No. 19-66

In the Supreme Court of the United States

GEORGE Q. RICKS,

Petitioner,

v.

STATE OF IDAHO CONTRACTORS BOARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO COURT OF APPEALS

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The State's brief only reinforces the need to revisit *Employment Division* v. *Smith*. The State has no answer to the petition's arguments that *Smith* is inconsistent with the text and historical meaning of the Free Exercise Clause. And "*stare decisis* cannot possibly be controlling" where a ruling's "underpinnings" have been "eroded[] by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). That's exactly what has happened here. The post-*Smith* Court has already held that *Smith* was inconsistent with precedent, and it's already held that courts are perfectly capable of scrutinizing the need for government burdens on religion.

Not only should *Smith* be revisited, but this is an ideal case for doing it. Contrary to the State's argument, the lower court's inconclusive (and incorrect) musings about whether then-*pro se* Ricks checked all state-law exhaustion boxes fail the Court's "clear statement" rule for assessing whether an adequate and independent state ground bars review. And the State's argument that it would survive strict scrutiny even absent *Smith* puts the cart before the horse: this case arises on a motion to dismiss, so the State has offered no evidence whatsoever that forcing Ricks to provide his Social Security number is the only way to support its interests in finding deadbeat parents and stopping unscrupulous contractors.

Indeed, when factfinding does occur, it's likely to show—as in *Bowen* v. *Roy*—that the State can easily accomplish its goals with alternative identification. And it can probably get Ricks's number without in-

volving Ricks. Under a Constitution that "aim[s] to foster a society in which people of all beliefs can live together harmoniously," the State should have to explore these alternatives before barring a citizen from his occupation because he can't renounce his religious beliefs. *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

ARGUMENT

I. The Court should revisit *Smith*.

A. *Smith* was wrong.

Smith was wrong, as a matter of text, historical meaning, precedent, and policy. Pet. 11-31. The State offers no response on text or history, and its arguments on precedent and policy—recycled from *Smith* itself—fall short of the mark.

1. *Smith* conflicts with the Free Exercise Clause's text and history. The text draws no distinction between incidental and targeted prohibitions of religious exercise. Pet. 15-17. And historically, free exercise was understood to require exemptions regardless of neutrality and general applicability, as indicated by (1) the state forerunners of the federal Free Exercise Clause; (2) the exemptions recognized at the founding and contemplated at incorporation; and (3) free exercise's founding-era philosophical underpinnings. Pet. 17-21.

Mimicking *Smith* itself, the State addresses none of this. Yet text and history are primary determinants of the correctness of this Court's constitutional decisions. See, *e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960 (2019) (certiorari granted to reconsider precedent in light of text and history); *Crawford* v. *Washington*,

541 U.S. 36 (2004) (same). Correcting *Smith*'s inattention to text and history, and thus aligning free exercise law with the "return to a jurisprudence of original meaning," is alone reason to grant the petition. Center for Constitutional Jurisprudence Br. 2-5.

2. The State rests its defense of *Smith* primarily on pre-*Smith* precedent. But this Court has already rejected that argument. While the State insists that *Smith* was "not" "a departure from Free Exercise cases," BIO 11-14, the Court has unanimously held the opposite: "*Smith* largely repudiated the method of analysis used in prior free exercise cases." *Holt* v. *Hobbs*, 135 S. Ct. 853, 859 (2015); see also Lund, *The Propriety of Religious Exemptions: A Response to Sager*, 60 St. Louis U. L.J. 601, 604 (2016) ("The idea that the no-exemptions position has always been our law—a core claim of *Smith*"—was "abandoned" in *Holt*). It's unjust for believers like Ricks to continue suffering under a rule whose reasoning this Court has already disavowed. In any event, the Court was correct to recognize *Smith's* break with precedent. *Smith*'s treatment of the caselaw convinced no one at the time, Pet. 22 & n.5, and continues to attract fresh criticism from all quarters today, Oleske, *Free Exercise (Dis)honesty,* 2019 Wis. L. Rev. 689.

The State doesn't rehabilitate it here. Far from it: the State headlines its defense of *Smith* with citations to *Reynolds*[1] and *Gobitis*,[2] cases which gave rise to some of the most "shameful * * * episodes" of persecution of minority religions in our history. Laycock, *The*

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[1] *Reynolds* v. *United States*, 98 U.S. 145 (1878).

[2] *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586 (1940).

Religious Freedom Restoration Act, 1993 BYU L. Rev. 221, 222-224. If these cases are *Smith*'s best supports, that's reason to abandon it, not keep it. Cf. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." (internal quotation marks omitted)).

And it is not just the notorious cases. Every case the State cites to support *Smith* is either consistent with an exemption regime or no longer good law.

Reynolds, for example, turned on the notion that the Free Exercise Clause protects only belief, not conduct. 98 U.S. at 166-167. That idea was abandoned long ago, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940), and is irreconcilable with the Clause's explicit protection of "exercise." *Lee*,[3] *Gillette*,[4] and *Braunfeld*[5] are all cases in which the government "demonstrate[d] a compelling interest" sufficient to negate the requested accommodation—not cases (like *Smith*) in which the government's interest was treated as irrelevant. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006) (discussing *Lee* and *Braunfeld*); see also McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U.

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[3] *United States* v. *Lee*, 455 U.S. 252 (1982).

[4] *Gillette* v. *United States*, 401 U.S. 437 (1971).

[5] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961).

Chi. L. Rev. 1109, 1126 & n.81 (1990) (*Gillette* "unequivocally applied the very constitutional standard that *Smith* stated had 'never' been applied"). *Goldman*[6] and *Lyng*[7] involved unique contexts in which the Court identified "special reasons to defer to the judgment of the political branches"—the military and federal land management. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 570 n.5 (1993) (Souter, J., concurring). And *Gobitis* was overruled in *Barnette*, because "freedoms of speech and of press, of assembly, and of worship may not be infringed" on the mere rational-basis grounds later held to suffice in *Smith*. *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 639 (1943).

As for the pre-*Smith* cases requiring exemptions, the State's attempted distinctions wilt under scrutiny. The State parrots *Smith*'s claim that *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), involved a "hybrid" of free exercise and parental rights. BIO 13-14. But *Yoder* took pains to explain that the plaintiffs would have lost had their motivations not been religious. 406 U.S. at 215-216. And *Yoder* mentioned "the parental rights recognized in *Pierce* v. *Society of Sisters*" "only to distinguish" them. *Lukumi*, 508 U.S. at 566 n.4 (Souter, J., concurring).

The State's designation of *Sherbert*, *Thomas*, and *Hobbie* as mere "unemployment compensation cases" is likewise rooted only in *Smith*'s own *ipse dixit*. Cf. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*,

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[6] *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

[7] *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) ("[O]ur cases are governed by general principles, rather than ad hoc improvisations." (internal quotation marks omitted)). Before *Smith*, this Court routinely applied these cases in contexts far removed from unemployment compensation. See, *e.g.*, *Yoder*, 406 U.S. at 215, 220, 221, 230, 235 & n.22, 236 (relying on *Sherbert* at every step in the analysis); see also *Lukumi*, 508 U.S. at 568 (Souter, J., concurring) (collecting examples). The sole explanation the State now offers for the distinction—that, unlike the peyote ritual in *Smith*, the conduct that led to the plaintiffs' unemployment in *Sherbert* and *Thomas* wasn't "prohibited by law," BIO 13—is confused. Of course it wasn't illegal for Sherbert to refuse to work on Saturday. But the government penalized her for doing so, which is why she needed the Constitution to require an exemption. *Sherbert* v. *Verner*, 374 U.S. 398, 401, 408-409 (1963).

3. Finally, the State briefly defends *Smith* as policy, asserting that *Smith* is justified because courts can't "question the sincerity or centrality" of a belief. BIO 13. But the point about sincerity is simply wrong: This Court has recognized that courts can (indeed *must*) weed out insincere claims. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717-718 & n.28 (2014). As for centrality, the State is right that it can't be considered, but wrong that this matters here. Courts for decades have managed to apply RFRA and RLUIPA, even while recognizing that they prohibit centrality inquiries. See, *e.g.*, *Yellowbear* v. *Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (Gorsuch, J.). That experience shows there's nothing incompatible about enforcing the exemptions the Constitution requires while

avoiding the religious questions the Constitution forbids.

B. *Stare decisis* poses no obstacle to revisiting *Smith*.

The State argues that it's more important for the law to be "settled" than "settled right." BIO 14-15, 16. But *Smith* is neither. It immediately sparked condemnation from civil rights groups across the political spectrum, was rejected by Congress and 32 states, and has been vehemently criticized by prominent scholars and at least ten Justices. Pet. 12-14, 28-31; see also *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial"). And far from reinforcing *Smith*, this Court's post-*Smith* free-exercise cases "in fact have never applied *Smith* to reject another fully briefed free exercise claim." Ten Legal Scholars Br. 3, 19-21. In any case, *stare decisis* "is at its weakest" on constitutional claims and applies "with perhaps least force of all" to decisions that shortchange First Amendment rights. *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2478 (2018).

The State's only counter on *stare decisis* is to say that the petition focused only on whether *Smith* was wrong, rather than on the other reasons for overruling it. BIO 15-16. Not so. As the petition explained at length, *Smith* should be overruled not just because it was wrong but also because it was poorly reasoned, doesn't fit with other law, invented a difficult-to-apply test that has fractured the lower courts, rested on raw policy intuitions that have been disproven through experience, and has caused many—particularly religious minorities—to unnecessarily suffer for following their

consciences. Pet. 5 & n.1, 21-31 (applying the *stare decisis* factors the State says should apply).

II. This is an ideal vehicle for revisiting *Smith*.

The State does not directly dispute that its requirement that contractors provide a Social Security number—on threat of criminal fines and imprisonment—is neutral and generally applicable. In passing, however, the State notes that "there are several exemptions to registering as a contractor, one of which includes being employed by a contractor that is registered." BIO 4. But that is irrelevant. The so-called exemptions simply identify activities that *aren't* contracting, such as working for, volunteering for, or providing supplies to a contractor, or engaging in activities peripheral to contracting. Idaho Code § 54-5205. The State does not dispute that there are no exemptions from the Social Security number requirement for what Ricks seeks to do: register himself as an actual contractor.[8]

Nor does the State dispute that dismissal at the motion-to-dismiss stage isolated purely legal issues for this Court's review—issues concerning the meaning and purpose of the Free Exercise Clause. And it does not dispute that Ricks's claims are narrowly focused on securing his ability to work and not on challenging his obligation to pay taxes or the government's ability to use his Social Security number for its own purposes.

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[8] Contrary to the State at BIO 5 n.4, Ricks has never stated "that he has been working as a contractor in the construction industry for the last 40 years." The words "as a contractor" are the State's fabrication. Compare Pet. 7. The State elsewhere concedes that registration is not required for construction workers. BIO 4.

Instead, the State alleges that the Court lacks jurisdiction and that a ruling in Ricks's favor would be futile. Both arguments are unavailing.

The State first suggests that "Ricks' case is subject to an independent state-law jurisdictional bar" because Ricks, proceeding *pro se*, failed to exhaust administrative remedies allegedly required by state law. BIO 1, 17-20. But this would thwart the Court's jurisdiction only if the state court had ruled "clearly and expressly" that the dismissal of Ricks's claims was "based on bona fide separate, adequate, and independent [state law] grounds." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). By contrast, if the state court ruling "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court's jurisdiction remains unimpeded. *Id.* at 1040-1041.

Here, the Idaho court's opinion gives no plain statement of an adequate and independent state-law ground. To the contrary, the court expressly admits *uncertainty* about the alleged failure to exhaust, stating that

> the record does not demonstrate what, if any, administrative review occurred

and

> it is unclear if Ricks exhausted the appropriate administrative procedures.

Pet. App. 9a, 10a. Because the court then "clearly went on to reject [Ricks's] federal claim on the merits," its

discussion of exhaustion is "insufficient to demonstrate clearly" whether it "intended to invoke [that doctrine] as an alternative ground" for dismissal. *Harris* v. *Reed*, 489 U.S. 255, 266 n.13 (1989); see Pet. App. 23a-25a.

The speculative nature of the court of appeals' exhaustion analysis is alone sufficient reason to disregard the State's claim of an adequate and independent state ground. And other aspects of the Idaho court's analysis further reinforce the wisdom of finding jurisdiction. For example, although the court of appeals chided the *pro se* Ricks for failing to "argue * * * any of the exceptions to th[e] exhaustion requirement," Pet. App. 9a, it conceded that "neither party" had "raised the issue of administrative exhaustion on appeal." Pet. App. 7a-8a. Thus, Ricks never raised an exhaustion defense only because the State "strategically and effectively determined" not to challenge the supposed "procedural defect" in the first place. BIO 19 n.7. Surely the State ignored the supposed jurisdictional defect only because it knew the argument lacked merit. See Idaho Code § 67-5278 (no exhaustion requirement for declaratory judgment actions).

And the court was simply mistaken in stating that "Ricks did not seek a declaratory judgment in the district court," Pet. App. 9a—an error conceded by the State, BIO 19, and confirmed both by Ricks's second amended complaint, Pet. App. 86a ("Plaintiff seeks relief in the form[] of declaratory judgment"), and the district court's own rulings, Pet. App. 38a (quoting

Second Amended Complaint for same).[9] Because the court of appeals' exhaustion analysis was both admittedly speculative and demonstrably wrong, there is no reason to conclude that the Idaho courts actually upheld dismissal on that ground, or would do so in the future once the issue is briefed.

The State's second argument—that the court of appeals' rejection of Ricks's *state-law* religious freedom claim means a post-*Smith* Free Exercise claim would likewise fail—is equally unpersuasive. Idaho courts are of course entitled to construe the Idaho statute's version of a compelling-interest test under their own understanding of Idaho law. But that understanding cannot dictate the scope of strict scrutiny or any other standard this Court might apply consistent with a historical understanding of the Free Exercise Clause. And indeed, *any* level of scrutiny above rational basis would at least require a remand for the State to make an affirmative, evidence-based showing why Ricks could not provide an alternative form of identification,[10] or why the State could not otherwise satisfy its claimed interests without forcing a violation of his conscience.

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[9] Both the Second Amended Complaint and the district court order acknowledging the claim for declaratory judgment were included in the record before the court of appeals. See BIO 4 n.1. The documents from Ricks's original action complained about at BIO 6 n.5 were cited by the court of appeals. Pet. App. 3a.

[10] The State protests that—at the motion to dismiss stage—there was no record evidence that Ricks was willing to offer his birth certificate as alternative identification. BIO 6 n.5. But it does not deny that a birth certificate could serve that function.

Moreover, factfinding will reveal that Ricks easily can be accommodated. The State already allows some individuals seeking other kinds of licenses to use their birth certificates in place of Social Security numbers. Idaho Code § 73-122. There is no obvious reason it couldn't do the same with contractors who have religious objections. And even if Social Security numbers were essential, the State can obtain them on its own. Idaho Code § 49-203(4)(a) (authorizing any state agency, "in carrying out its functions," to obtain Social Security numbers from state motor vehicle and driver records); Office of Child Support Enforcement, Dep't of Health & Human Servs., *Handbook on Child Support Enforcement* 11, https://perma.cc/E85Y-8286 (state child-support agencies can obtain Social Security numbers of deadbeat parents from the Federal Parent Locator Service using information that appears on birth certificate). The State's insistence that Ricks violate his religious beliefs to provide what the State could get itself vividly illustrates the danger *Smith* poses for minority religious practices.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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NOVEMBER 2019