No. 25-581

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, COLORADO, ET AL.,

Petitioners,

v.

LISA ROY, in her official capacity as Director of the Colorado Department of Early Childhood, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS BRIEF OF THE ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The Robertson Center for Constitutional Law ("the Center") is an academic center within the Regent University School of Law. Established in 2020, the Center advances first principles in constitutional law, including freedom of speech, separation of powers, and religious liberty. We advocate to protect rights secured in the United States Constitution and work to restore enumerated rights that have been eroded or lost over time.

Chief among those is the free exercise of religion. Like James Madison, the Center views conscience as "the most sacred of all property," and the free exercise of religion as "a natural and unalienable right." James Madison, Property (Mar. 29, 1792), in 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1986). In the Center's view, *Employment Division v. Smith* is inconsistent with the text, history, and purpose of the Free Exercise Clause. Freedom of conscience has suffered as a result of *Smith*'s sweeping transformation of free-exercise rights. The Free Exercise Clause exists to protect individuals and organizations like Daniel and Lisa Sheley, and St. Mary Catholic Parish. This case illustrates the dysfunction wrought by *Smith* on our

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[1] Pursuant to Supreme Court Rule 37.2, counsel for amicus notified all known parties of intention to file a brief of amicus curiae in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

free exercise jurisprudence.

SUMMARY OF THE ARGUMENT

"It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* The American Republic: Primary Sources 327, 327 (Bruce Frohnen ed., 2002). The First Amendment elevates the free exercise of religion above "the vicissitudes of political controversy," and places it "beyond the reach of majorities and officials." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Like the other guarantees of the Bill of Rights, it "may not be submitted to vote; [it] depend[s] on the outcome of no elections." *Id*. Consonant with that wisdom, this Court had subjected to heightened scrutiny any law that substantially burdened religious exercise. This understanding enabled individuals of different backgrounds and faiths to live and work together in a pluralistic society.

Employment Division v. Smith, 494 U.S. 872 (1990), upset that balance. It uprooted precedent, ignored the fundamental logic of the Free Exercise Clause, and transformed religious exercise into a second-class First Amendment right.

When decided, *Smith* repudiated history. Since then, history has repudiated *Smith*. Congress and the President rejected it. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993); *see*

also Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000). Nearly two-thirds of the states have rejected it. Legal scholars have rejected it. Lower courts have been confused by it. And the key assumption on which *Smith* was premised—that the failure to impose the test adopted in *Smith* would "court[ ] anarchy"—has proven unfounded.

ARGUMENT

I. *Smith* Was Wrong from The Moment It Was Decided.

A. Smith *repudiated* Sherbert *and reverted to the discredited logic of* Gobitis.

Smith hatched from this Court's decision in *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940). *Gobitis* upheld a law compelling school children to salute the American flag and recite the Pledge of Allegiance. The Gobitis children, Jehovah's Witnesses, were expelled from school for refusing to participate. But because the law was of "general scope [and] not directed against doctrinal loyalties of particular sects," the Court upheld it. 310 U.S. at 594.

If the Gobitis children and other religious minorities wished to find an accommodation, the Court said they should lobby rather than litigate. "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to

the judicial arena, serves to vindicate the self-confidence of a free people." *Id*. at 600.

The Court overruled *Gobitis* only three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In particular, *Barnette* took exception to *Gobitis's* conclusion that this Court was not competent to second-guess legislative resolution of First Amendment issues.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 638, 640 (emphasis added).

While *Barnette* is widely celebrated today, history has relegated *Gobitis* to the anticanon. *E.g.,* John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process, in* Responding to Imperfection: The Theory and Practice of Constitutional Amendment 191, 199 (Sanford Levinson ed. 1995) (mentioning *Gobitis* alongside *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Korematsu v. United States*, 323 U.S. 214 (1944), and *In re Yamashita*, 327 U.S. 1 (1946)).

After *Barnette*, the idea that the Free Exercise Clause protects against only overt discrimination fell largely out of favor. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (holding that "[t]he fact that the [challenged] ordinance is 'nondiscriminatory' is immaterial"); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (holding that a generally applicable law prohibiting the door-to-door distribution of religious pamplets violated the First Amendment). Ultimately, in *Sherbert*, this Court held that the Free Exercise Clause required exemptions from any law that substantially burdened an individual's religious exercise unless that law was narrowly tailored to serve a compelling state interest. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Nine years later, that standard was reaffirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The *Sherbert-Yoder* test stood for more than a quarter century. *E.g., Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). But in 1990, *Smith* abruptly reanimated the *Gobitis* standard that had lain dormant for nearly fifty years.

B. Smith *abandoned settled law and attempted to craft a pragmatic solution.*

In *Smith*, the Court concluded that burdens on religious exercise do not excuse individuals from obeying a neutral and generally applicable law. 494 U.S. at 879 (quoting *Gobitis*, 310 U.S. at 594–95). Both parties in *Smith* focused their arguments on the *Sherbert-Yoder* test and how the Court should apply it to the facts. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571–72 (1973) (Souter, J., concurring) ("[N]either party squarely addressed the proposition the Court was to embrace . . . .").

Smith declared that it would "court[ ] anarchy" to continue to apply the *Sherbert-Yoder* test. *Id.* at 888. The majority found it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5. It predicted that a regime of judicial exemptions would make functional government impossible. *See id.* at 890 (declaring that exemptions would make "each conscience . . . a law unto itself").

Channeling *Gobitis*, *Smith* left minority religious groups to fend for themselves in the legislature. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

But this promised to be a fool's errand. Indeed, *Smith* itself prophetically observed: The "unavoidable consequence of democratic government" is "that leaving accommodation to the political process will place at a relative disadvantage those religious

practices that are not widely engaged in." *Id.*

Four justices resisted *Smith's* revival of *Gobitis*. Justice O'Connor, concurring in the result, wrote, "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901 (O'Connor, J., concurring in the judgment). The three dissenting justices were more direct: Smith was "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 908 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

C. Smith m*et widespread and immediate rebuke.*

Smith "produced a firestorm of criticism." Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties*", 84 Neb. L. Rev. 795, 814 (2006). A broad coalition of religious communities and civil liberties organizations pushed for *Smith* to be reheard. *Id.* When that failed, the coalition petitioned Congress to overturn *Smith* by statute. *Id.* at 815. That effort succeeded three years later. In 1993, the Religious Freedom Restoration Act passed the Senate by a vote of 97 to 3 and had "such broad support it was adopted on a voice vote in the House." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000, 2000 (Nov. 16, 1993).

When signing that measure into law, President Clinton noted how "hesitantly and infrequently" Congress has acted to reverse a decision of this Court.

Id. "But this is an issue in which that extraordinary measure was clearly called for."[2] *Id*. President Clinton explained:

> [T]his act reverses the Supreme Court's decision [in *Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

Id.

Justices of the Court, past and present, have repeatedly suggested revisiting *Smith*. *Kennedy v. Bremerton Sch. Dist*., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (*Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [Smith] was correctly decided . . . ."); *id*. at 544–45, 565 (O'Connor, J., joined by Breyer, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith* . . . ."); *Lukumi*, 508 U.S. at 559 (1993) (Souter, J., concurring) ("[I]n a case presenting the issue, the

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[2] Congress's effort to fully reverse *Smith* was limited by this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress nevertheless stayed the course and passed RLUIPA in 2000 to restore the *Sherbert-Yoder* test nationally in narrow contexts within the ambit of its Article I power. Pub. L. No. 106-274, 114 Stat. 803 (2000).

Court should re-examine the rule *Smith* declared."); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 643 (2018) (Gorsuch, J., concurring) ("Smith remains controversial in many quarters."); *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *id* at 545, 553 (Alito joined by Thomas and Gorsuch, JJ., concurring) (*Smith*'s "severe holding" is "ripe for reexamination. … The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith's* interpretation … can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption.")

Nevertheless, *Smith's* standards of neutrality and general applicability live on. This Court should revisit *Smith* and reject the *Gobitis* principles that have politicized and harmed religious liberty in our society.

CONCLUSION

Amicus respectfully requests this Court to grant the Petition.

Respectfully submitted,

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