No. 24-319

In the Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Jewish Coalition for Religious Liberty is an organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. The Free Exercise Clause is uniquely important for minority faiths; JCRL thus is interested in restoring an understanding of that Clause that offers broader protection.

Since it was handed down thirty years ago, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), has prevented many believers from even trying to vindicate constitutional rights in court. Even when cases are brought, *Smith* shields many laws imposing severe burdens on religious minorities from meaningful review. JCRL urges the Court to grant certiorari to abrogate *Smith* and strengthen religious-liberty protections for all Americans.

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[1] No party's counsel authored this brief in whole or part; no entity or person, aside from JCRL, its members, and its counsel, made a monetary contribution intended to fund the brief's preparation or submission. Pursuant to Rule 37, all counsel of record received timely notice of JCRL's intent to file this brief.

ARGUMENT SUMMARY

Thirty years ago, the Court inflicted lasting harm on religious minorities when it said it "preferred" not to decide whether religiously neutral laws unconstitutionally interfere with Americans' religion. *Smith*, 494 U.S. at 890. In *Smith*, the Court held that generally applicable laws are subject only to rational-basis review—effectively immune to judicial review—under the Free Exercise Clause, even when they substantially burden religious exercise. *Id.* at 876. The Court so held despite its awareness of the likely consequences, that exempting generally applicable laws from Free Exercise review would disproportionately harm religious minorities. *Id.* at 890. And that observation was tragically prophetic. The last three decades demonstrate that *Smith* "has harmed religious liberty." *City of Boerne* v. *Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting).

As *Smith* itself expected, a diminished Free Exercise Clause disproportionately harms "religious practices that are not widely engaged in." 494 U.S. at 890. This is true for an obvious reason: general laws are more likely to inadvertently burden lesser-known religions like Judaism than larger faiths. They may even *severely* burden sacred Jewish practices. For example, under *Smith*, a generally applicable law that banned practices necessary for kosher slaughter or Sabbath observance might effectively escape scrutiny. Interpreting the First Amendment in a way that leaves Jewish Americans' religion so vulnerable betrays our republic's commitment to religious pluralism, abdicates the federal judiciary's duty to resolve the cases and controversies before it, and is inconsistent with the First Amendment's "text and structure." *Fulton* v. *Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring).

Evidence accumulated in the 34 years following *Smith* undercuts the decision's foundational assumptions. Specifically, the Court should grant certiorari for four reasons. First, post-*Smith* experience demonstrates that the diminished Free Exercise Clause has permitted significant harm to religious minorities. That will continue unless the Court changes course.

Second, thanks to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq., federal courts at all levels have 31 years' experience deciding religious-liberty claims under the strict-scrutiny standard that *Smith* cast aside. See, *e.g.*, *Ramirez* v. *Collier*, 595 U.S. 411 (2022); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). These cases show that applying strict scrutiny in religion cases is not inordinately difficult. And they would be a treasure trove of helpful caselaw for parsing future Free Exercise claims.

Third, *Smith* purported to provide an easy-to-apply rule that would simplify religious-freedom litigation. Cases about COVID-19 restrictions demonstrate, however, it failed. See *Tandon* v. *Newsom*, 593 U.S. 61 (2021). Far from simplifying matters, the supposed bright-line rule distinguishing between laws that are generally applicable and those that are not has turned out to be ambiguous and confusing.

Fourth, the time is right to correct *Smith*. The cancer of antisemitism is again metastasizing throughout our nation. Violence and harassment against Jews have been growing for a decade now—and have spiked since the October 7, 2023 terrorist attack on Israel. See Gabriella Borter, *US antisemitic incidents hit record high in*

2023, Reuters (Apr. 16, 2024), bit.ly/3NpJFTw. This phenomenon matches worldwide trends. See Timothy Jones, *Antisemitism rising dramatically across the world*, DW (May 5, 2024), bit.ly/486DddH. The time is right to shore up religious-freedom protections.

In short, since *Smith* was handed down, its fears have proven unfounded, its claimed benefits never materialized, and it has spun off significant issues of its own. For these reasons, the Court should grant certiorari and use the last three decades' accumulated wisdom to reconsider *Smith*'s mistaken conclusion.[2]

Even if the Court chooses not to reevaluate *Smith*, it should nevertheless review the interpretation set out in the opinion below. *Smith* suggested that political accommodation would replace judicial protection. 494 U.S. at 890. The lower court's ruling allows legislatures or regulators to divide and conquer believers by granting exemptions to favored groups while denying them to less popular faiths or subgroups. It threatens to leave minority religions utterly without political or legal recourse.

Faith has an important role in Americans' life and in helping "form a more perfect union." U.S. Const., preamble. Faith was and is essential to founders, abolitionists, suffragettes, civil rights leaders, Republicans, and Democrats. Religion, Washington said, is nothing less than an "indispensable support[]" to "political prosperity" and a "great pillar[] of human happiness." *Washington's Farewell Address (1796)*, bit.ly/48cszC1. Despite this vibrant history, *Smith* undervalued religion's importance and instead exalted an approach it believed would be more cost-effective. It "preferred" this route even though

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[2] JCRL continues to believe that *Smith* is also contrary to the Constitution's original public meaning. See Amici Br., *Tingley* v. *Ferguson*, 2023 WL 3212629, at *19–21 (U.S. Apr. 27, 2023).

it came (by its own admission) at minority faiths' expense. *Smith*, 494 U.S. at 890. The petition presents an opportunity to reextend constitutional protections against burdens on Americans' faith imposed by generally applicable laws. The Court should grant certiorari, reevaluate *Smith*, and replace it.

ARGUMENT

I. The Court Should Grant Certiorari to Reconsider *Smith*'s Harsh Rule in Light of Thirty Years' Experience.

"[C]ompelling reasons" support granting the petition for certiorari in this case. Sup.Ct.R.10. *Smith*'s legacy is a diminished Free Exercise Clause that leaves all religious practices vulnerable. Minority faiths like Judaism are most in danger because members practice their religions in lesser-known ways that officials might incidentally burden for one reason or another.

No justification remains for retaining *Smith*. Its first underlying assumption—that applying strict scrutiny to claims for religious accommodations would be prohibitively difficult—has proven incorrect. Federal courts applying RFRA and RLUIPA do exactly that. They have done it well, in fact. Furthermore, recent COVID-related litigation undercuts *Smith*'s notion that it created an easy-to-apply rule.

Four years ago, *Fulton* nearly overturned *Smith*. Now is the time to follow through and do it.

A. *Smith*'s Legacy Is a Diminished Free Exercise Clause That Leaves Religious Minorities Most Vulnerable.

Religious minorities bear the brunt of *Smith*'s holding. *Smith* acknowledged that, under its new rule, harms to religious Americans were "unavoidable." *Smith*, 494 U.S. at 890. It also recognized that immunizing generally applicable laws from meaningful scrutiny "will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.* But it claimed those harms "must be preferred" to the difficulty of applying meaningful scrutiny. *Id.*

The prophesied harms have come to pass. *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of cert.). "[L]ower courts … no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice." *Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting). Believers are thus left at the mercy of legislators and officials to provide religious exemptions from general laws. That may be good enough for larger, well-known faiths. But large groups are *least* in need of protection from majoritarian politics. The smaller, lesser-known—even unpopular—faiths that *Smith* leaves out in the cold are the ones *most* in need of robust constitutional safeguards.

Post-*Smith* cases involving minority faiths confirm *Smith*'s inadequacy. The problem is not simply that believers are denied exemptions in these specific cases. The greater problem is that under *Smith*, in some cases, governments may refuse to accommodate believers for any facially neutral reason—or no reason at all—without showing a compelling government need that could not reasonably accommodate faith-based practices.[3] The government may have satisfied strict scrutiny in some cases. But under *Smith*'s narrow interpretation of the First Amendment, it did not even need to try. These cases involve:

- **Jews**, see *E. End Eruv Ass'n* v. *Westhampton Beach*, 828 F. Supp. 2d 526 (E.D.N.Y. 2011) (allowing localities to enforce signage restrictions preventing Jews from establishing an eruv to facilitate Sabbath observance); *Subil* v. *Porter Cnty.*

[3] This remains true in many instances despite *Fulton* and *Tandon*'s marginal improvements.

Sheriff, 2008 WL 4690988 (N.D. Ind. Oct. 22, 2008) (allowing correctional officers to compel a Jewish inmate to perform housekeeping tasks on Sabbath); *Montgomery* v. *Clinton Cnty.*, 743 F. Supp. 1253 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite Jewish family's religious opposition);

- **Muslims**, see *Valdes* v. *New Jersey*, 313 F. App'x 499 (3d Cir. 2008) (denying a Muslim corrections officer trainee an accommodation to wear religiously required facial hair);
- **Native Americans**, see *Apache Stronghold* v. *United States*, 2021 WL 535525 (D. Ariz. Feb. 12, 2021) (declining to protect Apache holy site from desecration), aff'd, 101 F.4th 1036 (9th Cir. 2024), cert. pet. docketed, No. 24-291 (Sept. 13, 2024); *Thiry* v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) (declining to protect gravesite against First Amendment objections); *Fairbanks* v. *Brackettville Bd. of Educ.*, 2000 WL 821401 (5th Cir. May 30, 2000) (school district allowed to refuse to hire, based on grooming policy, Native American with shoulder-length hair); *Peyote Way Church of God* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (upholding statute permitting peyote use by the larger Native American church while prohibiting use by smaller groups);
- **Buddhists**, see *Tran* v. *Gwinn*, 262 Va. 572 (2001) (denying zoning accommodation to build temple);
- **Hmongs**, see *Yang* v. *Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (refusing damages to Hmong parents whose child was autopsied over their objections);

- **Amish**, see *Gingerich* v. *Commonwealth*, 382 S.W.3d 835, 837 (Ky. 2012) (requiring Amish buggies to display a "fluorescent yellow-orange triangle" despite objections that the color violated religious mandates "to be plain" and the triangular shape invoked trinitarian beliefs not held by Amish); *State* v. *Bontrager*, 683 N.E.2d 127 (Ohio Ct. App. 1996) (requiring Amish hunter to wear orange while hunting despite objections);
- **Seventh-day Adventists**, see *Genas* v. *N.Y. Dep't of Corr. Servs.*, 75 F.3d 825 (2d Cir. 1996) (no exemption for Seventh-day Adventist who did not report to work on a Saturday shift); and
- **Members of various other smaller faiths**, see *Ramsey* v. *Precythe*, 2024 WL 3594575 (E.D. Mo. July 31, 2024) (inmate of Odinist faith not allowed "book of Norse poetry and sagas"); *Nenninger* v. *USFS*, 2008 WL 2693186 (W.D. Ark. July 3, 2008), aff'd, 353 F. App'x 80 (8th Cir. 2009) (denying Rainbow Family members an accommodation to laws they found religiously objectionable); *Mefford* v. *White*, 770 N.E.2d 1251 (Ill. App. Ct. 2002) (refusing accommodation to use of social security number).

Empirical evidence confirms what these examples show: "the consequences of the *Smith* decision were swift and immediate." Amy Adamczyk et al., *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. Church & State 237, 248 (2004). "[T]he percentage of favorable decisions for free exercise cases dropped from over 39 percent to less than 29 percent following *Smith* …." *Id.* Not only did religious claims prevail less frequently, but believers brought them less often. "[T]he rate of free exercise cases initiated by

religious groups dropped by over 50 percent immediately after *Smith*." *Id.* at 242; see also 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, 380–381 (2018) (finding that over five-year period, religious-liberty cases made up less than 1% of 10th Circuit docket and fewer than half of plaintiffs obtained relief).

Recognizing these harms, the political branches, states, and even this Court have tried to contain the decision's fallout. RFRA and RLUIPA were primarily aimed at mitigating *Smith*'s effects. See 42 U.S.C. 2000bb ("'Laws neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."). *Boerne* promptly hamstrung much of RFRA's remedial effect, however. 521 U.S. at 536. Twenty-eight states passed their own RFRAs. *Religious Freedom Restoration Act Information Central*, bit.ly/401HUn0.

The Court also removed certain types of Free Exercise claims from *Smith*'s reach. *Lukumi*, for example, recognized a narrow exception for generally applicable laws motivated by anti-religious animus, which are subject to strict scrutiny. See *Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520 (1993). *Roman Catholic Diocese of Brooklyn* v. *Cuomo* narrowed the category of laws that qualify as "religiously neutral." 592 U.S. 14, 16 (2020). The Court has also clarified that churches' decisions to hire or fire ministers are *always* exempt from employment laws. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020). And in *Fulton*, the Court gave some color to what a "generally applicable" law must look like. 593 U.S. at 533–534, 540.

These efforts, though well-intentioned and offering tangible improvements, are not enough. They simply come up short on restoring the robust Free Exercise protections in force prior to *Smith*, and which the First Amendment (properly understood) requires. Only by reconsidering *Smith* in its entirety can this Court remedy the problem root and branch.

B. Members of Minority Faiths Like Judaism Are Most Vulnerable to Incidental Burdens.

It would be shortsighted to downplay the gap in protections that *Smith* left behind for Jews and members of lesser-known faiths. The Free Exercise Clause post-*Smith* offers religious Americans substantially diminished protection against generally applicable laws that incidentally burden religious exercise. That is precisely the problem for minority-faith adherents: state officials are more likely to inadvertently burden minority practices than more common ones. This happens not necessarily because of animus towards minority constituents—though animus can sometimes be an underlying (even if unprovable) part. It often happens because of differences in priorities, apathy, or simple unfamiliarity. But the effect on Jews is the same as a hostile prohibition.

For example, "[s]uppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine." *Fulton*, 593 U.S. at 545 (Alito, J., concurring). Besides preventing "the celebration of a Catholic Mass anywhere in the United States," *id.*, it would have also prevented Jews from using kosher wine in Passover, Purim, and Shabbat ceremonies. Similarly, if a court "enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court," the "rule would satisfy *Smith* even

though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing." *Id.*

Lukumi's rule against intentional discrimination thus does not mitigate *Smith*'s most pernicious threats to minority religions. As the Court previously recognized, "[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." *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972). And "it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination." *Fulton*, 593 U.S. at 543 (Barrett, J., concurring).

Smith, in other words, leaves one of the First Amendment's principal motivations unrealized. The Bill of Rights, Madison explained, served to protect minority rights against "the greatest danger": "the body of the people, operating by the majority against the minority." *Amendments to the Constitution, [8 June] 1789*, Nat'l Archives, bit.ly/3BWuePX. For members of minority faiths who find their sacred practices and beliefs curtailed by the "superior force of an interested and overbearing majority," The Federalist No. 10 (Madison), bit.ly/3BOHVAy, it is small comfort that the majority did so out of ignorance or indifference rather than bigotry. The ultimate outcome, from the believers' view, is the same—they are prohibited from freely exercising their religion.

A recent Fifth Circuit oral argument provides an illuminating example. One judge opined that a hypothetical law requiring Americans to turn "on a light switch every day" would probably not substantially burden religious practice. See Oral Arg. at 1:00:00, *E. Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449 (5th Cir. 2015). Perhaps such a law would matter little to Lutherans and Baptists. But

to an Orthodox Jew, turning on a light bulb on the Sabbath could violate Exodus 35:3's command to "kindle no fire throughout your habitations upon the sabbath day." The judge surely did not intend to demean Jews or belittle Sabbath observance. The learned jurist was simply—and understandably—unaware of how some Jews understand the Sabbath.

But the damage is not merely hypothetical. Caselaw offers numerous examples of incidental burdens on Jewish practices. One case dealt with a police department's ban on head coverings, hats, or other headgear for officers; there was "no evidence" the rule was "motivated by religious animus." *Riback* v. *Las Vegas Metro. Police Dep't*, 2008 WL 3211279, at *6 (D. Nev. Aug. 6, 2008). That court relied on *Smith* to hold that a Jewish police officer had no First Amendment right to wear a yarmulke, a traditional Jewish head covering. Because the ban was religiously neutral, *Smith* immunized it from constitutional scrutiny. *Id.* In another case, the court determined that a state agency need not place an Orthodox woman with developmental disabilities in a "habilitation" program that permitted her to observe Sabbath and Kosher laws. That was so because "in accordance with *Smith*," the state agency's "decision was religiously neutral." *Shagalow* v. *Dep't of Human Servs.*, 725 N.W.2d 380, 389 (Minn. Ct. App. 2006). Similarly, another court permitted a prison to deny a Jewish prisoner access to a prayer shawl, head covering, and prayer book—without justifying the prohibitions—simply because the ban on such items was religiously neutral. *Aiello* v. *Matthew*, 2003 WL 23208942, at *2 (W.D. Wis. Apr. 10, 2003).

Recent litigation surrounding Yeshiva University's refusal to recognize a student group (YU Pride Alliance)

offers another example. Yeshiva University, "our nation's largest Jewish undergraduate institution," "concluded that recognizing the Alliance" and permitting it to organize events "would have 'implications that are not consistent with Torah.'" *Yeshiva Univ.* v. *YU Pride Alliance*, 143 S. Ct. 1, 1–2 (2022) (Alito, J., dissenting from cert. denial). After this Court declined to stay a preliminary injunction against Yeshiva, the trial court granted final relief for YU Pride Alliance; the Appellate Division affirmed. *YU Pride Alliance* v. *Yeshiva Univ.*, 211 A.D.3d 562, 562–563 (N.Y. App. Div. 2022). But though the case has now passed through four courts, not a single judge has yet considered whether the state has a compelling interest in forcing Yeshiva to recognize the group, or whether granting an exemption would undermine that interest at the margins.

Yeshiva's lesson is that, though cases like *Tandon* and *Fulton* have somewhat improved on *Smith*, they did not go far enough. *Smith* still needs to be addressed. The student group seeks to transform Yeshiva University's interpretation of a core tenet of Judaism—teaching the precepts of the faith to the next generation—and they are not shy about it. See Emergency Application for Stay, *Yeshiva Univ.* v. *YU Pride Alliance*, 2022 WL 4287266, at *13, 24–25 (U.S. Aug. 29, 2022) (indicating that group seeks to effect "cultural changes" within YU and larger Orthodox community). If it strikes the Court as problematic that anything less than strict scrutiny should apply in such a case, *Yeshiva*'s lesson is clear: the answer is to abrogate *Smith*.

This is not to say, of course, these believers necessarily would or should prevail in every case. But the government should at least be required to prove a compelling need to impose such significant burdens on these

Jewish Americans' faith. Because of *Smith*, the government had no such obligation.

There are many more scenarios in which Jewish practices could bump up against general laws:

- **Shatnez**. Many Orthodox Jews understand Jewish law to prohibit wearing clothing containing shatnez, a mixture of wool and linen fibers. See Leviticus 19:19; Deuteronomy 22:9-11; Sasha Rogelberg, *What is Shatnez?* (June 28, 2023), bit.ly/48cNHId. Many blazers, skirts, blouses, slacks, sweaters, and uniform-type clothing contain shatnez. If a public school requires students to wear uniforms containing shatnez and does not permit alterations, that would substantially burden Jewish students.
- **Autopsies.** Many Jews interpret Jewish law to generally prohibit autopsies. Yet families have suffered the anguish of compelled autopsies on loved ones. See *Montgomery*, 743 F. Supp. at 1259 (finding that the government need not demonstrate a compelling need before performing an autopsy despite the wishes of the deceased's Jewish mother); *Thompson* v. *Robert Wood Johnson Univ. Hosp.*, 2011 WL 2446602, at *8 (D.N.J. June 15, 2011) (autopsy performed on Jewish child did not violate mother's Free Exercise rights, even if her "ability to exercise her religious beliefs was disturbed").
- **Circumcision.** Jews view male circumcision as a mandatory sign of an eternal covenant with the Jewish people. See Genesis 17:10–14. Muslims also circumcise for religious reasons. Nevertheless, some groups see the practice as inadvisable or even unethical. San Francisco, for example,

> previously considered banning circumcision. See Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. Times (June 4, 2011), nyti.ms/2WJmDNM. A generally applicable prohibition on circumcision would be seriously problematic; "[t]he religion decrees the penalty of spiritual excision, or kareit, for a person who is uncircumcised regardless of how observant they have been otherwise of the laws of Judaism." Mohammed Saqib Anwar et al., *Circumcision: a religious obligation or 'the cruellest of cuts'?*, 60(570) British J. Gen. Prac. 59 (Jan. 2010); see also *Fulton*, 593 U.S. at 545 (Alito, J., concurring) ("A categorical [circumcision] ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice.").

So far these examples have addressed incidental burdens accidentally or thoughtlessly imposed. But *Smith* also applies where legislators considered a legislative exemption but decided not to grant it. Our pluralistic society comprises myriad interest groups, all petitioning the government for action. Activists, and the officials they lobby, may simply be more focused on other priorities than on incidental religious burdens. They may not fully understand the seriousness of those burdens. And a smaller faith has less power to shape democratic processes.

Secular groups sometimes go farther and try to weaponize *Smith* to halt religious practices. Certain animal-rights groups, for example, have sought injunctions against the lesser-known Jewish practice of Kapparot. Kapparot is an atonement ritual conducted on the eve of Yom Kippur. Many believe donating to charity satisfies the requirement, but some still interpret Kapparot to

require ceremonial slaughter of chickens. Thus, animal-rights activists sometimes turn to lawsuits to halt this ritual. See, *e.g.*, *United Poultry Concerns* v. *Chabad of Irvine*, 743 F. App'x 130 (9th Cir. 2018). These activists rely on generally applicable laws regulating business practices. *Id.* at 130–131. Of course, lawmakers did not have Kapparot in mind when they passed these laws; most had probably never even heard of the practice. But given the laws' religious neutrality, activists opposing Kapparot rely on *Smith* to argue that Chabad rabbis are not entitled to religious accommodation. See Appellant's Br. at *25, *United Poultry*, 2017 WL 5663672 (9th Cir. Nov. 22, 2017). In fact, they bluntly assert that under *Smith*, "[t]he First Amendment does not protect" the Chabad's actions. *Id.*

One final point: generally applicable laws can prohibit religious exercise in ways that are not mere inconveniences or annoyances. *Yang*, "one of the saddest cases since *Smith*," demonstrates that. Douglas Laycock, *New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 226 (1993). A Hmong couple challenged a state law mandating autopsies for accident victims. Their son, killed in a car accident, was subsequently autopsied without their consent. They were haunted by their belief that he could never enter the afterlife due to the autopsy. *Id.* The court initially ruled the autopsy violated their Free Exercise rights. But *Smith* came down before the judgment became final, leading the district court to reverse its prior ruling.

In a moving tribute, the court declared its "deep regret that I have determined that the [*Smith*] case mandates that I recall my prior opinion." *Yang*, 750 F. Supp. at 558. "My regret," the court explained, "stems from the fact

that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. ... Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief." *Id.* In other words, though "[t]he law's application did profoundly impair the Yang's religious freedom," *Smith* meant that the impairment could not, as a matter of law, "rise[] to a constitutional level." *Id.* at 560. In believers' eyes, *Smith*'s so-called "incidental" burdens can mean eternal life or death.

The Court should reconsider *Smith*. The Free Exercise Clause may not ultimately protect faithful Americans from suffering such indignities. There may be times when the government can show that truly compelling interests admit no exceptions. But at a bare minimum it should have to extensively justify such intrusions with real evidence.

C. *Smith*'s Assumption Regarding the Difficulty of Administering Religious Accommodations Has Proven Incorrect.

Smith suggested that applying the Free Exercise Clause to generally applicable laws would be unworkable, and prohibitively so. 494 U.S. at 886–890. But the past three decades have disproved that assumption. Federal and state courts at all levels have successfully decided cases under statutes like RFRA, RLUIPA, and state analogues. These statutes subject *all* laws to strict scrutiny whenever they substantially impinge on religious exercise. In other words, where RFRA or RLUIPA apply, courts work through the precise exercise that *Smith* believed was too cumbersome and unworkable to even attempt.

Take *Centro Espirita*. Rejecting arguments that hallucinogenic sacramental tea could not be exempted from federal drug laws, the Court emphasized that by passing RFRA "Congress determined that the legislated test" (strict scrutiny) "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Centro*, 546 U.S. at 436. In fact, the Court had "reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Id.* at 436. "We had 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose." *Id.* And "[n]othing in our opinion suggested that courts were not up to the task." *Id.* In other words, this Court itself recognized that *Smith*'s anxieties are unfounded.

To be sure, as in any other area of law, RFRA and RLUIPA cases sometimes "require[] this Court to make difficult judgments about the strength of the [government's] interests and whether those interests can be satisfied in other ways that are less restrictive of religious exercise." *Ramirez*, 595 U.S. at 445 (Kavanaugh, J., concurring). That approach is no different from other First Amendment or Fourteenth Amendment cases involving strict or intermediate scrutiny. "[I]t is no way anomalous to accord heightened protection to a right identified in the text of the First Amendment." *Boerne*, 521 U.S. at 564 (O'Connor, J., dissenting). "[T]he requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights." *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 631 (2021) (Sotomayor, J., dissenting).

Courts have successfully distinguished between winning and losing claims under RFRA and RLUIPA. See,

e.g., *Holt*, 574 U.S. 352 (unanimously granting a Muslim a religious exemption from a prison's grooming policy); see also Douglas Laycock & Thomas Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 Cato Sup. Ct. Rev. 33, 44 ("The compelling-interest standard has not come close to producing the 'anarchy' of which *Smith* warned."). These laws' scope "shows that Congress was confident of the ability of the federal courts to weed out insincere claims." *Burwell* v. *Hobby Lobby*, 573 U.S. 682, 718 (2014). RFRA and RLUIPA's existence also means that abrogating *Smith* would not leave courts adrift without guidance. Federal courts would be able to rely on existing RFRA and RLUIPA caselaw to apply strict scrutiny to Free Exercise claims.

Regardless of whether *Smith*'s calculation was justifiable based on information available in 1990, the three decades that followed disproved its reasoning and justifications. This Court should grant certiorari.

D. COVID-Related Litigation Shows *Smith* Did Not Create an Easy-to-Apply Rule.

As it happens, while courts proved themselves capable of applying the pre-*Smith* scrutiny embodied in RFRA and similar statutes, the Court's supposedly simpler standard proved more challenging. "*Smith*'s rules about how to determine when laws are 'neutral' and 'generally applicable' have long proved perplexing." *Danville Christian Acad.* v. *Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial).

As COVID-19 swept through the United States, states and localities (not subject to the federal RFRA) made well-intentioned efforts to slow the pandemic. Public health officials restricted events like movie showings, concerts, and sports events, and included religious gatherings in those regulations. *S. Bay United Pentecostal*

Church v. *Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

But contrary to the Court's expectations in 1990, *Smith*'s lesser rule did not make it easier for courts to decide COVID-related cases. In fact, there was considerable confusion and uncertainty about which laws qualify as religiously neutral and generally applicable. Compare *Tandon*, 593 U.S. at 62 ("regulations are not neutral and generally applicable … whenever they treat *any* comparable secular activity more favorably than religious exercise") and *Diocese of Brooklyn*, 592 U.S. at 17 ("regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment") with *Tandon*, 593 U.S. at 65 (Kagan, J., dissenting) ("the law does not require that the State equally treat apples and watermelons") and *Diocese of Brooklyn*, 592 U.S. at 39 (Sotomayor, J., dissenting) (reasoning that regulations were neutral because "comparable secular institutions face restrictions that are at least equally as strict").

The Court summarily reversed the Ninth Circuit's Free Exercise cases five times in a short period. *Tandon*, 593 U.S. at 62. The Second, Third, and Tenth Circuits struggled as well. *Diocese of Brooklyn*, 592 U.S. at 15 (reversing Second Circuit); *Robinson* v. *Murphy*, 141 S. Ct. 972 (2020) (reversing Third Circuit); *High Plains Harvest Church* v. *Polis*, 141 S. Ct. 527 (2020) (reversing Tenth Circuit).

This is not to say, of course, that every church necessarily would have prevailed in pandemic-era cases absent *Smith*—or should have prevailed. Slowing a highly infectious virus's spread during a global pandemic could fairly be argued to be a compelling interest. And the government may have been able to present evidence that the marginal effects of granting exemptions to churches

would undercut that interest. But the point is that applying *Smith* has proven *at least* as difficult as applying traditional strict scrutiny. So there is no reason to begin the analysis in a way that, unique among First Amendment rights, disadvantages claimants out of the gate.

E. Now Is the Time to Replace *Smith*.

The Court almost reconsidered *Smith* four years ago in *Fulton*. It should not delay any longer. Antisemitism is on the move again, both here and throughout the world. "In each year since" 2007, "Jews have been a target of government restrictions or social hostilities involving religion in more countries than any other major religious group besides Christians and Muslims, even though only about 14.7 million people worldwide identify with the Jewish religion (about 0.2% of the world's population)." Jeff Diamant, *Anti-Jewish harassment occurred in 94 countries in 2020, up from earlier years*, Pew (Mar. 17, 2023), bit.ly/3UbFTkv. The "coronavirus pandemic fuel[ed] a worldwide rise in antisemitism." *Antisemitic incidents on rise across the U.S.*, Assoc. Press (Apr. 17, 2023), bit.ly/4eIkPdq. Then "[i]n the months since the October 7th, 2023, terrorist attack in Israel, the global Jewish community has witnessed an increase in antisemitic activity, unprecedented in recent years." *Antisemitic Attitudes in America 2024*, ADL (Feb. 29, 2024), bit.ly/3YbEGe8. "Anti-Jewish trope beliefs continue to increase, and younger Americans are showing higher rates" of susceptibility to them. *Id.* For these reasons, among others, "63% of American Jews say the status of Jews in the U.S. is less secure" than only a year ago. *The State of Antisemitism in America 2023*, AJC, bit.ly/3Y82v6y.

"Recent antisemitism is … a reflection of destructive forces tearing at American and western European

societies, where stability and democracy are already under pressure." Stephen Collinson, *A new wave of antisemitism threatens to rock an already unstable world*, CNN (Oct. 31, 2023), bit.ly/3Y6Owhb. Restoring our Free Exercise clause to its former regime will signal the republic's enduring commitment to religious freedom for all. And it will preemptively shore up the nation's defenses against antisemitism's rising tide.

II. Even if the Court Does Not Reconsider *Smith*, It Should Grant Certiorari to Reaffirm That Laws Preferring One Religious Group Over Others Are Subject to Strict Scrutiny.

When the Court decided *Fulton*, this case was returned to the state courts for further consideration. 142 S. Ct. 421 (2021). The New York Appellate Division and Court of Appeals both agreed, relying on a previous state case, that there was no First Amendment violation. Pet.App.3a–5a (citing *Cath. Charities* v. *Serio*, 7 N.Y.3d 510 (2006)). "[B]oth the regulation itself and the criteria delineating a 'religious employer' for the purposes of the exemption are generally applicable and do not violate the Free Exercise Clause," the court concluded. Pet.App.4a. But the New York courts' holding that a law is generally applicable even if it "exempt[s] some religious institutions and not others," *Serio*, 7 N.Y.3d at 522, exacerbates *Smith*'s harm.

Smith recognized that insulating neutral and general laws that burden religious practice from meaningful judicial review would relegate accommodations to the political process alone. This would inevitably "place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890.

The Court of Appeals' approach doubles down on this error. It would let legislatures further isolate disfavored

religions by dividing between different organizations within the same faith. Under the narrow religious exemption at issue, for example, synagogues could qualify for the abortion-mandate exemption while other Jewish organizations could not. Hatzalah, the largest nonprofit U.S. ambulance service, might not be covered by the exemption even though it was founded by Orthodox Jews with religious motivations. See *About*, Chevra Hatzalah, bit.ly/48aFFj8. And that would be true simply because Hatzalah's primary purpose is providing ambulance services, not teaching religious values.

Smith acknowledged that "a nondiscriminatory religious-practice exemption is permitted." 494 U.S. at 890. But laws like the one at issue, which privileges religious institutions practicing their faith in the state's preferred manner, are not nondiscriminatory. See, *e.g.*, *Larson* v. *Valente*, 456 U.S. 228 (1982); *Tandon*, 593 U.S. at 62. That is true despite the Court of Appeals' conclusion that the statutory criteria are not so ambiguous as to make the exemption "standardless and discretionary." Pet.App.5a. Rather, even under *Smith*, if a state wants to discriminate between different religious adherents, it must demonstrate that doing so is necessary to further a compelling government interest. If the state cannot provide such evidence, the First Amendment should not permit a divide-and-conquer approach that further "disadvantage[s] those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890.

CONCLUSION

This Court should grant certiorari to reconsider and abrogate *Smith*. Even if the Court does not reconsider *Smith*, it should grant certiorari to clarify that the decision below misapplied that case.

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