No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONER

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.

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

BRIEF FOR THE STATES OF TEXAS, ALASKA, ALABAMA, ARKANSAS, GEORGIA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, OKLAHOMA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alaska, Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, Utah, and West Virginia. Amici provide child welfare services through state and municipal agencies. Many of those agencies in turn contract with private agencies to better provide services to the State's children. Some of these private child-welfare agencies have religious missions.

This case implicates the contractual relationships between States and religiously oriented foster care organizations. Texas law protects such agencies' ability to operate according to their beliefs while providing services to both children in state care and potential foster parents willing to care for them. Other amici do as well. They have a strong interest in protecting their laws—and the invaluable public-private relationships they facilitate—from constitutional attack. Amici therefore urge the Court to revisit and overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and to reverse the Third Circuit's decision.[1]

[1] Pursuant to Supreme Court Rule 37.2, Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici contributed monetarily to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

Properly understood, the Free Exercise Clause grants special protection to religious exercise. Thirty years ago, in *Employment Division v. Smith*, this Court adopted a different—and incorrect—understanding. Rather than recognize that the First Amendment grants religious exercise special protection above what is afforded other human affairs, *Smith* read the Free Exercise Clause only to prohibit the government from targeting religious practice and singling it out for inferior treatment. That view cannot be reconciled with the Clause's original public meaning.

Smith was wrong the day it was decided, and it remains wrong today. The time has come to overrule it. Stare decisis does not compel adherence to *Smith*. Indeed, none of the factors this Court has considered in its recent stare decisis pronouncements cuts in favor of retaining *Smith*.

In particular, no one materially relies on *Smith*'s continued vitality, and overruling it will not result in significant disruption. Two-thirds of the States have already implemented, as a matter of state law, free-exercise protections resembling what the First Amendment's original public meaning requires. And the States that have not done so have no reliance interest in impinging on religious exercise.

Even if the Court does not overrule *Smith*, the decision below should be reversed. The record below shows that the City of Philadelphia acted with anti-religious animus intolerable even under *Smith*'s approach to the Free Exercise Clause. The Third Circuit wrongly concluded otherwise.

ARGUMENT

I. *Employment Division v. Smith* Should Be Overruled.

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. 1. When interpreting the Free Exercise Clause, the original meaning of its words must be the guide. That is because "[t]he Constitution is a written instrument" and "[a]s such its meaning does not alter. That which it meant when adopted, it means now." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *South Carolina v. United States*, 199 U. S. 437, 448 (1905)). It must be interpreted to "accord[] with history and faithfully reflect[] the understanding of the Founding Fathers." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). As to the Free Exercise Clause, history reveals that the Founding generation recognized a substantive liberty interest in religious freedom—one so precious that it cannot be given up to the state. *See infra* at 8–11.

Rejecting that principle, the Court concluded in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that the First Amendment does not protect against "the incidental effect of a generally applicable and otherwise valid provision [of law]." *Id.* at 878. *Smith* held the First Amendment prohibits the government from expressly targeting religion or religious practice as such, and nothing more. *See id.* at 877–78. This reading of the Free Exercise Clause is deeply flawed.

A. *Smith* is inconsistent with the original public meaning of the Free Exercise Clause.

1. To understand the original public meaning of the Free Exercise Clause, it is important to begin with the history that led to its enactment. That history begins before these shores were settled. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion* [hereinafter "*Origins and Historical Understanding*"], 103 Harv. L. Rev. 1409, 1421 (1990). "Although the free exercise and establishment clauses were proposed in 1789 and ratified in 1791, the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world." *Ibid.*

English settlers came to the New World with centuries of religious conflict still fresh in their minds. This conflict was present as early as the late 13th century, when King Edward I expelled the entire Jewish population from England—Jews would not be formally readmitted until 1656. Barnett D. Ovrut, *Edward I and the Expulsion of the Jews*, 67 The Jewish Quart. Rev. 224, 233 (1977); *see* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century* [hereinafter "*Continuity and Change*"], 80 Minn. L. Rev. 1047, 1065–66 (1996). In the sixteenth century, the Reformation ripped Christendom apart. *See* Patrick Collinson, The Reformation: A History, xix-xxv (2003). Wars of internecine strife rocked Europe for decades. *See ibid.*

In England, intense persecution of the minority religion was persistent. Persecution of Catholics began after Henry VIII separated the Church of England from

Rome in 1533. *Id.* at xx. His son continued that persecution. *Ibid.* When his daughter Mary Tudor, a Catholic, took the throne in 1553, it took her a mere five years to burn over three hundred Protestants at the stake. *Id.* at xxii, 134. Even during the reign of Elizabeth I—considered a period of relative religious tolerance for the era—Catholics were free to worship only in secret. *Id.* at 134–36; *see* Douglas Laycock, *Continuity and Change*, *supra*, at 1059.

During the first half of the seventeenth century, England faced near-constant religious conflict and intolerance. *See* F. Makower, The Constitutional History and Constitution of the Church of England 68–95 (1895). Under the Stuarts, Roman Catholicism and all Protestant dissent from the Church of England was suppressed. *See* Laycock, *Continuity and Change*, *supra*, at 1061–62. Puritanism was the most prominent element of that dissent. *Id.* at 1062. It was the Puritans who deposed Charles I and ushered in a short period of republicanism. *Ibid.* But the Puritans in Parliament imposed their own form of church structure. *Id.* at 1063. While they ostensibly guaranteed free exercise of religion to many Protestants, they denied religious freedom to "papists, the adherents of prelacy and the advocates of 'blasphemous, licentious or profane' doctrines." Makower, *supra*, at 86. Baptist preachers were imprisoned and ministers who adhered too closely to Anglican practice were ejected from office. McConnell, *Origins and Historical Understanding*, *supra*, at 1421.

After the Restoration in 1660, Parliament reconstituted the Church of England. *Ibid.* Many Catholics were still persecuted as suspected conspirators

with France or Spain. *See* Laycock, *Continuity and Change*, *supra*, at 1064. And freedom of religion was also limited for Protestant dissenters. *See ibid.* Indeed, official persecution of Protestant dissenters did not end until the Toleration Act of 1688. *See* An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes, 1 W. & M., c. 18.

2. While England struggled to define religious liberty's place in its Constitution, its North American colonies were gaining their own understandings of religious freedom.

Many colonies had little tolerance for religious dissent. New England was settled predominantly by English Calvinists, including Puritans, who traveled to the New World to establish a Christian commonwealth. McConnell, *Origins and Historical Understanding*, *supra*, at 1421. Ministers had the power to lecture government authorities on their civic and spiritual derelictions. *See* Harry S. Stout, The New England Soul: Preaching and Religious Culture in Colonial New England, 72–73 (2012). And the Puritans did not tolerate religious dissent. John Cotton, a Puritan minister, preached that "it was Toleration that made the world anti-Christian." John Cotton, The Bloudy Tenent Washed, and Made White in the Bloud of the Lambe 131–32 (London 1647).

Massachusetts actively persecuted dissenters from its Congregationalist establishments. McConnell, *Origins and Historical Understanding*, *supra*, at 1423. Baptists and Quakers were banished from the colony—four Quakers who returned were hanged. *Ibid.* Virginia's royal charter established the Church of England. *See*

ibid. In the eighteenth century, colonists of other religious faiths who attempted to enter the colony were met with fierce opposition. *Ibid.* Presbyterians were barred from preaching, Baptists were horsewhipped, and Quakers were banned. *Ibid.*

Other colonies, however, were established by and for religious dissenters. Maryland provided a place for English Catholics to escape the persecution in England. *Id.* at 1424. Rhode Island was a refuge for those fleeing Massachusetts's establishment. *Id.* at 1424–25. Pennsylvania and Delaware were sanctuaries for Quakers. *Id.* at 1425. It was within these colonies that "the free exercise of religion emerged as an articulated legal principle." *Ibid.*

3. The term "free exercise" first appeared in a legal document in 1648, when Maryland's proprietor required the governor to promise not to disturb Christians, including Roman Catholics, in the "free exercise" of religion. *Ibid.* A year later, the Maryland Assembly passed a statute containing the first "free exercise" clause on the continent. It read: "[N]oe person . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the beliefe or exercise of any other Religion against his or her consent." Act Concerning Religion of 1649, *reprinted in* 5 The Founders' Constitution 49, 50 (P. Kurland & R. Lerner eds. 1987).

Even then, some American colonies recognized that civil laws could place an intolerable burden on the various practices of religion within their borders. McConnell, *Origins and Historical Understanding*, *supra*, at 1429–31. In 1641, the Rhode Island legislature

ordered that "none be accounted a delinquent for doctrine, provided that it be not directly repugnant to the government or laws established." *See* Sanford Cobb, The Rise of Religious Liberty in America 430 (1902). And in 1663, Rhode Island guaranteed "liberty of conscience" in its Charter. R.I. Charter of 1663, *reprinted in* 2 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1328, 1338 (B. Poore 2d ed. 1878).

Rhode Island's charter protected residents from being "in any wise molested, punished, disquieted, or called into question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony," and in exchange, the residents may "freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceablie and quietlie and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others." R.I. Charter of 1663, *reprinted in* 2 Federal and State Constitutions, *supra*, 1338.

These protections were imitated later by Carolina and New Jersey. Carolina provided that, because some people of the province cannot conform to the Church of England, the leaders of the province shall grant to those persons liberty to practice as they see fit. *See* The Fundamental Constitutions of 1669 of Carolina, *reprinted in* 2 Federal and State Constitutions, *supra*, at 1397. This liberty extended so long as nonconforming persons did not disturb the civic peace. *Ibid.* In 1668, the proprietors of New Jersey promulgated a series of concessions in hopes of attracting settlers. This included:

"No person . . . shall be any ways molested, punished, disquieted, or called in question in matters of religious concernments, who do not actually disturb the civil peace of the province; but all and every such person, or persons, may . . . freely and fully have and enjoy his and their judgments and consciences in matters of religion throughout the province." COBB, *supra*, at 400.

Importantly, these charters extended to all "judgments and consciences in matters of religious concernments,"—not just opinion, speech and profession, or acts of worship. R.I. Charter, 1338. The free exercise of religion was limited only insofar as necessary to prevent "lycentiousnesse and profanenesse" or the "outward disturbeance of others." *Ibid.*

4. By the Revolutionary period, the clash between religious exercise and the civil law had given the founding generation a deep appreciation for the burdens government can place on religious belief and practice. The law increasingly sought to protect religious liberty from such burdens. Virginia declared: "[R]eligion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights, sec. 16, 12 June 1776, *reprinted in* 5 The Founders' Constitution, *supra*, at 70.

The Founders understood freedom of religion "as a natural and inalienable right—a God-given sphere of liberty over which the state has no proper jurisdiction." Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 Pepp. L. Rev. 1159, 1183–84

(2013); *see also* McConnell, *Origins and Historical Understanding*, *supra*, at 1451–55. Indeed, religious liberty was recognized as one of the few natural rights that "cannot be surrendered" to the state. *Essays of Brutus*, *reprinted in* 2 Herbert J. Storing, ed., The Complete Anti-Federalist 372, 373 (1981); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 The Writings of James Madison 183, 188 (1901).

5. Two hundred years later, *Smith* disregarded this historical evidence and concluded the Free Exercise Clause does not substantively protect the free exercise of religion; rather, *Smith* held that the Clause merely bars laws designed to discriminate against religion. Justice Scalia, writing for the Court, concluded "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 494 U.S. at 878–79. So religious exercise must yield to any "neutral, generally applicable regulatory law," even where that law "compel[s] activity forbidden by an individual's religion." *Id.* at 880 (citation omitted).

This new rule "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., respecting the denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.). And its conception of religious liberty would have been unrecognizable to the Founders.

Smith's holding rests on the twofold concern that religious exemptions from generally applicable laws would (1) make "the professed doctrines of religious belief superior to the law of the land," and (2) "permit

every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

As to the first, the Founding generation recognized that religious belief often *is* superior to the law of the land. The "dominant, eighteenth century American view of the priority and obligations of religious faith" was that "in a contest between the dictates of faith and the usual dictates of law . . . it is the law that ordinarily must yield." Paulsen, *Priority of God*, *supra*, at 1184; *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1117–19 (1990) (cataloguing and analyzing historical evidence); *see supra* Part I.A.4. And that view was recognized in the law. Recent scholarship shows that early American courts, like their English forbears, applied equitable principles to interpret broad, generalized statutory language to allow for exemptions—including religious exemptions. *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, Notre Dame L. Rev. (forthcoming 2020), Manuscript 61–66. *Smith*'s conception of religious exercise as subordinate to the law is a jaundiced view of the religious liberty cherished by the Founding generation.

Smith's ahistorical rule was criticized quickly and forcefully. The Court's opinion made no reference whatsoever to the Clause's historical underpinnings. *See* 494 U.S. at 878–82. That failure was criticized by jurists and commentators alike. *See* Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 Or. L. Rev. 563, 598–99 (2006); *see, e.g.*, Michael W. McConnell, *Freedom from Persecution or Protection*

of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 833 (1998). And *Smith*'s incongruity with the original public meaning of the Clause garnered immediate attention. Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; McConnell, *Free Exercise Revisionism*, *supra*, at 1111; Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. Rev. 221, 221, 223–24.

In response, Justice Scalia interpreted early American protections for religious liberty to provide no more than that "[r]eligious exercise shall be permitted *so long as it does not violate general laws governing conduct*." *City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring). That is unconvincing in light of the historical evidence discussed above. *See also* Pet'r BOM.44–46. And, as one commentator has put it, there is no reason to have a Free Exercise Clause at all if religious liberty simply means "allowing religious people to act in conformity with the state's laws and rules—freedom to do things that society already thinks good and proper." Paulsen, *Priority of God*, *supra*, at 1186.

Smith's second foundational fear—the "law unto himself" parade of horribles—is a phantom. 494 U.S. at 879. Even at the time, the Court "could not find a single example of the *Sherbert/Yoder* standard being used to give an exemption [it] found inappropriate." Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163, 175 (2016). And as subsequent experience has shown, the robust protection provided by many State constitutions and Religious

Freedom Restoration Acts has not caused disruption or undermined the rule of law. *See infra* Part II.A.

The Court should revisit and overrule *Smith*.

B. Stare decisis does not require adherence to *Smith*.

To be sure, this Court "will not overturn a past decision unless there are strong grounds for doing so." *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). But stare decisis "is 'not an inexorable command.'" *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2189 (2019) (Kagan, J., dissenting) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). This Court recently has overruled several longstanding precedents.[2] In doing so, the Court has identified several "factors that should be taken into account in deciding whether to overrule a past decision." *Janus*, 138 S. Ct. at 2478. These include "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79. Each factor weighs against *Smith*.

1. *Smith*'s reasoning is exceptionally poor.

For all the reasons discussed in Part I.A, *supra*, *Smith* "was not well reasoned." *Janus*, 138 S.Ct. at 2481.

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[2] *See id.* at 2179 (overruling *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Janus*, 138 S. Ct. at 2478–79 (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)).

Smith misunderstood the original meaning of the Free Exercise Clause and placed religion in a compromised position unimagined by the Founding Fathers.

Smith failed to interpret the Clause in light of that history and ignored the strong historical evidence that it embodies a substantive liberty interest in religious freedom that often overrides conflicting law. *See supra* Part I.A.4. Instead, it focused on two concerns—that robust religious liberty protections (1) would give religious exercise preference over the law of the land and (2) would undermine the rule of law by making every citizen "a law unto himself." 494 U.S. at 879. Neither of those justifies limiting the Free Exercise Clause to a mere bar to overt discrimination. *See supra* Part I.A.5.

2. The *Smith* rule leads to intolerable infringements on religious liberty.

Smith's troubling consequences were immediately recognized. As one commentator put it, *Smith* created "a widespread impression that religious minorities simply have no constitutional rights anymore." Laycock, *Religious Freedom Restoration Act*, *supra*, at 224–28 (discussing examples). And it left churches and other places of worship at the mercy of local authorities. For example, the Eighth Circuit held no more than a rational basis is needed to exclude all houses of worship from a city's limits. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991); *see* Laycock, *Religious Freedom Restoration Act*, *supra*, at 227–28 (discussing *Cornerstone Bible Church* and similar cases).

In response, Congress passed the Religious Freedom Restoration Act ("RFRA") with enormous bipartisan support. Many states followed suit, either adopting state-level RFRAs or construing the religious-freedom provisions in their state constitutions more broadly than *Smith*. Christopher C. Lund, *Religious Liberty After* Gonzales: *A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010). As discussed *infra* Part II.A, these statutory protections aim to give religious liberty the robust protection it enjoyed prior to *Smith*. The overwhelming embrace of these protections by Congress and in the States illustrates *Smith*'s deficiency.

3. *Smith* has been eroded by subsequent developments.

Stare decisis already stands at its weakest where, as here, the decision at issue interprets the Constitution rather than a congressional act. *See Janus*, 138 S. Ct. at 2478; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring). Its force is weakened even further here because *Smith*'s construction of the Free Exercise Clause has been undermined by subsequent doctrinal developments.

a. Chief among these developments is the ministerial exception. *Smith* held that "the incidental effect of a generally applicable and otherwise valid provision" does not "offend[]" the First Amendment. 494 U.S. at 878. Statutes prohibiting discrimination in employment, like the Americans With Disabilities Act ("ADA"), fall well within that reasoning. Yet in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012), the Court concluded such antidiscrimination laws cannot be applied to inhibit a church's choice of ministers. *Id.* at 188.

As the Court explained in *Hosanna-Tabor*, "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own [ministers]." *Id.* at 184. Such interference would have been anathema to the Founding generation, which—looking back on centuries of conflict—ratified the First Amendment to "ensure[] that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Ibid.* "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments," the Court explained. *Ibid.* Thus, the Hosanna-Tabor Lutheran Church and School could not be held liable under the ADA for terminating a teacher who served in a ministerial role. *Id.* at 192.

Hosanna-Tabor distinguished *Smith* in a few lines: "[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190.

That distinction is hard to square with *Smith*'s rationale, and it reveals the underlying weakness of *Smith*'s reasoning and historical justification. The members of the Native American Church surely did not believe they were engaging in a mere "outward physical act[]," *ibid.*, when they "ingested peyote for sacramental purposes," *Smith*, 494 U.S. at 874. And laws prohibiting a substance that is essential to a church's sacraments would surely "affect[] the faith and mission of the church itself." *Hosanna-Tabor*, 565 U.S. at 190. That is

presumably why the Volstead Act, ch. 85, 41 Stat. 305 (1919), exempted sacramental wine from Prohibition—the failure to do so would have raised weighty First Amendment concerns.

And the ministerial exception is far more significant than its application suggests. It applies to "ministers," which the Court described as "those who will personify [the Church's] beliefs" and "minister to the faithful," *Hosanna-Tabor*, 565 U.S. at 188–89, or whose "job duties reflect[] a role in conveying the Church's message and carrying out its mission," *id.* at 192.[3] But its import is broad because it demonstrates *Smith*'s weakness. As *Hosanna-Tabor* explains in compelling detail, a federal law that constrains a church's selection of ministers would have been abhorrent at the Founding. *See id.* at 182–84. The First Amendment was enacted, in part, to protect against such a thing. *Id.* at 184. Yet *Smith*'s rule would allow it. The need for such a doctrinally significant carveout from *Smith* is evidence that *Smith* itself set the wrong rule.

b. The Court has repeatedly been called upon to clarify that, even under *Smith,* facially neutral and generally applicable laws can nevertheless violate the First Amendment. As the Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by

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[3] The Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. That question is presented in *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267, and *St. James School v. Biel*, No. 19-348, which are presently pending.

mere compliance with the requirement of facial neutrality." *Id.* at 534.

The Court again was confronted with such a conflict two terms ago. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, (2018), the Court observed that a baker whose religious beliefs prevented him from designing and baking a cake for a same-sex "might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1723–24. That is the *Smith* principle in a nutshell. But the Court went on to hold that when the Colorado Civil Rights Commission "considered [his] case, it did not do so with the religious neutrality that the Constitution requires." *Id.* at 1724; *see id.* at 1729–30.

In the course of its decision, the Court recognized the troubling implications of applying Colorado's antidiscrimination laws to require the baker to violate his sincere religious beliefs. *See id.* at 1724–25, 1727. "[I]t can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion," the Court observed. *Id.* at 1727. But the Court said that requiring "equal access to goods and services under a neutral and generally applicable public accommodations law"—even in the face of sincere religious objections—does not violate anyone's right to free exercise. *Ibid.*

But without recognizing an exception to *Smith*'s conception of the First Amendment, it is hard to see how the former can be assumed. To be sure, anti-discrimination laws often contain explicit carveouts for churches and clergy (as does Colorado's). But under *Smith*'s logic, "the First Amendment" would not be

"offended," 494 U.S. at 878, by requiring a clergyman to comply with a neutral, generally applicable law treating sexual orientation as a protected class.

That result is self-evidently wrong, which is presumably why the Court was comfortable assuming it away in *Masterpiece Cakeshop*. 138 S. Ct. at 1727. The need to do so undercuts *Smith* and illustrates how its rule deprives the right to free exercise of religion of the "special solicitude" to which it is entitled. *Hosanna-Tabor*, 565 U.S. at 189.

4. *Smith* has not engendered reliance interests.

Stare decisis interests are "at their acme" in "cases involving property and contract rights." *Payne*, 501 U.S. at 828. Such cases merit special protection because "parties are especially likely to rely on such precedents when ordering their affairs." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2410 (2015); *see also Janus*, 138 S. Ct. at 2485-86 (discussing economic considerations related to collective-bargaining contracts). In contrast, "the force of *stare decisis* is 'reduced' when rules that do not 'serve as a guide to lawful behavior' are at issue." *Knick*, 139 S. Ct. at 2179 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). That is the case with *Smith*. Its rule—that neutral laws of general applicability apply even where they burden religious exercise—does not guide how individuals structure their affairs.

And overruling *Smith* will not create "new liabilities" for government actors. *Knick*, 139 S. Ct. at 2179 (observing that overruling *Williamson County* will not "expose governments to new liabilit[ies]"). The federal

government is already subject to the Religious Freedom Restoration Act ("RFRA"), so overruling *Smith* will not change the law under which it operates. The same is true in the thirty-three States already operating under state constitutional provisions or RFRAs that approximate the correct understanding of the First Amendment's original public meaning. *See infra* Part II.A.

Even in other States, no "new liabilit[ies]," *ibid.*, will be created. State government can change its policies going forward, thereby obviating *Ex parte Young* suits to stop an "ongoing violation of federal law." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citing *Ex parte Young*, 209 U.S. 123 (1908)). Municipalities can do the same in order to avoid claims from arising. As to liability for past actions, it would be difficult for a plaintiff to show *deliberate* indifference to Free Exercise rights where the municipality's policies were permissible under *Smith* at the time the municipality acted. *See Connick v. Thompson*, 563 U.S. 51, 61 (2011) (discussing *Monell* liability for municipalities under 42 U.S.C. § 1983). And individual officials are entitled to qualified immunity in a suit based on their past actions. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (government officials can be held liable under 42 U.S.C. section 1983 only "when, at the time of the challenged conduct, '"the contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))).

* * *

Smith "remains controversial in many quarters." *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J.,

concurring); *see also Kennedy*, 139 S. Ct. at 637 (statement of Alito, J., respecting the denial of certiorari). And rightly so. It was wrong in 1990, and it is wrong today. The Court should set *Smith* aside and restore the Free Exercise Clause to its original meaning.

C. The Free Exercise Clause requires the government to justify any burden on religious exercise with a compelling interest that cannot be accomplished by less restrictive means.

The original public meaning of the Free Exercise Clause shows that it was meant to give religious exercise special protection, above that afforded to other private activities. *See supra* Part I.A. Thus, it should be interpreted to require a significant showing from the government before it can burden religious practice. *See* Pet'r BOM 50. That means the government must provide a religious exemption when its actions burden religious exercise *unless* it can show a compelling reason to override the religious practice and could not achieve that interest in some less restrictive way. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S 398, 404 (1963). The *Sherbert/Yoder* doctrine recognizes this fundamental truth: When a government benefit is conditioned on or withheld because of religious conduct, the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). The Free Exercise Clause cannot countenance such pressure.

To be sure, the government may burden religious practice where necessary to prevent "some substantial threat to public safety, peace or order." *Sherbert*, 374

U.S. at 403. Under *Sherbert/Yoder*, many state interests are of sufficient gravity to justify burdening religious exercise; for example, preventing child labor. *See Prince v. Massachusetts*, 321 U.S. 158, 168–170 (1944) (state interest in regulating child labor justifies denial of religious exemption from child labor laws); *see also, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 608–09 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law).

The infamous episode of William Penn's hat highlights why requiring such exemptions is so important—and shows how *Smith* deviated from the original public meaning of the Free Exercise Clause. Penn, who later founded the Pennsylvania colony, appeared in an English court under indictment for speaking to an unlawful assembly (a Quaker meeting). McConnell, *Origins and Historical Understanding*, *supra*, at 1472. Under English law, all persons were required to remove their hats in respect for the court once they entered the courtroom. *See ibid.* But Quakers could not do so because any form of obeisance to secular authority was forbidden by their religious beliefs. *Ibid.* Penn, in an attempt to show respect to the court while abiding by his faith's demands, appeared bareheaded before the court. *Ibid.* But knowing of his objection, the judge ordered the bailiff to place a hat on Penn's head. *Ibid.* Then, when Penn refused to remove the hat because of his religious beliefs, the judge held Penn in contempt of court. *Ibid.* Penn was acquitted of the original charges arising from the Quaker meeting, but still sent to prison for refusing to compromise his religious beliefs. *Ibid.*

The historical record shows that this episode loomed large in the minds of the Founders. During the First Congress's deliberations on the Bill of Rights, a representative's "mere reference" to a man's "'right to wear his hat or not,'" was "equivalent to half an hour of oratory." Irving Brant, The Bill of Rights: Its Origin and Meaning 53–55 (1965) (citing 1 Annals of Cong. 759–60); *see also* John. D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly 23–25 (2012) (discussing the significance to the Founders of William Penn's trial). And in response to Penn's trial, which became "a *cause célèbre* in America," North Carolina and Maryland expressly exempted Quakers from removing their hats in court. McConnell, *Origins and Historical Understandings*, *supra*, at 1471–72 & nn.316 & 317.

Penn's hat is emblematic of the error in *Smith*'s rule. The Court's robust, pre-*Smith* application of the Free Exercise Clause would have protected Penn from contempt of Court. The logic of *Smith* would not. The hat-removal rule was neutral and generally applicable—it was aimed at promoting respect for the court, not at religion or religious practice. It can be assumed that respect for the Court—and the rule of law it personifies—is a compelling government interest and the hat-removal rule is necessary to further it. Penn himself suggested the less restrictive means—his proposed solution was to wear no hat when entering the courtroom. *Smith* would not exempt Penn from the neutral and generally applicable hat-removal rule. But the Free Exercise Clause should. And, when given its original meaning, it does.

By restoring the Free Exercise clause to its pre-*Smith* construction, the Court can restore the Clause to

its original understanding and return religion to the privileged place envisioned by the Founders.

II. Subsequent Experience Shows that *Smith* is Not Necessary to Guard Against Every Citizen Acting as a Law unto Himself.

The compelling interest test, discarded by *Smith*, applies against the federal government and more than half the states. Those who protest that overruling *Smith* will cause disruption must ignore the last thirty years of experience under RFRA and its parallel state protections.

A. The experience of state RFRAs demonstrates that *Smith*'s fears were overblown.

The great majority of the States have eschewed the limited free exercise interpretation found in *Smith* in favor of broader protections for religious liberty. Their experience demonstrates that overruling *Smith* will remove an improper federal thumb on the scales, rather than impose upon state authority. Nor would the change lead to religiously imposed tyranny or disruption.

Today, two-thirds of the States provide broader protection for religious liberty than *Smith*. Fourteen States—Alaska, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Washington, and Wisconsin—interpret their State constitution's free exercise clause more broadly than *Smith*.[4] Twenty-one

[4] *See Larson v. Cooper*, 90 P.3d 125, 131–32 & n.31 (Alaska 2004) (requiring "substantial threat to public safety, peace or order or . . . competing governmental interests that are of the highest order.") (internal quotations, citations, and omitted);

City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redev., 744 N.E.2d 443, 445–51 (Ind. 2001) (protecting religious conduct against material burdens); *State v. Evans*, 796 P.2d 178, 179–80 (Kan. Ct. App. 1990) (requiring compelling interest and least restrictive means); *Foltin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1227–30 (Me. 2005) (requiring compelling interest); *Rasheed v. Comm'r of Corr.*, 845 N.E.2d 296, 302–03, 307–08 (Mass. 2006) (requiring state "interest sufficiently compelling to justify" burden on religious exercise and proof that a religious exception would "unduly burden that interest"); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998) (requiring compelling interest), vacated on other grounds, 593 N.W.2d 545 (Mich. 1999); *State v. Hershberger*, 462 N.W.2d 393, 396–99 (Minn. 1990) (requiring compelling interest and least restrictive means); *In re Brown*, 478 So. 2d 1033, 1037–39, 1039 n.5 (Miss. 1985) (requiring compelling interest); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1276–77 (Mont. 1992) (requiring interest of the highest order and not otherwise served); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 465–68 (N.Y. 2006) (protecting religious practice against unreasonable interference); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996) (requiring compelling interest); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043–45 (Ohio 2000) (requiring compelling interest and least restrictive means); *City of Woodlinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009) (requiring "a narrow means for achieving a compelling goal"); *Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 884–87 (Wis. 2009) (requiring compelling interest and least restrictive alternative, except that with respect to hiring and firing employees with ministerial functions, the constitutional protection is absolute); *see also Lower v. Bd. of Dirs. of the Haskell Cnty. Cemetery Dist.*, 56 P.3d 235, 244–46 (Kan. 2002) (quoting the *Smith* standard but applying pre-*Smith*

States have enacted RFRAs.[5] Iowa's legislature is presently considering one.[6] In contrast, the courts of just seven States have interpreted their own constitutions to embody something like the *Smith* rule, and three of these States' legislatures then enacted a RFRA to restore greater protections.[7]

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standard). Kansas and Mississippi have since adopted Religious Freedom Restoration Acts. *See infra* n.5.

[5] *See* Ariz. Rev. Stat. §§41-1493.01 to -1493.02; S.B. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); Conn. Gen. Stat. § 52-571b; Fla. Stat. §§ 761.01-.05; Idaho Code §§ 73-401 to -404; 775 Ill. Comp. Stat. 35/1, *et seq.* ; S.B. 101, 99th Gen. Assemb., Reg. Sess. (Ind. 2015); Kan. Stat. § 60-5301, *et seq.*; Ky. Rev. Stat. § 446.350; La. Stat. § 13:5231, *et seq.*; Miss. Code § 11-61-1; Mo. Rev. Stat. §§ 1.302-.307; N.M. Stat. §§ 28-22-1, *et seq.*; Okla. Stat. tit. 51, § 251, *et seq.* ; 71 Pa. Stat. and Cons. Stat. § 2401, *et seq.* ; R.I. Gen. Laws § 42-80.1-1, *et seq.*; S.C. Code § 1- 32-10, *et seq.*; Tenn. Code § 4-1-407; Tex. Civ. Prac. & Rem. Code § 110.001, *et seq.*; Utah Code §§ 63L-5-101 to -403 (applicable to religious land use); Va. Code §§ 57-1 to -2.02. Alabama's RFRA is embedded in its constitution. *See* Ala. Const. art. I, § 3.01.

[6] Iowa SF 508.

[7] *State v. Fluewelling*, 249 P.3d 375, 378–79 (Idaho 2011); *Gingerich v. Commonwealth*, 382 S.W.3d 835, 844 (Ky. 2012); *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 123 (Md. 2001); *In re Interest of Anaya*, 758 N.W.2d 10, 19 (Neb. 2008); *Appeal of Trotzer*, 719 A.2d 584, 589 (N.H. 1998); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 359–62 (Or. 1995), *abrogated by State v. Hickman*, 358 P.3d 987 (Or. 2015); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761–62 (Tenn. Ct. App. 2001), *but see State* ex rel. *Swann v. Pack*, 527 S.W.2d 99, 107

Most state RFRA cases have little to do with public accommodations, anti-discrimination statutes, or hot-button issues. Instead, as one commentator has explained, "[w]hatever else can be said of them, RFRA and state RFRAs have been valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations." Lund, *RFRA, State RFRAs*, *supra*, at 165.

For example, a Native American boy in Texas wanted to wear his hair long, as required by his family's religious beliefs. *A.A.* ex rel. *Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010). The school district refused to make an exception to the rule that all boys' hair be cut short. *Id.* at 254–55. The boy and his family's right to free exercise were protected only because of Texas's state RFRA. *Id.* at 271-72; *see* Lund, *RFRA, State RFRAs*, *supra*, at 165–66 (analyzing the case). Another example comes from Kansas, where Mary Stinemetz, a Jehovah's Witness, needed a liver transplant. *Stinemetz v. Kan. Health Policy Auth.*, 252 P.3d 141 (Kan. Ct. App. 2011). She objected on religious grounds to the blood transfusion that an ordinary liver transplant required. But a bloodless liver transplant could enable her to have the procedure without compromising her beliefs. The problem was that no Kansas hospital could do the procedure, she was a Medicaid patient, and Medicaid had a policy against

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(Tenn. 1975) (applying compelling interest standard and stating that Tennessee Constitution provides "substantially stronger" protection than federal Constitution). Three of these states—Idaho, Kentucky and Tennessee—have since enacted Religious Freedom Restoration Acts. *See infra* n.5.

reimbursing out-of-state procedures. *Id.* at 143. The Kansas Court of Appeals construed the religious freedom provision in the Kansas Constitution to incorporate the federal RFRA's compelling-interest standard. *Id.* at 155. Soon after this case, Kansas's legislature passed its own state RFRA. *See* Kan. Stat. § 60-5301*, et seq*. Fortunately for Stinemetz, Kansas law protected religious liberty. But the Free Exercise Clause, properly understood, does so too.

Federal and state RFRAs have been used by both Muslims and Orthodox Jews to challenge no-beard policies of police and fire departments. *Potter v. District of Columbia*, 558 F.3d 542, 544 (D.C. Cir. 2009); *Litzman v. N.Y.C. Police Dep't*, No. 12 Civ. 4681(HB), 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013). Muslims have utilized RFRA protections to gain the right to wear veils at work. *E.E.O.C. v. GEO Grp., Inc.*, 616 F.3d 265, 267-69 (3d Cir. 2010); *Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009). In short, experience shows that robust free exercise protections have not resulted in majority religions forcing their beliefs on others. Far from it. Rather, such protection is often the only way for minority religions to defend themselves against the broad sweep of neutral and generally applicable government policies that do not take their religious practices into account.

Nor have these robust protections engendered unmanageable conflict or litigation. Texas has seen the most robust development of the state RFRA doctrines in the country. *See* Lund, *Religious Liberty After* Gonzalez, *supra*, at 479–80 & n.82. Even so, RFRA litigation is far from overwhelming the courts. A Westlaw search shows just thirty-three RFRA cases decided in Texas courts

since Texas's RFRA's passage in 2000 (and some of these were decided under the federal RFRA). The decisions range from a Texas Supreme Court case finding invalidating a zoning ordinance under Texas's RFRA, *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009), to a Fifth Circuit case allowing a Santeria priest the right to continue ritual animal sacrifice, *Merced v. Kasson*, 577 F.3d 578, 581 (5th Cir. 2009).

And even in Texas, "[t]he [*Smith*] Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment). The threat of the "law unto himself" has not materialized under RFRA and state RFRA standards, further eroding *Smith*'s rationale.

B. The existence of RFRA and state protections does not reduce the urgent need to restore the original meaning of the Free Exercise Clause.

So long as *Smith* stands, religious liberty is held hostage by the very thing the Founders feared—the tyranny of the majority. Many religions require practices that are incomprehensible or even distasteful to outsiders. That is why the Founding generation enshrined protection for religious liberty in the First Amendment. *See supra* Part II.A. And that is why the First Amendment, properly understood, often *requires* exemption from neutral and generally applicable laws.

1. Even *Smith* recognized that "leaving accommodation to the political process will place at a

relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. Democracy is little comfort to religious minorities whose practices are foreign to the majority, and therefore frequently clash with generally applicable law.

Take, for example, Kawaljeet Tagore, a member of the Sikh religion who wished to wear a dulled-down *kirpan* (a ceremonial sword) to work in a federal building. *Tagore v. United States*, 735 F.3d 324, 326 (5th Cir. 2013). That violated a neutral prohibition on carrying "dangerous weapons," including any blade over 2.5 inches, in the building. *Id.* at 327. *Smith* would surely have provided Tagore no protection. It was only because of RFRA that Tagore's religious liberty claim survived. *See id.* at 332.

2. Worse still, government actors show hostility to religious beliefs and practices with increasing frequency. *Smith* thought "a society that believes in the negative protection accorded to religious belief [under *Smith*] can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. That solicitation, however, is often nigh impossible to find. This case is an unfortunate example. As discussed *infra* Part III, the City of Philadelphia finds Petitioner Catholic Social Services of the Archdiocese of Philadelphia ("CSS")'s religious beliefs repugnant.

Similarly, the dispute in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), rested on the petitioners' religious objections to California's compelled message, *see id.* at 2380 (Breyer, J., dissenting) (noting that petitioners "object to abortion for religious reasons"). The California Legislature made no secret of its hostility to those religious beliefs. *See id.*

at 2379 (Kennedy, J., concurring) ("The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of 'forward thinking.'"); *id.* at 2368 (majority op.) *("'[U]nfortunately*,' the author of the FACT Act stated, 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California." (emphasis added)). And in *Masterpiece Cakeshop,* the Colorado Commission acted with "clear and impermissible hostility toward the sincere religious beliefs that motivated [the petitioner's] objection" to generally applicable Colorado law. 138 S. Ct. at 1729; *see also id.* at 1734 (Kagan, J., concurring) (explaining the government cannot make decisions "infected by religious hostility or bias"); *ibid.* (Gorsuch, J., concurring) (explaining the government violates the First Amendment where it "fail[s] to act neutrally toward . . . religious faith").

Where hostility to a religious belief or practice becomes a majority view, statutory protections for religious liberty are no protection at all. In this sense, *Smith* "is positively perverse in its consequence." Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, Public Discourse (April 17, 2015), available at https://www.thepublicdiscourse.com/2015/04/14844/. Under *Smith*:

> [T]he sphere of religious liberty is utterly at the mercy of government's choices. The broader and more unrestrained government's reach, the smaller the sphere for religious liberty. As government expands, religious liberty shrinks. This is an upside-down reading of a constitutional

> provision that obviously singles out religion for special protection from government.

Id.

Smith brushed all that aside. *See* 494 U.S. at 890. The Court should no longer do so.

III. Even Under *Smith*, the Third Circuit Erred.

Amici urge the Court to overrule *Smith*. But Fulton's free exercise claim succeeds even applying the *Smith* rule.

A. The City of Philadelphia "act[ed] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citing *Lukumi*, 508 U.S. at 540). The record contains ample evidence of the City's hostility toward CSS's religious beliefs. Philadelphia's mayor has a history of disparaging comments against the Archdiocese. *See* J. App. 26–27. And the City's treatment of CSS in this case reflects hostility towards its religious beliefs and practices. That violates the First Amendment even under *Smith*. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731.

First, the City Council's resolution authorizing an inquiry into CSS stated: "Philadelphia has laws in place to protect its people from discrimination that occurs *under the guise of religious freedom*." *Fulton v. City of Philadelphia*, 922 F.3d at 140, 149 (3d Cir. 2019) (emphasis added), *see* Pet. App. 147a. That statement accused CSS of intentional discrimination by suggesting CSS uses "religious freedom" to conceal the true nature of its actions. Pet. App. 147a. And it implied CSS's religious beliefs are unimportant, or worse, disingenuous. As this Court recently explained, such

accusations "disparage . . . religion . . . by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere." *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

Next, the Commission's letter rescinding CSS's foster-care contract stated: "We respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services." Pet. App. 169a–170a. Just as in *Masterpiece Cakeshop*, this letter "endorse[s] the view that religious beliefs cannot legitimately be carried into the public sphere." 138 S. Ct. at 1729. That is not so. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). Just as it did in *Masterpiece Cakeshop*, the Court should condemn such hostility.

Finally, the Commissioners told CSS its beliefs are wrong as a matter of religious doctrine. Commissioners urged CSS to reconsider its practice, arguing "times have changed," "attitudes have changed," and it is "not 100 years ago." J. App. 182-83; Pet. App. 304a-306a. One of the Commissioners told CSS "it would be great if we could follow the teachings of Pope Francis." *Fulton*, 922 F.3d at 157 (quoting J. App. 182); *see also* Pet. App. 269a. Not even the Colorado Commissioners—who "compare[d] [the baker's] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust"—went so far as to challenge his beliefs' doctrinal validity. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

The Third Circuit attempted to distinguish *Masterpiece Cakeshop* by concluding the City of

Philadelphia was *not hostile enough*. *Fulton*, 922 F.3d at 157. But even minor hostility towards religion violates the Free Exercise Clause. *See Masterpiece* Cakeshop, 138 S. C.t at 1724 (explaining "the Constitution requires" "religious *neutrality*." (emphasis added)). And, regardless, the City's hostility here was hardly minor. The City targeted CSS for its religious beliefs, implied CSS was using religion as a screen for intentional discrimination, and even went so far as to argue CSS's beliefs are wrong as a matter of doctrine. The City's actions violated the First Amendment.

B. The Third Circuit's view is that that Free Exercise Clause is violated only when "religiously motivated conduct [i]s treated worse than otherwise similar conduct with secular motives." *Fulton*, 922 F.3d at 156. Applying that erroneous rule, the Third Circuit required CSS to show the City treated it "worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs." *Ibid.*

That is wrong even under *Smith*. To be sure, disparate treatment of similar secular and religious conduct can be evidence of hostility toward religion. *See Lukumi*, 508 U.S. at 535–37. But that is not the only way to violate the First Amendment. The overt hostility evident in the City's actions does so too. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729. As discussed above, CSS was the target of coordinated action by the City. The Commissioner summoned CSS to a meeting where she so much as declared its beliefs about marriage to be outdated, unwelcome, and even doctrinally incorrect. J. App. 365–66. Even under *Smith*, the Third Circuit's holding was incorrect and should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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