No. 24-154

In the Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,
Petitioners,

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of Wisconsin

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty. The ACLJ has appeared before this Court in many cases advocating for the freedoms of religious groups and individuals, as counsel for a party, *e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Locke v. Davey*, 540 U.S. 712 (2004), or for amicus, *e.g., Carson v. Makin*, 596 U.S. 767 (2022); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

SUMMARY OF ARGUMENT

This Court again and again has pointed to the authoritativeness of history and tradition as guides to interpretation of a wide variety of constitutional provisions, including several clauses of the First Amendment. That same history-and-tradition approach should therefore also govern interpretation of the text of the Free Exercise Clause of the First Amendment. Because the test taken from *Employment Division v. Smith*, 494 U.S. 872 (1990), cannot be reconciled with the proper history-and-tradition test, this Court should overrule, or at least modify and clarify, use of the *Smith* test in Free Exercise jurisprudence.

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[1] No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

This Court Should Expressly Clarify that the "History and Tradition" Mode of Analysis Applies to the Free Exercise Clause.

I. This Court has Embraced "History and Tradition" as Reliable Guides to Constitutional Interpretation.

A recurring theme in this Court's jurisprudence is that "our Nation's history, legal traditions, and practices," *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), offer valuable, indeed frequently dispositive, guides for the faithful interpretation of the text of constitutional provisions. *See, e.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 449 (2021) (**Article III**) ("history, tradition, and common practice"); *Reid v. Covert*, 354 U.S. 1, 17 (1957) (**Supremacy Clause**) ("history and tradition"); *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (**Second Amendment**) ("history and tradition"); *Timbs v. Indiana*, 586 U.S. 146, 149-50, 154 (2019) (**Eighth Amendment: Excessive Fines**) ("history and tradition"); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (**Eighth Amendment: Cruel and Unusual Punishments**) ("expansive language in the Constitution[] must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design"); *Dep't of State v. Muñoz*, 602 U.S. 899, 903, 910-11 (2024) (**Due Process Clause: marriage and immigration**) ("history and tradition"); *Richardson v. United States*, 526 U.S. 813, 820 (1999) (**Due Process Clause: jury unanimity**) ("history or tradition"); *Dobbs v. Jackson Women's Health Organization*, 597

U.S. 215, 231, 235, 237-40, 250, 260-61, 298 (2022) (**Due Process Clause: abortion**) (relying repeatedly on "history and tradition" in discerning unenumerated rights); *Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (**Eleventh Amendment**) ("history and tradition").

This interpretive approach applies no less to the various clauses of the **First Amendment**. *E.g., Vidal v. Elster*, 602 U.S. 286, 301 (2024) (**Free Speech**) ("we can consider . . . history and tradition . . . when considering the scope of the First Amendment"; "[t]his history and tradition is sufficient" to decide the constitutional issue);[2] *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (**Petition Clause**) ("history and purpose"); *id.* at 394-97 (citing practices dating to "the founding" and earlier, tying "the same tradition" to the Declaration, and tracing subsequent practices); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022) (**Establishment Clause**) ("original meaning and history"); *Town of Greece v. Galloway*, 572 U.S. 565, 578 (2014) (**Establishment Clause**) ("history and tradition").

This approach makes perfect sense: history and tradition "offer a meaningful guide," *Sprint Communics. Co. v. APCC Servs.*, 554 U.S. 269, 274 (2008), to the interpretation of the constitutional text governing our nation.

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[2] *See also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (**Free Speech**) (noting that "a history and tradition of regulation are important factors" in constitutional interpretation); *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 75 (2022) (**Free Speech**) (citing *Williams-Yulee* for relevance of "history and tradition").

II. "History and Tradition" Should Govern the Free Exercise Clause as Well.

There is no reason "history and tradition" analysis should not govern analysis of the text of the Free Exercise as well. Everyone from former Justices Ginsburg (*Timbs*) and Kennedy (*Guarnieri*), to former Chief Justice Rehnquist (*Glucksberg*), to members of the current Court agrees that this approach represents a valuable tool for constitutional interpretation – even if they do not always agree on the *outcome* of a particular case. Indeed, as noted above, this Court has applied the "history and tradition" method to a host of different constitutional clauses, *including at least three other clauses of the First Amendment* (Speech, Petition, and Establishment). It would make little sense to treat the Free Exercise Clause as an exception. Accordingly, this same valued interpretive tool – recourse to history and tradition – should apply as well when construing the text of the *Free Exercise Clause* of the First Amendment. *See also* William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 346 Harv. J.L. & Pub. Pol'y 419 (2023).[3]

[3]"On this approach, the Free Exercise Clause would presumptively protect a given religious exercise unless the opposing party can show a long, unbroken tradition of restriction that is analogous to the burden at issue." 346 Harv. J.L. & Pub. Pol'y at 421. *Cf. New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation").

III. Consequently, this Court should Modify or Replace the Incompatible "Neutral and Generally Applicable" Test of *Employment Division v. Smith***.**

If "history and tradition" are to guide the interpretation of the Free Exercise Clause – as it should – it follows that the "neutral and generally applicable" test from *Employment Division v. Smith*, 494 U.S. 872 (1990), cannot stand, at least not in the form articulated in that case. *See also* Stephanie Barclay, *Replacing Smith*, 133 Yale L.J. 436, 439 (2023) (recommending adjustments to test that would be "historically grounded").

This Court has noted the controversy over *Smith*'s test, while thus far sidestepping a resolution of that controversy. *E.g., Kennedy,* 597 U.S. at 525 n.1; *Fulton v. City of Philadelphia*, 593 U.S. 522, 540-41 (2021). Indeed, a majority of this Court has called *Smith* into serious question. *Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause – lone among the First Amendment freedoms – offers nothing more than protection from discrimination"); *id.* at 545 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment) (*Smith* test "is fundamentally wrong and should be corrected"). The time has come to clarify that the *Smith* test, at least in unmodified form, cannot be squared with the history-and-tradition method of constitutional interpretation.

Smith is incompatible with the history-and-tradition hermeneutic. The *Smith* test provides that,

with various exceptions,[4] a Free Exercise claim should fail in the face of a "'valid and neutral law of general applicability.'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). The constitutional misfit of this approach is plain.

First, the *Smith* test approach wrongly relegates the free exercise of religion to second-class status. For example, a law that banned leafletting on a public sidewalk would be blatantly unconstitutional as a matter of *free speech*, *Schneider v. State*, 308 U.S. 147 (1939), yet – because the law is neutral as to the content of the leaflets and applicable to all leafletters generally – under *Smith* would summarily pass muster against the *free exercise* claim that it stifled evangelical efforts. Likewise, a law that prohibited gatherings of more than three non-family members (say, during a pandemic) would trigger demanding review as a matter of *freedom of association* for those gathering for political or social advocacy, *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("it is now

[4]The *Smith* test does not apply to a church's selection of its ministers, *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 190 (2012), and by definition does not apply to laws which single out religious entities or individuals for special disabilities, *e.g., Carson v. Makin*, 596 U.S. 767 (2022). The "hybrid rights" exception, meanwhile, *Smith*, 494 U.S. at 882 (noting a "hybrid situation," where more than one right is asserted, as possibly falling into a different category), has generated both uncertainty and withering criticism. *E.g., 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1208 n.14 (10th Cir. 2021) (Tymkovich, C.J., dissenting) ("jurists and scholars have expressed doubts as to the practical validity of *Smith*'s hybrid-rights doctrine, characterizing it as dicta, difficult to define, illogical, and untenable") (citing authorities), *rev'd*, 600 U.S. 570 (2023). The prevalence of, and need for, work-arounds for the *Smith* test bolsters the proposition that the test itself is flawed.

beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is [constitutionally] protected"), but not, under *Smith*, as a matter of *free exercise* for those gathering for worship. A generally applicable requirement that all parents submit their children to whatever instruction the locality deems "essential to good citizenship" would run afoul of *parental* rights, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), but under *Smith* would much more likely survive a free exercise challenge, *see Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *cert. granted sub nom. Mahmoud v. Taylor*, No. 24-297 (U.S. Jan. 17, 2025).[5] In such cases, *Smith* improperly ennervates the Free Exercise Clause.

Second, the *Smith* approach does not even *ask* what history or tradition might say on the matter. Recourse to such history and tradition would provide a clear route to distinguishing between child *sacrifice* (no history or tradition in this country) and child*rearing* (*Pierce*), or between consumption of Communion and consumption of psychedelic drugs (*Smith*). *Smith* itself could have invoked the lack of a history or tradition of illegal drug use to dispose of that case without the need to water down the Free Exercise Clause generally. As *Smith I* correctly noted: "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who

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[5] *Mahmoud* is not an outlier. The petition for certiorari in *Mahmoud* cites other federal circuit court decisions that embrace the proposition that forced subjection of children to ideologically charged public school instruction is not a Free Exercise problem. Pet. at 20-21, No. 24-297 (U.S. Sept. 12, 2024) (citing cases).

engage in that conduct." *Employment Div. v. Smith*, 485 U.S. 660, 670 (1988) (*Smith I*).

Third, setting aside history and tradition severs the Constitution from historical guardrails, thus opening the door to dual interpretive dangers. On the one hand, government could assert newly minted interests (such as "equity" or "diversity" or "climate justice") as supposed justifications for restrictions on religious practices.[6] On the other hand, religions could claim constitutional protection for religious practices, such as polygamy, that historically would have been regarded as proper targets for the exercise of the police power, regardless of religious motivations. *Reynolds v. United States*, 98 U.S. 145, 165 (1878) ("we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity").[7]

To be sure, this Court might be able to avoid overruling *Smith* by reconfiguring it significantly. The Court could emphasize the importance of history and tradition in identifying those religious practices which are proscribable as *malum in se*, such as child sacrifice or use of historically illegal drugs, and those which are historically recognized as lawful religious practices, even when seemingly eccentric, such as Amish childrearing practices, *Wisconsin v. Yoder*, 406 U.S.

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[6] *See* Barclay, *Replacing Smith*, 133 Yale L.J. at 460 ("Focusing on [a] more historically grounded set of permissible government interests may result in a smaller and more determinate set of interests").

[7] *See also Bruen*, 597 U.S. at 30 (use of history and tradition exclude practices that are "outliers that our ancestors would never have accepted").

205 (1972). The more demanding application of *Smith* in cases such as *Tandon v. Newsom*, 593 U.S. 61 (2021) (*per curiam*), likewise can ameliorate the disparity between *Smith*'s test and the vitality of the Free Exercise Clause.

Ultimately, however, *Smith* begins at the wrong starting point. Rather than ask what history and tradition have to say about the meaning of the constitutional text, *Smith* looks woodenly and arbitrarily to the particular characteristics of the restriction in question. Given that foundational misstep, there is no reason to engage in contortionist moves to preserve *Smith*. The more direct, elegant solution would be to harmonize Free Exercise jurisprudence with this Court's constitutional law as a whole, clarifying that reference to history and tradition should govern the textual interpretation. (And as noted, the lack of a history or tradition supporting use of psychedelic drugs can leave the *result* in *Smith* unchanged.)

Here, the state supreme court expressly invoked the "neutral" and "generally applicable" test of *Smith*, Pet. App. 49a (¶103) (citing *Kennedy v. Bremerton*'s description of the *Smith* test). This Court should forthrightly disavow, or at least modify, adherence to the *Smith* test, and accordingly reverse the decision below, which relied upon that constitutionally unfaithful test.

CONCLUSION

This Court should reverse the judgment of the Supreme Court of Wisconsin.

Respectfully submitted,

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