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

BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JUDD E. STONE II
Counsel of Record
CHRISTOPHER D. HILTON
ARI CUENIN
CODY C. COLL
CARSON W. SCHWERTNER
STONE HILTON PLLC
600 Congress Ave.,
Suite 2000
Austin, Texas 78701
judd@stonehilton.com
(737) 256-6025

Counsel for Amicus Curiae

QUESTIONS PRESENTED

The Petition presents the following questions:

1. Whether *Employment Division v. Smith*, 494 U.S. 872 (1990), should be overruled.

2. Whether, as applied to the Amish Petitioners, New York's compulsion of permanent acts that are inconsistent with the religious beliefs and practices parents wish to instill in their children violates the Free Exercise Clause.

3. Whether, as applied to the Amish Petitioners, New York's refusal to allow religious exemptions to a law that allows secular exemptions and other comparable secular activity violates the Free Exercise Clause.

The Court should grant the Petition and overrule *Employment Division v. Smith*.

TABLE OF CONTENTS

Page

Questions Presented I
Table of Contents II
Table of Authorities III
Interest of *Amicus Curiae* 1
Summary of Argument 1
Argument 3
I. The Court Should Overrule *Employment Division v. Smith*. 4
II. This Case Is an Ideal Vehicle for Overruling *Smith*. 14
III. Even Under Existing Doctrine, New York's Law Is Subject to Strict Scrutiny. 17
Conclusion 23

TABLE OF AUTHORITIES

Page(s)

Cases

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 10

City of Boerne v. Flores,
521 U.S. 507 (1997) 10, 13

Cutter v. Wilkinson,
544 U.S. 709 (2005) 11, 12

Employment Division v. Smith,
494 U.S. 872 (1990) 1-17, 21-23

Fulton v. City of Philadelphia,
593 U.S. 522 (2021) 2-4, 6, 11-13, 15-17, 19, 21

Goe v. Zucker,
43 F.4th 19 (2d Cir. 2022) 21

Gonzales v. O Centro Espírita Beneficente União do Vegetal,
546 U.S. 418 (2006) 11

Holt v. Hobbs,
574 U.S. 352 (2015) 11

Jewish Cmty. Rels. Council of S.F. v. Arntz,
No. CPF-11-511370, 2012 WL 11891474
(Cal. Super. Ct. Apr. 6, 2012) 13

Mahmoud v. Taylor,
606 U.S. 522 (2025) 3, 13, 15-19

Mirabelli v. Bonta,
607 U.S. 492 (2026) 3, 15-19

Montgomery v. County of Clinton,
743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*,
940 F.2d 661 (6th Cir. 1991) 7

Perry v. Marteney,
172 F.4th 315 (4th Cir. 2026) 15

Riback v. Las Vegas Metro. Police Dep't,
No. 2:07-cv-1152, 2008 WL 3211279
(D. Nev. Aug. 6, 2008) 6, 7

Roman Cath. Diocese of Albany v. Vullo,
242 N.E.3d 1174 (N.Y. 2024), *cert. granted, judgment vacated*, 145 S. Ct. 2794 (2025) 16

Roman Cath. Diocese of Brooklyn v. Cuomo,
592 U.S. 14 (2020) 11, 16

Shagalow v. Minn. Dep't of Hum. Servs.,
725 N.W.2d 380 (Minn. Ct. App. 2006) 7

Sherbert v. Verner,
374 U.S. 398 (1963) 2, 5, 10, 12

State v. Cordingley,
302 P.3d 730 (Idaho Ct. App. 2013) 11

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 20

Tandon v. Newsom,
593 U.S. 61 (2021) 3, 15-17, 19-20

Thomas v. Review Bd. of Ind. Emp. Sec. Div.,
450 U.S. 707 (1981) 6

Thompson v. Robert Wood Johnson Univ. Hosp.,
No. 09-cv-00926, 2011 WL 2446602
(D.N.J. June 15, 2011) 7

United States v. Quaintance,
608 F.3d 717 (10th Cir. 2010) 11

Wisconsin v. Yoder,
406 U.S. 205 (1972) 2-6, 8, 14, 16-19

Yeshiva Univ. v. YU Pride All.,
143 S. Ct. 1 (2022) 8, 9

YU Pride All. v. Yeshiva Univ.,
180 N.Y.S.3d 141 (N.Y. App. Div. 2022) 9

YU Pride All. v. Yeshiva Univ.,
No. 154010/21, 2022 WL 2158381
(N.Y. Sup. Ct. June 14, 2022) 8

Statutes

U.S. Const., amend. I 1, 4, 6-8, 12, 15

U.S. Const., amend. XIV 15

42 U.S.C. § 1983 15

42 U.S.C. § 2000bb(a)(5) 10, 12

42 U.S.C. § 2000bb-1 10

42 U.S.C. § 2000cc-1 10

N.Y. Pub. Health Law § 2164 ..... 15, 23

N.Y. Pub. Health Law § 2164(8) 20

Regulations

N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(l) 21

N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.3(c) 21

Other Authorities

Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237 (2004) 6

Brief of Amicus Curiae Jewish Coalition for Religious Liberty, *Indiv. Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 26S-PL-00128 (Ind. filed May 21, 2026), 2026 WL 1639898 14

CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1994) 18

Christina Caron, *Bill Banning Circumcision in Iceland Alarms Religious Groups*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html 13

Federal & State RFRA Map, Becket Fund, https://becketfund.org/research-central/rfra-info-central/map (last visited Oct. 28, 2026) 10

Jewish Education 101, Chabad.org, https://www.chabad.org/library/article_cdo/aid/1230127/jewish/Jewish-Education-101.htm (last visited Oct. 28, 2026) 18

Law Library of Congress, Global Legal Research Center, *Legal Restrictions on Religious Slaughter in Europe* (Mar. 2018), https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf (last visited Oct. 28, 2026) 13

Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990) 2

Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) 2

San Francisco Circumcision Ban (November 2011), Ballotpedia, https://ballotpedia.org/San_Francisco_Circumcision_Ban_(November_2011) (last visited Oct. 28, 2026) 13

Liam Stack, *Yeshiva University Reverses Itself and Bans L.G.B.T.Q. Club*, N.Y. TIMES (May 12, 2025), https://www.nytimes.com/2025/05/12/nyregion/yeshiva-university-lgbtq-club-ban.html 9

Liam Stack, *Yeshiva University's Ban on L.G.B.T.Q. Club Leads to Scrutiny of Funding*, N.Y. TIMES (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/nyregion/yeshiva-university-ny-public-funds.html 9

INTEREST OF *AMICUS CURIAE*

Amicus Jewish Coalition for Religious Liberty (JCRL) is an incorporated organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. JCRL has an interest in restoring a robust understanding of the Free Exercise Clause. That protection is important to members of every faith in America, including Judaism.

For more than thirty years, *Employment Division v. Smith*, 494 U.S. 872 (1990), has made the vindication of free-exercise rights exceptionally difficult. Many religious adherents have forgone claims altogether, while laws imposing substantial burdens on sincere religious practice have escaped meaningful First Amendment review. JCRL urges the Court to overrule *Smith* and restore rigorous protection for religious exercise.

JCRL takes no position on the ultimate merits of Petitioners' exemption claim. Its interest is in ensuring that courts apply strict scrutiny before governments substantially burden sincere religious activity, regardless of whether a particular practice is popular or widely understood.*

SUMMARY OF ARGUMENT

This case demonstrates why *Employment Division v. Smith* should be overruled rather than narrowed again. *Smith* leaves minority faiths particularly exposed

---

* Under Rule 37.6, no counsel for any party authored this brief, in whole or in part, nor did counsel for any party, or either party, make a monetary contribution intended to fund this brief in whole or part. No person or entity other than *Amicus* and counsel for *Amicus* contributed monetarily to this brief's preparation or submission. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

to laws written without awareness of their unfamiliar religious obligations. For Jews, that is not merely an abstract fear: Courts applying *Smith* have rejected claims involving kippahs, Sabbath- and kosher-compatible services, and religious objections to autopsies without applying any heightened scrutiny. The recent litigation involving Yeshiva University shows the institutional stakes. New York courts invoked *Smith* while ordering a flagship Orthodox Jewish university to act contrary to the judgments of its rabbinic leadership, forcing years of costly litigation without ever providing meaningful review of the burden on Jewish education.

Because of the wealth of scholarship analyzing *Smith*'s legal flaws,[1] this brief will focus on the actual impact *Smith* has had on Americans seeking to practice their faith. "Indeed, the case against *Smith* is very convincing." *Fulton v. City of Philadelphia*, 593 U.S. 522, 594 (2021) (Alito, J., concurring in the judgment).

I. The Court should overrule *Employment Division v. Smith*. *Smith* abandoned the compelling-interest test of *Sherbert* and *Yoder*. As *Smith* itself predicted, leaving accommodation to the political process has disproportionately disadvantaged minority faiths. Jewish claimants have been denied meaningful review of burdens on religious practices, and neutral laws have exposed religious institutions like Yeshiva University to years of litigation without any court requiring the government to demonstrate a compelling interest. *Smith*'s fear of "anarchy" has proven unfounded. At the same time, courts

---

[1] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99 (1990).

have successfully applied strict scrutiny for decades under RFRA, RLUIPA, and state analogues, while *Smith*'s own doctrines have produced persistent confusion, inconsistent and unpredictable results, and little reliance.

II. This case is an ideal vehicle for overruling *Smith*. Petitioners' sincerity is undisputed, and the stakes are concrete: Amish schools face crippling penalties, and their community faces pressure to leave New York. On remand, the Second Circuit rejected every route around *Smith* that this Court has offered: *Mahmoud*, *Mirabelli*, *Tandon*, and *Fulton*. Correcting the judgment below without overruling *Smith* would invite another round of line-drawing. JCRL takes no position on religious exemptions to vaccination. It asks only that New York be required to meet strict scrutiny before burdening Petitioners' sincere religious beliefs.

III. Even under existing doctrine, strict scrutiny applies. New York's vaccine mandate burdens parents' right to guide their children's religious development under *Yoder* and *Mahmoud*. The Second Circuit's distinction between health regulations and curricular ones improperly confines those precedents to their facts, contrary to this Court's instruction. New York's law is also not generally applicable. It permits comparable secular nonvaccination exemptions, and its medical exemption is a mechanism for individualized exemptions, which subjects the law to strict scrutiny under *Fulton*.

ARGUMENT

The Court should grant certiorari because this case presents an ideal vehicle to overrule an unworkable and oft-critiqued precedent. Indeed, several members of the Court have recently expressed their dissatisfaction with that precedent and the rule expressed therein. And

rightly so. *Employment Division v. Smith* established that the government may substantially burden a religious adherent's religious exercise without demonstrating that it has a compelling need to do so, as long as the law in question is religiously neutral and generally applicable. 494 U.S. at 878–80. That rule impinges on the ability of religious adherents to vindicate First Amendment rights of paramount concern. This Court's review is required to correct First Amendment jurisprudence; so long as *Smith* is the law, no other court may do so.

In *Fulton*, a majority of the Court questioned Smith's continuing validity. 593 U.S. at 544 (Barrett, J., concurring, joined by Kavanaugh, J.); *id.* at 545 (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.). This Court will likely reconsider *Smith* eventually, and *Amicus* urges it to do so sooner rather than later to restore appropriate First Amendment protections to religious minorities. This case is a clean vehicle that neatly presents an opportunity to do just that. But even if the Court chooses to revisit *Smith* in a later case, it should clarify that the statute at issue here is subject to strict scrutiny.

I. The Court Should Overrule *Employment Division v. Smith*.

Amicus understands the plight of the Old Order Amish in this case. This Court has long recognized both Jews and the Amish as sincere practitioners of faith. *See Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972) (likening the Amish practice of adult baptism to the Jewish Bar Mitzvah). As with the Amish, the Jewish way of life "is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

In *Yoder*, the Court held Wisconsin could not subject Old Order Amish communities to its compulsory school-attendance law. 406 U.S. at 234. Because the respondents believed their children should not receive formal education beyond the eighth grade, the Court required Wisconsin to show a compelling interest in requiring conduct that conflicted with that belief. *Id.* at 220–21. That was so even though the law in question was "neutral on its face" and imposed a "general obligation of citizenship." *Id.*

The same requirement should apply here, but *Smith* dramatically changed the landscape such that it does not. Time and experience have shown that change to be unwise and the *Smith* rule to be both unworkable and in conflict with original public meaning. As a representative of a religious minority burdened by *Smith*, *Amicus* provides its perspective on why the Court should overrule *Smith*.

Smith often places unfamiliar and minority faith obligations outside meaningful constitutional protection and limits access to the constitutionally mandated review of laws that burden those practices. JCRL's perspective begins with a practical reality: Judaism regulates daily life through a dense network of religious obligations. Legislators familiar with majority customs can enact facially neutral rules without appreciating that they prohibit Sabbath observance, dietary practice, religious dress, burial practice, or the transmission of Jewish teaching. Minority faiths therefore bear *Smith*'s costs first, absent overt hostility.

A. Before *Smith*, this Court applied *Sherbert v. Verner*, 374 U.S. 398 (1963), to protect the free-exercise rights of religious minorities. Under *Sherbert*, a law that substantially burdened religious exercise had to be

narrowly tailored to serve a compelling interest. *See Fulton*, 593 U.S. at 556 (Alito, J., concurring in the judgment); *Yoder*, 406 U.S. at 234. As *Yoder* illustrates, the Court recognized "areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." 406 U.S. at 220; *see also Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 710, 720 (1981).

Smith abruptly changed course. It held that a "valid and neutral law of general applicability" does not violate the Free Exercise Clause where burdening religion "is not the object of the [law] but merely the incidental effect." 494 U.S. at 878–79.

The *Smith* Court itself recognized that leaving accommodation to the political process would place relatively unfamiliar religious practices at a disadvantage. *Id.* at 890. As this case and others illustrate, that fear has proven to be well founded. One empirical study found that free-exercise filings by religious groups fell by more than half immediately after *Smith*, while favorable outcomes fell from more than 39 percent to under 29 percent. Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237, 242, 248 (2004). That chilling effect falls hardest on members of minority faiths, like Jews and the Amish, whose relatively unfamiliar practices are the ones governments most often burden incidentally.

Courts applying *Smith* have repeatedly denied Jewish claimants any meaningful review of burdens on core practices. One court cited *Smith* to deny a Jewish police officer's claimed right to wear a religious head covering. *Riback v. Las Vegas Metro. Police Dep't*, No. 2:07-cv-

1152, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008). Because the department's ban on head coverings was neutral and generally applicable, *Smith* shielded it from heightened First Amendment scrutiny. *Id.* Moreover, the officer found no relief under the Equal Protection Clause, because even though the department's ban "disproportionately impact[ed] a protected class of religionists, the regulation [was] not invidious," and was thus subject to mere rational basis review. *Id.*

In another case, a state agency denied an Orthodox Jewish woman with developmental disabilities' request for placement in a habilitation program that would let her observe the Sabbath and keep kosher. *Shagalow v. Minn. Dep't of Hum. Servs.*, 725 N.W.2d 380, 383 (Minn. Ct. App. 2006). The court upheld the agency's denial "in accordance with *Smith*" because the government's decision "was religiously neutral." *Id.* at 389. Courts have also held that officials could order or perform autopsies on Jewish decedents over their families' religious objections because the autopsy laws were generally applicable and neutral. *See, e.g.*, *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990) ("The incidental effect upon [plaintiff's] practice of her religion, though regrettable, does not offend the First Amendment."), *aff'd*, 940 F.2d 661 (6th Cir. 1991); *Thompson v. Robert Wood Johnson Univ. Hosp.*, No. 09-cv-00926, 2011 WL 2446602, at *8 (D.N.J. June 15, 2011) (autopsy of a Jewish child did not violate his mother's free-exercise rights, even if her religious exercise "was disturbed," because the government's decision was based on presumptively neutral laws).

These cases share a pattern. Legislators familiar with majority customs enact facially neutral rules without realizing they prohibit traditional Jewish

observance: Sabbath observance, dietary law, religious dress, and burial practice. Just so for Amish communities like the one Petitioners represent: As *Yoder* and now this case demonstrate, Amish child-rearing values are especially vulnerable because they are out of the mainstream. Without First Amendment protection, Amish families cannot raise and instruct their children according to the core tenets of their faith. At bottom, minority faiths—those most in need of protection—bear *Smith*'s costs to an exceptional degree.

B. *Smith* allows private litigants to aggressively invoke generally applicable and neutral laws as a method of interfering with sincerely held religious beliefs. The recent Yeshiva University litigation draws this practice into sharp relief. Yeshiva University is the Nation's most prominent Modern Orthodox Jewish university, and it exists to transmit Orthodox Judaism to the next generation. *See Yeshiva Univ. v. YU Pride All.*, 143 S. Ct. 1, 1 (2022) (Alito, J., joined by Thomas, Gorsuch, and Barrett, JJ., dissenting from denial of application for stay). In 2021, the Yeshiva University Pride Alliance and several students and alumni sued Yeshiva under the New York City Human Rights Law (NYCHRL) seeking to force Yeshiva "to officially recognize the YU Pride Alliance as an LGBTQ student organization." *YU Pride All. v. Yeshiva Univ.*, No. 154010/21, 2022 WL 2158381, at *1 (N.Y. Sup. Ct. June 14, 2022). Yeshiva argued that the NYCHRL, as applied to Yeshiva through the plaintiffs' claims, violated the Free Exercise Clause. *Id.* at *6. In response, the plaintiffs argued that the NYCHRL was a neutral and generally applicable law subject to rational basis review. *Id.* Relying on *Smith*, the trial court agreed, denying Yeshiva's free-exercise defense without ever subjecting the law to heightened scrutiny. *Id.* at *7.

Yeshiva then sought a stay from this Court, which was denied on procedural grounds. *Yeshiva Univ.*, 143 S. Ct. at 1. Four Justices dissented, noting that Yeshiva "would likely win if its case came before us." *Id.* at 2 (Alito, J., dissenting). Those Justices reasoned that New York's "imposition of its own mandatory interpretation of scripture is a shocking development that calls out for review" given that "[t]he Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith." *Id.* Despite this guidance, and demonstrative of the difficulty courts have in applying *Smith*, the New York Appellate Division later affirmed the trial court, finding no violation of Yeshiva's free exercise rights for the same reason the trial court had: *Smith* doomed Yeshiva's position. *YU Pride All. v. Yeshiva Univ.*, 180 N.Y.S.3d 141, 145 (N.Y. App. Div. 2022). That holding proved calamitous for Yeshiva's ability to administer its educational environment according to its religious beliefs: New York lawmakers, pointing to "discriminatory behavior," threatened Yeshiva's state funding.[2] The University reached a settlement in March 2025.[3] But that settlement fell apart within two months, landing the litigants back where they started after four years of expensive litigation.[4]

---

[2] Liam Stack, *Yeshiva University's Ban on L.G.B.T.Q. Club Leads to Scrutiny of Funding*, N.Y. TIMES (Apr. 3, 2023), https://www.nytimes.com/2023/04/03/nyregion/yeshiva-university-ny-public-funds.html.

[3] Liam Stack, *Yeshiva University Reverses Itself and Bans L.G.B.T.Q. Club*, N.Y. TIMES (May 12, 2025), https://www.nytimes.com/2025/05/12/nyregion/yeshiva-university-lgbtq-club-ban.html.

[4] *Id.*

A minority religious institution spent years defending its rabbinic authority, yet no court ever required New York to show a compelling interest or to consider less restrictive means. Under *Sherbert*, those questions would have been the heart of the case. Under *Smith*, they were never asked. So long as *Smith* remains, other minority faiths and their institutions face the same prospect.

C. The *Smith* Court reasoned that applying strict scrutiny to generally applicable laws would invite unadministrable exemptions and "anarchy." 494 U.S. at 888. Experience has disproved that fear. For three decades, courts have applied exactly that scrutiny under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. After this Court held RFRA could not be applied to states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), many states adopted (constitutionally, legislatively, or judicially) their own RFRA-type regimes.[5] Today, 39 states are governed by such regimes.[6]

In enacting RFRA, Congress took the position that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735–36 (2014) (quoting 42 U.S.C. § 2000bb(a)(5)). Consistent with that belief, this Court has affirmed "the feasibility of case-by-case consideration of religious exemptions to generally

---

[5] *See Federal & State RFRA Map*, Becket Fund, https://becketfund.org/research-central/rfra-info-central/map (last visited Oct. 28, 2026).

[6] *Id.*

applicable rules" under RLUIPA, *see Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (discussing *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005)), and RFRA, *id.* at 436–37.

Practice proves the point—courts are capable of and practiced in applying the relevant standards, including compelling interest, narrow tailoring, and sincerity. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 369–70 (2015) (holding that a prison grooming policy violated RLUIPA as applied to a Muslim prisoner); *United States v. Quaintance*, 608 F.3d 717, 722–23 (10th Cir. 2010) (finding a claimed belief insincere where evidence showed it was fabricated as a legal defense); *State v. Cordingley*, 302 P.3d 730, 733–34 & n.3 (Idaho Ct. App. 2013) (describing similar tests state courts apply under their RFRA clones). Cases in which courts hold generally applicable laws unconstitutional as applied are an altogether "unremarkable" occurrence. *Fulton*, 593 U.S. at 602 (Alito, J., concurring in the judgment).

By contrast, *Smith* itself has proven difficult to administer. Its concepts of neutrality, general applicability, and hybrid rights have generated persistent confusion. Lower courts repeatedly misapply them, and this Court has repeatedly had to intervene. Particularly visible examples include litigation over COVID-19 restrictions on worship. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16–17 (2020) (per curiam) (granting injunctive relief from New York's COVID-related "restrictions on attendance at religious services" that allegedly "treat[ed] houses of worship much more harshly than comparable secular facilities").

Smith has generated little reliance of the kind *stare decisis* protects. It governs no contracts or property arrangements. And governments that burden religion can

still prevail by showing that their laws satisfy strict scrutiny, as they have for decades under RFRA, RLUIPA, and state analogues. Congress rightly found that test "workable." 42 U.S.C. § 2000bb(a)(5). Indeed, the federal government and many states already operate under it successfully. For example, the Federal Bureau of Prisons "has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." *Cutter*, 544 U.S. at 725 (internal quotation marks omitted). Restoring the *Sherbert* framework would simply impose the same workable standard across all government action in service of core First Amendment protections.

D. In jurisdictions that have not restored pre-*Smith* protections, permission to engage in conduct compelled by sincerely held religious beliefs remains dependent on political grace. In those jurisdictions, reality does not necessarily comport with *Smith*'s prediction that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation." 494 U.S. at 890.

The risks resulting from those omissions are not hypothetical. As Justice Alito has explained, neutral and generally applicable laws could ban kosher and halal slaughter, prohibit infant circumcision, or forbid religious head coverings in court, all while satisfying *Smith*. *Fulton*, 593 U.S. at 545–46 (Alito, J., concurring in the judgment). Such conflicts have already arisen at home and abroad. Several European jurisdictions have

restricted ritual slaughter[7] or have recommended restricting infant circumcision[8]. And in 2011, a San Francisco ballot measure sought to prohibit circumcision of minors.[9] Fortunately, a state court judge ruled that the initiative was preempted by state law. *Jewish Cmty. Rels. Council of S.F. v. Arntz*, No. CPF-11-511370, 2012 WL 11891474, at *1 (Cal. Super. Ct. Apr. 6, 2012). Nevertheless, these are the risks that religious minorities face.

The Framers "did not intend simply to prevent the government from adopting laws that discriminated against religion." *City of Boerne*, 521 U.S. at 550 (O'Connor, J., dissenting). The historical record shows they believed the Constitution affirmatively protects religious exercise and limits government intrusion on it. *Id.*; *Fulton*, 593 U.S. at 571–94 (Alito, J., concurring in the judgment) (tracing the history and tradition of the Free Exercise Clause). When the political process fails religious minorities who cannot obtain legislative change, "the Bill of Rights and the doctrine of judicial review protect" them. *Mahmoud v. Taylor*, 606 U.S. 522, 563 (2025). But under *Smith*, judicial review's efficacy is limited by the fact that governments are often not required to meet

---

[7] *See* Law Library of Congress, Global Legal Research Center, *Legal Restrictions on Religious Slaughter in Europe* (Mar. 2018), https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf (last visited Oct. 28, 2026).

[8] *See* Christina Caron, *Bill Banning Circumcision in Iceland Alarms Religious Groups*, N.Y. TIMES (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html ("The push to curb circumcision has been brewing in parts of Europe for several years.").

[9] *San Francisco Circumcision Ban* (November 2011), Ballotpedia, https://ballotpedia.org/San_Francisco_Circumcision_Ban_(November_2011) (last visited Oct. 28, 2026).

strict scrutiny before burdening sincere religious exercise. The government could certainly show a compelling need and narrow tailoring in some cases.[10] Under *Smith*, though, it rarely has to try. To afford religious adherents sufficient constitutional protection of religious freedom, as the Founders intended and the Constitution demands, the Court should overrule *Smith*.

II. This Case Is an Ideal Vehicle for Overruling *Smith*.

This case presents a clean vehicle for overruling *Smith*. Petitioners have an undisputedly sincere and abiding religious objection to vaccination. Petition ("Pet.") at 7, 13. That undisputed belief avoids *Smith*'s concern that judges have no principled way to evaluate the "centrality" of religious objections. 494 U.S. at 887. There is no need for the Court "to question the centrality of particular beliefs or practices to a faith" where that issue is undisputed. *Id.* (internal quotation marks omitted). And *Amicus* agrees: Once sincerity is established, courts should never be called upon to evaluate theological questions such as the centrality of a particular belief to a particular religion. But neither sincerity nor centrality is at issue here in any event.

This case also presents an emergent problem that exposes *Smith*'s defects in unusually concrete terms. Amish communities have resided in New York since the 1830s, Pet. 1, contributing to the well-being of the State as "good farmers and citizens," *Yoder*, 406 U.S. at 212. Until recently, New York maintained a workable and

---

[10] *See* Brief of Amicus Curiae Jewish Coalition for Religious Liberty at 19–20, *Indiv. Members of the Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1*, No. 26S-PL-00128 (Ind. filed May 21, 2026), 2026 WL 1639898.

necessary religious exemption, Pet. 1, and most states continue to provide one. Nevertheless, three small Old Order Amish schools now face enormous penalties for noncompliance. Those penalties effectively force entire communities to choose between relocation from New York and actions that violate their religious beliefs, and *Smith* prevents meaningful judicial review of the substantial burden they suffer.

Faced with those realities, Petitioners brought a single, as-applied claim under 42 U.S.C. § 1983 for violation of their First and Fourteenth Amendment rights, a "fundamentally defensive . . . option of last resort." *Id.* at 13. The district court dismissed Petitioners' case. *Id.* at 14. The Second Circuit affirmed, holding that Petitioners "failed to allege that § 2164 is anything but neutral and generally applicable," and determining that New York satisfied rational basis review. *Id.* This Court then vacated and remanded in light of *Mahmoud*. *Id.* On remand, the Second Circuit reaffirmed its prior holding and held that neither *Mahmoud* nor *Mirabelli* changed the result. Pet. App. 21a–25a. It also reasoned that New York's medical exemption is neither comparable secular conduct under *Tandon* nor a discretionary "mechanism for individualized exemptions" under *Fulton*. *Id.* at 15a–21a.

That history matters. First, the Second Circuit's reasoning on remand flouted *Mirabelli*'s clarification that *Mahmoud* did not depend "on uniquely coercive 'curricular requirements.'" *Mirabelli v. Bonta*, 607 U.S. 492, 495 (2026) (per curiam) (citation omitted). The Second Circuit is not alone in misreading *Mahmoud*. *See Perry v. Marteney*, 172 F.4th 315, 327 (4th Cir. 2026) (holding that strict scrutiny does not apply where the "law is a public health measure" rather than "an instrument of

ideological indoctrination"). The Court's recent opinions limiting *Smith*—*Fulton*, *Tandon*, *Mahmoud*, and *Mirabelli*—should have prevented those outcomes. *See infra*, Part III. That they did not illustrates *Smith*'s continuing error.

Second, even if the Court cabins *Smith* without overruling it, the result is likely to recur. After all, the Second Circuit reached the same conclusion on remand, despite *Mahmoud*, *Mirabelli*, *Tandon*, and *Fulton*. In sum, the Second Circuit has now rejected every route around *Smith* that this Court has offered. A decision holding only that New York's vaccine mandate falls within *Yoder* or some other exception to *Smith* would correct the judgment below, but it would also invite another round of line-drawing and preserve *Smith* for the next law that substantially burdens religious exercise. That reality exists because of New York's unfortunate disregard for the beliefs of Amish New Yorkers and members of other religious minorities. *See Roman Cath. Diocese of Albany v. Vullo*, 242 N.E.3d 1174 (N.Y. 2024) (holding that state definition of "religious employer," which excluded some religious employers, was valid under *Smith* despite the regulation mandating abortion coverage in violation of employers' religious beliefs), *cert. granted, judgment vacated*, 145 S. Ct. 2794 (2025); *see also Roman Cath. Diocese of Brooklyn*, 592 U.S. at 15–16.

Amicus does not oppose vaccination, and in fact takes no position on whether New York's mandate would survive strict scrutiny, but it understands that courts should and must apply strict scrutiny before blessing laws that burden sincere religious activity no matter who agrees or disagrees with that activity. Petitioners may choose to leave New York if the State shows that mandatory vaccination is the least restrictive way of satisfying a

compelling government interest. But forcing Petitioners to leave New York merely because a law burdening their religious exercise has some rational basis is another matter, one that the Constitution does not tolerate.

The Court should therefore both hold that strict scrutiny applies here and overrule *Smith*. Resolving only the first step risks the avoidance illustrated by the Second Circuit's opinion on remand and leaves intact the rule responsible for the harms articulated here.

III. Even Under Existing Doctrine, New York's Law Is Subject to Strict Scrutiny.

Strict scrutiny should apply here because the Court should overrule *Smith*. But even if *Smith* stands, the judgment below cannot, for two independent reasons. First, New York's vaccine mandate burdens the "right of parents to guide the religious development of their children," *Mirabelli*, 607 U.S. at 496 (quoting *Mahmoud*, 606 U.S. at 559), and that burden triggers strict scrutiny "regardless of whether the law is neutral or generally applicable," *Mahmoud*, 606 U.S. at 565. Second, the vaccine mandate is not "generally applicable." It treats comparable secular nonvaccination more favorably than religious nonvaccination, and it incorporates a mechanism for individualized exemptions. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *Fulton*, 593 U.S. at 533.

A. Under *Yoder* and *Mahmoud*, strict scrutiny applies when government "substantially interfer[es] with the religious development" of children and "pose[s] 'a very real threat of undermining'" the beliefs and practices their parents wish to instill. *Mahmoud*, 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218). *Mahmoud* rejected confining *Yoder* to its facts. *Id.* at 558. And *Mirabelli* rejected the view that *Mahmoud* is limited to "uniquely

coercive 'curricular requirements,'" 607 U.S. at 495 (citation omitted), confirming that the principle reaches many forms of government interference with religiously grounded parental decisions about children, *id.* at 496. Because New York's law burdens the "right of parents to guide the religious development of their children," *id.* (citation omitted), strict scrutiny applies.

That protection reflects the nature of religious formation. "[F]or many people of faith across the country, there are few religious acts more important than the religious education of their children." *Mahmoud*, 606 U.S. at 546. For many faiths, directing a child's upbringing is itself a religious obligation, not merely a parental preference. Jewish parents, for example, understand *chinuch* as a religious duty to educate their children in the commandments and to transmit religious practice and values to them.[11] Similarly, catechism plays a central role in the Catholic community. *See* CATECHISM OF THE CATHOLIC CHURCH 8 (2d ed. 1994) (noting that the goal of "education in the faith of children is to initiate the hearers into the fullness of Christian life" (cleaned up)). The Amish Petitioners here assert the same kind of obligation, and the same constitutional principle protects it: Government burdens religious exercise when it prevents parents from raising their children according to sincerely held religious obligations. *See Yoder*, 406 U.S. at 233.

New York's vaccine mandate imposes exactly that burden. Petitioners' objection to vaccination is undisputedly sincere, and their faith requires them to raise their children in accordance with it. Pet. 3, 18. New York's

---

[11] *Jewish Education 101*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/1230127/jewish/Jewish-Education-101.htm (last visited Oct. 28, 2026).

statute conditions attendance at Petitioners' exclusively Amish community schools on a permanent and irreversible medical act that their religion forbids, thereby "compel[ling]" a "specific practice forbidden by their religion." *Mahmoud*, 606 U.S. at 549. And it requires Amish school officials who share that objection to exclude Amish children unless their parents submit. Pet. 20–21.

The Second Circuit acknowledged that this burden "may be serious" and "may weigh on [Petitioners] more heavily than the policy in *Mahmoud*." Pet. App. 23a & n.17. But it nonetheless declined to apply strict scrutiny because New York's law was not the same "kind" of law as in *Yoder*, *Mahmoud*, and *Mirabelli*, *id.* at 23a, but rather a "health-and-safety condition," *id.* at 22a. Regardless of how the Second Circuit characterizes it, that distinction confines this Court's precedents to their facts. But "*Yoder* . . . cannot be breezily dismissed." *Mahmoud*, 606 U.S. at 558. "It instead embodies a principle of general applicability." *Id.* And *Mirabelli* rejected the view that *Mahmoud* is limited to "uniquely coercive 'curricular requirements.'" 607 U.S. at 495 (citation omitted). The Second Circuit defied the Court's clear instruction. New York's vaccine mandate interferes with Petitioners' rights to guide their children's religious upbringing as surely as the curricular requirement in *Mahmoud*, and a mandate that compels an act forbidden by the parents' faith interferes with that right as well.

B. Strict scrutiny also applies because New York's law is not "generally applicable." A law is not generally applicable when it treats "any comparable secular activity more favorably than religious exercise," *Tandon*, 593 U.S. at 62, or provides "a mechanism for individualized exemptions," *Fulton*, 593 U.S. at 533 (citation omitted). Comparability is judged against the interest the

government asserts, and it depends on "the risks various activities pose, not the reasons why people" engage in them. *Tandon*, 593 U.S. at 62.

New York's vaccine mandate is not "generally applicable" for at least three distinct reasons. Pet. 26–30. First, it does not reach adults at all. It does not cover teachers, aides, administrators, or any other adults who work in the Amish schools. Pet. 9, 28. Second, students may remain unvaccinated for medical reasons. N.Y. Pub. Health Law § 2164(8). The Second Circuit justified that exemption by its purpose, sparing medically vulnerable children a vaccine's health consequences. Pet. App. 16a. But "[c]omparability is concerned with the risks various activities pose." *Tandon*, 593 U.S. at 62. A child unvaccinated for medical reasons poses the same risk of transmission as one unvaccinated for religious reasons. And third, Petitioners allege that tens of thousands of students attend school unvaccinated and without any exemption. Pet. 11–12, 27. As Petitioners assert, this rampant noncompliant nonvaccination does not "pose a lesser risk of transmission than [Petitioners'] proposed religious exercise." *Tandon*, 593 U.S. at 63.

Each of these categories presents the very risk the State invokes—an unvaccinated person who may transmit disease—yet only religiously motivated nonvaccination is categorically excluded and punished. The Second Circuit dismissed the adult and noncompliance categories as "wholly speculative." Pet. App. 18a n.13. But the first follows plainly from the statute's text, and, as for the second, Petitioners' factual allegations must be accepted as true at the pleading stage. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

The vaccine mandate's medical exemption independently triggers strict scrutiny because it operates on

an individualized student basis. A physician must certify a contraindication to a specific vaccine, and school officials may require additional information before deciding whether to accept the certification. N.Y. Comp. Codes R. & Regs. tit. 10, §§ 66-1.1(l), 66-1.3(c); *see Goe v. Zucker*, 43 F.4th 19, 33 (2d Cir. 2022) (describing school officials' authority to "grant a medical exemption"). The Second Circuit deemed this mechanism nondiscretionary. Pet. App. 19a–20a. But "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Fulton*, 593 U.S. at 537. And, in fact, school officials do have discretion: Discretion to require additional documentation and discretion to decide whether any amount of documentation is adequate to justify exemption. Pet. App. 44a. Having built a system for weighing individual secular hardship, New York "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Fulton*, 593 U.S. at 534 (quoting *Smith*, 494 U.S. at 884).

JCRL does not ask this Court to decide whether New York's law ultimately can satisfy strict scrutiny. The same underinclusiveness that triggers strict scrutiny cannot also prevent the State from satisfying that scrutiny. Strict scrutiny is a demanding test, but it is not an impossible one. The State's articulated interests and reasons for making the law's distinctions (rejected above as an explanation for why the law was generally applicable) will play an important role in determining the outcome of strict scrutiny. Simply put, the two analyses are distinct. A strict scrutiny analysis may require a developed record concerning New York's asserted interests, the risks posed by these particular Amish communities, the State's enforcement practices, and less restrictive

alternatives. Accordingly, the Court should grant certiorari, overrule *Smith*, and hold that strict scrutiny applies, reversing the lower courts' judgments resting on rational basis review, and instructing the lower courts to apply the correct standard in the first instance.

CONCLUSION

The Court should grant certiorari and overrule *Employment Division v. Smith*, or, alternatively, hold that New York Public Health Law § 2164 is subject to strict scrutiny. In either case, the Court should reverse the judgments below so that the lower courts may apply that standard in the first instance.

Respectfully submitted.

JUDD E. STONE II
Counsel of Record
CHRISTOPHER D. HILTON
ARI CUENIN
CODY C. COLL
CARSON W. SCHWERTNER
STONE HILTON PLLC
600 Congress Ave.,
Suite 2000
Austin, Texas 78701
judd@stonehilton.com
(737) 256-6025

NOVEMBER 2026 *Counsel for Amicus Curiae*