No. 25-233

IN THE

Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, LLC,
Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

Brief of *Amici Curiae* 14 First Amendment Scholars in Support of Petitioners

Mark I. Pinkert
Counsel of Record
Elizabeth Price Foley
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
119 S. Monroe St.
Suite 500
Tallahassee, FL 32301
850-270-5938
mpinkert@holtzmanvogel.com

Daniel A. Bruce
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
540-341-8808

Counsel for Amici Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

IDENTITY & INTEREST OF *AMICI CURIAE*[1]

Amici are First Amendment and anti-discrimination law scholars. They share a commitment to the proper interpretation of the Constitution and respect for free speech and free exercise rights. A list of all *amici* is included as an appendix.

INTRODUCTION

This Court should grant certiorari to halt a dangerous and unconstitutional trend. Lower courts are allowing the government to enforce ideological conformity in conflict with the First Amendment and our nation's constitutional first principles. Exploiting public accommodations laws, state officials have increasingly targeted artists to compel them to speak in ways that align with political orthodoxy but violate the artists' religious convictions. The individuals—florists, photographers, web designers, artisan bakers, and other creative professionals—must choose between their religion or artistic vocation. This is the scenario the First Amendment was meant to prevent.

This is not a new trend. This Court has confronted several cases in which states impose orthodoxy at the expense of liberty of conscience and religious self-determination, sometimes based on disdain for religious citizens. *See, e.g.*, *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018).

---

[1] Under Supreme Court 37.6, no counsel for any party authored this brief in whole or in part. All parties were given timely notice of *amici*'s intent to file.

Here, California officials—like the Colorado officials in *Masterpiece Cakeshop*—singled out Cathy Miller, a baker who refused to bake a designer cake for a same-sex wedding because of her sincere religious beliefs. Still, state officials tried to compel Miller to put her artistic imprimatur on—and therefore endorse—same-sex weddings. While the trial court correctly concluded that was unconstitutional, the California Court of Appeal refused to apply the First Amendment to protect against this blatant infringement on her rights. The California Supreme Court declined review.

Although this Court has admirably shored up Free Speech and Free Exercise rights recently, not all lower courts are getting the message. In some instances, courts construe "expressive activity" as a hyper-narrow concept and, in doing so, remove many artistic professionals from the First Amendment's protections. Notwithstanding this Court's statement that the First Amendment extends to "[a]ll manner of speech," *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023), the California court disagreed, categorizing Miller's wedding cakes as not "speech" at all. According to the court, creating a custom cake for a same-sex wedding "conveyed no particularized message" about marriage and was not "primarily a self-expressive act" because a third-party viewer would not consider the cake to be an endorsement of same-sex marriage. Pet.App.71a, 79a. In so holding, the court overrode Miller's artistic prerogative and subjected her art to government control.

Other courts similarly are flouting this Court's Free Exercise Clause jurisprudence. This Court has reinforced Free Exercise rights, especially when officials exercise their enforcement discretion in a

way that favors secular over religious conduct, or where officials show animus toward religion. Still, *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), continues to wreak havoc. Under *Smith*'s dubious holding that government can burden religion by any "neutral" and "generally applicable" law, many lower courts take a hands-off approach to government subjugation of religion. Although the Court has retreated from *Smith*—and five members of this Court have called it into doubt—lower courts employ *Smith* to permit government oppression. It is time to overrule *Smith*. Applying the *stare decisis* factors elucidated in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022), *Smith* should be emphatically cast aside.

This case is an ideal vehicle for the Court to correct course and align the First Amendment Free Speech and Free Exercise Clauses with their original meaning. Lower courts need clarity, and this Court can end state officials' abuse of public accommodations laws to coerce political orthodoxy over religious objection.

ARGUMENT

I. This Court should grant certiorari to reject a narrow view of "expressive activity" that conflicts with the First Amendment and gives government power to compel speech

A. The First Amendment offers robust protection against compelled speech

The protection against compelled speech is deeply rooted in American tradition: "If there is any fixed star in our constitutional constellation, it is that

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The First Amendment prohibits the government from making any "law abridging the freedom of speech." U.S. CONST. amend. I. That means a State cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quotation omitted). The government must "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Framers drafted the Free Speech Clause to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). "If we advert to the nature of Republican Government," James Madison observed, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 ANNALS OF CONG. 934 (1794).

The Framers knew the danger of government officials censoring or compelling speech. In 16th and 17th century England, Parliament passed licensing laws "to contain the 'evils' of the printing press." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002). The laws prohibited publishing a book without a license and required all works to be pre-approved by a government official "who wielded broad authority to

suppress works that he found to be 'heretical, seditious, schismatical, or offensive.'" *Id.* (quoting F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, at 240 (1952)). William Blackstone, whose *Commentaries* "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999), "warned against the restrictive power of . . . an administrative official who enjoyed unconfined authority to pass judgment on the content of speech." *Thomas*, 534 U.S. at 320 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (1769)). Even though the English licensing regime ended before the Revolution, Parliament's affront to free speech remained ingrained in the Founders' psyche.

But the Framers were not solely concerned with prior restraints on speech via licensing. They envisioned a broader marketplace of ideas where all could share ideas and advocate freely: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). They believed that "discussion"—rather than compulsion—"accords ordinarily adequate protection against the dissemination of noxious doctrine." *Id.* Thomas Jefferson thought it "sinful and tyrannical" for the government to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 893 (2018) (quoting A Bill for Establishing Religious Freedom, *in* 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950)).

B. States are trying to compel ideological conformity through aggressive use of public accommodations laws

Despite the First Amendment's original meaning, states are using public accommodations laws to compel ideological conformity. Public accommodations laws were historically used to combat monopoly power, ensure access to commerce, and protect civil rights. *See generally* Adam J. MacLeod, *The First Amendment, Discrimination, and Public Accommodations at Common Law*, 112 KY. L.J. 209 (2023). But today, states' enforcement of such laws appears less motivated by these aims and more about punishing those with disfavored views on the controversial issues of the day.

As this case demonstrates, states often use public accommodations laws to compel orthodoxy with respect to marriage, sexual orientation, and gender. In *Obergefell v. Hodges*, this Court emphasized that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." 576 U.S. 644, 679 (2015). But states like California force artists and business owners to abandon those sincere convictions.

Masterpiece Cakeshop is a perfect example. In hearings concerning whether to enforce Colorado's public accommodations law to require a Christian baker to bake a cake for a same-sex wedding, Colorado Civil Rights Commissioners did not hide their animus. One Commissioner stated that the baker "can believe what he wants to believe but cannot act on his religious beliefs if he decides to do business in the state." *Masterpiece Cakeshop*, 584

U.S. at 634 (cleaned up). Another called the baker's religious beliefs "one of the most despicable pieces of rhetoric that people can use." *Id.* at 635. The Commissioners' treatment of the baker was so egregious that the Court held it failed to afford "neutral and respectful consideration" to religious beliefs. *Id.* at 634. While the Court did not need to address whether the Commission's action also violated the Free Speech Clause, the Commission made it clear that its goals were ideological conformity, not vindicating civil rights.

Other states have likewise sought to compel florists (*State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019)), photographers (*Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013)), calligraphers (*Brush & Nib Studios, LC v. City of Pheonix*, 448 P.3d 890 (Ariz. 2019)), and website designers (*303 Creative*, 600 U.S. at 577) to convey messages through their art that they do not wish to convey. These state-compelled messages go beyond marriage. For example, notwithstanding *Masterpiece Cakeshop*, Colorado sought to compel the same business to create a cake celebrating a gender transition. *Masterpiece Cakeshop, Inc. v. Scardina*, 556 P.3d 1238 (Colo. 2024).

This Court has repeatedly vindicated First Amendment rights in the face of overzealous applications of public accommodations laws. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the Court unanimously held that Massachusetts violated the First Amendment when it required private parade organizers to include a group advocating a message the organizers did not wish to convey. 515 U.S. 557, 559 (1995). This "use of the State's power violate[d] the fundamental rule of

protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Likewise, in *Boy Scouts*, the Court held that New Jersey's public accommodations law violated the First Amendment by prohibiting the Boy Scouts from firing a scoutmaster who advocated for views contrary to the organization's values. 530 U.S. at 643. According to the Court, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased" as the application of those laws has broadened. *Id.* at 657.

The Court recently addressed that conflict in *303 Creative*, holding that Colorado could not use its public accommodations law to require a website designer to create a custom wedding website for a same-sex wedding. 600 U.S. at 577–79. Colorado tried to "compel an individual to create speech she does not believe." *Id.* at 579. It was undisputed that "the coercive elimination of dissenting ideas about marriage constitutes Colorado's very purpose." *Id.* at 588 (cleaned up). That was "more than enough[] to represent an impermissible abridgement of the First Amendment's right to speak freely." *Id.* at 589.

The founding generation rebelled against such restrictions on speech. Yet today, state and localities transform venerable public accommodations laws into modern-day licensing laws, giving government "unconfined authority to pass judgment on the content of speech." *Thomas*, 534 U.S. at 320. Those beliefs deemed "heretical" or "offensive," *see id.*, are punished, and good-faith objectors are deprived of their livelihoods for daring to speak.

Here, California seeks to compel Miller to speak in a manner she does not wish to speak by forcing her to create a custom wedding cake celebrating same-sex marriage, imposing its own orthodoxy. *See* Pet.App.145a. But the First Amendment does not permit California to do so. This Court should grant certiorari to protect First Amendment freedoms from further curtailment by state actors.

C. California's narrow interpretation of expressive activity enables censorship and speech compulsion

Despite this Court's First Amendment jurisprudence disallowing public accommodations laws to be used to compel speech or censor unpopular views, the California Civil Rights Department did just that. And the California Court of Appeal permitted it by imposing an exceedingly narrow interpretation of "expression" that removes large swaths of expressive conduct from the First Amendment's ambit. The Court should not allow state courts to under-rule precedent through dubiously narrow interpretations of the Court's rulings. As Justice O'Connor once explained, judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *Txo Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (citation omitted).[2]

---

[2] To the extent the court was attempting to evade *303 Creative*, that alone warrants review. The Court has increasingly "had to intercede" in cases "'squarely controlled' by one of its precedents." *Nat'l Inst. of Health v. Am. Pub. Health Ass'n*, 606 U.S. ___ (2025) (slip op., at 4) (Gorsuch, J., concurring in part and dissenting in part).

Here, the trial court correctly concluded that Petitioners' wedding cakes are entitled to First Amendment protection because they are "designed and intended—genuinely and primarily—as an artistic expression of support for a man and women uniting in the 'sacrament' of marriage." Pet.App.60a. The trial court also concluded that Petitioners' "participation in the design, creation, delivery, and setting up of a wedding cake is *expressive conduct*, conveying a particular message of support for the marriage." *Id.* Both conclusions aligned with this Court's analysis of similar activity related to compelled participation in ceremonies. *303 Creative*, 600 U.S. at 587–88; *Barnette*, 319 U.S. at 632–33.

But the California Court of Appeal reversed in a decision riddled with errors. First, the court reviewed the record de novo to *intrude* on free expression when de novo review can be invoked only to *protect* First Amendment rights. *See, e.g.*, *Lovell By & Through Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996).

Second, misunderstanding the record, the court insisted that the cake was not a form of artistic expression, labeling it a "predesigned, routinely generated and multi-purpose consumer product[] with primarily nonexpressive purposes." Pet.App.70a. In doing so, the court ignored overwhelming evidence—credited by the trial court—that *all* of Petitioners' wedding cakes are "labor intensive, artistic" custom creations, *all* of which that Miller intended to express support for the sacrament of marriage. *See* Pet.App.144a. Nevertheless, according to the court, while it could imagine cakes that contained sufficient artistic elements to render them

expressive, Petitioner's cake *was not artistic enough*, in the court's view. Pet.App.70a.

That is wrong under this Court's precedents and as a matter of first principles. There is no legally salient difference between the design and creation of the wedding cake, here, and the website design services in *303 Creative*. First Amendment protections extend to "[a]ll manner of speech." *303 Creative*, 600 U.S. at 587; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (Constitution protects artistic expression); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) ("artistic speech" qualifies for full First Amendment protection); *Miller v. California*, 413 U.S. 15, 24 (1973) (First Amendment protects all speech with "serious literary, artistic, or scientific value"). Yet, the California court's view that the cake was not artistic enough to merit First Amendment protection flatly contradicts a cardinal principle of First Amendment law—that "courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981).

Third, the California court held that, because a third-party observer would be "unlikely to understand this cake's sale and delivery for a wedding reception to convey a message of celebration or endorsement of same-sex marriage," Miller's compelled participation in the wedding ceremony could not violate the First Amendment. Pet.App.76a. As one federal judge has observed, this rule, "[t]aken to its logical end," would mean "the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of ensuring access to the

commercial marketplace." *303 Creative, LLC v. Elenis*, 6 F.4th 1160, 1204 (10th Cir. 2021) (Tymkovich, J., dissenting), *rev'd* 600 U.S. 570 (2023).

As Miller emphasizes, the California appellate court's decision deepens a split among lower courts regarding whether a compelled speech claim can only be brought if a third-party would view the speech as an "endorsement" of something the speaker objects to. But this Court has never imposed a third-party endorsement test for compelled speech claims. In *303 Creative*, a website designer's "choice to speak as the State demands or face sanctions for expressing her own beliefs" alone was sufficient "to represent an impermissible abridgment of the First Amendment's right to speak freely" without the need to analyze that speech's impact on third-party observers. 600 U.S. at 588–89.

By applying a constrained definition of expression and subjecting expression to an endorsement test, the California court allowed the government to compel speech through public accommodation laws, rendering those laws the modern-day equivalent of licensing laws. Its narrow view of expressive qualities forecloses First Amendment protection whenever a court or agency thinks a third party would not "understand" the expression. Yet art is not in the eye of the beholder; it is in the mind of the artist. Most people do not understand what message Jackson Pollack's paintings convey, but there is no doubt Pollack understood. Art, in other words, is not contingent on third parties' appreciation.

The California court's approach gives state agencies and courts extraordinarily broad authority to determine what speech is acceptable and what

speech is "wrongthink." But as Madison observed, the First Amendment places "the censorial power . . . in the people over the government, and not in the government over the people." 4 ANNALS OF CONG. 934 (1794). The Court should grant certiorari to restore this original understanding of the First Amendment.

II. This Court should grant certiorari to overrule *Smith*, which inhibits the free exercise of religion and divides lower courts

A. One of our Constitution's deepest commitments is to the full, equal, and free exercise of religion

Like freedom of speech, freedom of religion lies at the core of this nation's founding. *See* BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 268 (1967); *see also* John Adams to James Warren (Feb 3, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 202 (Paul H. Smith *et al.* eds., 2000) (freedom of conscience was worth all the blood that would be shed in the War).

Some American colonies, although founded for specific religious sects, extended religious freedom to groups beyond their own and created havens for religious "dissenters." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421–25 (1990). The term "free exercise" first appeared in legal documents in the 1640s, when Lord Baltimore required the Protestant governor and councilors in Maryland to promise not to disturb Roman Catholics in the "free exercise" of their religion, and when, shortly after, the Maryland Assembly codified that promise by statute. *Id.* at 1425.

After American independence was won in 1783, almost all the states ratified constitutions that explicitly protected religious freedom: "With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789." *Id.* at 1455. Among the states, religious freedom was "universally said to be an unalienable right." *Id.*

The Founders wrote, and the People ratified, a First Amendment clear and unambiguous in its protection of religious rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

The First Amendment's text is therefore "absolute"; "there is no textual exception in either of the Religion Clauses." Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 339 (1996); *see also* 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (speech by Rep. Madison) ("[N]or shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."). To be sure, the lack of a textual exception does not mean the First Amendment would never allow government to encumber religious practice, even in the most extreme circumstances. Still, "a strong burden of persuasion rests on those who would imply exceptions to an expressly absolute constitutional text." Laycock, *Religious Liberty*, *supra*, at 339; *see also* Michael McConnell, *Free Exercise Revisionism*, 57 U. CHI. L. REV. 1109, 1116 (1990) (explaining because the First Amendment is stated in "absolute terms . . . it is more faithful to the text to confine any implied limitations to those that are indisputably necessary").

The breadth of the protection is reflected in the Founders' choice of the word "exercise." That term encompasses not only religious *beliefs* but also religiously motivated *conduct*, because the word "'exercise' strongly connoted action." McConnell, *Origins*, *supra*, at 1489. Contemporary dictionaries and sources defined the term "exercise" as including labor, tasks, acts, or employment. *Id.* Further, "exercise" was chosen in lieu of the proposed freedom or liberty of "conscience," which could have been interpreted to encompass only beliefs. *Id.*

The Free Exercise Clause not only enshrines the Founders' desire for religious self-determination and practice, but it also strictly limits the government from deciding *how* Americans conduct their lives in accordance with religious beliefs. The First Amendment is "an important statement about the *limited* nature of governmental authority." *Id.* at 1516. As this Court later explained, the Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222–23 (1963).

Limiting the government's role from interfering in the religious sphere not only protects individual rights from government interference but also promotes domestic tranquility. As James Madison explained in *The Federalist* Nos. 10 and 51, religious pluralism would be a great strength of the Nation. While Madison's writing is more popularly associated with *political* factions—and the checks that they provide on one another—he also believed that the more "variety of *religious* sects dispersed" throughout

the Country, the less likely that one sect would take over and oppress the Nation. *See* THE FEDERALIST NO. 10 (James Madison) (emphasis added). Thus, "[i]n a free government the security for civil rights must be the same as that for religious rights," and the "[t]he degree of security . . . will depend on the number of interests and sects." THE FEDERALIST NO. 51 (James Madison).

Like Madison, the founding generation understood the benefits of religious pluralism. Well-versed in John Locke's political philosophy and European history of religious turmoil, they recognized that "[r]eligious intolerance was inconsistent both with public peace and with good government." McConnell, *Origins*, *supra*, at 1431. As Locke had written, "[i]t is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion." J. Locke, *A Letter Concerning Toleration*, *in* 6 J. LOCKE, THE WORKS OF JOHN LOCKE 53 (London 1823 and 1963 photo. reprint).

B. State officials and lower courts rely on and manipulate *Smith* to impair the right to Free Exercise, in violation of the First Amendment

In its recent decisions, this Court has reinforced the Free Exercise Clause against government interference, as the Founders intended. *See, e.g.*, *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025); *Carson v. Makin*, 596 U.S. 767, 778 (2022); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 475 (2020);

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017).

Despite this, state officials continue to aggressively enforce political orthodoxy by stifling religion. Often, they do so based on explicit animus toward religion or, at least, overt favoritism toward political movements that conflict with religious views.

In *Masterpiece Cakeshop*, for example, the Colorado Civil Rights Commission expressed "clear and impermissible hostility toward the sincere religious beliefs," disparaging the petitioner's religious views as "despicable . . . rhetoric" and comparing it to defenses of slavery and the Holocaust, when those officials wanted to force the petitioner to bake cakes for same-sex weddings, in violation of his religious beliefs. 584 U.S. at 635.

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) (per curiam), at the height of COVID-19, the Governor of New York targeted religion in Brooklyn, stating that "if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.'" *Agudath Isr. of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting).

In Kansas, a Jehovah's Witness sought a liver transplant without a blood transfusion but was prevented by a Kansas Medicaid rule disallowing payment for care obtained more than 50 miles beyond state lines. Although officials had discretion to grant exemptions, they refused for the Jehovah's Witness, who died from liver disease during administrative appeals. *See* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith,* 2020-2021 CATO SUP. CT. REV. 33, 40 (2021).

State officials too often get away with burdening religion because lower courts authorize it, relying on (and manipulating) this Court's decision in *Smith*. *Smith* held that "neutral" and "generally applicable laws" can override the Free Exercise Clause. 494 U.S. at 880. Many lower courts have taken a broad, and often confused, view of what those independently significant terms mean. As Justice O'Connor observed several decades ago, "[L]ower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice". *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting).

That problem persists, notwithstanding this Court's multiple attempts to clarify the *Smith* standard. In both *Fulton* and *Lukumi*, the Court explained that a law is not "generally applicable" if it prohibits religious conduct while permitting secular conduct that similarly undermines the government's asserted interests. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

Nonetheless, two Circuits and two state supreme courts—contra this Court, four Circuits, and three state supreme courts—hold that a law with discretionary exemptions can be generally applicable, unless government officials have "unfettered" discretion. So long as there are "objectively defined" criteria guiding official discretion, the official can discriminate against religion in granting exemptions. That is wrong and would allow any regulatory scheme to "always be manipulated" to evade review, subjecting First Amendment protections to "semantic exercise" and "religious gerrymanders." *Carson*, 596 U.S. at 784.

This Petition is a case-in-point. The California Court of Appeal recognized that the State's public accommodations law permits exemptions for "facially discriminatory policies" that "are not arbitrary or unreasonable because they are based on public policy objectives." Pet.App.87a. But California courts have upheld exemptions for policies that benefit secular classes, for example, discriminatory age policies and giveaways based on sex. *Id.* (collecting cases). These exemptions—even if justified—prove there is no generally applicable law but one that allows government to gerrymander religion out of equal protection. *Carson*, 596 U.S. at 784. The California court's insinuation that religious freedom is not worthy of protection as a matter of "public policy" is a troubling reminder that state governments and courts often disfavor religion.

C. This Court should overrule *Smith*

It is time for this Court to overrule *Smith*. While it can reverse the decision below—as it misapplied *Smith*—and try to enforce lower court alignment with *Lukumi*, *Fulton*, *Mahmoud*, and this Court's Free Exercise jurisprudence, that will be an unsuccessful endeavor. *Smith* is the problem that creates confusion and has allowed lower courts to "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy*, 586 U.S. at 1134 (Alito, J., statement respecting denial of certiorari). More than being impracticable, *Smith* is poorly reasoned and inconsistent with the First Amendment. Applying the *stare decisis* factors from *Dobbs*, *Smith* should be overruled.

i. *Smith* erroneously interprets the Constitution and infringes on religious rights

As this Court explained in *Dobbs*, "[a]n erroneous interpretation of the Constitution is always important." 597 U.S. at 267. The error in *Smith* was not merely technical but strikes at the heart of constitutional interpretation, undermining religious freedom and constitutional first principles.

In *Smith*, the Court admitted that exempting generally applicable laws from Free Exercise review would "place at a relative disadvantage those religious practices that are not widely engaged in," i.e., disproportionately harm religious minorities. 494 U.S. at 890. As this case demonstrates, however, even majority religions are targeted for their disfavored views on topics such as marriage and sexuality. *Smith* therefore "leav[es] the Court open to the charge of abandoning its traditional role as protector of minority rights"—and minority viewpoints—"against majoritarian oppression." McConnell, *Free Exercise Revisionism*, *supra*, at 1129. Americans, in turn, are dissuaded from litigating Free Exercise claims "due to certain decisions of this Court." *Kennedy*, 586 U.S. at 1133–34 (Alito, J., statement respecting denial of certiorari).

ii. *Smith* was egregiously wrong

"[T]he quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Dobbs*, 597 U.S. at 269. But *Smith* failed to adequately grapple with the text and history of the Constitution. It also contravened decades of precedent in which the original meaning of the First Amendment's religion clauses predominated.

Scholars largely agree that the pre-*Smith* doctrine of free exercise exemptions was "more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." McConnell, *Origins*, *supra*, at 1512. Part of the problem is that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case. *See* McConnell, *Free Exercise Revisionism*, *supra*, at 1113.

The decision's reasoning was so widely disparaged and offensive to the First Amendment that, within only a few years, Congress passed the Religious Freedom Restoration Act, with overwhelming bipartisan support, explicitly rejecting *Smith's* interpretation of the Constitution. 42 U.S.C. §§ 2000bb *et seq*.

iii. *Smith* is not workable, as the lower court split shows

In deciding whether a precedent should be overruled, this Court also considers "whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 280–81.

Smith's "general applicability" standard is unworkable. Some courts hold that a law is not generally applicable if it admits exceptions for *some* secular interests but not religious ones. *See, e.g.*, *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). Others say that a law is generally applicable unless it singles out religion. *See, e.g., Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004). Still, others collapse neutrality and general applicability into the single question of religious animus. *See, e.g., Bethel World Outreach*

Ministries v. Montgomery Cnty. Council, 706 F.3d 548, 561 (4th Cir. 2013).

The fundamental problem with the *Smith* standard is that every law draws lines and creates distinctions to some degree. To decide whether a law is "generally applicable" is therefore a difficult task. The framework ultimately forces courts to make rough distinctions between religious burdens that receive no protection and those that receive strict scrutiny. The same problem arises with respect to "neutrality," as laws can be drafted in facially neutral language while intentionally targeting religious practices, and determining legislative intent is a notoriously difficult task.

iv. *Smith* distorts other areas of the law

If a decision has "led to the distortion of many important but unrelated legal doctrines," that effect "provides further support for overruling those decisions." *Dobbs*, 597 U.S. at 286.

As noted, *Smith* did not sufficiently grapple with the text and history of the First Amendment, making it incompatible with this Court's past but also modern jurisprudence. Since *Smith*, this Court has continued to emphasize the importance of original meaning when analyzing both Religion Clauses. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, a unanimous Court assessed the Religion Clauses by examining the text and history of free exercise, pre- and post-ratification. 5 U.S. 171, 182–85 (2012). In *Town of Greece v. Galloway*, the Court pronounced that "the Establishment Clause must be interpreted by reference to historical practices and understandings," and that "[a]ny test the Court adopts must acknowledge a practice that was

accepted by the Framers and has withstood the critical scrutiny of time and political change." 572 U.S. 565, 576–77 (2014). Most recently, in *American Legion v. Am. Humanist Association*, the Court examined the prevalent "philosophy at the time of the founding [a]s reflected in . . . prominent actions taken by the First Congress." 588 U.S. 29, 61 (2019).

Smith is also incompatible with *Mahmoud*. There, the Court did *not* apply *Smith*'s framework to a free exercise claim in the context of parents trying to control their young children's religious upbringing in the face of sacrilegious schooling. According to the Court, it was "the character of the burden" that made *Smith* inapplicable. *Mahmoud*, 145 S. Ct. at 2361. But there is no textual or historical basis to distinguish between burdens on parents and artists, particularly because the Court in *Mahmoud* did not rule based on the "hybrid rights" elevated standard. *Id.* at 2361 n.14. In any event, the notion that a free exercise claim might warrant stricter scrutiny if combined with another constitutional claim, "never made any sense, and almost nothing has come of the hybrid-rights theory." Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 B.Y.U. L. REV. 167, 172 (2019).

v. *Smith* does not undermine "reliance" interests

This Court also considers whether overruling precedent will "upend substantial reliance interests." *Dobbs*, 597 U.S. at 287. "Traditional reliance interests arise where advance planning of great precision is obviously a necessity." *Id.* (internal quotation omitted). "[I]ntangible form[s] of reliance," on the other hand, include whether society generally has

ordered itself around a particular decision. *Id.* Such intangible reliance interests are on dubious footing after *Dobbs*. *See id.* at 288–89.

Neither form of reliance interests is present. Religious exemptions do not require advance planning of great precision to accommodate. Exemptions can be written into laws themselves (many states exempt religious corporations and associations, *see* Va. Code § 2.2-3904(C)) or they can be granted on a case-by-case basis. And citizens have not ordered their lives or businesses to "comply" with *Smith*. Many, on the other hand, must upend their businesses and livelihoods to comply with dubious applications of *Smith* like the one below. Overruling *Smith* would limit government's ability to burden religion.

CONCLUSION

For the reasons above, this Court should grant certiorari.

Respectfully submitted,

Mark I. Pinkert
Counsel of Record
Elizabeth Price Foley
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
119 S. Monroe St., Suite 500
Tallahassee, FL 32301
Phone: (850) 270-5938
Fax: (540) 341-8809
mpinkert@holtzmanvogel.com

Daniel A. Bruce
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
Phone: (540) 341-8808
Fax : (540) 341-8809

APPENDIX TABLE OF CONTENTS

APPENDIX – LIST OF *AMICI CURIAE*[1]

Larry Alexander
Warren Distinguished Professor of Law, Emeritus
University of San Diego School of Law

Helen Alvaré
The Robert A. Levy Chair and Professor of Law
Antonin Scalia Law School
George Mason University

Elizabeth A. Clarke
Associate Director, International Center for Law and Religion Studies
J. Reuben Clark Law School
Brigham Young University

George W. Dent, Jr.
Schott-van den Eynden Professor of Law, Emeritus
Case Western Reserve University School of Law

Richard F. Duncan
Sherman S. Welpton, Jr. Professor of Law
Warren R. Wise Professor of Law
University of Nebraska College of Law

Richard Epstein
Laurence A. Tisch Professor of Law
Director, Classical Liberal Institute
New York University School of Law

---

[1] Institutions are listed for identification purposes only. Opinions expressed are those of the individual *amici* and not necessarily of their affiliated institutions.

Elizabeth Price Foley
Professor of Law
Florida International University College of Law

Bruce Frohnen
Professor of Law
Pettit College of Law
Ohio Northern University

Michael W. McConnell
Richard and Frances Mallery Professor, Stanford Law School
Faculty Director, Stanford Constitutional Law Center
Senior Fellow, Hoover Institution

Stephen B. Presser
Raoul Berger Professor of Legal History Emeritus, Northwestern University School of Law
Visiting Scholar in Conservative Thought and Policy, University of Colorado, Boulder 2018–2019

Robert J. Pushaw
James Wilson Endowed Professor of Law
Caruso School of Law
Pepperdine University

Glenn Reynolds
Beauchamp Brogan Distinguished Professor of Law
Winston College of Law
University of Tennessee

Michael A. Scaperlanda
Professor of Law Emeritus
University of Oklahoma College of Law

Maimon Schwarzschild
Professor of Law
University of San Diego School of Law