No. 25-133

IN THE

Supreme Court of the United States

JOSEPH MILLER; EZRA WENGERD; JONAS SMUCKER; DYGERT ROAD SCHOOL; PLEASANT VIEW SCHOOL; SHADY LANE SCHOOL,

Petitioners,

v.

JAMES V. MCDONALD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK; BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondents.

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

BRIEF OF THE NATIONAL CATHOLIC BIOETHICS CENTER, ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE[1]

The National Catholic Bioethics Center (NCBC) is a nonprofit research and educational institute committed to applying the principles of natural moral law, consistent with many traditions including the teachings of the Catholic Church, to ethical issues arising in health care and providing health care in accordance with the moral, ethical, and social teachings of Jesus Christ and His Church through ongoing evangelization, education, advocacy, and mutual support.

The Catholic Medical Association (CMA) is the largest Catholic association of people in healthcare. Its membership includes more than 2,400 physicians, nurses, physician assistants, and allied health members nationwide. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person's conscience and religious freedoms should be protected. CMA's mission is to inform, organize, and inspire its members to uphold the Catholic faith in the science and practice of medicine. CMA's mission also includes defending its members' right to follow their consciences and Catholic teachings in their professional work. Both the Ethics Committee and the Health Care Policy Committee have lent their time, expertise, and full support to this amicus brief

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made any monetary contribution to its preparation or submission. Both parties received timely notice of intent to file this brief.

because of its important conscience rights considerations.

The National Association of Catholic Nurses, USA (NACN-USA) is a non-profit 501(c)(3) organization dedicated to promoting moral principles in nursing practice, the integration of faith and health, and patient advocacy through the provision of educational programs and spiritual nourishment. NACN-USA also provides guidance, support, and networking for Catholic nurses, nursing students, and other professionals.

SUMMARY OF ARGUMENT

Religious liberty lies at the heart of our constitutional freedoms. As Thomas Jefferson wrote to Richard Douglas in 1809, "[n]o provision in our constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprises of the civil authority." Thomas Jefferson, From Thomas Jefferson to Richard Douglas (Feb. 4, 1809), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/99-01-02-9714 [perma.cc/G8R2-58RM]. These protections are cherished for good reason: conscience is not only a moral compass but also a wellspring of inspiration to serve others. It is no wonder, then, that many healthcare professionals place faith and conscience at the center of their Hippocratic mission—to heal and to do no harm.

Catholic doctors in America practice medicine at the intersection of three enduring institutions: a faith that has existed for thousands of years, a profession

that is even older, and a country that constitutionally recognized over 250 years ago a preexisting right to freely exercise one's religion. Given these historic roots, it is surprising that Catholic medical professionals must wonder whether and how to legally marry their religious and medical practices in modern America.

"In a time of new medical discoveries, rapid technological developments, and social change, what is new can either be an opportunity for genuine advancement in human culture, or it can lead to policies and actions that are contrary to the true dignity and vocation of the human person." U.S. CONF. OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 7 (6th ed. 2018) [hereinafter U.S. CONF. OF CATHOLIC BISHOPS]. As laws strive to keep pace with these rapid developments, Catholic medical professionals of all kinds face daily challenges that pit their right to freely exercise their religion against the demands of the state, their employers, and their professions. "This is especially true in healthcare, where such immoral interventions as assisted suicide, affirming transgender interventions, abortion, and contraception may place a healthcare professional in uncomfortable situations, and even threaten the person[']s livelihood." CATHOLIC MEDICAL ASS'N, ETHICAL GUIDELINES FOR ADDRESSING COMMON DILEMMAS IN THE PRACTICE OF MEDICINE (June 24, 2024) [hereinafter CATHOLIC MEDICAL ASS'N], https://www.cathmed.org/wp-content/uploads/2025/02/5b_Ethical-Guidelines-for-Addressing-Common-Dilemmas.pdf.

These challenges stem in large part from *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), which oversimplifies a complex question and provides no First Amendment protection to religious professionals facing government regulation that is "neutral" and generally applicable. *Smith* was a legal shortcut that left "religious liberty in a confused and vulnerable state." *Fulton v. City of Philadelphia*, 593 U.S. 522, 618 (2021) (Alito, J., concurring). No doubt there is a line at which government can, and should, limit conduct even when a religious adherent vehemently objects. But that line cannot be drawn anywhere near *Smith*'s "neutral and generally applicable" standard without neutering the Free Exercise Clause. Amici urge this Court to grant certiorari, overrule *Smith*, and revive the Free Exercise Clause.

REASONS FOR GRANTING THE WRIT

I. *Smith* was wrongly decided, and this Court's free exercise jurisprudence is currently unsettled.

Smith allows the government to burden religious exercise via regulations that are "neutral" and "of general applicability." 494 U.S. at 879 (internal quotation marks and citation omitted). In other words, *Smith* "held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice." *Fulton*, 593 U.S. at 545 (Alito, J., concurring). Fundamentally, *Smith* treats the Free

Exercise Clause as a simple antidiscrimination provision, when, in fact, it memorialized a "right to religious liberty [that] already had a long, rich, and complex history in this country." *Id.* at 572.

Four years ago, a majority of this Court appeared to agree that *Smith* should be overruled, but only three justices were ready to do so in that case. *Compare id.* at 617 ("I would overrule *Smith*"), *with id.* at 543, 544 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are more compelling," but "I … see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it.").

Notwithstanding the debate surrounding *Smith*, lower courts remain bound by it and continue to apply it. Case in point, the Second Circuit's decision here. *See Miller v. McDonald*, 130 F.4th 258, 269 (2d Cir. 2025) (concluding that New York Public Health Law § 2164 is neutral and generally applicable and survives *Smith's* rational-basis test). The Second Circuit's decision was not only wrong on the merits, but its analysis—starting and ending with whether a law compelling vaccinations is "neutral" and "generally applicable"—proves it is past time for this Court to reconsider *Smith*.

Regardless of whether *Fulton* was the right case in which to reconsider *Smith*, this Court should no longer hesitate to settle its "governing interpretation of a bedrock constitutional right." *Fulton*, 593 U.S. at 545 (Alito, J., concurring). If *Smith* is wrong, "the country is … stuck with the bad decision unless [this Court] correct[s] [its] own mistake." *Dobbs v. Jackson Women's Health Org.*, 597

U.S. 215, 264 (2022). Conversely, if *Smith* is correct and the Free Exercise Clause merely protects religious groups from discrimination, this Court should say so and reinforce a decades-old precedent it has questioned but refuses to overrule. But the time for indecision has long since passed, and amici can confirm that (as Justice Gorsuch predicted) this Court's "*indecision*" regarding *Smith* has forced them to "pay the price—in dollars, in time, and in continued uncertainty about their religious liberties." *Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring) (emphasis added).

Smith has framed the free exercise debate for decades. When government regulation unconstitutionally favors secular groups over religious ones, or openly shows hostility toward religion, its action is deemed unconstitutional not simply because it abridges the free exercise of religion, but because it "falls outside *Smith*," *Fulton*, 593 U.S. at 533, or "'depart[s] from neutrality,'" *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) (citation omitted); *see also Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 638 (2018). If religious liberty is the appropriate constitutional starting point, *and it is*, this Court should make clear that formal neutrality and general applicability are means by which to evaluate government regulation, not ends in themselves.

II. Religious organizations like amici are uncertain about the extent of their Free Exercise rights, and this comes at a cost.

Justice Gorsuch predicted that this Court's "indecision" to re-evaluate *Smith* would be borne by "[i]ndividuals and groups across the country [who] will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties." *Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring). He was correct. Amici and their constituents are medical professionals who navigate this uncertainty (and bear these costs) in real time. For Catholic medical professionals, religious exercise questions can arise when "working with others or in institutions that may not share those values"; or when "state laws … require the healthcare professional to oversee the practice arrangements or protocols of others, such as nurse practitioners or physician assistants"; or when "health care [is] provided by students and residents, … who must work under the supervision of a healthcare professional, [and] may be directed by the supervising physician to perform, recommend, or refer for an immoral practice." CATHOLIC MEDICAL ASS'N, *supra*, at 1.

In *Fulton*, Justice Alito correctly noted that "the dangers posed by *Smith* are not hypothetical." 593 U.S. at 546 (Alito concurring). The experiences and evidence gathered by NCBC, CMA, and NACN-USA demonstrate this truth. In 2021 and 2022 alone, NCBC estimates it engaged in correspondence with over 1,000 requests for information and guidance related to vaccine mandates.

Indeed, confusion over conscience rights has grown so serious among Catholic medical professionals that the CMA established a Medical Student and Resident Boot Camp to address these concerns. *See Medical Student & Resident Boot Camp*, CATHOLIC MEDICAL ASS'N, https://www.cathmed.org/medical-student-resident-boot-camp/ (last visited Sept. 2, 2025). This multi-day initiative offers an intensive formation experience that combines prayer, study, practical training, and mentorship from leading physicians, priests, and moral theologians. It is specifically designed to support Catholic medical students in navigating ethical challenges within a medical education system that is increasingly shaped by secularism, atheism, relativism, and scientism. Attendance has increased from 35 participants in 2022 to 50 in 2025, with many more students expressing interest than CMA can currently accommodate due to logistical constraints. The very existence of this Boot Camp—and its growing popularity—underscores the strong desire among future practitioners to be equipped for the moral and professional challenges they anticipate in today's evolving healthcare landscape.

Amici are healthcare professionals, not lawyers. But they nevertheless spend an inordinate amount of time tracking—and at times participating in as amici or as named parties—"important religious liberty cases that are bubbling up" across the country. *Fulton*, 593 U.S. at 553 (Alito, J., concurring). For example, amici have been involved in cases seeking, *inter alia*, to enjoin the U.S. Department of Health and Human Services (HHS) from using a provision of the Affordable Care Act to

force Florida physicians to conduct transgender procedures on minors, restore restrictions on the dispensing of the abortion drug mifepristone, and defend the right of a Catholic hospital to terminate a physician for violating its directive on physician-assisted suicide.

As in this case, religious objections to vaccine mandates have been the cause of recent First Amendment litigation elsewhere, including challenges to mandatory vaccine schedules imposed by educational institutions. *See, e.g., Doescher v. Pan*, 23-cv-02995, 2025 WL 1705012 (E.D. Cal. June 18, 2025); *Royce v. Pan*, No. 23-cv-02012, 2025 WL 834769 (S.D. Cal. Mar. 17, 2025); *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F. 4th 728 (6th Cir. 2021); *Wade v. Univ. of Conn. Bd. of Trs.*, 554 F. Supp. 3d 336 (D. Conn. 2021). Beyond the educational context, vaccine mandates also strike at the heart of healthcare professionals' conscience rights and their ability to care for patients in need. The experiences of healthcare professionals in the wake of COVID-19 vaccine mandates—which, in many cases, did not include religious exemptions—illustrate the First Amendment problem as well as the practical cost to healthcare systems. Eriketa Cost, *'Walked out with my head held high': Religious exemptions end for health care vaccine mandate*, ROCHESTERFIRST.COM (Nov. 24, 2021), https://perma.cc/BAH2-MF2S; ABC News, *Hundreds of hospital staffers fired or suspended for refusing COVID-19 vaccine mandate*, KAKE.COM, (Oct. 4, 2021), https://www.kake.com/news/coronavirus/hundreds-of-hospital-staffers-fired-or-suspended-for-refusing-covid-19-vaccine-mandate/article_9b7a1cb3-7e7e-5fc9-a57a-3183d86dc4d9.htm

l; Grace Dean, *The healthcare industry was already understaffed before vaccine mandates hit*, BUSINESS INSIDER (Oct. 3, 2021), https://www.businessinsider.com/labor-shortage-hospital-beds-empty-nurses-doctors-staff-covid-vaccine-2021-10.

So-called "duty to dispense" laws represent another area of medicine where First Amendment clarity is lacking. Pharmacist refusals to dispense medication on moral and religious grounds are becoming more and more frequent, particularly in the contraceptives setting. NAT'L WOMEN'S L. CTR., *Pharmacy Refusals 101* (July 14, 2025), https://nwlc.org/resource/pharmacy-refusals-101/. At least eight states explicitly require pharmacists to dispense all medications pursuant to a valid prescription and offer little to no accommodation for healthcare professionals' conscience-based objections. *See id.*; Catherine Grealis, *Religion in the Pharmacy: A Balanced Approach to Pharmacists" Right to Refuse To Provide Plan B*, 97 GEO. L. J. 1715, 1725 (2009) (providing overview of state duty to dispense laws). As one example, California law provides that a pharmacist may refuse to prescribe medication on ethical, moral, or religious grounds but *only* if the pharmacist has provided prior written notice to their employer of the class of drugs the pharmacist finds to be objectionable. Cal. Bus. & Prof. Code § 733(b)(3). Notwithstanding the pharmacist's prior written notice of objectionable medications, the pharmacist is still required to dispense medication, regardless of any moral objection thereto, in the event the pharmacist's employer cannot accommodate the objection without creating an "undue burden" on the patient. *Id.*

Similarly, the Washington State Board of Pharmacy regulations categorically require pharmacists to dispense all medications subject to a valid prescription and make the failure to do so grounds for professional discipline. *See* Wash. Admin. Code § 246-869-010; *id.* § 246-863-095. Washington law provides only a "narrow right of conscience," allowing the pharmacist to refuse to dispense medication only when another on-duty pharmacist is willing to dispense the medication in place of the objector. *See Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1253–54 (W.D. Wash. 2007), *rev'd*, 586 F.3d 1109 (9th Cir. 2009). The constitutionality of these Washington regulations was upheld pursuant to *Smith*'s holding on facial neutrality and general applicability. *Stormans, Inc. v. Wiesman*, 794 F. 3d 1064 (9th Cir. 2015), *cert. denied*, 579 U.S. 942 (2016).

Growing efforts to legalize assisted suicide present another area of uncertainty as it relates to the conscience rights of healthcare professionals. Since the "death with dignity" movement began with Oregon's legalization through ballot initiative in 1994, eleven states and the District of Columbia have legalized assisted suicide via separate ballot initiatives, judicial decisions, and the legislative process. *States Where Medical Aid in Dying is Authorized*, COMPASSION & CHOICES, https://compassionandchoices.org/states-where-medical-aid-in-dying-is-authorized/ (last visited Sept. 2, 2025). Another seventeen states will consider legalizing assisted suicide within the next year. *Death with Dignity U.S. Legislative Status State Map*, DEATH WITH DIGNITY, https://deathwithdignity

.org/states/ (last visited Aug. 29, 2025). From the movement's outset, religious opposition to assisted suicide has been steadfast, and even many non-religious Americans believe the practice to be "'fundamentally incompatible with the physician's role as healer.'" *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (citation omitted).

On the religious front, in 2019, global leaders representing Islam, Judaism, and Christianity assembled in the Vatican to sign a joint interfaith statement unequivocally opposing assisted suicide "because [it] fundamentally contradict[s] the inalienable value of human life," Robin Gomes, *Abrahamic religions: no to euthanasia, assisted suicide, yes to palliative care*, VATICAN NEWS (Oct. 28, 2019), https://www.vaticannews.va/en/vatican-city/news/2019-10/abrahamic-religions-life-euthanasia-suicide-palliative.html. Similarly, the Ethical and Religious Directives for Catholic Health Care Services provide that Catholic health care institutions "may never condone or participate in euthanasia or assisted suicide in any way." U.S. CONF. OF CATHOLIC BISHOPS, *supra*, at 21. Yet, in many instances, medical care providers lack sufficient protections under state law. For example, religious hospitals are powerless to regulate their physicians' ability to prescribe life-ending medication despite the hospital having conscientious objections to such treatment through the "premises loophole" found in most assisted suicide laws. Zachary R. Carstens, Note, *The Right to Conscience vs. the Right to Die: Physician-Assisted Suicide, Catholic Hospitals, and the Rising Threat to Institutional Free Exercise in Healthcare*, 48 PEPP. L. REV. 175, 200

(2021). Meanwhile, in 2016, pro-life physicians were required to seek protection in federal court in response to the Vermont Board of Medical Practice and Office of Regulation's interpretation of the state's Act 39 to mandate that physicians inform all patients about the "option" of assisted suicide, despite having conscientious objections to it. *See Vermont All. for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227 (D. Vt. 2017). With so many states having made assisted suicide lawful, it is not difficult to imagine similar conscience-based conflicts arising elsewhere.

The scope of medical care providers' conscience rights needs clarification in the area of transgender health care, too. There are both religious and non-religious objections to transgender medical interventions. *United States v. Skrmetti*, 145 S. Ct. 1816, 1841–45 (2025) (Thomas, J., concurring) (discussing the lack of medical consensus as it relates to the efficacy of transgender healthcare). But the conscience rights of objectors to transgender interventions lack sufficient protections under this Court's First Amendment jurisprudence so long as *Smith* remains good law. Indeed, infringements on the rights of individuals to raise conscientious objections to transgender interventions have been the subject of widespread litigation. *See, e.g.*, *Franciscan All., Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022) (appeal from district court injunction of HHS rule requiring gender-reassignment surgery against religious objection); *Florida v. Dep't of Health and Hum. Servs.*, 739 F. Supp. 3d 1091 (M. D. Fla. 2024) (preliminary injunction and stay granted against HHS interpretation of the Affordable Care Act's prohibition of sex discrimination to include

discrimination on the basis of gender identity); *Am. Coll. of Pediatricians v. Becerra*, No. 23-5053, 2024 WL 3206579 (6th Cir. June 7, 2024) (appeal from district court's dismissal of suit by healthcare professionals to prevent enforcement of HHS gender-identity discrimination rules). This widespread litigation seeking to vindicate the rights guaranteed by the First Amendment is indicative of the need for reform.

The potential and actual affronts to healthcare professionals' free exercise rights, alone, warrants revisiting *Smith*. But leaving *Smith* in place also risks alienating (and perhaps forcing out of the medical practice) the thousands of healthcare professionals whose religious beliefs forbid certain acts. Pressuring religious individuals and institutions out of the medical profession would be devastating not only for doctors of faith but for the healthcare system as a whole. Nearly one in five hospitals in the United States is religiously affiliated. Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, 2 JAMA NETWORK OPEN (Dec. 27, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2757998. And a substantial number of medical professionals, including those serving in secular institutions, have religious commitments and view those religious commitments as integral to their profession. Kristin A. Robinson et al., *Religious and Spiritual Beliefs of Physicians*, 56 J. RELIGION & HEALTH 205, 210, 212 (2017) (finding that 29% of Mayo Clinic doctors reported that religious or spiritual beliefs influenced their decision to become a doctor and 64% considered religion important in their lives).

To amici and their constituents, the right to freely exercise their religion is not an academic exercise. Rather, that freedom resides at the center of the daily practice of medicine for thousands of American healthcare professionals, who need to know that their First Amendment rights will be vindicated in court.

III. *Smith* should be overruled.

The "uncertainty" that surrounds *Smith*, *Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring), and hinders amici's faith-based provision of medical services is inevitable while *Smith* remains on the books. *Smith*'s parsimonious view of the Free Exercise Clause stands fundamentally in tension with the nation's enduring jurisprudential tradition and thus should be overruled.

a. *Smith*'s bright-line rule improperly limits religious liberty.

Smith announced the now-familiar rule "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (quotation omitted). As a result, this Court held that Oregon could deny unemployment benefits to someone dismissed from his job for sacramental peyote use because the state's ban on peyote was neutral and generally applicable. *See id.* at 890. *Smith*'s first mistake was even *attempting* to impose a bright-line rule to govern religious exemptions under the Free Exercise Clause, a constitutional provision that has always invited case-by-case

analysis. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (recognizing "play in the joints between what the Establishment Clause permits and the Free Exercise Clause compels") (quotation omitted). But *Smith*'s more profound error is that its bright-line rule places a thumb on the scales *in the government's favor*. Indeed, *Smith* limits religious exemptions to "hybrid" scenarios in which the Free Exercise Clause combines with another constitutional right, as if the Free Exercise Clause is surplusage with no independent power. *See Smith*, 494 U.S. at 881–82.

The changing contours of religious *practice* since our nation's founding did not alter the nation's "bedrock" commitment to religious liberty. *Fulton*, 593 U.S. at 545 (Alito, J., concurring). So even if peyote use (or state-level regulation in the first place) was not front-and-center when the Free Exercise Clause was ratified, the Clause nevertheless recognized the founding generation's "fierce commitment to each individual's natural and inalienable right to believe according to his 'conviction and conscience' and to exercise his religion 'as these may dictate.'" *Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 808 F.3d 1, 4–5 (D.C. Cir. 2015) (Brown, J., dissenting from denial of reh'g en banc) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, *reprinted in* 2 WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed. 1901)). *Smith* treats the "natural and inalienable right," *id.*, to freely exercise one's religion as essentially an antidiscrimination guarantee, when it is much more than that.

In *Fulton*, Justice Alito highlighted examples of the "startling consequences" *Smith* seemingly permits, the first of which asks a nearly identical question to what this Court considered in *Smith*. *Fulton*, 593 U.S. at 545–46 (Alito, J., concurring). Since *Smith* permitted Oregon to ban sacramental peyote use, could the Volstead Act (implementing the Eighteenth Amendment's alcohol prohibition) have constitutionally prohibited sacramental wine consumption in Catholic Mass? *See id.* at 545. If so, "it would have prevented the celebration of a Catholic Mass anywhere in the United States." *Id.* (footnote omitted). To be sure, the Volstead Act (unlike Oregon's peyote ban) exempted sacramental wine, *see* National Prohibition Act, ch. 85, 41 Stat. 305, 308–09 (repealed 1935), but what if it had not? Could the Eighteenth Amendment have "prevented the celebration of a Catholic Mass," *Fulton*, 593 U.S. at 545–46 (Alito, J., concurring), without the First Amendment having any say in the matter? Of course not.

These concerns are not limited to the hypothetical. This past July, a federal district court in Washington preliminarily enjoined a state law that would have compelled Catholic priests to disclose information learned through the Sacrament of Confession. *See Etienne v. Ferguson*, No. 3:25-cv-05461, 2025 WL 2022101, at *7–11 (W.D. Wash. July 18, 2025). The district court correctly determined that Washington's law "is neither neutral nor generally applicable because it treats religious activity less favorably than comparable secular activity." *Id.* at *8. But what if Washington eliminated *all* privileges, both sacred and secular?

Under *Smith*, the Free Exercise Clause would not save the sacrament. But that cannot be correct—even a neutral and generally applicable law can "prohibit the free exercise" of religion and, if it does, surely the First Amendment has something to say about it. U.S. Const. amend. I.

Smith held that because "Oregon's drug law" did not "attempt to regulate religious *beliefs*," the Free Exercise Clause was simply not implicated. 494 U.S. at 882 (emphasis added). But that does not account for a constitutional provision that, unsurprisingly, protects the right to *exercise* one's religion, not just hold certain religious beliefs. *Smith* has proven itself unworkable and would likely have been reconsidered already had Congress not enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, and Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, in its wake. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Affordable Care Act's contraceptive mandate violates RFRA); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–39 (2006) (government's interest in uniform application of Controlled Substances Act insufficient under RFRA to ban importation of sacramental tea); *Holt v. Hobbs*, 574 U.S. 352, 369–70 (2015) (prison grooming policy violated RLUIPA by requiring Muslim inmate to shave beard).

In sum, *Smith* dictates the application of a bright-line rule *favoring* the government to claims based on a religious liberty clause that, by its very nature, *constrains* the government. It remains, as it

ever has been, a flawed interpretation of a foundational constitutional guarantee.

b. Many options to replace *Smith* exist.

Smith feared "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." 494 U.S. at 890. To be sure, "the right to freely exercise one's religion is not—and was not intended to be—absolute." *Priests for Life*, 808 F.3d at 5 (Brown, J., dissenting from denial of reh'g en banc). But the complex and ever-changing religious landscape in America is no reason for this Court to rubber stamp heavy-handed (albeit "neutral" and "generally applicable") government regulations that burden religious exercise. That free exercise claims are often thorny is a reason for this Court to *embrace*, not evade, them.

Fortunately, if certiorari is granted and *Smith* is reconsidered, there are a variety of viable doctrinal substitutes for this erroneous precedent. For one, James Madison recognized that free exercise "could be limited where 'the preservation of equal liberty … and the existence of the [government] may be manifestly endangered.'" *Id.* (citation omitted). The federal standard codified in RFRA—i.e., the version of strict scrutiny described in *Sherbert v. Verner*, 374 U.S. 378 (1963)—is another option. An alternative approach could be a framework that contemplates Justice Souter's distinction between *Smith*'s "formal neutrality" and a more rigorous "substantive neutrality," in which a facially neutral law "may 'nonetheless offend [the Free Exercise Clause's] requirement for government neutrality if it unduly

burdens the free exercise of religion.'" *Church of Lukumi Babalu Aye*, 508 U.S. at 562–63 (Souter, J., concurring) (citation omitted). And scholars have weighed in on *Smith* from the moment it was decided. *See, e.g.*, Michael W. McConnell, *The Origin and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). This Court regularly crafts constitutionally sound standards in challenging contexts; *Smith*'s elevation of simplicity over accuracy is an outlier worth correcting. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968) (right to free expression); *United States v. Rahimi*, 602 U.S. 680, 692 (2024) (right to bear arms).

The Court should not go on applying *Smith* just to avoid determining its replacement. Granting certiorari in this case would provide the Court with a fully briefed issue, including the pros and cons of what should replace *Smith*. With "religious liberty in a confused and vulnerable state," now is the time for this Court to act. *Fulton*, 593 U.S. at 618 (Alito, J., concurring).

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's brief, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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