No. 21-1143

# In the Supreme Court of the United States

DR. A, *et al.*,

*Petitioners,*

*v.*

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, *et al.*,

*Respondents.*

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

## BRIEF OF 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 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).

## INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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-four states have rejected it through legislation, judicial decision, or both.[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

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[2] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 844 n.22 (2014) [hereinafter, Laycock, *Culture Wars*] (citing state cases); *id.* at 845 n.26 (citing state statutes). Four states 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); Mont. Code Ann. §§ 27-33-101 to 27-33-105 (2021); S.D. Codified Laws § 1-1A-4 (2021).

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.

## 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 Gobitas 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 Gobitas 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

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. 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 (1993) (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. 494 U.S. 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 convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

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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).

*Ibid.*

Justices of the Court, past and present, have repeatedly suggested revisiting *Smith*. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., joined by Kavanaugh, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *id.* at 1912 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment) (explaining that *stare decisis* factors "weigh strongly against *Smith*," while "[n]o relevant factor, including reliance, weighs in *Smith*'s favor"); *City of Boerne*, 521 U.S. at 566 (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."). 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).

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 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 multifactor analysis or handwringing. 319 U.S. at 636–42.

For better or worse, times have changed. Today, reversing a prior case usually requires a "special justification." *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015). The factors considered "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 considerations 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.

"[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 and provides "reason to interpret the [Free Exercise] Clause to accord with its natural reading." *Lukumi*, 508 U.S. at 576 (Souter, J., concurring). 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).

### 1. *Smith* Gave Passing Attention To The Free Exercise Clause's Text.

"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 subject 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 many claims brought under the Free Exercise Clause. It did so without meaningfully confronting the constitutional text. Instead, the majority summarily concluded that its own "permissible reading" of the Free Exercise Clause should win the day. 494 U.S. at 878.

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]," U.S. Const. amend. I, was never explained.

### 2. *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 881, 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). Meanwhile, the cases *Smith* relied on—such as *Gobitis* and *Reynolds*—were dubious, and "their subsequent treatment by the Court would seem to require rejection of the *Smith* rule." *Id.* at 569.

*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." 494 U.S. 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 Bos.*, 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, *supra*, 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)).[4]

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[4] In *Fulton*, this Court held that "[t]he creation of a *formal mechanism* for granting exceptions renders a policy not generally applicable, *regardless whether any exceptions have been given*." 141 S. Ct. at 1879 (emphases added). But this focus on formal mechanisms seems misplaced when *informal* mechanisms may accomplish the same purpose. The potential for individualized, discretionary assessment lurks beneath every generally applicable law. Discretion is ubiquitous. Local prosecutors, for example, increasingly refuse to enforce certain drug laws—the very neutral and generally applicable prohibition at the heart of *Smith*. Moreover, *Fulton*'s focus on formal *administrative* discretion as a trigger for strict scrutiny is difficult to square with the text of the First Amendment. *Smith* allows legislatures to pass neutral and generally applicable laws without

### 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 logical, predictable, and easy to administer. It didn't.

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.

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exemptions. 494 U.S. at 878–79. And it insulates those laws from strict scrutiny. But *Fulton* forbids legislatures from delegating that same power to administrators. *See* 141 S. Ct. at 1879 ("The *creation* of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." (emphasis added)). This interpretation rests at odds with the First Amendment's plain language, which prohibits the use of *legislative* power to interfere with religious exercise. U.S. Const. amend. I ("*Congress* shall make no law . . . prohibiting the free exercise [of religion]." (emphasis added)).

Or so it seemed. In practice, "neutrality" and "general applicability" have been difficult, if not impossible, to define consistently. As Petitioners highlight, *Smith* has created deep, enduring circuit splits. Pet. 14–26.

As a result, *Smith* has forced religious Americans like Petitioners to endure years of litigation to vindicate a fundamental freedom. 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. As Long As *Smith* Is Good Law, Religious Americans Will Endure Prolonged Litigation To Vindicate Their Free Exercise Rights.

Under *Smith*, a religious objector must establish that a law is either not neutral or not generally applicable to trigger heightened scrutiny. Religious litigants have enjoyed successes in this Court as it has applied and explained *Smith*'s standard. *E.g.*, *Fulton*, 141 S. Ct. at 1882; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018); *Lukumi*, 508 U.S. at 547. *But see Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 n.27 (2010). But lower courts and policymakers haven't always been so solicitous of religious Americans.

Consider *Fulton*. Last term, this Court ruled unanimously against Philadelphia's policy excluding a Catholic agency from its foster care system because of the agency's traditional view of marriage. 141 S.

Ct. at 1875. Every Justice agreed that Philadelphia's actions were unconstitutional.

Not so in the lower courts. The District Court applied rational-basis review and denied relief. *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 682–83 (E.D. Pa. 2018). This Court denied an emergency injunction. *Fulton v. City of Philadelphia*, 139 S. Ct. 49 (2018). The Third Circuit asked only whether the agency had been "treated differently *because of* its religious beliefs" and denied relief. *Fulton v. City of Philadelphia*, 922 F.3d 140, 156 (3d Cir. 2019) (emphasis added). Finally, after the foster-care agency endured years of litigation waiting for its rights to be vindicated, this Court unanimously applied strict scrutiny and ruled in favor of the agency. In the meantime, Catholic Social Services and prospective foster parents like Sharonell Fulton and Toni Lynn Simms-Busch were left out in the cold.

This case has unfolded like *Fulton*. Both the Second Circuit and this Court denied preliminary relief to the Petitioners. As a result, "every Petitioner except one" has lost his or her job, lost admitting privileges, or violated his or her conscience under duress. Pet. 13–14. *Smith* provides the fig-leaf that enables local governments and lower courts to avoid what the Constitution demands.

### 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-four 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 overturn *Smith* legislatively. *Ibid.*

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). Through RFRA, 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." 42 U.S.C. § 2000bb(b)(1). Thirty-four states have also adopted some form of heightened scrutiny review, either by statute or by interpreting state constitutional

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[5] Four states—Indiana, Kansas, Mississippi, and Montana—passed legislation after their courts imposed heightened scrutiny under their respective constitutions.

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.

### 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. *E.g.*, U.S. Comm'n on C.R., *Peaceful Coexistence: Reconciling Nondiscrimination Principles With Civil Liberties* 29 (2016) (statement of Chairman Martin R. Castro) (calling "religious liberty" and "religious freedom" "code words for discrimination"); Lacie Pierson, *Debate Around Religious Freedom Stirs as "RFRA" Bill Is Reintroduced*, Charleston Gazette-Mail (Jan. 29, 2022) (noting one West Virginia lawmaker's labeling of a proposed RFRA as a "recycled hate bill");[6] *see generally* Bradley J. Lingo & Michael G. Schietzelt, Fulton *and the Future of Free Exercise*, 33 Regent U.L. Rev. 5, 32–34

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[6] https://www.wvgazettemail.com/news/debate-around-religious-freedom-law-stirs-as-rfra-bill-is-reintroduced/article_6b18db69-a28e-5e7c-8682-7feea036a83a.html.

(2021) (noting fallout from recent state RFRA battles).

As a result, the coalitions that made legislative accommodation possible when *Smith* was decided are increasingly difficult to assemble. *Compare* Jacob, *supra*, 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).

Meanwhile, adherents of minority religious traditions find themselves caught in the crossfire of culture-wars disputes. *Smith* has justified denying Jewish police officers' requests to wear yarmulkes. *Riback v. Las Vegas Metro. Police Dep't*, No. 2:07-cv-1152-RLH-LRL, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008). It has justified denying a Jewish woman with developmental disabilities access to a habilitation program that would permit her to observe the Sabbath. *Shagalow v. State Dep't of Human Servs.*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006). And it cost Jehovah's Witness Mary Stinemetz her life as she fought to obtain a liver transplant without a blood transfusion. Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163, 166–67 (2016).

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. 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.

### 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, *supra*, 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*.

Moreover, overruling *Smith* will not require the dismantling of an entire economic or political program as might be the case if other constitutional precedents were overruled. Instead, it would require only that authorities make occasional and narrow exceptions to accommodate people of faith. And *Smith* has already been overridden by most jurisdictions in the

union. In short, governmental reliance on *Smith* has been limited.

Where *Smith* is still relied upon to ride roughshod over religious exercise—those matters illustrate why *Smith* should be overruled. *Smith* was never intended, and should never have been relied upon, as a fig-leaf to strip people of faith of their right to exercise religion freely. 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 v. AFSCME*, 138 S. Ct. 2448, 2484 (2018) (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, *Culture Wars*, *supra*, at 844. And like federal circuit courts, those states have not applied *Smith* consistently. *Ibid.*

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 and in the academic literature.

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 been legislatively rejected, it has proven unworkable and a

threat to religious liberty and toleration. One can scarcely imagine a case less worthy of deference under *stare decisis*.

## CONCLUSION

This case illustrates how *Smith* continues to plague our Free Exercise jurisprudence. It provides another opportunity to overrule *Smith*. There are no factual disputes here—only a wrongful use of *Smith* to deprive religious Americans of their Free Exercise rights. This Court should overrule *Smith* and restore the traditional meaning of the Free Exercise Clause.

Respectfully submitted,

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March 18, 2022