No. 26-438

IN THE

Supreme Court of the United States

JOSEPH MILLER, ET AL.,

Petitioners,

v.

JAMES V. MCDONALD, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* STEPHANIE BARCLAY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should reconsider *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Stephanie Barclay is a legal scholar at Georgetown Law who teaches, researches, and publishes in the fields of constitutional law and religious freedom. *Amicus* is committed to a view of free exercise that protects all religious individuals and institutions and seeks to reconcile this Court's jurisprudence with the original meaning and purpose of the Free Exercise Clause. Legal scholarship published after the Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), including works authored by *amicus*, has argued that *Smith*'s framework can and should be replaced by a test that protects the full scope of the free-exercise right enshrined in the First Amendment. *Amicus* seeks to inform the Court of aspects of this scholarship that confirm the need for the Court to reconsider and replace *Smith*.

SUMMARY OF ARGUMENT

As it has done with other ahistorical and results-driven precedents, this Court has gradually narrowed its sweeping holding in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Yet while *Smith* appears to be on life support in the U.S. Reports, news of its decline has not reached the lower courts—and never will, without this Court's intervention. See *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534-36 (2022) (overruling *Lemon* after it was "long ago abandoned" by the Court but continued to cause mischief in lower

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or her counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice of the filing of this brief.

courts). As a result of this Court's holding in *Smith*, lower courts continue to apply a cramped view of the Free Exercise Clause, resulting in the routine underenforcement of free-exercise rights by government officials and state and federal courts. Overruling *Smith* thus is a necessary and salutary step towards restoring the full promise of the First Amendment.

And the Court should not wait for a vehicle in which *Smith* would be outcome-determinative before this Court. Such a vehicle would be hard to come by, because this Court has generally found case-specific reasons to decline to apply *Smith*, often on the ground that a law is not neutral or generally applicable. In the meantime, however, lower courts remain bound by *Smith* while often failing to apply the test as narrowly as does this Court.

But what should replace *Smith*? Justice Alito's concurrence in *Fulton* rightly makes clear that the most straightforward approach—one that is both workable and defensible as a matter of original meaning and practice—would be a return to the strict-scrutiny regime that *Smith* displaced. Restoring strict scrutiny need not entail reinstating all the precise contours of this Court's pre-1990 framework, as if those precedents were frozen in amber and brought back to life. Although a deeply flawed decision in other respects, *Smith* did identify some legitimate concerns about the Court's prior approach, such as the subjective nature of judicial inquiry into whether someone's beliefs are "central" to religious practice or whether those beliefs outweigh compelling government interests under so-called "balancing."

Smith's error was not in identifying those problems, but in concluding that they required jettisoning strict scrutiny altogether. The concerns underlying

Smith can be (and have been elsewhere) readily addressed through other refinements that would render a strict-scrutiny test more objective, more administrable, and better grounded in historical practice. For example, rather than embarking on subjective, value-laden inquiries into the "centrality" of someone's religious views, this Court in cases like *Mahmoud* has redirected the inquiry to whether the government has placed an *objective* burden on free exercise (for example, a penalty or loss of otherwise-available benefits). *Mahmoud* v. *Taylor*, 606 U.S. 522, 545-55 (2025). And rather than framing strict scrutiny as an exercise in "balancing" incommensurable values against one another, the Court could reframe the test as a historically grounded exclusionary norm with a heavy evidentiary burden for the government.

Put differently, the Court could direct that a person's right to free exercise may be objectively impaired only for the types of reasons deemed permissible at the Founding—to the exclusion of other potential rationales like governmental preference or convenience—and require the government to prove, through clear evidence, that impairing religious exercise is necessary to achieve one of those historically grounded justifications. Such a framework would not be very different from the type of strict scrutiny this Court already applies under the Religious Freedom Restoration Act.

Those changes to the pre-*Smith* framework would help to defuse concerns about *Smith*'s replacement—and thus help bring to pass *Smith*'s own, much-needed overruling.

ARGUMENT

I. *SMITH* WILL CONTINUE TO HARM FREE-EXERCISE RIGHTS UNTIL IT IS OVERRULED.

Since *Smith* was decided, the Court has gradually cut back on the decision's scope—fleshing out exceptions to *Smith* in some cases and declining to apply it in others. But that is not enough. In actual practice and in lower courts, *Smith* continues to restrict free exercise, creating inconsistency, unpredictability, and costs for worshippers and the government alike. These harms will continue until the Court finally overrules *Smith*.

A. Since *Smith* Was Decided, The Court Has Continually And Correctly Limited Its Scope.

Over the past three decades, the Court's free-exercise precedents have chipped away at *Smith*'s expansive holding.

In some cases, the Court declined to apply *Smith* because the challenged law was not neutral or generally applicable. See *Carson* v. *Makin*, 596 U.S. 767, 780 (2022); *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 536-37 (2021); *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 17-18 (2020) (per curiam); *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 476 (2020); *Masterpiece Cakeshop, Ltd.* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 625 (2018); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 462 (2017).

In other cases, the Court sidestepped *Smith* altogether. *Hosanna-Tabor* recognized a "ministerial exception" that prevents the government from interfering with a church's internal governance. *Hosanna-*

Tabor Evangelical Lutheran Church & Sch. v. *EEOC*, 565 U.S. 171, 188 (2012); see also *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020). Even though the law at issue was "a valid and neutral law of general applicability," the Court declined to apply *Smith*, instead holding that *Smith* should be limited to laws regulating "only outward physical acts." *Hosanna-Tabor*, 565 U.S. at 190; see also Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1192 (2014) (noting tension between reasoning of *Smith* and *Hosanna-Tabor*). Similarly, in *Mahmoud*, the Court held that "[w]hen the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny." *Mahmoud*, 606 U.S. at 564. And in *Mirabelli*, where the Court held that "the intrusion on parents' free exercise rights" was "greater than the introduction of LGBTQ storybooks [the Court] considered sufficient to trigger strict scrutiny in *Mahmoud*," this Court again did not apply (or cite) *Smith*. *Mirabelli* v. *Bonta*, 607 U.S. 492, 496 (2026) (per curiam). Instead, it held that "California's policies" allowing for the "unconsented facilitation of a child's gender transition * * * will likely not survive the strict scrutiny that *Mahmoud* demands." *Ibid.*

In no post-*Smith* case has this Court relied on *Smith*'s deferential standard to uphold a law against a fully briefed free-exercise challenge.[2] *Smith*'s track record at this Court has therefore been a halting one: *Smith* has been continually narrowed, and on the

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[2] In *Christian Legal Society* v. *Martinez*, 561 U.S. 661, 697 n.27 (2010), the Court cited *Smith* in rejecting—in a footnote—a "briefly argue[d]" free-exercise claim.

merits docket, the Court has never allowed the survival of any government action that would have been deemed impermissible pre-*Smith*. Indeed, *Smith* is unlikely to *ever* be outcome-determinative in a case before this Court, given this Court's reluctance to find laws neutral or generally applicable. Although a continually narrowed *Smith* is sufficient to decide individual cases in *this* Court based on case-specific facts, it is insufficient to guide government officials and lower courts. And as this case illustrates, *Smith* results in costly, protracted, unpredictable, and unnecessary litigation for religious claimants and government defendants.

B. *Smith* Nevertheless Continues To Restrict Free-Exercise Rights In Real-World Situations.

This Court's gradual narrowing of *Smith* has produced a two-track approach to religious liberty. In this Court, the decision has suffered death by a thousand cuts. But government officials and lower courts continue to treat *Smith* as a bulwark protecting government action that is hostile to religious liberty. *Smith* will therefore continue to restrict free-exercise rights and impose substantial costs on litigants until its demise.

Although *Smith* may not yet have been the basis for *this* Court's rejection of a free-exercise claim, *Smith* routinely prevents worshippers from vindicating their free-exercise rights in the lower courts.[3] At

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[3] See, *e.g.*, *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1071 (9th Cir. 2015) (policy requiring "pharmacists who have religious objections to delive[r] emergency contraceptives"); *Commack Self-Serv. Kosher Meats, Inc.* v. *Hooker*, 680 F.3d 194, 201, 210-12 (2d Cir. 2012) (law imposing labeling and inspection requirements

least some challenges that fail in the lower courts today under *Smith* would likely succeed under an alternative regime. And even those that would still fail would at least get the meaningful consideration that the Free Exercise Clause demands.

Religious minorities bear the brunt of *Smith*'s overly restrictive rule. *Smith* "protects religious needs only to the extent there are analogous secular needs." Christopher C. Lund, *Second-Best Free Exercise*, 91 Fordham L. Rev. 843, 872 (2022). But religious minorities may have idiosyncratic needs that lack secular parallels, which means that "general applicability as a concept is somewhat stacked against them." *Ibid.* And more generally, religious exemptions under *Smith* depend on "constitutional luck": "more-or-less random factors" that are "not directly related either to the religious claimant's interest in getting an exemption or the government's interest in denying one," but rather the mere coincidence of a religious need overlapping with a government-preferred secular desire. *Id.* at 869-70.

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for "kosher food"); *Miller* v. *Reed*, 176 F.3d 1202, 1206-07 (9th Cir. 1999) (policy requiring applicants for a driver's license to provide social security numbers); *Am. Friends Serv. Comm. Corp.* v. *Thornburgh*, 961 F.2d 1405, 1407-08 (9th Cir. 1991) (restrictions on employment of immigrants as applied to Quaker organization); *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1210, 1231 (Wash. 2019) (prohibition on "discrimination in 'public * * * accommodation[s]' on the basis of 'sexual orientation'"); *State* v. *Forchion*, 2015 WL 4661507, at *7, *11 (N.J. Super. Ct. App. Div. Aug. 7, 2015) (law criminalizing possession of controlled substance "used in the practice of [defendant's] Rastafarian faith"); *You Vang Yang* v. *Sturner*, 750 F. Supp. 558, 560 (D.R.I. 1990) (law allowing medical examiner to perform autopsy in violation of Hmong beliefs).

Smith also leads to confusion in the case law. "*Smith*'s rules about how to determine when laws are 'neutral' and 'generally applicable'" are "perplexing" at best. *Danville Christian Acad., Inc.* v. *Beshear*, 592 U.S. 1156, 1159 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay). And they are "manipulable" at worst. Lund, *Second-Best Free Exercise*, *supra*, at 854, 859-60. Lower courts thus often reach different results on similar facts. This Court intervenes on occasion, see, *e.g.*, *Tandon*, 593 U.S. at 64 (noting that this Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" five times), but it cannot correct every error below. Some incorrect decisions will inevitably remain on the books and bar religious practices protected by the Constitution's promise of free exercise.

Smith also vastly increases the unpredictability and costs faced by litigants. *Smith*'s threshold inquiry into a law's neutrality and general applicability "complicates" and "prolongs" litigation. Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 Cato Sup. Ct. Rev. 33, 39. Litigants often cannot predict whether a court will ultimately apply *Smith* or not—in contrast to the pre-*Smith* certainty that any law substantially burdening a worshipper's free exercise would be scrutinized for compliance with the First Amendment.

Even when litigants do obtain relief on constitutional grounds, that relief is inherently limited. The government need only tweak the challenged rule—for example, by eliminating a secular exemption—to satisfy *Smith* and defeat any future constitutional challenge. Consider Jack Phillips, the baker in *Masterpiece*, who was first asked to make a wedding cake

that was inconsistent with his religious beliefs in 2012. 584 U.S. at 621. He litigated all the way to this Court and, in 2018, won on the narrow ground that the specific enforcement action against him was motivated by animus. *Id.* at 639. But before this Court had even issued its opinion, Phillips had already been asked to make another cake that violated his religious beliefs.[4] He became embroiled in another six years of litigation, losing before the Colorado trial court and the Colorado Court of Appeals before the Colorado Supreme Court finally dismissed the suit in October 2024.[5] That dismissal was rooted in Colorado procedural law, not the merits of Phillips's constitutional claim, thus providing zero certainty regarding his free-exercise rights going forward. *Masterpiece Cakeshop, Inc.* v. *Scardina*, 556 P.3d 1238, 1242 (Colo. 2024).

And often, even when litigants ultimately receive a durable ruling in their favor, the ruling comes only after lengthy litigation over the niceties of neutrality and generality. Among other reasons, litigation is drawn out because litigants must marshal evidence regarding the government's application of the law to *other* parties. Such evidence is typically outside the plaintiff's control, necessitating discovery. Meanwhile, litigants can experience permanent and significant harm. For example, although Catholic Social Services ultimately received a unanimous victory

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[4] *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring in judgment); Associated Press, *Lakewood Baker Jack Phillips Sued for Refusing Gender Transition Cake* (Mar. 22, 2021), https://tinyurl.com/ynr5wnzv.

[5] Reuters, *Colorado Court Dismisses Suit Against Baker Who Wouldn't Make Transgender-Themed Cake* (Oct. 9, 2024), https://tinyurl.com/4j7mapdr.

from this Court, its foster care program was decimated in the meantime and many beds of willing foster families sat empty while foster children urgently needed homes. See Brief for Petitioners at 11-12, *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123). Or consider Mary Stinemetz, a Jehovah's Witness who sought a religious accommodation to receive a bloodless liver transplant in Kansas. The government refused, and after years of litigation, she ultimately won her case. But the victory came too late to save her life. See *Stinemetz* v. *Kan. Health Pol'y Auth.*, 252 P.3d 141, 156 (Kan. Ct. App. 2011); Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. Rev. 167, 203-04 (2019) ("*Smith* led Kansas officials to believe that they never have to consider religious exemptions—that they didn't have to talk to Mary Stinemetz or take her seriously. And they didn't.").

Worshippers in this country deserve better. The Constitution promises them better. The Court should overrule *Smith* and adopt a test that adequately protects and respects free exercise.

II. THIS COURT CAN, CONSISTENT WITH ORIGINAL MEANING, REPLACE *SMITH* WITH A REFINED STRICT-SCRUTINY TEST.

As a matter of constitutional construction, this Court should replace *Smith* with a test that provides presumptive protection for religious exercise. Strict scrutiny is one such test. And although strict scrutiny may not be required by the Free Exercise Clause as a matter of constitutional interpretation, it "is at least *consistent* with the constitutional limits and historical sources" that identify the scope of the original right. Stephanie H. Barclay, *Replacing* Smith, 133 Yale L.J.F. 436, 441 (2023). Further, strict scrutiny can

and should be refined as an "exclusionary norm" grounded in the historically acceptable limits on free exercise, *id.* at 455-61, so that the test will be more objective, workable, and consistent with jurisprudence and practice at the Founding.

A. Strict Scrutiny Is Consistent With Original Meaning.

The Free Exercise Clause provides that "Congress shall make no law * * * prohibiting *the* free exercise of [religion]." U.S. Const. amend. I (emphasis added). The use of the article "the" is not ornamental. Rather, it signals that the Framers were recognizing and securing a longstanding liberty, rather than inventing a novel one. As George Washington expressed upon his election as President, "[t]he liberty enjoyed by the People of these States, of worshipping Almighty God agre[e]able to their Consciences, is not only among the choicest of their *Blessings*, but also of their *Rights*." Letter from George Washington to the Society of Quakers (Oct. 1789), https://tinyurl.com/5fts3r8d.

Early state constitutions reflect that the free exercise of religion was a well-established liberty at the Founding. At the time of the Constitution's drafting, "the Free Exercise Clause had more analogs in State Constitutions than any other individual right," and "[i]n all of those State Constitutions, freedom of religion enjoyed broad protection, and the right 'was universally said to be an unalienable right.'" *Fulton*, 593 U.S. at 573-74 (Alito, J., concurring in judgment) (quoting Michael W. McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1990)). "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those

who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." McConnell, *supra*, at 1456; *Fulton*, 593 U.S. at 575 (Alito, J., concurring in judgment).

At the same time, it was recognized that some aspects of free exercise could be made to yield to secular interests. "The idea that rights were subject to inherent limitations in the public interest was widely accepted at the Founding." Barclay, *supra*, at 457. These limitations, too, were reflected in early state constitutions. *Ibid.* And although the limitations on free exercise in these state constitutions were not identical, they "provide evidence of what types of government interests were understood as natural limitations to the right of religious exercise." *Id.* at 459.[6]

The predominant model in state constitutions at the time of the Founding was not unlike the modern compelling-interest test. See Barclay, *supra*, at 460. As observed by Professor McConnell, "[t]he most common feature of the state provisions was the government's right to protect public peace and safety." McConnell, *supra*, at 1464. Nine states "limited the free-exercise right to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the

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[6] At the Founding, "Americans used to view the state and federal bills of rights as declaratory of rights that were common across jurisdictions rather than as creating rights specific to that jurisdiction." Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. Ill. L. Rev. 1433, 1434 (2020). "The precise articulation of the right in a written instrument was thus of marginal importance for delimiting its scope and even its existence." Barclay, *supra*, at 459.

state." Barclay, *supra*, at 459 (quoting McConnell, *supra*, at 1461). Those provisions reveal a "predominant model"—one which "extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger 'the public peace' or 'safety.'" *Fulton*, 593 U.S. at 575 (Alito, J., concurring in judgment). Similarly, "when Madison debated with George Mason about the limits of religious liberty, he did not articulate a list of prior laws that provided analogies to limit such liberty"; rather, Madison "focused on the types of *reasons* for which government could regulate religious exercise," reasons that he thought "should be exceedingly limited." Michael W. McConnell, Douglas Laycock, Stephanie H. Barclay & Mark Storslee, *The Court Shouldn't* Bruen*-ize the Free Exercise Clause*, Reason (Mar. 8, 2025), https://tinyurl.com/2euamdbc. In Madison's view, "[r]egulation needed to be justified based on government interests like the need to preserve 'equal liberty' of other citizens, or because the religious exercise could 'endange[r]' the 'existence of the state.'" *Ibid.* The majority of available historical evidence thus "support[s] * * * the idea that mere government preference, convenience, or desire to avoid any marginal costs were not * * * permissible reasons to limit religious exercise." Barclay, *supra*, at 460.

The least-restrictive-means and narrow-tailoring aspects of strict scrutiny also find historical support in the earliest cases granting religious exemptions. For example, in both *People* v. *Philips*, 1 W.L.J. 109 (Gen. Sess. N.Y. 1813), and *Commonwealth* v. *Cronin*, 1 Q.L.J. 128 (Va. Cir. Ct. 1855), state courts considered whether a Catholic priest could be forced to testify as to information he received in the sacrament of

confession. And in both cases, "the state court sought to identify the government's stated goals of promoting public safety and decreasing crime after identifying the burden on religious exercise." Barclay, *supra*, at 462. The courts required more than a government interest articulated in the abstract. *Ibid.* Further, hypothetical harm and slippery-slope arguments were insufficient. Instead, "both courts demanded evidence that the government was actually advancing its stated goals." *Ibid.* The *Cronin* court also reasoned that "refusing to grant a religious exemption would in fact undermine the government's stated goal" and "noted the broader legal landscape," including legislative exemptions. *Id.* at 463. And the *Philips* court "looked at the question of evenhandedness, considering existing secular exemptions to the general rule," including exemptions for spousal privilege, self-incrimination, and attorney-client privilege. *Ibid.*

This reasoning resembles the modern least-restrictive-means test. The courts asked: "Are the government's actions necessary to meaningfully advance its stated objective? Is the government prohibit[ing] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way?" Barclay, *supra*, at 463-64 (internal quotation marks and citations omitted).[7]

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[7] McConnell et al., *The Court Shouldn't* Bruen*-ize the Free Exercise Clause*, *supra* ("It is far more workable, and more consistent with constitutional text and history, for courts to force government to prove with a robust evidentiary showing that a regulation that limits religious activity is a narrowly tailored means of actually protecting an interest like the peace and safety of the state. That is what historical materials concerning the meaning

Although strict scrutiny is consistent with a historical understanding of free exercise in many contexts, and thus a good default replacement for the *Smith* framework, this Court has rightly recognized that other aspects of free exercise require more categorical or absolute protection. The need for such protection is most evident where free-exercise rights overlap with antiestablishment interests. Barclay, *supra*, at 441-48. In certain church-autonomy doctrines, including the ministerial exception, "the Free Exercise Clause and the Establishment Clause speak with one voice" and "the resulting protection is absolute." *Id.* at 442-43 (citing *Hosanna-Tabor*, 565 U.S. 171; *Our Lady of Guadalupe Sch.*, 591 U.S. 732). Likewise, where the "government burdens religious exercise based on 'official expressions of hostility to religion,'" this Court has recognized that the government action "is per se invalid." *Id.* at 442 (quoting *Masterpiece*, 584 U.S. at 639; *Kennedy*, 597 U.S. at 525 n.1). Thus, although strict scrutiny can operate as a default test, it would not preclude this Court from adopting different doctrines for areas of religious exercise where the historical evidence and antiestablishment pedigree warrant even deeper protection.

Replacing *Smith* would also not require eliminating the alternative trigger for strict scrutiny where the government has discriminated against religious organizations by, for example, offering secular exemptions when it denies religious ones. For the most part, parties on all sides of the *Smith* debate agree that the

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of free exercise point towards. And that, more or less, is what strict scrutiny requires.").

Free Exercise Clause prohibits, at the very least, discrimination against religious groups.[8] Overruling *Smith* would simply provide an additional route to strict scrutiny—one that applies when government burdens (or interferes with) religious exercise.

B. The Strict-Scrutiny Test Can And Should Be Refined.

Outside of those areas meriting absolute protection, strict scrutiny remains an appropriate starting point for assessing free-exercise claims. But the Court can refine the application of that test to more closely adhere to the original meaning of the Free Exercise Clause. Both *Smith* itself and later scholars advanced several criticisms of strict scrutiny's theoretical origins and practical operation. For example, critics have argued that the test originally involved a subjective judicial assessment of how "central" religious exercise is to a plaintiff's religion and that the traditional "balancing" of private and governmental interests is unworkable in the religious context.

Those criticisms are not without some force. Yet none of the "bugs" in the Court's "early strict-scrutiny approach [is] endemic to that test." Barclay, *supra*, at 450.

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[8] See, *e.g.*, Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1934 (2015) (Free Exercise Clause "protect[s] a freedom from penalty or from discriminatory constraint"); Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 Notre Dame L. Rev. 1387, 1416 (2016) (Founders understood that "[n]o individual could be punished * * * on account of religious opinions, profession, or observances as such").

Strict scrutiny can be refined in at least two ways to avoid the problems identified by Justice Scalia and others:

1. Objective Interference. Take, for example, the issue of the "centrality" of a religious belief. Justice Scalia zeroed in on that subjective inquiry in *Smith*, deeming it beyond judges' institutional competence. *Smith*, 494 U.S. at 886-87. No "principle of law or logic" could sensibly "contradict a believer's assertion that a particular act is 'central' to his personal faith." *Id.* at 887.

Justice Scalia's criticism is well-taken. "Plainly, the First Amendment forbids civil courts" from "determin[ing] matters at the very core of a religion." *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 450 (1969). But concerns about a subjective, value-laden inquiry do not support casting the entire strict-scrutiny framework aside. Instead, the Court can refine the test—and post-*Smith* developments supply a ready model for reorienting strict scrutiny around the *objective* burden to religious litigants, rather than subjective questions about the "centrality" of certain beliefs to broader religious practice.

Both the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibit courts "from assessing how central a particular belief is to an adherent's belief system." Barclay, *supra*, at 451. Instead, each statute calls for courts to protect "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" when the government has substantially burdened that religious exercise. See 42 U.S.C. § 2000cc-5; 42 U.S.C. § 2000bb-1. Whereas courts remain confused about how to apply *Smith*, see

supra 6-10, they are perfectly capable of applying RFRA and RLUIPA—looking to "the objective gravity of the government's interference with voluntary religious choice." Barclay, *supra*, at 451.

This Court has already taken steps towards adjusting its free-exercise doctrine in this same way in *Mahmoud*. There, the Court focused on the "objective danger" that a government action posed to a sincerely held religious exercise. *Mahmoud*, 606 U.S. at 546. That objective burden can come in the form of government denial of generally available benefits or imposition of penalties; for persons in government custody, sometimes such a burden can even come in the form of making religious exercise impossible. *E.g.*, *Ramirez* v. *Collier*, 595 U.S. 411, 426 (2022) (government defendants did not dispute that total ban on spiritual advisors in execution chamber was a substantial burden); see also *Tanvir* v. *Tanzin*, 120 F.4th 1049, 1061 (2d Cir. 2024).

Under this test, the obstacle the government action creates for religious exercise must be "more than an inconvenience" to the plaintiff. *Dorman* v. *Aronofsky*, 36 F.4th 1306, 1314 (11th Cir. 2022). But the requirement of an objective, non-*de minimis* burden need not entail a high threshold. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 208 (1972) (suggesting that a $5 fine would suffice).

Further, as the First Amendment's text makes clear, a burden on religious exercise requires there to be some religious *action* that the plaintiff desires to take (or not take). The government does not burden religious exercise simply by taking actions that conflict with the religious sensibilities of a plaintiff but that place no objective burden on the plaintiff to do (or not do) *something*.

That reasoning explains this Court's decision in *Bowen* v. *Roy*, 476 U.S. 693 (1986). There, Roy, a member of the Abenaki Tribe, objected to the requirement that his daughter, Little Bird of the Snow, obtain a Social Security number to qualify for welfare benefits. *Id.* at 695-96. But at trial, the parties discovered that Little Bird of the Snow *did* have a Social Security number, so the "litigants' arguments shifted" from "religious interference" to arguing that "the government was, itself, engaging in a sacrilege." Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1347-48 (2021). This Court rejected Roy's claim, just as it would almost certainly reject a claim from religious parents who objected to material used by teachers for their own professional training, apart from involvement with students. Such a claim would be a far cry from the objective interference with religious exercise at issue in *Mahmoud*, where the school put parents to the Hobson's choice of either continuing to send children to school in a way that violated their religious exercise or forgoing the benefit of public school altogether. *Mahmoud*, 606 U.S. at 545-55.

Focusing on the objective interference with sincerely desired religious exercise also tracks the historical cases. In an early English case, for example, the Corporation and Test Acts prohibited nonconforming Protestants from serving as sheriff of London. Barclay, *supra*, at 453. The city of London, in turn, passed a bylaw fining anyone who refused to serve as sheriff, and then repeatedly elected dissenting Protestants as sheriff in order to fine them—"a useful money-making operation for the city." *Ibid.* When certain dissenters refused to pay the fine, Lord Mansfield sided with them, noting the "'wretched dilemma'" the laws im-

posed between paying a fine or violating religious conscience. *Id.* at 454. "[I]nfluential" early American cases likewise looked to objective measures of interference with desired religious action (or inaction). *Fulton*, 593 U.S. at 588 (Alito, J., concurring in judgment). As noted above, *supra* 13-14, both *People* v. *Philips*, 1 W.L.J. 109 (Gen. Sess. N.Y. 1813), and *Commonwealth* v. *Cronin*, 1 Q.L.J. 128 (Va. Cir. Ct. 1855), exempted Catholic priests from testifying about confessions—lest "the whole weight of the penal branch of the law" be deployed to "prohibi[t]" the seal of confession, *Cronin*, 1 Q.L.J. at 138-39. The *Philips* court noted that requiring the priest to testify would place him "between Scylla and Charybdis" where the priest must "either violate his oath" or be subject to government penalties. Barclay, *supra*, at 454. All three of those cases looked to "the objective actions taken by government," rather than merely subjective theological questions about how central the religious exercise was. *Id.* at 455.[9]

2. Exclusionary Norm Rather than "Balancing" Test. In similar fashion, the Court could also discipline strict scrutiny to allay longstanding concerns about the unadministrable nature of balancing required by the pre-*Smith* strict-scrutiny test. Writing for the *Smith* majority, Justice Scalia found it "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." 494 U.S. at 889 n.5.

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[9] *Cf. Etienne* v. *Ferguson*, 791 F. Supp. 3d 1226, 1245 (W.D. Wash. 2025) (protecting the seal of confession only because the law happened to protect comparable secular conduct).

As this Court's experience with RFRA has demonstrated, strict scrutiny need not function in that manner, and the language of "balancing" is a misnomer. Rather than enlisting individual judges to poise the scales of justice as between incommensurable values, strict scrutiny "is better understood as a type of exclusionary reason (or exclusionary norm) combined with a heavy evidentiary burden." Barclay, *supra*, at 456. In other words, strict scrutiny should be understood as a test that "directs courts to exclude all but the permissible reasons for interfering with religious exercise," which then "requires the government to demonstrate with clear evidence that the government's actions were necessary" to advance a goal within that universe of permissible reasons. *Ibid.* That "type of analysis * * * is not balancing." *Ibid.* It does not require judges to balance the importance of governmental policies, on the one hand, against the significance of religious beliefs, on the other. It simply requires them to determine whether the government met its burden of proof needed to invoke particular governmental interests that would have justified intrusions on free exercise at the Founding.[10]

Reformulating strict scrutiny in this manner would help to answer what "'compelling' mean[s]" and how courts can "determine when the State's interest rises to that level." *Ramirez*, 595 U.S. at 442 (Kavanaugh, J., concurring). Rather than engage in "'minimally structured appraisals of the significance of competing values or interests,'" *id*. at 442 n.1 (citation omitted), courts could look to the type of "specific

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[10] See generally Stephanie H. Barclay, *Making Laws for the Human Mind: The Founding, Free Exercise, and Parental Rights after* Mahmoud *and* Mirabelli (forthcoming in Cornell L. Rev. 2026), available at https://tinyurl.com/34he9vj7.

government interests that were viewed at the Founding as inherent limitations on natural rights related to religious liberty, and only allow those sorts of government interests to limit religious exercise under strict scrutiny's exclusionary norm," Barclay, *supra*, at 460. Early state constitutions, as noted above, commonly codified protections for free exercise except where it would threaten the "public peace and safety." McConnell, *supra*, at 1464. Courts would still need to determine precisely which forms of religious exercise cross those lines, but reorienting strict scrutiny to a "historically grounded set of permissible government interests" would "result in a smaller and more determinate set of interests * * * than whatever a judge deems compelling." Barclay, *supra*, at 460. Courts have largely interpreted RFRA to track these very sorts of government interests.

Finally, as in other contexts, "the opportunity to challenge" government action under strict scrutiny—unlike with *absolute* protections, see *supra* 15-16—"does not mean that * * * plaintiffs will always win." *Corner Post, Inc.* v. *Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 823 (2024). Far from "courting anarchy," *Smith*, 494 U.S. at 888, strict scrutiny *permits* the government to pursue weighty policies if it can adequately justify why its actions are clearly necessary to serve those permissible state interests. That form of presumptive protection, defeasible only in cases of true necessity, would better align this Court's precedent with the right of free exercise as originally understood.[11]

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[11] Some scholars attempt to marshal historical evidence to defend *Smith*. See generally, *e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Hofstra L. Rev. 245, 267, 271-72 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992); Vincent Phillip Muñoz, *Religious Liberty and the American Founding* (2022). But while some of these scholars critique the lack of widespread historical examples of judicial protection of religious exercise in the face of generally applicable laws, they do not marshal examples of judicial protection of religious exercise in the face of discriminatory laws either. At most, the evidence indicates that recorded examples of judicial protection of rights were rare at the Founding. See Barclay, *supra*, at 464 n.141; Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 Harv. L. Rev. F. 140, 152-59 (2025). The expectation of judicial protection of rights became even clearer with the adoption of the Fourteenth Amendment. See Kurt T. Lash & Stephanie Hall Barclay, *A Crust of Bread: Religious Resistance and the Fourteenth Amendment*, 78 Vand. L. Rev. 1203, 1256-57 (2025).