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 FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY OF THE ANGLICAN CHURCH IN NORTH AMERICA; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; CHURCH OF GOD IN CHRIST, INC.; AND SAMARITAN'S PURSE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question: Whether *Employment Division, Department of Human Resources of Oregon* v. *Smith* should be reconsidered.

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INTERESTS OF AMICI CURIAE[1]

Amici are churches and other religious organizations with a shared commitment to defending religious freedom under the Constitution. Like other religious organizations, we have a profound interest in the correct interpretation and application of the Free Exercise Clause. Some *amici* participated in the congressional effort to enact the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) to secure meaningful protections for religious freedom.

SUMMARY OF ARGUMENT

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) has been a disaster for religious freedom. Its standard misguides courts into routinely denying constitutional protection for even the most obvious and avoidable invasions of the free exercise of religion. Some courts even invoke *Smith* to deny any free exercise claim that lacks proof of religious animus. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013). In this way, the "rare example of a law actually aimed at suppressing religious exercise" has become for some courts the *only* circumstance warranting constitutional protection.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* state that all parties have submitted their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in judgment). Religious people and institutions have been severely and repeatedly injured, just as *Smith*'s dissenters and prominent critics predicted. Reconsidering *Smith* is amply justified. Its legal standard has proved thoroughly unworkable. The time has come for *Smith* to be overruled.

What then? Without the distorting influence of *Smith*, judicial doctrines governing the Free Exercise Clause essentially form a two-part framework.

First, some government actions are categorically barred. The government cannot interfere in a church's selection and retention of a minister. Nor can the government impose a religious test for public office. A similar principle holds that the government cannot engage in religious targeting. Singling out a person or group for special penalties or disabilities because of religious belief, practice, or character is antithetical to both Religion Clauses. Government hostility toward religion contradicts the Establishment Clause, while targeting a faith community for special burdens violates the Free Exercise Clause. Religious targeting calls for prompt relief—not judicial balancing.

Second, when a law or other government action is not subject to a categorical rule, strict scrutiny applies. That familiar test requires the government to justify a substantial burden on religion by demonstrating that its application of the law to the religious objector advances a compelling state interest through the least restrictive means. A close review of the Court's leading free exercise decisions shows that, properly applied, the compelling interest test supplies the analytical

tools to vindicate the freedom to exercise religion without preventing the government from carrying out its essential tasks. Unless a categorical rule applies, strict scrutiny controls any claim under the Free Exercise Clause.

Both the categorical rule against religious targeting and strict scrutiny apply here. Record evidence shows that the City of Philadelphia targeted Catholic Social Services (CSS) for exclusion from the City's foster care system because of CSS's sincere religious beliefs and practices. Even if that exclusion does not qualify as religious targeting, Philadelphia's treatment of CSS cannot withstand strict scrutiny. The City's interest in ensuring a fair opportunity for same-sex couples to act as foster parents may be compelling, but the government cannot hope to demonstrate that removing CSS as a foster care provider is the least restrictive means of achieving that goal when twenty-nine other private agencies in the City offer foster care services to same-sex couples. Philadelphia has thus infringed CSS's fundamental right to carry out its religious mission to serve vulnerable children. That determination violates the Free Exercise Clause and cannot stand.

ARGUMENT

I. *Smith* Should Be Overruled.

A. Religious people and institutions have suffered serious injuries because of *Smith*.

Smith's central holding is that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or

prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (quotation omitted). For thirty years, that has been the governing standard under the Free Exercise Clause.

Speaking from *amici's* personal experience, *Smith* thwarts religious organizations from enjoying the freedom to exercise religion guaranteed by the First Amendment. Because courts invoking *Smith* now routinely deny free exercise claims, fewer such claims are litigated. See Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. Church & St. 237, 248 (2004) (finding that "the rate of free exercise cases initiated by religious groups dropped by over 50% immediately after *Smith*"); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 389–90 (2018) (concluding that the Tenth Circuit sustained only two free exercise claims during a five-year period).

Not all the damage is visible in reported judicial decisions. *Smith* encourages government-wide indifference to conflicts between laws and the sincere exercise of religion. Lawmakers and other government officials see no reason to bargain with churches, religious charities, and religious schools for reasonable accommodations. Many refuse to discuss urgent religious concerns—even with representatives from sizable faith communities. This pattern of reduced respect for religious freedom has chilled the free exercise of religion protected by the Constitution. Religious organizations often face an untenable choice between conceding the government's exercise of regulatory

power in religiously sensitive areas and challenging the government in court despite the low odds of success.

Smith has injured religious people and institutions by denying them the freedom to exercise religion despite the most sympathetic facts:

- Mary Stinemetz, a devout Jehovah's Witness, could not accept a blood transfusion because of her faith. Her home state refused to pay for a liver transplant that a hospital in a neighboring state could perform without a transfusion. Stinemetz challenged the denial but the trial court, applying *Smith*, brushed aside her free exercise claim. That decision was reversed on appeal, see *Stinemetz* v. *Kan. Health Policy Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011), but not before her declining medical condition rendered her ineligible for a transplant. She died soon after. Because of *Smith*, state officials "believe[d] that they never [had] to consider religious exemptions—that they didn't have to talk to Mary Stinemetz or take her seriously." Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. Rev. 167, 203–4.

- In *Catholic Charities* v. *Serio*, 859 N.E.2d 459 (N.Y. 2006), numerous faith-based social services organizations brought a free exercise challenge to a state law requiring employers, in violation of their religion, to include contraceptives in their health insurance plans. The statute narrowly exempted

"churches ministering to the faithful," but not other religious employers. *Id.* at 463. New York's highest court invoked *Smith* as justification for rejecting plaintiffs' free exercise claim. *Id.* at 464.

- Another case involved Dr. Christine Brody. When a lesbian patient came to her for fertility treatments, Dr. Brody informed the patient that her religious faith prevented her from performing "intrauterine insemination." *N. Coast Women's Care Med. Grp., Inc.* v. *Superior Court*, 189 P.3d 959, 963 (Cal. 2008). Dr. Brody referred the patient to another doctor in the same office, who performed that procedure, yet the patient sued her for discrimination. Applying *Smith*, the California Supreme Court likewise brushed aside her free exercise claim. *Id.* at 966 (quoting *Smith*, 494 U.S. at 879).

- Unfortunately, *Smith*'s damage extends to interpretations of state constitutions. In *Gingerich* v. *Commonwealth*, 382 S.W.3d 835, 837 (Ky. 2012), a Kentucky law required the Amish to display a brightly colored triangular sign on their horse-drawn buggies to indicate a slow-moving vehicle. Complying with that rule contradicted the well-known Amish belief in shunning bright colors. Presented with claims under the state constitution, the Kentucky Supreme Court incorporated *Smith* as the rule of decision under state law and denied the free exercise claim. *Id.* at 844.

B. *Smith*'s standard has been unworkable.

Three decades' experience has shown that *Smith* is thoroughly unworkable.

1. Federal circuits are mired in an entrenched split of authority over the meaning of neutrality under *Smith*. Compare, *e.g.*, *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (neutrality "prohibits government from deciding that secular motivations are more important than religious motivations"); with *KDM* v. *Reedsport Sch. Dist.*, 196 F.3d 1046, 1050 (9th Cir. 1999) (concluding that a law was neutral because it did not target religion).

Smith's requirement of general applicability has produced no greater consensus. Some courts hold that a law is not generally applicable if it admits exceptions for some secular interests but not any religious ones. See, *e.g.*, *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). Other courts say that a law is generally applicable unless it singles out religion for harmful treatment. See, *e.g.*, *Am. Family Ass'n, Inc.* v. *FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004). Still other courts collapse neutrality and general applicability into the single question of religious animus. See, *e.g.*, *Bethel World Outreach Ministries*, 706 F.3d at 561.

2. Courts applying *Smith* have sustained laws whose object is to single out religion for penalties or burdens, merely because religious targeting does not appear on the face of the law. In *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the Ninth Circuit upheld Washington State regulations requiring pharmacies to stock and dispense controversial contraceptives like *ella* and Plan B. See *id.* at 1071. State officials drafted these facially neutral regulations with

the object of removing long-standing exceptions for religious and moral objections, while preserving exceptions for secular reasons. Despite that object, the court of appeals pronounced the regulations sufficiently neutral under *Smith*. "The possibility that pharmacies whose owners object to the distribution of emergency contraception for religious reasons may be burdened disproportionately does not undermine the rules' neutrality." *Id.* at 1077.

This Court denied review over a dissent by Justice Alito, joined by Chief Justice Roberts and Justice Thomas. These Justices reaffirmed that "a law that discriminates against religiously motivated conduct is not 'neutral.'" *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2436 (mem) (2016) (Alito, J., dissenting) (quotation omitted). Strict scrutiny should have governed the free exercise challenge, the dissent reasoned, because the Washington regulations manifested "hostility toward pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State." *Id.* at 2433.

3. Supposed exceptions to *Smith* have turned out to be meaningless. The notion that a free exercise claim might warrant strict scrutiny if combined with some other constitutional claim, 494 U.S. at 881, "never made any sense, and almost nothing has come of the hybrid-rights theory." Laycock, 2019 B.Y.U. L. Rev. at 172. Courts have generally reduced it to inconsequence, or rejected it altogether. See *Combs* v. *Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 244–47 (3d Cir. 2008) (reviewing decisions and concluding that the hybrid-rights theory is dicta).

Smith also endorses strict scrutiny when a free exercise claim arises from a government "system of individualized exemptions." 494 U.S. at 884. But that supposed exception has also fallen flat. No later decision by the Court has "explained with specificity what constitutes a 'system' of individualized exceptions, and * * * courts and commentators are divided on the question." *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004).

In all these ways, *Smith* has been unworkable.

II. Free Exercise Doctrines Form a Two-Part Framework Consisting of Categorical Rules and a Rigorous Form of Strict Scrutiny.

If *Smith* is overruled (as we urge), an imperative question will be what judicial standard should replace it. A straightforward answer is to embrace existing precedent (without *Smith*) that forms a two-part framework for free exercise jurisprudence. The first part consists of categorical rules that protect certain forms of religious exercise, no matter what interest the government asserts. The second part consists of a balancing test—strict scrutiny—that governs other free exercise claims. Clearing away *Smith* would allow the Court to revert to this framework.

A. The Free Exercise Clause categorically bars certain government actions.

The First Amendment declares that "Congress shall make no law * * * prohibiting the free exercise [of religion]." U.S. Const. amend. I. Although the freedom to act on one's religious convictions is not absolute in every circumstance, certain forms of religious freedom do receive uncompromising protection.

1. One such right is the ministerial exception. "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *E.E.O.C.*, 565 U.S. 171, 181 (2012). That rule is categorical, meaning that it admits no judicial balancing. "When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way." *Id.* at 196. This rule reflects the larger principle of church autonomy—the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); accord Mark DeWolfe Howe, *The Garden and the Wilderness* 86 (1965) ("[R]eligious liberty has little substance if those who join together in churches are not free to manage their ecclesiastical affairs as they choose.").

2. The Constitution's ban on religious tests for public office is likewise inflexible. "[N]either a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion." *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961). This principle extends not only to public office, but also to other government decisions because "[t]he test oath is abhorrent to our tradition." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946); see also *Town of Greece* v. *Galloway*, 572 U.S. 565, 621 (2014) (Kagan, J., dissenting) ("[G]overnment, in its various processes and proceedings, imposes no religious tests on its citizens.").

Again, this principle is not subject to judicial balancing. No government interest can justify "restor[ing] the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Torcaso*, 367 U.S. at 494 (footnote omitted).

3. A third categorical rule under the Free Exercise Clause holds that no government agency or official may "devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Lukumi*, 508 U.S. at 547. Under this "rule," the Court has held that "a law targeting religious beliefs as such is *never* permissible." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 n.4 (2017) (emphasis added) (quoting *Lukumi*, 508 U.S. at 533). Strict scrutiny does not apply to such a law. *Ibid.* Rather, "[t]he Free Exercise Clause *categorically* prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion) (emphasis added).

Recognizing a categorical bar on religious targeting fairly reflects the history of religious persecution that led to adoption of the First Amendment. Those who adopted the Free Exercise Clause were "sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience." *McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J., separate opinion); accord Sanford H. Cobb, *The Rise of Religious Liberty in America* 17 (1903) ("The American people came to the work of framing their fundamental

laws after centuries of religious oppression and persecution * * * had taught the utter futility of all attempts to propagate religion by the rewards, penalties, or terrors of human law."). The Free Exercise Clause expresses the founding generation's determination to end that cycle of violence and repression. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 22 ("The purpose that we can most confidently attribute to the religion clauses is that the two centuries of religious conflict in the wake of the Reformation were not to be repeated here.").

A categorical rule against religious targeting is likewise consistent with precedent.

Take *Trinity Lutheran*. There, the State of Missouri denied a grant for an otherwise eligible religious school to replace its gravel playground with a rubberized surface. See 137 S. Ct. at 2018. The Court affirmed the rule that "a law targeting religious beliefs as such is never permissible." *Id.* at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 533) (citing *McDaniel*, 435 U.S. at 626). *Trinity Lutheran* did not reach the issue whether the categorical rule applied because Missouri's determination to withhold a grant purely because of the school's religious character could not satisfy strict scrutiny. See *id.* Even so, the rule remains valid—and, we argue, increasingly important. Whatever else the government can do, it cannot single out religious people or institutions for penalties or special burdens.

That rule has decided cases involving city ordinances criminalizing the religious practice of animal sacrifice, *Lukumi*, 508 U.S. at 547; a provision of state law excluding ministers from serving as delegates to a state constitutional convention, *McDaniel*, 435 U.S. at

629; and a city's decision to exclude Jehovah's Witnesses from using a public park for religious meetings when other groups had access for similar purposes, *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953). These decisions condemn laws targeting religion—without judicial balancing.

The rationale is self-evident. Official hostility toward religion is blatantly "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum* v. *Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 211–12 (1948). Government officials bear the solemn "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Com'n*, 138 S. Ct. 1719, 1731 (2018). The ban on laws targeting religion also arises from the Establishment Clause, which prohibits laws that manifest hostility toward a particular religious belief, tradition, or identity. See *Everson* v. *Bd. of Educ. of Ewing*, 330 U.S. 1, 15–16 (1947). Like the ministerial exception, *Hosanna-Tabor*, 565 U.S. at 181, the rule against religious targeting reflects the independent force of both Religion Clauses. See *McDaniel*, 435 U.S. at 629–30 (Brennan, J., concurring) (concluding that Tennessee law's exclusion of ministers from the state constitutional convention "violates both the Free Exercise and Establishment Clauses"). No interest, however weighty, can justify the government in singling out a person or organization for special burdens and penalties because of the religion they profess or practice. Freedom from religious targeting remains a vital principle of constitutional law.

Critics may object that a categorical ban on religious targeting would disable the government from preventing harms that are uniquely caused by or associated with the exercise of religion. Not so.

Consider the practice of handling poisonous snakes as part of a religious ceremony. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99 (Tenn. 1975), cert. denied, 424 U.S. 954 (1976). Lawmakers can prohibit that practice without targeting religious belief or affiliation. The same prohibition can be framed as a general rule whose only exceptions allow for handling venomous snakes when it poses substantially lower risk of injury or death, as in zoological or other scientific research. Even if the rule is framed in general terms, however, a ban on snake handling that imposes a substantial burden on the exercise of religion is still subject to strict scrutiny (as we explain below). But the government can likely demonstrate a compelling interest in ending this practice because it falls in the small class of religious activities that poses a "*substantial* threat to public safety." *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963) (emphasis added).

Requiring the government to couch laws in terms that do not classify people by religious belief, practice, or identity is not a pointless formality. Adhering to the ban on religious targeting is necessary (although not always sufficient, *pace Smith*) to satisfy the Religion Clauses. Complying with that ban likewise requires lawmakers and administrators to frame any legal requirement in general terms, which enhances the rule of law. See Lon L. Fuller, *Morality of Law* 46 (rev. ed., 1969). It also teaches government officials and the public alike that religious targeting is per se unconstitutional. And a ban does not preclude the government

from carrying out its essential purposes: suppressing or punishing the exercise of religion is never the least restrictive means of achieving such purposes.

B. Unless a categorical rule applies, a claim under the Free Exercise Clause should be controlled by strict scrutiny.

When a categorical rule does not apply, the text and history of the First Amendment demonstrate that safeguarding the free exercise of religion deserves strong judicial protection. It is not enough to shield the exercise of religion from government sponsored discrimination; after all, the First Amendment guarantees the "free exercise" of religion—not merely the "equal protection" of religion. Strict scrutiny, or the compelling interest test, fairly reflects the high and distinctive value that the Constitution places on religious belief and practice. In considering whether strict scrutiny should replace *Smith*, the Court's leading free exercise decisions repay close reading. Reviewing the facts and circumstances where strict scrutiny has decided previous free exercise claims discloses aspects of free exercise jurisprudence that are easily overlooked. Indeed, that jurisprudence contains five principles of law that ought to guide the Court in applying strict scrutiny to future free exercise claims.

1. In *Sherbert*, Adell Sherbert lost her job and could not find another one because her Seventh-day-Adventist faith precluded work on Saturdays. *See* 374 U.S. at 399–400. South Carolina denied her claim for unemployment compensation under a statute disqualifying any person who "has failed, without good cause" to accept work when offered. *Id.* at 401 (quotation omitted). Presented with Sherbert's challenge under

the Free Exercise Clause, the Court held that the state could not "constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Id.* at 410.

South Carolina's denial of benefits imposed a "clear" burden on Sherbert's exercise of religion. *Id.* at 403. That was so even though the burden was "an indirect result of welfare legislation within the State's general competence." *Ibid.* Denying unemployment benefits placed "unmistakable" pressure on Sherbert to forgo her religious practice of refraining from work on Saturday. *Id.* at 404. South Carolina applied that pressure by forcing her "to choose between following the precepts of her religion and forfeiting benefits * * * and abandoning one of the precepts of her religion in order to accept work." *Ibid.* By thrusting that choice on Sherbert, South Carolina law "effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

Since the law burdened the exercise of religion, the Court asked "whether some compelling state interest * * * justifies the substantial infringement of [Sherbert's] First Amendment right." *Ibid.* South Carolina's half-hearted response was the "possibility" of "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work." *Id.* at 407. Yet there was no evidence that Sherbert was guilty of "malingering or deceit." *Ibid.* Even if an interest in avoiding spurious claims were compelling, the state could not "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Ibid.* (footnote omitted). South Carolina failed to show that accommodating Sherbert was unworkable. See *id.* at 408–09. The

Court added that accommodating an employee's Sabbath observance did not foster the establishment of religion. See *id.* at 409.

Wisconsin v. *Yoder*, 406 U.S. 205 (1973) held that the First Amendment precluded Wisconsin from enforcing its mandatory high-school attendance law against members of the Amish faith. Jonas Yoder and Wallace Miller, members of the Old Order Amish religion, were convicted of violating a state law requiring their children to attend public high school and "fined the sum of $5 each." *Id.* at 207. These men "believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but * * * also endanger their own salvation and that of their children." *Id.* at 208. Enforcing the compulsory attendance law for Amish high-school students "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they exist today." *Id.* at 218.

The potentially devastating cost of enforcing Wisconsin's school attendance law prompted the Court to frame the free exercise standard in memorable terms:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

Id. at 215.

Wisconsin could not meet this burden by asserting "a sweeping claim" that the state's "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. It was "settled" in the Court's view that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* at 215. Nor was the state's interest in uniform enforcement sufficient. "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. When faced with a free exercise claim, a reviewing court must "*searchingly* examine the interests that the State seeks to promote" and determine "the impediment to those objectives that would flow from recognizing the claimed [religious] exemption." *Ibid.* (emphasis added).

Wisconsin asserted state interests in preparing all students—including the Amish—"to participate effectively and intelligently in our open political system" and "to be self-reliant and self-sufficient participants in society." *Id.* at 221. To this, the Court responded that vocational training adequately prepares a child for "the separated agrarian community" characteristic of Amish life. *Ibid.* Considering the Amish community's centuries-long success in childrearing, the Court reasoned that Wisconsin's interest in forcing Amish attendance in high school was "somewhat less substantial than requiring such attendance for children generally." *Id.* at 228–29. The state's broad interest in compulsory education could not carry the day. Rather, the state had "to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.* at 236.

Wisconsin's other justification for enforcing the law was that requiring Amish children to attend high school reflects the state's power to act "as *parens patriae*." *Id.* at 229. But the record contained no hint that children were harmed by allowing Amish parents to train them at home. See *id.* at 230. What is more, the state's assertion lacked proof of "any actual conflict between the wishes of parents and children." *Id.* at 232. The Court rejected the "all-encompassing scope" of this *parens patriae* rationale as antithetical to "the central values underlying the Religion Clauses in our constitutional scheme of government." *Id.* at 234. As in *Sherbert*, the Establishment Clause did not preclude accommodating the Amish way of life. *Id.* at 234 n.22.

In *McDaniel*, Paul McDaniel challenged a Tennessee law barring him from office as a delegate to the state constitutional convention because he was a Baptist minister. See 435 U.S. at 620. As in *Yoder*, the Court asked whether this restriction served state "interests of the highest order." *Id.* at 628 (quoting *Yoder*, 406 U.S. at 215). Tennessee asserted an interest in avoiding the establishment of religion. *Ibid.* In particular, the state expressed concern that a minister, once elected, would "necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others." *Id.* at 628–29. But the Court regarded the prospect of interdenominational strife as unconvincing. See *id.* at 629. Accordingly, the Court held that the Tennessee provision violated McDaniel's right to free exercise. See *ibid.*

Justice Brennan added a thoughtful and influential concurrence, explaining his view that Tennessee's exclusion of ministers violates both Religion Clauses. *See*

id. at 629–30. He rejected the state's distinction between regulating religious belief and restricting professional ministers. *Id.* at 631. Not only that, he reasoned that "Tennessee's disqualification provision imposed an unconstitutional penalty upon [McDaniel's] exercise of his religious faith." *Ibid.* (footnote omitted). The law, in effect, forced a minister like McDaniel "to purchase his right to engage in the ministry by sacrificing his candidacy." *Id.* at 634. Tennessee's restriction on ministers also violated the Establishment Clause by manifesting hostility toward religion. Brennan explained that the Establishment Clause "may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* at 641.

Thomas v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) held that Indiana violated the Free Exercise Clause by denying unemployment compensation to Eddie Thomas. He quit his job because his Jehovah's Witness faith conflicted with his work producing tank turrets. *See id.* at 711. A fellow worker, also a Jehovah's Witness, disagreed that their religion proscribed work on military armaments. *See ibid.* Finding that Thomas did not quit for "good cause," the Indiana Supreme Court held that he "did not qualify for benefits." *Id.* at 713. The Indiana court further concluded that awarding Thomas unemployment benefits, "while denying such benefits to persons who terminate for other personal but nonreligious reasons," would offend the Establishment Clause. *Ibid.*

For this Court, it did not matter that Thomas disagreed with his fellow church member about the morality of assisting in the production of military

weapons. "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715–16. Rather, the "narrow function" of a court reviewing a free exercise claim is to decide whether the claimant acted on "an honest conviction that such work was forbidden by his religion." *Id.* at 716.

The starting point of analysis in *Thomas* was the time-honored principle that the government imposes a substantial burden on religion where it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief." *Id.* at 717–18. Either action puts "substantial pressure" on a religious believer "to modify his behavior and to violate his beliefs." *Id.* at 718. Indiana's law had a "coercive impact" on Thomas's religious practice, because it forced Thomas to choose "between fidelity to religious belief or cessation of work"—a choice that the Free Exercise Clause forbids. *Id.* at 717.

On finding that Indiana law imposed a substantial burden on Thomas's religion, the Court asked whether the State could demonstrate that its law "is the least restrictive means of achieving some compelling state interest." *Ibid.* Indiana asserted its interests in "avoid[ing] * * * widespread unemployment" and "avoid[ing] a detailed probing by employers into job applicants' religious beliefs." *Id.* at 718–19. Neither interest satisfied the Court's "properly narrowed" inquiry. *Id.* at 719. It was implausible that accommodating Thomas would cause "widespread unemployment," especially since the record said nothing about the number of Indiana employees who faced a conflict of faith like his. See *ibid.* And the Court found

no evidence supporting the state's concern that a religious accommodation would lead to "detailed inquir[ies] by employers into applicants' religious beliefs." *Ibid.* Lacking evidentiary support, the state's interests were not "sufficiently compelling to justify the burden upon Thomas' religious liberty." *Ibid.* Once again, the Establishment Clause did not pose any impediment to accommodating Thomas. See *id.* at 720.[2]

Trinity Lutheran held that the State of Missouri violated the Free Exercise Clause by denying a competitive grant for playground resurfacing only because the applicant was a religious school. See 137 S. Ct. at 2012. Missouri's policy of automatically disqualifying the school because of its "religious character" acted as "a penalty on the free exercise of religion that "triggers the most exacting scrutiny." *Id.* at 2021. While acknowledging the categorical rule against religious targeting, the Court declined to apply that rule "because [the state] cannot survive strict scrutiny in any event." *Id.* at 2024 n.4 (quoting *Lukumi*, 508 U.S. at 553). The state's only asserted interest was a "policy preference for skating as far as possible from religious establishment concerns." *Id.* at 2024. Considering "the clear infringement on free exercise," that preference did not rank as compelling. *Ibid.* Missouri's desire to maintain a separation of church and state beyond

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[2] *Sherbert* and *Thomas* have controlled the outcome in other free exercise decisions. See *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Frazee* v. *Illinois Dep't Emp't Sec.*, 489 U.S. 829 (1989) (unanimous).

what the First Amendment requires is, after all, "limited by the Free Exercise Clause." *Ibid.* (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 286 (1981)).

2. Together, these decisions establish durable principles for adjudicating free exercise claims.

First, the government imposes a substantial burden on the exercise of religion when it withholds a public benefit because of religious belief, practice, or identity. See *Trinity Lutheran*, 137 S. Ct. at 2022 (subsidy for resurfaced school playground); *McDaniel*, 435 U.S. at 626 (public office); *Sherbert*, 374 U.S. at 406, *Thomas*, 450 U.S. at 717–18 (unemployment benefits); *Everson*, 330 U.S. at 16 (subsidy for busing children to school). This principle ensures that the government does not "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

Second, the government can justify a substantial burden on religion only by demonstrating that applying the law to the religious objector advances a compelling state interest through the least restrictive means. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019; *Lukumi*, 508 U.S. at 531–32; *Thomas*, 450 U.S. at 718; *McDaniel*, 435 U.S. at 628; *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406. This rigorous standard properly reflects the high and distinctive value assigned to religious freedom by the First Amendment.

Third, the government must show with particularity that its interest in applying the law (or carrying out some other government decision) to the religious objector is genuinely compelling. A "sweeping" or generic

interest like a state's interest in compulsory public education does not suffice. *Yoder*, 406 U.S. at 221. Rather, the government must make "a more particularized showing" by identifying the precise state interest that conflicts with the religious objector's exercise of religion and producing evidence demonstrating "the impediment to *those* objectives that would flow from recognizing the claimed [religious] exemption." *Id.* at 220 (emphasis added); accord *Thomas*, 450 U.S. at 719 (requiring a "properly narrowed" inquiry). When applying strict scrutiny, "this Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (summarizing *Sherbert* and *Yoder* as the foundation of the compelling interest standard prescribed by RFRA, 42 U.S.C. § 2000bb(b)(1)).

Fourth, even a compelling interest must be pursued through means that avoid unnecessarily infringing the right to exercise religion. The government must "demonstrate that no alternative forms of regulation would [advance its compelling interests] without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407 (footnote omitted); accord *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").[3] In other words, "if a less restrictive means is available for the

[3] The least restrictive means requirement unmistakably appeared as an essential element of strict scrutiny in free exercise decisions predating *Smith*. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 750 (2014) (footnote omitted).

Government to achieve its goals, the Government must use it." *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000).

Fifth, accommodating the exercise of religion "follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Valid restrictions on the exercise of religion, without an accommodation, have "invariably posed some substantial threat to public safety, peace or order" on the scale of an outbreak of dangerous, infectious disease. *Sherbert*, 374 U.S. at 403; accord *Yoder*, 406 U.S. at 230; *McDaniel*, 435 U.S. at 631 n.2 (Brennan, J., concurring).

To be clear, lifting a government burden from the exercise of religion does not offend the Establishment Clause. See *Amos* v. *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints*, 483 U.S. 327, 338 (1987); *Trinity Lutheran*, 137 S. Ct. at 2024; *Thomas*, 450 U.S. at 719–20; *McDaniel*, 435 U.S. at 641; *Yoder*, 406 U.S. at 234 n.22; *Sherbert*, 374 U.S. at 409. Accommodating the exercise of religion preserves genuine "neutrality in the face of religious differences." *Sherbert*, 374 U.S. at 409. Accommodation produces a healthy religious pluralism, not a prohibited religious establishment. Repeatedly, this Court has held that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie*, 480 U.S. at 144–45.[4]

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[4] Before *Smith*, the Court sometimes relaxed or disregarded the formal requirements of strict scrutiny in free exercise decisions. See *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (asking

3. Skeptics may ask whether following these principles would prevent the government from meeting society's needs. Not at all. Like RFRA, strict scrutiny prescribes "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a). Decades of experience applying RFRA and RLUIPA demonstrate that strict scrutiny has not prevented the government from regulating when it has a compelling reason. See *Kiczenski* v. *Gonzales*, 237 F. App'x. 149, 150 (9th Cir. 2007) (prosecution under the Controlled Substances Act for the use of hemp did not violate RFRA because the claimant's objections were "not rooted in religious belief"); *Dean* v. *Corrections Corp. of Am.*, 108 F. Supp. 3d 702 (D. Ariz. 2014) (rejecting a state inmate's RLUIPA claim for a raw-food vegetarian diet). See generally Goodrich & Busick, 48 Seton

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whether requiring the payment of social security taxes "is essential to accomplish an overriding governmental interest"); *Bowen* v. *Roy*, 476 U.S. 693, 707–08 (1986) (plurality opinion) (unless the law discriminates against religion, a condition on government benefits that is "neutral and uniform in its application" satisfies the First Amendment if it is "a reasonable means of promoting a legitimate public interest"); *Goldman* v. *Weinberger*, 475 U.S. 503, 509–10 (1986) (omitting any free exercise standard); *Lyng*, 485 U.S. at 450–51 (declining to apply strict scrutiny). These departures from the *Sherbert-Yoder* standard hold little precedential weight; later free exercise decisions tend not to cite them. See *Hobbie*, 480 U.S. at 136; *Frazee*, 489 U.S. at 829. More importantly, past lapses are hardly a reason to abandon strict scrutiny. Two decades' experience applying RFRA and RLUIPA conclusively show that "courts [are] up to the task" of applying strict scrutiny to adjudicate free exercise claims. *O Centro*, 546 U.S. at 436.

Hall L. Rev. at 356 (concluding that in the Tenth Circuit RFRA is "underenforced" and religious freedom cases occupy less than 1 percent of the federal docket).

Consider how strict scrutiny might affect the government's interests in responding to the COVID-19 pandemic. Suppose that researchers develop a vaccine and that a state enacts a law requiring all its citizens to be vaccinated. Suppose further that a state resident raises a sincere religious objection to getting vaccinated. Strict scrutiny would likely erect no impediment to enforcing that rule. Established principles hold that a dangerous and contagious disease poses a "substantial threat to public safety," *Sherbert*, 374 U.S. at 403, that may justify restrictions on the exercise of religion. Cf. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38 (1905) (a municipal law requiring vaccination for smallpox has not "invaded any right secured by the Federal Constitution"); *Prince* v. *Massachusetts*, 321 U.S. 158, 167 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

Of course, this does not mean that a public health threat like COVID-19 creates a blanket exception to the Free Exercise Clause. A government order restricting the exercise of religion more stringently than comparable activities could fall within the categorical rule against religious targeting. By similar logic, an order imposing greater restrictions on religious exercise than necessary to protect the public might fail under strict scrutiny.

The two-part framework we have described best accounts for the Court's free exercise decisions. This

framework highlights where judicial balancing is appropriate, where it is not, and how that balancing should be conducted. Using these analytical tools, courts can reconcile meaningful protection of religious freedom with the government's ability to carry out its functions "of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019 (quotation omitted). The aim, we submit, should not be to "merely restore[ ] this Court's pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715. Instead, the Court should restore the Free Exercise Clause as a meaningful constitutional protection for all Americans.

III. Philadelphia Violated the Free Exercise Clause When It Excluded Catholic Social Services As a Foster Care Provider.

Philadelphia's decisions not to refer foster children to Catholic Social Services or to renew its annual contract, Pet. App. 150a, 170a, have infringed CSS's right to the free exercise of religion in two ways.

First, the City has targeted CSS because of its religion, in violation of the categorical rule against religious targeting. See *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. The City Council accused CSS of perpetrating "discrimination under the guise" of religion. Pet, App. 147a. The Mayor initiated formal investigations by City agencies into CSS, even though no same-sex couple had ever applied for service, much less been turned away. See Pet. App. 259a. Tellingly, the City admitted that "its investigation was targeted at religious entities," Pet. 28 (citing Pet. App. 278a–279a), and that the responsible City official "did not investigate secular agencies" besides "a single call to a friend." Pet. Br. 10.

Philadelphia's course of action appears to fall within the categorical rule against religious targeting.

Second, even if the categorical rule does not apply, Philadelphia's mode of enforcing its nondiscrimination policy cannot survive strict scrutiny.

CSS has no doubt suffered a substantial burden on its exercise of religion. The City's suspension of foster care referrals and its refusal to renew the annual contract effectively prevent CSS from carrying out its religious mission to serve vulnerable children within the City. Under this Court's decisions, withholding a public benefit because of religious belief, practice, or identity operates as a penalty on the exercise of religion. See, *e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2022. That Philadelphia has imposed a penalty by terminating its contractual relationship with CSS rather than by denying a grant or subsidy is a distinction without a difference. The constitutionally significant fact is that the City government has forced CSS to "choose between following the precepts of [its] religion" and "forfeiting" its legal authority to continue serving foster children. *Sherbert*, 374 U.S. at 404. Since that choice penalizes CSS for its exercise of religion, the City's actions place a substantial burden on its religious exercise.

Philadelphia can justify its burden on CSS "only by a state interest of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019 (quotation omitted). The Third Circuit did not identify such an interest since it concluded that the City's nondiscrimination norms satisfy *Smith*'s requirements of neutrality and general applicability. Pet. App. 37a. But the court of appeals did identify a compelling interest for the purpose of state law. That interest is "eradicating discrimination," the

court held, and it further concluded that "mandating compliance is the least restrictive means of pursuing that interest." Pet. App. 47a (quoting *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

We seriously doubt that an unbounded interest in eliminating discrimination meets the demands of strict scrutiny. Philadelphia's interest, as described by the court below, is framed in "all-encompassing" terms, with a "sweeping potential for broad and unforeseeable application." *Yoder*, 406 U.S. at 234. If "properly narrowed," *Thomas*, 450 U.S. at 719, the City's actual interest appears to lie in ensuring that same-sex couples have a reasonable opportunity to act as foster parents.

That interest may be compelling, but Philadelphia's exclusion of CSS as a foster-care provider is not the least restrictive means of pursuing it. An accommodation that respects CSS's sincere religious beliefs will not jeopardize the City's core interest in preserving equal opportunity for its LGBT residents. Twenty-nine other foster-care providers remain available to serve same-sex couples interested in being foster parents. See Pet. App. 286a. There is no evidence that CSS's participation in Philadelphia's foster-care system has resulted in a single same-sex couple losing the opportunity to foster a child. See Pet. App. 259a.

At bottom, the case is about which will prevail—the First Amendment's guarantee of religious freedom or Philadelphia's insistence that all foster care providers within its control must conduct their operations "consistent[ly] with [the City's] conception of equality." Pet. App. 169a. Accommodating CSS would prevent the City from enforcing its nondiscrimination laws

uniformly, to be sure. But a bare desire for perfect uniformity in the application of a law cannot be an end in itself, or religious freedom as we know it is dead. See *Yoder*, 406 U.S. at 220 ("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."). The Free Exercise Clause safeguards the right to exercise one's religion—even if that means dissenting from the government's preferred values.

CONCLUSION

The Third Circuit's judgment should be reversed.

Respectfully submitted,

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