No. 25-703

IN THE

Supreme Court of the United States

CALVARY CHAPEL SAN JOSE, *et al.*,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE* NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.[1]

Since its founding in 1944, NRB has worked to support its members' efforts to spread the Gospel and freely and fully exercise their religion. NRB also works to ensure that members may broadcast their messages of hope through First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

If government officials and courts are allowed to continue to weaponize so-called neutral, generally applicable laws to shut down religious exercise in churches, a dangerous precedent is set that could empower regulators to stop, under the guise of neutral, generally applicable laws, all manner of religious practice, including religious broadcasting and media. The free exercise of religion is too precious

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief. Counsel further certifies that, pursuant to Supreme Court Rule 37.2, counsel of record were timely notified on January 5, 2026, of the intent to file this brief under this Rule.

a fundamental right to be subjected to the goodwill and good faith of government officials and courts.

SUMMARY OF ARGUMENT

Employment Division, Department of Human Resources of Oregon v. Smith was a mistake. Continuing to cling to it despite its legal shortcomings and practical harms compounds the mistake exponentially. First, exempting "neutral, generally applicable" statutes from the Free Exercise Clause's protections is at odds with *Smith*'s own acknowledgement that free exercise must include actual exercise, not only belief, the plain meaning of the word "prohibit," and the powerful and un-caveated introduction, "*no* law." The most natural reading of the Free Exercise Clause recognizes citizens' rights to practice religion to the maximum extent possible, which is incompatible with *Smith*'s overbroad carveout. *Smith* also ignores and cannot be squared with the Framers' original understanding, practice, and drafting of the Free Exercise Clause and related contemporaneous clauses, which highlighted their worry that the First Amendment would not protect free exercise broadly enough. Finally, *Smith* distorts and sometimes entirely misrepresents the precedents on which it purports to rely, leaving it with no leg to stand on.

These legal deficiencies have led to practical problems. *Smith*'s test closed the door to as-applied free exercise challenges, effectively rendering free exercise a second-class right, alone among the First Amendment's fundamental rights. Additionally, *Smith*'s rhetoric provided lower courts with tools to circumvent even the limited protection of *Smith*

through unfair burden-shifting, as Petitioners underwent below.

This Court should take this opportunity to put *Smith* to rest and, in its place, adopt a test that affords free exercise the protection due a fundamental right. To replace *Smith*, we offer two suggestions. First, as modeled by the Virginia Supreme Court in *Vlaming v. West Point School Board*, this Court should honor religious convictions in the absence of a historically grounded exception, an approach which is consistent with this Court's treatment of other fundamental rights. In the alternative, this Court should return to true strict scrutiny and require laws that infringe upon free exercise to further a truly compelling interest using the least restrictive means possible.

ARGUMENT

I. *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH*'S LEGAL SHORTCOMINGS AND RESULTING PRACTICAL HARMS REQUIRE THAT *SMITH* BE OVERTURNED WITHOUT FURTHER DELAY.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court adopted a rule of constitutional law that was never briefed or argued by the litigants. Now, with the benefit of three and a half decades of hindsight, the majority's errors and omissions are all too plain.

A. *Smith's* legal shortcomings

1. *Smith* is at odds with the Free Exercise Clause's text.

The First Amendment guarantees that Congress—and government generally, post-incorporation—"shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause). The key phrases for free exercise purposes are "no law," "prohibiting," and "free exercise of religion."

Smith begins on a high note, acknowledging that the Free Exercise Clause protects "the free exercise" of religion, which includes not only "the right to believe and profess whatever religious doctrine one desires" but also "the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877. Unfortunately, the strong start ends there. *Smith* almost immediately proceeds to its conclusion that neutral, generally applicable laws do not violate the First Amendment, without addressing how that arises from or even squares with the First Amendment's text. The short answer: it doesn't.

The *Smith* Court appears to take the position that for a law to "prohibit" something, it must target or single out that thing. *Smith*, 494 U.S. at 878. Therefore, neutral, generally applicable laws can never "prohibit" the exercise of religion, since they do not apply only to religious exercise and are not specifically intended to prevent religious exercise. *Id.*

But the usual meaning of "prohibit" includes more than merely to "target" or "single out." The 1773

edition of Samuel Johnson's Dictionary defines "prohibit" "to forbid; to interdict by authority. . . . *To hinder; to debar; to prevent; to preclude*." https://johnsonsdictionaryonline.com/views/search.php?term=prohibit (emphasis added). A zoning ordinance that requires that a particular area be restricted to "residential uses" prohibits toy stores, even though the ordinance did not target toy stores, much less mention them. Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 185 (1992).

Taking "prohibit" in its full sense, rather than artificially limiting it as *Smith* did, is also consistent with the absolute language in the rest of the clause. "*No* law" may prohibit free exercise—not discriminatory laws, and not neutral, generally applicable laws either. And unlike most state free exercise provisions, the First Amendment does not contain any limiting language, even the most common "peace and safety" language. Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J.L. & Pub. Pol'y 971, 972 (2019).

The full-throated language in the First Amendment contrasts with the caveated language of the Fourth Amendment. Unlike the Fourth Amendment, the First Amendment does not distinguish between reasonable and "unreasonable" government actions. U.S. Const. amend. I, IV. The First Amendment applies to all laws.

Thus, the most natural reading of the Free Exercise Clause is that it recognizes the right of "all

citizens . . . to practice religion to the maximum extent possible." McConnell, *Should Congress Pass Legislation*, *supra*, at 181. While even the broadest right must have some limiting principle, *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), the omission of a limiting principle and the included language's strength point to a narrow limiting principle. Reading the Free Exercise Clause to apply only in the absence of a neutral, generally applicable law strains the plain language of the clause and reduces key terms to useless decoration.

2. *Smith* is at odds with the Free Exercise Clause's historical context.

Compounding its cursory treatment of the text, the *Smith* Court made no attempt to analyze the Framers' original understanding or the historical context surrounding the Free Exercise Clause.[2] Even prior to *Smith*, the Supreme Court's free exercise jurisprudence suffered from a lack of historical analysis, which set free exercise in a vulnerable position compared to other fundamental rights. But it was not until *Smith* that the Court's ahistorical approach led to an entirely ahistorical result.

A quick look at the Framers' writings and practices shows that contrary to *Smith*, providing free exercise exemptions from generally applicable laws was the norm. While exemptions were not often

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[2] The *Smith* majority opinion's oldest citation is to *Reynolds v. United States*, 98 U.S. 145 (1878), an odd citation because that case relied on the faulty premise that the Free Exercise Clause protected beliefs but not conduct, which was rejected in *Cantwell*, 310 U.S. at 303, and in *Smith* itself paragraphs earlier. *Smith*, 494 U.S. at 877-79.

necessary in the early days of the colonies and states because most Americans shared the same Protestant viewpoint and legislated accordingly, governments were swift to turn to exemptions when conflicts between faith and law arose, or to avoid such conflicts in the first place. For example, colonies and the Continental Congress exempted religious objectors from military conscription and oath requirements. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1118 and n.41 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1467-69 (1990). Notably, in granting conscription exemptions, the Continental Congress confirmed that it "intend[s] no violence to their consciences" and simply urges conscientious objectors to do that "which they can consistently with their religious principles" "in this time of universal calamity." Resolution of July 18, 1775, *reprinted in* 2 Journals of the Continental Congress, 1774-1789, at 187, 189 (W. Ford ed. 1905 & photo. reprint 1968). Not even "this time of universal calamity" was sufficient to justify infringing upon the free exercise of one's religion.

Moreover, at least two early cases, *People v. Phillips*, N.Y. Ct. Gen. Sess. June 14, 1813,[3] and *Commonwealth v. Cronin*, 2 Va. Cir. 488 (1855), recognized religious exemptions to generally applicable law, specifically subpoena power. Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev.

[3] This case was not officially reported, but a record of the arguments and the court's ruling are found in William Sampson, *The Catholic Question in America* (photo. reprint 1974) (1813).

55, 64, 106 (2020). In *Cronin*, the court began with the presumption that religious exemptions were appropriate and noted that no contrary precedent existed in English precedents either. 2 Va. Cir. at 141.

Such attitudes and outcomes are entirely consistent with the views of the First Amendment's drafters. The primary author, James Madison, advocated for free exercise exemptions, supporting, among other things, enshrining a religious exemption from conscription in the Constitution. McConnell, *Free Exercise Revisionism*, *supra*, at 1119 and n.42. Madison's broad view of religious liberty is highlighted in Virginia's religious liberty constitutional provision, which he also helped to draft. During the debate preceding the adoption of the 1776 Constitution of Virginia, Madison proposed the following language:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that *all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, [u]nless the preservation of equal liberty and the existence of the State are manifestly endangered;* [a]nd that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

James Madison, *Madison's Amendments to the Declaration of Rights*, *in* 1 *The Papers of James Madison* 174, 174-75 (William T. Hutchinson &

William M.E. Rachal eds., 1962) (emphasis added) (footnotes omitted). While the final provision was somewhat pared down, Madison succeeded in removing language from George Mason's original draft which would have limited free exercise protections to circumstances which did not "disturb the peace, the happiness, or safety of society." *See* George Mason, *Committee Draft of the Virginia Declaration of Rights*, *in* 1 *The Papers of George Mason* 282, 284-85 (Robert A. Rutland ed., 1970). Ultimately, Virginia's Constitution, like the federal Constitution, remained silent as to the limiting principle of religious liberty.

Justice O'Connor, discussing this history, rightly observes that the debate between Madison and Mason over the limiting principle "would have been irrelevant if either had thought the right to free exercise did not include a right to be exempt from certain generally applicable laws." *City of Boerne v. Flores*, 521 U.S. 507, 556-57 (O'Connor, J., dissenting). The Virginia General Assembly concurred when it enacted Thomas Jefferson's Act for Religious Freedom in 1786, providing that civil government could interfere with an individual's sincerely held religious principles only when these "principles break out into overt acts against peace and good order." Va. Code § 57-1. This attitude is a far cry from the *Smith* perspective, which leaves free exercise open to death by a thousand "neutral, generally applicable" cuts.

Madison's opposition to a *Smith*-like rule is made even clearer by his correspondence with Thomas Jefferson about whether a bill of rights was wise at all. In December 1787, Jefferson wrote to Madison pushing to add a bill of rights to the proposed

constitution that would "provid[e] clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0454. Madison responded that he had not "viewed [the omission of a bill of rights] in an important light" "[b]ecause there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), https://founders.archives.gov/documents/Jefferson/01-14-02-0018. Madison explained that the "essential rights" he was "particular[ly]" concerned about were "the rights of conscience" because he feared that "if submitted to public definition [they] would be narrowed much more than they are likely ever to be by an assumed power." *Id.* Put differently, he was concerned primarily that a bill of rights would not go far enough in protecting rights of conscience. Moreover, he was concerned that government would override the "essential rights" like "rights of conscience" given that "[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State." *Id.* Madison explained that despite the breadth of Virginia's religious liberty provision, various officials had already attempted to limit free exercise to the majority sect. *Id.* The idea that a facially neutral, generally applicable statute might be able to impinge

on rights of conscience and free exercise would have been anathema to Madison.

3. *Smith* distorts and occasionally entirely misrepresents the precedents on which it purports to rely.

To mask manufacturing its new rule *ex nihilo*, *Smith* takes liberties with the Supreme Court's free exercise jurisprudence, distorting the precedents on which it purports to rely.

Nowhere is this clearer than in its treatment of *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Smith* hails *Yoder* as a prime example of its novel claim that free exercise has never been entitled to protection from a neutral, generally applicable law except as a tag-along afterthought in "hybrid" cases involving another constitutional right as the primary right at issue. *Smith*, 494 U.S. at 881. As framed by the *Smith* Court, petitioners in *Yoder* succeeded only because the case involved "the right of parents to direct the education of their children." *Id.*; *see also id.* at 882 (concluding that since *Smith* did not involve "an attempt to regulate . . . the raising of one's children," it did not fall into the *Yoder* exception to the neutral, generally applicable statute rule) and 881 n.1 (emphasizing that *Yoder* "specifically adverted to the non-free-exercise principle involved").

Smith's analysis of *Yoder* was fundamentally wrong. *Yoder* was not a parental rights case with a free exercise free-rider. The *Yoder* Court's reasoning focused almost exclusively on the Free Exercise Clause. The Court, in deciding to apply a balancing test, explained,

> [A] State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, *such as those specifically protected by the Free Exercise Clause of the First Amendment*, and the traditional interest of parents *with respect to the religious upbringing of their children* . . . .

Yoder, 406 U.S. at 214 (emphasis added). The Court held,

> [I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Id. The longstanding "right to free exercise of religious beliefs" was "specifically and firmly fixed" in the Religion Clauses and "zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* Because petitioners had raised "legitimate claims to the free exercise of religion," "only those interests of the highest order and those not otherwise served can overbalance" those claims, a burden not satisfied in *Yoder*. *Id*. at 215. The Court made clear that *"secular* considerations," if raised, would not have carried the day. *Id.* at 216 (emphasis added). "A way of life, however virtuous and admirable, may not be

interposed as a barrier to reasonable state regulation of religion if it is based on purely secular considerations." *Id.* Only a free exercise claim was important enough to justify an exemption from this neutral, generally applicable law.

Smith's odd twisting of precedents is also on display in its parade of actually-not-horribles. *Smith*, 494 U.S. at 888. It is hard to understand why Justice Scalia believed citing a series of cases that employed the compelling interest test and reached results he deemed generally correct would prove that this test must be abandoned. A true parade of horribles requires a list of cases replete with bad results. A list of good outcomes does not prove that the compelling interest test results in harm to society. *See* Michael P. Farris, *Facing Facts: Only a Constitutional Amendment Can Guarantee Religious Freedom for All*, 21 Cardozo L. Rev. 689, 698 (1999).

The *Smith* Court recognized this tension, but its response was less than satisfying. Justice Scalia simply claimed, "It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Smith*, 494 U.S. at 888 n.5. This falls short for two reasons. First, even if balancing was not Justice Scalia's first choice, it certainly was not new. Courts had been "regularly balanc[ing]" religious interests against state interests in general laws for decades. *Yoder* was just one example. Not long before *Smith*, Justice Scalia had cited five cases, including *Yoder*, as holding "that in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable laws." *Edwards v. Aguillard*, 482

U.S. 578, 617 (1987) (Scalia, J., dissenting) (citing *Hobbie v. Unemployment Appeals Comm'n of Fl.*, 480 U.S. 136 (1987); *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Yoder*, 406 U.S. 205 (1972); and *Sherbert v. Verner*, 374 U.S. 398 (1963)); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (citing *Sherbert*, *Yoder*, *Thomas*, and *Hobbie* as holding that "the Free Exercise Clause . . . *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws"). As these cases and the rest of the "parade of horribles" illustrate, whatever the pitfalls of balancing, the outcomes, at least thus far, had not been all bad. Religious liberty had sometimes carried the day, usually in the form of an exemption rather than a law's facial invalidation, and certain generally applicable laws had been upheld when they satisfied the compelling interest test.

Second, when considering a fundamental right, the proper response to balancing tests' potential weaknesses is not to adopt a test that functionally obliterates the fundamental right. As discussed below, Justice Scalia could have adopted an approach similar to that employed in the Second Amendment context and by the Virginia Supreme Court, upholding religious liberty in the absence of a historically grounded exception. *See* Section II.A., *infra.* Before *Smith*, at least some free exercise claims succeeded, although arguably a few more in the parade of rightly-decided horribles should have been decided in favor of religious liberty. But after *Smith*, the free exercise constitutional landscape has been bleak indeed. *See* Section I.B., *infra*; *see also* Michael P. Farris & Jordan

W. Lorence, Employment Division v. Smith *and the Need for the Religious Freedom Restoration Act*, 6 Regent U. L. Rev. 65, 77-85 (1995) (describing lower court cases in the aftermath of *Smith*, illustrating its already-apparent ill effects).

B. *Smith's* practical harms

Yet again, "the present case shows that the dangers posed by *Smith* are not hypothetical." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 546 (2021) (Alito, J., concurring in the judgment). *Smith*'s analytical deficiencies have led to predictable problems, no less serious for their predictability, placing religious liberty in jeopardy. First, *Smith*'s test closed the door to as-applied challenges, functionally demoting free exercise from fundamental to second-class right and rendering the Free Exercise Clause toothless against modern challenges to religious liberty. Second, *Smith*'s rhetoric provided lower courts with tools to circumvent even the limited protection of *Smith* through unfair burden-shifting.

1. *Smith's* foreclosing of as-applied challenges demoted free exercise to a second-class right.

The real rule emerging from *Smith* is this: Laws which facially deny the free exercise of religion are presumptively unconstitutional under the Free Exercise Clause; laws which deny the free exercise of religion as applied to a religious objector are never unconstitutional. Justice Scalia admitted as much, writing, "We cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not

protect an interest of the highest order." *Smith*, 494 U.S. at 888. As noted above, however, Justice Scalia's fears were groundless. He himself admitted that his parade of horribles was not a parade of horrible *outcomes*—the Court had managed to reach outcomes he thought were correct in cases involving neutral, generally applicable statutes, without employing his new test. Moreover, contrary to his assertion that "the cases we cite have struck 'sensible balances' only because they have all applied the general laws, despite the claim for religious exemptions," *Smith*, 494 U.S. at 888 n.5, *Yoder* provides a prime example of a case where the Court granted a religious exemption—which Justice Scalia thought correct—from the neutral, generally applicable law. Additionally, one could question the necessity of upholding some of the generally applicable laws in his parade of horribles. For example, religious objectors are statutorily allowed to opt out of military service, and Madison supported constitutionalizing this exemption. Where is the harm in permitting this same outcome on a constitutional basis?

The result of Justice Scalia's irrational fears is that litigants are forced into an all-or-nothing posture when making free exercise claims that is unique to this fundamental right, or into relying on another right entirely. In no other First Amendment context are litigants precluded from requesting and receiving exemptions from laws infringing upon another constitutional right. *See, e.g., U.S. v. Grace*, 461 U.S. 171, 178-79 (1983) (free speech as-applied challenge); *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967) (free speech and free press as-applied challenge); *Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965) (free

expression as-applied challenge); *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991) (upholding the district court's dismissal of Cornerstone's free exercise claim, but reversing the summary judgment against Cornerstone's free speech and equal protection claims and allowing a "hybrid rights" claim based on that reversal).

And since it is not difficult to cloak religious animosity in facially neutral, generally applicable statutes, Madison's fears that a federal bill of rights would not adequately protect rights of conscience appear to have been justified. As Judge Posner wrote in his concurring opinion in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1102-03 (7th Cir. 1990) (*en banc*) (citations omitted), "the principle derived from the free-exercise clause of the First Amendment [is] that government must accommodate its laws of general applicability to the special needs of religious minorities[, and] that principle is moribund after *Employment Division v. Smith*."

2. *Smith's* divorce from history and text invites unfair burden-shifting like that experienced by Petitioners below.

The improper burden-shifting experienced by Petitioners in the courts below is symptomatic of what happens when the exercise of a fundamental constitutional right is made contingent on an ahistoric, atextual test like that adopted in *Smith*. *Smith*'s rhetoric provided lower courts with tools to circumvent even *Smith*'s limited protection through unfair burden-shifting. By emphasizing its belief that the Free Exercise Clause does not apply to neutral,

generally applicable laws, assuming that the law in question was in fact neutral and generally applicable, and noting there was "no contention" that there was a hybrid right at issue, the *Smith* Court, perhaps inadvertently, left the false impression that lower courts could take the same cavalier approach in future cases and place all burden of proving that a law was *not* neutral or generally applicable, or that the Free Exercise Clause was otherwise triggered, on the party whose rights were burdened. *See Smith*, 494 U.S. at 878, 882. Of course, the parties in *Smith* had had no meaningful opportunity to brief these questions, given that the Supreme Court created the new "neutral, generally applicable law" rule *sua sponte* in *Smith* after rejecting it decisively multiple times in the prior decade and without requesting supplemental briefing on the issue. *See, e.g., Thomas*, 450 U.S. 707 (1981); *Bowen v. Roy*, 476 U.S. 693 (1986); *Hobbie*, 480 U.S. 136 (1987); *see also* Farris & Lorence, Employment Division v. Smith, *supra*, at 72-75 and n.27. Nonetheless, the *Smith* Court did make clear, though not as clear as it could have done, "that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Its rule only applied to an "across-the-board . . . prohibition on a particular form of conduct." *Id.*

The Supreme Court post-*Smith* has repeatedly held that laws with language that fell short of "this applies to everyone across the board" are subject to strict scrutiny. *See, e.g., Fulton*, 593 U.S. at 534-35 (declining to grant the City and intervenor-respondents' request to "apply a more deferential

approach in determining whether a policy is neutral and generally applicable in the contracting context" and holding that "the inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable"); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (citing *Fulton*, 593 U.S. at 533-34) (holding that "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions,'" and holding the rule not generally applicable because the requirement that coaches supervise student-athletes after games was "not applied in an evenhanded, across-the-board way"); *see also Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284, 299 (D.D.C. 2020) (correctly placing the burden on the Government to establish that a religious exemption would not be comparable to the other statutory exemptions and finding that while "[t]he District attempts to distinguish the risks posed by mass 'protest marches' from those posed by 'worship services in which individuals stand in place for long periods of time,'" "it marshalled no scientific evidence on this point").

Nonetheless, lower courts continue to improperly shift the burden for establishing general applicability, necessitating Supreme Court intervention. *Compare Tandon v. Newsom*, 992 F.3d 916 (9th Cir. 2021) (attempting the same comparability analysis employed below) *with Tandon v. Newsom*, 593 U.S. 61, 62-63 (2021) (citation omitted) (reversing the Ninth

Circuit's denial of an injunction pending appeal and holding that the government "must do more than assert that certain risk factors 'are always present in worship, or always absent from the other secular activities' the government may allow"); *see also, e.g., Roman Catholic Diocese v. Cuomo*, 592 U.S. 14 (2020); *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021).

So too here. The California Court of Appeal held that "Calvary Chapel has not shown" a lack of general applicability, although it admitted multiple exemptions existed. *People v. Calvary Chapel San Jose*, 2025 Cal. App. Unpub. LEXIS 2244 at *52 (Apr. 15, 2025) (Pet. App. 41a). The court did not require the Government to show that the multitudinous and varied statutory exemptions were not comparable to the narrow religious exemption requested by Petitioners. *Id.*

This error should be corrected, and the root problem, *Smith* itself, put to rest.

II. THE SUPREME COURT SHOULD ADOPT A FREE EXERCISE ANALYSIS THAT AFFORDS FREE EXERCISE THE PROTECTION A FUNDAMENTAL RIGHT DESERVES AND THE FIRST AMENDMENT PROMISES.

Smith should go. "Yet what should replace *Smith*?" *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). We offer two suggestions.

A. To ensure that the fundamental right to free exercise of religion is not infringed, this Court should honor religious convictions in the absence of a historically grounded exception.

Given the strong text of the Free Exercise Clause, the clear original meaning confirmed by its drafters and adopters' communications on the subject, and this Court's long history recognizing the fundamental importance of religious liberty, free exercise of religion should be afforded the highest level of protection.

Far from being a second-class right, free exercise of religion was the right Madison was particularly anxious to protect with the "requisite latitude." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), https://founders.archives.gov/documents/Jefferson/01-14-02-0018. Perhaps for this reason, the First Amendment is silent as to a limiting principle—to avoid giving government tools to creatively restrict religious liberty as Madison had already seen the Virginia General Assembly attempt. *Id.* As other scholars have suggested, this omission makes the First Amendment's free exercise protections arguably broader than those guaranteed by state constitutional provisions, which usually include "peace and public safety" or other provisos. *See, e.g.,* Nestor, *supra*, at 972.

One aspect of *Smith* which does hold water is its concern that the compelling interest test invites arbitrary judgments as courts attempt to "balance against the importance of general laws the

significance of religious practice." 494 U.S. at 889 n.5. While its suggested parade of horribles lacks horror as explained above, the Court correctly recognized the inherent difficulty in fairly applying balancing tests without a tangible reference point. Even prior to *Smith*, this Court did not always "apply a genuine 'compelling interest' test," but rather "a far more relaxed standard" below that afforded to other fundamental rights, albeit one step above rational basis review. McConnell, *Free Exercise Revisionism*, *supra*, at 1128. Moreover, while this trend toward heightened but not truly strict scrutiny is not necessarily unique to free exercise, *see* McConnell, *Free Exercise Revisionism*, *supra*, at 1127 n.89, free exercise cases have arguably suffered the most. *See U.S. v. Lee*, 455 U.S. 252, 262-63 (Stevens, J., concurring) (observing that the claimed interests are so weak that the Court must not be applying strict scrutiny).

Therefore, we propose that this Court model its jurisprudence on the Virginia Supreme Court's free exercise analysis in *Vlaming v. West Point School Board*, 895 S.E.2d 705, 720 (Va. 2023). That decision carefully parsed Virginia's free exercise constitutional provision, drafted by the same men who drafted the federal First Amendment, and that provision appears to be the closest analog to the broad freedom intended by the Framers. While the justices were careful to note that they reached their decision based on Virginia's provision rather than the federal one, not being in a position to overrule *Smith*, much of the decision's interpretive analysis applies with equal persuasiveness to the federal Free Exercise Clause. The Virginia Supreme Court discussed the Framers'

debate over limiting principles and concluded that "the best inference to draw from this textual omission of a limiting principle, as Justice O'Connor observed, is that 'the Virginia Legislature intended the scope of its free exercise provision to strike some middle ground between Mason's narrower and Madison's broader notions of the right to religious freedom.'" *Vlaming*, 895 S.E.2d at 720 (quoting *Boerne*, 521 U.S. at 557 (O'Connor, J., dissenting)). Mason's approach protected free exercise "unless, under color of religion, any man disturb the peace, the happiness, or safety of society." *Id.* at 719. Under Madison's approach, "all men are equally entitled to enjoy the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, [u]nless the preservation of equal liberty and the existence of the State are manifestly endangered." *Id.* The Virginia General Assembly, and now the Virginia Supreme Court, ultimately concluded that "civil government could interfere with an individual's sincerely held religious 'principles only when these principles break out into overt acts against peace and good order.'" *Id.* at 720 (citation omitted).

To determine whether the behavior in question constituted an "overt act[] against peace and good order," the *Vlaming* court looked to history to see whether the behavior was something that had historically been considered an overt breach of peace and good order and hence subject to regulation, *id.* at 722[4], rather than arbitrarily balancing interests in

[4] This sort of analysis has been employed by this Court in other contexts, including the Second and Fourth Amendments.

the abstract. "[O]nly a distinct subcategory of unlawful behavior," not "all behaviors that may conceivably be regulated by all government laws, edicts, and policies," qualifies as the requisite overt act. *Id.* at 722 (citing John A. Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* 155-60 (2010); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 834-37 (1998); Nestor, *supra*, at 977-99. For example, actions that are *malum in se*, like murder, kidnapping, and trespass, have historically been prohibited as clear breaches of peace and good order, even though someone could claim his religion required human sacrifice, forcible proselytization, or protesting in a particular location. *See* McConnell, *Origins*, *supra*, at 1464. By contrast, the maintenance of peace and societal order does not turn on total compliance with the sort of masking-in-certain-locations-based-on-political-discretion requirements at issue in this case, which have no historical antecedents, especially as applied to religious practice.

B. At minimum, laws which infringe upon the free exercise of religion should be required to survive strict scrutiny.

Alternatively, if the Court chooses not to employ the historical exceptions test, it should return to true

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See, e.g., D.C. v. Heller, 554 U.S. 570, 633 (2008); *Florida v. Jardines*, 569 U.S. 1, 6-9 (2013).

strict scrutiny and require laws that infringe upon free exercise to further a truly compelling interest using the least restrictive means possible. "[O]nly those interests that are of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion." *Yoder*, 406 U.S. at 215. As the Framers strove to ensure, free exercise should be given no less protection than any of the other fundamental rights this Nation holds dear.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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