No. 19-123

In The
Supreme Court of the United States

SHARONELL FULTON, *ET AL.*,
Petitioners,
v.
CITY OF PHILADELPHIA, PENNSYLVANIA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF ARCHBISHOP JEROME E. LISTECKI AND THE ROMAN CATHOLIC ARCHDIOCESE OF MILWAUKEE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI[1]

The Most Reverend Jerome Edward Listecki was named the 11th archbishop of the Roman Catholic Archdiocese of Milwaukee by Pope Benedict XVI. Archbishop Listecki was installed as archbishop of Milwaukee on January 4, 2010, by the Papal Nuncio to the United States, Archbishop Pietro Sambi. At that time, he assumed responsibility for the spiritual well-being of Catholics in the 10 counties of southeastern Wisconsin and took on the day-to-day administration of the Archdiocese. Archbishop Listecki is a retired lieutenant colonel in the United States Army Reserve and holds doctorates in both canon and civil law.

The Archdiocese of Milwaukee was established on November 28, 1843, and was created an archbishopric on February 12, 1875. It covers 10 counties and 4,758 square miles in southeastern Wisconsin. As of November 2018, the Archdiocese contained 543,155 registered Catholics, 292 diocesan priests, 394 religious order or extern priests, 65 religious order brothers, 1,173 women religious, 176 permanent deacons, and 37 seminarians. Additionally, the Archdiocese oversees over 100

[1] As required by Supreme Court rules 37.3 and 37.6, Amici state as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made such a monetary contribution. Consent has been given by all parties for this brief.

elementary schools, high schools, colleges, and universities as well as almost a dozen hospitals.

As representatives of over half a million faithful Catholics, Amici have a strong interest in ensuring that Americans are afforded their constitutional right to exercise their religion free of undue governmental interference.

SUMMARY OF ARGUMENT

It can fairly be said that this is among the most consequential cases this Court has ever considered. Religious liberty is one of the most essential of those freedoms protected by the federal constitution. *See, e.g.*, Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1244 (2000) ("defend[ing] the idea of religious freedom as our first freedom—both in chronological and logical priority"); *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539 (1971) (opinion of Hallows, C.J.) ("No liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment."), *aff'd*, 406 U.S. 205 (1972).

Yet, for the past thirty years, substantial burdens on religious practice have attracted only deferential scrutiny. In *Employment Division v. Smith,* this Court famously concluded that, *contra* the express terms of the Free Exercise Clause that

"Congress shall make no law . . . prohibiting the free exercise [of religion]," U.S. Const. amend. I, those who object to the dictates of law on grounds of sincere religious scruple will find no recourse in the courts so long as the law is "valid," "neutral," and "of general applicability." *Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). In so doing, this Court "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy v. Bremerton Sch. Dist.*, ___ U.S. ___, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., respecting the denial of certiorari).

In numerous instances the results of *Smith* have been disastrous. Under its rule, religious liberty is afforded no special protection. The state need not accommodate its claims. One need go no further for disturbing examples than this case, a municipality has ceased doing business with a religious foster care agency which for decades has nobly supported some of the most vulnerable among us, solely because of the agency's (hardly anomalous) views on the nature of marriage and family.

As segments of society continue to push for fundamental social and cultural change at the current breakneck pace, religious liberty protections are more vital than ever to ensure that those viewed as "out of step" because they follow the promptings of conscience in spite of the zeitgeist are not effectively expelled from society. Relevant to this case, it was not

five years ago that one member of this Court predicted that while "those who cling to old beliefs [regarding marriage] will be able to whisper their thoughts in the recesses of their homes, . . . if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J, dissenting).

That anticipated time is already here. The Petitioners have repeated unpopular views about marriage in public and a government actor is now forcing them (and children in need) to pay a heavy price for doing so. What does the Free Exercise Clause have to say about this? Are the Petitioners consigned to the "recesses of their homes" or are they permitted the right to fully participate in our society including the right to assist the state in providing services to children in need?

The time has come for this Court to overrule *Smith* and reinvigorate those religious liberty rights that are the birthright of all Americans not only by virtue of the federal constitution but because "the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him . . . 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), Founders Online, National Archives, https://founders.archives.gov/documents/Madison/01-

08-02-0163#JSMN-01-08-02-0163-fn-0002-ptr (last visited May 12, 2020). For too long *Smith* has denied what no civil authority may take away: "the right of every man to exercise [religion] as [conviction and conscience] dictate." *Id.*

In deciding whether to overrule *Smith* this Court will no doubt conduct the now-familiar analysis of whether *Smith* was correctly decided and whether *stare decisis* concerns nevertheless support maintaining the precedent. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2478-79 (2018). Drawing on the Wisconsin experience, this brief addresses a specific portion of that analysis: whether it is actually workable for courts to apply strict scrutiny to laws that substantially burden religious practice.

The reason for this focus is twofold. First, the *Smith* Court itself was significantly preoccupied with that question. It feared that adopting a true rule of strict scrutiny for free exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," risking "anarchy." *Smith*, 494 U.S. at 888. And a close reading of the *Smith* decision shows that this concern formed much or even most of the basis for the Court's ultimate holding. Put simply, the *Smith* majority feared the parade of horribles. Would more rigorous protection of religious freedom lead to a proliferation of religious liberty claims that

might undermine the administration of the law? Whether the Court's concern was well-founded is thus highly relevant to whether the case was "poorly reasoned," an "important factor in determining whether a precedent should be overruled." *Janus*, 138 S. Ct at 2479.

Time has shown that the Court's fears were overstated. Wisconsin, like many states, has long applied a rule of strict scrutiny for conscience claims, yet the feared parade of claims for religious exemption has not ensued. The experience of its courts thus not only calls *Smith*'s reasoning into question, it bears upon several of this Court's other *stare decisis* factors: "the workability of the rule [*Smith*] established," "developments since the decision was handed down," and "reliance on the decision." *Id.* at 2478-79. Put differently, the answer to the question of whether the strict scrutiny that *Smith* rejected is workable plays an outsize role in any examination of whether *Smith* should be overruled.

As will be discussed below, the development of free exercise case law in Wisconsin demonstrates that applying strict scrutiny to laws that substantially burden religious practice is highly workable. Shortly after this Court decided *Smith*, the Wisconsin Supreme Court concluded that the Free Exercise Clause's analogue in the Wisconsin Constitution provided those protections that this Court had rejected. Since that time, the floodgates have not

opened in Wisconsin. And Wisconsin courts, like courts in many other jurisdictions, have quite comfortably resolved what conscience-exemption claims have been brought. Consequently, whatever the Court decides in this case with respect to *Smith*'s fate, it should not base its decision on unproven—if not disproven—fears about the feasibility of applying to free exercise claims a standard frequently applied to claimed violations of other essential constitutional rights.

ARGUMENT

I. The *Smith* Court Premised Much of its Decision on Concerns that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice Risked "[A]narchy."

In *Smith* this Court was asked to determine whether Oregon could apply its criminal ban on the use of the hallucinogenic drug peyote to two former employees who had taken the drug for religious purposes and, after being fired for doing so, were denied unemployment compensation for their putative misconduct. *Smith*, 494 U.S. at 874.

Although the ex-employees asked the Court to analyze the drug law under strict scrutiny pursuant to its decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court declined the request and ruled that no exception to the law could be had. *See Smith*, 494 U.S. at 882-890. In so doing the Court set forth what

is now black letter law in federal free exercise cases: "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in the judgment)).[2]

The Court's rejection of "established free exercise jurisprudence," *id.* at 903 (O'Connor, J., concurring in the judgment), rested on relatively few grounds. For instance, the Court did not base its decision on the text of the Free Exercise Clause, which it indicated was ambiguous. *See id.* at 878-79. Nor did the Court examine the original meaning of the Clause. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 574-75 (1993) (Souter, J., concurring in part and concurring in the judgment) (explaining that *Smith* failed to "consider the original meaning of the Free Exercise Clause" and noting the "curious absence of history from our free-exercise decisions"). The Court's examination of its own precedent likewise disclosed that its cases at the very least pointed in both directions. *See, e.g.*, *Smith*, 494

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[2] In choosing this standard, the majority ignored what Justice O'Connor pointed out in her concurrence: that the Court could have reached precisely the same result under the strict scrutiny standard theretofore typically applied in First Amendment jurisprudence. *Employment Division v. Smith*, 494 U.S. 872, 900, 903-907 (1990) (O'Connor, J., concurring in the judgment).

U.S. at 884-885 (admitting that the Court had "sometimes used the *Sherbert* test to analyze free exercise challenges" to "across-the-board criminal prohibition[s] on . . . particular form[s] of conduct" but distinguishing those cases on the basis that the Court "ha[d] never applied the test to invalidate one [of those laws]"); *Lukumi*, 508 U.S. at 565, 571 (Souter, J., concurring in part and concurring in the judgment) (characterizing language in case law of the Court as "hard to read as not foreclosing the *Smith* rule" and concluding that "whatever *Smith*'s virtues, they do not include a comfortable fit with settled law").

With text, history, and precedent unavailable or unexamined as sources, the Court turned to something it called "constitutional tradition," explaining that while it applies the "'compelling government interest' requirement" in areas like racial discrimination and speech regulation, "[w]hat it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Smith*, 494 U.S. at 885-886.

Of course, the application of strict scrutiny in these other fields can result in the invalidation of what would otherwise be generally-applicable laws. "As-applied" challenges can bar application of those laws when doing so would infringe constitutional liberties. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L.

Rev. 1109, 1137-41 & n.134 (1990) (discussing areas of constitutional law involving exceptions from generally applicable laws, and noting more broadly that "the concept of an 'as applied challenge,'" wherein a "law remains in force as to most applications, but an exception is carved out for those to whom its application, under their particular circumstances, would be a constitutional violation," constitutes a "precise parallel" to a system of accommodations in free exercise jurisprudence).

Further, strict scrutiny applied to substantial burdens on free exercise can also be said to serve a constitutional norm—unfettered freedom of religion.

But even were this not so, the Court's "norms"-based approach fails to explain why the analysis pertaining to dissimilar constitutional rights must (or even should) be the same. *Id.* at 1139 (observing that "the ideal of racial nondiscrimination is that individuals are fundamentally equal and must be treated as such" whereas "[t]he ideal of free exercise of religion . . . is that people of different religious convictions are different and that those differences are precious and must not be disturbed"). The Framers certainly had the *ability* to afford special protection to rights of conscience; and, as noted, the decision did not examine the history of the Clause and whether they might actually have done so. "Constitutional tradition" does little or no work here.

The Court's actual concern seems to have been that a religious freedom that protected practice as well as belief would be unworkable:

> If the "compelling interest" test is to be applied at all . . . it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic

> obligations of almost every conceivable kind . . . .

Smith, 494 U.S. at 888-89 (citation omitted) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). Responding to a separate writing, the Court also clarified in a footnote its view that it was "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." *Id.* at 889 n.5.

Stripped down to its essentials, then, the *Smith* decision rested on little more than the Court's apprehensions that strict scrutiny could not practicably be applied and thus simply was not an option. It was that concern that led the majority to conclude that the First Amendment's protection of free exercise does not apply to what most religious adherents would see as an essential part of their faith—the duty to live in accord with its mandates.

While the Court's concern about a slippery slope was understandable, whether that slope exists is a different question entirely. And, as will now be discussed, the Court erred in concluding that it does.

II. Experience in Wisconsin Demonstrates that Applying Strict Scrutiny to Laws that Substantially Burden Religious Practice is Highly Workable.

Wisconsin provides an excellent case study for what life looks like in a world where religious adherents are offered the ability to argue that they should be exempted from generally applicable laws. Wisconsin has never operated under *Smith*'s weak protection of religious freedom and yet *Smith*'s concerns of widespread self-exemption from civic obligations or persistently subjective and intrusive decision-making by judges have never come to fruition here. This evidence, coupled with similar experiences throughout the country, demonstrates that the fundamental premise justifying the *Smith* decision is flawed.

A. Modern free exercise case law in Wisconsin before *Smith*

i. State v. Yoder

The landmark pre-*Smith* free exercise decision in Wisconsin was also a landmark for this Court: *State of Wisconsin v. Yoder*, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 406 U.S. 205 (1972). There followers of the Old Order Amish religion—which "requires as a part of the individual's way of salvation a church community separate from the world"—argued that Wisconsin's compulsory education laws violated their religious beliefs insofar as they would require Amish children to attend two years of high school. *Yoder*, 49 Wis. 2d at 434-36, 447 (opinion of Hallows, C.J.).

Although the lead opinion written by Chief Justice E. Harold Hallows, one of Wisconsin's most respected jurists, *see, e.g.*, Nathan S. Heffernan, *In Memoriam-Chief Justice E. Harold Hallows*, 58 Marq. L. Rev. xi, xi (1975) (noting Chief Justice Hallows "earned place in Wisconsin legal history"), failed to garner the support of the Chief Justice's colleagues, the Wisconsin Supreme Court nevertheless ruled 6-1 that it was unconstitutional to force the Amish objectors to comply with the law, with five justices briefly concurring in the result. *Yoder*, 49 Wis. 2d at 447-48.

Before conducting any constitutional balancing, Chief Justice Hallows first examined whether there was actually any infringement of the federal Free Exercise Clause at all. *Id.* at 434. In so doing he sketched out a limited role for courts in conducting the analysis. The Chief Justice remarked that it was "of no concern" that the Amish faith was not codified, as, "[f]or its purpose, religion defines itself and binds the individual conscience." *Id.* at 435. Similarly, he noted that the court was "prohibited from evaluating[] a religious belief for ecclesiastical purposes" and added that the court's view "of the validity, the reasonableness, or the merits" of Amish beliefs was irrelevant. *Id.* at 436. Finally, the Chief Justice rejected out of hand the State's argument that the Amish's "refusal to obey the compulsory school law is no part of their worship but merely a practice or a way of life," given that "[t]he Free Exercise Clause is not restricted in its protection to formal

ritualistic acts of worship common in theistic religions but also includes the practice or the exercise of religion which is binding in conscience." *Id.* at 436-37. On this remarkably humble view of the role of a civil court in the adjudication of a free exercise claim, the Chief Justice concluded that the compulsory education law at least intruded upon the objectors' First Amendment rights. *Id.* at 437.

Citing *Sherbert*, the Chief Justice then proceeded to weigh the interests of the Amish against those of the state. *Id.* at 434, 437. The compulsory education law imposed a "heavy . . . burden" on the Amish insofar as complying with the compulsory education law was "repugnant to their religion" and forced them to choose between "risk[ing] the loss of . . . salvation" and "disobey[ing] the law and invit[ing] criminal sanctions." *Id.* at 437. "To the Amish," the Chief Justice explained, "secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child." *Id.* Indeed, in other states, the opinion noted, the Amish sold their farms and moved rather than comply with similar laws. *Id.*

Proceeding to the State's interest, the opinion concluded that the State's interest in compulsory education was not "in itself . . . a compelling interest" which would reflect "the need to apply the regulation without exception to attain the purposes and

objectives of the legislation." *Id.* at 438. The State could not point to any serious ill effect resulting from allowing the Amish to live consistent with their faith, nor a substantial benefit from forcing them to follow the compulsory education law. *See id.* at 439-443. "Granting an exception from compulsory education to the Amish," the Chief Justice wrote, "will do no more to the ultimate goal of education tha[n] to dent the symmetry of the design of enforcement." *Id.* at 443.[3]

As noted, five justices concurred only in the result and stated in a one-paragraph concurrence that they would confine their ruling to the particular facts of the case and the State's failure to meet its burden. *Id.* at 447-48 (Hansen, J., concurring).

On appeal, this Court affirmed, confirming that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

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[3] *See, e.g.*, *State of Wisconsin v. Yoder*, 49 Wis. 2d 430, 439, 182 N.W.2d 539 (1971) (opinion of Hallows, C.J.) ("The Amish point out that the education talked about in [certain case law] is for a world which is not theirs; that their cultural values are different; that their life requires no professional training and that two years of high school education does not help Amish children to adjust normally to their Amish environment. The Amish claim, with compelling merit, that their education produces as good a product as two additional years' compulsory high school education does.").

ii. *Development of the* Yoder *Standard*

In the 18 years between *Yoder* and *Smith*, there was no deluge of free exercise cases in Wisconsin (or, for that matter, anywhere else) under either the federal constitution or its state counterpart. What cases did arise were generally dispatched by the Wisconsin Courts with relative ease.

For example, in *State v. Kasuboski*, members of the Life Science Church argued that *Yoder* permitted them to withdraw their children from public school as well—a perfect illustration of the potential slippery slope later sketched out by the *Smith* Court. *State v. Kasuboski*, 87 Wis. 2d 407, 411, 275 N.W.2d 101 (Ct. App. 1978). The Kasuboskis objected to the putative fact that the local public schools taught "humanism and racial equality and are influenced by communists and Jews." *Kasuboski*, 87 Wis. 2d at 413.

The Wisconsin Court of Appeals, acknowledging that what constitutes a "'religious' belief or practice entitled to constitutional protection may present a most delicate question," concluded on the record before it that the Kasuboskis had "removed their children from the public schools on the basis of ideological or philosophical beliefs rather than fundamentally religious beliefs," and rejected the

Kasuboski's claim for a religious exemption. *Id.* at 417-18.

Kollasch v. Adamany, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980) provides another example of what the *Smith* Court might have conceived as a "hard case"—a request for exemption from general taxation. There Catholic Benedictine sisters asked not to have to pay sales tax on the meals they sold to visitors and provided "substantial evidence at trial to prove that all of the work which they do is religiously, rather than commercially, motivated." *Kollasch*, 99 Wis. 2d at 538-39, 548. In this case, the sisters' objection was clearly religiously-based. But even though the Wisconsin Court of Appeals "accept[ed] as a given that the sisters are engaged in the exercise of religion when they serve meals to their guests and join them in dining," *id.* at 551, it concluded the sisters could simply collect the taxes from the consumer, which imposed little or no burden on their religious exercise, *id.* at 557.[4]

Finally, just two years before *Smith*, the Court of Appeals decided a case that is striking in its similarity to *Smith*. *See State v. Peck*, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988). In *Peck* a priest of the Israel Zion Coptic Church, whose "doctrine

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[4] On appeal, the decision was reversed on other grounds. *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) (concluding the sisters were not "retailers" within the meaning of the sales tax and thus not subject to it).

dictates the use of marijuana as a 'religious sacrament,'" was charged with and convicted of manufacturing controlled substances when County sheriffs discovered around 1,600 marijuana plants on his property. *Peck*, 143 Wis. 2d 624, 629-31, 422 N.W.2d 160 (1988).

There was no dispute that Peck's religious beliefs were both sincere and burdened by the criminal law; unlike the *Smith* Court, however, the Court of Appeals applied strict scrutiny and concluded that the state's interest in "[p]reservation of the public health and safety" was "of sufficient magnitude to override Peck's first amendment interest in using the drug as a daily continual sacrament." *Id.* at 631-35.

Kasuboski, *Kollasch*, and *Peck* are illustrative examples in that they demonstrate three obstacles to the vindication of any free exercise claim and thus three reasons to doubt pandemonium upon the reinvigoration of the Free Exercise Clause.

First, per *Kasuboski*, the claimant must demonstrate a sincere religious belief. Second, per *Kollasch*, the challenged law must actually significantly burden the exercise of that belief. And third, per *Peck*, the law must flunk strict scrutiny. To the complaint that in judicial analysis of these three steps—which admittedly can involve close questions—there is a risk of erroneous denial of a free exercise claim, the answer is that a jurisprudence

that offers religious adherents at least a fighting chance to vindicate their consciences is preferable to one in which the adherents are given no chance at all.

As of 1990, then—the year *Smith* was decided—Wisconsin had a workable system of analyzing free exercise claims that did not denude the constitutional language of most of its force as *Smith* would later do.

B. The Wisconsin Supreme Court's rejection of *Smith*'s rule

Following *Smith*, Wisconsin, which has its own free exercise clause, *see* Wis. Const. art. 1, § 18, needed to determine whether it was appropriate to adopt *Smith*'s test for state constitutional claims or to continue applying the test from *Yoder* and its progeny.[5] In *State v. Miller*, another case involving the Amish, the Court unanimously chose the latter course. 202 Wis. 2d 56, 549 N.W.2d 235 (1996).

The question in *Miller* was whether Wisconsin could force the Amish to display "the red and orange triangular slow-moving vehicle (SMV) emblem on their horse-drawn buggies." *Miller*, 202 Wis. 2d at 59. While recognizing that the Supreme Court of the United States had recently eschewed the application

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[5] Article 1, § 18 reads in relevant part: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . .."

of strict scrutiny to conscience claims, the Wisconsin Supreme Court explained that the state constitution guaranteed broader protections "best . . . furthered through continued use" of the "time-tested [strict scrutiny] standard." *Id.* at 64-66, 69.

Analyzing the traffic law at issue turned out to be an especially easy task in light of the State's concession that the law burdened sincerely held religious beliefs and the Amish's concession that highway safety was a compelling state interest. *Id.* at 69-71. On the question of narrow tailoring the Amish proffered unrebutted expert evidence that their use of reflective white tape was actually superior to the method mandated by the State, which in turn failed to support its contention that uniformity was required, given exceptions for various types of vehicles and similar-looking symbols required for other purposes. *Id.* at 70-73. On these showings, the Wisconsin Supreme Court ruled for the Amish. *Id.* at 59.

Miller is no less than a charter for religious liberty in Wisconsin. *See, e.g.*, *id.* at 65 ("[T]he drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise the dictates of their religious beliefs."). For over two decades it has stood for the proposition that no Wisconsin civil power has the ability to command that a Wisconsinite violate his

or her conscience without an exceptionally powerful justification.[6]

C. Free exercise case law in Wisconsin after *Smith*

The reason that Wisconsin case law is worth this Court's study is that at approximately the same time that *Smith* rejected strict scrutiny for free exercise claims, *Miller* announced that Wisconsin would retain the test. Thus persuasive evidence is available regarding whether *Smith*'s fears of "anarchy" were overblown.

Post-*Miller* experience in Wisconsin suggests they were. Similar to the state of affairs following *Yoder*, Wisconsin courts were not inundated with conscience exemption claims under the state constitution; research discloses perhaps around a dozen appellate cases in twice as many years.

And despite the fact that this collection of cases concerned a variety of challenged laws or government

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[6] Although the text of the Wisconsin Constitution's religious liberty provision is more broadly worded than its federal counterpart, that fact alone proves little with respect to the issue of whether *Smith* was correctly decided. The *Miller* Court, after all, decided to continue applying a test originally drawn from federal free exercise case law. Even if strict scrutiny has a firmer basis in the text of the Wisconsin Constitution, the impact—or, more accurately, the lack of impact—of adopting the test is instructive.

actions ranging from the significant to the mundane, *see, e.g.*, *Interest of Jonathan S.*, No. 98-0790, 1998 WL 734475 (Wis. Ct. App. Oct. 22, 1998) (corporal punishment prohibition); *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, 246 Wis. 2d 502, 631 N.W.2d 229 (automatic fire sprinkler requirement); *Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd.*, 2008 WI App 52, 311 Wis. 2d 237, 751 N.W.2d 385 (pharmacist's refusal to dispense oral contraceptives); *State v. Driessen*, No. 2010AP1050-CR, 2011 WL 978241 (Wis. Ct. App. Mar. 22, 2011) (per curiam) (criminal marijuana ban); *Cty. of Jackson v. Borntreger*, No. 2012AP162, 2012 WL 2924067 (Wis. Ct. App. July 19, 2012) (permit for saw mill); *Fond du Lac Cty. v. Manke*, No. 2012AP516, 2012 WL 4898037 (Wis. Ct. App. Oct. 17, 2012) (speeding citation); *Eau Claire Cty. v. Borntreger*, No. 2012AP1973, 2013 WL 322907 (Wis. Ct. App. Jan. 29, 2013) (building code requirements); *State v. Caminiti*, No. 2013AP730-CR, 2014 WL 1059175 (Wis. Ct. App. Mar. 20, 2014) (child abuse statute); *State v. Caminiti*, Nos. 2015AP122-CR, 2015AP123-CR, 2016 WL 1370164 (Wis. Ct. App. Apr. 7, 2016) (same), Wisconsin's courts have shown themselves "quite capable of applying [strict scrutiny] to strike sensible balances between religious liberty and competing state interests." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).[7]

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[7] Under Wisconsin law, the unpublished opinions cited in this brief are generally not citable as precedent or authority in Wisconsin courts, subject to certain exceptions. *See* Wis. Stat. §

Notably, a trend in the post-*Smith* Wisconsin cases is rejection of claims for religious exemptions. The *Smith* Court apparently would find fault with such a state of affairs, *see Smith*, 494 U.S. at 889 n.5 ("[T]he cases we cite have struck 'sensible balances' only because they have all applied the general laws, despite the claims for religious exemption."), but it is unclear why.

If the implication is that Wisconsin courts have "water[ed] . . . down" the strict scrutiny standard, *Smith*, 494 U.S. at 888, that is not borne out by the facts. In most cases, the Court of Appeals concluded on the evidence before it that the claimant had failed to demonstrate the threshold requirement that the government was actually burdening a religious belief. *See Jonathan S.*, 1998 WL 734475, at *3; *Peace Lutheran Church & Acad.*, 246 Wis. 2d 502, ¶¶20-21; *Noesen*, 311 Wis. 2d at 252; *Driessen*, 2011 WL 978241, at *2; *Borntreger*, 2012 WL 2924067, at *5; *Manke*, 2012 WL 4898037, *2; *Borntreger*, 2013 WL 322907, at *4.

On the other hand, in those few cases where strict scrutiny was actually applied, the State arguably possessed truly compelling interests that

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809.23(3). Further, *Amici* do not necessarily endorse the outcome in each of the many free exercise cases cited herein. They are presented simply to show the workability of the strict scrutiny standard in the free exercise context.

could not be served by less restrictive alternatives. *See Peace Lutheran Church & Acad.*, 246 Wis.2d 502, ¶22 (state had compelling state interest in requiring installation of sprinkler system in church, namely "the saving of lives and preservation of property," and "proved that there were no alternative fire suppression systems"); *Driessen*, 2011 WL 978241, at *2 (ban on use of marijuana justified because of the "serious problems" marijuana "causes . . . for society"); *Caminiti*, 2014 WL 1059175, at **6-7 (defendant who instructed church attendees to apply harsh physical discipline to "infants starting as young as two or three months of age" lawfully convicted of conspiracy to commit child abuse given compelling state interest in "preventing child abuse" and lack of available alternatives); *Caminiti*, 2016 WL 1370164, at **6-10 (similar).

Of course, as *Yoder* and *Miller* show, free exercise claimants are sometimes successful. That possibility is necessary in a country that values religious liberty. Each time a court rules in a particular instance that the state may not substantially burden a sincerely held religious belief because it lacks adequate justification, the social compact is strengthened, not weakened; these conscience exemptions are the price paid to maintain the allegiance of those citizens whose primary allegiance is to their Creator.

D. Courts apply strict scrutiny to free exercise claims quite comfortably.

As this Court is well aware, Wisconsin is by no means the only jurisdiction that applies strict scrutiny to free exercise claims. Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, which restored by statute the application of strict scrutiny in free exercise cases. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-94 (2014). And a relatively recent tally places the number of states providing "heightened religious freedom protections" via either legislation or state court decision at 31. Juliet Eilperin, *31 states have heightened religious freedom protections*, The Washington Post (Mar. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/. Put differently, although the country remains riddled with inconsistency on this issue, the majority of jurisdictions offer religious adherents robust free exercise protections. This is strong evidence of workability.

It is worth examining why *Smith*'s concerns about chaos—whether due to widespread rule by individual conscience or to inappropriate judicial decision-making on matters of religion—have not come to pass in these states. There are a few possible answers, each focusing on a different branch of government.

The first is the likelihood that where strong free exercise protections exist, legislatures, by and large, actually attempt to draft laws that will not infringe upon religious belief or that permit exceptions when infringement is likely. This proposition need not rest on unqualified confidence that legislators will always do the right thing (although the broad esteem in which the value of religious liberty is held in America should not be underestimated—it is worth recounting that RFRA passed Congress with near-unanimity). Even viewed from the perspective of legislators' incentives and self-interest, it is perfectly logical that, in jurisdictions where conscience exemptions are already required by law, legislators will hash out potential problems in advance and adjust their proposals accordingly to avoid findings of unconstitutionality.

The second consideration is that the executive branch—the law enforcer—possesses both prosecutorial discretion and little motivation to squelch the peaceful dissenter *except* where a compelling governmental interest is truly present. Our society may be litigious, but not so litigious as to eliminate the possibility of citizens and their officials working out solutions that respect both the law and conscience.

Third, the balancing-of-interests that strict scrutiny requires is a test that the judicial branch applies in any number of circumstances. They are capable of doing it here. It is true that religious

claims can present especially sensitive questions given the inability of civil courts to inquire into ecclesiastical matters, but those waters have proven navigable as well. Civil deference to a religious determination is not equivalent to judicial abdication; on the contrary, it represents a civil court's understanding of its proper role. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

The old lawyer's adage that strict scrutiny is "strict in theory, but fatal in fact" is simply not true. *Cf. Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). Courts need not question or evaluate the worth of religious beliefs. They are able to assess the degree of burden on the adherents' terms. Nor have they proven incapable of weighing that burden against the governmental interest in enforcement.

Finally, apart from the branches of government, we may consider the American people themselves. While there can be little doubt that strong free exercise protections will at times be abused by citizens who in fact lack moral scruple, periodic mendacity in the court room is (unfortunately) nothing new. Here, too, in Wisconsin and elsewhere, courts have shown that they can separate the wheat from the chaff. *See, e.g.*, *United*

States v. Quaintance, 608 F.3d 717, 722 (10th Cir. 2010) (per Gorsuch, J.) (examining evidence in the record and affirming district court's conclusion that the defendants' "marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction").

None of this obviates the need for constitutional protection. That religious liberty is often respected and that adherents are unlikely to bring marginal cases does not mean that constitutional safeguards ought not be scrupulously respected. Our Constitution says that religion is special and has marked it as a fundamental liberty. State actions that substantially burden that fundamental liberty ought to attract heightened scrutiny.

III. That the Court Erred in its Assessment of the Workability of Strict Scrutiny in this Context Relates to Several of the Factors this Court Considers When Deciding Whether to Overrule a Case

This Court assesses whether it should overrule a case by reference to the doctrine of *stare decisis*—"in English, the idea that today's Court should stand by yesterday's decisions." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 135 S. Ct. 2401, 2409 (2015). "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne*

v. Tennessee, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

Pursuant to this "principle of policy," the Court's "cases identify 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 [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." *Id.* at 2478-79.

Given this analytical framework, that *Smith* erred in concluding it would be unworkable to apply strict scrutiny to laws that substantially burden religious practice is especially relevant to the question of whether *Smith* should be overruled. This is so both because the conclusion formed a substantial part of the basis for the *Smith* decision and because its correctness relates to multiple *stare decisis* factors.

Most obviously, for the reasons already discussed, the force of *Smith*'s reasoning is substantially lessened if what formed the primary basis for the decision is untrue. If (as was shown *supra*) providing robust protections to religious adherents who sincerely object to complying with a generally applicable law on religious grounds is in fact highly feasible and would *not* lead to "each conscience [becoming] a law unto itself," then *Smith*

has neither text, nor history, nor precedent, nor "constitutional tradition" to fall back on.

Second, the "workability of the rule [*Smith*] established" can only fairly be judged when considered with reference to other available rules. *Smith*'s rule—under which conscience exemptions simply do not exist for most laws (and therefore under which many are forced to violate their consciences)—appears more workable if it is the only possible option. If, on the other hand, a regime of strict scrutiny is easily administrable, *Smith*'s restrictive doctrine takes on a different color.

Third, given that this Court may reconsider a decision based on subsequent developments, post-*Smith* practice in the states with respect to more generously affording religious exemptions and the consequences of their having done so are matters highly relevant to *Smith*'s viability. Proof that the Court's initial concerns were unfounded, which was unavailable at the time *Smith* was decided, weighs heavily in favor of reconsidering (and overruling) the decision.

Finally, the fact that the federal government and the majority of states already successfully apply heightened standards to conscience claims via legislation and case law suggests that reliance interests are substantially lessened. Whether a conscience claim will be entertained in court is now merely an accident of one's latitude and longitude.

In sum, in weighing whether to overrule *Smith*, this Court's time is well-served dissecting whether the *Smith* Court's anxiety about the practical effects of its decision was ultimately justified. As this brief has demonstrated, it was not, so *stare decisis* concerns are substantially lessened.

CONCLUSION

As the Court considers this case, many voices will attempt to warn it that should it overrule *Smith* it will unleash a Pandora's box of irresolvable religious exemption claims. These voices will encourage the Court to bow to inertia and refrain from upsetting a system that has supposedly been in place for decades.

The Court should resist these arguments because they are based on false assumptions. The status quo in this country is that over half of the states have already rejected *Smith*'s rule. And, as Wisconsin's history shows, courts in these jurisdictions have had little trouble adjudicating free exercise claims under a rule of strict scrutiny.

This Court has a valuable opportunity to reconsider *Smith* in light of the text and history of the Free Exercise Clause as well as its own precedents in the area. The case should be decided on these sources. It should not be decided on the basis of a boogeyman that does not exist.

Consequently, Amici respectfully request that this Court rule in favor of the Petitioners and, in so doing, overrule its decision in *Employment Division v. Smith*.

Respectfully submitted,

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