

No. 26-286

In the
Supreme Court of the United States

Olympus Spa, et al.,
Petitioners

v.

Andreta Armstrong Executive Director of the
Washington State Human Rights Commission, et al.
Respondents

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

Brief of *Amicus Curiae* Thomas More
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INTEREST OF AMICUS CURIAE¹

The Thomas More Society (“TMS”) is a Chicago-based nonprofit law firm that defends First Amendment rights through litigation, education, and related activities. TMS has defended religious exercise against federal, state, and local restrictions nationwide, including before this Court. It seeks to preserve constitutional protection for religious conduct, including conduct that departs from prevailing social norms.

¹ Pursuant to this Court’s Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION

Bathhouses have put Christians in hot water before. Like secular contemporaries, European Christians long frequented bathhouses for hygienic reasons but also social and spiritual ones, understanding communal nudity to foster equality, solidarity, and mutual trust. Tertullian, *Apology* ch. 42, in 3 *Ante-Nicene Fathers* 43 (1903) (197 A.D.); Pope Gregory the Great, *Registrum Epistolarum*, in 13 *Nicene and Post-Nicene Fathers* 92 (Philip Schaff & Henry Wace eds. 1900) (603 A.D.); Thomas Aquinas, *Summa Theologica* Ia-IIae q.38, art.5. Churches even operated their own nude bathhouses. Paolo Squatriti, *Water and Society in Early Medieval Italy, AD 400 to 1000*, at 44-60 (Cambridge Univ. Press 1998).

But because communal nudity carries moral risks, and physical ones for women and children, Christian leaders from antiquity forward proscribed nude intermingling of unrelated male and female patrons at church bathhouses and for Christians at secular ones. *Apostolic Constitutions* bk. 1, ch. V, in 7 *Ante-Nicene Fathers* 393-94 (1886) (380 A.D.); 14 Henry R. Percival, *The Seven Ecumenical Councils* 149, 399 (Oxford Univ. Press 1900) (Catholic rules in 4th and 7th centuries); 44 Martin Luther, *Works* 214 (1966); 1 John Calvin, *Registers of the Consistory of Geneva* 184-85, 310 (Cambridge Univ. Press 2000).

Secular contemporaries often mocked that prudence as prudery, condemning Christian bathers for breaking from cultural norms. Virginia Smith, *Clean: A History of Personal Hygiene and Purity* 140 (Oxford Univ. Press 2008). But one hunts the history of Western bathhouses in vain for an example of *government* turning opprobrium into oppression by

conditioning operation of a Christian bathhouse on male and female patrons being able to mix without restraint in violation of its religious beliefs. See Fikret Yegül, *Bathing in the Roman World* (Cambridge Univ. Press 2009); Virginia Smith, *Clean, supra*.

Until now.

Petitioners explain why Washington’s action fails under this Court’s existing free-exercise decisions. They also ask the Court to reconsider the continuing validity of *Employment Division v. Smith*, 494 U.S. 872 (1990), if the Ninth Circuit’s reading of that case is correct. Pet. 24 n.1. Amicus writes to develop that second, conditional request and urges the Court to overrule and replace *Smith*, which conflicts with the original public meaning of the First Amendment, fits poorly with earlier precedent, and rests on reasoning later decisions have undercut. Precedent on precedent strongly supports such an overruling, and it is time to throw in the towel on *Smith*.

SUMMARY OF ARGUMENT

The Free Exercise Clause protects religious conduct against unjustified governmental coercion. Petitioners explain why Washington’s action violates existing precedent. Amicus addresses a further question their petition presents, viz. whether *Smith* should survive if its rule permits the result below.

Founding-era evidence forces one to conclude it should not. Madison viewed religious duties as superior to the claims of civil society except in narrow circumstances when they undermine public peace, safety, morality, and others’ fundamental rights. By 1791, every state’s constitution shared his view, broadly accommodating religious belief and

objection to participation even in core civic duties from military service to oathtaking and payment of taxes to support the work of established churches. Read together with other sources of original meaning, they disabuse any notion that free exercise rises or falls merely on a law's generality.

Smith also fits poorly with earlier and later decisions. *Sherbert* and *Thomas* required compelling justification for conditioning unemployment benefits on willingness to violate religious obligations. *Yoder* protected the Amish against compulsory schooling that substantially burdened their religious exercise. *Tandon* required strict scrutiny when government favors comparable secular activity. *Fulton* holds that discretionary individualized exceptions defeat general applicability. *Hosanna-Tabor* protects selection of ministers against neutral employment laws. And so on. *Smith*, its holding cabined and its reasoning undercut, remains intact but on life support.

Stare decisis supports correct its error in *Smith*, which adopted its categorical rule without examination of original meaning and discounted precedents that required strong justification for burdens on religious conduct. It promised that the Faustian bargain it struck would make law simpler and more predictable. But it has done the opposite, heavily burdening the lower courts, sowing confusion, and producing irreconcilable circuit splits even on threshold questions like what a generalized law *is* and how its neutrality can be quantified. The hard questions have simply changed, not disappeared.

Experience under the heightened scrutiny RFRA and state religious-liberty protections have shown

Smith's predictions of administrative paralysis to have been at best overblown. And they have minimized reliance and any disruption that overruling *Smith* might cause. The Court should grant review and, after plenary consideration, overrule *Smith*.

ARGUMENT

The Ninth Circuit did not doubt Petitioners' sincere religious opposition to sex-integration in nude areas of Olympus Spa, holding only that their belief must yield to Washington's interest in preventing discrimination. The court of appeals misunderstood *Smith*, which in turn independently misunderstood free exercise. Egregiously wrong when decided and its logic undercut since then, precedent on precedent compels that it be overruled.

I. Free exercise was originally understood to allow permit exemption from neutral and generally applicable laws.

The lack of sustained historical examination of the original public meaning of free exercise in Justice Scalia's opinion surprised constitutional scholars (and dismayed some fellow travelers) when the decision was announced. *E.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1116-17 (1990). Justice O'Connor's papers, made public last year, reveal that questions about history and original meaning were absent at conference and during drafting as well. 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, 516-31 (2026).

The unstudied history shows the American colonies trended toward ever greater religious liberty over the century before the Revolution. Official intolerance had died out even in once-doctrinaire New England by the mid-1700s. William G. McLoughlin, *New England Dissent 1630-1833*, at 3-110 (Harvard Univ. Press 1971); James Truslow Adams, *The Founding of New England* 266-67 (1921). New York and New Jersey were paragons of ideological laissez-faire. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 62-73 (Oxford Univ. Press 1986). And the four colonies founded as religious havens for one Christian sect had quickly and broadly extended the tolerance they had sought to other Christians and often even non-Christians. Sanford H. Cobb, *The Rise of Religious Liberty in America* 362-398, 423-453 (1902); William Warren Sweet, *Religion in Colonial America* 177-79 (1942).

The breadth of tolerance was globally unrivalled, least of all by an England still so scarred by religious civil war a century earlier that its greatest champions of liberty remained convinced that free exercise of religion beyond a few state-friendly churches is inevitably destabilizing and decadent. 4 William Blackstone, *Commentaries* *52-54; John Locke, *A Letter Concerning Toleration* 50-52 (James H. Tully ed. 1983); 3 David Hume, *The History of England* 134-36 (1983); 4 *id.* at 352; Adam Smith, *The Wealth of Nations* 788-803 (Oxford Univ. Press 1976).

The generation of Americans coming of age in the ferment of the Revolution instead saw religious liberty as a social good to be cultivated. Disestablishmentarianism swept the seaboard. Ga.

Const. of 1777, art. LVI; N.Y. Const. of 1777, art. XXXV; N.C. Const. of 1776, art. XXXIV; S.C. Const. of 1778, art. XXXVIII. Mere toleration of religious practice rapidly shifted to the tyrannical edge of the Overton window, even deist foe of orthodox religion Thomas Paine convinced that mere toleration is nothing more than disguised despotism. Thomas Paine, *Rights of Man* 161 (Oxford Univ. Press 1995).

Beneath the liberalization of liberty was a sentiment, regularly voiced by Madison, that every citizen's duty to God precedes the claims of civil society. 8 James Madison, *The Papers of James Madison* 299 (Robert A. Rutland & William M. E. Rachal eds. Univ. of Chicago Press 1973). As Madison's academic mentor at Princeton University put it, religious men are in everyday practice the most obedient subjects or citizens, but when they must choose between obedience to a civil law or their conscience, "no earthly power can constrain" them to subordinate the latter. 2 *The Works of John Witherspoon* 415 (1815); see Ralph Ketcham, *James Madison* 40-47 (UVA Press 1990).

Such was the zeitgeist that even opponents of religious liberty widely thought religious exemptions from neutral and generally applicable laws inherent to it. Michael W. McConnell, *Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1447 (1990). Madison modeled the view unapologetically, opining that since every person's duties to society are subordinate to his duty to the Creator, the dictates of faith must take precedence over civil laws. 8 James Madison, *Papers at* 299. George Washington vehemently agreed. 30 George Washington, *The Writings of George Washington from the Original Manuscript Sources*

1745–1799, at 416 n.64 (John C. Fitzpatrick ed., 1939).

The same view perfused state constitutions and bills of rights ratified between 1776 and 1790, all of which save Connecticut’s recognized free exercise as an unalienable right and protected religious practice (and correlatively nonpractice) as well as belief. Michael W. McConnell, *Origins*, 103 Harv. L. Rev. at 1455-60. And it hung in the air of the Confederation Congress, which wrote the protection into the Northwest Ordinance even as delegates convened nearby to draft a new federal constitution. 32 J. Cont. Cong. 314 (1787).

Exemptions from neutral laws were a commonplace in those constitutions and other organic acts. Several state constitutions protected *any* religiously motivated action absent danger to public peace, safety, or morals. Ga. Const. of 1777, art. LVI; Md. Declaration of Rights of 1776, art. XXXIII; R.I. Charter of 1663. These provisos communicated as much by what they excluded from their enumerations as what they included, setting a default presumption that exemptions could be delimited only by a express and exhaustive list of compelling state interests. *Cf. Enbridge Energy, LP v. Nessel*, 146 S. Ct. 1074, 1081-82 (2026) (“an explicit listing of exceptions, set forth in a detailed manner, strongly indicates that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute”) (cleaned up).

To his twilight years, Madison insisted that the First Amendment he had sponsored prioritizes free exercise over all state interests other than the existential and over all but equally fundamental

private rights. Letter from James Madison to Edward Livingston (July 10, 1822), in 2 *The Papers of James Madison, Retirement Series* 543 (UVA Press 2013). No state appears to have disagreed in rhetoric or on parchment. Philip A. Hamburger, *A Constitutional Right of Religious Exemption*, 60 Geo. Wash. L. Rev. 915, 918–24 (1992); Michael W. McConnell, *Origins*, 103 Harv. L. Rev. at 1511–13. And in practice, exemptions to neutral and generally applicable laws were widespread even for despised religious minorities’ like Catholics and Baptists. *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) (exempting Catholic confession from evidence laws); N.Y. Const. of 1777, arts. XXXIX–XL (exempting Quakers from conscription law).

States stuck to that view even in the face of national security crisis. British troops stayed in their Midwestern forts after the revolution in violation of the Treaty of Paris, equipping powerful Indian confederacies to attack American settlers. Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 112–113, 123–132 (Oxford Univ. Press 2009). So, early Congresses passed a general militia bill every year to defend the frontier. Just as Continental Congress had done during the Revolution, Congress every year included a religious exemption in the annual bill and resisted all attempts to delete it. Resolution of July 18, 1775, 2 J. Continental Cong. 187–190 (Worthington Chauncey Ford ed. 1905); 1 Annals of Cong. 779 (1789); 2 Annals of Cong. 1864 (1790); 1 Stat. 271, 272 (1792).

When Congress first debated the First Amendment, Madison proposed that its free exercise clause apply to the states too since it was “equally

necessary” that the right “be secured against State Governments.” 1 Annals of Cong. 783 (Aug. 17, 1789). The sponsor of the Fourteenth Amendment agreed, understanding his amendment to guard free exercise against the States. Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* 232–36 (1908). This Court has agreed since 1940. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

II. *Smith* fits poorly with prior and subsequent free-exercise precedent.

The Court adhered to that original meaning for half a century after *Cantwell* despite federal efforts in dozens of briefs to get the Court to abandon it. Stephanie Barclay & Matthew M. Krauter, *Untold Story*, 174 U. Pa. L. Rev. at 451-453 & nn.91-109 (collecting cases and briefs). In time of existential war, the Court exempted children from saluting the flag for religious reasons. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It exempted proselytists from a license tax. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). It exempted an unemployment-benefit claimant from neutral and general work requirements in conflict with her faith’s sabbath. *Sherbert v. Verner*, 374 U.S. 398 (1963). It exempted Amish parents from neutral and general education laws. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). And so forth. *E.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978); *Thomas v. Review Bd. of Ind. Employ. Sec. Div.*, 450 U.S. 707 (1981).

Neither party in *Smith* asked the Court to break with precedent to abandon strict scrutiny—a standard so uncontroversial they thought so self-evidently applied that they did not even brief the question or think to raise the proper standard of review at oral argument. That made sense, as the

Court recently had rebuffed the U.S. Solicitor General's invitation to take a more "nuanced approach" to religious liberty by lowering the burden on government when it wished to override religious belief. Br. for United States as Amicus Curiae at 5, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (No. 85-993) (1987); *id.* at 15-16. Even the Solicitor General understood the Court to have rejected that invitation. Br. of Petitioners at 24 n.21, *Lyng v. Nw. Indian Cemetery Protective Assn.* 485 U.S. 439 (No. 86-1014) (1988).

But behind the scenes in conference and the exchange of draft decisions, the Court's allegiance to original meaning was eroding under growing consequentialist concerns. Stephanie Barclay & Matthew M. Krauter, *Untold Story*, 174 U. Pa. L. Rev. at 475-476 & nn.275-282. The consequences of concern varied by Justice. Five thought continued adherence to *Sherbert* and *Yoder* would eventually back the Court into endorsing religious exemptions even to criminal laws as a time when criminality already seemed to be out of control. *Id.* at 517 n.562. Another worried that American religion was ramifying so rapidly that traditional deference to religious scruple might soon render the country ungovernable. *Id.* at 518 n.563. But they could agree that the remedy was to weakness protection of religion.

The fears that haunted the Supreme Court during deliberation over *Smith* would have sounded foreign to the Framers, who like a different (Adam) Smith thought vigorous and varied religious conduct to be a net societal boon even when it sometimes adds friction to governance and administration. And the decades since have seen the Court piecemeal walk

back *Smith* to restore some of the protection those Framers thought innate to free exercise. *Tandon v. Newsom* required strict scrutiny if government favors comparable secular activity. 593 U.S. 61, 62 (2021) (per curiam). *Fulton v. City of Philadelphia* held discretionary individualized exceptions defeat general applicability. 593 U.S. 522, 533–37 (2021). *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* carved out a ministerial exception to general applicability 565 U.S. 171, 188–90 (2012). Almost nothing remains of *Smith*’s logical underpinnings.

III. Precedent on precedent undermines *Smith*.

Stare decisis checks arbitrary rulings to guard the guardians of constitutional liberty. *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring); The Federalist No. 78, at 529 (J. Cooke ed. 1961); cf. Plato, *The Republic* 93-94 (Allan Bloom trans. 2d ed. 1991). But it is not an inexorable command: the Court indeed has overruled fifty-four of its precedents since deciding *Smith*. Cong. Research Serv., *Table of Supreme Court Decisions Overruled by Subsequent Decisions* (Oct. 4, 2026). And precedent is weakest in constitutional cases because fundamental rights are at stake and ordinary legislation cannot correct constitutional error. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019).

For most of U.S. history, the Court inchoately knew a precedent was ripe for overruling when it saw it. Recent decisions have rigorized the analysis, with mostly consistent factors that signal a precedent should at least be revisited if not overruled. *E.g.*, *Janus v. AFSCME*, 585 U.S. 878, 917 (2018); *Ramos*

v. Louisiana, 590 U.S. 83, 121-23 (2020) (Kavanaugh, J., concurring). The latest framework was offered in June in *National Republican Senatorial Committee v. FEC*, which offers the three factors of whether the precedent was egregiously wrong, its jurisprudential and real-world effects, and reliance interests on it. 609 U.S. ---, 146 S. Ct. 2404, 2424 (2026) (“*NRSC*”). All three factors support overruling *Smith*.

A. Smith was egregiously wrong.

The first *NRSC* factor is whether a holding was egregiously wrong when made or subsequently “unmasked” as such by “legal or factual understandings or developments.” *Id.* at 2424. *NRSC* illustrates how to apply this factor when it overruled a 2001 free-speech precedent. That precedent, the Court noted, had misread relevant doctrine even at the time and had been overtaken by changes in the law and background facts, including more demanding tailoring requirements and a change in how political campaigns operate. *Id.* at 2425-26.

Smith checks all the same boxes. Justice Scalia conceded as *Smith* was conferenced and drafted that its new and lower standard could not be squared with settled free-exercise principles. Stephanie Hall Barclay & Matthew M. Krauter, *Untold Story* at 440. Leading constitutional scholars agreed. The decision, one opponent wrote, was “strange and unconvincing,” seeming to intentionally avoid constitutional text and a search for original meaning. Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990). Defenders were no less confused, confessing they though *Smith* “exhibits only a shallow understanding of free exercise jurisprudence” and that its “use of precedent borders on fiction.” William P. Marshall, *In*

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

It is not hard to see after textual review *Smith* failed to undertake that such critics is right and “*Smith* is demonstrably wrong.” *City of Boerne v. Flores*, 521 U.S. 507, 548 (1997) (O’Connor, J., dissenting). The text does not distinguish neutral and generally applicable laws from those that are not. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 557 (Scalia, J., concurring in part and concurring in the judgment). Instead, it gives free exercise “a preferred position” within the Bill of Rights, *id.* at 578 (Blackmun, J., concurring in the judgment), because it lies “at the foundation of free government by free men,” *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (cleaned up). That special protection: a blanket ban on laws that “prohibit” free exercise.

Original meaning aligns with the text. See Section I *supra*. Contemporary state constitutional protections for free exercise are most persuasive, as “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). And they confirm Madison’s understanding of the amendment he drafted as making faith “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” 8 James Madison, *The Papers of James Madison* at 299. Combined, they showcase wide original public belief that “liberty of conscience” is “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 (Univ. of Chicago Press 1987)

But rather than protect free exercise’s “preferred position” among the fundamental liberties catalogued in the Bill of Rights, *Smith* demotes free exercise to a lower class based on obvious misreading of the very cases on which it relied. It invoked *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), for a principle that neutral and general laws cannot violate free exercise—but, as Justice Scalia later acknowledged, this Court had in short order repudiated *Gobitis* as erroneous in *Barnette*. *FEC v. Wis. Right to Life*, 551 U.S. 449, 500-01 (2007) (Scalia, J., concurring in part and concurring in the judgment). It reached back a century to *Reynolds v. United States* for a theory that free exercise extends only to belief, not conduct—even as it admitted that conclusion also had been disavowed. 98 U.S. 145, 166-67 (1878).

B. Smith has caused pernicious jurisprudential and real-world effects.

The second NRSC factor is whether a precedent has caused negative jurisprudential and real-world effects. 146 S. Ct. at 2424. *Smith* has. It aimed to simplify the First Amendment to avoid “anarchy” and administrative paralysis of patchwork religious exemptions to neutral and generally applicable laws. 494 U.S. at 888. A bright line, it divined, would save courts from the drudgery of weighing “the social importance” of a law “against the centrality of all religious beliefs” proliferating in America. And unspoken outside conference and internal memos, it would effectively curtail “odd ball” religions and “squeaky wheel” faiths with “eccentric beliefs” too “unimportant” to accommodate. Stephanie Barclay & Matthew Krauter, *Untold Story*, 174 U. Pa. L. Rev.

at 529 (internal marks omitted) .; *see Smith*, 494 U.S. at 890

Nearly the opposite has happened. Because this Court has struggled to “define how to evaluate if a prohibition is of general application,” *Lukumi*, 508 U.S. at 543), lower courts have found its standard unworkable. *Cf. Janus*, 585 U.S. at 921-24. They disagree on the threshold for what qualifies as comparable secular activity, how much activity must be unregulated for a challenged law to be generally applicable, and whether (and if so, how) activities should be weighed. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 11 (2016). Such calculus is often *more* onerous, and at best simply displaces, the individualized adjudication under *Sherbert* and *Yoder*, and it has cleaved a “deep and wide circuit split.” *Id.* at 15; *compare, e.g., Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004), *with Am. Fam. Ass’n, Inc. v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004), *and Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013).

The real-world effects of *Smith* have not been any less unfavorable. The anarchy and governing paralysis it warned would occur unless it lessened constitutional protection for religion have not come to pass in the majority of States that have rejected *Smith*’s framework in favor of heightened scrutiny when adjudicating free exercise claims brought under state constitutions. Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, Wash. Post (Mar. 1, 2014). This Court also has retrospectively recognized adjudicating case-by-case religious exemptions can be very straightforward.

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).

In contrast with that lack of any discernible benefit from *Smith*'s standard, three decades of applying *Smith* has suggested what is likely a severe real-world erosion of the federal free-exercise right. Drawing from *Religious Freedom Reporter's* selected state and federal decisions, one study analyzed outcomes in 1,171 free-exercise cases from 1981 to 1997 to detect the impact of *Smith* and the political branches' effort to overturn *Smith* with the Religious Freedom Restoration Act. Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. Church & State 237, 241–42, 250–52 (2004). During the three years between *Smith* and RFRA, plaintiffs lost roughly thirty percent more often than they had during the nine years before *Smith* while the number of free-exercise cases litigants thought even worth their time to file plummeted by about half. *Id.*; see also Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. Church & St. 237, 248 (2004).

C. Overruling Smith would upset nearly no cognizable reliance interests.

The third and final NRSC factor asks whether sizable reliance interests depend on the continuing validity of a precedent. 146 S. Ct. at 2424. That factor should not be disprized, as lives and livelihoods can be destroyed if arranged around a precedent that suddenly falls. Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 Harv. L. Rev. 1845, 1885–1902 (2023). But minimal such reliance exists here in part because of the widespread

confusion as to how *Smith*'s terms are to be defined and standard to be applied. When such confusion reigns and a precedent "does not provide a clear or easily applicable standard" reliance arguments that might have merit if the standard were workable and predictable "are misplaced." *Janus*, 585 U.S. at 927. That is especially true when interested parties have been on notice for years about strong backlash to the decision on the Court, in the legal academy, or in the political branches, as that backlash makes it unreasonable to fully trust the precedent has a long shelf life. *Id.*

Blowback against *Smith* was fierce, immediate, enduring, and ideologically broad. Constitutional scholars who favored and disfavored its outcome alike predicted it would soon be reversed. *E.g.*, Michael W. McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1111; Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 Neb. L. Rev. 795, 814 (2006). Public outcry led to Congress almost unanimously voting to reverse it via RFRA. William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993). And members of the Court itself regularly have urged that *Smith* be revisited. *E.g.*, *City of Boerne*, 521 U.S. at 566; *Lukumi*, 508 U.S. at 559; *Kennedy v. Bremerton Sch. Dist.*, 586 U.S. 1130, 1133-34 (2019) (Alito, J., concurring in denial of certiorari) (mem).

Reliance on the continuing validity of *Smith* is even more misplaced since later cases have undercut its reasoning. Once a decision's reasoning has been "hollowed out as if by termites," *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1223 (9th Cir. 2013) (Kozinski, C.J., dissenting), it is unreasonable

for a litigant to “assume[] [it] to still be good law” even as to an identical case. *Ramos*, 590 U.S. at 104; see *Trump v. Hawaii*, 585 U.S. 667, 710 (2018); see generally Daniel B. Rice, *Repugnant Precedents and the Court of History*, 121 Mich. L. Rev. 577 (2023).

Lastly, whatever little reliance on *Smith* might still be justifiable in the abstract despite that backlash and abandoned reasoning is minimized yet further by the fact that the federal government and state governments have actively cabined its effect in the decades since it was decided. As noted above, more than three in five states have rejected *Smith*’s test to instead impose heightened scrutiny on free exercise claims brought under their own constitutions. Congress enacted RFRA. Thirty-one states, home to roughly 185 million residents (more than half the country), have enacted state RFRA or akin constitutional protection.² All told, many (perhaps most) Americans have likely never even heard of *Smith* or experience its effects in their lives. Fewer still, presumably, have imprudently ordered

² Ala. Const. of 2022, art. I, §3.01; Ariz. Rev. Stat. 41-1493.01; Ark. Code § 16-123-404 (2020); Conn. Gen. Stat. § 52-571b; Fla. Stat. § 761.03; Ga. Code Ann. § 50-15A-1; Idaho Stat. § 73-402; 775 ILCS 35/15; Ind. Code § 34-13-9-8; Iowa Code § 675.4; Kan. Stat. 60-5303; Ky. Rev. Stat. § 446.350; La. R.S. § 13:5233; Miss. Code § 11-61-1; Mo. R.S. § 1.302; Mont. Code Ann. § 27-33-105; Neb. Rev. Stat. § 20-703(1); N.M. Stat. Ann. § 28-22-3; N.D. Cent. Code ch. 14-02.4; 51 O.S. § 253 (2026); 71 Pa. Stat. § 2404; R.I. Gen. L. § 42-80.1-3 (2025); S.C. Code of Laws § 1-32-40; S.D. Codified Laws § 1-1A-4; TN Code § 4-1-407 (2020); Tex. Civ. Prac. & Rem. Code § 110.103; Utah Code § 63G-33-201; Va. Code § 57-2.02; W.Va. Code § 35-1A-1; Wyo. Stat. Ann. §§ 9-29-101 to -104; see U.S. Census Bureau, *Vintage 2025 National and State Population Estimates* (Jan. 27, 2026).

their lives around a firm belief that a universally panned precedent it sure to endure.

CONCLUSION

During the centuries it was illegal to practice the Christian faith in the Roman Empire, cities often barred Christians from visiting the public bathhouses that were their social centers. 1 Eusebius, *Ecclesiastical History* 406-08 (Kirsopp Lake trans. Harv. Univ. Press 1926) (c. 313 A.D.). That was if they were lucky. More insidious public officials forced Christians who wished to cleanse their bodies and bond with their communities to choose to serve God or man by requiring all bathhouse patrons to make a pagan sacrifice to enter. 2 Louis Duchesne, *Early History of the Christian Church from Its Foundation to the End of the Fifth Century* 21 (English reprinted ed. 1957).

Today, Washington would similarly force Petitioners to shed their beliefs beside their clothes at the bathhouse door in service to the anthropology of a new civic religion. Such is the soft despotism latent to all democracies, which allow the despised thought but ostracize its thinker. Alexis de Tocqueville, *Democracy in America* 244 (Harvey C. Mansfield & Delba Winthrop trans. Univ. of Chicago Press 2000). But it is a defect the Framers sought to *keep* latent via a Free Exercise Clause they understood to broadly allow exemptions to neutral and generally applicable laws except in extremis.

The petition should be granted because of the Ninth Circuit's misapplication of *Smith*. But amicus asks the Court to take advantage of Petitioners' request that it revisit *Smith* as well so that it belatedly can undertake the serious textual and

historical study of the original public meaning of free exercise *Smith* declined to do. And to then do what that text and history compel and stare decisis allows—overrule a *Smith* standard egregiously wrong the day it issued and that has had severely pernicious jurisprudential and real-world effects.

Overruling *Smith* need not result in the anarchy *Smith* feared, either doctrinally or practically. The Court could of course revert to its *Sherbert/Yoder*, but it also could endorse a replacement, perhaps among those proposed in the academic literature. *E.g.*, Stephanie H. Barclay, *Replacing Smith*, 133 Yale L.J.F. 436, 451–55 (2023); Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. Pa. L. Rev. 147, 156–64, 171–81, 189–202 (2022); Brady Earley, *Necessity in Free Exercise*, 92 U. Chi. L. Rev. 2015, 2032–36 (2025). In restoring religion to its rightful place in the constitutional order and vindicating the rights of Olympus Spa, one need not, as it were, throw out the baby with the bathwater.

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