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 EXECUTIVE 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

BRIEF OF NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE LUTHERAN CHURCH-MISSOURI SYNOD; THE COALITION FOR JEWISH VALUES; AND THE JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY AS *AMICI CURIAE* SUPPORTING PETITIONERS

R. SHAWN GUNNARSON
Counsel of Record
CHRISTOPHER A. BATES
JAROM M. HARRISON
KRISTEN CLARKE
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTERESTS OF AMICI CURIAE[1]

Amici are religious organizations with a shared commitment to defending the correct interpretation of the Religion Clauses of the First Amendment. The Constitution's guarantee of religious equality is a fundamental principle on which amici rely, including when they participate in public benefit programs. Some amici joined briefs defending that principle in *Carson* v. *Makin*, 596 U.S. 767 (2022) and *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017). In our experience, allowing a State to exclude religious organizations from public funding because of their religious beliefs or practices is a threat to religious freedom.

SUMMARY OF ARGUMENT

Colorado offers preschool funding to schools—but only if they do not discriminate in admissions or employment because of sexual orientation or gender identity. Petitioners are Catholic institutions whose faith clashes with that requirement. The Tenth Circuit sustained the State's exclusion under *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Neither that decision nor *Smith* should stand.

Constitutional text and history affirm that the Free Exercise Clause categorically prohibits religious discrimination. This Court's precedents apply that principle. Religious freedom cannot be free if a State

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Rule 37.2, amici further certify that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due.

can deny public funding to qualified religious institutions because it disapproves of their religion.

Smith obscures that principle. Its lax test of neutrality and general applicability screens out free exercise claims more effectively than it protects them. Consider the decision below. Misguided by *Smith*, the Tenth Circuit sustained Colorado's exclusion of Catholic institutions because of their faith. That result exemplifies *Smith*'s basic flaw. A judicial standard governing a constitutional right should vindicate that right. *Smith* doesn't.

Fulton v. *City of Philadelphia*, 593 U.S. 522 (2021), held back from overruling *Smith*—but such reticence is unnecessary to satisfy *stare decisis*. *Smith*'s reasoning has been questioned since the day it was issued. Members of the Court have detailed its basic errors, unworkability, and far-reaching harms to religious people and institutions. Reliance interests are insubstantial since "parties have long been on notice that the decision might soon be reconsidered." *Id.* at 614 (Alito, J., concurring in judgment). And it would be a mistake to postpone reconsideration until a fully articulated constitutional framework emerges. This Court's settled practice is to announce a constitutional standard and resolve the case before it. Nothing more.

Petitioners have made a compelling case that *Smith* should be reconsidered. The Tenth Circuit's decision exemplifies the lower-court confusion surrounding *Smith* and the resulting harm to religious organizations. Only this Court can resolve the important and recurring questions presented by the petition. Certiorari should be granted, *Smith* overruled, and the decision below reversed.

ARGUMENT

I. *SMITH* URGENTLY MERITS RECONSIDERATION BECAUSE IT FAILS TO GUARD AGAINST RELIGIOUS DISCRIMINATION.

A. Religious Organizations Rely on the Free Exercise Clause to Form Communities United by Religious Standards.

Churches, synagogues, mosques, and ministries rely on the understanding that the Free Exercise Clause protects the freedom of religious organizations to form communities of faith governed by shared religious doctrine and standards. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012).

Justice Brennan perceptively described the character of faith communities. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). A faith community, he explained, is "an organic entity not reducible to a mere aggregation of individuals." *Ibid.* He added that because "[r]eligion includes important communal elements for most believers," and because individuals "exercise their religion through religious organizations, * * * these organizations must be protected by" the Free Exercise Clause. *Id.* at 341 (quoting Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

Consistent with these principles, the church autonomy doctrine protects the independence of

religious organizations in "matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Beyond these areas, the doctrine "protect[s] their autonomy with respect to internal management decisions that are essential to the [religious] institution's central mission." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 746 (2020). Among such decisions is the freedom to select "who will preach their beliefs, teach their faith, and carry out their missions"—known as the "ministerial exception." *Hosanna-Tabor*, 565 U.S. at 196.

Colorado's nondiscrimination requirement would invade petitioners' constitutional autonomy by seeking to control which employees a religious school hires and which students it admits. For that reason, Colorado's demand violates the First Amendment.

B. The First Amendment Categorically Bars Religious Discrimination.

But Colorado's nondiscrimination requirement also runs headlong into the Constitution by withholding a substantial public benefit from petitioners because of their religion. Putting them to the choice between their faith and equal treatment under a State benefit program is textbook religious discrimination that the First Amendment categorically prohibits.

Its Religion Clauses are clear: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Few laws are as effective at "prohibiting the free exercise" of religion as those that impose special burdens or penalties because of religious belief or practice. See *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

Founding-era evidence confirms that interpretation. When considering the original Constitution, State ratifying conventions proposed amendments outlawing religious favoritism. Virginia's proposed amendment declared that "no particular sect or society ought to be favored or established by Law in preference to others." Va. Ratifying Convention, Proposed Amendments, June 27, 1788, *reprinted in Complete Bill of Rights* 13 (Neil H. Cogan ed., 2d ed. 2015). Similar amendments were proposed by New York, North Carolina, and Rhode Island. See *id.* at 12–13.

These proposals influenced the First Amendment. James Madison introduced an amendment assuring that "[t]he civil rights of none shall be abridged on account of religious belief or worship" and that "the full and equal rights of conscience" would be secure. 1 *Annals of Cong.* 451 (Joseph Gales ed., 1834). Congressional debate reshaped that language into the familiar guarantee of "the free exercise of religion." U.S. Const. amend. I; see also J. H.R., 1st Cong., 1st Sess. 121 (1826) (Sept. 24, 1789) (approving Religion Clauses); J. First Sess. S. United States, 1st Cong., 1st Sess. 88 (Sept. 25, 1789) (same).

Scholars during the early Republic understood the Constitution to prohibit religious discrimination. A prominent commentator explained that the Constitution's commitment to "the equality of all our citizens" precludes "the denial of the smallest civic right" on the ground of "religious intolerance." William Rawle, *A View of the Constitution of the United States of America* 119 (1825). Justice Story agreed. He discerned that the First Amendment "sought to cut off the means of religious persecution * * * and the power of subverting the rights of conscience in matters of religion." Joseph

Story, *Commentaries on the Constitution of the United States* 701 (reprint ed. 1987) (1833).[2]

This Court's decisions likewise recognize a categorical bar on religious discrimination. Under those precedents "a law targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 522 (1993). That rule encompasses any law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. Safety from religious discrimination is the irreducible minimum guaranteed by the Free Exercise Clause.

Lukumi illustrates this "fundamental nonpersecution principle of the First Amendment." *Id.* at 523. There, city ordinances criminalized animal sacrifice—an "integral part" of Santeria religious practice—while exempting animal slaughter by kosher butchers and others operating for nonreligious purposes. *Id.* at 527–28, 531. Although the ordinances did not discriminate on their face, "mere compliance with the requirement of facial neutrality" did not suffice. *Id.* at 534. A closer look revealed that the ordinances "singled out" Santeria adherents "for discriminatory treatment." *Id.* at 538. "[A]lmost the only conduct subject to" the ordinances was Santeria members' religious exercise, the city's asserted interests could be achieved by less restrictive means, and the ordinances were enacted "in

[2] The founding generation's antipathy to religious discrimination owes much to the harsh experience of religious minorities in England and the American colonies. See Brief for *Amici Curiae* The Church of Jesus Christ of Latter-day Saints, et al. at 3–19, *Carson*, 596 U.S. at 767 (2022) (No. 20-1088).

direct response to the opening" of a Santeria church in the community. *Id.* at 535–40.

Other decisions forcefully condemn religious discrimination. In *McDaniel* v. *Paty*, this Court invalidated a Tennessee statute barring ministers from serving as delegates to a state constitutional convention. 435 U.S. 618, 620 (1978) (plurality op.). In *Fowler* v. *Rhode Island*, the Court reversed the conviction of a Jehovah's Witness minister for preaching in a public park because the conviction amounted to "discrimination * * * barred by the" First (and Fourteenth) Amendment. 345 U.S. 67, 69 (1953). Likewise, *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission* invalidated a ruling that a baker violated State civil rights law by declining to create a custom wedding cake for a same-sex couple, when State officials expressed "clear and impermissible hostility toward" the baker's religious beliefs. 584 U.S. 617, 634 (2018).

The Constitution's bar on religious discrimination means that the government may not deny government benefits to religious organizations because of their religious character and beliefs. See *Trinity Lutheran*, 582 U.S. at 466. "[E]xclusion * * * from a public benefit for which [one] is otherwise qualified, solely because" of religion, is "discriminat[ion]." *Id.* at 467. Such discrimination is "odious to our Constitution." *Ibid.* Yet Colorado's law does exactly that.

C. Colorado Law Discriminates Against Petitioners by Withholding Public Funding Because of Their Religious Practices.

There is no dispute that Colorado's Universal Preschool Program (UPK) is a public benefit. Nor does Colorado contend that petitioners are ineligible to

participate in the program aside from their inability to accept the State's LGBT nondiscrimination requirement. Petitioners operate state-licensed preschools that have received excellent quality ratings from the State. See, *e.g.*, Pet.App.306a–307a.

Yet the Tenth Circuit denied petitioners' free exercise claim because Colorado "did not exclude faith-based preschools from participating in UPK." App.21a. Not so. Colorado's acceptance of religious schools is highly conditional. *Ibid.* State law puts petitioners "to the choice" between their religion and State funding under UPK. *Fulton*, 593 U.S. at 532. In this way, Colorado excludes petitioners from preschool funding because of their religion.

The Tenth Circuit found that Colorado's "program is a model example of maintaining neutral[ity]." App.42a. But facial neutrality is not enough. See *Lukumi*, 508 U.S. at 534. The Free Exercise Clause protects against "indirect coercion or penalties." *Trinity Lutheran*, 582 U.S. at 463. "[T]he effect of a law in its real operation" can be "strong evidence of its object" to discriminate. *Lukumi*, 508 U.S. at 535.

Colorado's law is textbook religious discrimination. The State denied petitioners a religious exemption. App.12a–13a. Yet it has granted exceptions for over *1,000* other preschools. See Pet.App.69a. Whatever else, the State's nondiscrimination requirement is not generally applicable. Colorado tolerates discrimination on other grounds prohibited by the same law—including income, disability, gender, and race. See Pet.App.371a (income and disability); Pet.App.354a (gender and race). But State officials deny a religious exemption that would afford petitioners the same public support as other qualified preschools. Pet.App.12a–13a. Colorado's refusal is no mere technical departure from

free exercise doctrine. Its preference for religions that affirm the State's views on sexual orientation and gender identity over those that adhere to traditional understandings constitutes denominational preference that the First Amendment forbids. Cf. *Cath. Charities Bureau, Inc.* v. *Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 241–42 (2025).

D. The Decision Below Exemplifies How *Smith* Misleads Courts into Denying Relief from Religious Discrimination.

Colorado's unmistakable religious discrimination should make this a straightforward case. But the Tenth Circuit got distracted when trying to apply *Smith*. In the court's view, if Colorado's law is a "neutral law of general applicability" that only "incidentally conflicts with" petitioners' religious practices, all Colorado needed to do was identify a rational basis for it. App.22a–23a (citing *Smith*, 494 U.S. at 879). The Tenth Circuit held that the law met that undemanding standard. App.47a.

The decision below highlights the defects in *Smith*—and the urgent need for its reconsideration.

Take the Tenth Circuit's failure to account for the substantial burden Colorado's law places on petitioners' religious exercise. Petitioners' religious beliefs drive their admissions and employment decisions. See Pet.6–8. By excluding petitioners from UPK because of those beliefs, Colorado burdens petitioners' religious exercise. See *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). A law that conditions a public benefit on abandoning religious standards is not an incidental burden on religion—it is coercive pressure the Free Exercise Clause forbids.

Overlooking the fact of religious burden is explained by *Smith*, under which the magnitude of the burden on religious exercise is immaterial. *Smith* asks whether the burden is "incidental[]" to the law at issue rather than its intended result. 494 U.S. at 878. When the burden is incidental, the government need only show the law is neutral and generally applicable and has a rational basis. See *id.* at 877–79. Because (in the Tenth Circuit's view) Colorado's law did not "specifically target[]" petitioners' religious beliefs, Pet.App.22a, the court did not consider how far the law burdens their religious exercise. That oversight led the court to sanction a law that discriminates against Catholic institutions because of their faith. See *Thomas*, 450 U.S. at 717–18.

Next, the Tenth Circuit required petitioners to provide proof of "hostility" to establish the lack of "neutrality" *Smith* demands. Pet.App.24a–28a. Hostility toward petitioners' religious standards is evident in the record—but that's hardly the point. See, *e.g.*, Pet.App.367a. Requiring proof of hostility reduces the Free Exercise Clause to a shield against persecution when it plainly guarantees the freedom to exercise religion. This Court's cases reject "subtle departures from neutrality" and "covert suppression" of religious belief as contrary to the First Amendment. *Lukumi*, 508 U.S. at 534. Take *Lukumi*. There, the City of Hialeah's appeal to public health and safety did not save ordinances aimed at suppressing religious practice. See *id.* at 536.

So too, here. Colorado's law discriminates against petitioners by denying them public benefits because of their religious beliefs and practices. Yet, distracted by *Smith*, the Tenth Circuit asked whether the law is "neutral"—which it misunderstood as a question of

"intent." Pet.App.24a. The court thereby mistakenly hunted for evidence of hostility rather than recognizing the law's impermissible religious discrimination.

The decision below is equally mistaken in its application of *Smith*'s general applicability prong. "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. The Tenth Circuit turned that principle upside-down by "focus[ing] on the different reasons Colorado exempts others from complying with the [same nondiscrimination] Mandate." Pet.22.

Even apart from these errors, the lower court's extensive detours into the statute's intricacies show how much *Smith*'s test deforms free exercise analysis. When a law results in religious discrimination, that law violates the Free Exercise Clause. Further statutory discussion is immaterial.

The decision below is hardly the only case where a lower court has invoked *Smith* to sustain religious discrimination. Other examples include *Masterpiece Cakeshop*, 370 P.3d 272, 289–92 (Colo. App. 2015) (affirming state civil rights commission order requiring baker to create custom wedding cake over baker's religious objections, despite the commission's more favorable treatment of other bakers with conscience-based objections); *Fulton* v. *City of Philadelphia*, 922 F.3d 140, 152–59 (3d Cir. 2018) (affirming city's refusal to refer foster children to religious social services agency because of agency's religious beliefs about marriage); and *Agudath Israel of America* v. *Cuomo*, see 980 F.3d 222, 225–27 (2d Cir. 2020) (denying injunction against state executive order that subjected

houses of worship to much more restrictive occupancy limits than many businesses).

Unlawful religious discrimination in those cases ended only when this Court intervened. See *Masterpiece Cakeshop*, 584 U.S. at 634–38; *Fulton*, 593 U.S. at 532–40; *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 16–19 (2020). Intervention is justified here as well. But reversal, while necessary, is insufficient. Because *Smith* has so often misled lower courts into excusing religious discrimination, *Smith* should be reconsidered and overruled.

II. RECONSIDERING *SMITH* SATISFIES *STARE DECISIS* AND FITS THIS COURT'S ESTABLISHED PRACTICE.

A. Overruling *Smith* Satisfies *Stare Decisis*.

The decision below is not an outlier. Decades of experience under *Smith* have imposed serious hardships on religious people and institutions. Pet.32 ("Religious people across the country are stuck in forever conflicts precisely because of the (sometimes willful) confusion among the lower courts over the meaning of the Free Exercise Clause.") (citations omitted). Thirty-five years of litigation, loss, and a pervasive chill on religious freedom is enough. *Smith* should be discarded.

Fulton, agreed to reconsider *Smith* but ultimately did not take that step because strict scrutiny applied with or without *Smith*. 593 U.S. at 541. *Smith* thus remains the governing standard under the Free Exercise Clause. But *Smith* has not improved with age; *stare decisis* is no reason to keep it.

Adhering to precedent generally "promotes the evenhanded, predictable, and consistent development

of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). But *stare decisis* is hardly "an inexorable command." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emp.*, 585 U.S. 878, 917 (2018) (quotation omitted). The principle is "at its weakest" when the Court interprets the Constitution. *Ibid.* (quoting *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997)). See also Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* 361 (2016) (footnote omitted) ("The doctrine of stare decisis doesn't compel inflexible adherence anyway, but that is especially true in the realm of constitutional interpretation."). "And *stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus*, 585 U.S. at 917.

Deciding when overruling precedent is consistent with *stare decisis* turns on familiar factors. These include "the quality of [the decision's] 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." *Ibid.* Each factor supports overruling *Smith*.

Start with the "quality of [the decision's] reasoning." *Id.* From the beginning, multiple members of this Court have complained about the quality of *Smith*'s reasoning. "*Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution." *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring). *Smith* itself contained separate opinions by four Justices criticizing the decision for its analytical weakness and its severe damage to religious freedom. See 494 U.S. at 892 (O'Connor, J., concurring);

id. at 908 (Blackmun, Brennan, and Marshall, JJ., dissenting). Justice O'Connor reiterated her concerns in *City of Boerne* v. *Flores*, 521 U.S. 507, 545 (1997) (O'Connor, J., dissenting). Justice Breyer's dissent expressed interest in additional argument to address *Smith*'s evident methodological flaws. *Id.* at 566 (Breyer, J., dissenting).

Justices Barrett and Kavanaugh considered the "textual and structural arguments against *Smith*" to be "compelling." *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). Justice Alito (joined by Justices Thomas and Gorsuch) added that "*Smith* is a methodological outlier" because it ignored the "meaning of the constitutional text" and "made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption." *Id.* at 595 (Alito, J., concurring).

Prominent First Amendment scholars echo this critique. See, *e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 1 (1990).

Congress expressed its opposition to *Smith* by adopting two statutes designed to shore up federal law against its threats to religious freedom. See 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act); 42 U.S.C. § 2000cc *et seq.* (Religious Land Use and Institutionalized Persons Act). These statutes, passed with near unanimity, reflect *Smith's* dramatic departure from long-settled consensus about the Constitution's commitment to religious freedom.

Another *stare decisis* factor is "the workability of the rule [the precedent] established." *Janus*, 585 U.S. at 917. *Smith*'s neutral-and-generally-applicable test has

proven anything but workable. Repeated efforts have been necessary to clean up misapplications of *Smith*'s vague standard. See, *e.g.*, *Lukumi*, 508 U.S. at 520 (explaining the meaning of "neutral"); *Fulton*, 593 U.S. at 522 (explaining the meaning of "generally applicable"); *Cath. Charities Bureau*, 605 U.S. at 247–48 (further explaining the meaning of "neutral").

Stare decisis also turns on "consistency with other related decisions." *Janus*, 585 U.S. at 917. Few cases have introduced doctrinal confusion into constitutional law so markedly as *Smith*. It is "discordant with other precedents" such as *Sherbert*, which is "tough to harmonize." *Fulton*, 593 U.S. at 600 (Alito, J., concurring). The same tension is evident between *Smith* and the ministerial exemption. *Id.* at 601 (citing *Hosanna-Tabor*, 565 U.S. at 171). Nor can *Smith* be easily reconciled with *Masterpiece Cakeshop*, 584 U.S. at 617. See *id.* at 600.

Another *stare decisis* factor looks to "developments since the decision was handed down." *Janus*, 585 U.S. at 917. Experience under RFRA and RLUIPA established that courts can effectively apply the compelling interest test when a law substantially burdens religion. Cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (affirming that courts are "up to the task" of conducting a "case-by-case consideration of religious exemptions to generally applicable rules."). That statutory regime has not resulted in "a system in which each conscience is a law unto itself" or one where "judges weigh the social importance of all laws against the centrality of all religious beliefs." *Smith*, 494 U.S. at 890. *Smith*'s jaundiced view of judicial accommodation was mistaken. The sky did not fall.

Another *stare decisis* factor is detrimental reliance. *Janus*, 585 U.S. at 917. No serious reliance interests need to be accounted for, because "parties have long been on notice that the decision might soon be reconsidered." *Fulton*, 593 U.S. at 614 (Alito, J., concurring). Insofar as government officials have counted on the lax protection of religious freedom that *Smith* provides, a perceived license to disregard First Amendment rights is hardly a form of reliance that merits judicial respect.

Some members of the Court have added another *stare decisis* factor—whether the precedent has "caused significant negative jurisprudential or real-world consequences." *Ramos* v. *Louisiana*, 590 U.S. 83, 122 (2020) (Kavanaugh, J., concurring). *Smith* checks that box too. Consider how Colorado's funding denial injures religious schools:

> During this litigation, two parish preschools * * * closed their doors due to shortfalls in funding and decreased enrollment. Across the Archdiocese, parish preschool enrollment has declined almost twenty percent since [the preschool funding program] was enacted. And families committed to Catholic education * * * are missing out on thousands of dollars of state funding solely because they chose a Catholic preschool for their children.

Pet.12.

Hardships such as these flout the Constitution's guarantee that the exercise of religion is free. That *Smith* routinely generates such results underscores the need for its reconsideration—just as petitioners request. *Stare decisis* should be no impediment.

B. *Smith* Should Be Reconsidered Without Waiting for a Complete Legal Framework to Replace Current Doctrine.

Granting certiorari to reconsider *Smith* is fully justified by Rule 10. The Tenth Circuit's application of *Smith* raises the question of *Smith*'s continuing validity—a question only this Court can resolve. See Sup. Ct. R. 10(c) (approving certiorari when a federal court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court."). Without this Court's intervention, lower courts will continue struggling to adjudicate claims under the Free Exercise Clause.

Skeptics might say that the Court should not reconsider *Smith* until a full legal framework is ready to replace it. Not so. Holding out for a complete framework before reconsidering an erroneous constitutional precedent would invite advisory opinions that the Court shuns. See *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 423–24 (2021).

What's more, the Court's settled practice does not prolong the life of a moribund constitutional precedent by waiting for a fully developed framework of rules and exceptions to replace it. This Court's decisions establish the settled practice. *First*, the Court considers whether reconsideration fits with *stare decisis*. *Second*, the Court announces the new constitutional standard. *Third*, the Court applies that standard to the case before it. Three recent decisions illustrate that practice in operation.

1. *Kennedy* v. *Bremerton School District*

Kennedy involved a high school football coach who was fired for kneeling on the ball field after games to offer prayer. 597 U.S. 507, 512–13 (2022). The school

district told Kennedy to avoid praying around other students or encouraging them to pray. Kennedy offered to pray alone on the field, but the district "issued an ultimatum." *Id.* at 517. Kennedy must not do anything that could "appea[r] to a reasonable observer to endorse * * * prayer * * * while he is on duty as a District-paid coach." *Id.* at 518 (citations omitted). In the district's view, "anything less would lead it to violate the Establishment Clause." *Ibid.*

Kennedy sued the district, asserting free speech and free exercise claims. The school district maintained that terminating him was justified to resolve the "clash" between his rights and "the District's interest in avoiding an Establishment Clause violation." *Id.* at 532. This Court disagreed.

It criticized lower courts for applying the so-called *Lemon* test, which "called for an examination of a law's purposes, effects, and potential for entanglement with religion." *Id.* at 534 (citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971)). Eventually that test included an endorsement test consisting of "estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion.'" *Ibid.* (citations omitted). That approach, *Kennedy* explained, "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Ibid.* (quotations omitted).

Even worse, *Lemon* and the endorsement test misread the Establishment Clause in principle. The First Amendment's bar on "laws respecting an establishment of religion," U.S. Const. amend. I, do not license a "'modified heckler's veto, in which * * * religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Ibid.* (quoting *Good News Club* v.

Milford Cent. Sch., 533 U.S. 98, 119 (2001) (emphasis removed)). Nor does that prohibition require the government to "purge" any public expression that "an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Id.* at 535 (quoting *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

So guided, *Kennedy* recognized that *Lemon* and the endorsement test were overruled. Replacing them was the principle that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Ibid* (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014)). Equipped with this principle, the Court agreed with Coach Kennedy. His "brief, quiet, personal religious observance [was] doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment." *Id.* at 543.

Rather than address *stare decisis* directly, *Kennedy* acknowledged that prior decisions had severely eroded *Lemon*'s foundations. See *id.* at 534–35. Nothing viable remained. See *id.* at 535–36. *Kennedy* thus demonstrates the Court's settled practice: It announces a new standard and applies it to the case before it. Nothing more.

2. *Knick* v. *Township of Scott*

In *Knick*, a Pennsylvania property owner challenged a local ordinance requiring her to let visitors enter her land to visit a private cemetery without compensation. 588 U.S. 180, 185–86 (2019). The owner brought a federal suit claiming that the ordinance violated the Takings Clause of the Fifth Amendment. Lower courts dismissed her claim as unripe under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and she asked this Court reconsider that decision.

Williamson County held that a takings claim is unripe until an owner satisfies two requirements—"finality" and "exhaustion." *Id.* at 193. Finality concerns whether the government "has arrived at a definitive position" on how the law restricts private property. *Ibid.* Exhaustion concerns whether the owner has pursued "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." *Ibid.*

Knick overruled *Williamson County*'s exhaustion requirement. 588 U.S. at 185 ("[T]he state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."). The usual factors under *stare decisis* applied. *Id.* at 203 (citing *Janus*, 585 U.S. at 917).

Replacing *Williamson County* was a straightforward rule: "A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." *Id.* at 206. Again, there was no discussion of how the new rule would apply beyond the facts of *Knick* itself.

3. *Dobbs* v. *Jackson Women's Health Organization*

Then there's *Dobbs*—the most prominent case of overruling constitutional precedent in the past fifty years. At issue was a Mississippi statute "that generally prohibits an abortion after the 15th week of pregnancy." *Dobbs*, 597 U.S. 215, 230 (2022). All parties insisted that the Court must either "reaffirm or overrule *Roe* [v. *Wade*, 410 U.S. 113 (1973)] and *Casey* [v. *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992)]." *Id.* at 231. The Court overruled these decisions.

Roe "found that the Constitution implicitly conferred a right to obtain an abortion." *Id.* at 270. *Casey* partly overruled *Roe* while keeping its "central holding" that the Constitution protects the abortion right. *Id.* at 229 (quoting *Casey*, 505 U.S. at 860). *Casey* "grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 236.

To determine whether abortion is a fundamental right under that theory, *Dobbs* canvassed the history of English and American law, from Bracton to the state of American law when *Roe* was decided. *Id.* at 242–50. That survey was definitive. "The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973." *Id.* at 250. Nor was "the abortion right * * * an integral part of a broader entrenched right," such as a privacy or personal autonomy. *Id.* at 255. It followed that the Due Process Clause does not imply the right to an abortion.

Dobbs then considered *stare decisis*. *Id.* at 268. Each traditional factor pointed toward overruling *Roe* and *Casey*, and any concern with the Court's public reputation was immaterial. "We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly." *Id.* at 292. The conclusion followed ineluctably. "*Roe* and *Casey* must be overruled, and the authority to regulate must be returned to the people and their elected representatives." *Ibid.*

Dobbs identified rational basis review as the correct constitutional standard to assess state laws regulating

abortion. *Ibid.* Three paragraphs sufficed for the Court to explain that Mississippi's statute met that standard. *See id.* at 301.

* * *

Each of these decisions—*Kennedy*, *Knick*, and *Dobbs*—illustrates the Court's settled practice when overruling constitutional precedent. That same practice should prevail when reconsidering *Smith*. *Smith* is constitutionally objectionable, and overruling it is consistent with *stare decisis*. The Court should therefore overrule *Smith*, announce the standard to replace it, and apply that standard to this case. Nothing more.

CONCLUSION

Thirty-five years is long enough. *Smith* has imposed grave hardships on religious people and institutions by routinely screening out free exercise claims rather than vindicating them. That *Smith* misdirected the Tenth Circuit into taking a permissive approach to Colorado's religious discrimination is another proof that *Smith* is irredeemably flawed. It should be revisited and overruled at last. The petition should be granted.

Respectfully submitted,

R. SHAWN GUNNARSON
Counsel of Record
CHRISTOPHER A. BATES
JAROM M. HARRISON
KRISTEN CLARKE
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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