No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, *et al.*,

Respondents.

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

BRIEF OF PROFESSORS IRA C. LUPU, FREDERICK MARK GEDICKS, WILLIAM P. MARSHALL, AND ROBERT W. TUTTLE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University. Frederick Mark Gedicks is the Guy Anderson Chair & Professor of Law, Brigham Young University. William P. Marshall is the William Rand Kenan, Jr., Distinguished Professor of Law, University of North Carolina. Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion, George Washington University. All of them have been studying and writing about the First Amendment's Religion Clauses since the 1980s, and they submit this brief to explain why *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), correctly held that the Free Exercise Clause does not mandate religious exemptions from generally applicable, religion-neutral laws.

SUMMARY OF ARGUMENT

Smith was correctly decided. The Free Exercise Clause mandates evenhandedness in the government's treatment of religion, as reflected in contemporaneous understandings at the time of the Founding and nearly two centuries of caselaw that followed. Although the Court departed from this longstanding interpretation in the line of cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963), in 1990 *Smith* correctly reaffirmed the

1. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

foundational principle that the Free Exercise Clause does not require religious exemptions from neutral laws of general applicability. Rather, it gives religious claimants the right to be treated equally as compared with their secular counterparts.

In addition, *Smith* provides a workable framework for adjudicating Free Exercise challenges. Precedent dictates that strict scrutiny of burdens on religious practice is appropriate only where a law demonstrates hostility towards a particular faith or religion generally, or systematically disfavors religious claimants compared to their fully analogous secular counterparts. The strict scrutiny test that Petitioners advance is far more sweeping and would often be impossible for the government to satisfy. It would invite a regime of exemptions on demand, ensuring widespread religious carve-outs from many laws. It also would induce courts to return to the inconsistent, unpredictable, and arbitrary case-by-case determinations of Free Exercise claims that marked the period between *Sherbert* and *Smith*.

Petitioners' approach lacks solid constitutional footing and would be judicially unmanageable. This Court should reaffirm *Smith*.

ARGUMENT

I. THE FREE EXERCISE CLAUSE DOES NOT REQUIRE RELIGIOUS EXEMPTIONS FROM GENERALLY APPLICABLE, RELIGION-NEUTRAL LAWS

The Founders enacted the Religion Clauses of the First Amendment to ensure that the government would

neither meddle in explicitly religious affairs nor treat religious adherents better or worse than anyone else. Accordingly, in adopting the Free Exercise Clause, they intended to place limits on the government's power to regulate religious beliefs and worship practices, not to require the government to grant religious exemptions from generally applicable, religion-neutral laws. This Court's decision in *Smith* correctly reaffirmed the understanding—which prevailed for most of our nation's history—that the Free Exercise Clause requires equal treatment of religious and secular counterparts.

A. Judicial recognition of religious exemptions from neutral laws has no historical foundation

In the late eighteenth century, religious freedom was generally understood to bar the government from targeting religious belief and worship. *See* James H. Hutson, Church and State in America: The First Two Centuries 137 (2007) ("On one subject there was unanimity: Governments must not interfere in the spiritual realm, in men's beliefs and modes of worship."). The Free Exercise Clause was therefore drafted to protect religious belief and modes of worship from legal disadvantage—not to exempt religiously-motivated conduct from generally applicable laws. The line of Free Exercise decisions beginning with *Sherbert*, in which this Court first recognized a constitutionally mandatory religious exemption, departed from the original understanding. *Smith* properly corrected this constitutional error. 494 U.S. at 878-79.[2]

2. Between 1990 and 1996, both Professor Gedicks and Professor Lupu published works that expressed criticism of *Smith*.

1. Early Understandings and Practice

For nearly the first two hundred years of our country's existence, the Free Exercise Clause was understood to prohibit only those laws that explicitly impinge on religious practice. Ellis West, *The Case Against a Right to Religion-Based Exemption*, 4 NOTRE DAME J. L., ETHICS & PUB. POL'Y 591, 594 (1990). Free exercise of religion was not originally understood to include a right to violate generally applicable, religion-neutral laws, but instead provided "the freedom to choose and practice one's religion (or no religion) without being subjected to intentional, direct government coercion or influence." *Id.* at 623. Professor Hamburger likewise concluded that 18th century "Americans did not authorize or acknowledge a general constitutional right of religious exemptions from civil laws." Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917 (1992).

This concept of free exercise dovetailed with the general understanding of "freedom" in the eighteenth century. Early Americans, influenced by the thinking of John Locke, understood "freedom" to mean freedom from "arbitrary, unauthorized, unconstitutional law"—not the ability to evade an otherwise legitimate law. West at 624 & n.148 (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17 (C.B. Macpherson ed. 1980) (1st ed. 1690)). As Locke put it, "freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in

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After careful study, both have embraced the view, originally defended by Professor Marshall, that *Smith* is correct. Professor Tuttle has always held that view.

it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . ." *Id.* at 624 n.148.

Against this backdrop, the drafters of the First Amendment intended to place limits on the government's power to regulate religious beliefs and worship practices. *Id.* at 624-27; *see also* Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 208 (1987) ("At the Virginia Ratifying Convention, [James] Madison had stated that the federal government had not the 'shadow of a right . . . to intermeddle with religion,' and all Americans, Federalists and Antifederalists, agreed with him.").

The religious liberty clauses of early state constitutions, which predate the federal Constitution, confirm this understanding of religious freedom. State religious liberty clauses typically took one of three forms. Some reflected the view that the government could restrict both worship and religious beliefs that it deemed dangerous; these states expressly authorized disfavored treatment for adherents of particular religions. Hamburger at 922; *e.g.*, Ga. Const. of 1777, art. LVI (expressly permitting state to deny free exercise rights to religious exercise "repugnant to the peace and safety of the State"). Many others allowed for worship practices so long as they did not "breach the peace," meaning the government could prohibit religious conduct that violated civil law. Hamburger at 922. The Northwest Ordinance (passed in 1787 to establish a government for the Northwest Territory) took this approach by specifying that "[n]o person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode

of worship or religious sentiments in the said territory." *Id* at 922-23. Finally, other state constitutions contained "provisions condemning the punishment of individuals 'on account' of their religious beliefs." *Id* at 923; *e.g.,* Ky. Const. of 1792, art. XII, §§ 3, 4; Pa. Const. of 1776, art. II. None of these approaches exempted worship practices, or religiously motivated conduct unrelated to worship, proselytizing, or religious education, from general laws.

The Framers drew upon corresponding provisions in the various state constitutions when drafting the Bill of Rights. *See* Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 Publius 19, 19-29 (1992). The absence of state law provisions requiring religious exemptions from neutral laws thus strongly supports a similar interpretation of the Free Exercise Clause.

Jurisprudence from the decades following the Founding confirms that the Free Exercise Clause was not understood to require religious exemptions from neutral laws. As Justice Scalia observed in *City of Boerne v. Flores*, "[h]ad the understanding in the period surrounding the ratification of the Bill of Rights been that . . . various forms of accommodation . . . were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation." 521 U.S. 507, 542 (1997) (concurring opinion). Yet, as Justice Scalia noted, "none exists."[3] *Id.* at 543.

3. Justice Scalia identified only a single possible exception, decided in a lower court and arising entirely under state law. 521 U.S. at 543 (citing *People v. Phillips*, Ct. Gen. Sess., City of

When first called upon to decide whether the Free Exercise Clause requires religious exemptions from generally applicable, religion-neutral laws, this Court found that it does not. *Reynolds v. United States*, 98 U.S. 145 (1878); *see also Smith*, 494 U.S. at 879. As this Court declared in *Reynolds*: "[t]o permit [religious exemptions from neutral laws] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 98 U.S. at 167.[4]

For eighty-five years following *Reynolds*, this Court declined to grant special treatment to religious claimants under the Free Exercise Clause, or to elevate Free Exercise

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N.Y. (June 14, 1813), excerpted in *Privileged Communications to Clergymen*, 1 Cath. Law. 199 (1955)). Although legislatures have enacted religious exemptions throughout American history (including exemptions to swearing oaths and participating in military service), no court ever held that they were required by the First Amendment. Hamburger at 929. Such statutory accommodations thus do not shed light on what the Free Exercise Clause requires. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 323 (1991). Justice Scalia made the same point in *City of Boerne*, noting that the Constitution does not mandate religious exemptions, though legislatures may grant them. *See* 521 U.S. at 541.

4. Petitioners argue that the claimant in *Reynolds* sought a religious exemption without regard to any countervailing governmental interest and that *Reynolds* relied on reasoning that is inconsistent with later precedent. Brief for Petitioners at 48-49, Fulton v. City of Philadelphia, No. 19-123 (filed May 27, 2020). Both points are irrelevant; *Reynolds* demonstrates this Court's historical understanding that the Free Exercise Clause does not require religious exemptions from generally applicable, religion-neutral laws.

claims over free speech claims and conscientious moral objections to religion-neutral laws. *See Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (rejecting Jehovah's Witnesses' claim to a Free Exercise exemption from a law requiring school children to salute the flag); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (rejecting Free Exercise claim of Jehovah's Witness convicted for violating law that prohibited children from selling newspapers in streets and public places). As Justice Rutledge wrote in *Prince*, "[i]f . . . appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others." *Id*. at 164; *see also* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 48-49 (2015).

Prior to *Sherbert*, religious claimants prevailed on Free Exercise claims only when "considerations of religious liberty informed more general claims of personal liberty, instead of creating religiously exclusive rights." *See* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 180, 183 (2014). In these cases, the Court's rulings protected rights sounding in both religious and secular concerns like free speech and due process. *See, e.g.*, *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (sustaining religious plaintiffs' due process challenge to a statute requiring all children to attend secular public school); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that requiring children in public schools to salute the American flag infringes freedom of speech *and* worship); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (finding that punishing Jehovah's Witness street proselytizer violates freedom of speech *and* Free

Exercise). Protecting religious liberty interests as part of more general rights maintained crucial church-state boundaries, as courts could base their decisions on broader nonreligious principles, and therefore were not required to evaluate questions of religiosity. *See, e.g.*, *Barnette*, 319 U.S. at 634-35 (observing that the case did not "turn on one's possession of particular religious views or the sincerity with which they are held"); *see also* LUPU & TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE, at 188-89.

Consistent with the original understanding and the Court's historical precedents, these pre-*Sherbert* decisions recognized that the Free Exercise Clause does not require that the government exempt citizens from generally applicable laws on the basis of their religious beliefs. In 1961, however, this Court set the stage for *Sherbert*'s interest-balancing test by evaluating a Free Exercise exemption claim in terms of the burden on the claimant's religion and the availability of less burdensome alternatives. *See Braunfeld v. Brown*, 366 U.S. 599 (1961); *see also* LUPU & TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE, at 190-91. Two years later, in *Sherbert*, the Court mistakenly brought into question two centuries of history and precedent holding that the Free Exercise Clause does not mandate religious exemptions from generally applicable laws, thereby setting free exercise doctrine on an unsustainable path.

2. *Sherbert* and *Yoder* Diverged from Historical Understandings and Precedent

In *Sherbert*, Adell Sherbert claimed that a state law disqualifying her from unemployment benefits on the basis of her religious objection to working on Saturdays

abridged her Free Exercise rights. 374 U.S. at 399-401. This Court held that the First Amendment allowed such disqualification only if it "represent[ed] no infringement by the State of her constitutional rights of free exercise," or if "any incidental burden on the free exercise of appellant's religion [was] justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* at 403 (internal quotation marks and alterations omitted). The Court found that, by denying Sherbert unemployment benefits without demonstrating a countervailing compelling state interest, the state had unconstitutionally burdened her Free Exercise rights. *Id.* at 406-10.

The invocation of a "compelling interest" test was unnecessary to decide the case. South Carolina discriminated in favor of the majority of Christians by protecting them against discharge for refusing to work on Sundays. 374 U.S. at 406. This denominational discrimination was a sufficient basis for upholding Sherbert's claim under the Court's existing precedents without importing strict scrutiny. *Cf. id.* (noting that denominational discrimination "compounded the unconstitutionality" of the treatment of Saturday Sabbatarians.)

Instead, by mandating a religious exemption to a generally applicable, religion-neutral law, *Sherbert* broke sharply from the Court's previously settled approach to Free Exercise claims. *See id.* at 418 (Harlan, J., dissenting) ("Today's decision is disturbing . . . in its rejection of existing precedent . . . ."). For the first time, the *Sherbert* Court abandoned its traditional approach (which declined to grant special treatment to religious claimants) and elevated the rights of a religious claimant over those

of her secular counterparts. *See id.* at 416 (Stewart, J., concurring in the result) (noting that, under the Court's decision, "the State must prefer a religious over a secular ground for being unavailable for work . . . ."); *id.* at 422 (Harlan, J., dissenting) ("The State . . . must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior . . . is not religiously motivated.").

This Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), deepened the break with the historical understanding of the Free Exercise Clause. Respondents, convicted for violating Wisconsin's compulsory school-attendance law, claimed that their convictions were invalid under the Free Exercise Clause because sending their children (aged 14-15) to school threatened their traditional agrarian and religious way of life. *Id.* at 207-12. Citing *Sherbert* for the proposition that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion," *id.* at 220, the *Yoder* Court determined that the compulsory education law "would gravely endanger if not destroy the free exercise of respondents' religious beliefs," *id.* at 219. The Court rejected Wisconsin's contention that "its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way." *Id.* at 221. Notably, the Court framed the relevant state interest narrowly, as the "interest in compelling the school attendance of Amish children to age 16," rather than the more "substantial" interest of "requiring such attendance for children generally." *Id.* at 228-29. As the next section of this brief demonstrates, the focus on the state's interest in avoiding an exemption for particular claimants, as distinguished

from its more general interest in advancing its policy goals, would eventually prove to be among the elements of Free Exercise law most subject to manipulation.

3. Inconsistent Application of the *Sherbert/Yoder* Standard Provoked a Restoration of Traditional Free Exercise Principles in *Smith*

Petitioners badly mischaracterize this Court's Free Exercise Clause jurisprudence between *Sherbert* in 1963 and *Smith* in 1990. Far from being stable and predictable, *see, e.g.*, Pet. Br. 50, it reflected a chaotic, results-oriented approach, under which the *Sherbert/Yoder* standard was applied selectively and arbitrarily—if at all. *See generally Smith*, 494 U.S. at 882-84 (collecting Free Exercise cases in which the Court declined to apply *Sherbert*).

Had the Court faithfully applied strict scrutiny during this period, the government would have consistently lost. The *Sherbert/Yoder* rule, after all, demanded that the government have a compelling state interest in its policy goals—not only generally, but as applied against a specific group of religions claimants—and that the government action be "the least restrictive means of achieving" that compelling interest. *See Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). As this Court has recognized, this standard "is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. Yet, despite facing what should have been a nearly insurmountable standard, the government almost always prevailed. Aside from *Yoder*, the only successful claims relying solely on the Free Exercise Clause involved eligibility for unemployment benefits—cases squarely governed by *Sherbert* because they involved

"denials of unemployment compensation benefits to those who have refused work on the basis of their religious beliefs." *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 832 (1989) (Free Exercise claimant who could not work between sundown Friday and sundown Saturday for religious reasons entitled to unemployment benefits); *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (Free Exercise claimant who could not work Friday and Saturday evenings for religious reasons entitled to unemployment benefits); *Thomas*, 450 U.S. 707 (Free Exercise claimant who could not work in arms manufacturing for religious reasons entitled to unemployment benefits).

Outside of that narrow context, the government won in every case in this Court across a remarkably broad range of Free Exercise claims.[5] The Petitioners and their

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5. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying claim that the government paving a highway through grounds used for religious rituals violated the Free Exercise Clause); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying claim that prison policy preventing Muslim inmates from attending worship services violated the Free Exercise Clause); *Bowen v. Roy*, 476 U.S. 693 (1986) (denying claim that requiring a Social Security number in order to receive certain benefits violated the Free Exercise Clause); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying claim that prohibiting yarmulkes with Air Force uniforms violated the Free Exercise Clause); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (denying claim that application of the Fair Labor Standards Act to religious foundation violated the Free Exercise Clause); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying claim that stripping university, which prohibited interracial dating and marriage, of its tax-exempt status violated the Free Exercise Clause); *United States v. Lee*, 455 U.S. 252 (1982) (denying claim that requiring Amish employer to comply

amici barely mention these decisions, no doubt because they disrupt Petitioners' false narrative of doctrinal stability and predictability. Yet the interregnum between *Sherbert* and *Smith* is marked by this Court's persistent efforts to avoid the consequences of strict scrutiny. In part, the Court accomplished this by categorically exempting whole swaths of state action from strict scrutiny. *See, e.g.*, *Shabazz*, 482 U.S. 342 (1987) (declining to apply strict scrutiny to prison policy); *Weinberger*, 475 U.S. 503 (1986) (declining to apply strict scrutiny to military policy). In other contexts, the Court retreated from the narrow conception of the government's interest employed in *Yoder*, instead crediting "the government's wholesale interest in refusing to entertain any exemption claims whatsoever" in those contexts. Lupu, *Dubious Enterprise*, at 52; *see also, e.g.*, *Lee*, 455 U.S. at 261 (emphasizing need for uniform social security policy and declining to exempt Amish employers); *Bob Jones Univ.*, 461 U.S. at 604 (stating that government's general interest in eliminating racial discrimination "substantially outweighs" the burden that denial of tax benefits places on university's exercise of its beliefs). In yet another case, the Court sidestepped strict scrutiny by refusing to find a "substantial burden" on religious practice from government development on public lands that would have disturbed sacred Native American ceremonial sites and devastated worship practices. *Lyng*, 485 U.S. at 447-53. These workarounds so diminished the force of *Sherbert* and *Yoder* that, by the time of *Smith*, little was left of them: Free Exercise jurisprudence had been completely hollowed out.[6]

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with social security requirements violated the Free Exercise Clause).

6. The lower courts tended to follow the pattern of working around *Sherbert* and *Yoder*. *See* James E. Ryan, Smith *and the*

After these wholesale departures from strict scrutiny, the Court eventually acknowledged that the standard was thoroughly ill-suited to Free Exercise jurisprudence. In *Smith*, the Court squarely addressed the pattern of its Free Exercise decisions since *Sherbert* and *Yoder*. Returning to the historical understanding and this Court's pre-*Sherbert* precedents, the Court held that application of the *Sherbert* test to generally applicable laws is inconsistent with the longstanding norm of not requiring Free Exercise exemptions. Accordingly, the Court rejected respondents' claim that Oregon's criminal prohibition on the use of peyote (which did not target their religious practice but made no exception for sacramental use) violated the Free Exercise Clause, and held that the Clause does not compel courts to grant exemptions from generally applicable laws to individuals with religious motivations for violating those laws. 494 U.S. at 878.

In declining to apply *Sherbert* and *Yoder*, the Court emphasized that the unwieldiness of the test in those cases had made them largely irrelevant. "Although we have sometimes purported to apply the *Sherbert* test in contexts other than [unemployment compensation]," the Court explained, "we have always found the test satisfied"; "[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id.* at 883. Given *Sherbert*'s unworkability, the Court returned to the stable foundation of its earlier decisions, announcing "in accord with the vast majority of our precedents," it would "hold the [*Sherbert*] test inapplicable" to generally applicable laws. *Id.* at 885. It reaffirmed that holding in *Church of the Lukumi Babalu*

Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1416-1437 (1992).

Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), and in *City of Boerne*, 521 U.S. at 514 ("*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."). As *Smith* prescribed, *Sherbert* has since been tightly confined to situations "where the State has in place a system of individual exemptions"; under such regimes, the state "may not refuse to extend . . . to cases of 'religious hardship' without compelling reason." 494 U.S. at 884 (citing *Bowen v. Roy*, 476 U.S. at 708).

With this significant cabining of *Sherbert*, *Smith* rejected the principle that any generally applicable, religion-neutral government regulation "may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220. *Smith* thus returned the law of religious exemptions to the original understanding and long-controlling application of the Free Exercise Clause. 494 U.S. at 885 ("To make an individual's obligation to obey [a generally applicable criminal law] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense.").

B. *Smith* correctly held that the Free Exercise Clause does not create a right to exemption from general laws, but rather protects the right to be treated equally with one's secular counterparts

The rule set forth in *Smith* and its progeny faithfully applies the Constitution's mandate of evenhandedness in the government's treatment of religion and is consistent

with other First Amendment protections. As this Court soon recognized in *Lukumi*, 508 U.S. 520, the concepts of general applicability and neutrality toward religion provide the required constitutional protection against government departures from evenhandedness. *Lukumi* involved a set of local ordinances gerrymandered to apply exclusively to the Santeria faith's practices of animal sacrifice. *Id.* at 527. This unconstitutional gerrymander reflected hostility to the Santerian faith, rather than any general policy about cruelty to animals, and therefore violated constitutional norms against singling out religious conduct for disfavor. *Id.* at 535-36. *Lukumi* thus made clear that government action that targets a particular religion or religion generally is not subject to the *Smith* rule. Because such actions are neither religion-neutral nor generally applicable, the burden they impose on religious exercise constitutes religious discrimination, properly subject to strict scrutiny. *Id.* at 532-33.

The line between religion-neutral laws subject to minimal review under *Smith*, and non-neutral laws subject to strict review under *Lukumi,* has been the subject of considerable dispute.[7] Some have contended that the presence of any secular exceptions to a law destroys its general applicability and religious neutrality,[8] thereby

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7. For a careful review of the competing positions, see James Oleske, Lukumi *at Twenty: Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 Animal L. Rev. 295 (2013); Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 Cal. L. Rev. 282 (2020).

8. *See Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, slip op. at 4-7, 591 U.S. ___ (2020) (Kavanaugh, J., dissenting) (arguing that the state must have a compelling interest in treating religious entities worse than *any* secular entity).

negating the *Smith* rule. This approach would thoroughly undermine *Smith* rather than sensibly apply its premises. Most laws have exceptions of some kind; many laws also restrict their application to activities of certain sizes and kinds. If a single exception from a law or the slightest limitation of its scope is enough to destroy its general applicability, then *Smith* would rarely govern. Once courts head down this path, legitimate and substantial government interests will be regularly subordinated to religious exemption claims, because any exception or limitation in scope will undermine the state's position that its interest is compelling.

In order to maintain the constitutionally appropriate relationship between the *Smith* principle and the *Lukumi* exception, this Court should require a religious claimant to show that its interests are being impermissibly disfavored compared to those engaged in analogous secular activity. To make that showing, a religious claimant must demonstrate that the law's treatment of religious actors reveals hostility to a particular faith, *see Lukumi*, or discriminates against religion generally, *see Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). In the absence of either showing, it is constitutionally appropriate to presume that the state has not discriminated against religion.

A cogent example is this Court's treatment of state regulation of religious gatherings during the COVID-19 pandemic. Chief Justice Roberts' concurring opinion in *South Bay United Pentecostal Church v. Newsom* addressed the appropriate considerations:

> Although California's guidelines place restrictions on places of worship, those

> restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

As this analysis reveals, the reach of *Smith* is not limited to laws that apply identically to everyone, with no differences recognized. Rather, the touchstone is the relevant secular comparator to religious activity: *Smith* applies to laws and policies that treat religious conduct similarly to secular conduct that has the same implications for relevant government interests. Such laws and policies are "not aimed at the promotion or restriction of religious beliefs." *Smith*, 494 U.S. at 879 (internal quotation marks omitted) (quoting *Gobitis*, 310 U.S. at 594-95).[9]

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9. The Court's disposition of *Calvary Chapel Dayton Valley*, 591 U.S. ___, can best be understood as involving the application of a similar principle. Nevada had classified different gatherings in ways that reflect its assessment of the risks of spreading COVID-19 associated with particular activities, secular or religious. The state's permission for larger gatherings in casinos than houses of worship reflected, among other things, a choice to "reopen a highly regulated industry," because the state could impose "significant punishment" on the gaming industry if it did

This approach fully realizes the aim of the Free Exercise Clause—to "protect[] religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status," *Espinoza*, 140 S. Ct. at 2254 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (internal quotation marks and alterations omitted)), and forbid discrimination against the belief or worship practices of any particular faith, *see Smith*, 494 U.S. at 877-78 ("It would doubtless be unconstitutional, for example, to ban the casting of statues that are to be used for worship purposes, or to prohibit bowing down before a golden calf." (internal quotation marks omitted)). In contrast, subjecting denial of religious exemption claims to strict scrutiny would warp broader antidiscrimination doctrine, ensuring *un*equal treatment for religious claimants by "excus[ing]" them from complying with otherwise valid laws. *See Smith*, 494 U.S. at 879.

Moreover, *Smith* coheres with the rest of the First Amendment. Free speech principles, for example, do not protect speech against "incidental burdens" from generally applicable, speech-neutral laws. *See, e.g.*, *Cohen v. Cowles Media*, 501 U.S. 663, 669-70 (1991) (collecting cases and stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to

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not comply with COVID-19 parameters. Brief for Respondents at 18, Calvary Chapel Dayton Valley v. Sisolak, 591 U.S. ___ (2020) (No. 19A-1070) (filed July 15, 2020). In any event, the church did not meet its burden of showing that it was being treated differently because of its religious character. Nevada treated churches and movie theaters alike, limiting both to the lesser of 50% capacity or 50 persons gathered in a single room, subject to social distancing requirements.

collect and report the news"); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").[10]

In contrast, applying strict scrutiny to claims for religious exemptions departs from broader First Amendment jurisprudence. This Court has consistently upheld content-neutral speech restrictions that incidentally burden the exercise of religion without requiring narrow tailoring. *See, e.g.*, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Cox v. State of New Hampshire*, 312 U.S. 569 (1941). In such cases, "[b]ecause the class of religious speakers is likely to be more limited in number than the class of all speakers, the state's interest in proscribing the expression of only religious claimants may not be deemed as compelling as when measured against the class of all speakers." William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 Mont. L. Rev. 227, 245 (1995). Strict scrutiny would mean that a person challenging a restriction of speech under the auspices of a religious mandate would be more likely to succeed than one who challenged the same law for non-religious reasons. *Id.* A significant imbalance would inevitably result: religious speech would

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10. *United States v. O'Brien*, 391 U.S. 367 (1968), is not to the contrary. In cases evaluating content-neutral restrictions on conduct that involves symbolic speech, this Court has consistently ruled that government actions were constitutionally permissible despite incidental limitations on some expressive activity. In addition to the holding in *O'Brien* itself, *see, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-70 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000).

flourish while secular speech would be stifled, in violation of "the seminal First Amendment principle that there is an equality in the realm of ideas." *Id.* at 244; *see also Heffron*, 452 U.S. at 653 ("[N]onreligious organizations . . . are entitled to rights equal to those of religious groups to enter a public forum and spread their views."); *Prince*, 321 U.S. at 164 (the First Amendment does not provide "freedom of conscience a broader protection than for freedom of the mind").

Interpreting the Free Exercise Clause to require religious exemptions from generally applicable laws would present decisionmakers with the additional, practical problem of distinguishing between beliefs that are religious and those that are philosophical, moral, or social. *Thomas*, where the United States and Indiana Supreme Courts disagreed over whether the petitioner's objection to manufacturing armaments was religious or philosophical, illustrates the problem. Marshall, *In Defense of* Smith, at 319 n.59 (citing *Thomas*, 450 U.S. at 714-15).

Finally, *amici curiae* in support of Petitioners argue that religious liberty is insufficiently protected by "perfect uniformity in the application of a law." Brief for The Church Of Jesus Christ Of Latter-Day Saints et al. as Amici Curiae Supporting Petitioners at 31, Fulton v. City of Philadelphia (No. 19-123) (filed June 3, 2020). But equality under the law is a core constitutional principle. The suggestion that the free exercise of religion and religiously motivated conduct stand alone as the most favored First Amendment activity, more worthy of protection than analogous claims of conscience and the right to the freedom of speech, is in tension with our

constitutional tradition. *See Welsh v. United States*, 398 U.S. 333 (1970) (holding that the conscientious objector provision of Universal Military Training and Service Act should be construed to exempt from military service those whose moral, ethical, or religious beliefs preclude their participation in war.); *see also* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. Ark. Little Rock L. J. 555 (1998).

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For the foregoing reasons, both history and logic demonstrate that the Free Exercise Clause does not require religious exemptions from generally applicable, religion-neutral laws. *Smith* was correctly decided.

II. REPLACING *SMITH* WITH PETITIONERS' STRICT SCRUTINY TEST WOULD UNDERMINE JUDICIAL ADMINISTRATION OF THE LAW AND CREATE A REGIME OF EXEMPTIONS ON DEMAND

Petitioners ask this Court to "revisit" *Smith* and replace its clear, administrable rule with a "strict scrutiny" test modeled on "RFRA, RLUIPA, state RFRAs, and the *Sherbert*/*Yoder* line of cases . . . ." Pet. Br. 50. Petitioners conspicuously fail to describe or propose the particulars of an administrable test. They do not explain how courts could apply a strict scrutiny test with more doctrinally sound and consistent results than the unpredictable Free Exercise cases of the 1980s. *See, e.g.*, Pet. Br. 50-52. Nor can they. Replacing *Smith* with a strict scrutiny test of the sort Petitioners seek would be disastrous for both judicial administrability and substantive constitutional norms.

A. Petitioners' test would inject inconsistency and unpredictability into a coherent and administrable area of law

Smith and its progeny provide a clear, administrable rule for adjudicating claims for religious exemptions. Petitioners, however, urge the Court to replace *Smith* with a strict scrutiny test that would require courts to balance religious burdens against the state's regulatory interest. Replacing *Smith* with Petitioners' test would necessitate a "judgment-by-judgment analysis" of Free Exercise protections that this Court has explicitly rejected. *Espinoza*, 140 S. Ct. at 2260. Moreover, the balancing test Petitioners suggest invites inconsistent results and could disadvantage religions outside the Judeo-Christian tradition. *Compare Lyng*, 485 U.S. at 452-57 (refusing to apply *Sherbert/Yoder* to government interference with Native American spiritual site on public land), and *Bowen*, 476 U.S. at 693 (declining to extend *Sherbert* to Native American religious belief on grounds it implicated governmental, not individual, conduct), *with Hobbie*, 480 U.S. at 141-42 (rejecting *Bowen*'s reasoning to grant religious exemption to Seventh-day Adventist).

This Court's Free Exercise and contemporary RFRA jurisprudence illustrate the difficulty of defining a "substantial burden" on free exercise of religion, underscoring the inconsistency, uncertainty, and unworkability of Petitioners' test. A court's "narrow function" in reviewing a religious exemption claim is to determine only whether an individual's asserted religious belief represents an "honest conviction," not to decide its validity or worth. *Thomas*, 450 U.S. at 716; *cf. June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment) (noting that courts lack any "plausible" way to "objectively assign weight

to . . . imponderable values"). This Court repeatedly has "warned that courts must not presume to determine . . . the plausibility of a religious claim." *Smith*, 494 U.S. at 887 (collecting cases).[11] Indeed, after this Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), claimants have become their own judge of what counts as a substantial burden on their religious exercise, and courts may not review a plaintiff's self-identified religious beliefs for anything other than sincerity. *Id.* at 725 (stating that, where RFRA plaintiffs "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line . . . it is not for [the Court] to say that their religious beliefs are mistaken or insubstantial."); *see also* Frederick Mark Gedicks, *Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 Geo. Wash. L. Rev. 94 (2017) (noting *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), "left undecided whether courts may adjudicate the substantiality of burdens on religion in light of the religious-question doctrine" and underscoring the doctrinal consequences of "entrust[ing] the question" to religious claimants "so self-interested in the answer, however sincere their belief"); *Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting) ("[T]oday's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.").

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11. *See also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) (rejecting argument that would require "courts to delve into the sensitive question of what it means to be a 'practicing' member of a faith"); *Smith*, 494 U.S. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims." (internal quotation marks and citation omitted)).

Overruling *Smith*, and imposing a constitutional framework on all state and local policies akin to that in *Sherbert-Yoder* and RFRA, will replicate and exacerbate the difficulties in judicial administration found in those contexts.

B. Petitioners' test would invite exemptions "on demand"

If, as one would expect, the *Hobby Lobby* Court's approach to "substantial burdens" under RFRA feeds back into Free Exercise adjudication, religious exemption claims will routinely trigger the strict scrutiny standard that Petitioners advance. And the *Hobby Lobby* Court's approach to the *Sherbert/Yoder* standard would be nearly impossible for governments to overcome, resulting in widespread religious exemptions to generally applicable laws, and diminishing the government's ability to effectively regulate conduct.

Strict scrutiny has proven onerous in the RFRA context in part because there is nearly always a less restrictive means to accomplish the Government's goal—even if it imposes significant expense on the taxpayer. *See Hobby Lobby*, 573 U.S. at 730; *see also id.* at 766 (Ginsburg, J., dissenting) ("[W]here is the stopping point to the 'let the government pay' alternative? . . . [T]he Court cannot easily answer that question . . . ."). And this standard is particularly difficult to satisfy because the government's interest is balanced against the impact on a few religious objectors. The state will rarely succeed in arguing that its interests—even when compelling—will be undermined by granting an exemption to a handful of objectors. *See Yoder*, 406 U.S. at 235-36 (finding that the state failed to adequately show "how its admittedly strong interest

in compulsory education would be adversely affected by granting an exemption to the [plaintiffs]").

Jettisoning *Smith* in favor of a stringent, RFRA-like standard for Free Exercise claims would make virtually every law vulnerable to a Free Exercise challenge, and open the floodgates to "religious exemptions from civic obligations of almost every conceivable kind," *Smith*, 494 U.S. at 888. Under such a standard, it is easy to foresee religious exemptions to applications of criminal law, tort law, child welfare law, marriage and divorce law, labor and employment law, abortion regulation, and so on. Recent challenges to generally applicable laws, routinely denied now under *Smith* and its progeny, would be vindicated under strict scrutiny, vividly foreshadowing the burden on the courts and on legitimate government interests under a jurisprudence of exemptions "on demand." *See, e.g.*, *Doe v. Parson*, 960 F.3d 1115 (8th Cir. 2020) (denying Satanic Temple member's free exercise challenge to Missouri's informed consent to abortion law); *State v. Sunderland*, 168 P.3d 526 (Haw. 2007) (denying Cannabis Ministry member's claim for exemption from state drug law); *Plumbar v. Perrilloux*, 2020 WL 3966876 (M.D. La. July 13, 2020) (denying religious claimants' motion for injunctive relief, on Free Exercise grounds, against Louisiana's cockfighting prohibition).

Under Petitioners' test, courts faced with such claims could avoid applying strict scrutiny only on the grounds that a claim is "so bizarre, so clearly nonreligious" as to be beyond the ambit of the First Amendment. *Thomas*, 450 U.S. at 715. This escape valve will necessarily invite courts to become "arbiters of scriptural interpretation"—a role that *Thomas* purported to reject, *id.* at 716—by assessing the reasonableness of claimed religious beliefs, a task from

which courts should be constitutionally barred, *see United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting) ("[A]s a matter of either practice or philosophy, I do not see how we can separate an issue as to what is believed from considerations as to what is believable."). As this Court has recognized repeatedly, courts are particularly ill-suited to resolve such questions, which entangle religion and state in ways that compromise both. *See, e.g.*, *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061 (emphasizing "church independence in matters of faith and doctrine"); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012) (underscoring constitutional prohibition on "government involvement in . . . ecclesiastical decisions").[12] And judicial review of reasonableness would inevitably privilege more familiar religious beliefs at the expense of less-familiar religious beliefs, a result that is anathema to the Free Exercise Clause. The standard for which Petitioners advocate would thus perversely render minority beliefs disproportionately vulnerable to suppression.

Petitioners point to RFRA's strict scrutiny standard as an exemplar of what the Court should adopt in place

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12. Adjudication of the "ministerial exception" recognized in *Hosanna-Tabor* and *Our Lady of Guadalupe School* does not entail any balancing of state interests against competing claims of ecclesiastical freedom. As the Chief Justice noted in *Hosanna-Tabor*, the First Amendment has already "struck the balance." 565 U.S. at 196. *See* generally Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in* Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 20 Lewis & Clark L. Rev. 1265 (2017) (arguing that *Hosanna-Tabor* rests entirely on the longstanding doctrine of judicial abstention from decision of exclusively ecclesiastical questions, and its unanimity is therefore no mystery at all).

of *Smith*. *E.g.*, Pet. Br. 18, 38-39, 50. But experience demonstrates that if a RFRA-like standard were endowed with constitutional dimensions, it would diminish the power of state and local governments to protect their citizens. *See, e.g.*, *United States v. Girod*, 159 F. Supp. 3d 773 (C.D. Ky. 2015) (RFRA barred U.S. Marshals Service from photographing Amish detainee as part of standard processing procedure); *Perez v. Paragon Contractors, Corp.*, 2014 WL 4628572 (D. Utah Sept. 11, 2014) (RFRA barred the Department of Labor from questioning a fundamentalist Mormon about the inner workings of his sect during child labor investigation). If Petitioners' view were to prevail, lower courts would face a lose-lose choice. They could either hamstring local governance and undermine the rule of law, or sacrifice uniformity and predictability for pre-*Smith*-style workarounds that enable governments to exercise legitimate police powers.[13] This Court should not relaunch such a regime.

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In the three decades since *Smith*, the decision has provided a clear, administrable approach that is consistent with First Amendment principles and does not impose an unreasonable barrier to government action. Petitioners' test, on the other hand, poses manifold threats. It would resurrect a highly subjective case-by-case approach to Free Exercise claims, force courts to take up ecclesiastical questions they have long disclaimed, and generate

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13. Pre-*Hobby Lobby* RFRA jurisprudence provides a blueprint for such workarounds. *See* Lupu, *Dubious Enterprise*, at 60-61 & n.118 (documenting persistent workarounds in federal Courts of Appeals). Similarly, state courts often smuggled free-exercise workarounds into state RFRA applications. *Id.* at 74.

inconsistent applications of the "substantial burden" test. Petitioners' test would stack the deck heavily in favor of religious claimants, wreaking havoc on the affairs of state and local governments. It would flout the Constitution's mandate for evenhandedness by elevating religious claimants above all secular counterparts. Petitioners' test would produce a profoundly unworkable body of law, under which religious exemptions from a wide array of statutes could be readily obtained. These dire consequences underscore that *Smith* should not be "revisited," but reaffirmed.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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