**No. 19-123**

# In the Supreme Court of the United States

SHARONELL FULTON, *et al., Petitioners,*

v.

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

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

**BRIEF OF CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, CENTER FOR PUBLIC JUSTICE, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE LUTHERAN CHURCH—MISSOURI SYNOD, QUEENS FEDERATION OF CHURCHES, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND WORLD VISION, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS**


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## QUESTION PRESENTED

This brief addresses whether the Court should overrule its holding that the Free Exercise Clause provides no protection against laws that are neutral and generally applicable. See *Employment Division v. Smith*, 494 U.S. 872 (1990).

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## INTEREST OF *AMICI*

The *amici* joining this brief are listed on the cover. *Amici* are Christian service organizations and denominations, an association of churches, and the umbrella body for Orthodox synagogues. Each *amicus* also works to protect the free exercise of religion for all Americans.[1]

## INTRODUCTION

*Employment Division v. Smith*, 494 U.S. 872 (1990), announced two rules. The better-known unprotective rule says that the Free Exercise Clause offers no protection against neutral and generally applicable laws. No matter how severely such a law burdens the exercise of religion, it presents no free-exercise issue. Refusing religious exemptions requires no justification and need serve no government interest.

*Smith*'s protective rule says that if a law is not neutral, or not generally applicable, any burden it imposes on religion must be necessary to serve a compelling government interest. It suggests that a law is not generally applicable if it has "at least some" exceptions. *Id.* at 884.[2]

Many government officials acknowledge only the unprotective rule. They believe that they no longer have to consider regulatory exceptions to protect free

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[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. All parties have consented in writing to this brief.

[2] Douglas Laycock & Steven T. Collis, *Generally Applicable Laws and the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016) (exploring this rule).

exercise. They can just say no.

And that is why Mary Stinemetz died for her faith, in America, in the twenty-first century. Stinemetz was a Jehovah's Witness who needed a liver transplant without a blood transfusion. Bloodless transplants were available in Omaha. But Kansas Medicaid wouldn't pay for medical care more than fifty miles beyond the Kansas state line.

This arbitrary limit served no purpose. Transplants were actually cheaper in Omaha than in Kansas. The rule wasn't even generally applicable, because Kansas officials had "absolute discretion" to grant exceptions. *Stinemetz v. Kansas Health Policy Authority*, 252 P.3d 141, 155 (Kan. Ct. App. 2011). But through multiple hearings and appeals, they refused any exception for Stinemetz. They "failed to suggest any state interest, much less a compelling interest," that refusing an exception might serve. *Ibid.* They understood *Smith* to mean that they didn't need a reason.

The court held that their refusal violated the federal Constitution, invoking *Smith*'s protective rule, and that it violated the Kansas constitution, rejecting *Smith*'s unprotective rule as a matter of state law. 252 P.3d at 148-61.

But it was too late. During two years of administrative appeals and litigation, Steinmetz's condition had deteriorated, and she was no longer medically eligible for a transplant. Mary Stinemetz died of liver disease in the year after the court's decision.[3]

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[3] Brad Cooper, *Jehovah's Witness who needed bloodless transplant dies*, Kansas City Star (Oct. 25, 2012).

The death of Mary Stinemetz followed naturally from telling government officials that they have no obligation to consider the religious needs of their constituents. Absent *Smith*, the law would have been clear and the litigation quicker, or Kansas would have complied voluntarily. The source of this tragedy is the unprotective rule in *Smith*. It should be overruled.

## SUMMARY OF ARGUMENT

**I.** *Smith*'s unprotective rule conflicts with constitutional text. When a law as applied makes a religious practice illegal, it is a law "prohibiting the free exercise [of religion]," whether or not it also has other applications.

**II.** If the Free Exercise Clause doesn't apply to neutral and generally applicable laws, it cannot serve its original purposes. Those purposes include protecting individual conscience and preventing human suffering, social conflict, and persecution.

**A.** In the eighteenth century, every colony found that free exercise required exempting dissenters from oaths, military service, and other requirements that burdened their religious practices. Those laws, although neutral and generally applicable, overrode conscience, caused psychological suffering and loss of liberty or property, inflamed social conflict, and discouraged people from settling or remaining in the colony.

**B.** Free-exercise exemptions are still needed today. Generally applicable laws without exemptions coerce conscience and cause Americans to suffer for their faith. In today's atmosphere of cultural and political polarization, exemptions are needed to calm

fear and resentment and reduce social conflict.

**C.** Exemptions best reconcile the key principles of the Religion Clauses. They protect liberty and voluntarism in religious matters. They promote government neutrality in the sense of neutral incentives, neither encouraging nor discouraging religious practice. These principles help explain decisions in other Religion Clause areas too.

**D.** This analysis fully applies to the public funds at issue here. The case involves licensing, not just funding: Catholic Social Services cannot place children at all unless it has a contract with the city. And loss of government funding to which one is otherwise entitled is a powerful disincentive to religious faith and practice. It requires a justification of the highest order.

**III.** *Smith* rests on additional misconceptions.

**A.** Exemption claims are no "constitutional anomaly;" they are simply as-applied free-exercise challenges. As-applied challenges are "the normal rule" for other First Amendment rights. Free-speech and association challenges seek exemption from facially neutral and generally applicable laws, including from laws that regulate conduct, not just speech.

**B.** The compelling-interest test is a workable standard for balancing government interests and the right to exercise religion. Speech and association cases regularly do analogous balancing. Courts need not make a threshold determination, categorizing all religious practices as central or non-central; rather, the compelling-interest test requires that the government interest compellingly outweigh the burden on religion. The as-applied approach preserves the challen-

ged law's core purposes while protecting religious freedom. The need to draw lines cannot justify restricting a right grounded in constitutional text and history. A standard that weighs the competing interests will do justice far more often than a standard that ignores the weight of those interests.

**IV.** Other protections for religious exercise do not eliminate the need for federal constitutional protection against generally applicable laws. State and federal legislation, and state constitutional rulings, have ameliorated *Smith*'s harms but are far from solving the problem. Nor would it suffice to clarify *Smith*'s requirement that laws burdening religion be neutral and generally applicable. That threshold requirement vastly complicates every litigation and will never protect every claim that it should. Mary Stinemetz lost her life while lawyers argued about general applicability.

## ARGUMENT

### I. *Smith* Is Inconsistent with Constitutional Text.

*Smith* gave no serious attention to constitutional text. The Court briefly stated that its reading of the Free Exercise Clause was textually "permissible." 494 U.S. at 878. It made no effort to show that its reading is the most plausible from among the "permissible" readings. It is not.

**1.** "Exercise" means actions or conduct, in the Founders' time and now. "As defined by dictionaries at the time of the framing, the word 'exercise' strongly

connoted action."[4] *Smith* acknowledged that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts." 494 U.S. at 877. See *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) (the Clause "guarantees the free *exercise* of religion, not just the right to inward belief (or status)") (emphasis in original).

**2.** When a law makes a religious practice illegal, it prohibits the exercise of religion. In Justice O'Connor's words:

> [A] law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. … Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.

*Smith*, 494 U.S. at 893 (O'Connor, J., concurring in the judgment).

The law in *Smith* prohibited the central ritual of a worship service. That application makes the law one "prohibiting the free exercise [of religion]," whether or not the law has other applications. Under this Court's settled practice concerning other rights, the victim of such a constitutionally burdensome application of a law that also has valid applications can file an as-

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[4] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1489 (1990) (collecting definitions).

applied challenge. See part III.A.

*Smith* inserted qualifiers into the constitutional text. It made the Clause read: "Congress shall make no law prohibiting the free exercise [of religion], except for neutral and generally applicable laws." The extra words are not part of the Constitution.

**3.** *Smith* converts a substantive liberty into an equality right. It protects an exercise of religion only if someone else is allowed to engage, for secular reasons, in activity that causes harms similar to those the religious exercise allegedly causes. The majority cited the rule "that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause." *Smith*, 494 U.S. at 886 n.3 (emphasis in original). It said the same rule governs free exercise.

But the two rights differ by their terms. The Equal Protection Clause guarantees equal treatment; the Free Exercise Clause guarantees the right to engage in a particular class of activities. "A civil service examination with disparate racial impact does not penalize an activity that the Constitution protects. A law prohibiting peyote worship does prohibit an activity the Constitution protects. … The impact on religious users is not a mere statistical association; it is a flat prohibition of their religious exercise."[5] That is precisely what the text forbids.

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[5] Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 18.

## II. If the Free Exercise Clause Does Not Apply to Neutral and Generally Applicable Laws, It Cannot Serve Its Original Purposes.

### A. Free Exercise Without Exemptions Did Not Work in the Eighteenth Century.

**1.** There were multiple reasons for the American experiment in religious liberty, some of them directly relevant to the need for religious exemptions. The articles cited in this brief cite historians and original sources that are temporarily inaccessible.

First was a growing respect for individual conscience. John Locke had written that "no man can so far abandon the care of his own salvation" as to let anyone else "prescribe to him what faith or worship he shall embrace."[6] "The care, therefore, of every man's soul belongs unto himself."[7]

Over the next century, the colonists adopted, extended, and sometimes modified Locke's views.[8] In 1744 a pamphlet attributed to Elisha Williams argued that "Every man has an equal right to follow the dictates of his own conscience in the affairs of religion."[9] And because for Christians, Christ alone is "Lord of the conscience," "all imposers on men's con-

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[6] John Locke, *The Second Treatise of Civil Government and A Letter Concerning Toleration* 127 (J.W. Gough, ed. 1948) (1689).

[7] *Id.* at 137.

[8] McConnell, *supra* note 4, at 1430-31, 1443-48.

[9] Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), https://www.consource.org/document/the-essential-rights-and-liberties-of-protestants-by-elisha-williams-1744-3-30/ [https://perma.cc/E2X2-VP7X].

sciences are guilty of rebellion against GOD and CHRIST."[10] Williams was a Congregationalist minister, legislator, and Rector (President) of Yale College.[11]

Protecting conscience was James Madison's first point in his *Memorial and Remonstrance Against Religious Assessments*. "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[12]

Second, government efforts to override conscience had led to human suffering, social conflict, and persecution. In history that was recent to the Founders, England had suffered two centuries of intermittent religious persecution, civil war, regicide, and multiple revolutions, two of them successful.[13] Protestant monarchs had executed Catholics and vice versa; Anglicans had oppressed Puritans and vice versa. Similar conflicts had plagued continental Europe.[14] As Madison summarized, "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to

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[10] *Ibid.*

[11] Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1421-27.

[12] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶1, reprinted in *Everson v. Board of Education*, 330 U.S. 1, 64 (1947).

[13] Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1055-66 (1996); McConnell, *supra* note 4, at 1421-22.

[14] Laycock, *supra* note 13, at 1049-55.

extinguish Religious discord, by proscribing all difference in Religious opinions."[15]

Blood had also been shed in the colonies.[16] Massachusetts, Connecticut, and Virginia expelled religious dissenters, and the New England colonies occasionally executed them when they returned.[17] The more common punishment was repeated whippings and renewed expulsion.[18] New England and the southern colonies taxed dissenters to support the established church.[19]

Third, persecution and religious conflict excluded or discouraged whole classes of potential settlers. When Georgia refused to enact an exemption from military service in the 1730s, the entire Moravian community moved en masse to Pennsylvania.[20] Madison argued that Virginia's proposed tax to support Christian ministers would discourage new settlers from coming and encourage existing citizens to

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[15] *Memorial and Remonstrance* ¶11, in *Everson*, 330 U.S. at 69.

[16] Laycock, *supra* note 13, at 1066-69; McConnell, *supra* note 4, at 1422-24.

[17] Thomas J. Curry, *The First Freedoms* 22 (1986); McConnell, *supra* note 4, at 1423.

[18] Curry, *supra* note 17, at 21-24; Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1805 & n.54 (2006).

[19] Curry, *supra* note 17, at 80.

[20] McConnell, *supra* note 4, at 1468 & n.293.

leave.[21]

**2.** Over time, every colony found that the underlying purposes of religious liberty required exemptions.

The issue arose most frequently with respect to Quakers, who couldn't swear oaths or serve in the militia. Carolina exempted Quakers from swearing oaths in 1669.[22] As toleration spread, the exemption from oath-taking became nearly universal.[23]

Rhode Island enacted the first exemption from military service in 1673, and after substantial debate in some colonies,[24] this too eventually became universal.[25] Rhode Island also exempted the Jewish community from facially neutral but Christian-based marriage laws.[26]

The exemption issue also arose with respect to taxes to support the established church. Beginning with New Hampshire in 1692, every colony that retained such a tax eventually exempted dissenters from paying it.[27] From a modern perspective, the church tax seems not to be religiously neutral. But its

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[21] *Memorial & Remonstrance* ¶¶9-10, in *Everson*, 330 U.S. at 68-69.

[22] Laycock, *supra* note 18, at 1804 & n.51.

[23] Curry, *supra* note 17, at 81; McConnell, *supra* note 4, at 1467-68; Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630-32 (1989).

[24] Laycock, *supra* note 18, at 1808-25.

[25] *Id.* at 1806-08; McConnell, *supra* note 4, at 1468-69.

[26] McConnell, *supra* note 4, at 1471.

[27] *Id.* at 1469-71.

supporters understood it to serve important secular purposes like any other law—it promoted public morality.[28] They viewed the exemption for dissenters as a real and generous exemption.

**3.** The most revealing histories are in colonies that came to free exercise late and reluctantly. Even they soon enacted exemptions, because free exercise without exemptions didn't solve the problems they were trying to solve. Quakers couldn't live in Massachusetts if they were banned. But neither could they live in Massachusetts if their important religious practices were banned.

Requiring oaths or military service would override individual conscience just as banning Quakers overrode conscience. For those who succumbed to legal pressure, such requirements would cause the same guilty feelings and psychological suffering, the same disruption of their relationship with God. For those who didn't succumb, criminal penalties and other enforcement efforts inflicted loss of liberty and property, causing human suffering and social conflict. Prosecutions for religious conduct discouraged settlement and drove citizens from the colony.

It mattered not that these harms were imposed by neutral and generally applicable laws. A right to believe a religion, with no right to practice it, wasn't religious liberty at all. As a seventeenth-century Baptist argued, there is no freedom of conscience without freedom to act.[29]

Once a colony decided that dissenters should be

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[28] *Id.* at 1441, 1470-71.

[29] Curry, *supra* note 17, at 15.

allowed to live there, and that their lives shouldn't be made miserable because of their faith, exemptions for religiously motivated conduct followed naturally. One by one, even the colonies with intolerant histories enacted exemptions from all the important legal requirements that burdened religious dissenters.

In 1708, Connecticut allowed dissenters to conduct their own worship services.[30] It exempted Quakers from swearing oaths by an eighteenth-century statute of uncertain date; Massachusetts did the same in 1744.[31] Both colonies exempted dissenters from paying the church tax in a series of statutes beginning in 1727.[32] In 1757, Massachusetts exempted Quakers from military service.[33]

Virginia, which had long resisted religious liberty, followed suit. It exempted Quakers from swearing oaths in 1722.[34] It exempted Huguenots from paying the church tax in 1700, and German Lutherans in 1730.[35] Finally, in 1776, it exempted the remaining dissenters from the church tax, then suspended collection of the tax altogether,[36] and it exempted Quak-

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[30] Laycock, *supra* note 18, at 1803 & nn. 46-47.

[31] *Id.* at 1805 & n.55.

[32] *Id.* at 1806 & n.60; McConnell, *supra* note 4, at 1469; 1 William G. McLoughlin, *New England Dissent 1630-1833*, at 221-43, 269-77 (1971).

[33] Laycock, *supra* note 18, at 1806 & n.63.

[34] Thomas E. Buckley, *Establishing Religious Freedom: Jefferson's Statute in Virginia* 16 (2013).

[35] McConnell, *supra* note 4, at 1469 & n.303.

[36] *Ibid.*; Buckley, *supra* note 34, at 56.

ers from military service.[37]

**4.** This lived experience is the best guide to how the Founders understood religious liberty. Once they undertook to guarantee religious liberty, whether early or late, whether enthusiastically or reluctantly, they also exempted religious minorities from neutral and generally applicable laws that substantially burdened their exercise of religion.

These actual decisions are much better evidence of the original public meaning than the occasional quotation that arguably addresses the issue. Many such quotations are best understood to support a right to exemptions.[38] But most, on either side, are indirect; often the speaker was addressing some other issue altogether. The biggest church-state issue in the 1780s was disestablishment and how to fund the church. A general right to exemptions wasn't a live issue. With much less regulation and much more religious homogeneity, exemption issues could be addressed individually.

Legislatures granted these exemptions, because in colonial courts, judicial review did not yet exist. But all the colonies, and then all the states, implemented free exercise of religion by granting exemptions. That is what they understood free exercise of religion to mean.

Another body of evidence is that state guarantees of religious liberty contained provisos: free exercise of

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[37] McConnell, *supra* note 4, at 1468 & n.297.

[38] *Id.* at 1446-49 (quoting Madison, William Penn, Presbyterian leader John Witherspoon, and Baptist leader John Leland).

religion but no right to breach the peace or engage in licentiousness.[39] Why were these provisos thought necessary? Because without them, guarantees of free exercise would have protected religious conduct from generally applicable laws against breach of peace and licentiousness. The scope of these provisos was debated, showing that their reach was thought to matter; they were not a textually odd way of referring to all generally applicable laws.[40]

The experience of protecting religious liberty in the colonies and state constitutions is the best guide to the original public meaning of the Free Exercise Clause: it provides for religious exemptions when necessary.

### B. Free Exercise Without Exemptions Does Not Work Today.

Free exercise without exemptions causes the same problems today. It fails to avert the historic evils that religious liberty is meant to avert: coercion of conscience, suffering for one's faith, and social conflict.

**1.** Generally applicable laws without exemptions still coerce individuals and cause them to suffer for their faith. People surrender their conscience for fear of fine or imprisonment. Or they go to jail, pay the fine, or as here, lose their social-welfare benefits or professional licenses, because of their religion. In the worst case, they die. See Introduction.

These are the modern equivalents of the harms that so troubled the Founders. "'Neutral, generally applicable' laws, drafted as they are from the perspec-

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[39] *Id.* at 1461-62.

[40] *Id.* at 1461-66.

tive of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring in part and in the judgment). Religious exemptions avoid violations of conscience, and they avoid suffering for the sake of conscience.

This case involves an institution, but institutions have free-exercise rights too. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). Burdens on institutional free exercise harm individuals, including congregants, workers, donors, beneficiaries, and leaders forced to decide whether to surrender their institution's conscience or its mission. In terminating its work with CSS, the city excluded foster parents working with CSS, many of whom chose CSS because they shared its faith. It blocked children from reuniting with their former foster parents and with siblings in those parents' care, reduced the number of available foster families, and exacerbated delays in moving children from institutions. Pet. Br. 11-12.

**2.** Penalties on the exercise of religion aggravate religious, cultural, and political conflict. "A person's response to [religious] doctrine, language, and imagery … reveals a core aspect of identity—who that person is and how she faces the world." *Town of Greece v. Galloway*, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting). Substantial burdens on religious practice threaten a person's fundamental way of life, causing fear and resentment.

It may be frustrating for those on either side in a social conflict to see governments, or other citizens, legally doing things that they deeply disapprove of.

But it is far worse to be told that your own religious or intimate personal practices must conform to the other side's preferences: that you must participate or assist or else surrender important activities of your own, such as helping neglected children. It is the difference between losing a political battle and being forced to surrender your own faith and identity.

Resentment and fear certainly operate in today's political and cultural environment. Americans of different political parties now distrust each other more than at any time in the last fifty years. "[P]oliticians need only incite fear and anger toward the opposing party to win and maintain power."[41] "Confrontational politics" causes "voters to develop increasingly negative views of the opposing party."[42] Religious disagreements are an important component of this polarization.[43]

These developments make strong constitutional protections for religious liberty as important as ever. First, in an atmosphere of fear and distrust, people are especially likely to perceive threats to their reli-

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[41] Alan Abramowitz & Steven Webster, *"Negative Partisanship" Explains Everything*, Politico (Sept./Oct. 2017), https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534 [https://perma.cc/H267-VRYU].

[42] Alan I. Abramowitz & Steven Webster, *The Only Thing We Have to Fear Is the Other Party*, Rasmussen Reports (June 4, 2015), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_alan_i_abramowitz/the_only_thing_we_have_to_fear_is_the_other_party [https://perma.cc/7PK8-YYXX].

[43] Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 412-23 (2011).

gious practices as threats to their overall identity. Historic religious minorities fear that laws restricting their practices reflect the growing hostility of the majority. Conservative Christians fear that some applications of antidiscrimination laws pose existential threats to their institutions and to individuals in business and the professions.

Vigorous protection of religious liberty calms polarization by reducing people's "existential fear that a hostile majority will successfully attack their core commitments."[44] Protecting religious practice gives people space in civil society, not just to hold beliefs but to live by them.

Second, negative polarization reduces the likelihood that the political process will accommodate the needs of religious minorities. The side of the political divide that holds power often has no sympathy for the predicament the other side faces. Culturally conservative places have little sympathy for Muslims, Native Americans, or other historic religious minorities. Culturally progressive places have little sympathy for conservative Christians.[45] Thus, even when balanced solutions to religious-liberty conflicts exist, the political process doesn't reach them. In recent years, even state versions of RFRA—laws that once passed with near unanimity—have been blocked by the polariza-

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[44] Thomas C. Berg, Masterpiece Cakeshop*: A* Romer *for Religious Objectors?*, 2017-18 Cato Sup. Ct. Rev. 139, 157.

[45] Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U.L.Q. 919, 943-48 (2004) (describing how different religious groups are vulnerable in different jurisdictions and settings); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839 (surveying polarization over sexual morality).

tion over LGBT rights and religious liberty.[46]

Third, without exemptions, a threat to religious liberty from proposed legislation can be countered only by blocking the legislation entirely. If the choice is between a gay-rights law with no exemptions or no gay-rights law at all, then in many places there will be no gay-rights law at all. Lack of religious exemptions greatly raises the stakes in political disputes.

Religious liberty cannot solve the problems of polarization, but it can reduce them. Today as much as ever, free-exercise exemptions are needed to serve religious liberty's historic purpose of calming fear and reducing social conflicts that "can strain a political system to the breaking point." *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970) (opinion of Harlan, J.).

### C. Exemptions Best Reconcile the Key Principles of the Religion Clauses.

The Religion Clauses contain multiple principles that serve the purposes discussed above. Most obviously, the Religion Clauses guarantee liberty with respect to choices and commitments about religion—liberty for believers in every faith and in none. E.g., *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000).

Second, the Religion Clauses generally commit the government to neutrality in matters of religion. E.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723-24, 1731-32 (2018).

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[46] Brian Miller, *The Age of RFRA*, Forbes (Nov. 16, 2018), https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/#3d9637e477ba [https://perma.cc/N6D7-S93F].

Third, religion in America is voluntary. No one is required to support, believe, or participate in religion; people do these things in the way and to the extent that they choose, or from their personal sense of religious obligation. E.g., *Walz*, 397 U.S. at 694-96 (opinion of Harlan, J.). What the founding generation called "voluntaryism" was an essential element of their church-state settlement.[47]

These principles are closely related, and despite occasional tensions, they generally cohere. Government neutrality in religious matters protects liberty and voluntarism; it leaves religion to decisions of private citizens.

*Smith* requires that government regulation of religious practices be "neutral." So did the leading cases requiring exemptions. *Sherbert v. Verner* said that religious exemption "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. 398, 409 (1963). *Wisconsin v. Yoder* said that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. 205, 220 (1972).

Obviously, the Court has used "neutrality" in more than one sense. A coherent but unexplained conception of neutrality can be identified in each of these opinions. *Sherbert* and *Yoder* require neutral *incentives*. *Smith*, and the facial neutrality held insufficient in *Yoder*, require neutral *categories*.

Professor McConnell and Judge Posner labeled

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[47] Esbeck, *supra* note 11.

these two conceptions "incentive neutrality" and "category neutrality."[48] Professor Laycock labeled them "substantive neutrality" and "formal neutrality." Substantive neutrality requires government "to minimize the extent to which it either encourages or discourages religious belief or … practice."[49] See also *Lukumi*, 508 U.S. at 562 (Souter, J., concurring in part and in the judgment) (contrasting formal and substantive neutrality).

Regulating an activity and exempting conscientious objectors departs from neutral categories; it treats the religious objector differently. But exemption is far better at achieving neutral incentives.

When government prohibits or penalizes a practice, its purpose and effect is to discourage or eliminate that practice. If that practice is religious for some people, the penalties discourage religion. Imprisonment, fines, loss of social-welfare benefits, and loss of government licenses and contracts are powerful disincentives.

But exemptions rarely encourage the religious practice, because there is little reason to engage in religious practices apart from the religious belief that gives them meaning. No one became a Sabbatarian because Sherbert got her unemployment compensation; no parents removed their children from school because Yoder was allowed to educate his children on the farm. More precisely, no one did these things un-

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[48] Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 37-38 (1989).

[49] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990).

less they already had the religious motivation to do them but had refrained because the law deterred them. No child-placing agency not already religiously committed to traditional views of marriage will stop working with same-sex couples if CSS is exempted.

Of course there are exceptional cases. An exemption from military service, or from paying taxes, both protects conscience and confers secular benefits. Then neutral incentives are hard to achieve. But in the great bulk of cases, regulatory exemptions for conscientious objectors provide far more neutral incentives than penalizing those who exercise their religion.

> [Requiring neutral incentives] highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice.[50]

Substantive neutrality, or incentive neutrality, better protects both liberty and voluntarism.

This conception of neutrality also works across other areas of church-state controversy. Neutrality in funding cases is both formal and substantive. Equal funding for everyone who provides the same secular service creates no religion-based categories, and because money has the same value for everyone, it has no effect on incentives. Funding secular providers but

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[50] *Id.* at 1002. See Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 64-68 (2007) (elaborating these connections).

not religious providers, or vice versa, both creates religious categories and powerfully distorts incentives, discouraging the category that isn't funded.

The Court's decisions on government speech have retreated from neutrality, permitting government to endorse particular religious teachings, because those cases don't involve government's coercive powers. *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). But free-exercise cases are all about government's coercive powers. See parts II.A-B. Religious exemptions avoid coercive disincentives to religion. They preserve religious liberty, government neutrality, and religious voluntarism; they avoid suffering for the sake of conscience.

### D. This Analysis Fully Applies to the Funding Issue in This Case.

The fact that public funds are at issue in this case changes none of the foregoing analysis.

First, this case isn't just about funding; it's about licensing. CSS cannot place children at all unless it has a contract with the city. J.A. 168; BIO 31. Philadelphia has entirely barred CSS from its religiously motivated work of helping children in need, unless CSS surrenders its conscience concerning the nature of marriage.

Second, even if this case involved only funding, it wouldn't matter. Loss of government funding to which one is otherwise entitled is a powerful disincentive to religious faith and practice. This Court so held in *Sherbert*. Forcing believers to choose between surrendering conscience or surrendering unemployment benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against

appellant for her Saturday worship." 374 U.S. at 404. Mary Stinemetz sought state funds to save her life; the pressure to abandon her faith was far greater than any fine or imprisonment.

"[D]enying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019. Government cannot withhold "the benefits of public welfare legislation" from any religious group, "because of their faith, or lack of it." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

If the unprotective rule in *Smith* is overruled, then *Trinity Lutheran*'s holding and *Everson*'s reasoning will apply when government withholds benefits because of a recipient's protected religious practice. That was the rule in *Sherbert*, and it is essential to religious liberty. Governments spend enormous amounts of money; they would have extraordinary power to buy up constitutional rights if they were allowed to withhold government contracts or social-welfare benefits from those who persist in exercising their religion.

## III. *Smith* Rests on Additional Misconceptions.

### A. Exemption Claims Are Simply As-Applied Free-Exercise Challenges.

*Smith* argued that free-exercise exemptions from generally applicable laws are a "constitutional anomaly." 494 U.S. at 886. Not so. An exemption claim asserts that a law valid on its face prohibits religious exercise in its application to particular facts. In such an as-applied challenge, "the court will order a remedy that protects the exercise of the constitutional right,

but otherwise leaves the law in place to apply to other circumstances that may arise."[51]

Far from anomalous, as-applied challenges are common across constitutional doctrines. "[T]he '*normal* rule' is that 'partial, rather than facial, invalidation is the required course,' such that a statute 'may … be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) (emphasis and ellipsis in original).

As-applied challenges are common under other First Amendment rights, especially freedom of speech and association. As in free-exercise cases, these challenges seek exemption from facially neutral and generally applicable laws, including laws regulating conduct as well as speech.

*Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), held that a law requiring disclosure of political parties' campaign contributions and expenditures, valid on its face, "cannot be constitutionally applied" to a minor party whose members and contributors would face "threats, harassment or reprisals." *Id.* at 101-02. Disclosure requirements mostly regulate conduct, not speech; disclosure serves an anti-corruption purpose unrelated to suppressing expression. But this Court required an exemption where the law would significantly deter political association.

*Brown* reaffirmed *NAACP v. Alabama*, 357 U.S. 449 (1958), which unanimously exempted the NAACP

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[51] Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1611 (2018).

from an order, entered pursuant to a generally applicable statute, requiring it to disclose its membership, Because those members would face public reprisals, disclosure had to serve a compelling interest, even if the burden on association was the incidental effect of a law that "appear[ed] to be totally unrelated to protected liberties." *Id.* at 461, 463.

The Court granted exemptions from otherwise valid and generally applicable antidiscrimination laws in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995), unanimously holding that parade organizers didn't have to admit marchers with a message inconsistent with the organizers' message, and in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), holding that the Boy Scouts couldn't be penalized for dismissing a scoutmaster whose public statements and identity conflicted with the organization's message. Both cases affirmed the general validity of public accommodation laws, but held that such a regulation of conduct must give way when it "would significantly burden the organization's right" to express its message. *Id.* at 659.

The Court granted an as-applied exemption in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), holding that the tort of intentional infliction of emotional distress couldn't be applied to a parody of a public figure. That tort covers a wide range of conduct, often involving no expressive component. See *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 46 cmt. *d* (giving examples including physical, mental, or sexual abuse; committing suicide in another's home; and killing another's pet). But this Court unanimously held that while the tort is generally valid, "the First Amendment prohibits such a re-

sult in the area of public debate about public figures." *Hustler*, 485 U.S. at 53. The Court granted a similar exemption from the tort for speech of public concern in *Snyder v. Phelps*, 562 U.S. 443 (2011).

Breach-of-peace laws regulate conduct as well as speech and are formally neutral among viewpoints. But speech has been exempted from such laws in some of this Court's best-known decisions. E.g., *Cohen v. California*, 403 U.S. 15 (1971) (profanity), and unanimously in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (denigrating another faith).

*Smith* cited Press Clause cases that rejected challenges to generally applicable laws. 494 U.S. at 878. But these cases held only that the commercial activities of large media corporations do not escape all taxation and regulation simply because their end product is communication. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (tax); *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (antitrust). They don't conflict with the larger number of cases exempting speech or association from direct restriction by generally applicable laws.

Religious exercise deserves as much protection as speech and association. As-applied claims may arise more often for religious exercise, but the principle is the same.

### B. The Compelling-Interest Test Is a Workable Standard for Balancing Government Interests and the Right to Exercise Religion.

**1.** *Smith* also said that courts are incompetent to apply the compelling-interest test by weighing the

burden on religious exercise against the government's interest in regulation. 494 U.S. at 889 n.5.

But the speech and association cases regularly weigh First Amendment interests and government interests. The Court held that government interests in nondiscrimination outweighed the expressive interests of the Jaycees and the Rotary, but not the more political expressive interests of the Boy Scouts and the St. Patrick's Day paraders in *Hurley*. See *Dale*, 530 U.S. at 657-59 (discussing all these decisions and noting that they set the First Amendment interests "on one side of the scale, and the State's interest on the other"). In both speech and religion cases, the Court has explicitly described the compelling-interest test in terms of balancing interests.[52]

*Smith* also said that courts cannot determine which religious practices are central, so they cannot even distinguish religious weddings from throwing rice at weddings. 494 U.S. at 887 & n.4. But courts need not make a threshold determination, categorizing all religious practices as central or non-central. What the compelling-interest test requires is that the government interest compellingly outweigh the burden on religion.[53] The weight of the religious interest is not an either-or, but a variable in the balance. Claimants who request an exemption cannot object to the court assessing the constitutional weight of the interests they assert.

The compelling-interest test of *Sherbert* and *Yoder* is appropriate, because the right to practice religion

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[52] Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers J.L. & Religion 139, 152 n.47 (2009) (collecting cases).

[53] *Id.* at 151-52.

is a fundamental right. Substantial burdens on fundamental rights generally trigger the compelling-interest test. E.g., *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 442-44 (2015). The test properly holds that only the prevention of significant harm can justify prohibiting religiously motivated conduct. And the test has a flexibility that allows it to apply to the wide range of circumstances in which religious exercise is prohibited.

**2.** The compelling-interest test should govern instead of the intermediate scrutiny illustrated by *United States v. O'Brien*, 391 U.S. 367 (1968), which allowed the government to punish a protester for burning a draft card. *Boy Scouts v. Dale* applied strict scrutiny rather than *O'Brien*, because the law in *Dale* "directly and immediately affects associational rights," while the draft-card law "only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest." 530 U.S. at 659.

Both laws were generally applicable. The difference must be that a prohibition on symbolic conduct leaves open many other ways to express the same views. But prohibiting a religious practice is like the prohibition in *Dale*; it leaves open no other way to participate in that practice. Other religious practices are not substitutes for the one that is prohibited. *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015).

All that said, serious intermediate scrutiny would be better than *Smith*'s total abdication of review. The problem is that intermediate scrutiny too often declines into undue deference to flimsy government interests, as in *O'Brien*.

**3.** The compelling-interest test is demanding, but it will be satisfied more often in religious-exemption cases than in speech cases. Government has interests in regulating conduct that don't apply to belief or speech. "The [freedom to believe] is absolute but, in the nature of things, the [freedom to act] cannot be." *Cantwell*, 310 U.S. at 303-04.

Moreover, neutral and generally applicable regulations of conduct will be justified more often than discriminatory or selective regulations. A pattern of exceptions undercuts the government's asserted interest and causes it to fail strict scrutiny. "[A] law cannot be regarded as protecting an interest 'of the highest order' … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

Before *Smith*, the government proved compelling interests in some free-exercise cases. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (racial equality in education); *United States v. Lee*, 455 U.S. 252 (1982) (collecting taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (military draft). Before *Smith*, the Court always affirmed that the government had to show that the conduct "'posed some substantial threat to public safety, peace or order.'" *Yoder*, 406 U.S. at 230 (quoting *Sherbert*, 374 U.S. at 403); see *Sherbert*, 374 U.S. at 406 ("'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'") (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Serious threats to public health are of course part of "public safety."

The compelling-interest test sets a strong but workable standard. Congress found in 1993 that "compelling interest" is "a workable test for striking

sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §2000bb(a)(5).

One reason the test strikes "sensible balances" is that religious-exemption claims are like other as-applied challenges: they seek to invalidate only one application of the law "while leaving other applications in force." *Ayotte*, 546 U.S. at 329. They avoid "nullify[ing] more of a legislature's work than is necessary." *Ibid.* They allow courts "to tailor their relief to the religious-freedom claimant …. By examining government interests and ordering relief 'at the margin,' the court can preserve the law's core purposes while also protecting religious freedom."[54] As this Court later explained, *Sherbert* and *Yoder* "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Professor Volokh's brief defending an entirely unprotective interpretation of *Smith* says nothing about text, history, or original meaning. It rests solely on extratextual claims about judicial capacity. His analogy to substantive due process ignores multiple distinctions: that free exercise is a textually enumerated right but substantive due process isn't; that religious exemptions limit government policy at the margins, as applied, but substantive due process invalidated government policy across the board; that religion is

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[54] Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 Harv. J.L. & Gender 103, 121-22 (2015).

an intensely personal matter but substantive due process protected economic activity explicitly subject to regulation under the Commerce Clause; and that judges are actually better than legislators at deciding whether it's necessary to suppress unpopular religious practices in specific factual contexts.[55]

The compelling-interest test requires careful weighing of interests and drawing of lines. But that cannot justify restricting a right specified in constitutional text and vital to our history. A standard that weighs the competing interests will do justice far more often than *Smith*'s standard, which wholly ignores the weight of these interests. And as discussed below, *Smith*'s two rules complicate litigation more than the compelling-interest test.

## IV. Other Protections for Free Exercise Are Insufficient.

Other protections for religious exercise do not eliminate the need for federal constitutional protection against generally applicable laws.

**1.** Heightened scrutiny applies to generally applicable laws in several contexts: to federal laws through RFRA, 42 U.S.C. §2000bb *et seq.*, to land-use and prison regulation through RLUIPA, 42 U.S.C. §2000cc *et seq.*, and to generally applicable laws in about thirty states through state constitutional interpretation and state RFRAs.[56] These states and Congress rejected the Court's constitutional understanding in *Smith*.

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[55] Douglas Laycock, *A Syllabus of Errors*, 105 Mich. L. Rev. 1169, 1172-77 (2007).

[56] Laycock, *supra* note 45, at 844-45 & nn.22, 26 (collecting citations).

But that leaves more than twenty states. California has neither a RFRA nor heightened scrutiny.[57] New York protects religion only against "unreasonable" burdens. *Catholic Charities v. Serio*, 859 N.E.2d 459, 526 (N.Y. 2006). Florida largely nullified its state RFRA by hostile interpretation. E.g., *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004). These three states have more than 80 million people, nearly a quarter of the nation.[58]

As Florida illustrates, there are barriers to the effectiveness of state RFRAs. They have gaps and exceptions. Many attorneys overlook these laws. Or they file in federal court under supplemental jurisdiction; if the federal claim is dismissed under *Smith*, the state claim is usually dismissed too.[59] And other courts besides Florida's "interpret state RFRAs to mean very little indeed."[60]

Specific legislative or regulatory exemptions, enacted one statute at a time, are also not workable substitutes for meaningful judicial review. "In each request for a legislative exemption, churches are likely to find an aroused interest group on the other side."[61]

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[57] *Ibid.*

[58] U.S. Census Bureau, *2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing* (Dec. 30, 2019), https://www.census.gov/newsroom/press-releases/2019/popest-nation.html [https://perma.cc/U3Y9-CG46].

[59] Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 479-93 (2010) (surveying these and other problems).

[60] *Id.* at 485.

[61] Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 229.

> Churches have to win these battles over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislatures, by the county commissions, by the city councils, and by the administrative agencies at each of these levels. Churches have to avoid being regulated this year and next year and every year after that. If they lose even once in any forum, they have lost the war; their religious practice is subject to regulatory interference.[62]

The smaller a religious minority, the less chance it has in this process, but as this case illustrates, size is no guarantee of legislative protection. Legislative and state-law responses to *Smith* have ameliorated its harms, but they are far from solving the problem.

**2.** *Smith*'s requirement that laws burdening religion be neutral and generally applicable provides a second rule, far more protective of religious exercise. See Introduction; Pet. Br. 19-30. But clarifying and reemphasizing this rule wouldn't suffice.

A threshold requirement to show that a law is not generally applicable vastly complicates every litigation. Which secular exceptions are sufficiently analogous to count? What standard of review applies to that question? What if the secular exceptions arise from uncodified enforcement policy? And on and on. Mary Stinemetz lost her life while lawyers argued about general applicability.

Courts often refuse protection when they shouldn't. Litigation is prolonged even when courts

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[62] *Ibid.*

get it right. Rules of doubtful necessity are sometimes generally applicable. If Philadelphia's bumbling regulatory efforts in this case are not generally applicable, but on remand it enacts an ordinance with no exceptions, the case will be right back where it started. A court should still decide whether the severe burden on CSS's religious exercise is justified. No matter how stringently general applicability is interpreted, free exercise under *Smith* will never protect in all the cases where it should.

## CONCLUSION

The judgment should be reversed, *Smith*'s unprotective rule should be overruled, and the case should be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,


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