No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE THE ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Robertson Center for Constitutional Law ("the Center") is an academic center within the Regent University School of Law. Established in 2020, the Center advances first principles in constitutional law, including freedom of speech, separation of powers, and religious liberty. We advocate to protect rights secured in the United States Constitution and work to restore enumerated rights that have been eroded or lost over time.

Chief among those is the free exercise of religion. Like James Madison, we view conscience as "the most sacred of all property," and the free exercise of religion as "a natural and unalienable right." James Madison, *Property* (Mar. 29, 1792), *in* 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1986).

In the Center's view, *Employment Division v. Smith* is inconsistent with the text, history, and purpose of the Free Exercise Clause. Freedom of conscience has suffered as a result of *Smith*'s sweeping transformation of free-exercise rights. The Free Exercise Clause exists to protect individuals and organizations like Sharonell Fulton, Toni Lynn Simms-Busch, and Catholic Social Services ("CSS").

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No such monetary contributions were made by anyone other than amici and their counsel.

This case illustrates the dysfunction wrought by *Smith* on our free exercise jurisprudence.

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* The American Republic: Primary Sources 327, 327 (Bruce Frohnen ed., 2002). The First Amendment elevates the free exercise of religion above "the vicissitudes of political controversy," and places it "beyond the reach of majorities and officials." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Like the other guarantees of the Bill of Rights, it "may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Ibid.* Consonant with that wisdom, this Court had subjected to heightened scrutiny any law that substantially burdened religious exercise. This understanding enabled individuals of different backgrounds and faiths to live and work together in a pluralistic society.

Employment Division v. Smith, 494 U.S. 872 (1990), upset that balance. It uprooted precedent, ignored the fundamental logic of the Free Exercise Clause, and transformed religious exercise into a second-class First Amendment right.

When decided, *Smith* repudiated history. Since then, history has repudiated *Smith*. Congress and the President rejected it. Religious Freedom Restoration

Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993); *see also* Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000). Thirty-two states have rejected it, twenty-one by legislation and eleven by judicial decision.[2] Legal scholars have rejected it. Lower courts have been confused by it. And the key assumption on which *Smith* was premised—that the failure to impose the test adopted in *Smith* would "court[ ] anarchy"—has proven unfounded.

Stare decisis does not counsel preserving *Smith*. With the benefit of hindsight, we know *Smith* erred both as a matter of constitutional law and in its predictions about the future. It scarcely considered the text and history of the Free Exercise Clause. Decades of experience with federal and state RFRAs have proven the workability of the *Sherbert-Yoder* framework. All the while, lower courts have struggled to apply *Smith* consistently. Given the widespread criticism—and outright rejection—of *Smith* from so many quarters, reliance interests are particularly, perhaps singularly, weak. For these reasons, *Smith* should find no refuge in *stare decisis*.

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[2] The cases interpreting state free exercise clauses to require heightened scrutiny post-*Smith* are catalogued in Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 n.22 (2014). Most of the state RFRA statutes are catalogued in that same article. *Id.* at 845 n.26. Arkansas and Indiana passed RFRA statutes after Professor Laycock's article was published. Ark. Code Ann. §§ 16-123-401 to 16-123-407 (2020); Ind. Code §§ 34-13-9-0.7 to 34-13-9-11 (2019).

ARGUMENT

I. *Smith* Was Wrong From The Moment It Was Decided.

A. *Smith* Repudiated *Sherbert* And Reverted To The Discredited Logic Of *Gobitis*.

Smith hatched from this Court's decision in *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940). *Gobitis* upheld a law compelling school children to salute the American flag and recite the Pledge of Allegiance. The Gobitis children, Jehovah's Witnesses, were expelled from school for refusing to participate. But because the law was of "general scope [and] not directed against doctrinal loyalties of particular sects," the Court upheld it. 310 U.S. at 594.

If the Gobitis children and other religious minorities wished to find an accommodation, the Court said they should lobby rather than litigate. "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." *Id.* at 600.

The Court overruled *Gobitis* only three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In particular, *Barnette* took exception to *Gobitis*'s conclusion that this Court was not competent to second-guess legislative resolution of First Amendment issues.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, *to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts*. . . . We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 638, 640 (emphasis added).

While *Barnette* is widely celebrated today, history has relegated *Gobitis* to the anticanon. *E.g.*, John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*, *in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 191, 199 (Sanford Levinson ed. 1995) (mentioning *Gobitis* alongside *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Korematsu v. United States*, 323 U.S. 214 (1944), and *In re Yamashita*, 327 U.S. 1 (1946)).

After *Barnette*, the idea that the Free Exercise Clause protects against only overt discrimination fell largely out of favor. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (holding that "[t]he fact that the [challenged] ordinance is 'nondiscriminatory' is immaterial"); *Martin v. City of Struthers*, 319 U.S. 141 (1943). Ultimately, in *Sherbert*, this Court held that the Free Exercise Clause required exemptions from any law that

substantially burdened an individual's religious exercise unless that law was narrowly tailored to serve a compelling state interest. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Nine years later, that standard was reaffirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The *Sherbert-Yoder* test stood for more than a quarter century. *E.g.*, *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). But in 1990, *Smith* abruptly reanimated the *Gobitis* standard that had lain dormant for nearly fifty years.

B. *Smith* Abandoned Settled Law And Attempted To Craft A Pragmatic Solution.

In *Smith*, the Court concluded that burdens on religious exercise do not excuse individuals from obeying a neutral and generally applicable law. 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594–95). Both parties in *Smith* focused their arguments on the *Sherbert-Yoder* test and how the Court should apply it to the facts. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571–72 (1973) (Souter, J., concurring) ("[N]either party squarely addressed the proposition the Court was to embrace . . . .").

Smith declared that it would "court[ ] anarchy" to continue to apply the *Sherbert-Yoder* test. *Id.* at 888. The majority found it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of

religious practice." *Id.* at 889 n.5. It predicted that a regime of judicial exemptions would make functional government impossible. *See id.* at 890 (declaring that exemptions would make "each conscience . . . a law unto itself").

Channeling *Gobitis*, *Smith* left minority religious groups to fend for themselves in the legislature. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Ibid.*

But this promised to be a fool's errand. Indeed, *Smith* itself prophetically observed: The "unavoidable consequence of democratic government" is "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Ibid.*

Four justices resisted *Smith*'s revival of *Gobitis*. Justice O'Connor, concurring in the result, wrote, "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901 (O'Connor, J., concurring in the judgment). The three dissenting justices were more direct: *Smith* was "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

C. *Smith* Met Widespread And Immediate Rebuke.

Smith "produced a firestorm of criticism." Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 Neb. L. Rev. 795, 814 (2006). A broad coalition of religious communities and civil liberties organizations pushed for *Smith* to be reheard. *Ibid.* When that failed, the coalition petitioned Congress to overturn *Smith* by statute. *Id.* at 815. That effort succeeded three years later. In 1993, the Religious Freedom Restoration Act passed the Senate by a vote of 97 to 3 and had "such broad support it was adopted on a voice vote in the House." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993).

When signing that measure into law, President Clinton noted how "hesitantly and infrequently" Congress has acted to reverse a decision of this Court. *Ibid.* "But this is an issue in which that extraordinary measure was clearly called for."[3] *Ibid.* President Clinton explained:

> [T]his act reverses the Supreme Court's decision [in *Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am

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[3] Congress's effort to fully reverse *Smith* was limited by this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress nevertheless stayed the course and passed RLUIPA in 2000 to restore the *Sherbert-Yoder* test nationally in narrow contexts within the ambit of its Article I power. Pub. L. No. 106-274, 114 Stat. 803 (2000).

> convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

Ibid.

Justices of the Court, past and present, have repeatedly suggested revisiting *Smith*. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (*Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided . . . ."); *id.* at 544–45, 565 (O'Connor, J., joined by Breyer, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith* . . . ."); *Lukumi*, 508 U.S. at 559 (1993) (Souter, J., concurring) ("[I]n a case presenting the issue, the Court should re-examine the rule *Smith* declared."); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters.").

Nevertheless, *Smith*'s standards of neutrality and general applicability live on. This Court should revisit *Smith* and reject the *Gobitis* principles that have politicized and harmed religious liberty in our society.

II. *Stare Decisis* Does Not Counsel This Court To Preserve *Smith*.

Stare decisis is not "an inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)

(quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)) (internal quotation marks omitted), or a "mechanical formula of adherence to the latest decision," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). It is "a principle of policy." *Ibid.* This policy is "weakest" when reevaluating constitutional decisions "because a mistaken judicial interpretation of that supreme law is often 'practically impossible' to correct through other means." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Payne*, 501 U.S. at 828). "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one)." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted) (quoting *Barnette*, 319 U.S. at 642).

Between 1810 and 2019, the Court overruled more than two hundred of its decisions, in whole or in part.[4] This Court has always been especially willing to reassess precedents that limit freedoms guaranteed by the Constitution. *E.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Hurst v. Florida*, 136 S. Ct. 616 (2016).

For much of our history, when it came to precedent, "The [C]ourt bow[ed] to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so

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[4] *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, Cong. Research Serv. (last visited May 16, 2020), https://constitution.congress.gov/resources/decisions-overruled/.

fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting). Indeed, in *Barnette*, the Court directly confronted the wrong-headed premises of *Gobitis* and overruled it without a multi-factor analysis or handwringing. 319 U.S. at 636–42.

For better or worse, times have changed. Today, reversing a prior case requires a "special justification." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Factors related to the justification for revisiting a precedent include the quality of the case's reasoning, its consistency with related decisions, the workability of the case's rule, factual and legal developments since the case was decided, and reliance interests related to the rule. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478–79 (2018); *see also Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) (adding "the age of the precedent" to these factors); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1505–06 (2019) (Breyer, J., dissenting) (applying these factors to show a lack of a special justification for overruling a prior case). These factors "fold into three broad considerations that . . . can help guide the [*stare decisis*] inquiry": (1) whether "the prior decision . . . [is] grievously or egregiously wrong[;]" (2) whether "the prior decision [has] caused significant negative jurisprudential or real-world consequences[;]" and (3) whether "overruling the prior decision [would] unduly upset reliance interests." *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring in part).

Overwhelmingly, these factors point toward overruling *Smith*.

A. *Smith* Is Grievously Wrong And Should Be Reversed.

"*Smith* is demonstrably wrong." *City of Boerne*, 521 U.S. at 548 (O'Connor, J., joined by Breyer, J., dissenting). Its treatment of the text of the Free Exercise Clause is "strange and unconvincing." Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990). Its failure to consider the historical context in which the Free Exercise Clause emerged is puzzling. *Id.* at 1116–17. Even *Smith* apologists concede that the opinion "exhibits only a shallow understanding of free exercise jurisprudence" with a "use of precedent [that] borders on fiction." William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991).

Like *Gobitis*, *Smith* was wrong when decided. But in the years since then, it has become even more apparent that it sits at odds with the text, history, and precedents of the Free Exercise Clause.

1. *Smith* Gave Passing Attention To The Text Of The Free Exercise Clause.

"Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. These words shield religious conduct from governmental interference. They " 'give[ ] special protection to the exercise of religion,' specifying an activity and then flatly protecting it against government prohibition." *Lukumi*, 508 U.S. at 574 (Souter, J., concurring) (quoting *Thomas*, 450 U.S. at 713). The right to religious exercise is thus an affirmative right, requiring Congress to leave untouched religious

practices that do not pose a direct and intolerable threat to public safety and order.

The text "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); *see also Lukumi*, 508 U.S. at 557 (Scalia, J., concurring) ("The terms 'neutrality' and 'general applicability' are not to be found within the First Amendment itself . . . ."). A shield against overt religious discrimination may be secured to all people of faith by the Equal Protection and Due Process Clauses. But the First Amendment is different. Its liberties "occupy a preferred position" in our nation, and the right to exercise them "lies at the foundation of free government by free men." *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)).

For that reason, even modest encroachments on the First Amendment's guarantees are held to heightened scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (describing the test for time, place, or manner restrictions on speech under the First Amendment); *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (explaining that the test for time, place, or manner restrictions on speech "demand[s] a close fit between ends and means"). The First Amendment affords no less protection to the free exercise of religion.

Smith eliminated heightened scrutiny for claims made under the Free Exercise Clause. It did so without meaningfully confronting the constitutional text.

Smith's textual analysis began by restating the petitioners' argument that the Free Exercise Clause forbids the government from "requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." 494 U.S. at 878. That interpretation squares naturally with the requirements of the Constitution. The First Amendment protects against laws that "prohibit" or prevent religious conduct, not merely laws that "discriminate against" such conduct.

But the majority rejected that argument out of hand. It simply declared that it "d[id] not think the words *must* be given that meaning." *Ibid.* (emphasis added). With that, the majority summarily concluded that its own "permissible reading" of the Free Exercise Clause should win the day. *Ibid.* *Smith* said little else about the text.

Indeed, the *Smith* majority essentially admitted that its outcome is at odds with the text of the Free Exercise Clause. The majority conceded that religiously motivated conduct is the "exercise of religion." *Id.* at 877–78. It further conceded that the plaintiffs' religiously motivated conduct was "prohibited under Oregon law." *Id.* at 890. But how, as a textual matter, a law prohibiting plaintiffs' exercise of religion was not a "law . . . prohibiting the free exercise [of religion]" was never explained.

2. *Smith* Ignored The History Of Colonial Religious Liberty Protections.

The Free Exercise Clause's history, like its text, undercuts *Smith*. "[C]ontrary to *Smith*[,] the Framers did not intend simply to prevent the Government from adopting laws that discriminated against religion." *City of Boerne*, 521 U.S. at 550 (O'Connor, J., dissenting). Rather, historical evidence confirms that the clause safeguards an affirmative right to religious exercise. This evidence provides "powerful reason to interpret the [Free Exercise] Clause to accord with its natural reading." *Lukumi*, 508 U.S. at 576 (Souter, J., concurring).

Other scholars have thoroughly analyzed the theory, text, and structure of colonial and state religious liberty protections. *See generally* W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DePaul L. Rev. 71, 79–85 (1992); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421–73 (1990). But to take just one example, the Massachusetts Constitution of 1780 and its failed predecessor of 1778 offer insight into how the founding generation viewed religious freedom.

State constitutional free exercise protections "are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty." *City of Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting); *cf. District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (looking to "analogous arms-bearing rights in state constitutions" for interpretive clues regarding the

Second Amendment and rejecting interpretation that would "treat the Federal Second Amendment as an odd outlier"). The rejected Massachusetts Constitution of 1778 contained a restrictive view of religious freedom. Article XXXIV of the proposed constitution read: "The free exercise and enjoyment of Religious profession and worship shall forever be *allowed to every denomination of protestants within this State*." *The Constitution of 1778*, *in* The Revolution in America 1754–1788: Documents and Commentaries 435, 445 (J.R. Pole ed., 1970) (emphasis added).

In the *Essex Result*, delegates from Essex County objected to the proposed 1778 constitution, calling its free exercise provision "exceptionable, . . . because the free exercise and enjoyment of religious worship is there said to be *allowed* to all the protestants in the State, when in fact, that free exercise and enjoyment is the *natural and uncontroulable right of every member of the State*." *The Essex Result*, *in* 1 The Founders' Constitution 112, 113, (Philip B. Kurland & Ralph Lerner eds., 1986) (second emphasis added).

The *Essex Result*'s description of religious exercise as a "natural and uncontroulable right" of all people was widely accepted in the founding era. The Massachusetts Constitution of 1780, drafted by John Adams, incorporated the view of the Essex County delegates:

> [N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for

> his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Mass. Const. art. II. On its face, this formulation evinces an affirmative, general right to free religious exercise while carving out exceptions where the state may regulate.

Massachusetts was no outlier. Many other post-Revolution state constitutions contained free exercise clauses with similar text and structure. *See City of Boerne*, 521 U.S. at 553–54 (O'Connor, J., joined by Breyer, J., dissenting) (looking at similar protections in the constitutions of New York, New Hampshire, Maryland, and Georgia and the Northwest Ordinance). This language "strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice." *Id.* at 554.

That interpretation is consistent with the prevailing view of the founding era—expressed by the Essex County delegates, among others—that religious liberty was an unalienable right. James Madison, "the leading architect of the religion clauses of the First Amendment," *Flast v. Cohen*, 392 U.S. 83, 103 (1968), declared that one's duty to act according to the dictates of one's faith "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance against Religious Assessments*, *in* The American Republic: Primary Sources at 327.

Consistent with this philosophy, the founding generation placed unmistakably strong protections of religious liberty in the First Amendment. "Words could not well express in a fuller or more forcible manner the understanding of the Convention, that the liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States." James Madison, *Report on the Virginia Resolutions* (Jan. 1800), *in* 5 The Founders' Constitution 141, 146.

The view of religious exercise as an unalienable right cannot be squared with *Smith* and *Gobitis*. The protection of a duty "precedent . . . to the claims of Civil Society" must not be subject to the whims of the political process.

3. *Smith* Departed From This Court's Free Exercise And First Amendment Jurisprudence.

Smith also conflicts with this Court's First Amendment jurisprudence. *Smith*'s resuscitation of *Gobitis* placed free exercise claims in a second-class position relative to other First Amendment rights. *Cf. Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) (noting that an analysis "indistinguishable from rational-basis review" reveals a "general failure to afford the Second Amendment the respect due an enumerated constitutional right").

"*Smith* largely repudiated the method of analysis used in" *Sherbert* and *Yoder*. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). But while *Smith* rejected the *Sherbert-Yoder* test in favor of its nondiscrimination

standard, it did not explicitly overrule *Sherbert* or its progeny. It merely attempted to distinguish earlier free exercise cases by placing them into two categories.

In the first category, *Smith* placed "hybrid rights" cases which "involved . . . the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. Why *Smith* itself did not qualify as a hybrid free exercise-free speech case, the majority never explained.

In the second category of free exercise cases, the Court placed its unemployment benefits cases in which "individualized governmental assessment[s] of the reasons for the relevant conduct" must be made. *Id.* at 883–84. In this way, the majority cabined *Sherbert* and its progeny to a narrow class of cases. But why the hypothetical criminal trial at the heart of *Smith* is not an "individualized governmental assessment" went unexplained.

After distinguishing decades of precedent, the Court concluded that it had "*never* held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." *Id.* at 878–79 (emphasis added). The Court attempted to establish a nuanced view of Free Exercise Clause claims: laws regulating religious exercise "as such" are "always exclude[d]," *id.* at 877, laws directly targeting religious conduct, which "would doubtless be unconstitutional," *ibid.*, laws that implicate more than one constitutional right, which are "bar[red]" by the First Amendment, *id.* at 880, and laws establishing standards for "unemployment compensation," which are occasionally subject to

strict scrutiny, *id.* at 883. The majority's attempts to distinguish, rather than overrule, cases created "a free-exercise jurisprudence in tension with itself." *Lukumi*, 508 U.S. at 564 (Souter, J., concurring).

The cases *Smith* relied on were dubious, and "their subsequent treatment by the Court would seem to require rejection of the *Smith* rule." *Id.* at 569. For instance, *Gobitis* is the leading case cited by *Smith* for the rule that neutral laws of general applicability do not offend the Free Exercise Clause. 494 U.S. at 879. But Justice Scalia would later acknowledge that *Gobitis* was an erroneous decision that had been overturned by *Barnette*. *Wis. Right to Life*, 551 U.S. at 500–01 (Scalia, J., concurring in part and concurring in the judgment). *Smith* found further support for its rule in *Reynolds v. United States*, 98 U.S. 145 (1897), a case that relied on the discredited theory that the Free Exercise Clause protects only religious beliefs, not religious conduct. 98 U.S. at 166–67. To its credit, *Smith* explicitly disavowed that theory, 494 U.S. at 877–78, despite relying on the rationale that followed from that theory, *id.* at 879.

Smith also departs from the broader body of First Amendment jurisprudence. *Smith* claimed that granting "a private right to ignore generally applicable laws" would result in "a constitutional anomaly." *Id.* at 886. But in granting as-applied challenges in other First Amendment contexts, this Court has provided the same type of exemption that *Smith* found to be untenable under the Free Exercise Clause. *See generally Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (applying the ministerial exception required by the Free Exercise and Establishment Clauses to an

employment discrimination claim); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (granting the Boy Scouts of America an exemption from state public accommodation laws that, while not facially invalid, conflicted with the Scouts' freedom of expressive association); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 558 (1995) (granting, on First Amendment grounds, an exemption from a statute that did "not, on its face, target speech or discriminate on the basis of its content").

Perhaps this all could have been avoided if the *Smith* Court had received the benefit of briefing and argument on the issue it decided. But the parties in *Smith* focused on the *Sherbert-Yoder* test and how the Court should have applied it to the facts of the case, with "neither party squarely address[ing] the proposition the Court was to embrace." *Lukumi*, 508 U.S. at 571–72 (Souter, J., concurring); *see also* Jacob, 84 Neb. L. Rev. at 815 (noting that neither the parties nor any amicus had addressed "the question of whether [*Sherbert*] should be jettisoned as the appropriate constitutional test for free exercise cases"). "[A] constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument." *Lukumi*, 508 U.S. at 572 (Souter, J., concurring) (citing *Ladner v. United States*, 358 U.S. 169, 173 (1958)).

In sum, whether one measures *Smith* against the text and history of the Free Exercise Clause or against this Court's cases interpreting the Free Exercise Clause, *Smith* is wrong—grievously so.

B. *Smith* Has Caused Significant Negative Jurisprudential And Real-World Consequences.

It would be one thing if *Smith*, though decided incorrectly, had created a standard of judging free exercise claims that was predictable and easy to administer. It didn't. *Smith* has created a "deep and wide circuit split" in free exercise jurisprudence. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 15 (2016). In contrast to *Smith*, state and federal RFRA laws have shown accommodation regimes to be effective and workable. Finally, *Smith*'s disfavored treatment of religious liberties has inflamed tensions between religious and secular groups as this Court has expanded its view of individual rights.

1. Lower Courts Have Struggled To Apply *Smith* Consistently.

The difficulty of administering judicial accommodations to laws that encroach on religious exercise concerned the majority in *Smith*. It expected that such a regime would "court[ ] anarchy." 494 U.S. at 888. "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

Smith's supposed virtue was easy administrability. No need for "individualized governmental assessment." *Id.* at 884. No need for courts to "weigh the social importance of all laws

against the centrality of all religious beliefs." *Id.* at 890. *Smith* gave us a bright line.

Or so it seemed. In practice, "neutrality" and "general applicability" have been difficult, if not impossible, to define consistently. This Court has said that a law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. It has said that laws that are underinclusive in pursuit of the purported state interest might not be generally applicable, *see id.* at 543–45, though the Court has not "define[d] with precision the standard used to evaluate whether a prohibition is of general application," *id.* at 543; *see also id.* at 557 (Scalia, J., concurring in part and concurring in the judgment) ("If it were necessary to make a clear distinction between [neutrality and general applicability], I would draw a line somewhat different from the Court's.").

Defining "general applicability" has proven elusive. In *Lukumi*, this Court looked to the purported interest behind the law restricting religious conduct and then compared it to analogous secular conduct left unregulated. *Id.* at 544–45 (majority opinion). This opens the door for courts to consider a range of secular activities in relation to the government's proffered interest in regulating the religious behavior in question. *See ibid.* (analyzing restaurant waste as conduct analogous to religious animal sacrifices because both threaten public health).

This raises additional questions that courts have struggled to answer consistently. "[H]ow much

analogous secular conduct can be left unregulated before a law ceases to be generally applicable? Are some exceptions more acceptable, or more troublesome, than others?" Laycock & Collis, 95 Neb. L. Rev. at 11. What has emerged is not the bright-line rule that the *Smith* majority likely envisioned, but rather a balancing test of the sort it sought to avoid.

Lower courts are understandably divided on when a law violates the principle of general applicability under *Smith*. *Id.* at 15. On one side of the split, some circuits have considered a range of evidence to prove that a law is not neutral or generally applicable. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012) (holding that a policy is not neutral and generally applicable because it "permit[ted] secular exemptions but not religious ones"); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (looking at history to find evidence of intent to discriminate). Other circuits interpret *Smith* more narrowly, holding that laws are neutral and generally applicable so long as they prohibit "the same conduct for all, regardless of motivation." *Stormans, Inc. v. Wiseman*, 794 F.3d 1064, 1077 (9th Cir. 2015).

The effect? Religious exercise receives different protections in different jurisdictions governed by the same Constitution. Unlike the familiar levels of scrutiny routinely applied by federal and state courts under the First and Fourteenth Amendments, *Smith*'s standards of neutrality and general applicability are anomalous and chimerical. The resulting circuit split underscores how *Smith* has failed to achieve its primary objective.

2. Federal And State Measures Enacted In *Smith*'s Wake Have Discredited The Prediction On Which *Smith* Was Premised.

In the three decades since *Smith*, Congress and twenty-one state legislatures have statutorily restored some form of heightened scrutiny for laws that substantially burden religious conduct. And at least fourteen state courts have interpreted state constitutional provisions to require heightened scrutiny for laws burdening religious conduct.[5] These developments demonstrate that, contrary to *Smith*'s fears, judicial-accommodation regimes are perfectly feasible.

Smith concluded with a sentiment eerily reminiscent of *Gobitis*'s parting remark: "leaving accommodation to the political process" is "preferred to a system in which" the Courts must decide whether accommodation is required. *Smith*, 494 U.S. at 890; *Gobitis*, 310 U.S. at 600. This slight treatment of religious freedom evoked a sharp popular response. In the wake of *Smith*, "a broad coalition of Americans came together . . . across ideological and religious lines" to petition Congress. 2 Pub. Papers at 2000. Those Americans did not seek accommodations; they sought to legislatively overturn *Smith*. *Ibid.*

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[5] Three states—Indiana, Kansas, and Mississippi—passed legislation after their courts imposed heightened scrutiny under their respective constitutions. *See* Ind. Code §§ 34-13-9-0.7 to 34-13-9-11 (2019); Laycock, 2014 U. Ill. L. Rev. at 844 n.22.

Those efforts succeeded in 1993 when Congress passed the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb through 2000bb–4). Congress found 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) (2018). Accordingly, Congress sought "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1). Thirty-two states have also adopted some form of heightened scrutiny review, either by statute or by interpreting state constitutional provisions to require heightened scrutiny for laws burdening religious conduct.

Contrary to the "anarchy" *Smith* feared, state and federal courts have preserved order while ably vindicating religious liberties. More than once, this Court has recognized "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *see also Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005) (finding "no cause to believe" that heightened scrutiny could "not be applied in an appropriately balanced way"). In short, history has shown that *Smith*'s concern about administering an accommodation regime—a fundamental premise of the opinion—was unfounded. The swift and emphatic rejection of *Smith* by a nearly-unanimous Congress, the President, and a broad bipartisan coalition ought to weigh significantly against *Smith*'s preservation.

3. *Smith* Raised The Stakes In The Culture Wars, Thereby Eroding Liberty For All.

The *Smith* Court could have never foreseen the profound cultural changes in the ensuing thirty years and the extent to which those changes would increase the possibility for conflict between generally-applicable laws and religious conviction. This conflict has come into sharper focus as religious exercise has declined in America. When *Smith* was decided, half of Americans of all faiths attended religious services at least monthly, with a third attending every week. *In U.S., Decline of Christianity Continues at Rapid Pace*, Pew Research Ctr., 14 (Oct. 17, 2019), https://perma.cc/BN58-TM7B. Today, however, the number of Americans who attend religious services weekly and the number of Americans who never attend religious services are roughly equal. *Ibid.* There are no obvious signs that this trend will abate.

The increasing secularization of society has profound implications for *Smith*'s concession that the "unavoidable consequence of democratic government" is "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890.

But what happens when religious practice itself is no longer widely observed? What happens when orthodox religious views become marginalized in society? A rule that once burdened only those with fringe religious views now increasingly burdens even those holding orthodox religious beliefs.

Indeed, the very concept of "religious freedom" has become toxic in some quarters. As a result, the coalitions that made legislative accommodation possible when *Smith* was decided are increasingly difficult to assemble. *Compare* Jacobs, 84 Neb. L. Rev. at 816–17 (identifying the ACLU as a leader in the Coalition for the Free Exercise of Religion, a key supporter of RFRA) *with* Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, Wash. Post (June 25, 2015).

Take, for example, the issue of same-sex marriage and the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The majority assured people of faith that this decision would not interfere with their right to free religious exercise. "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." 135 S. Ct. at 2607.

But the dissenters in *Obergefell* recognized that the opinion left open "serious questions about religious liberty." *Id.* at 2625 (Roberts, C.J., dissenting). After all, the First Amendment protects more than simply the ability to "teach" one's views—it "guarantees the freedom to '*exercise*' religion." *Ibid.* Accordingly, "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or *a religious adoption agency declines to*

place children with same-sex married couples." *Id.* at 2525–26 (emphasis added).

Such a case is now before this Court. This case provides an example of just how far we have come since *Obergefell* assured people of faith that they would continue to have the right to free religious exercise only five years ago. As the lower court pointed out, "[s]o far as the record reflects, no same-sex couples have approached CSS seeking to become foster parents." *Fulton v. City of Philadelphia*, 922 F.3d 140, 148 (3d Cir. 2019). Instead, this case began because a reporter from the *Philadelphia Inquirer* called the City to inform it that two of its foster care agencies—out of thirty—had policies against working with same-sex couples. *Ibid.*

Now, CSS must choose between writing home reports that violate deeply held religious tenets or abdicating its duty to provide for needy children. Pet'rs' Br. 9–11. That's exactly the sort of dilemma that the Free Exercise Clause was designed to prevent. But instead of finding refuge in the First Amendment, CSS and the children it serves have been left behind as collateral damage in the culture wars. *Id.* at 11–12.

This is not an incidental effect of *Smith*. This is the process that *Smith* demanded and begat. 494 U.S. at 890. President Clinton noted that "one of the reasons [the Founders] worked so hard to get the [F]irst [A]mendment into the Bill of Rights . . . is that they well understood what could happen to this country, how both religion and [g]overnment could be perverted if there were not some space created and some protection provided." 2 Pub. Papers at 2000.

Smith largely removed that protection. In doing so, *Smith* damaged American political discourse and harmed religious Americans. A free exercise doctrine more consonant with the text and history of the First Amendment would secure religious liberty and deescalate the legal and political battles between secular and religious culture. In short, overruling *Smith* would promote liberty for all in a pluralistic society.

C. Overruling *Smith* Would Not Unduly Upset Reliance Interests.

Reliance interests in *Smith* never took root. Many called for—and predicted—its reversal almost from the day it was decided. *E.g.*, Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That was Never Filed*, 8 J.L. & Religion 99, 99–100 (1990); McConnell, 57 U. Chi. L. Rev. at 1111. Not long after, Congress and many states restored much of the pre-*Smith* status quo. And even where the *Smith* standard still applies, courts cannot agree on what *Smith* means and fail to apply it consistently.

It's a fair bet that many of those who don't regularly follow the Supreme Court or Congress would be shocked to hear the *Smith* position was ever constitutional law in the United States of America. Most would probably struggle to understand how it could be reconciled with the text and history of the First Amendment. And none would be likely to order his or her private life around *Smith*.

Smith has been overridden by most jurisdictions in the union, with twenty-one states and Congress

adopting RFRA laws and courts in eleven states imposing heightened scrutiny for state constitutional claims.[6] In short, governmental reliance on *Smith* has been limited. Indeed, many jurisdictions reject rather than rely on *Smith*. In those settings, reversing *Smith* would formally remove a precedent from the books that is inconsequential in practice.

And in those limited cases where *Smith* is still relied upon to ride roughshod over religious exercise—those matters illustrate why *Smith* should be overruled. One need look no further than the case at bar. *Smith* was never intended, and should never have been relied upon, as a fig-leaf to strip people of faith of their right to freely exercise religion. Indeed, *Smith* presumed a world where governments would "be solicitous of" religious liberty. 494 U.S. at 890. Though well-intentioned, that presumption has proven Pollyannaish.

Smith "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.' " *Cf. Janus*, 138 S. Ct. at 2484 (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018)). Only a handful of states adopted *Smith*'s reasoning to interpret their own free exercise clauses. Laycock, 2014 U. Ill. L. Rev. at 844. And like the federal circuit courts, those states have not applied *Smith* consistently. *Ibid.*

Moreover, overruling *Smith* will not require the dismantling of an entire economic or political program as might be the case if other constitutional

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[6] For a collection of cases and statutes restoring heightened scrutiny post-*Smith*, see the sources cited in note 1, *supra*.

precedents were overruled. Instead, it would require only that authorities make occasional and narrow exceptions to accommodate people of faith.

To the extent that any jurisdiction has relied on *Smith*, such reliance was misplaced. *Smith* has been on the chopping block since the day it was decided. *Smith*'s deep unpopularity is lavishly documented in this Court's opinions, as well as in the academic literature.

Members of this Court have repeatedly joined the chorus criticizing *Smith* and expressing doubts about its viability. From *Lukumi* in 1992 to *Kennedy* in 2019, *Smith* has been besieged since its birth. Part I.C, *supra*. Any entity relied on *Smith* to endure forever rather than meet the same fate as *Gobitis* did so at its own peril.

The freedom of religious exercise was set aside at the American founding as an unalienable right beyond the reach of politics. *Smith* broke with the constitutional text and precedent to upset that balance, based largely on misplaced predictions about the feasibility of the alternatives. Where *Smith* has not already been legislatively rejected, it has proven to be both unworkable and a threat to religious liberty and tolerance in a pluralistic society. Indeed, it has thwarted the collective desire of all Americans to live and work together peacefully. One can scarcely imagine a case less worthy of deference under *stare decisis*.

CONCLUSION

This Court should overrule *Smith* and restore the traditional meaning of the Free Exercise Clause.

Respectfully submitted,

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