No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,
v.
CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor

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[1] This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

Here, NLC, ICMA, IMLA, and NPELRA address the second Question Presented, whether the Court should revisit *Employment Division v. Smith*.

SUMMARY OF ARGUMENT

I. Amici contend that the Court should not revisit *Smith*. The decision has provided a clear, workable rule to local governments for thirty years. Local governments know they can enforce neutral, generally applicable laws without being subject to strict scrutiny if they deny religious exemptions. Furthermore, this Court's subsequent decisions applying *Smith* have given local governments clear guidance on how to meet the neutral and generally applicable requirements. The unanimous court below and other circuits have readily applied these workable rules from *Smith* and the Court's subsequent decisions.

Replacing *Smith* with strict scrutiny review of exemption denials would be unworkable. Such review would be fact-intensive and unpredictable, as the concurring and dissenting opinions in *Smith* revealed. Such review would also revive the problems created by the substantive due process doctrine of the early 1900s. As it has before, the Court should continue to apply *Smith*. In addition, the many values of *stare decisis* counsel against revisiting *Smith*.

II. Revisiting *Smith* would harm local governments in numerous ways, because whenever they denied religious exemptions to neutral, generally applicable laws, they could face constitutional challenges in court. Employees could raise objections to performing aspects of their jobs that offended their religious beliefs, and employers have no ability to pre-screen such objections. Private contractors, who do much of the work of local governments these days, could do the same. Moreover, similar to Petitioners in this case, private contractors could go to court to vary the terms of their contracts based on their religious beliefs.

The effects on local governments would extend far beyond the employment and private contractor contexts; the full range of neutral and generally applicable laws could be subject to judicial review whenever religious exemptions were denied.

Furthermore, local governments lack the resources to withstand an onslaught of litigation over religious exemptions. Cases would be fact-intensive, decisions would be subjective, and local governments—still reeling from the Great Recession—face drastic resource restraints due to the pandemic. And local governments cannot avoid litigation by simply acceding to one religion's claim for an exemption, because a governmental decision that can be seen as favoring one religion may spur a lawsuit by another.

Smith also allows local governments to promote economic growth through protection of LGBT individuals from discrimination. The relationship between protection from discrimination and economic growth is well-established. In addition to this ability

to promote economic growth, local governments should have the ability to prevent what they view as harmful, including discrimination that harms foster youth and same-sex and potentially other couples. Without *Smith*, however, denials of religious objections motivated by the desire to prevent discrimination will be subject to judicial review. Finally, preserving *Smith* will allow local governments to avoid line-drawing between religions and the appearance of favoritism. In short, with *Smith* preserved, local governments will be better able to serve the people.

ARGUMENT

I. The Court Should Not Revisit *Smith*.

Amici urge this Court not to revisit *Employment Division v. Smith*, 494 U.S. 872 (1990), because there the Court provides a clear rule for local governments to follow; the alternative rule proposed by Petitioners would be unworkable; and the core values of *stare decisis* support the preservation of *Smith*.

First, *Smith* and subsequent decisions applying it provide clear, workable rules. *See, e.g.*, *Knick v. Township of Scott, PA*, 139 S. Ct. 2162, 2178 (2019) (noting that one factor to consider in "whether to overrule a past decision" is the "workability" of its rule). In *Smith*, this Court set forth the rule that the Free Exercise Clause does not relieve an individual of the obligation to comply with a neutral, generally applicable law that incidentally requires performance of an act that the individual's religious belief forbids. 494 U.S. at 878. To instead require a "compelling government interest" test, this Court reasoned, "would produce . . . a private right to ignore generally applicable laws . . . a constitutional anomaly." *Id.* at

885-86. As a result of *Smith*, local governments are not subject to strict scrutiny whenever they decline religious requests to be exempt from neutral, generally applicable law. They can safely enforce such laws without risking protracted litigation.

This Court's decision in *Smith* can be viewed as consistent with Justice Jackson's views on the First Amendment, including the opinion upholding religious freedom he wrote for the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). As Professor (now Judge) Bybee has noted, "When we read *Barnette* and *Smith* in context, we will find that Justice Jackson and Justice Scalia have remarkably similar views on the First Amendment." Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 Tulane L. Rev. 251, 259 (2000). That is, "[f]or both Jackson and Scalia, who share a deep concern with the *rules* of the law, . . . either the law is unconstitutional in all of its applications, or the law must be obeyed by all those to whom it applies." *Id.*

Moreover, local governments are on notice from this Court's subsequent decisions applying *Smith* that they fail the neutrality requirement if they demonstrate animosity toward a particular religion. *Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018). They are also on notice that a law is not generally applicable if they enforce it only against specific religious entities, they provide exemptions only for certain religious beliefs, or the law is substantially underinclusive. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543 (1993). In short, this Court's Free Exercise precedents regarding local government regulations

"are workable in practice" and "if anything would be unworkable in practice, it would be for [the Court] now to abandon [its] settled jurisprudence" regarding Free Exercise challenges to neutral, generally applicable laws. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (applying workability factor in rejecting challenge to Due Process Clause and Commerce Clause precedent).

Applying this Court's clear rules from *Smith*, *Masterpiece Cakeshop*, and *Lukumi*, the Third Circuit below unanimously affirmed the District Court's denial of Petitioners' injunction request, concluding that "the current record does not show religious persecution or bias" and that "[i]nstead it shows so far the City's good faith in its effort to enforce its laws against discrimination." *Fulton v. City of Philadelphia*, 922 F.3d 140, 165 (3d Cir. 2019). The unanimity of all the judges below shows that this Court has established clear, workable rules.

Similarly, other circuits have had no difficulty applying *Smith* to a wide variety of religious exemption claims. *See, e.g., Abdus-Shahid v. Mayor and Council of City of Balt.*, 674 F. App'x 267, 268 (4th Cir. 2017) (per curiam) (applying *Smith* to a Baltimore health insurance policy requiring a formal marriage certificate for joint insurance plan—even after a religious ceremony—ultimately holding that this requirement was both neutral and generally applicable); *Cent. Rabbinical Cong. of U.S. & Can. v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 198 (2d Cir. 2014) (applying *Smith* to a New York City ordinance prohibiting a controversial religious practice, holding that the act's targeted application against a religious sect rendered it neither neutral nor generally applicable); *Fairbanks*

v. Brackettville Bd. of Educ., No. 99-50265, 2000 WL 821401, at *3 (5th Cir. May 30, 2000) (applying *Smith* to a public school's grooming policy, holding that it was neutral and generally applicable to all male students); *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) (applying *Smith* to a dispute where a township refused to grant a church an exemption to create a cemetery, holding that the township's zoning ordinances were both neutral and generally applicable); *Swanson By and Through Swanson v. Guthrie Ind. Sch. Dist.*, 135 F.3d 694, 698 (10th Cir. 1998) (applying *Smith* to a school board's admission policy, holding that its disallowance of "part-time students" was both neutral and generally applicable).

Accordingly, with *Smith* having provided clear guidance to local governments for so long, Amici ask this Court not to revisit it.

Second, the Court should not revisit *Smith* because Petitioners' alternative rule would prove unworkable. *See Kimble v. Marvel Entm't*, LLC, 576 U.S. 446, 459 (2015) (declining to overrule precedent where proposed alternative rule "would make the law less, not more, workable than it is now"). Petitioners ask the Court to replace *Smith* with strict scrutiny review. *See* Pet'rs' Br. at 50 ("This Court should adopt the strict scrutiny test for laws which infringe upon religious exercise."). Unlike the clear rule from *Smith*, which courts continue to apply with minimal difficulty, a strict scrutiny test would be unworkable in various ways. As this Court noted in *Smith*, in rejecting a "compelling interest" test, "many laws will not meet the test" and "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that

does not protect an interest of the highest order." 494 U.S. at 888.

In addition to those problems noted by the *Smith* majority, the concurring and dissenting opinions further illustrate the impracticality of strict scrutiny review. The concurring Justice acknowledged that a compelling interest test "requires a case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* at 899 (O'Connor, J., concurring). Such a protracted, fact-intensive proceeding would burden local governments. In addition, such a review would lead to unpredictable results that would be at least in part subjective.

In *Smith* itself, for example, both the concurrence and the dissent (Justice Blackmun, joined by Justice Brennan and Justice Marshall) applied strict scrutiny review to an Oregon statute, but they reached opposite conclusions as to whether the statute survived the searching review. *Compare id.* at 905-06 (O'Connor, J., concurring) (concluding that the State had shown a compelling interest in regulating the drug in question, "[a]lthough the question is close"), *with id.* at 907-21 (Blackmun, J., dissenting) ("For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion").[2] The very terminology used—that "the question is close" and that the State's interest was not "sufficiently" compelling—indicates that strict

[2] The *Smith* dissenters also dismissed the State's concern with a possible "flood of other religious claims" under a strict scrutiny regime as "purely speculative." 494 U.S. at 917 (Blackmun, J., dissenting). Would that it be so.

scrutiny review puts the judiciary in the difficult role of making policy decisions best left to the legislature.

Conceptually, overruling *Smith*, and thereby subjecting all denials of religious exemptions to strict scrutiny review, would "repeat the mistakes of substantive due process" made in the first decades of the 1900s. *See* Br. *Amicus Curiae* of Professor Eugene Volokh in Support of Neither Party, at 4-12 ["Volokh Br."]. That is, "Overruling *Smith* would revive all the flaws of a broad substantive due process regime: It would require courts to routinely and definitively second-guess legislative judgments about the normative bases for a wide range of laws, and about the laws' practical necessity." *Id.* at 1-2. Moreover, overruling *Smith* would shift normative and pragmatic decisions from the states to the federal judiciary. *Id.* at 7. In sum, as explained by City Respondents (at 51-52), "[o]verruling *Smith* would create a doctrinal mess."

Instead of such a monumental upheaval, Amici ask this Court to reaffirm *Smith* and continue to hold that absent the singling out of individuals or groups for different treatment on the basis of religion, "the Free Exercise Clause does not provide a presumptive constitutional right to religious exemptions from government action." Volokh Br. at 4.

This Court previously rejected attempts to overrule *Smith*. *See City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). In *Boerne*, the Court examined the Religious Freedom Restoration Act of 1993 ("RFRA"), in which Congress prohibited state and municipal governments from substantially burdening religion—"even if the burden comes from a rule of general applicability"—unless the government body could

prove that its actions further a compelling interest. *Id.* at 515-16 (citing 42 U.S.C. § 2000bb-1 (1996)). This Court concluded that RFRA's burden on state and municipal governments exceeded Congress's powers under the Fourteenth Amendment, allowing *Smith*'s neutrality and general applicability standard to continue applying to state and municipal governments. *Id.* at 536.

Concurring, Justice Scalia noted there was "great popular attraction" to the "abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice." *Id.* at 544. Justice Scalia then noted that this "abstract proposition must ultimately be reduced to concrete cases," and in *Smith* the Court had determined that it is "the people, through their elected representatives [who] control the outcome of those concrete cases." *Id.* As it declined to do in *Boerne*, this Court should once again not revisit *Smith*. *See, e.g.*, *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2192 (2018) (Roberts, C.J., dissenting) ("This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the old adage 'third time's charm' has in daily life, it is a poor guide to Supreme Court decisionmaking.").

Third, in addition to *Smith*'s clarity and the dangers from overruling it, this Court should not revisit *Smith* because of that "old friend of the common lawyer," *stare decisis*. *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (Roberts, C.J., concurring) (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944)). The

principle of *stare decisis* "is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them." *Id.* at 2134.

Stare decisis, this Court has explained, is "a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (citation omitted). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Stare decisis also "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 576 U.S. at 455. Adhering to precedent "promotes stability, predictability, and respect for judicial authority." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). And, as Justice Powell once said, to eliminate *stare decisis* in constitutional questions would explicitly endorse "the idea that the Constitution is nothing more than what five Justices say it is." Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990)).

In sum, due to the clarity of its rule, the dangers of overruling it, and the values of *stare decisis*, Amici ask this Court not to revisit *Smith*.

II. Revisiting *Smith* Would Harm Local Government.

Under *Smith*, local governments may exempt individuals or organizations from complying with neutral laws of general applicability based on their religious objections to those laws, but resolution of those objections is not subject to strict scrutiny. Amici ask this Court not to upset thirty years of practice under *Smith* and not to subject every denial of a religious objection to neutral laws of general applicability to strict scrutiny. To do so would harm local governments in at least the nine ways described below and create other, unpredictable problems.

First, consider local government decisions related to employment. Government employers need the ability to apply neutral and generally applicable policies to all their employees in a myriad of ways. Yet employment decisions such as drug testing, work schedules, and holidays (to name just a few) could all be challenged based on Free Exercise grounds if *Smith* were overruled.

Moreover, without *Smith*, government employees might raise a Free Exercise objection to performing aspects of their job that offend their religious beliefs. For example, a fireman who believes that gay people are committing sin and will suffer eternal damnation might refuse to put out a fire that breaks out at a gay bar. The example is extreme but not unimaginable. *See, e.g.*, *Coronavirus: Radical evangelist who says gays will burn in "flames of hell" builds Covid-19 hospital in Central Park*, The Independent (April 1, 2020), https://www.independent.co.uk/news/world/americas/coronavirus-hospital-central-park-franklin-graham-anti-gay-christian-volunteers-a9441376.html.

All sorts of employee objections to job requirements can be foreseen, such as a police officer refusing to guard an abortion clinic for religious reasons or postal workers refusing to deliver mail they consider sacrilegious. *See* Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1497 (1999). A court applying strict scrutiny "might feel obligated to let police officers choose their beats and let mailroom workers choose what they deliver, . . . [but] [t]his would be the wrong result. The government should be able to demand that employees do their jobs without having the job requirements pass strict scrutiny . . . ." *Id.*

Furthermore, local government employers have no ability to anticipate employee Free Exercise objections. Employers lack the ability to pre-screen potential employees for possible religious objections to their future employment conditions, and rightly so. *See, e.g.*, EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs,* https://www.eeoc.gov/pre-employment-inquiries-and-religious-affiliation-or-beliefs ("Questions about an applicant's religious affiliation or beliefs . . . are generally viewed as non job-related and problematic under federal law. . . . [Non-religious] employers should avoid questions about an applicant's religious affiliation . . . ."). Therefore, if *Smith* is overruled, local governments will face unforeseen religious objections by their employees to neutral laws of general applicability and will either have to bow to the objections or face strict scrutiny.

Second, the problem grows when one considers, in addition to employees, all the private independent contractors through whom governments also serve the public. For decades, governments have increasingly privatized their services, that is, contracted them out

to private entities. The privatization trend accelerated in the 1990s, to the point where it is now estimated "that $1 trillion of America's $6 trillion in annual federal, state, and local government spending goes to private companies." Molly Ball, *The Privatization Backlash*, The Atlantic (Apr. 23, 2014), https://www.theatlantic.com/politics/archive/2014/04/city-state-governments-privatization-contracting-backlash/361016/. All these private companies would seemingly be entitled to application of strict scrutiny if they unsuccessfully raise religious objections to neutral, generally applicable laws relevant to government services they had agreed to provide, were *Smith* to be overruled. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014) ("there is no apparent reason why [for-profit] corporations may not further religious objectives").

Additionally, if *Smith* is overruled, local governments will not only face religious objections by private contractors to compliance with generally applicable neutral laws, they may face demands to alter the contractual terms themselves to accommodate religious beliefs. As Petitioners seek to do here, private contractors may seek injunctions to unilaterally impose contractual terms in their agreements with local governments. As the Third Circuit noted below, such a remedy "would be highly unusual." *Fulton*, 922 F.3d at 153 n.8. Indeed, such a remedy goes "one large step further" than "prohibiting the free exercise [of religion]." *Smith*, 494 U.S. at 878. It would be as if the baker in *Masterpiece Cakeshop* sought a mandatory injunction authorizing him to create the cake for a same-sex couple's wedding reception and to put bride and groom figurines on top.

Third, the effects on local government of overruling *Smith* would go far beyond the employment and independent contractor settings. As this Court recognized thirty years ago, "religious exemptions from civil obligations of almost every conceivable kind" have been sought, including "compulsory military service," "payment of taxes," "health and safety regulation such as manslaughter and child neglect laws," "compulsory vaccination laws," "traffic laws," "social welfare legislation such as minimum wage laws," "child labor laws," "animal cruelty laws," "environmental protection laws," and "laws providing for equality and opportunity for the races." *Id.* at 889 (citations omitted).

Numerous other areas of local regulations would be affected, in addition to the list above from *Smith*. All sorts of neutral and generally applicable local school policies currently governed by *Smith* might instead be subject to strict scrutiny. *See, e.g.*, *Swanson*, 135 F.3d at 698 (school board's neutral and generally applicable policy that part-time attendance was not allowed did not infringe upon home-schooled student's right to Free Exercise); *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 439-40 (9th Cir. 2008) (high school's neutral and generally applicable dress code did not infringe on Free Exercise rights of students who sued to wear t-shirts bearing religious messages). Additional areas typically regulated by local government include noise and other ordinances meant to prevent nuisances to neighbors, building codes, zoning requirements, locations of roads, and local holidays. Local governments attempt to make awards of grant money, such as to local arts organizations or local charities, in an even-handed fashion as well.

Indeed, religious objections of the most unusual variety can be made to all sorts of local code enforcements. *See, e.g.*, *Mayle v. Chicago Park Dist.*, No. 18 C 6211, 2019 WL 2773681, *6 (N.D. Ill. July 2, 2019) (dismissing claim that city infringed upon plaintiff's Free Exercise Clause right to practice Satanism when city prohibited plaintiff from bringing his Guinea Hog to public facilities and noting that under *Smith* "neutral laws with general applicability do not apply to the Clause"); *aff'd sub nom. Mayle v. City of Chicago*, 803 F. App'x 31 (7th Cir. 2020). Absent the clear rule from *Smith*, attending to the diversity and number of religious exemption claims could be overwhelming.

Fourth, without the clear rule from *Smith*, requests for religious exemptions would burden local governments because they would be difficult to resolve. As this Court has reasoned, "Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest." *Boerne*, 521 U.S. at 534. If strict scrutiny is applied, as Petitioners seek, "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *Id.* Strict scrutiny would not only be a demanding test, it would also be unpredictable in outcome. Strict scrutiny review of local government decisions would be fact-specific, highly individualized, and subjective. One need look no further than *Smith* itself, where the concurring Justice determined that a state statute survived strict scrutiny while the dissenting Justices concluded that it did not. With Supreme Court Justices disagreeing on how to apply strict scrutiny to the same generally applicable neutral law, imagine

the burden on (and variability of) decisions by rank-and-file government employees.[3]

Fifth, subjecting denials of religious objection claims to strict scrutiny would also strain local government resources. Before 2020, government resources were already severely limited, having not recovered from the effects of the Great Recession. *See "Lost Decade" Casts a Post-Recession Shadow on State Finances*, Pew Charitable Trust (June 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/lostdecade-casts-a-post-recession-shadow-on-state-finances ("[T]he deepest downturn since World War II also has lived up to early predictions that states would face a "Lost Decade" because of missed economic and revenue growth.").

Now, due to the effects of Covid-19, local government resources have cratered for the foreseeable future. Local governments have lost 1.2 *million* jobs since March 2020. *See* National Association of Counties, *Local Governments Continue to Lose Non-Education Related Jobs, Despite Continued Recovery of Other Major Sectors*, NACo (July 2, 2020), https://www.naco.org/covid19/topic/research-data/june-jobs-report. Local government revenue is plunging, and deep cuts in programs and services will have to be made. Ted C. Fishman, *America's Next Crisis is Already Here*, The Atlantic (May 21, 2020), https://www.theatlantic.com/ideas/archive/2020/05/

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[3] Local governments would also be burdened by this Court's replacement of *Smith* with some sort of "intermediate scrutiny" test as well, as this Court has previously recognized. *See Boerne*, 521 U.S. at 534 ("some lesser test, say, one equivalent to intermediate scrutiny, . . . nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation").

state-and-local-governments-are-plunging-crisis/611932/ ("Government and think-tank estimates project total losses in state and local revenue at 15 to 45 percent, shaving up to $1.75 trillion a year from the most essential things governments do. . . . The speed with which this crisis has hit local economies exceeds that of even the Great Depression . . . ."). Simply put, if *Smith* is overruled, local governments will lack the wherewithal to process the potentially innumerable religious objections to generally applicable neutral laws.

Sixth, local governments cannot avoid litigation by simply acceding to demands for a religious exemption from generally applicable neutral laws. The reason, of course, is that when a government allows one religion to opt out of a law applicable to all, the government opens itself to protracted lawsuits brought by other religions that it has violated the Establishment Clause, the Free Exercise Clause, or the Equal Protection Clause. Specifically, in the foster care field at issue in this case, adherents of disfavored religions have sued for violations of those clauses. *See, e.g.*, *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988). In *Wilder*, for instance, Black Protestant children raised "troublesome issues" under the Establishment Clause and the Free Exercise Clause based on allegations that New York City's foster care practices favored Catholics and Jews over them. *Id.* at 1342. The initial *Wilder* litigation lasted fourteen *years* before a settlement was reached. *Id.* at 1341.

In another, ongoing example, an observant Catholic couple has sued federal and state defendants, alleging that the largest foster care placement agency in the State of South Carolina (responsible for more than 90% of statewide foster

care placements) violates the Establishment Clause and the Equal Protection Clause by favoring evangelical Protestants as foster parents over Catholics and Orthodox Christians. *See Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 6-19-cv-03551 (D.S.C.), Complaint ¶¶ 6, 16, 48, 58-59, ECF No. 1.

Thus, there is a very real rock-and-a-hard-place dilemma for local governments, as they can face expensive litigation no matter whether they choose to enforce neutral laws equally or they choose to allow exemptions requested by particular religions.[4] The bright-line rule of *Smith*, on the other hand, allows local governments to enact and enforce generally applicable neutral laws without spawning expensive, protracted litigation.

Seventh, many local governments have concluded that prohibiting discrimination against LGBT persons promotes economic growth and benefits all their citizens. In May 2015, for instance, Laramie, Wyoming prohibited discrimination based on sexual orientation and gender identity in public accommodations, employment, and housing in order to:

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[4] The financial cost of litigation under a strict scrutiny regime can be overwhelming. For example, when a New York town faced a lawsuit under the Religious Land Use and Institutionalized Persons Act (under which towns must establish a compelling interest for zoning ordinances affecting religion), a resulting settlement cost taxpayers $6.5 million. Greg Shillinglaw & Akiko Matsuda, *Communities Pay a High Price When Religious Groups Invoke Land-Use Law*, LOHUD (May 17, 2014), https://www.lohud.com/story /news/politics/2014/05/17 /communities-pay-high-price-religious-groups-invoke-land-use-law/9237531/.

> Encourage the economic growth of the city, raise revenue for the city for the benefit of its residents, prevent activities that disturb or jeopardize the public health, safety, peace or morality of the city, provide for the health, safety and welfare of the city, and to generally encourage the growth and economic expansion of the city, and the ability of its residents to fully participate in the cultural, social and economic life of the city.

Laramie, Wyo. No. 1681 (5-13-2015), *codified at* Laramie, Wyo., Code § 9.32.010(B).

In all, more than 300 local governments in forty-two states have adopted ordinances protecting citizens from sexual-orientation discrimination. *Equality Maps: Local Nondiscrimination Ordinances*, *Movement Advancement Project*, https://www. lgbtmap. org/equality-maps/non_discrimination_ ordinances. In Pennsylvania, including City Respondent, two counties[5] and fifty-six municipalities[6] have prohibited

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[5] Allegheny and Erie.

[6]Abington Township, Allentown, Ambler, Bethlehem, Bridgeport, Bristol, Camp Hill, Carlisle, Cheltenham Township, Conshohocken, Dickson City, Downingtown, Doylestown, East Norriton Township, Easton, Harrisburg, Hatboro, Haverford Township, Huntingdon, Jenkintown, Kennett Square, Lancaster, Lansdale, Lansdowne, Lower Merion Township, Mt. Lebanon Township, Narberth, New Hope, Newtown Borough (Bucks County), Newtown Township (Bucks County), Norristown, North Wales, Philadelphia, Phoenixville, Pittsburgh, Pittston, Plymouth Township (Montgomery County), Reading, Ross Township, Royersford, Scranton, Springfield Township, State College, Stroudsburg, Susquehanna Township, Swarthmore, Upper Dublin Township, Upper Merion Township, Upper Moreland, West Chester, West Conshohocken, West

"discrimination based on sexual orientation in private employment, housing[,] and public accommodations." *Id.* These states and municipalities have relied on *Smith* in identifying a "trait[] which cannot be the basis for discrimination." *Romer v. Evans*, 517 U.S. 620, 629 (1996).

This relationship between protection from discrimination and economic growth is well-established. Specifically, "[t]he key to success in the knowledge-based economy is . . . human capital," and "a city's diversity—its level of tolerance for a wide range of people—is key to its success in attracting talented people." Richard Florida & Gary Gates, *Technology and Tolerance: The Importance of Diversity and High Tech Growth*, The Brookings Institution (2002), https://www.brookings.edu/articles /technology-and-tolerance-diversity-and-high-tech-growth/.

As another example, when Amazon was determining where to place its HQ2, one characteristic it sought was "the presence and support of a diverse population." Amazon HQ2 Request for Proposal, https://images-na.ssl-images-amazon.com/images/ G/01/ Anything/test/images/usa/RFP_3._V516043504_.pdf. The ability of local governments to promote themselves as diverse and inclusive would be threatened, however, if religions could seek exemptions from generally applicable neutral laws on Free Exercise grounds and subject any denials to strict scrutiny review.

Eighth, continuing to protect generally applicable neutral laws from objections based on the Free Exercise Clause will allow a local government to protect individual citizens from what the government

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Norriton Township, Whitemarsh Township, Wilkes-Barre, Yardley, and York.

views as harmful. *See* Volokh Br. at 20 ("the Free Exercise Clause cannot be sensibly seen as generally authorizing people to inflict harms on others simply because they feel a religious obligation to do so"). Local governments should retain the ability to protect the rights of their citizens from infringement due to acts attributed to the exercise of religious freedom. As the Georgia Supreme Court stated nearly eighty years ago, echoing this Court's reasoning from sixty-four years before then:

> A person's right to exercise religious freedom, which may be manifested by acts, ceases where it overlaps and transgresses the rights of others. . . . To construe this constitutional right as being unlimited, and to hold as privileged any act if based upon religious belief, would be to make the professed doctrine of religious faith superior to the law of the land, and in effect would permit every citizen to become a law unto himself.

Jones v. City of Moultrie, 27 S.E.2d 39, 42 (Ga. 1943); *see also Smith*, 494 U.S. at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense.") (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

When it comes to the foster care system, allowing discrimination as to participants based on religion can be viewed as a form of harm, whether the discrimination is against same-sex couples, Black Protestant children, or Catholic adults. *See, e.g.*, Emily London and Maggie

Siddiqi, *Religious Liberty Should Do No Harm*, Center for American Progress (April 11, 2019), https://www.americanprogress.org/issues/religion/reports/2019/04/11/468041/religious-liberty-no-harm/ ("On the state level, religious liberty has been used to discriminate in taxpayer-funded child welfare programs such as adoption and foster care services. In response to marriage equality, states have begun to pass laws that allow these child welfare programs to deny services through religious exemptions.").

Local governments that view such discrimination as harm should continue to be shielded, under *Smith*, from constitutional Free Exercise challenges. *See* Volokh Br. at 5 ("The only legitimate ways to finally resolve these controversies [about whether discrimination causes harm], this Court has concluded, is through the political process.").

Finally, *Smith* promotes a value that is both intangible and vitally important to good governance at the local level: the notion that government officials enforce the law neutrally and do not play favorites. "As Thomas Jefferson said, 'The government closest to the people serves the people best.'" *True North: The Principles of Conservatism*, http://www.heritage.org/truenorth. Indeed, "[f]ar more Americans have a favorable opinion of their local government (67%) than of the federal government (35%)." *The Public, the Political System, and American Democracy*, Pew Research Center, (Apr. 26, 2018), https://www.pewresearch.org/politics/2018/04/26/the-public-the-political-system-and-american-democracy/.

The Founders knew "that line-drawing between religions is an enterprise that, once begun, has no logical stopping point." *McCreary Cty, Ky. v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring). Similarly, local governments have no desire to take sides in religious controversies. *See How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars* (May 23, 2019), https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars ("The free exercise of religion is guaranteed only if it applies to all faiths. That can happen only if government does not take sides.").

Overruling *Smith*, and thereby ending its protection of generally applicable neutral laws, would threaten local government's ability to act and be viewed as a fair arbiter. There would be "no logical stopping point" to strict scrutiny review of denials of religions exemptions from generally applicable neutral laws, requiring continual line-drawing by local governments, decisions in favor if some religions, and apparent bias towards others. Of all the problems that the Pandora's box of overruling *Smith* would create, this last one may be the worst of all.

CONCLUSION

The judgment below should be affirmed.

Respectfully Submitted,

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