious exemptions against petitioners did not violate their Free Exercise rights because the law was both "neutral" and "generally applicable." The court found that it was "generally applicable" because the religious exemption and the medical exemption were not "comparable." The Court found that the two exemptions were not "comparable" because repeal of the religious exemption would cause more students to become vaccinated than repeal of the medical exemption.

This case is a notable addition to an already long list of questionable results which *Smith* has yielded. *Smith*'s abandonment of strict scrutiny in Free Exercise cases challenging what it calls "neutral" and "generally applicable" laws is contrary to the Constitution's original public meaning and is unworkable.

This Court should grant certiorari and reconsider *Smith*.

ARGUMENT

I. *Smith*'s Abandonment Of Strict Scrutiny In Free Exercise Cases Is Contrary To The Constitution's Original Public Meaning And Is Unworkable.

A. The Right Of Free Exercise Is A Preeminent Constitutional Right.

"The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides in relevant part that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. See *id.* at 546; see also *Sherbert v. Verner*, 374 U.S. 398, 402–03.

"To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S., 618, 628 (1978), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Where the government seeks to enforce a law that is neutral and of general applicability, however, it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices. See *Church of Lukumi Babalu Aye, supra,* at 531; *Smith, supra,* 494 U.S. at 878–79.

Because "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever

religious doctrine one desires," courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists. *Smith, supra,* 494 U.S. at 886–87. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 714 (1981). An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are "sincerely held" and in the individual's "own scheme of things, religious." *United States v. Seeger,* 380 U.S. 163, 185 (1965); see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 635 (2018).

B. *Smith*'s Abandonment Of Strict Scrutiny In Free Exercise Cases Challenging What It Calls "Neutral" And "Generally Applicable" Laws Is Contrary To The Constitution's Original Public Meaning And Is Unworkable.

In *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021), this Court reaffirmed the centrality of religious liberty to our Constitutional order. It observed that at the time when our Bill of Rights was ratified, "the right to religious liberty already had a long, rich, and complex history in this country." *Id.* at 572 (Alito, J., concurring). In many State Constitutions, "freedom of religion enjoyed broad protection, and the right was universally said to be an unalienable right. *Id.* at 574 (internal quotation omitted). Freedom of religion was understood at the time to provide "broad protection for the free exercise of religion except where public 'peace' or 'safety' would be endangered." *Id.* at 578.

This Court observed, even at the time *Smith* was decided, that it departed significantly from these understandings and from prior Court precedent. In *Smith*, Justice O'Connor wrote that *Smith* is "incompatible with our Nation's fundamental commitment to individual religious liberty." *Smith, supra,* 494 U.S. at 891 (O'Connor, J., concurring in the judgment). As Justice Alito has observed in his concurrence in *Fulton*, *Smith* "ignored the 'normal and ordinary' meaning of the constitutional text, . . . and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption. *Fulton, supra,* 593 U.S. at 595 (Alito, J., concurring) (internal citation omitted).

Smith also disregarded substantial contrary precedent. In *Smith*, Justice Blackmun wrote in his dissenting opinion that "the majority had 'mischaracteriz[ed]' and 'discard[ed]' the Court's free-exercise jurisprudence on its way to 'perfunctorily dismiss[ing]' the 'settled and inviolate principle' that state laws burdening religious freedom may stand only if 'justified by a compelling interest that cannot be served by less restrictive means.'" *Id.* at 907–908 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). Justice Alito further observed that *Smith* is "discordant" with such authority as *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) and with *Masterpiece Cake. Fulton, supra*, 593 U.S. at 600-601.

Smith's workability in practice has been subject to similar question. See *Doe 1-3 v. Mills*, ––– U.S. ––––, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief related to regulation mandating COVID-19 vaccinations for Maine healthcare workers) ("[W]hen judging whether a law treats a religious

exercise the same as comparable secular activity, this Court has made plain that only the government's actually asserted interests as applied to the parties before it count—not post-hoc reimaginings of those interests expanded to some society-wide level of generality").

Justice Alito amplified these fidelity and workability concerns in *Fulton*:

> There is no question that Smith's interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. See Pub. L. 66, § 3, 41 Stat. 308–309. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added. *Fulton, supra,* 593 U.S. at 545-546 (Alito, J., concurring).

C. This Case, And Similar Cases Involving Vaccine Mandates Decided Since *Fulton*, Notably Illustrate *Smith*'s Workability Limitations.

The Amish petitioners in this case challenged New York's repeal of a religious exemption to a school vaccine mandate in New York Public Health Law Section 2164. Appendix A to Petition for Certiorari, at 2a (Appendix). The mandate included a medical exemption. *Id.* at 4a. They brought a claim under 42 U.S.C. § 1983 that the enforcement action taken against them by the State of New York violated their right to free religious exercise under the First and Fourteenth Amendments. *Id.* at 3a.

The Second Circuit affirmed the dismissal of petitioners' complaint. Appendix at 3a. It found under *Smith* that the enforcement of the religious exemptions against petitioners did not violate their Free Exercise rights because the law was both "neutral" and "generally applicable." *Id.* at 19a. It was "neutral," the Court found, because it "does not target or affirmatively prohibit religious practices." *Id.* at 11a. It was "generally applicable," the Court found, because the medical exemption and the religious exemption are not comparable and because the law does not extend broad discretion to government officials to grant exemptions based on their subjective assessments of a party's reasons for requesting an exemption. *Id.* at 13a-14a, 17a.

As to comparability, the Court found that "New York's interest in passing § 2164 was in 'protect[ing] the health of all New Yorkers, particularly our children,' N.Y. Sponsor's Memorandum, 2019 S.B. S2994-A, from 'disease outbreaks' by 'sustaining a high vaccination rate

among school children,' Bill Jacket at 4A." Appendix at 14a. The Court noted that there was reference in the legislative history to a recent increase in religious exemptions, including in areas which had seen a recent measles outbreak. *Id.* at 5a. This same legislative history recounts that "[r]eligious exemptions far outpaced medical exemptions – five to one." *Ibid.*

The Court acknowledged at least implicitly that both a religious exemption and a medical exemption favor New York's stated intent. Appendix at 15a. It found though that "[r]epealing the religious exemption decreases to the greatest extent medically possible the number of unvaccinated students and thus the risk of disease; maintaining the medical exemption allows the small proportion of students who medically cannot be vaccinated to avoid the health consequences that taking a particular vaccine would inflict." *Id.* at 15a.

The Court offered that a religious exemption and a medical exemption are not comparable because they "are meaningfully different in scope and duration." Appendix at 15a. A medical exemption is limited to a specific immunization and lasts only "until such immunization is found no longer to be detrimental to the child's health." *Ibid* (internal quotation omitted). A religious exemption applies to all vaccines and applies for the entire duration of a child's school admission. *Ibid.*

The Court offered further that even petitioners' relative isolation favored repeal of the religious exemption. Appendix at 16a. It rejected petitioners' argument that Amish religious practice occurred in settings limited to the practitioners themselves and that the number of

Amish practitioners was far smaller than the number of unvaccinated children statewide. *Id.* at pp. 15a-16a. The Court rejected "the notion that the comparability analysis should be governed by a one-to-one comparison." *Id.* at 16a (internal quotation omitted). It found, referencing this Court's decision in *Tandon v. Newsom* 593 U.S. 691 (2021), that the proper comparators were "aggregations of individual behaviors, not individual behaviors themselves." *Ibid.*

The Court found that exclusively Amish schools with religious-based objection to vaccines "are made up of a clustered population of almost 100% unvaccinated students – precisely the circumstances that most concerned the State." Appendix at 16a. It observed that the presence of communicable diseases in Amish communities "demonstrate[s] that **Amish isolation does not protect their communities from disease.** It then found that the unique attributes of Amish communities do not present a lesser risk as it pertains to the State's interest in protecting New Yorkers from disease. *Id.* at 16a-17a (emphasis in original).

The Court thus found that § 2164 was a permissible burden on religious exercise because it burdened religious exercise more aggressively. Appendix at 16a-17a.

Nor is this kind of analytical slippage unique to this case. In *Doe v. San Diego Unified School District*, Doe sought an injunction pending appeal barring the San Diego Unified School District (SDUSD) from requiring compliance with a student COVID-19 vaccination mandate. *Doe v. San Diego Unified School District*, 19 F.4th 1173, 1175 (2021). SDUSD's mandate allowed for

medical exemptions as well as conditional enrollment in on-site education for 30 days for certain categories of newly enrolling students (students who are homeless, in "migrant" status, in foster care, or in military families), and provided certain accommodations for students with Individualized Education Programs (IEP's). *Id.* at 1176. It did not have a religious exemption. *Ibid*. Doe brought a Free Exercise challenge to the mandate, alleging that the mandate was unconstitutional on its face and applied to her because it treated comparable secular conduct more favorably than religious exercise. *Ibid*.

The Ninth Circuit denied her request for an injunction pending appeal. *Doe, supra,* 19 F.4th at 1175. The Court found that the mandate was both neutral and generally applicable. *Id.* at 1180.

The Court found that the medical exemption and a religious exemption were not comparable. *Doe, supra.* 19 F.4th at 1177-78. It found that "[t]he medical exemption is limited to students with contraindications or precautions recognized by the Centers for Disease Control and Prevention or the vaccine manufacturer, and the request must be certified by a physician. Limitation of the medical exemption in this way serves the primary interest for imposing the mandate — protecting student "health and safety" — and so does not undermine the District's interests as a religious exemption would." *Id.* at 1178. It concluded therefore that "[a]ppellants have not demonstrated a likelihood of success in showing that the district court erred by applying rational basis review." *Id.* at p. 1180.

The dissent countered that the majority had reached its result by mis-framing SDUSD's interest. *Doe, supra,* 19

F.4th at 1184 (Ikuta, J., dissenting). The dissent contended that the majority's formulation allowed it incorrectly to take into account that the reason for medical exemption is to protect the health of students with recognized contraindications or precautions for vaccination. *Id.* at 1185. The dissent found that SDUSD's interest was to "'ensure the highest-quality instruction in the *safest environment* possible for all students and employees' by preventing the transmission and spread of COVID-19. *Ibid* (emphasis in original). Measured against this interest, the reasons why a given person is exempt are irrelevant. *Ibid.* All exempt people pose the same risks to the health and safety of students and employees regardless of why they are exempt. *Ibid.*

The dissent therefore reasoned that "[b]ecause in-person attendance by students who are unvaccinated for religious reasons poses "similar risks" to the school environment as in-person attendance by students who are unvaccinated for medical or logistical reasons, the mandate is not generally applicable." *Doe, supra,* 19 F.4th at 1184. Applying strict scrutiny, the dissent would have granted Doe's application for an injunction pending appeal. *Id.* at 1188.

Thus, under *Smith*, the vindication of Doe's preeminent Constitutional right of free exercise of religion turned on whether the court framed SDUSD's interest in its COVID-19 vaccine mandate as "protecting student health and safety" or as "ensur[ing] the highest-quality instruction in the *safest environment* possible for all students and employees' by preventing the transmission and spread of COVID-19." See *Doe, supra,* 19 F.4th at 1178, 1185 (emphasis in original); see also *We The Patriots USA, Inc*

v. Connecticut Office of Early Childhood Development, 76 F.4th 130, 151-155 (2023) (repeal of religious exemption to school vaccine mandate while retaining medical exemption "generally applicable" and thus constitutional under rational relation because medical exemption protects the health of medically exempt persons by not forcing them to take medically counterindicated vaccine); but see *id.* at 165 ("To the extent the asserted interest justifying the Act is the prevention of the spread of communicable diseases among Connecticut students entering a school, it is obvious that an unvaccinated student with a medical objection who is allowed to attend school poses the same health risk to another student as an unvaccinated student with a religious objection.") (Bianco, J., concurring in part and dissenting in part); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285-287 (2021) (COVID-19 workplace vaccine mandate with medical exemption but no religious exemption "generally applicable" and thus constitutional under rational relation because medical exemption protects the health of workers by not forcing them to take medically counterindicated vaccine).

Moreover, in *Doe,* the result also turned on SDUSD's modification of a prior vaccine mandate. *Doe, supra,* 19 F.4th at 1174. The Court entered an injunction pending appeal "only while a 'per se' deferral of vaccination is available to pregnant students under SDUSD's student vaccination mandate." *Ibid*. SDUSD had documented to the Court that it had removed the deferral option for pregnant students. *Ibid*. The court's prior injunction had therefore terminated under its own terms. *Ibid*; see also *Fulton*, 593 U.S. at 551-552 ("This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in,

and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started.") (Alito, J., concurring).

D. *Smith*'s Unworkability Burdens Particularly Minority Religious And Smaller Religious Institutions.

In *Fulton*, this Court considered whether the refusal of the City of Philadelphia to refer children to Catholic Social Services (CSS) for placement in foster homes because CSS would not certify same-sex couples as foster parents due to its sincerely held religious beliefs about marriage. (*Id.* at 526.) Taken up on questions including the question of whether to overrule *Smith*, this Court concluded that the City's actions fell outside the scope of *Smith* because they were not generally applicable. (*Id.* at 618 (Gorsuch, J., concurring); see *id.* at 533.)

The Court found that the "uniquely selective" process for qualifying state-licensed foster agencies invites the government to "consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." (*Id.* at 533 (internal quotations omitted).) Applying strict scrutiny, the Court found that the City's refusal to contract with CSS to provide foster-care services unless it agrees to certify same-sex couples as foster parents violates the First Amendment. (*Id.* at 542.)

The burdens of *Smith*'s lack of clarity are considerable and fall hardest on adherents to minority religions and on smaller religious institutions. See *Fulton, supra,* 593 U.S. at 587 (Alito, J., concurring). As Justice Gorsuch observed further in his concurrence, the Court's failure in

Fulton to overrule *Smith* was a matter of great practical consequence, "Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice ALITO outlines — holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable — this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. . . ." *Id.* at 624. He continues, "The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children." *Id.* at 625.

In her dissent in *Mahmoud v. Taylor*, Justice Sotomayor moreover noted the chilling effect of the strict scrutiny standard on state regulators, " . . . [T]he majority closes its eyes to the inevitable chilling effects of its ruling. Many school districts, and particularly the most resource strapped, cannot afford to engage in costly litigation over opt-out rights or to divert resources to tracking and managing student absences. Schools may instead censor their curricula, stripping material that risks generating religious objections." *Mahmoud v. Taylor* 606 U.S. ___, 145 S. Ct. 2332, 2381-2382 (2025) (Sotomayor, J., dissenting) (*Mahmoud*).

E. *Yoder* Is General Precedent Of Full Applicability.

Finally, the Second Circuit here limited *Yoder* to its facts, noting similar treatment in "sister circuits." Appendix at 21a & fn. 16.

This Court's decision in *Mahmoud* has put this contention conclusively to rest. The Court relied heavily on *Yoder* in holding that "[t]he introduction by the Montgomery County Board of Education of "LGBTQ+-inclusive" storybooks, along with its decision to withhold opt outs, places an unconstitutional burden on the parents' rights to the free exercise of their religion." *Mahmoud, supra,* 145 S.Ct. at 2363.

In *Mahmoud*, this Court found precisely that "[w]e have never confined *Yoder* to its facts." *Mahmoud, supra,* 145 S.Ct. at 2357. This Court relied on *Yoder* for the central principle underlying its decision in the case: the right of parents under the Free Exercise Clause to refuse to "submit their children to instruction that poses 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill." *Id.* at p. 2341; see also *id.* 2351-2353. It also relied on *Yoder* to determine that the books presented an "objective danger" to the parents' free exercise of their religion and to determine that strict scrutiny is the applicable standard of review. *Id.* at 2355, 2361. It also noted that it had "distinguished [*Yoder*] when appropriate." *Id.* at 2357.

CONCLUSION

For every Roman Catholic Church, for every Jack Phillips, there are hundreds of people and hundreds of small religious groups forced to capitulate to the anti-religious animus and disdain which this cases, and which *Fulton*, reflect.

This Court should grant the Petition and take the opportunity which this case provides to reconsider *Smith*.

Respectfully submitted,

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