

No. 25-581

In the Supreme Court of the United States

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

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF EARLY CHILDHOOD, ET AL.

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

**BRIEF OF *AMICUS CURIAE*
PROTECT THE FIRST FOUNDATION
SUPPORTING PETITIONERS AND REVERSAL**

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QUESTIONS PRESENTED

1. Whether proving a lack of general applicability under *Employment Division v. Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.

2. Whether *Carson v. Makin* displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*¹

It is not uncommon for this Court to issue a decision that is then overread by lower courts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), which interpreted “undue hardship” in Title VII’s religious accommodation provision, is an example of one such case that later fell victim to lower courts’ overreading. This Court, of course, recently fixed that misreading in *Groff v. DeJoy*, 600 U.S. 447 (2023).

Employment Division v. Smith, 494 U.S. 872 (1990), a case that looms large in the Tenth Circuit decision on review here, is another example of lower courts’ going too far in reading this Court’s precedents. A careful reading of that decision shows something that has been hidden in plain sight since the beginning. *Smith*’s framework, which applies rational-basis review to neutral, generally applicable laws that substantially burden religion, by its terms applies only in challenges to the application of *criminal* laws.

That understanding of *Smith* would come as no surprise to its author, Justice Scalia, whose post-*Smith* jurisprudence accords with the decision’s plain text. For example, he applied *Smith*’s standard only in the context of challenges to criminal laws. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But he *never* authored or joined any opinion that applied *Smith* in other free exercise

¹ This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its members or counsel made a monetary contribution toward the brief’s preparation or submission.

contexts. See, e.g., *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting); *Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010) (Alito, J., dissenting); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189-190 (2012).

This proper understanding of *Smith*—that it applies only where a religious burden arises from application of a criminal law—matters. For thirty-six years, state and lower federal courts have overread *Smith* to erroneously stifle religious free exercise in countless other contexts. And that damaging and almost universal misreading threatens all Americans of faith. Protect the First Foundation (PT1), a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas, submits this brief to urge the Court to do what it has done in other cases, including *Groff*, and correct lower courts’ historical misapplication of its precedents.

In short, by its terms, *Smith* was far narrower than lower courts have treated it. It is high time to return *Smith* to its original confines for the sake of religious liberty for people of all faiths or of no faith.

STATEMENT

Colorado funds a universal preschool program and allows both private and public schools to participate. App.6a. The department responsible for implementing this program adopted an equal opportunity mandate that families may enroll their children in participating schools without regard to any protected characteristic. App.6a.

Petitioner Archdiocese of Denver oversees nearly three dozen Catholic preschools that seek to fulfill a

religious mission. App.235a. Parents seeking to enroll their children in one of these Catholic preschools must sign a statement which requires that “all Catholic school families must understand and display a positive and supportive attitude toward the Catholic Church, her teachings, her work, and the mission of the Catholic school.” App.240a. Those who teach and work at the schools must sign a similar statement. App.221a; App.228a; App.234a.

This commitment by parents is crucial to the schools’ fulfilling their religious mission because, if families oppose the Church, it will undermine the schools’ ability to inculcate the faith in their students. App.240a; App.272a-275a; App.316a-318a. Thus, the Archdiocese has told school leaders that if a family “doesn’t see eye to eye on” the Church’s teachings about such things as biological sex and marriage, school leaders should “not admit the child out of abundant respect for the family.” App.318a.

Given the universal preschool regulations and the Catholic Church’s need to protect its preschools’ religious mission, the Archdiocese sought an accommodation from the equal opportunity mandate. App.283a. The state department denied any accommodation. App.289a-290a. So Petitioners sued.

The district court ruled in Respondents’ favor, noting that the challenged regulations were “neutral and generally applicable,” and therefore applied rational-basis review under *Smith*. See App.50a-172a. The Tenth Circuit affirmed, likewise relying on *Smith*. See App.1a-49a.

SUMMARY

This Court reads the words of its precedent carefully. This general principle was most recently emphasized in *Groff v. DeJoy*, where the Court rejected a broad lower-court misreading of its decision in *Hardison*.

But lower courts have overread this Court's decision in *Employment Division v. Smith* as well. A close and faithful reading of that decision shows what has been hiding in plain sight for over three and a half decades: *Smith's* holding that mere rational-basis review is required for religious free-exercise challenges to neutral-and-generally-applicable law applies only in the limited context of criminal laws.

This Court should take the opportunity that this case presents to restore *Smith's* actual scope by limiting its applications to cases involving a conflict between faith and a criminal law. To do so would not only be consistent with *Smith's* text, but also with this Court's free-exercise jurisprudence since that decision.

Since this case presents no challenge to the application of any criminal law, strict scrutiny, which Colorado cannot hope to satisfy, should apply to Colorado's law.

ARGUMENT**I. This Court Reads Its Precedents Carefully, and It Should Clarify that *Smith*, by Its Terms, Only Applies to Conflicts with Criminal Laws.**

Lower courts misinterpreted *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), for nearly half a century. Similarly, for decades, lower courts have misread *Employment Division v. Smith*, 494 U.S. 872 (1990), a case that, by its terms, applies only in challenges to the application of criminal laws. In misreading *Smith*, lower courts have treated it as though it applied to claimed religious exemptions to *all* laws, rather than just to criminal laws. This Court should correct that error here.

A. As *Groff v. DeJoy* makes clear, this Court gives precedent a close reading.

As this Court recently recognized, for “nearly 50 years,” lower courts misinterpreted its decision in *Hardison*. *Groff v. DeJoy*, 600 U.S. 447, 454-456, 464-465 (2023). *Hardison* interpreted Title VII’s requirement that employers accommodate their employees’ religious practices unless doing so would impose an “undue hardship” on the employer’s business. See *Groff*, 600 U.S. at 453-454 (quoting 42 U.S.C. §2000e(j)). As *Groff* explained, “many lower courts” later equated “undue hardship” with “any effort or cost that is ‘more than * * * *de minimis*.’” *Id.* at 454 (quoting *Hardison*, 432 U.S. at 84). This was because of a single line in *Hardison* that used the “*de minimis*” language, which “would later be viewed by

many lower courts as the authoritative interpretation of the statutory term ‘undue hardship[.]’” *Id.* at 464.

But the *Groff* Court rejected this interpretation, observing that “it is doubtful that [this line] was meant to take on that large role” because three other times in *Hardison* the Court stated “that an accommodation is not required when it entails ‘substantial’ ‘costs’ or ‘expenditures.’” *Ibid.* (quoting *Hardison*, 432 U.S. at 83 n.14). *Groff* also found the *Hardison* majority’s response to the dissent “telling” as to why “more than a *de minimis* cost” was not the appropriate way to read the case. *Ibid.*

B. *Smith*’s holding, question, and analysis show its limited context.

Applying such a careful reading to *Smith* reveals a similar story. Lower courts have misread it for thirty-six years. *E.g.*, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075 (9th Cir. 2015) (applying *Smith* to a conflict with a non-criminal law). The Tenth Circuit here is just the most prominent recent example. But this Court should read *Smith* in the same careful way that it read *Hardison* in *Groff*. Doing so reveals that *Smith* is about religious free exercise challenges to the application of criminal laws—not all types of laws.

1. First, the background of the *Smith* decision is significant. The case came before the Court twice. See *Smith*, 494 U.S. at 875-876. The first time, because the Oregon Supreme Court had not determined whether peyote use violated Oregon’s criminal laws, this Court found it premature to decide whether those laws violated the Free Exercise Clause. *Id.* at 875. This Court therefore vacated the state court’s ruling and

remanded so that the Oregon Supreme Court could decide whether the state's *criminal* laws prohibited the religious free exercise at issue. *Id.* at 876.

It was only after the state court confirmed that peyote use was indeed criminal that this Court took the case again and felt comfortable issuing its own ruling in *Smith*. *Ibid.*

2. Then, in its opening paragraph, the *Smith* Court framed the case as asking “whether the Free Exercise Clause * * * permits * * * Oregon to include religiously inspired peyote use within the reach of its *general criminal prohibition* on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.” *Id.* at 874 (emphasis added). The legal question facing the Court, therefore, was merely what happens when criminal laws clash with someone's religious obligation.

This background is critical to understanding *Smith's* precedential sweep. It is well settled that determining what is precedent and what is not in a judicial opinion is aided by a “focus on the legal questions actually presented to and decided by the court.”² And, for over a century and a half, this Court has consistently recognized the principle that precedent must be “construed in connection with the question to be decided.” See *Moorewood v. Enequist (The Gothland)*, 64 U.S. (23 How.) 491, 495 (1859).³

² Bryan A. Garner et al., *The Law of Judicial Precedent* 44 (2016).

³ The Court phrased it differently in other cases, but the principle is the same. See *Wright v. Nagle*, 101 U.S. 791, 796-797

The criminal-law limitation on *Smith*'s holding is similarly apparent when one considers the argument Mr. Smith made. He “argue[d] that even though [an] exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963).” *Smith*, 494 U.S. at 882-883 (cleaned up).

Of course, *Smith* rejected that argument. But in so doing, the Court framed its rejection—and its resulting distinction of *Sherbert*—in the narrow context of criminal law: The Court explained that, “[e]ven if [the Court] were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal law*.” *Id.* at 884 (emphasis added).

And when questioning Smith’s reading of past precedent, the *Smith* Court observed that “[w]hether or not the decisions are that limited, they at least have nothing to do with an across-the-board *criminal prohibition* on a particular form of conduct.” *Ibid.* (emphasis added). So, while the Court conceded that it

(1879) (“The language of the court in the opinion [of a prior case] is to be construed with reference to the question actually under consideration, and should not be extended beyond for *any* purpose of authority in another and different case.” (emphasis added)); *Bramwell v. U.S. Fid. & Guar. Co.*, 269 U.S. 483, 489 (1926) (“It is a rule of universal application that general expressions used in a court’s opinion are to be taken in connection with the case under consideration” and “read in the light of the facts considered and questions decided.”).

had “sometimes used the *Sherbert* test to analyze free exercise challenges to such [criminal] laws,” it also explained that it had “never applied the test to invalidate one.” *Id.* at 884-885 (citations omitted). Hence, *Smith* concluded that “the approach in accord with the vast majority of [the Court’s] precedents” was “to hold the test inapplicable to *such* challenges”—again, meaning religious free exercise challenges to generally applicable *criminal* laws. *Id.* at 885 (emphasis added).

Thus, the question before the *Smith* Court, the arguments it rejected, and the language of its holding all point in the same direction—that the case is limited to challenges to the application of criminal laws.⁴

2. Granted, at times *Smith* used broader language, such as “generally applicable, religion-neutral laws,” *id.* at 886 n.3, “health and safety laws,” *id.* at 885 n.2, or “generally applicable prohibitions of socially harmful conduct,” *id.* at 885. But that broad language must be understood in the context of *Smith*’s more specific language. As Chief Justice Marshall

⁴ Given *Smith*’s language, it is not surprising that initially some lower courts read the decision as limited to criminal prohibitions. See, e.g., *Alabama & Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1331 (E.D. Tex. 1993) (“The holding in *Smith* arose in a very discrete context, where the Court determined that the state’s interest in regulating criminal conduct, thereby protecting the public health, safety, and welfare, was so overwhelming that a free exercise challenge, standing alone, could not be maintained. * * * A finding that *Smith* is generally applicable to every free exercise challenge, whether in the civil or criminal context, would be a gross aberration from decades of established Supreme Court precedent in the First Amendment arena.” (cleaned up)).

observed over two centuries ago, “[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.” *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).⁵

And the Court has recently applied this ancient principle—that is, that “broad language” in an opinion that is “unnecessary to the Court’s decision” is not “binding authority.” *Kastigar v. United States*, 406 U.S. 441, 454-455 (1972). In *United States v. Alvarez*, a man falsely claimed to have been awarded the Congressional Medal of Honor, and so was convicted of violating the Stolen Valor Act. 567 U.S. 709, 713-714 (2012). And before this Court, in defense of the conviction, the government “cite[d] language from some of this Court’s precedents to support its contention that false statements have no value and hence no First Amendment protection.” *Id.* at 718. But *Alvarez* rejected this broad rule because the “quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement,” contexts in which “the falsity of the speech at issue was” neither “irrelevant” nor “determinative” in the Court’s analysis. *Id.* at 719.

So too with *Smith*. Its occasional use of broad language provides no cover for reading it for more than the principle for which it stands: Strict scrutiny is not applied to religious free exercise challenges to the

⁵ Accord *Garner et al.*, *supra*, at 58 (“As for explicit statements, the general ones in an opinion have less precedential value than the specific ones.”).

application of neutral and generally applicable *criminal* laws. This reading of *Smith* makes sense. Criminal laws “usually represent[] the moral condemnation of the community.” *United States v. Bass*, 404 U.S. 336, 348 (1971). A natural consequence of that condemnation is the threat of imprisonment. But believers charged with crimes are not left entirely unprotected. Rather, to mitigate against the risk of imprisonment, religious criminal defendants, like all others, have many procedural protections that are unavailable to civil litigants, including the government’s heightened burden of proving the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The additional procedural protections given to criminal defendants diminish the risk that neutral, generally applicable *criminal* laws will seriously burden religious free exercise. Conversely, the lack of such protections in the civil context makes civil enforcement more prone to discretionary abuses with less practical remedies available to believers, justifying a different standard than *Smith* for civil laws: the strict scrutiny that this Court applied to such laws pre-*Smith*.

II. This Court Has Never Squarely Applied *Smith*’s Rational-Basis Review to a Neutral and Generally Applicable Law Outside the Criminal Context.

But limiting *Smith*’s application to criminal laws is also consistent with this Court’s free exercise jurisprudence since *Smith*. While this Court has decided sixteen Free Exercise Clause cases since *Smith*, it has often ignored *Smith* and has only once rejected a free-exercise claim under it outside of the

criminal context—but in a way that has no precedential force.

A. Many post-*Smith* cases do not apply it at all, with each of those cases not involving challenges to criminal laws.

Of the sixteen free exercise cases decided since *Smith*, seven have not squarely applied *Smith*'s framework at all. Sometimes the cases have directly stated that *Smith* was irrelevant; other times the cases have just ignored *Smith* and its rational-basis standard altogether. And, tellingly, not one of those cases involved a challenge to a criminal law.

For instance, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), and later in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020), this Court recognized the ministerial exemption, grounded in both the Free Exercise and the Establishment Clauses. See *Hosanna-Tabor*, 565 U.S. at 188-189. But the Court expressly rejected *Smith*'s applicability to “a church’s selection of its ministers,” noting that *Smith* was about individuals’ ineligibility for unemployment benefits after being fired for committing what was “a crime under Oregon law.” *Id.* at 190.

Additionally, during oral argument in *Hosanna-Tabor*, when the government attorney raised *Smith*, its author, Justice Scalia, emphatically declared that he could not “see how” *Smith* had “any relevance to” the issue before the Court because it “had nothing to

do with who the church could employ.”⁶ Consistent with Justice Scalia’s understanding, this Court’s later decision in *Our Lady* ignored *Smith* and its rational-basis standard altogether. See generally 591 U.S. 732.

Then came *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), two cases that dealt with Free Exercise Clause challenges to public school policies. In *Mahmoud*, this Court rejected the relevance of *Smith* to burdens on parental free exercise rights and so determined that it had no need to “ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.” 606 U.S. at 564.⁷ Following *Mahmoud*’s lead, *Mirabelli* ignored *Smith* when it examined the parental free exercise claims at issue. See 607 U.S. at 496-497.

Similarly, in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025), *Smith* and its rational-basis standard could nowhere be found. In that case, this Court faced a state statute that discriminated among denominations. *Id.* at 250. Never examining the neutrality or general applicability of the statute,

⁶ Transcript of Oral Argument at 38, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (No. 10-553).

⁷ True, in *Mahmoud*, the Court used broad language in characterizing *Smith* when it observed that “the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.” See 606 U.S. at 564. But since *Mahmoud* found *Smith* irrelevant, that broad characterization was—at most—dicta.

Catholic Charities, relying on pre-*Smith* case law, determined that denominational preferences embedded in law triggered strict scrutiny without the need for the showing *Smith* requires. *Id.* at 250-251.

Locke v. Davey, which included a free exercise challenge to a state scholarship program that excluded students seeking a “devotional theology” degree, also bypassed *Smith*. 540 U.S. at 715. There, the Court never purported to apply *Smith*’s free exercise approach, only discussing *Lukumi* in response to a free-exercise argument that the majority rejected primarily because of the history of denying public funding for ministerial training. See *id.* at 721-724.

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. 617 (2018), did the same. *Masterpiece*, of course, held that a state civil rights commission had failed to act neutrally to a baker’s religion in a hearing when it denigrated his faith. *Id.* at 639-640. But, although it mentioned *Smith* since the lower court had applied it, the Court did not follow *Smith*’s analytical framework and instead simply invalidated the commission’s ruling outright once it identified anti-religious animus. *Id.* at 640.

In short, *Smith* has been honored nearly as often in the breach as it has in the application. And every time it has been ignored, the case has involved challenges to the application of civil laws rather than criminal prohibitions.

B. After *Smith*, this Court has only once applied rational-basis review, and that exception, not joined by Justice Scalia, does not merit *stare decisis* effect.

Of the nine remaining post-*Smith* Free Exercise Clause cases, only one applied *Smith*'s rational-basis review.⁸ And that lone case suffered from a serious defect: Its free exercise analysis was so cursory that it is not entitled to *stare decisis* consideration.

That case, of course, is *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). There, a bare majority of this Court decided various constitutional challenges to a university's non-discrimination policy for student groups. See *id.* at 668. Largely focusing on the other constitutional claims, *Christian Legal Society* relegated its analysis of the free exercise claim to two nearly identical sentences across two footnotes that cross-reference one another, cite *Smith* as controlling (without analysis) and reject the free exercise claim with no additional analysis. See *id.* at 697 n.27; accord *id.* at 694 n.24.

That meager treatment of the free exercise claim amounted to the limited observation that, since the

⁸ The eight cases that did not apply *Smith*'s rational-basis review were *Kennedy v. Bremerton School District*, 597 U.S. 507, 525 (2022); *Carson v. Makin*, 596 U.S. 767, 780 (2022); *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); *Tandon v. Newsom*, 593 U.S. 61, 62-65 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (per curiam); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 484 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017); and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

college had an “across-the-board all-comers policy,” requesting an exemption to it was akin to seeking the “preferential, not equal, treatment” that *Smith*, apparently, foreclosed. *Id.* at 697 n.27. Brief to the point of being opaque, *Christian Legal Society* essentially deemed an “across-the-board * * * policy” as necessarily neutral and generally applicable. *Ibid.*⁹

That paltry reasoning is hardly enough to command the respect of *stare decisis*. As this Court recently clarified, “the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 269 (2022). For example, in deciding to overturn *Roe v. Wade*, 410 U.S. 113 (1973), one important factor was that the case “stood on exceptionally weak grounds.” *Dobbs*, 597 U.S. at 270. Likewise, when this Court overturned *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), a significant consideration was that the prior decision “was poorly reasoned.” *Janus v. American Fed’n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 918 (2018).

So too here. The conclusory one-sentence analysis of the free exercise claim in *Christian Legal Society* is not quality reasoning. True, quantity and quality can be independent, but they are not here. The brief mention of *Smith* in *Christian Legal Society* is thus owed no *stare decisis* respect in a case involving a non-criminal law.

⁹ Of course, Justice Scalia dissented, necessarily signaling that he disagreed with applying *Smith* in this context.

In short, this Court has often refused to apply *Smith*'s rational-basis standard. And nearly all of the post-*Smith* free exercise decisions—including the most recent cases—never applied *Smith*'s rational-basis review. Further, the sole exception that did purport to apply that standard outside the criminal context is deeply flawed and antiquated given clarifications in subsequent free exercise doctrine. Limiting *Smith* to criminal law challenges would thus be “in accord with the vast majority of” this Court’s post-*Smith* “precedents.” 494 U.S. at 885.

III. Since This Case Does Not Present a Challenge to a Criminal Law, Strict Scrutiny Rather than *Smith* Applies and Cannot Be Satisfied Here.

Since *Smith*'s rational basis standard only applies to a believer's efforts to avoid criminal laws, and since there is no such challenge here, *Smith* does not apply. Strict scrutiny does. And the government cannot satisfy it in this case.

To satisfy “the most rigorous of scrutiny” a government policy must advance “interests of the highest order and [be] narrowly tailored to achieve those interests.” *Fulton*, 593 U.S. at 541 (cleaned up). As to the first element, in the context of nondiscrimination, exceptions undermine the government's argument that its interests are sufficiently compelling. See *id.* at 542. And here, as Petitioners show, Colorado cannot show an interest of the highest order because it has granted exceptions to

the very law to which it now claims that it cannot grant a religious exception. Pet. Br. 49.

But even if Colorado *could* show a sufficiently compelling interest, it cannot show it has used the least restrictive means of achieving that interest for the same reason. It is willing to allow exceptions to others, and an exception for Petitioners would obviously be less restrictive on religious free exercise. As this Court has explained, for a government that allows exemptions to carry its burden of establishing narrow tailoring, “it must show that the religious exercise at issue is more dangerous [to the government’s interests] than those activities.” See *Tandon*, 593 U.S. at 63. Colorado cannot possibly carry that burden.

CONCLUSION

Justice Scalia revolutionized the law by championing a close reading of legal language to limit judicial discretion and bolster the rule of law. Applying that same interpretive technique to *Smith* reveals that—consistent with Justice Scalia’s own post-*Smith* jurisprudence—*Smith* applies only to religious claimants asserting a conflict with the application of a criminal law. This Court should take *Smith* at its word and hold that it does not apply here because this case does not involve a claimed religious conflict with a criminal law. And because the government cannot possibly satisfy *Sherbert*’s strict scrutiny standard, the Court should reverse the Tenth Circuit.

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Respectfully submitted,

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