No. 26-438

IN THE
Supreme Court of the United States

JOSEPH MILLER, ET AL.,

Petitioners,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* U.S. NAVY SEALS 1–4 IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are United States Navy SEALs who were told to choose between their faith and their service. Gabriel Lynch, Chad Gates, Paul Drew Forsberg, and Shawn Harnish are current or former members of the Navy's special operations forces.[2] Each served where the government's interest in readiness is at its height. Each asked the Navy for what the Amish now ask of New York: breathing room to follow his conscience. The Navy refused, and each lost his place in special operations because his faith forbade receiving a vaccine the Navy required. For the SEALs who asked, the cost was personal and steep. The Navy declared them non-deployable for merely submitting a request and froze their travel, training, and

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than *amici curiae* or their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.2, *amici curiae* certify that counsel of record for all parties received notice of their intent to file this brief at least 10 days before it was due.

[2] Each of the four Amici is a member of the Christian faith and holds deep and sincere convictions consistent with that faith. Gabriel Lynch served 21 years as a Navy SEAL, retiring in June 2024 as a Senior Chief Special Warfare Operator (E-8), and his decorations include the Bronze Star Medal with Combat "V" and the Purple Heart. Paul Drew Forsberg served 22 years in the U.S. Navy, all of it with the SEAL Teams. Chad Gates served 20 years in the Navy, 18 of them in the SEAL Teams. Shawn Harnish has served in the Navy since June 2008, reporting directly after boot camp to become a SEAL.

advancement.[3] It threatened to recover training costs that could exceed $1 million per SEAL.[4] One command master chief even called them an "acceptable loss."[5]

Amici have stood where the Amish now stand. Both faced a categorical rule that honored secular reasons and refused religious ones. The Navy granted at least 276 medical and 83 administrative exemptions from its vaccine requirement. Yet more than 4,000 service members sought religious exemptions, and the Navy denied them all.[6] In fact, the Navy had not accommodated a single religious objection to any vaccine in seven years.[7] The Army followed the same pattern.[8] New York drew the same line. In 2019, it repealed its religious exemption and kept its medical one. Pet. 11. Both rules forced believers to choose between conscience and a calling, a choice the Fifth Circuit described as

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[3] *U.S. Navy SEALs 1–26 v. Biden*, 27 F.4th 336, 342 (5th Cir. 2022) (per curiam), *appeal dismissed as moot*, 72 F.4th 666 (5th Cir. 2023).

[4] *Id.*

[5] *Id.* at 343.

[6] *Navy SEALs 1–26*, 27 F.4th at 342.

[7] *Id.*

[8] As of March 30, 2022, the Regular Army had approved 20 permanent medical exemptions but only 2 of 4,066 requested religious exemptions. Press Release, U.S. Army, *Department of the Army Announces Updated COVID-19 Vaccination Statistics* (Mar. 31, 2022), https://www.army.mil/article/255252/department_of_the_army_announces_updated_covid_19_vaccination_statistics.

"pitting their consciences against their livelihoods."[9]

The government bore the burden of explaining, under the most demanding standard, why it denied the SEALs a religious exemption; this Court should hold New York to the same standard. Under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4, the Navy had to justify denying an exemption to each service member who sued.[10] The Fifth Circuit held that the Navy had not carried that burden and left the injunction in place.[11] Under *Employment Division v. Smith*, 494 U.S. 872 (1990), New York had to clear only the lowest bar, because the Second Circuit asked only whether the law was rational. Pet. App. 21a. Amici respectfully ask the Court to give the Amish under the Constitution what Congress gave its service members by law: a government that must justify itself under strict scrutiny.

SUMMARY OF ARGUMENT

This brief focuses on Smith, the precedent that fixes the standard of review in this case, rather than on the public-health judgments underlying New York's vaccination requirement. Amici do not dispute New York's position that vaccination serves an important public-health interest. The question is whether, and how rigorously, New York must

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[9] *Navy SEALs 1–26*, 27 F.4th at 348.
[10] *Navy SEALs 1–26, 27 F.4th at 350–51.*
[11] *Id.* at 352–53.

justify denying an exemption to religious objectors whose sincerity is undisputed. So long as *Smith* stands, a rational basis is enough.

Smith should be overruled. It does not withstand the considerations this Court weighs before adhering to a precedent. *Smith* cannot be squared with the text of the Free Exercise Clause and the history and traditions of the Republic. From the colonial period through the Draft Acts of both World Wars, the Nation honored religious objections even to the most fundamental civic duty, bearing arms in its defense. New York abandoned that tradition for a far lesser demand. *Smith* has produced no workable rule, because its exceptions, from *Lukumi* to *Mahmoud*, now swallow the rule itself. *Smith* never gained broad acceptance; the American people immediately rejected it. Congress repudiated it within three years through RFRA, and Justices across the Court have urged its reconsideration. *Smith*'s only reliance interests belong to governments, and this Court gives little weight to government reliance on the power to burden a constitutional right. Overruling *Smith* would repeal no law, because it would change only the standard a court applies when a believer seeks an exemption.

Strict scrutiny should instead replace *Smith*, just as strict scrutiny governed free exercise claims under *Sherbert* and *Yoder* for over a quarter of a century. Federal courts apply strict scrutiny under RFRA every day, and the Fifth Circuit applied it to the Navy's special operations forces, where judicial

deference reaches its peak. Even if *Smith* retains influence in other settings, strict scrutiny should minimally govern when direct government penalties condition a religious community's continued operation of its own school on abandoning a religious practice.

Even under *Smith*, however, New York's law triggers strict scrutiny, because the State singled out religion for unfavorable treatment. The 2019 repeal removed only the religious exemption and kept a medical exemption, and enforcement fell first on three one-room Amish schools. The State's own administrative law judge found that the Department "failed to offer reasonable accommodation" for the schools' "distinct religious and cultural differences," yet the Department imposed $118,000 in fines. Pet. App. 113a–114a. More troubling still, the bill's sponsors called the beliefs at issue "fake" and "garbage," and that animus removed the political safety valve *Smith* offered.

This case offers the Court a lasting opportunity to decide *Smith*'s future: the error has spread to two circuits, the Amish's sincerity is undisputed, and the outcome turns entirely on the standard of review. The Court should thus grant the petition.

INTRODUCTION

New York has fined three Amish schools $118,000 because the families who run them will not violate their faith. Pet. App. 6a–7a & n.9. No one doubts that faith. Pet. App. 93a. The Amish have lived

and taught their children in New York since the 1830s, and the State had never before charged their schools. Pet. 1, 12. The same law still excuses children for medical reasons, but it no longer excuses any child for religious reasons. Yet no court has ever made New York explain, under any meaningful standard, why it could not accommodate the Amish. The families ask only for what New York gave them for more than fifty years: an exemption that honors religious conscience. Pet. 10.

New York owed no meaningful explanation because of one decision: *Employment Division v. Smith*, 494 U.S. 872 (1990). Under *Smith*, a law that does not single out religion gets almost no judicial review, regardless of the burden to a believer. The Second Circuit therefore asked only whether New York's law was rational. Pet. App. 11a, 20a. *Smith* saw this coming. It admitted that leaving faith accommodations to the political process would "disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. The Amish are that minority, and the legislators who repealed their exemption called beliefs like theirs "fake" and "garbage." Pet. 12. The irony is difficult to miss: *Smith* may meet its end in the very case that proves its warning correct.

The Nation's history answers *Smith*'s fear of "anarchy." 494 U.S. at 888. From the founding, American governments have made room for religious conscience even in military service, where the government's interest is greatest. Quakers who would not

bear arms "from scruples of conscience" were to be "excused by the legislature" under New York's first Constitution.[12] That same charter guaranteed free exercise "without discrimination or preference."[13] When James Madison drafted the Bill of Rights in 1789, he wrote conscience into it: "no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[14] President Washington wrote that same year that "the Consciencious scruples of all men should be treated with great delicacy & tenderness."[15]

The tradition held through two World Wars and holds in federal law today. Congress exempted religious objectors from combatant service through both wars. *United States v. Seeger*, 380 U.S. 163, 170–72 (1965). In 1943, the Second Circuit, the same court that decided this case, ordered a wrongly drafted objector released. *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 525–26 (2d Cir. 1943). The Military Selective Service Act still protects conscientious objectors from combatant training and service. 50 U.S.C. § 3806(j). *Smith* overlooked that history.

If the Nation could make room for religious conscience in wartime, New York can be made to justify

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[12] N.Y. Const. of 1777, arts. XXXVIII, XL.
[13] *Id.*
[14] 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834).
[15] Letter from George Washington to the Society of Quakers (Oct. 13, 1789), *in* 4 *The Papers of George Washington: Presidential Series* 265, 266 (Dorothy Twohig ed., 1993).

refusing it in an Amish schoolhouse. Yet under *Smith*, New York may fine Amish schools for practicing a faith no one doubts while offering nothing more than a rational basis. The Court should grant the petition and hold New York to the burden *Smith* lifted.

ARGUMENT

I. *SMITH* SHOULD BE OVERRULED BECAUSE IT FAILS EACH CONSIDERATION THIS COURT WEIGHS BEFORE RETAINING A CONSTITUTIONAL PRECEDENT.

Smith holds that the Free Exercise Clause offers no protection from a "valid and neutral law of general applicability," however heavily that law burdens religious exercise. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). That holding is entitled to no special solicitude. Stare decisis is "at its weakest when we interpret the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The relevant factors include "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned," as well as workability. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). Justice Kavanaugh has distilled them into "three broad considerations": whether the prior decision is "not just wrong, but grievously or egregiously wrong"; whether it has "caused significant negative jurisprudential or real-world consequences"; and whether

overruling it would "unduly upset reliance interests." *Ramos v. Louisiana*, 590 U.S. 83, 121–22 (2020) (Kavanaugh, J., concurring in part). *Smith* fails each of them.

A. As a textual matter, Smith *was exceptionally wrong, and it has never been settled.*

Smith cannot be squared with the constitutional text. The First Amendment forbids laws "prohibiting the free exercise" of religion. U.S. Const. amend. I. To exercise religion is to act on it, as *Smith* itself recognized: "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 494 U.S. at 877. A law that forbids a religious act prohibits its free exercise, whether or not the law mentions religion. The Clause protects the exercise of religion and says nothing about discrimination. Justice Barrett, joined by Justice Kavanaugh, found "the textual and structural arguments against *Smith*" to be "more compelling" than the historical debate, which she regarded as "more silent than supportive." *Fulton v. City of Phila.*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring).

Smith did not rest on the text. It claimed only that its rule was "a permissible reading of the text," *Smith*, 494 U.S. at 878, and rested instead on a premise drawn from *Minersville School District v. Gobitis*: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the

individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id.* at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940)). That framework was short-lived. This Court overruled *Gobitis* three years after deciding it, albeit on free-speech grounds. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Having revived a repudiated premise, *Smith* then recast the precedents that contradicted it. *Sherbert v. Verner*, 374 U.S. 398 (1963), became a rule about unemployment compensation. *Smith*, 494 U.S. at 883–84. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), became a "hybrid" case. *Smith*, 494 U.S. at 881–82. But *Yoder* had announced no such limitation. It held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

The result is a rule that lets the government have it both ways. A State may penalize the religious exercise the Clause protects and escape scrutiny so long as the law can be called neutral. In 2019, New York amended its law to eliminate the exemption for "genuine and sincere religious beliefs" while keeping the exemption for medical reasons. Pet. App. 2a, 5a. The Second Circuit held that repealing the religious exemption did not "in and of itself transmute" the law into one "that targets religious beliefs." Pet. App. 12a (internal quotation marks omitted). As the Second Circuit applied *Smith*, an amendment whose only effect is to withdraw protection from religious objectors is "neutral," and a burden the Second Circuit

acknowledged "may be serious," Pet. App. 22a–23a, need only be rational. That is not what "prohibiting the free exercise" means.

Moreover, *Smith* has never been settled. Five Justices joined its reasoning. Justice O'Connor concurred only in the judgment and rejected the majority's rule, *Smith*, 494 U.S. at 891–907 (O'Connor, J., concurring in the judgment), and three Justices dissented, *id.* at 907–21 (Blackmun, J., dissenting). The American people, through their representatives, promptly repudiated *Smith*. Congress enacted RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), finding that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). After this Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA could not be applied to the States, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5), and 28 States have enacted RFRAs of their own.[16] Within this Court, the doubts surrounding *Smith* have never subsided. *See Fulton*, 593 U.S. at 543 (Barrett, J.,

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[16] Movement Advancement Project, *Religious Exemption Laws: Broad Religious Exemptions ("RFRAs")*, https://mapresearch.org/map-sections/broad/ (last visited Oct. 26, 2026) (identifying 28 States with broad statutory religious-exemption laws and one more whose constitution provides comparable protection).

concurring); *id.* at 544 (Alito, J., concurring in the judgment); *id.* at 618 (Gorsuch, J., concurring in the judgment).

B. Smith *has caused significant negative jurisprudential and real-world consequences, and the test it displaced has proved workable.*

Smith promised simplicity. Its progeny have delivered a patchwork of exceptions. Laws whose object is to suppress religion automatically receive strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A church's choice of its ministers is protected categorically, beyond *Smith*'s reach. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). A law is not generally applicable if it treats "any comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam), or provides "a mechanism for individualized exemptions," *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). And a burden "of the same character as that in *Yoder*" triggers strict scrutiny "regardless of whether the law is neutral or generally applicable." *Mahmoud v. Taylor*, 606 U.S. 522, 565 (2025).

Each of those decisions was correct. But each added a threshold inquiry, and together they have made the question whether *Smith* even applies as contested as the balancing *Smith* abandoned. *Smith*'s own "hybrid" category has fared worst of all. Justice

Souter found "the distinction *Smith* draws" to be "ultimately untenable" and warned that a hybrid exception of any breadth "would probably be so vast as to swallow the *Smith* rule." *Lukumi*, 508 U.S. at 566–67 (Souter, J., concurring in part and concurring in the judgment). The Amish pressed exactly such a claim, joining their free exercise objection to their right as parents to direct the religious upbringing of their children. The Second Circuit rejected it on the ground that its precedent "does not apply a heightened standard to such 'hybrid rights' claims." Pet. App. 8a.

This Court has watched a governing test decay this way before. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), also promised a single rule, and it too gave way to exceptions until this Court stopped applying it. The Court eventually acknowledged that it had "long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). *Smith* warrants the same candor.

The Amish have borne the cost. They are still litigating seven years after the repeal, through two panel opinions and a remand from this Court. On remand, the Second Circuit held that "[a] greater burden in degree is not necessarily the same burden in kind." Pet. App. 23a & n.17. That rule lets a State escape *Yoder* by burdening a community's religious formation more heavily than the policy in *Mahmoud* did. The Fourth Circuit has taken the same view of a school vaccination law. *Perry v. Marteney*, 172 F.4th 315, 327 (4th Cir. 2026). The error is no longer

confined to one circuit, and only this Court can correct it. And because no court of appeals can reconsider *Smith*, no circuit split over its continued validity will ever develop.

The test *Smith* displaced has no such difficulty. In RFRA, Congress restored it as set forth in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b)(1), finding it "a workable test for striking sensible balances between religious liberty and competing prior governmental interests," *id.* § 2000bb(a)(5). This Court has applied it under RFRA and RLUIPA for three decades. *See, e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006).

American governments have accommodated religious conscience even when the stakes were highest, and they did so before the Republic was founded. "Various methods of ameliorating [objectors'] difficulty were adopted by the Colonies." *Seeger*, 380 U.S. at 170. New York's first Constitution directed that Quakers who, "from scruples of conscience, may be averse to the bearing of arms, be therefrom excused by the legislature," on payment of a sum "in lieu of their personal service." N.Y. Const. of 1777, art. XL. During the Civil War, Congress extended exemptions to conscientious objectors "who were members of religious denominations opposed to the bearing of arms." *Seeger*, 380 U.S. at 171. The Draft Act of 1917 exempted members of religious sects whose creeds forbade participation in war. *Id.* And on the eve of the Second World War, Congress extended the exemption

to objectors whose opposition arose from "religious training and belief." *Id.* at 171–72. In 1943, with the Nation at war, the Second Circuit held that a registrant had been "erroneously denied the benefits of the exemption he claimed." *Phillips*, 135 F.2d at 525–26. Those accommodations were legislative, and Amici cite them to show that accommodation works, without claiming them as evidence of original meaning. And the "anarchy" *Smith* foresaw, 494 U.S. at 888, has not followed from a generation of judicially enforced exemptions under RFRA.

That tradition is personal to Amici. They served in the most elite and capable ranks of the Nation's armed forces, where the government's need for every man is at its height. Even there, federal law makes room for religious conscience. Amici ask only that when the government forces a believer to choose between his faith and his calling, it be required to justify the choice. If that principle holds in the special warfare community, it holds in an Amish schoolroom.

C. No legitimate reliance interest supports Smith.

Reliance interests carry the most weight "in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). *Smith* created none. No citizen arranges his affairs around the government's freedom to burden his religion without justification.

The only reliance *Smith* protects is the government's own. A State may have repealed an exemption, or declined to enact one, confident that *Smith* would excuse it from justifying the choice. But that officials may come to regard a rule as an entitlement "does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349 (2009).

Overruling *Smith* would facially invalidate no statute. Courts would still test sincerity, an inquiry New York itself conducted for decades under its "genuine and sincere religious beliefs" standard. Pet. App. 5a. The only change would be the standard a court applies when such an objection is raised: the State would bear the burden of justifying a refusal to accommodate, as the federal government and a majority of States already require by statute.[17]

[17] The century-old decisions on which States rely in this field do not hold otherwise. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and *Zucht v. King*, 260 U.S. 174 (1922), decided no free exercise question; both predate this Court's holding that the Clause applies to the States. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

II. STRICT SCRUTINY IS THE PROPER STANDARD, AND THE COURT CAN ADOPT IT NARROWLY.

A. The Court should restore the Sherbert *and* Yoder *test, at a minimum for direct penalties on religious practice.*

Justice Barrett asked, "what should replace *Smith*?" *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). Her hesitation concerned "swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights . . . has been much more nuanced." *Id.* This case requires no categorical regime.

She also asked whether there should "be a distinction between indirect and direct burdens on religious exercise," whether religious entities should "be treated differently than individuals," and "[w]hat forms of scrutiny should apply." *Id.* at 544. The burden here is a direct penalty. Each day an unvaccinated child attends is a separate violation punishable by a fine of up to $2,000. Pet. App. 6a–7a & n.9. Because individuals sue alongside the schools, the case presents the claim *Yoder* itself sustained, whatever rule governs entities. And the governing scrutiny is *Yoder*'s. 406 U.S. at 215.

Amici propose a rule that follows from this Court's precedents: strict scrutiny applies when the government imposes escalating penalties that force a religious community to choose between its faith and the religious education of its children. *Yoder* held that compulsory attendance enforced by criminal penalties carried "a very real threat of undermining the Amish community and religious practice as they exist today," and that the State's interest could not justify it. 406 U.S. at 218; *see id.* at 215. *Mahmoud* confirmed that such a burden triggers strict scrutiny whatever the law's neutrality. 606 U.S. at 565. If the Court is not prepared to reconsider *Smith*, it should hold that forcing that choice is a burden of the same character as *Yoder*'s.

B. Strict scrutiny works even in the military.

Strict scrutiny has been applied even to the Navy's special warfare community. Courts can equally apply it to fines against three Amish schools. In *U.S. Navy SEALs 1–26 v. Biden*, the Fifth Circuit applied RFRA's compelling-interest test and denied the government's motion for a partial stay of an injunction protecting service members who sought religious accommodation from a vaccination requirement. 27 F.4th 336 (5th Cir. 2022) (per curiam), *appeal dismissed as moot*, 72 F.4th 666 (5th Cir. 2023). This Court later granted a partial stay, and Amici invoke

the ruling only for what strict scrutiny requires.[18] The Navy had "granted hundreds of medical exemptions from vaccination requirements," but it had "not accommodated any religious objection to any vaccine in seven years." *Navy SEALs 1–26*, 27 F.4th at 339. The Fifth Circuit's analysis shows two things strict scrutiny demands that rational-basis review never asks.

First, the government must justify its refusal as to each claimant. "The question, then, is not whether the [government] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to" the particular claimant. *Fulton*, 593 U.S. at 541; *see O Centro*, 546 U.S. at 430–31. Applying that standard on a stay motion, the Fifth Circuit concluded that the Navy's generalized interest in a vaccinated force was unlikely to justify denying these plaintiffs. *Navy SEALs 1–26*, 27 F.4th at 350–52. Under rational-basis review, the Second Circuit never reached that question.

Second, secular exemptions paired with religious refusals undermine the asserted interest. The Navy granted medical exemptions while refusing

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[18] This Court's stay reached the district court's order only "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *Austin v. U.S. Navy SEALs 1–26*, 142 S. Ct. 1301, 1301 (2022) (mem.). Justice Kavanaugh's concurrence rested on the deference courts owe to the Commander in Chief. *See id.* at 1301–02 (Kavanaugh, J., concurring). That deference derives from Article II and has no analogue in a state health department's regulation of three schools.

religious ones, and the Fifth Circuit treated that underinclusiveness as evidence that the asserted interest was not compelling. *Id.* at 352; *accord Lukumi*, 508 U.S. at 547. New York kept its medical exemption and repealed the religious one. Pet. App. 2a. New York has not shown that medically exempt children pose a different risk, and strict scrutiny requires that showing. Even if New York's public-health judgments were neutral, they would be an input to strict scrutiny rather than a substitute for it. And as Part III shows, the judgment behind the 2019 repeal was not neutral.

C. Leaving accommodation to the political process failed the Amish, and New York has never been put to its proof.

New York may argue that the SEALs' case proves that *Smith* works. Congress enacted RFRA, and it later directed rescission of the military's vaccination mandate. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571–72 (2022). That argument concedes the problem. *Smith* itself acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are *not widely engaged in*." 494 U.S. at 890 (emphasis added). The political process protected Navy SEALs, who command national respect and had a federal statute behind them. The Amish are a small, separate community in a State with no RFRA. After an outbreak, the legislature repealed the exemption the State had maintained since

1966, by votes of 84 to 61 and 36 to 26. Pet. App. 2a–3a, 13a. "One's right to . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. Strict scrutiny keeps that promise for believers who cannot win the vote.

New York will invoke *Prince v. Massachusetts*, which observed that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease." 321 U.S. 158, 166–67 (1944). That dictum identifies an interest that may be compelling, but a court must still ask whether denying these claimants an exemption is necessary to serve it.

Under strict scrutiny, New York would have to show that its refusal to exempt these schools is narrowly tailored to a compelling interest. *Lukumi*, 508 U.S. at 546. Today, "45 states and DC permit religious and/or personal belief exemptions."[19] When other jurisdictions accommodate a practice, the government "must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt v. Hobbs*, 574 U.S. 352, 368–69 (2015) (applying RLUIPA). New York will invoke the 2019 outbreak;

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[19] Josh Michaud, Clea Bell & Jennifer Kates, *State and Local Policies on School Vaccine Requirements: Overview and Current Status*, KFF (Aug. 21, 2026), https://www.kff.org/other-health/state-and-local-policies-on-school-vaccine-requirements-overview-and-current-status/.

that evidence belongs in the strict-scrutiny inquiry no court has conducted. Petitioners conceded that the law survives rational-basis review, nothing more, and under the correct standard New York has not made its case.

III. EVEN UNDER *SMITH*, NEW YORK'S LAW TRIGGERS STRICT SCRUTINY BECAUSE THE STATE SINGLED OUT RELIGION.

Smith never protected a law aimed at religion. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi*, 508 U.S. at 533. The Second Circuit found New York's law "neutral on its face" and its legislative record free of "hostility." Pet. App. 12a (internal quotation marks omitted). The law's operation, its exemptions, and its supporters' own words say otherwise.

A. The repeal reached only religious objectors, and enforcement followed.

"Facial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. "[T]he effect of a law in its real operation is strong evidence of its object." *Id.* at 535. The 2019 amendment did one thing: it withdrew protection from children whose parents held "genuine and sincere religious beliefs" against vaccination. Pet. App. 2a, 5a. Enforcement then fell on three Amish schools, fined a combined $118,000, each at the $2,000

maximum penalty per violation. Pet. App. 6a–7a & n.9. Meanwhile, petitioners allege, at least 66,000 students without any exemption remain unvaccinated, Pet. 26, an allegation that must be accepted as true at this stage, Pet. App. 3a n.4, and the State has itself suggested the number may be as high as 97,900, Pet. 26. Hialeah, too, invoked public health, yet its ordinances "pursue[d] the city's governmental interests only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. So does New York's.

B. A medically exempt child and a religiously exempt child pose the same risk.

A law is not generally applicable when it "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. "Comparability is concerned with the risks various activities pose, not the reasons why people gather." *Id.* An unvaccinated child poses the same risk of transmission to her classmates whether her exemption is medical or religious. New York accepts that risk for one child and refuses it for the other. The Second Circuit rejected a "one-to-one comparison" and measured risk only in the aggregate. Pet. App. 17a. Even in the aggregate, the comparison favors the Amish: New York's entire Amish population, about 21,000 people, is less than a quarter of the up to 97,900 students who may attend school unvaccinated without any exemption. Pet. 11–12, 26. But *Tandon* judges comparability against "the asserted government interest that justifies the regulation at issue," 593 U.S. at 62, and each

unvaccinated child implicates the interest in preventing transmission, whatever the reason she is unvaccinated.

C. Supporters called religious objections "fake," and the law treated them that way.

Supporters of the repeal "denigrated 'fake' and 'garbage' religious beliefs" and called those who held them "selfish and misguided." Pet. 12 & nn.9–11. The bill's primary Assembly sponsor likened objectors to those who "tried [Galileo] as a heretic." Id. at 13 n.12. He had the history backwards. Galileo was the dissenter, tried by the Inquisition, forced to recant, and confined for life for departing from official orthodoxy. Galileo, the Amish, and Amici have each faced an authority that overrides conscience and calls it protection.

The State may not "act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018). The Amish faith is neither fake nor in doubt. Pet. App. 93a. The Second Circuit dismissed the statements as the views of "a small number of legislators." Pet. App. 13a. But they included the bill's primary sponsor, and the law did exactly what they implied: it withdrew protection only from the beliefs its supporters had called fake. This Court treats "contemporaneous statements made by members of the decision-making body" as evidence bearing on neutrality. *Masterpiece*,

584 U.S. at 639 (quoting *Lukumi*, 508 U.S. at 540 (opinion of Kennedy, J.)).[20] *Smith* left religious minorities to the political process. 494 U.S. at 890. When that process derides their faith as fake, *Smith*'s premise fails, and strict scrutiny must take its place.

IV. THE COURT SHOULD GRANT THE PETITION.

Five years ago, this Court granted certiorari to decide whether to overrule *Smith*, then concluded that it "need not revisit that decision." *Fulton*, 593 U.S. at 533. Justice Alito warned that a ruling resting on a city's contract terms "might as well be written on the dissolving paper sold in magic shops." *Id*. at 551 (Alito, J., concurring in the judgment). This case offers no such off-ramp.

First, the standard of review decides the case. The Second Circuit held the law neutral and generally applicable and applied rational-basis review, which petitioners conceded the law survives. Pet. App. 11a, 20a. Under *Smith*, the Amish lose. Under strict scrutiny, New York must make a showing no court has required of it.

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[20] The Second Circuit read *Masterpiece* to reach only adjudicatory bodies. Pet. App. 13a–14a. But *Masterpiece* reserved whether lawmakers' statements count; it did not reject them. 584 U.S. at 636.

Second, the record is clean. The Amish's sincerity is not in doubt. Pet. App. 93a. The burden is a direct, per-day penalty. Pet. App. 6a–7a & n.9. And the claimants are the community *Yoder* protected.

Third, this Court has already signaled the question's importance. It vacated the Second Circuit's first judgment and remanded. On remand, the Second Circuit reaffirmed, reading *Mahmoud* to reach only burdens of the same "kind." Pet. App. 23a & n.17. A second remand would accomplish nothing; only plenary review will.

Amici know how such cases can end. Their own appeal was dismissed as moot after Congress directed the mandate's rescission, before any court finally decided whether the Navy could justify its refusals.[21] This case cannot end that way. The fines have been imposed. Pet. App. 6a–7a. The Amish have waited years for a court to require New York to justify its refusal to accommodate them. This Court should require it now.

For the foregoing reasons, Amici Curiae respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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[21] *Navy SEALs 1–26*, 72 F.4th at 669, 676.

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