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 Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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

HOWARD SLUGH
Counsel of Record
2400 Virginia Ave. N.W.
Apt. C619
Washington, D.C. 20037
(202) 930-1857
hslugh@jcrl.org

JOSHUA PIERSON
61 Pierce St., N.E.
Apt. 1126
Washington, D.C. 20002
(434) 227-0256
jpierson179@gmail.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTERESTS OF AMICUS CURIAE[1]

The Jewish Coalition for Religious Liberty is an incorporated group of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. Amicus has an interest in restoring an understanding of the Free Exercise Clause that offers broad protection to religious liberty. That provision is singularly important for the flourishing of minority faiths in America. Over the last thirty years, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), has presented such a substantial obstacle to successfully litigating Free Exercise claims that many religious adherents have not even attempted to defend their rights in court. When such cases have been brought, *Smith* has shield numerous laws that impose substantial burdens on the practice of religious minorities from First Amendment review. Amicus urges this Court to reconsider *Smith* in order to help ensure religious liberty for all Americans.

SUMMARY OF ARGUMENT

Thirty years ago, in *Smith*, this Court announced that it would no longer engage in the allegedly prohibitively difficult task of deciding whether laws that do not specifically target religion nonetheless

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

unconstitutionally interfere with Americans' exercise of religion. The Court admitted that exempting generally applicable laws from Free Exercise review would disproportionately harm religious minorities. *Smith*, 494 U.S. at 876. Unfortunately, that was an astute prediction. The last three decades have demonstrated that *Smith* did indeed "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 637 (2019) (Alito, J., statement respecting denial of *certiorari*). This case represents an opportunity for the Court to restore robust Free Exercise protection to religious minorities.

As *Smith* foresaw, a diminished Free Exercise Clause disproportionately harms "those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 876. This is not surprising. Generally applicable laws are more likely to inadvertently burden lesser known religions than those that enjoy widespread practice and support. Under *Smith*, a hypothetical "generally applicable" law that banned circumcision or required practices incompatible with kosher animal slaughter would escape Free Exercise scrutiny. This is true even though such laws would severely burden some of Judaism's most sacred practices. An interpretation of the Free Exercise Clause that leaves Jewish Americans' religious liberty so vulnerable betrays America's proud history of religious pluralism.

This Court should use the knowledge that it has acquired over the past thirty years to reconsider *Smith*'s conclusion that applying the Free Exercise

Clause to generally applicable laws is more trouble than it is worth. This Court should reconsider that conclusion for two reasons. First, the post-*Smith* evidence demonstrates that a diminished Free Exercise Clause causes religious people to suffer substantial distress. *See*, *e.g.*, *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (discussing the emotional pain caused by deprivations of religious liberty). This burden has fallen heavily on members of minority religious faiths and is likely to continue doing so unless this Court changes course.

Second, this Court now has tangible evidence that it is possible to efficiently adjudicate whether to grant religious exemptions to generally applicable laws. The experience of adjudicating religious liberty claims under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), *see*, *e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), should allay any concerns that such an endeavor is inordinately difficult. With *Smith*'s fears alleviated, and considering the significant harms that opinion has generated, this Court should restore a more robust understanding of the Free Exercise Clause.

Even if this Court were to decline to reconsider *Smith*, it should nevertheless reverse the judgment below. The lower court mistakenly held that, in order to prevail in a Free Exercise challenge, plaintiffs must show that they engaged in the exact same behavior as other groups but were treated more harshly solely because of their faith. *Fulton v. City of Philadelphia*, 922

F.3d 140 (3d Cir. 2019). That holding effectively immunizes *all* laws, other than those that are facially discriminatory, against a Free Exercise challenge. The Third Circuit's rule would immunize a neutrally phrased law that burdened Jewish practice from Free Exercise review unless a Jewish plaintiff could show that some other group engaged in an identical action without government interference—an impossible task with respect to practices only Jews observe. Such a harsh rule is not mandated by *Smith*, and therefore this Court should reverse the decision below even if it chooses not to reconsider *Smith*.

Not only does the Third Circuit's rule expand *Smith*'s already problematic approach beyond all bounds, but it also directly contradicts *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, where this Court held that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." 508 U.S. 520, 534 (1993). This Court should reaffirm *Lukumi*'s holding which is especially important to Jews (and practitioners of other minority faiths) because they are the most likely to face covert discrimination.

As a final alternative, this Court should reverse the decision below because the City never presented Catholic Social Services (CSS) with a "neutral decisionmaker who would give full and fair consideration to [its] religious objection." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1732 (2018). Rather than affording CSS the constitutionally

required "full and fair consideration," the City suggested that CSS misunderstands the teachings of its own faith and that it should "modernize" its practices. Such comments evince disrespect for CSS's beliefs and entitle CSS to a new adjudication. *See id*.

Tolerating Philadelphia's behavior presents particular dangers to the Jewish community. Because Judaism is a faith that contains a great diversity of opinions and practices, Jews are uniquely vulnerable to claims that they are "doing it wrong" when it comes to their religion. This Court should reaffirm that government officials may not make such theological judgments. *See id*. at 1731 ("It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a] conscience-based objection is legitimate or illegitimate"); *In re Anastaplo*, 366 U.S. 82, 86 (1961) (Attempts to "delve into the consistency of [one]'s religious beliefs [are] unjustifiable").

One does not have to be a believer to recognize that faith has played an important role in American life. Faith was essential to the lives of founders, abolitionists, suffragettes, civil rights leaders, Republicans, and Democrats. In George Washington's farewell address, he stressed religion's importance to the Republic that America was creating. He referred to religion as an "indispensable support" to "political prosperity" and

a "great pillar of human happiness."[2] John Adams similarly noted that our Constitution was "made only for a moral and religious people."[3] More recently, President Obama "pray[ed] that we will uphold our obligation to be good stewards of God's creation," and that "we answer Scripture's call to lift up the vulnerable, and to stand up for justice, and ensure that every human being lives in dignity."[4]

Thirty years ago, the *Smith* Court overlooked the importance of religion in American life. It "preferred" to diminish the Free Exercise Clause to a shell of its former self, doing so (by its own admission) at the expense of minority faiths. *Smith*'s "preference" contradicts America's historic dedication to religious pluralism. The past thirty years demonstrate that a better way is possible: This case represents the ideal opportunity to restore the Free Exercise Clause's protection to generally applicable laws that impose burdens on American's faith.

---

[2] Transcript of President George Washington's Farewell Address (1796), Ourdocuments.gov, https://bit.ly/3cNSOBh (last visited May 17, 2020).

[3] From John Adams to Massachusetts Militia, 11 October 1798, Founders Online, https://bit.ly/2WLfOeQ (last visited May 17, 2020).

[4] Simone Leiro, *President Obama: "Faith Is the Great Cure for Fear,"* Feb. 4, 2016, https://bit.ly/2XeF4Jl (last visited May 17, 2020).

I. The Court Should Reconsider *Employment Division v. Smith* and Fully Restore Religious Minorities' Right to the Free Exercise of Religion.

A. *Smith*'s legacy is a diminished Free Exercise Clause that imperils religious minorities the most.

Unsurprisingly, religious minorities have borne the brunt of *Smith*'s holding—*Smith* itself recognized that immunizing generally applicable laws from scrutiny under the Free Exercise Clause "will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 876.

That prediction has proven accurate. *See City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting) ("[L]ower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice."). Cases following *Smith* that involved Jews,[5] Muslims,[6] traditional Christians,[7] Quakers,[8] Native

---

[5] *See, e.g.*, *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite Jewish religious beliefs opposing it).

[6] *United States v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 884 (3d Cir. 1990) (Prohibiting a Muslim substitute teacher from teaching in her religiously-required clothing).

[7] *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278-80 (Alaska 1994) (landlord held in violation of state fair housing law because of religiously-motivated refusal to rent to an unmarried couple).

[8] *United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (compelling

Americans,[9] Hmong,[10] and the Amish,[11] all show that *Smith* left religious people's practices vulnerable to infringement by generally applicable laws.

As one study explained, "the consequences of the *Smith* decision were swift and immediate."[12] In fact, "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*."[13] Additionally, "the percentage of favorable decisions for Free Exercise cases dropped from over 39 percent to less than 29 percent following *Smith*. . . ."[14]

Quakers to enforce IRS levy against two employee-members who refused, on religious grounds, to pay part of their federal taxes).

[9] *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Ind. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (disciplining Texas public school students who refused to cut their hair in conformance with school policy because, according to their religious beliefs, doing so was equivalent to dismemberment).

[10] *Yang v. Sturner*, 750 F. Supp. 558, 559 (D.R.I. 1990) (denying damages to parents of a child who, against the commands of their Hmong faith, had an autopsy performed on him).

[11] *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (rejecting a free-exercise claim for Amish farmer against state requirement that he display a bright orange triangle on his buggy, even with evidence of adequate alternatives).

[12] Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. Church & State 237, 248 (2004).

[13] *Id.* at 242.

[14] *Id.*at 248. Given the precipitous decline in the number of cases, it seems likely that people with weaker claims were dissuaded from pursuing their cases. That makes the decline in success rate—for what were presumably the most promising cases—even more troubling.

As four Justices recently wrote, even thirty years later, religious Americans are dissuaded from litigating Free Exercise claims "due to certain decisions of this Court." *Kennedy*, 139 S.Ct. at 637 (Alito, J., statement respecting denial of *certiorari*).

Smith "drastically cut back on the protection provided by the Free Exercise Clause[15];" as was its inevitable and intended effect. The *Smith* Court acknowledged that, under its new rule, the harms to religious Americans described above were "unavoidable," but claimed that such harms "must be preferred" to the difficulty of subjecting generally applicable laws to Free Exercise review. *Smith*, 494 U.S. at 890.

In the thirty years since *Smith*, the political branches,[16] the states,[17] and this Court[18] have attempted to ameliorate *Smith*'s harsh consequences. However, those efforts have failed to restore the robust Free Exercise protection that existed prior to *Smith*.

---

[15] *Id.*

[16] The Religious Freedom Restoration Act was primarily aimed at mitigating the harms caused by *Smith*. 42 U.S.C.A. § 2000bb (acknowledging that "'Laws neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").

[17] Twenty-one states have passed their own laws similar to the federal Religious *Freedom Restoration Act. Religious Freedom Restoration Act Central*, BecketLaw.org, https://bit.ly/2ygdumx (last visited April 29, 2020).

[18] *See*, *e.g.*, *Lukumi*, 508 U.S. 520 (creating an exception to *Smith* for generally applicable laws motivated by anti-religious sentiment).

See Kennedy, 139 S.Ct. at 637 (Alito, J., statement respecting denial of *certiorari*). This Court's last three decades of experience with RFRA, RLUIPA, and similar state statutes have however produced ample evidence that harms to religious Americans need not be "unavoidable" and that there is no reason to "prefer" such harms to the broad accommodation of religious practices. Considering that experience, and the impact *Smith* has had on members of minority faiths including Judaism, it is time for this Court to abandon *Smith*'s preference.

The Court should abandon its piecemeal attempts to ameliorate the harsh rule adopted in *Smith* and restore Free Exercise review to generally applicable laws. Doing so would mark a return to the original understanding of religious pluralism and liberty on which this country was built.[19]

---

[19] Letter From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790, Founders Online, https://bit.ly/2ZqkLLu (last visited May 17, 2020) ("[T]he Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support. . . . [In this country] every one shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.").

B. Members of minority faiths such as Judaism are the most likely to suffer under *Smith* because they adhere to relatively unknown religious practices that government officials might incidentally burden.

Under *Smith*, the First Amendment offers religious Americans no protection against laws that unintentionally burden religious exercise. *See Smith*, 494 U.S. at 892 (O'Connor, J., concurring). Unfortunately for members of minority religions, legislators are more likely to pass laws which inadvertently burden minority religious practices than more common religious observances. In other words, a government actor is more likely to innocently pass a law that burdens a little-known Jewish practice than to unintentionally prohibit a well-known Christian practice. This happens not necessarily as a result of political actors harboring any sort of animus towards their minority constituents, but rather as a result of lack of familiarity with how these constituents practice their faith.[20]

---

[20] A particularly illuminating example of a government actor lacking awareness of a Jewish tradition occurred during a Fifth Circuit oral argument. One of the panel judges thought a hypothetical law requiring Americans to turn "on a light switch every day" was a prime example of a rule unlikely to substantially burden anyone's religious liberty. *See* Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. April 7, 2015). But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of the prohibition contained in Exodus 35:3. Certainly, this judge did not intend to demean Orthodox Jews or belittle Jewish Sabbath observance. He simply,

Take for example the attempts by some animal rights groups to have courts enjoin the lesser-known Jewish practice of Kapparot. Kapparot is an atonement ritual conducted on the eve of Yom Kippur. Many Jews believe the requirement can be satisfied by donating money to charity, but some Jews interpret Kapparot to require the ceremonial use and slaughter of chickens. Animal rights activists routinely sue Jews to stop this ritual. *See*, *e.g.*, *United Poultry Concerns v. Chabad of Irvine*, 743 F. App'x 130 (9th Cir. 2018).

When seeking injunctive relief against the performance of Kapparot, opponents of the practice do not rely on statutes overtly targeting Judaism, as thankfully this country has largely avoided the scourge of officially sanctioned anti-Semitism. Rather, opponents cite generally applicable laws such as those regulating business practices. *Id.* at 130. Lawmakers did not have Kapparot in mind when they passed these laws; after all, most of them probably have never even heard of the practice. In fact, opponents of Kapparot have cited *Smith* as the reason why Chabad rabbis are not entitled to a religious accommodation to perform the ritual.[21] Under *Smith*, religious adherents cannot even present an argument in court regarding the ways that

---

and understandably, was unaware of how some Jews understand the Commandment to guard the Sabbath.

[21] *United Poultry Concerns v. Chabad of Irvine*, Appellant's Opening Br. at 25. (Nov. 22, 2017) 2017 WL 5663672 (C.A.9).

a generally applicable law burdens their faith or why they should be granted an exemption.[22]

In one instance, a court cited *Smith* as the reason that a Jewish police officer had no Free Exercise right to wear a yarmulke, a traditional Jewish head covering.[23] The police department's ban on head coverings was religiously neutral, and therefore, *Smith* immunized it from Constitutional scrutiny. In 2006, a court determined that a state agency did not have to place an Orthodox woman with developmental disabilities in a "habilitation" program compatible with her faith because "in accordance with *Smith*," the state agency's "decision was religiously neutral."[24] The woman simply wanted to be placed in a facility that would enable her to observe the Sabbath and Kosher laws.[25] Under *Smith*, the state could deny her such basic religious accommodations without facing constitutional scrutiny. In yet another case, a court ruled that a prison could deny a Jewish prisoner access to a prayer shawl, head covering, and prayer book without even having to justify the prohibitions, because the ban on such items

---

[22] *Id.* (bluntly stating that under *Smith*, "[t]he First Amendment does not protect [Chabad's] acts" from generally applicable laws).

[23] *Riback v. Las Vegas Metro. Police Dep't*, No. 2:07CV1152RLHLLRL, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008).

[24] *Shagalow v. State, Dep't of Human Servs.*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006).

[25] *Id.* at 383.

was religiously neutral.[26] This is not to say that these plaintiffs should have necessarily won each of their cases. But, at the very least, the government should have been required to prove that it had a compelling need to impose such significant burdens on Jewish Americans' exercise of their faith. Because of *Smith*, the government faced no such obligation.

To give another example, many Jews understand Jewish law to prohibit wearing a garment made from a mixture of wool and linen.[27] If a public school were to require students to wear uniforms made of wool and linen, that religiously neutral law would impose a substantial burden on Jewish students. Yet, *Smith* would immunize such a rule against Free Exercise review.[28]

There are many other areas of Judaism where a conflict between Jewish practices and a generally applicable law might arise. For instance, San Francisco as well as several European countries has discussed banning circumcision.[29] Belgium bans ritual slaughter,

---

[26] *Aiello v. Matthew*, No. 03-C-0127-C, 2003 WL 23208942, at *2 (W.D. Wis. Apr. 10, 2003).

[27] *Shatnez-Free Clothing*, Chabad.org, goo.gl/RZRcSm (last visited May 17, 2020); Leviticus 19:19; Deuteronomy 22:9-11.

[28] The issue of Shatnez has arisen in the context of prison uniforms, but the court did not reach the merits of the issue. *Smith v. Drawbridge*, No. CIV-16-1135-HE, 2018 WL 3913175, at *4 (W.D. Okla. May 22, 2018), report and recommendation adopted, No. CIV-16-1135-HE, 2018 WL 2966946 (W.D. Okla. June 13, 2018), *aff'd*, 764 F. App'x 812 (10th Cir. 2019).

[29] Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, NYTimes.com, June 4, 2011, https://nyti.ms/2WJmDNM (last visited May 17, 2020)

a process without which meat cannot be kosher.[30] *Smith* would prevent this Court from reviewing such enactments despite the fact that they would create significant burdens for American Jews. If this sounds intolerable, that's because it is, and this Court should remedy that situation by extending Free Exercise protection to generally applicable laws.

C. *Smith*'s unduly narrow understanding of religious liberty harms real people, and its assumptions regarding the difficulties of administering religious exemptions have proven unfounded.

Both of the main considerations that drove *Smith*'s conclusion have been undermined over the last thirty years. *Smith* underestimated the harmful consequences of its holding, and it overestimated the difficulty inherent determining whether to grant religious exemptions to generally applicable laws.

Smith concluded that since the burdens caused by generally applicable laws are merely "incidental," the Free Exercise Clause does not require the government to provide religious exemptions to avoid such burdens. *See* 494 U.S. at 878; *see also City of Boerne*, 521 U.S. at 530-31 ("[T]he persons affected have [not] been burdened any more than other citizens, let alone burdened because of their religious beliefs."). But what *Smith*

---

[30] Milan Schreuer, *Belgium Bans Religious Slaughtering Practices, Drawing Praise and Protest*, NYTimes.com, Jan. 5, 2019, https://nyti.ms/2WK6nMx (last visited May 17, 2020).

considers an "incidental" burden can make it impossible for a religious claimant to engage in practices he considers essential. Craig Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS 149, 159 (1997).

Yang v. Sturner, "one of the saddest cases since *Smith*," demonstrates this point. *See* Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 226 (1993) (citing 750 F. Supp. 558 (D.R.I. 1990)). In *Yang*, a Hmong family brought a Free Exercise challenge to a state law mandating autopsies for accident victims. The family was haunted by the conviction that their son, who had been killed in an automobile accident and subsequently autopsied without his family's consent, would never enter the afterlife due to the autopsy. *Id.* Before *Smith* was decided, the district judge ruled that the forced autopsy violated the family's Free Exercise rights. But *Smith* was decided before the judgment became final, prompting the district court to reverse its prior ruling.

In a moving tribute to the serious harm done to the plaintiffs by a neutral, generally applicable law, the district court concluded:

> It is with deep regret that I have determined that the [*Smith*] case mandates that I recall my prior opinion.
>
> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom

> during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs testimony provided stark support for the depth of the Yangs' grief. Nevertheless, I feel that I would be less than honest if I were to now grant damages in the face of the [*Smith*] decision.

Yang, 750 F. Supp. at 558. Thus, although the court recognized that "[t]he law's application did profoundly impair the Yang's religious freedom[,]" under *Smith*, "this impairment [did not] rise[ ] to a constitutional level." *Id.* at 560. The Yang's' agony is lasting proof that *Smith*'s burden on those with minority religious beliefs can prove staggeringly high.

Many Jews also believe that autopsies are religiously prohibited, and Jewish families have similarly suffered the anguish of failing, given the strictures of *Smith*, to prevent autopsies from being performed on their loved ones. *See*, *e.g.*, *Montgomery v. Cty. of Clinton, Mich.*, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (finding that, because of *Smith*, a Jewish mother could not require the government to demonstrate a compelling need before performing an autopsy on her son); *Thompson v. Robert Wood Johnson Univ. Hosp.*, No. CIV.A. 09-00926 JAP, 2011 WL 2446602, at *8 (D.N.J. June 15, 2011) (performing an autopsy on a Jewish child did not violate

his mother's Free Exercise rights because, even if her "ability to exercise her religious beliefs was disturbed," the government action that did so was religiously neutral).

The other half of the calculation that led to *Smith*'s "preference," the allegedly prohibitive difficulty of applying the Free Exercise Clause to generally applicable laws, has also been upended over the last thirty years. During that time, courts have gained more experience weighing the burdens placed on free exercise rights under statutes like 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-2. These statutes subject laws, including generally applicable ones, to strict scrutiny whenever they impinge on religious freedom. In other words, where RFRA and RLUIPA apply, courts engage in the exact analysis that *Smith* determined would be excessively difficult. Although, as in any other area of law, some RFRA and RLUIPA cases present challenging questions, overall, courts have successfully distinguished between meritorious and frivolous claims.[31] *See*, *e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (unanimously granting a Muslim prisoner a religious exemption from a prison grooming policy); *Burwell*, 573 U.S. at 718 (2014) ("[T]he scope of [RLUIPA] shows

[31] A study of the Tenth Circuit's docket found that, over a five-year period, religious liberty claims made up less than 1% of the cases, and that fewer than half of the plaintiffs obtained any form of relief. *See* Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 380 (2018).

that Congress was confident of the ability of the federal courts to weed out insincere claims."); *United States v. Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010) (finding a claimed religious belief insincere after examining substantial evidence that it was specifically fabricated as a legal defense, including a statement by the defendant that the purpose of the religion was to "legalize marijuana use").

Regardless of whether *Smith*'s calculation was justifiable based on the information before the Court in 1990, that information has changed and so must the calculation.

D. The original meaning of the Free Exercise Clause requires robust protection of religious minorities.

Smith is not faithful to the original meaning of the Free Exercise Clause. Nothing in the original understanding of the Free Exercise Clause compelled the result in *Smith*—nor did *Smith* ever claim otherwise.[32]

Smith runs contrary to extensive precedent, and it does not make a compelling historic case, or indeed any historic case, explaining why it is appropriate to do so.

---

[32] *See*, *e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1116-19 (1990) (analyzing the history of the Free Exercise Clause and criticizing *Smith* for "render[ing] a major reinterpretation of the Free Exercise Clause without even glancing in" the direction the clause's history"); *Id.* at 1152-53 (concluding that the better reading of the Free Exercise clause's history indicates that it should apply to generally applicable laws).

See Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (recognizing that the Free Exercise Clause does apply to burdens arising as "an indirect result of welfare legislation within the State's general competence to enact"); *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

Moreover, reconsidering *Smith* would bring this Court's religious exemption cases back in line with the rest of its Religion Clauses jurisprudence. That body of law increasingly appreciates that subjecting religious liberty to "grand unified theor[ies]," *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2087 (2019) or "rigid formula[s]," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012), undermines religious pluralism. Although *Smith* itself warned about "constitutional anomal[ies]," 494 U.S. at 886, over the last thirty years, it itself has become the very anomaly it sought to avoid. This Court should not perpetuate that anomaly by maintaining a rigid anti-accommodation view in Free Exercise cases while other Religion Clauses cases are governed by the much more sensible requirement of practical accommodation for believers and non-believers alike. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (declining to apply the rigid *Lemon* test and instead looking to "the nature of

the monument and [] our Nation's history" in determining the permissibility of a Ten Commandments display).

II. If This Court Chooses Not to Reconsider *Smith*, it Should Still Reverse the Decision Below Which Misapplied *Smith* by Unduly Restricting the Ways in Which a Religious Adherent Could Prove That a Law is Not Generally Applicable.

The Third Circuit misapplied this Court's First Amendment jurisprudence by holding that under *Smith*, constitutional scrutiny is warranted *only* when two groups who engaged in identical conduct, are treated differently due to their faith. *Fulton*, 922 F.3d at 156.

To prevail under the Third Circuit's view, CSS would have had to show that the City "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs." *Fulton*, 922 F.3d at 156. In other words, the only way that CSS could demonstrate that Philadelphia's law was not religiously neutral was by showing that other organizations with different or no religious beliefs which engaged in the same practices were not affected by the City's ban. Under this view, laws burdening practices particular to one religion—such as Judaism's prohibitions on wearing mixed fabrics or operating electrical equipment on the Sabbath—will necessarily

be considered "generally applicable" and therefore impervious to a Free Exercise challenge. After all, if no other group objects to wearing clothes made of wool and linen for any reason, then there is no opportunity for Jewish litigants to demonstrate the disparate treatment as required by the Third Circuit.

This Court has never endorsed such a blinkered view of religious liberty or of the government's obligations to accommodate it. Even if this Court chooses not to overrule *Smith*, it should reaffirm that, even under *Smith*, a plaintiff need not marshal evidence of explicit religious animus in order to prevail on a Free Exercise claim. The Third Circuit's approach is uniquely harmful to religious Jews who have faced a history of anti-Semitism both overt and covert.

Consider, for example, the case of the *eruv* in Mahwah, New Jersey. On the Sabbath, religious Jews are prohibited from carrying any objects outside of their home—even mundane items such as keys or baby supplies. An *eruv* is a ceremonial wire that many religious Jews set up around their neighborhoods because they believe that doing so allows them to create a zone in which carrying is permissible. Unfortunately, some people who would prefer to keep religious Jews from moving into their neighborhoods, realized that laws which prohibit the placing of a string around their community are an effective tool to accomplish their nefarious ends. This is what happened in Mahwah. The City Council proposed a "facially neutral" and "generally applicable" ordinance that would expand existing

regulations pertaining to placing signs on utility poles to prohibit affixing any "other matter."[33]

While the language of the proposed statute might have been generally applicable, its effects were not. The ordinance would have imposed a substantial burden on Jews' observance of their faith. In the absence of an *eruv*, it is difficult, and in some cases impossible, to leave one's home on the Sabbath—even to visit a Synagogue for prayer services. On the other hand, no group other than Orthodox Jews would likely ever have a reason or desire to place a wire on such poles. Perversely, it is precisely the fact that the statute only harmed Jewish people that would protect it from Free Exercise review under the Third Circuit's reasoning. Since only Jews have a reason to hang wires on utility poles, no comparison group engaging in the same behavior is likely to exist, and this ordinance would easily survive a Free Exercise challenge in the Third Circuit. Such a test effectively neuters the First Amendment and conflicts with this Court's precedents.

---

[33] The Mahwah case illustrates why the Third Circuit's view not only overreads *Smith*, but also runs contrary to *Lukumi*. It was generally understood that the sole purpose for this ordinance was to prevent the building of an *eruv*. When the issue of *eruv* was discussed at a session of the City Council, proponents of the ban described Orthodox Jews as a "cult" and "an infection." Tom Nobile, Mahwah Council repeals controversial parks ban, https://njersy.co/3cxbHZe (Dec. 28, 2017). Yet, the Third Circuit test under which the existence of a "control" group that engages in an identical practice that the religious group wishes to engage in but remains unpunished is a prerequisite for a Free Exercise challenge would ignore such comments.

Unlike the Third Circuit, this Court recognizes that it is sufficient to show that similar—rather than *identical*—conduct was subjected to different treatment. In *Lukumi*, this Court explained that a law cannot be deemed "generally applicable" when it exempts secular conduct that undermines the government's interests "in a similar or greater degree than [religious conduct] does." *Lukumi*, 508 U.S. at 543. The question is not whether the exempted secular behavior is identical to the behavior engaged in by the religious adherents; rather, the inquiry is whether the secular behavior (however dissimilar it may be from its religious counterpart) has a similar effect on the government's professed interest. Thus, a law that prohibited building an *eruv* because it allegedly detracted from an unobstructed skyline view, but allowed for construction of billboards that would obstruct the same view to "a similar or greater degree" would not, under *Lukumi*, be considered to be "generally applicable." However, under the Third Circuit's opinion below, that same law would avoid Free Exercise review. This Court should not allow a rule that conflicts with its precedents, and leads to such unjust results, to stand.

Furthermore, on multiple occasions, this Court has recognized that religious adherents could rely on factors other than differential treatment to prove that a law is not generally applicable. In *Masterpiece Cakeshop*, just as in *Lukumi*, the Court held that "even 'subtle departures from neutrality' on matters of religion" are prohibited by the Free Exercise Clause.

138 S.Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534). The Court concluded that, when determining whether a law is "generally applicable," courts should consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." *Id.* This Court's test is a much more robust and searching inquiry than the test applied by the court below. Though still less preferable than replacing *Smith* with a more protective Free Exercise test, the faithful application of this Court's existing precedents would have protected the Jews of Mahwah from a proposed ordinance motivated by anti-Semitism. The same cannot be said about the test articulated by the Third Circuit in this case.

Any test that considers a law like the proposed Mahwah *eruv* ban to be "religiously neutral" is seriously flawed and should not be endorsed by this Court. The Court should instead reaffirm that lower courts must make a holistic assessment of a government actor's neutrality to religion.

III. The Court Below Erred by Allowing the City to Second-Guess CSS's Understanding of its own Faith.

A. Religious objectors are entitled to have government decisions makers give their sincere religious objections full and fair consideration.

A religious adherent is "entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." *Masterpiece Cakeshop*, 138 S.Ct. at 1732. The City of Philadelphia denied CSS such consideration by second-guessing and denigrating its religious beliefs. This behavior alone should have been a sufficient basis to set aside the City's decision to exclude CSS from its foster care program.

When discussing CSS's status, the Commissioner of Human Services told CSS "that it would be great if CSS could follow the teachings of Pope Francis." *Fulton*, 922 F.3d at 148. Such a quip evinces disrespect for CSS's understanding of its own faith, thus violating *Masterpiece Cakeshop*'s dictate. The "government has no role in deciding or even suggesting whether the religious ground for [plaintiff's] conscience-based objection is legitimate or illegitimate," and the Commissioner's jibe at CSS shows that the City was not "neutral and tolerant of [. . .] religious

beliefs," as *Masterpiece Cakeshop* requires.[34] 138 S.Ct. at 1731.

The record also contains other statements that are even more troubling. First, the Commissioner of Human Services made a statement equating CSS's views on same-sex marriage with a view that women and African-Americans should not have the same rights as white men. *Fulton*, 922 F.3d at 148. Directly equating CSS's sincere religious belief with bigoted discrimination, can hardly constitute the required "neutral and respectful consideration." *Masterpiece Cakeshop*, 138 S.Ct. at 1729.

Finally, when the City Council passed a resolution requiring the investigation of social service contractors' policies regarding LGBTQ applicants, it noted that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the *guise* of religious freedom." *Fulton*, 922 F.3d at 149 (emphasis added). Just as in *Masterpiece*, this language unconstitutionally "disparage[s]" religion "by characterizing it as merely rhetorical—something insubstantial or even insincere." *Id.* And this statement was not idle chatter—CSS's contract was terminated as a direct result of this resolution.

---

[34] It is entirely irrelevant that the Commissioner was "Catholic and Jesuit-educated," for no matter how well-versed in theology a government official may be, it is a "fixed star in our constitutional constellation [that] that no official, high or petty, can prescribe what shall be orthodox in [matters of] religion. . . ." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

B. Allowing Government Decisionmakers to Substitute Their Understandings for Those of Religious Objectors is Particularly Dangerous to Jews because Judaism Contains a Unique Diversity of Acceptable Beliefs and Practices.

The Third Circuit's disregard for the principles set forth in *Masterpiece Cakeshop* poses a particular risk to Jews. The prohibition against government actors directing a "proper" understanding of religion, *see Barnette*, 319 U.S. at 642, is particularly important to Judaism because Judaism does not have a central authority that settles doctrinal questions. Different groups within Judaism (Sephardic, Ashkenazi, and Yemenite, for example) maintain different traditions—none of them can speak for the "true Judaism." The First Amendment prohibits the government from treading where even religious authorities often do not dare set foot. If the Third Circuit's rule prevails, Jews who find themselves on the wrong side of the government's definition of "true Judaism" will, like CSS, be unable to exercise their faith without risking the government's wrath. Such a result is untenable in a free society.

CONCLUSION

This Court should reconsider *Smith* and adopt a Free Exercise test most conducive to protecting religious minorities, but even if it does not do so, it should

reverse the decision below for any of the reasons cited above.

Respectfully submitted,

HOWARD SLUGH
Counsel of Record
2400 Virginia Ave. N.W.
Apt. C619
Washington, D.C. 20037
(202) 930-1857
hslugh@jcrl.org

JOSHUA PIERSON
61 Pierce St., N.E.
Apt. 1126
Washington, D.C. 20002
(434) 227-0256
jpierson179@gmail.com

Counsel for Amicus Curiae

May 2020