No. 25-581

IN THE

# Supreme Court of the United States

**ST. MARY CATHOLIC PARISH IN LITTLETON, COLORADO, ET AL.**,

*Petitioners,*

*v.*

**LISA ROY,** in her official capacity as Director of the Colorado Department of Early Childhood, et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## *AMICUS* BRIEF OF THE ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS[1]

The Robertson Center for Constitutional Law ("the Center") is an academic center within the Regent University School of Law. Established in 2020, the Center advances first principles in constitutional law, including freedom of speech, separation of powers, and religious liberty. The Center advocates to protect rights secured in the United States Constitution and works to restore enumerated rights that have been eroded or lost over time.

Chief among those rights is the free exercise of religion. Like James Madison, the Center views conscience as "the most sacred of all property," and the free exercise of religion as "a natural and unalienable right." James Madison, Property (Mar. 29, 1792), in 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1986). The Free Exercise Clause exists to protect individuals and organizations like Daniel and Lisa Sheley and St. Mary Catholic Parish. *Employment Division v. Smith*, upon which the misguided decision below was premised, is inconsistent with the text, history, and purpose of the Free Exercise Clause. Freedom of conscience has suffered because of *Smith*'s sweeping transformation of free-exercise rights.

The decisions below are just two of many examples of the lower courts' misapplication of *Smith,*

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[1] No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

notwithstanding this Court's clear countervailing guidance. Halting the damage to religious liberty in this nation requires a more unequivocal statement of *Smith*'s vestigial status. This Court should explicitly abandon *Smith*. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (abandoning *Lemon v. Kurtzman*, 403 U.S. 602 (1971) even though the questions presented in the petition for certiorari did not raise the issue).

## SUMMARY OF THE ARGUMENT

"It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* The American Republic: Primary Sources 327, 327 (Bruce Frohnen ed., 2002). The First Amendment elevates the free exercise of religion above "the vicissitudes of political controversy" and places it "beyond the reach of majorities and officials." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Like the other guarantees of the Bill of Rights, free exercise "may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Id*. Consonant with that wisdom, this Court historically subjected any law that substantially burdened religious exercise to heightened scrutiny. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963). This approach enabled individuals of different backgrounds and faiths to live and work together in a

pluralistic society.

*Employment Division v. Smith* upset that balance. 494 U.S. 872 (1990). Following the notorious holding in *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940), *Smith* subordinated the constitutional right of free exercise to the states' police powers and transformed religious exercise into a second-class First Amendment right. In so doing, *Smith* uprooted Free Exercise Clause precedent and ignored the fundamental logic of the Free Exercise Clause, as well as the history of colonial religious liberty protections.

*Gobitis* was overruled only three years after it was decided, but *Smith* lingers on, notwithstanding the damage it has wreaked on religious liberty. *Smith* exceeds even *Lemon v. Kurtzman* as a precedent widely criticized for its egregiously wrong understanding of a Religion Clause. Shortly after *Smith* was decided, the two coequal branches of the federal government overwhelmingly rejected it. Forty states have also repudiated it, either judicially or legislatively. *Smith* has fared no better among legal scholars and Members of this Court. Like *Lemon*, *Smith* continues to confuse and mislead the lower courts, notwithstanding the corrective guidance given by this Court over the past decade. And a key assumption on which *Smith* was premised—that the failure to impose the test adopted in *Smith* would "court[] anarchy"—has proven to be unfounded.

Most recently, in *Mahmoud v. Taylor*, 606 U.S. 525 (2025), this Court repudiated *Smith's* incorporation of *Gobitis*. *Mahmoud* re-tethered Free Exercise Clause analysis to *West Virginia State Board of Education v.*

*Barnette,* 319 U.S. 624 (1943), holding that both *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Barnette* afforded constitutional protection to parents' right to shield their children from curricular materials that infringed their religious exercise rights. *Mahmoud* emphasized the primacy of parents' Free Exercise rights which are constitutionally immune to the "chilling vision of expansive state power" wrought by *Smith*'s a-textual nondiscrimination principle. *Mahmoud* strengthens an already compelling case for *Smith*'s continued abandonment.

## ARGUMENT

Although this Court declined to grant certiorari on whether to overrule *Smith*, the Court should nevertheless continue its significant progress toward that end by abandoning it.[2] While it is possible to resolve this case short of explicit abandonment, as long as the lower courts continue to evade or misconstrue this Court's precedents about the meaning of the "neutral and generally applicable" standard, *Smith* will continue to relegate religious liberty to a second-class constitutional status.

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[2]Incremental dismantlement has at times been the preferred, or perhaps only viable, approach to erode the precedential value of longstanding but egregiously wrong constitutional decisions. *See generally* Adam Feldman, *How Supreme Court Precedents Die Before They Are Overruled*, Legalytics (June 6, 2026), *available at* https://legalytics.substack.com/p/how-supreme-court-precedents-die?shem=rimspwouoe%2Crimspwouohe%2C.

## I. *Smith* Should Be Abandoned Because It Was Wrong from the Moment It Was Decided and Has Been Widely Repudiated.

### *A.* Smith *Elevated Pragmatism over Principle and Abandoned Settled Law by Repudiating* Sherbert *and Reverting to the Discredited Logic of* Gobitis.

*Smith* hatched from *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940), which upheld a law compelling school children to salute the American flag and recite the Pledge of Allegiance. The Gobitis children, who were Jehovah's Witnesses, were expelled from school for refusing to participate. This Court upheld the law because it was of "general scope [and] not directed against doctrinal loyalties of particular sects." *Id*. at 594. If the Gobitis children and other religious minorities wished to find an accommodation, the Court said they should lobby rather than litigate, which would "vindicate the self-confidence of a free people." *Id*. at 600.

The Court overruled *Gobitis* only three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *Barnette* took particular exception to *Gobitis*'s conclusion that this Court was not competent to second-guess legislative resolution of First Amendment issues:

> withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

> by the courts . . . . We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

*Id*. at 638, 640.

*Barnette* is widely celebrated today, while *Gobitis* is relegated to the notorious anti-canon.[3] *E.g.*, John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 191, 199 (Sanford Levinson ed. 1995) (mentioning *Gobitis* alongside *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Korematsu v. United States*, 323 U.S. 214 (1944), and *In re Yamashita*, 327 U.S. 1 (1946)).

After *Barnette*, the idea that the Free Exercise Clause protects against only overt discrimination fell roundly out of favor. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (holding that "[t]he fact that the [challenged] ordinance is 'nondiscriminatory' is immaterial"); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (holding that a generally applicable law prohibiting door-to-door distribution of religious pamphlets violated the First Amendment). This Court subsequently held in *Sherbert v. Verner* that the Free Exercise Clause

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[3] Justice Scalia, the author of *Smith*, later acknowledged that *Gobitis* was wrong and had been properly overturned by *Barnette*. *FEC v. Wis. Right to Life*, 551 U.S. 449, 500–01 (2007) (Scalia, J., concurring in part and concurring in the judgment).

required exemptions from any law that substantially burdened an individual's religious exercise unless that law was narrowly tailored to serve a compelling state interest. 374 U.S. 398, 403 (1963). *Wisconsin v. Yoder*, 406 U.S. 205 (1972), reaffirmed that standard.

The *Sherbert-Yoder* test stood for more than a quarter century. *E.g.*, *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). But in 1990, *Smith* reanimated the *Gobitis* standard that had lain largely dormant for nearly fifty years.

Although neither party addressed the proposition the Court was to embrace, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571–72 (1993) (Souter, J., concurring), *Smith* explicitly resurrected *Gobitis*, holding that individuals must obey neutral and generally applicable laws regardless of their impact on religious expression. 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594–95).

Justice O'Connor's recently published papers reveal that the *Smith* majority recognized the decision's tension with *Sherbert* and *Yoder*. Stephanie Hall Barclay & Matthew M. Krauter, *The Untold Story of the Proto-Smith Era: Justice O'Connor's Papers and the Court's Free Exercise Revolution*, 174 U. Pa. L. Rev. 435, 440 (2026). Justice Scalia, the author of *Smith*, had gone so far as to say, "*Yoder* was wrong." *Id.* at 517 (citing Justice Sandra Day O'Connor, Conference Notes, *Emp. Div. v. Smith*, No. 88-1213 (Nov. 9, 1989) (on file with Libr. of Cong., Sandra Day O'Connor Papers, Box II:171) (discussing Justice Scalia's views)).

*Smith* asserted that it would "court[] anarchy" to continue to apply the *Sherbert-Yoder* test, declaring it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of religious practice." 494 U.S. at 888, 889 n.5. The majority further predicted that a regime of judicial exemptions would make functional government impossible. *See id.* at 890 (permitting exemptions would make "each conscience . . . a law unto itself").

Channeling *Gobitis*, *Smith* left minority religious groups to fend for themselves in legislatures. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. The majority was untroubled by the prospect that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.* But, as the dissent correctly pointed out:

> [The majority's] distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford, and that the repression of *minority* religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance

> "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

*Id*. at 908–09 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

Four justices resisted *Smith*'s revival of *Gobitis*. Justice O'Connor wrote, "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id*. at 901 (O'Connor, J., concurring in the judgment). The three dissenting justices were more direct: *Smith* was "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id*. at 908 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

*Smith* "changed the legal standard based on a meta-policy level judgment about the government's need to operate without having to deal with 'squeaky wheel' religious accommodations that would make life difficult for the government." Barclay & Krauter, *supra,* at 526. Like *Gobitis*, *Smith* essentially subordinated the constitutional right of free exercise to the states' police powers, thereby eviscerating it. *Cf. Silvester v. Becerra*, 583 U.S. 1139, 1139–40 (2018) (Thomas, J., dissenting from denial of certiorari) (noting that an analysis "indistinguishable from rational-basis review" reveals a "general failure to afford the Second Amendment the respect due an enumerated constitutional right").

*B.* Smith *Met Widespread and Immediate Opposition.*

When decided, *Smith* repudiated history. Since then, history has repudiated *Smith*. *Smith* "produced a firestorm of criticism." Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties,"* 84 Neb. L. Rev. 795, 814 (2006). Congress and the President rejected it. A broad coalition of religious communities and civil liberties organizations pushed for *Smith* to be reheard. *Id*. When that failed, the coalition petitioned Congress to overturn *Smith* by statute. *Id*. at 815. That effort succeeded three years later. *See* Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993); Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000).

The Religious Freedom Restoration Act ("RFRA") passed the Senate by a vote of 97 to 3 and had "such broad support it was adopted on a voice vote in the House." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993). Congress found that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4) (2018). Accordingly, Congress sought "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id*. § 2000bb(b)(1).

When signing RFRA into law, President Clinton

noted how "hesitantly and infrequently" Congress reverses a decision of this Court. Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993). "But this is an issue in which that extraordinary measure was clearly called for." *Id*. President Clinton explained:

> [T]his act reverses the Supreme Court's decision [in *Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

*Id*. Although this Court subsequently attempted to limit Congress's effort to fully reverse *Smith* in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress soldiered on and passed RLUIPA in 2000 to restore the *Sherbert-Yoder* test nationally in narrow contexts within the ambit of Congress's Article I power. Pub. L. No. 106-274, 114 Stat. 803 (2000).

Forty states have rejected Smith. [4] At least

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[4] Twenty-seven states rejected *Smith* by legislation, twelve by judicial decision, and one (Alabama) by constitutional amendment. The cases interpreting state free exercise clauses to require heightened scrutiny post-*Smith* are catalogued in Douglas Laycock, Religious Liberty and the Culture Wars, 2014 U. Ill. L. Rev. 839, 844 n.22 (2014). Many of the state RFRA statutes are catalogued in that same article. *Id*. at 845 n.26. In the years since Professor Laycock's survey, several additional States have legislatively or judicially rejected *Smith* in the same fashion. *See, e.g.*, Ark. Code Ann. §§ 16-123-401 to -407 (2015);

fourteen state courts have interpreted state constitutional provisions to require heightened scrutiny for laws burdening religious conduct.[5]

Legal scholars likewise rejected *Smith*'s treatment of the text of the Free Exercise Clause as "strange and unconvincing" due to its puzzling failure to consider the historical context in which the Free Exercise Clause emerged. Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1115–19 (1990). Even *Smith* proponents concede that the opinion "exhibits only a shallow understanding of free exercise jurisprudence" with a "use of precedent [that] borders on fiction." William P.

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Georgia Religious Freedom Restoration Act, 2025 Ga. SB 36; Ind. Code §§ 34-13-9-0.7 to -11 (2019); Mont. Code Ann. §§ 27-33-101 to -105 (2021); Neb. Rev. Stat. § 20-703 (2024); N.D. Cent. Code § 14-02.4-08.1 (2021); S.D. Codified Laws § 1-1A-4 (2021); W. Va. Code § 35-1A-1 (2023); Iowa Code §§ 675.1 to 675.4 (2024); Utah Code Ann. § 63G-33-201; Wyo. Stat. Ann. § 9-29-103 (2025); *see also Vlaming v. West Point Sch. Bd.*, 302 Va. 504, 556 (2023) (interpreting Article I, § 16 of Virginia's own Constitution to provide a more robust protection of religious exercise than Smith's ahistorical "reformulat[ion of] the federal free-exercise doctrine"); *State v. Heath*, 485 P.3d 1121 (Idaho 2021); *State v. Mack*, 173 N.H. 793, 814 (2020) ("in construing our State Constitution, we decline to adopt the reasoning of Smith"); *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 390 P.3d 728, 736 (Wyo. 2017) ("unlike the Smith Court, we will apply strict scrutiny to our analysis").

[5] Three states—Indiana, Kansas, and Mississippi—passed legislation after their courts imposed heightened scrutiny under their respective constitutions. See Ind. Code §§ 34-13-9-0.7 to 34-13-9-11 (2019); Laycock, 2014 U. Ill. L. Rev. at 844 n.22.

Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991).

Justices of the Court, past and present, have repeatedly suggested revisiting *Smith*. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 568 U.S. 1130, 1134 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., respecting the denial of certiorari) (*Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided . . . ."); *City of Boerne*, 521 U.S. at 565 (O'Connor, J., joined by Breyer, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith* . . . ."); *Lukumi*, 508 U.S. at 559 (1993) (Souter, J., concurring) ("[I]n a case presenting the issue, the Court should re-examine the rule *Smith* declared."); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 643 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters."); *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *Fulton*, 593 U.S. at 545, 553 (Alito joined by Thomas and Gorsuch, JJ., concurring) (*Smith*'s "severe holding" is "ripe for reexamination," "[t]he correct interpretation of the Free Exercise Clause is a question of great importance," and *Smith*'s

approach "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption.").

Contrary to the "anarchy" *Smith* feared, state and federal courts have preserved order while ably vindicating religious liberties. 494 U.S. at 888. This Court has often recognized "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005) (finding "no cause to believe" that heightened scrutiny could "not be applied in an appropriately balanced way").

In short, the swift and emphatic rejection of *Smith* by a nearly unanimous Congress, the President, and a broad bipartisan coalition, *Smith*'s overwhelming rejection in the states, the resulting confusion in the lower courts, and the discrediting of *Smith*'s "anarchy" assumption all weigh heavily in favor of *Smith*'s abandonment.

### *C. Following a Line of Cases that Circumvented* Smith *to Preserve Religious Liberty,* Mahmoud v. Taylor *Further Eroded* Smith *by Re-tethering Free Exercise Clause Analysis to* Barnette.

Like *Lemon v. Kurtzman*, 403 U.S. 602 (1971), before its abandonment, *Smith* is increasingly vestigial. In the decades since *Smith*, this Court has circumvented it, ruling in favor of religious claimants

and reversing decisions that relied upon *Smith*. *See* Pet. Br. at 21–26 (discussing holdings of the eighteen Free Exercise Clause cases this Court has decided since *Smith*); *see also* Christopher C. Lund, *Second-Best Free Exercise*, 91 Fordham L. Rev. 843, 845 n.6 (2022).

*Smith's* ill-considered adoption of *Gobitis*'s reasoning was implicitly repudiated in *Mahmoud v. Taylor*, 606 U.S. 525 (2025). There, this Court reassociated Free Exercise Clause analysis with *Barnette*, holding that *Yoder* and *Barnette* afforded constitutional protection to the *Mahmoud* parents who sought to shield their children from a reading curriculum that infringed the parents' religious exercise rights by promoting LGBTQ+ ideology. 606 U.S. at 548. *Mahmoud* reaffirmed the primacy of parents' Free Exercise rights to guide the religious development of their children. *Id.* at 546 (recognizing that "for many people of faith across the country, there are few religious acts more important than the religious education of their children"). Because the burden on that paramount right was "the same burden as in *Yoder*," *Smith* did not apply. *Id.* at 564. The parents were accordingly entitled to an injunction granting them permission to remove their children from class whenever the books were read. *Id.* at 569.

Criticizing the majority opinion for "judicial maximalism," the dissent lamented "the cost" to what it viewed as a "bedrock principle of free exercise doctrine ensuring that professed doctrines of religious belief are not superior to the law of the land." *Id.* at 625 (Sotomayor, J., joined by Kagan & Jackson, JJ.,

dissenting). In the dissent's view, an "individual's religious beliefs [may not] excuse him from compliance with an otherwise valid law or policy." *Id.* at 625–26 (citation modified).

The majority excoriated the dissent's *Smith*-centric reasoning:

> Under this test, even instruction that denigrates or ridicules students' religious beliefs would apparently be allowed. We reject a chilling vision of the power of the state to strip away the critical right of parents to guide the religious development of their children. *Yoder* and *Barnette* embody a *very different view* of religious liberty, one that *comports with the fundamental values of the American people*.

*Id.* at 559 (majority opinion) (emphasis added). *Mahmoud* repudiated the very same reasoning *Smith* sought to revive from *Gobitis*. What remains of *Smith* is a holding severed from its foundations. Most importantly, *Smith* sits at odds with the precedents, text, and history of the Free Exercise Clause. This ill-conceived decision should be abandoned.

## II. *Smith* Should Be Abandoned Because It Ignored this Court's Precedent and the Historical Meaning of the Free Exercise Clause.

### *A.* Smith *Illogically Departed from this Court's Free Exercise and First Amendment Jurisprudence.*

*Smith* was an anomaly from the outset. In addition to its explicit resurrection of the discredited *Gobitis* analysis described above, "*Smith* largely repudiated the method of analysis used in [*Sherbert* and *Yoder*]." *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Yet *Smith* did not explicitly overrule *Sherbert* or its progeny. It instead attempted to distinguish those cases, confining them to two narrow and burdensome categories.

In the first category, *Smith* placed "hybrid rights" cases which "involved . . . the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. Yet the majority never explained why *Smith* itself did not qualify as a hybrid free-exercise free-speech case. In the second category of free-exercise cases, the Court placed its unemployment benefits cases, which require "individualized governmental assessment[s] of the reasons for the relevant conduct." *Id*. at 883–84. But the Court again failed to explain why the hypothetical criminal trial at the heart of *Smith*—which would be far more consequential than a government benefit assessment—was not similarly an "individualized governmental assessment." *Id.* at 884. After distinguishing decades of precedent, the Court

concluded that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." *Id.* at 878–79 (emphasis added).

The resulting framework was unworkable. Laws regulating religious exercise were "always excluded" while laws targeting religious conduct would doubtless be constitutional. *Id.* at 877. Further, laws implicating more than one constitutional right were "bar[red]" by the First Amendment, and laws setting standards for "unemployment compensation" were occasionally subject to strict scrutiny. This attempt to distinguish, rather than overrule, prior cases created "a free-exercise jurisprudence in tension with itself." *Lukumi*, 508 U.S. at 564 (Souter, J., concurring).

Compounding these flaws, the cases *Smith* relied on were themselves dubious, and "their subsequent treatment by the Court would seem to require rejection of the *Smith* rule." *Id.* at 569. In addition to relying on *Gobitis*, 494 U.S. at 879, *Smith* found further support for its rule in *Reynolds v. United States*, 98 U.S. 145 (1878), a case that relied on the discredited theory that the Free Exercise Clause protects only religious beliefs, not religious conduct. 98 U.S. at 166–67. To its credit, *Smith* explicitly disavowed that theory, 494 U.S. at 877–78, despite relying on the rationale that followed from it, *id.* at 879.

*Smith* also departs from the broader body of First Amendment jurisprudence. *Smith* claimed that granting "a private right to ignore generally applicable laws" would result in "a constitutional anomaly." *Id.* at 886. But in granting as-applied challenges in other First Amendment contexts, this

Court has provided the same type of exemption that *Smith* found to be untenable under the Free Exercise Clause. *See generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (applying the ministerial exception required by the Free Exercise and Establishment Clauses to an employment discrimination claim); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (granting the Boy Scouts of America an exemption from state public accommodation laws that, while not facially invalid, conflicted with the Scouts' freedom of expressive association); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 558 (1995) (granting, on First Amendment grounds, an exemption from a statute that did "not, on its face, target speech or discriminate on the basis of its content").

Even modest encroachments on the First Amendment's guarantees are subjected to heightened scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (describing the test for time, place, or manner restrictions on speech under the First Amendment); *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (explaining that the test for time, place, or manner restrictions on speech "demand[s] a close fit between ends and means").

Perhaps all this could have been avoided if the *Smith* Court had received the benefit of briefing and argument on the issue it decided. But the parties in *Smith,* consistent with the Court's precedent to that point, focused on whether the Court should have applied the *Sherbert-Yoder* test to the facts of the case, with "neither party squarely address[ing] the

proposition the Court was to embrace." *Lukumi*, 508 U.S. at 571–72 (Souter, J., concurring); *see also* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties*," 84 Neb. L. Rev. 795, 815 (2006) (noting that neither the parties nor any amicus had addressed "the question of whether [*Sherbert*] should be jettisoned as the appropriate constitutional test for free exercise cases"). Under this Court's time-honored precedent, "a constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and argument." *Lukumi*, 508 U.S. at 572 (Souter, J., concurring) (citing *Ladner v. United States,* 358 U.S. 169, 173 (1958)).

### *B.* Smith *Is Contrary to the Text and Meaning of the Free Exercise Clause*.

*Smith* eliminated heightened scrutiny for Free Exercise Clause claims without meaningfully confronting the constitutional text. The Free Exercise Clause shields religious conduct from governmental interference by giving "'special protection to the exercise of religion,' specifying an activity and then flatly protecting it against government prohibition." *Lukumi*, 508 U.S. at 574 (Souter, J., concurring) (quoting *Thomas*, 450 U.S. at 713). The right to religious exercise is therefore an affirmative right, protecting religious practices that do not pose a direct and intolerable threat to public safety and order.

The text "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); *see also Lukumi*, 508 U.S.

at 557 (Scalia, J., concurring) ("The terms 'neutrality' and 'general applicability' are not to be found within the First Amendment itself . . . ."). A shield against overt religious discrimination may be secured by the Equal Protection and Due Process Clauses, but the First Amendment is different. Its liberties "occupy a preferred position" in our nation, and the right to exercise them "lies at the foundation of free government by free men." *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)); *see also Kennedy*, 597 U.S. at 523 (recognizing that the Free Exercise and Free Speech Clauses of the First Amendment "work in tandem": "the Free Exercise Clause protects religious exercises," and "the Free Speech Clause provides overlapping protection for expressive religious activities").

Plaintiffs Smith and Black argued that the Free Exercise Clause forbids the government from "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." *Smith*, 494 U.S. at 878. That interpretation squares naturally with the requirements of the Constitution. The First Amendment protects against laws that "prohibit" or prevent religious conduct, not merely laws that "discriminate against" such conduct.

Justice O'Connor's working papers confirmed that there was virtually no discussion during the *Smith* conference deliberations about the meaning of the Free Exercise Clause. Barclay & Krauter, *supra*, at 525. Rather than grappling with the text, the majority

simply declared that it "d[id] not think the words must be given that meaning." *Smith*, 494 U.S. at 878 (emphasis added). With that, the majority summarily concluded that its own novel but "permissible reading" of the Free Exercise Clause should win the day. *Id*.

*Smith*'s textual indifference exposes the incoherence of its reasoning. It acknowledged motivated conduct as a valid "exercise of religion," and conceded that the plaintiff's religiously motivated conduct was "prohibited under Oregon law." 494 U.S. at 877–78, 890. But the Court never explained how, as a textual matter, a law prohibiting plaintiffs' exercise of religion was not a "law . . . prohibiting the free exercise [of religion]." *See id.* at 878.

### *C.* Smith *Ignored the History of Colonial Religious Liberty Protections*.

Justice O'Connor's papers also confirm that the *Smith* Court never considered the history of Colonial religious liberty that provides the background for a proper understanding of the Free Exercise Clause. Barclay & Krauter, *supra*, at 525; *see also City of Boerne*, 521 U.S. at 550 (O'Connor, J., dissenting) ("[C]ontrary to *Smith*[,] the Framers did not intend simply to prevent the Government from adopting laws that discriminated against religion."). That history, like the text of the First Amendment itself, undercuts *Smith* and confirms that the clause safeguards an affirmative right to religious exercise. This evidence provides a "powerful reason to interpret the [Free Exercise] Clause to accord with its natural reading."

*Lukumi*, 508 U.S. at 576 (Souter, J., concurring).

Scholars have thoroughly displayed this evidence by analyzing the theory, text, and structure of colonial and state religious liberty protections. *See, e.g.*, W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DePaul L. Rev. 71, 79–85 (1992); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421–73 (1990). State constitutional free exercise protections "are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty." *City of Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting); *cf. District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (looking to "analogous arms-bearing rights in state constitutions" for interpretive clues regarding the Second Amendment and rejecting interpretation that would "treat the Federal Second Amendment as an odd outlier").

To provide one example, the Massachusetts Constitution of 1780 and its failed predecessor of 1778 provide insight into the founding generation's understanding of religious freedom. The 1778 Constitution contained a restrictive view of religious freedom. Article XXXIV read: "The free exercise and enjoyment of Religious profession and worship shall forever be allowed to every denomination of protestants within this State." The Constitution of 1778, in The Revolution in America 1754–1788: Documents and Commentaries 435, 445 (J.R. Pole ed., 1970). Delegates from Essex County objected to the proposed 1778 constitution, calling its free exercise provision "exceptionable . . . because the free exercise

and enjoyment of religious worship is there said to be allowed to all the protestants in the State, when in fact, that free exercise and enjoyment is the natural and uncontroulable right of every member of the State." The Essex Result, in 1 The Founders' Constitution 112, 113 (Philip B. Kurland & Ralph Lerner eds., 1986).

The Massachusetts Constitution of 1780, drafted by John Adams, incorporated the view of the Essex County delegates:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Mass. Const. art. II. On its face, this formulation evinces an affirmative, general right to religious freedom, subject to exceptions only for conduct that disturbs the public peace or directly obstructs another's religious worship.

Many other post-Revolution state constitutions contained free exercise clauses with similar text and structure. *See City of Boerne*, 521 U.S. at 553–54 (O'Connor, J., joined by Breyer, J., dissenting) (looking at similar protections in the constitutions of New York, New Hampshire, Maryland, and Georgia and the Northwest Ordinance). This pattern of affirmative free exercise protections across the

founding-era states "strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice." *Id*. at 554. The exceptions to that right were narrow, reaching only conduct that disturbed the public peace or obstructed another's religious worship.

This interpretation is consistent with the prevailing view of the founding era—expressed by the Essex County delegates, among others—that religious liberty was an unalienable right. James Madison, "the leading architect of the religion clauses of the First Amendment," *Flast v. Cohen*, 392 U.S. 83, 103 (1968), declared that one's duty to act according to the dictates of one's faith "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* The American Republic: Primary Sources 327, 327 (Bruce Frohnen ed., 2002).

Consistent with this philosophy, the founding generation placed patently strong protections of religious liberty in the First Amendment. "Words could not well express in a fuller or more forcible manner the understanding of the Convention, that the liberty of conscience and the freedom of the press were equally and completely exempted from all authority whatever of the United States." James Madison, *Report on the Virginia Resolutions* (Jan. 1800), in 5 The Founders' Constitution 141, 146.

In sum, the text and history of the Free Exercise Clause and this Court's cases interpreting the Free

Exercise Clause show that *Smith* is grievously wrong. It is time for *Smith* to join *Lemon* in the judicial dustbin.

## CONCLUSION

Amicus respectfully requests this Court to reverse the decision below.

Respectfully submitted,

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