No. 22-204

In the Supreme Court of the United States

MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,
Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, CHRISTIAN LEGAL SOCIETY, JEWISH COALITION FOR RELIGIOUS LIBERTY, & COALITION FOR JEWISH VALUES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice as to unionization since 1968. To advance this mission, Foundation litigators have defended employees' political and religious autonomy in many cases before this Court, including most recently *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The Foundation files this brief to highlight this case's national importance for its clients and others who are harmed by *Employment Division v. Smith*, 494 U.S. 872 (1990).

Amicus Christian Legal Society (**CLS**) is an association of attorneys, law students, and law professors. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

Amicus Jewish Coalition for Religious Liberty is an organization of Jewish rabbis, lawyers, and professionals who seek to defend religious liberty. As members of a minority faith that adhere to practices many may not know or understand, amicus has an interest in ensuring that the political majority may not prohibit religious exercise. Amicus urges this Court to reconsider *Smith* and restore robust religious liberty protections for all Americans.

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[1] Under Supreme Court Rule 37.2(a), Amici provided timely notice of their intention to file this brief, and all parties consented. Under Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity aside from Amici Curiae, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

Amicus Coalition for Jewish Values is an organization that represents over 1,500 traditional, Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court effectively eliminated the constitutional right to exercise religion and broke our nation's commitment to religious freedom. *Smith* deprives all Americans of a fundamental right that our Founders struggled to achieve. Our Founders labored to preserve fundamental rights, and religious freedom was chief among them. Yet *Smith* discarded it without briefing on the matter.

Smith replaced religious freedom promised by the Free Exercise Clause with equal protection. The government *may* prohibit religious exercise if it equally suppresses secular conduct. The Founders intended more than generally applicable equal suppression. The Free Exercise Clause guarantees the right to freely exercise religion—not the right to equally exercise religion. The text promises religious liberty for all. It contains no exception.

History shows why. The founding generations considered religious liberty an unalienable right. As Madison famously put it, religious duties come from God, and so they come first, before civil duties. On that basis, the colonies and states adopted provisions protecting the free exercise of religion. And they granted religious exemptions when law and religion conflicted. A discernable legal principle emerged from these free exercise provisions and practices: individuals have the

right to exercise their religion unless the practice endangers peace and safety. The Founders enshrined this principle in the Free Exercise Clause.

Smith contradicts the clause's text and original, public meaning. At bottom, *Smith* rests on a one-sentence policy argument: religious freedom must perish under the Constitution to prevent anarchy and avoid arbitrary judicial balancing. Experience has disproved these fears and showed that *Smith*—not religious liberty—is unworkable.

Congress almost unanimously rejected *Smith* and, along with the executive branch, mandated that federal law protect religious freedom. Many state courts and legislatures have done the same. This Court has also tried to avoid *Smith*. Indeed, this Court has labored since *Smith* to minimize its decision and avoid its harsh results. And after more than thirty years, much more labor is still needed to explain *Smith*.

The reason is simple: *Smith* is wrong, and its rules are contradictory and unworkable. In fact, *Smith*'s rules are so absurd that lower courts have openly refused to accept some on that basis. And courts have struggled with others. *Smith* adopted its rules on an ad-hoc basis to reach its desired result and avoid the Free Exercise Clause's plain text and conflicting precedent. Yet the rules themselves contradict *Smith* and show that *Smith* is wrong.

Smith does not solve *any* problems. It makes things worse. The bottom line is that *Smith* harms all Americans, and there is no reason for this Court to continue to uphold it.

ARGUMENT

I. Whether to overrule *Smith* is an important, recurring constitutional question.

A. *Smith* is unworkable.

Smith promised to free courts from difficult and arbitrary judicial balancing. 494 U.S. at 882–884. It did not. *Smith* failed to define its basic terms—and after thirty years judges and Justices still struggle with them. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring). If anything, *Smith* has made it harder for judges to apply the Constitution and for individuals to practice their faith.

1. Smith *did not define indirect burdens.*

Smith held that the government may *incidentally* prohibit religious exercise under a valid, "neutral law of general applicability." *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). But *Smith* did not explain what incidental means, if anything, beyond neutral and generally applicable. The distinction is odd.

For one thing, the First Amendment's text makes no such distinction. After all, religious adherents wish to exercise their religion and care not whether the government directly or indirectly prohibits it. If a law, for example, banned circumcision, Jewish parents would take no solace in that it *only* incidentally prohibited the Jewish ritual of *Brit Milah*.

At bottom, it is a distinction without a difference. As Justice Alito noted, a law that incidentally prohibits religious exercise still prohibits religious exercise. *Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring). Con-

sider the Sixth Amendment, which provides the accused in criminal cases the right to counsel. Would anyone doubt that a law banning counsel in all cases—and therefore only incidentally banning counsel in criminal cases—would violate the Sixth Amendment? *Id.* Or take the Seventh Amendment, which provides the right to trial by jury in most suits at common law. "Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment's scope?" *Id.* It is immaterial whether the prohibition is direct or indirect.

2. Smith *did not define neutrality.*

Smith held that *neutral* laws may prohibit religious exercise, but it provided little guidance on what that means. So too the term is found nowhere in the constitutional text. Neutral could mean many things. Indeed, the Supreme Court declared almost thirty years before *Smith* that neutrality *requires* constitutional exemptions for religion. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court declared that free exercise exemptions "reflect[] nothing more than the governmental obligation of neutrality in the face of religious differences." *Id.* at 409. *Smith* apparently rejected the Court's earlier view with no explanation.

Just three years after *Smith*, the Court needed to explain *Smith*'s terms—and fix analytical problems *Smith* created. In *Lukumi*, the Court *unanimously* held that a city ordinance was neither neutral nor generally applicable. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993). The Court found that the ordinance fell "*well* below the minimum standard." *Id.* at 543 (emphasis added). Yet,

under *Smith*, the lower courts did not—likely could not—detect *any* defects in the ordinance.

Lukumi emphasized that a law is not neutral if its *object* is to suppress religion. *Id.* at 535–36. That could mean lawmakers' subjective motive and purpose—inferred from the law's text and context alone, or also from lawmakers' and supporters' statements. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 8 (2016). Or it could mean "simply what the law does, or what it is intended to do, regardless of why legislators wanted to do those things." *Id. Lukumi* did not resolve these questions.

Thus, lower court decisions on neutrality "remain in disarray." *Fulton*, 141 S. Ct. at 1921 (Alito, J., concurring). At a minimum, courts have guessed that a law is not neutral—and "at least one of its purposes or objects is to discriminate"—if it discriminates against religion on its face or in application by treating analogous religious and secular conduct unequally. Laycock & Collis, *supra*, at 9. But this raises further difficult and unresolved questions. What conduct is analogous, what constitutes unequal treatment, and what is the threshold for unequal treatment? Recent cases over COVID-19 rules have emphasized this dilemma. *Fulton*, 141 S. Ct. at 1921–22 (Alito, J., concurring).

What do we know about "neutral" thirty years after *Smith*? That we still do not know. A law with an anti-religious *motive* is not neutral. An improper motive, though, is not required. Yet an improper *object* may be required. "Or it may not." Laycock & Collis, *supra*, at 9. We do not know.

3. Smith *did not define general applicability.*

Smith held that a generally applicable law may prohibit religious exercise. Yet *Smith* did not define this term. The Court only applied this new rule to create a special exception to avoid *Sherbert* and other conflicting unemployment compensation cases. *Smith*, 494 U.S. at 882–85. *Smith* claimed that unemployment compensation rules are not generally applicable because they "invite" the government to individually assess "the reasons for [a person's] conduct" and enable "individual exemptions." *Id.* at 884.

But this explanation contradicts *Smith*. Due process requires an individualized hearing in many contexts—not just for unemployment benefits. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1123–24 (1990). Indeed, most free exercise cases require the government to individually assess the reasons for a person's conduct. *Id.* So *Smith*'s general applicability rule for avoiding strict scrutiny in the end requires it.

Consider the supposed criminal law in *Smith*. Why was it generally applicable? Criminal laws require the state to individually assess defendants' motives; afford prosecutors discretion on which crimes and defendants to prosecute; and almost always include *some* exceptions. *Id.* at 1124. If generally applicable means what *Smith* said, *Smith*'s holding is wrong.

In *Fulton*, this Court yet again tried to clarify *Smith*'s terms. 141 S. Ct. at 1876–77. And yet again it *unanimously* held that lower courts misapplied *Smith*. *Id.* The Court held that a law is not generally applicable, based on *Smith*'s reasoning, if it gives officials *any* discretion to grant exemptions. *Id.* at 1878. This Court also affirmed a second requirement from

Lukumi: a law is not generally applicable if it prohibits religious conduct but permits analogous secular conduct that similarly undermines the government's interests. *Id.* at 1877.

This second (and essential) requirement under *Smith* creates more conundrums. What conduct is analogous, and when? What does it mean to *similarly* undermine the government's interest? And how much unregulated, analogous conduct is needed to negate general applicability? Laycock & Collis, *supra*, at 11. Courts are understandably split—along with the Justices on this Court. *Fulton*, 141 S. Ct. at 1921 (Alito, J., concurring). After all, what objective principle could solve these problems? Is a church, for example, like a museum, theater, zoo, or sporting event; or is it like a casino, store, office, or restaurant?

Dealing with *Smith* is like Hercules fighting the hydra. Each term from *Smith* produces other terms that raise more problems.

4. Smith*'s hybrid-rights theory is absurd.*

To avoid conflicting precedent, *Smith* invented yet another special exception: "hybrid rights." The majority claimed that strict scrutiny applies to claims involving the Free Exercise Clause "in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881.

But this theory is absurd, and circuit courts have openly said so. The argument "that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights . . . is completely illogical." *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993). The Con-

stitution's meaning does not depend on a plaintiffs' arbitrary choice about which claims to include in his complaint.

Simply put, the hybrid-rights theory is untenable. If a free exercise claim is insufficient, it is immaterial whether the plaintiff adds another insufficient claim. If, on the other hand, the hybrid-rights theory requires a *viable* companion claim, then the free exercise claim is pointless. *Fulton*, 141 S. Ct. at 1918 (Alito, J., concurring); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296–97 (10th Cir. 2004). Of course, courts have refused to recognize this exception—it makes no sense.

Taken seriously, virtually every case could be considered a hybrid-rights case. *Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring). Consider *Smith* itself: the majority prohibited a Native American Church ceremony—a sacrament, no less. Religious ceremonies, like the one in *Smith*, undoubtedly communicate a message and involve speech. *Id.* Thus, *Smith* itself involved a hybrid free speech and free exercise right. *Id.* The exception therefore undermines *Smith*.

Smith cared little for the rules that it created. The majority invented the hybrid-rights theory to distinguish *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Yet *Yoder* rejected *Smith*'s theory. *Id.* at 215 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

5. Smith *requires exceptions to its exceptions.*

To avoid *Smith*'s harsh and unworkable results, this Court in *Masterpiece* created yet more exceptions.

Officials—and not just laws—must be neutral toward religion. On facts similar to this case, the Court held that a state agency violated its First Amendment duty to act neutrally toward religion. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). The Court explained that "[t]he Free Exercise Clause bars even '*subtle* departures from neutrality' on matters of religion," and stressed that neutrality "must be *strictly* observed." *Id.* at 1731–32 (emphasis added). So "upon even *slight* suspicion" that the government has failed to act neutrally toward religion, "officials must pause to remember their own high duty." *Id.* at 1731 (emphasis added).

In other words, rather than analyze whether the government prohibits a person's religious exercise, courts must search high and low for *subtle* or *slight*, undefined departures from neutrality—by virtually any related government official—before and during *every* case. This is far from the simple, objective test that *Smith* had promised. As the court below noted, it is hard to discern a "rule of law" from the case—let alone understand "how to apply it." Pet.App.33 *Smith* is the culprit.

Simply put, *Smith* is unworkable. It has created intractable problems rather than solutions. And it has required exceptions to its (many) exceptions that raise more problems. As Justice Gorsuch summarized, "judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced." *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring). Thirty years is enough.

B. *Smith* creates problems that will continue until the Court fixes *Smith*.

Even when courts protect religion, under *Smith*, these decisions rest on government missteps—not the freedom to practice religion. Thus, *Smith* always leaves governments free to try again and prohibit the free exercise of religion. As Justice Gorsuch explained, the majority's approach in *Fulton* "guarantees that this litigation is only getting started." *Id.* The City can simply revise its ordinance or rewrite its contract to close the loophole that negated general applicability. Then, after years of litigation, Catholic Social Services "will find itself back where it started." *Id.*

And if not Catholic Social Services, other religious individuals and organizations will face these redoubled efforts to prohibit religion. Like Oregon here, Philadelphia "made clear that it will never tolerate" religious individuals or organizations who do not share the political majority's beliefs about marriage—and, no doubt, other subjects too. *Id.*

Religious individuals and groups across the country bear the cost. *Smith* is no solution. *Id.* Since *Masterpiece Cakeshop*, activists have targeted Jack Phillips again after this Court protected him. And a Colorado court has ruled once more that Phillips cannot practice his religion.[2] Many religious individuals have

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[2] *Scardina v. Masterpiece Cakeshop*, No. 2019CV32214 (Colo. Dist. Mar. 4, 2021), https://adflegal.org/case/scardina-v-masterpiece-cakeshop (providing case documents in the links at the bottom of the page).

given up their businesses in whole or in part or forfeited "religious freedom that the Constitution protects." *Id.*

Upholding *Smith* "promises more of the same"—conflict, intolerance, and persecution. Religious individuals suffer every day that *Smith* remains. *Id.* at 1929. The Kleins have spent ten years litigating to defend the right to practice their faith. Enough is enough.

II. *Smith* overturns the Free Exercise Clause and undermines all Americans' ability to practice their religion.

Smith contradicts the Free Exercise Clause's text and original understanding—both of which protect religious liberty—and it allows religious persecution.

A. *Smith* contradicts the Free Exercise Clause's plain text.

Smith contradicts the constitutional text. The Free Exercise Clause's text is plain. It provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I.

The words have essentially the same meaning today as they did when the Founders wrote them. *Fulton*, 141 S. Ct. at 1898 (Alito, J., concurring). They prohibit the government from "forbidding or hindering" religious practice and guarantee the right to "unrestrained" religious practice or worship. *Id. Smith* held the opposite: the text provides no right to practice religion: it only provides for equal treatment.

If, as *Smith* implies, the Founders wanted to *merely* establish equal protection, or use general laws as limiting principles, they knew how to do it. And

they had ready examples. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 836 (1998). That is not what the Founders did. They protected religious exercise without limitation.

Because the text is "clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." *Fulton*, 141 S. Ct. at 1894 (quoting *Martin v. Hunter's Lessee*, 1 Wheat. 304, 338–339, 4 L. Ed. 97 (1816)). And any implied limits must fit the text's original meaning. *Smith* disregarded these essential rules. It added unwritten exceptions that in effect overturn the unqualified, written rule.

Smith's analysis, moreover, conflicts with the approach a written constitution demands. Our Founders labored to enact and pass down a *written* constitution. The Constitution's words alone are the supreme law. *Fairbank v. United States*, 181 U.S. 283, 285–86 (1901). Thus, judges may not rewrite or reinterpret these words. Judges undermine our constitutional government and destabilize the law when they do. *United States v. Sprague*, 282 U.S. 716, 731 (1931). *Smith*'s author, Justice Scalia, agreed. Antonin Scalia, *A Matter of Interpretation* 38 (1997). Yet *Smith* sharply clashes with these principles.

Smith "paid shockingly little attention to the text of the Free Exercise Clause." *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring). The majority there made no effort to determine the text's meaning. Indeed, *Smith* did not even consider briefs on the subject, and no party questioned the text's meaning. *Id.* at 1891–

92. The majority went out of its way to answer a question no one asked, and it adopted a position no one proposed. *Id. Smith* simply called its interpretation "permissible." 494 U.S. at 878. Yet even this meager excuse fails, because one cannot know which interpretations are permissible without at least *trying* to determine the text's meaning. Simply put, *Smith*'s "strange treatment of the constitutional text cannot be justified." *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring).

B. *Smith* contradicts the Free Exercise Clause's original meaning.

Smith contradicts the Free Exercise Clause's philosophical framework. This framework caused the colonies and states to enact free exercise provisions and provide religious exemptions. As a result, a basic legal concept emerged: "the free exercise principle." The Founders enshrined this principle in the Free Exercise Clause.

1. Smith *conflicts with the Free Exercise Clause's philosophical framework*

The founding generation considered religious liberty an unalienable right. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1990). That is why two years before the federal Bill of Rights, every state, except Connecticut, adopted a constitutional provision protecting religious liberty. *Id.* at 1455. Eight states also expressly affirmed that religious liberty is an "unalienable right" in state constitutions and federal constitutional proposals. *Id.* at 1457 n.242, 1480–81 n.360.

The reason is straightforward: the Founders believed that religious freedom comes from God. As James Madison put it, religious liberty is "an unalienable right" because it "is a duty towards the Creator." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 1785), https://founders.archives.gov/documents/Madison/01-08-02-0163.

In his *Memorial and Remonstrance*, Madison presented the most popular and widely accepted argument for religious freedom. There, he explained that all persons owe a duty "to the Creator" that they must individually determine. *Id.* "This duty," according to Madison, "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." *Id.* A person is first "a subject of the Governour of the Universe" before "a member of Civil Society." *Id.* Thus, when persons enter society—a "subordinate Association"—they retain their duty and allegiance to "the General Authority"—"the Universal Sovereign." *Id.* For these reasons, the Founders considered "[r]eligion . . . exempt from [Civil Society's] cognizance." *Id.*

This account shows the Founders' philosophical framework for the Free Exercise Clause. *Smith* contradicts it. Religious liberty was not understood as a nondiscrimination principle, nor did the Founders accept that religion is subject to general laws. As Madison put it, society has no right to regulate or interfere with religion. Religious freedom does not, as *Smith* held, depend on government approval. Rather, the Founders understood religion as an irrevocable duty to God that supersedes society's claims. *Id.* This account underpins the Free Exercise Clause.

Smith undermines this clause. It replaces a sacred, unalienable right with an equal protection rule: the

state may order everyone to bow and punish those who refuse.

2. Smith *conflicts with the free exercise principle developed in the colonies and states.*

The free exercise of religion developed as a legal principle in the American colonies. The term "free exercise" first appeared in an American legal document in 1648. McConnell, *Origins*, *supra*, at 1425. There, Lord Baltimore required Maryland officials to refrain from disrupting Christians, particularly Roman Catholics, in the free exercise of religion. Shortly after, Maryland enacted the first free exercise clause. *Id.*

Rhode Island also protected religious liberty in its 1663 Charter. *Id.* Notably, the Charter deviated from an earlier legislative decree that protected religious practice unless it was "repugnant to the government or laws established." *Id.* at 1426. The Charter, on the other hand, guaranteed that individuals may "freely and fully" exercise their religion if they behave "peaceably and quietly" and refrain from "using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others." *Id.* (cleaned up). In other words, only certain laws—those required to maintain the civil peace—limited the right to exercise religion. Carolina and New Jersey similarly guaranteed religious freedom. *Id.* at 1427.

Thus, colonial free exercise provisions did not allow general laws to limit religious exercise. Colonial compacts often used terms like "the public good" or "the common good" to convey legislative power. McConnell, *Freedom from Persecution*, *supra*, at 836. In contrast, these provisions generally limited the free exercise of religion *only* to protect the civil peace and prevent licentiousness.

These colonial provisions established a free exercise principle that continued in state constitutions. McConnell, *Origins*, *supra*, at 1427. Every state, except Connecticut, adopted a free exercise clause before the federal Free Exercise Clause. *Id.* at 1455. These state free exercise clauses "guaranteed the free exercise of religion or liberty of conscience, limited by particular, defined state interests." *City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).

New York was typical. Its Constitution stated:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

McConnell, *Origins*, *supra*, at 1456. Other state provisions followed the same pattern.

The language of these provisions shows the free exercise principle's scope. Nine states—the overwhelming majority—limited the free exercise of religion "to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state." *Id.* at 1461. Such language, if *Smith* were correct, would have been superfluous. After all, precise limitations are pointless if religion was subject to *every* general law. *Id.* at 1462. These accepted limits establish the principle's basic scope: the free exercise of religion guaranteed the right to practice religion unless it undermined peace and safety.

In modern constitutional terms, the free exercise principle means that religion prevails when law and religion conflict, unless vital state interests *require* government interference.

The Founders no doubt recognized and understood the free exercise principle. It is no accident that the Founders included it in the Constitution. Many Founders who drafted and ratified the Free Exercise Clause served in state legislatures. And some, like Madison, even helped draft their state free exercise clause and the federal Free Exercise Clause. McConnell, *Revisionism*, *supra*, at 1119. The best explanation is that in the First Amendment the term free exercise of religion meant what it meant in earlier state constitutions.

True enough, the federal clause has no limiting terms like the earlier colonial and state free exercise provisions. But this reinforces the argument and further cuts against *Smith*. If the Founders wanted to deviate from an established legal principle, they would have used limiting language. They did not. No such language shows that the Founders understood the principle and consciously incorporated it in the Free Exercise Clause. In any event, the decision to provide an unqualified right to exercise religion does not suggest that *all* laws limit the right to exercise religion.

3. Smith *conflicts with the free exercise principle's colonial and state application.*

The practice in the colonies and early states also suggests that the free exercise principle entailed religious exemptions from generally applicable laws. McConnell, *Origins*, *supra*, at 1466. Although law and religion rarely conflicted, when it did, the Founders viewed religious exemptions as the solution. *Id.*

During the founding era, conflict between law and religion mainly involved three issues: oath requirements, military conscription, and religious assessments. Each conflict was resolved by exemptions. *Id.*

To be sure, these exemptions were provided by legislatures. But judicial review did not yet exist, so the legislature is the precise place to look for religious exemptions. *City of Boerne*, 521 U.S. at 559 (O'Connor, J., dissenting). These exemptions also show how the founding generation understood and applied the free exercise principle. McConnell, *Freedom from Persecution*, *supra*, at 839–40. The Founders, no doubt, incorporated the free exercise principle in the Constitution and expected courts to enforce it just as legislatures had before. McConnell, *Revisionism*, *supra*, at 1119. There is no reason to assume that constitutional recognition diminished the free exercise principle as it was then understood and applied.

Simply put, the decisive question is not *who* granted these religious exemptions. The question is whether the founding generation considered religious exemptions as the solution when law and religion conflicted. McConnell, *Origins*, *supra*, at 1470. The answer from historical practice is plain: the founding generation favored religious exemptions and used them as the solution when law and religion conflicted.

C. *Smith* discards religious liberty and allows religious persecution.

Smith eviscerates our constitutional commitment to religious liberty. Individuals, often minorities, cannot practice their religion if the majority under a generally applicable law says otherwise. Under *Smith*, Native American Church members—and individuals who hold traditional beliefs about marriage—cannot

practice their religion. If they do, the government may punish them for exercising their faith.[3]

Smith allows persecution. If Oregon could, it would likely punish all who share the Kleins' religious beliefs. As the prosecutor explained below, there is no place for such beliefs in public. Individuals in Oregon may "harbor whatever *prejudices* they choose," but they may not exercise such prejudices in the market. Pet.App.12 (emphasis added). In other words, the political majority may label religious beliefs as prejudicial and prohibit them.

Prohibiting religious practices bans believers. Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J. L. & Religion 139, 149–50 (2009). It would have made little difference here if Oregon prohibited individuals from believing that marriage is a union between a man and woman. Requiring artists to celebrate same-sex marriage produces the same result. Individuals, like the Kleins, may not hold their religious beliefs.

Take another example. For a Quaker in the seventeenth century, it would have made little difference if Massachusetts prohibited Quakers or required everyone to serve in the military and swear oaths to testify in court. *Id.* A conscientious Quaker could not live in Massachusetts under either requirement. And if one tried, conflict and persecution would have resulted.

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[3] Jewish Americans have often suffered under *Smith*. *E.g.*, *Shagalow v. State*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006) (holding a state need not place an Orthodox woman in a habilitation program compatible with her faith); *Montgomery v. Cnty. of Clinton*, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (affirming a state could autopsy a Jewish child over his parents' religious objections).

Id. A Jewish family likewise could not live in a state that banned circumcision. Doing so would require them to renounce their faith or suffer for it. The bottom line is that persons are not free to believe what they cannot practice. Banning religious practices in effect bans believers.

Smith further breeds intolerance. It conveys that religious freedom is unimportant, and so the government need not accept or tolerate religious minorities. Religion—"lone among the First Amendment freedoms"—only offers rational basis review. *Fulton*, 141 S. Ct. at 1882. So the government may prohibit a person's religious exercise for little reason, or virtually no reason at all. Under *Smith*, states may ban all artists and wedding vendors who do not share the political majority's beliefs about marriage.

Smith endorses such religious suppression. According to *Smith*, religious freedom is not only unimportant, but also dangerous. In *Smith*'s words, religious freedom invites "anarchy" and impossibly hinders government. 494 U.S. at 888. For *Smith*, religious suppression is the solution. Religious freedom is a roadblock that the Court simply excised from the Bill of Rights. Religious minorities must therefore alter the political majority's views or suffer.

As a result, *Smith* creates conflict. Religious individuals and organizations must fight and win political and cultural battles to practice their religion. If they lose—even once, at any level—the political majority may prohibit their religion. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 228–29 (1993). Conflict is the inevitable result when government becomes a cudgel that may grant or deny the right to practice religion.

Religious liberty requires protection from the political process—in other words, a shield from generally applicable laws. It cannot be left to the majority. The majority is often unlikely and unwilling to protect religious minorities. And in fact, the majority is often responsible for religious suppression.

Legislative exemptions are thus inadequate. Legislators represent the majority and are vulnerable to lobbyists and political pressure. Judges are, or at least should be, different. *Perez v. Mortg. Bankers Ass'n*, (Thomas, J., concurring) 575 U.S. 92, 120–21 (2015). They are at least *sometimes* willing to protect unpopular minorities. Laycock, *Exemption Debate*, *supra*, at 163. Legislators, on the other hand, are seldom willing, because they cannot afford to protect groups that many voters reject. Thus, legislators "are least likely to protect those religious minorities who are most in need of protection." *Id.*

Lukumi is a perfect example. The Supreme Court held that the offending ordinances fell "well below" the First Amendment's "minimum standard." *Lukumi*, 508 U.S. at 543. Yet Representative Steve Solarz could not persuade *any* other member of Congress to join an amicus brief supporting the church. Laycock, *Exemption Debate*, *supra*, at 159. The religious harm and governmental interests involved did not matter. All that mattered was that the religious practice was unpopular. *Id.* Thus, even in *clear* cases of religious discrimination, *Smith*'s majoritarian approach fails to protect religion. The Court should not continue this error.

Smith's equal protection rule is hollow. It permits the government to persecute believers for practicing their faith. *Id.* at 149. The decision forces individuals—often religious minorities—to make the cruel

choice between "incurring legal penalties and surrendering core parts of their identity." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 842 (2014). The Kleins must violate their religion or endure increasing state punishment.

D. *Smith* contradicts this Court's precedent and constitutional framework.

Precedent both before and after *Smith* contradicts the decision. The ministerial exception is but one doctrinal example. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 565 U.S. 171 (2012), this Court affirmed a long line of cases recognizing religious organizations' freedom from secular control. On that basis, the Court in *Hosanna-Tabor* held that the First Amendment exempted a religious school from an otherwise neutral law of general applicability. And this Court did the same in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). If *Smith* is right, this doctrine is wrong.

Masterpiece, for example, also contradicts *Smith*. This Court held in *Masterpiece* that officials failed to act neutrally toward religion by suggesting that "religious beliefs cannot legitimately be carried into the public sphere" and stating that "Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs." *Masterpiece*, 138 S. Ct. at 1729. Yet this is precisely *Smith*'s holding. One might even mistakenly attribute these comments to *Smith*. Religious individuals can believe what they want, but *Smith* says they have no right to practice their religion.

Finally, *Smith* contradicts the framework this Court endorsed to resolve constitutional issues. In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.

Ct. 2111 (2022), this Court rejected a "judge empowering 'interest-balancing inquiry.'" *Id.* at 2129. These inquiries contradict the Constitution, which removes constitutional rights from government. *Id.* This court held that judges must apply the Constitution and "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131.

This is the proper approach to protect religion and other First Amendment rights, as this Court suggested in *New York State Rifle*. *Id.* at 2130. Other cases also signal that the Court is ready to consider a new standard. In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), this Court used the strict scrutiny test to define exacting scrutiny, a lower constitutional test. In other words, the Court revealed it may be ready to consider a new standard for traditional strict scrutiny and First Amendment cases. *New York State Rifle* shows the path forward. *Smith* contradicts it.

CONCLUSION

This case is an excellent vehicle to restore the robust free exercise protections that our Founders guaranteed. The Court should grant this petition.

Respectfully submitted,

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