No. 25-703

In the Supreme Court of the United States

CALVARY CHAPEL SAN JOSE, ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 19 OTHER STATES IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Religious freedom drove the Nation's founding. So as America's 250th birthday draws near, one might be forgiven for thinking religious exercise law would be settled by now. But after more than two centuries of relatively consistent judicial protection of this core liberty, the Court made an abrupt about-face.

Employment Division v. *Smith*, 494 U.S. 872 (1990), turned free exercise jurisprudence on its head. According to *Smith*, laws burdening religious exercise don't "offend[]" the First Amendment, so long as they are "generally applicable" and have merely "incidental effect" on religious liberty. *Id.* at 878. That test might seem initially innocuous. After all, some laws don't make any religious-based classification. For example, "a city fire code may require sprinklers in all buildings that can hold more than 100 people." *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting). A law like that one doesn't present "impermissible [religious] discrimination or favoritism." *Id.* But other laws do. And under *Smith*'s framework, "general applicability" is the key that unshackles laws from strict scrutiny's rigors.

For decades now, courts have struggled to consistently determine the bounds of *Smith*'s "general applicability" proviso. In the face of the COVID pandemic, the problem worsened. Some courts seemed to think the Constitution takes a backseat in times of crisis. So, following a bevy of legal challenges to pandemic-related directives, this Court

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[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

narrowed the focus. It said a law is not generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

Still, courts—like the lower court here—can't seem to untangle the general-applicability web. The California Court of Appeal found no free-exercise problem with directives requiring congregants to wear masks during worship, despite exemptions for professional sports and the film industry. The lower court leaned on the directives' seeming general applicability. It drew a meaningless line between the conduct of professional athletics and church services, ignoring what matters—their risks to the government's asserted interest. So this Court needs to remind lower courts that they can't relegate free exercise to disfavored status.

The Court should grant the petition. The States here have a strong interest in seeing the Free Exercise Clause applied as the Framers originally intended. And further course correction is necessary. Current free-exercise application departs from the First Amendment's text and history. Lower courts need clear guardrails—or they'll continue veering into making value judgments and calling it constitutional adherence.

SUMMARY OF ARGUMENT

I. The First Amendment guards religious exercise. Text and history confirm that much. Religious exercise should be unrestrained by government. The government, on the other hand, is held to an exacting standard whenever it passes a law burdening free exercise.

II. The Constitution doesn't relax its grip on government authority during emergencies. But lower

courts gave governments license to trample fundamental rights during the COVID pandemic. This Court stepped in repeatedly to ensure religious exercise was treated at least as well as comparable secular activities.

III. Lower courts still analyze free exercise challenges through a value-judgment lens. The lower court did that here. It recognized that state and county COVID guidance favored certain activities and individuals. And it acknowledged that religious worship wasn't in the favored category. But it simply concluded that religious worship and professional athletics, for instance, aren't comparable activities and moved on. The Court should grant the petition to remind lower courts that religious exercise is a fundamental liberty. It requires more than cursory review. Even *Smith* demands that.

IV. If *Smith* doesn't require a searching inquiry, the Court should scrap it. It's inconsistent with First Amendment text and history. And it's difficult to apply consistently, as evidenced by the lower court here. The Court should return to strict scrutiny. *Smith* poses a barrier to rigorous review. It's time to tear down the wall.

REASONS FOR GRANTING THE PETITION

I. Free Exercise is Our First Core Right.

A. The First Amendment secures the broad free exercise of religion under its plain text, structure, legislative context, and founding-era history.

"At its heart, the Free Exercise Clause of the First Amendment protects the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of religious acts." *Mahmoud* v. *Taylor*, 606 U.S. 522, 546 (2025) (cleaned up). This scope

comes from the text's "normal and ordinary meaning." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 564-65 (2021) (Alito, J., concurring) (cleaned up). The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. "Prohibit" means to "hinder." *Prohibit*, SAMUEL JOHNSON'S DICTIONARY (4th ed. 1773). "Free" means "unrestrained." *Free*, SAMUEL JOHNSON'S DICTIONARY (4th ed. 1773). "Exercise" means an "act of divine worship whether public[] or private." *Exercise*, SAMUEL JOHNSON'S DICTIONARY (4th ed. 1773). And "religion" means personal "virtue" or "a system of divine faith and worship as opposite to others." *Religion*, SAMUEL JOHNSON'S DICTIONARY (4th ed. 1773); see also *Religion*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828). So Congress cannot make any law that hinders unrestrained acts of worship expressed privately or publicly in virtue or a system of faith.

In placing the Free Exercise Clause where they did, the Framers further emphasized their wish for broad religious exercise protections. The Religion Clauses sit together. "A natural reading of the First Amendment suggests that the [Religion] Clauses have 'complementary' purposes, not warring ones where one clause is always sure to prevail over the others." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022) (cleaned up). The clauses join forces for a common goal—limiting government intrusion on religious exercise. See *Everson* v. *Bd. of Educ. of Ewing*, 330 U.S. 1, 13, 15 (1947). Courts thus have no "need to generate conflict between an individual's rights under the Free Exercise [Clause]" and other First Amendment clauses. *Kennedy*, 597 U.S. at 542.

A strong conception of religious liberty is also consistent with the First Amendment's place in the Constitution. "[T]he 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 the majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943). "Freedom of worship" is one of those rights. *Id.* And the Religion Clauses were intended to be unaffected by "elections." *Id.*

Legislative context at the ratification supports a broad construction of free exercise, too. James Madison, "the leading architect of the religion clauses," *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 141 (2011) (citation omitted), designed them to support "essential rights" "in the fullest latitude," James Madison, *Letter from James Madison to the Rev. George Eve, Jan. 2, 1789*, *in* 11 THE PAPERS OF JAMES MADISON 7 MARCH 1788 — 1 MARCH 1789 404, 404-06 (R. Rutland & C. Hobson eds. 1977), https://tinyurl.com/4r6mrw62. He said that the First Amendment would prevent the government from "compel[ling] men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 757 (1789) (J. Gales ed. 1834). Another congressman, Daniel Carroll, stated that such rights "will little bear the gentlest touch of governmental hand." *Id.* And after considering several versions of the amendment's specific language, Congress ultimately ratified Madison's synthesis. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1480-85 (1990) (recounting the legislative history). Therefore, Madison's intentions in drafting the Amendment—that religious rights be construed broadly—should be given great weight. See Michael W. McConnell, *Free Exercise*

Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1119 (1990).

Were that not enough, historical context further affirms a broad construction of free exercise. Even before the Revolution, "[s]eeking to escape the control of the national church, the Puritans fled to New England," so that they could "establish their own modes of worship." *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 565 U.S. 171, 182 (2012) (cleaned up). Indeed, "the popular conception of free exercise on this side of the Atlantic was more expansive" than conceptions dominating English philosophy at the time. *Origins and Historical Understanding*, *supra*, at 1444. "[E]arly American decisions justified protections for church autonomy" as opposed to government control of church affairs "in part based on the need to respect religious institutions' legitimate and distinct sphere of authority." *Catholic Charities Bureau, Inc.* v. *Wis. Labor & Indus. Rev. Comm'n*, 605 U.S. 238, 258 (2025) (Thomas, J., concurring). And constitutional charters routinely provided for broad free exercise rights subject only to "peace and safety" carveouts. *Fulton*, 593 U.S. at 575-76 (Alito, J., concurring). Pre-ratification cases suggest that broad free exercise—with exemptions from certain government regulations like oath requirements, military conscription, and ministerial support—was part of the legal backdrop. *Origins and Historical Understanding*, *supra*, at 1512.

Thus, the text, structure, legislative history, and founding-era understandings of the First Amendment establish "unrestrained" religious exercise.

B. Just as the First Amendment guarantees a broad free exercise right, it equally narrows government action burdening that right.

This Court has long limited government actions burdening free exercise. The Court narrowed regulations compelling religious solicitation licensure, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), affirmations of repugnant beliefs, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), school attendance, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and recission or denial of unemployment benefits due to religious affiliation, *Thomas* v. *Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Frazee* v. *Illinois*, 489 U.S. 829 (1989). Until recently, the "door of the Free Exercise Clause [stood] tightly closed against any governmental regulation of religious beliefs." *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963).

C. *Smith* opened the door. Instead of adhering to the First Amendment's command that "Congress … make no law" prohibiting religious exercise, U.S. CONST. amend. I, *Smith* permitted government to make *some* laws hindering free exercise. The Court reasoned that laws burdening religious exercise don't "offend[]" the First Amendment, so long as they are "generally applicable" and have merely "incidental effect" on religious liberty. *Smith*, 494 U.S. at 878. *Smith*'s standard departed from strict scrutiny—"a settled and inviolate principle of this Court's First Amendment jurisprudence." *Id.* at 908 (Blackmun, J., dissenting). The Court concluded "that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford." *Id.* at 908-909 (Blackmun, J., dissenting) (cleaned up). But that's not how "the Founders thought [of] their dearly bought freedom from religious persecution." *Id.* at 909 (Blackmun, J., dissenting).

Fortunately, the Court pulled back the reins (a bit) over the next few decades. It added a "minimum requirement of neutrality" to the "general proposition" that a law must be generally applicable. *Church of the Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 533 (1993). And laws that target religious beliefs can never be neutral. *Id.* at 532, 533 (cleaned up). The Court later condemned "even subtle departures from neutrality on matters of religion." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rts. Comm'n*, 584 U.S. 617, 638-39 (2018) (cleaned up). The Court tightened the general-applicability standard, too. It said "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533 (cleaned up). And "[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." *Id.* at 534. These subsequent-to-*Smith* cases somewhat shrunk the general-applicability standard's overbreadth.

The Court also clarified that, when government passes a law that is not neutral and generally applicable, it is subject to "the strictest scrutiny." *Carson* v. *Makin*, 596 U.S. 767, 780 (2022) (cleaned up). The Court takes this hard-look approach because the Free Exercise Clause prohibits laws that "impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia* v. *Comer*, 582 U.S. 449, 461 (2017) (cleaned up). "To satisfy strict scrutiny, government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (cleaned up). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S.

at 541. If the government fails to do so, such laws "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546.

So even post-*Smith*, laws burdening free exercise should face a steep standard.

II. Pandemics—Though Serious—Don't Reduce or Eliminate Constitutional Rights.

A. The COVID-19 pandemic changed the world. But it did not change the Constitution. The high bar restraining government regulation of religious exercise isn't lowered in times of crisis.

In December 2019, initial cases of a "novel [] coronavirus known as SARS-CoV-2" (COVID) were detected in China. Proclamation No. 9994 of March 13, 2020: Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 18, 2020), https://bit.ly/4jAQ4KC. The virus "spread globally." *Id.* By March 2020, President Trump declared a national emergency as the disease reached the United States. *Id.* The States followed suit. See, *e.g.*, *COVID-19 Declarations*, FEMA, https://www.fema.gov/covid-19 (last accessed Jan. 13, 2026) (listing COVID declarations); Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), *available at* https://tinyurl.com/y9envz3e.

Federal and State governments began campaigns to "slow the spread" of the virus. See, *e.g.*, *15 Days to Slow the Spread*, WHITE HOUSE (Mar. 16, 2020), https://tinyurl.com/yc5x7ybd; *Governor Newsom Orders Additional Action to Slow Community Transmission*, CAL. DEP'T PUB. HEALTH (last updated Feb. 3, 2021), https://tinyurl.com/ynhjajcx. States took varying

approaches. Paul C. Erwin, Kenneth W. Mucheck & Ross C. Brownson, *Different Responses to COVID-19 in Four US States: Washington, New York, Missouri, and Alabama*, 111 AM. J. PUB. HEALTH 647 (2021). "California, New York, and Washington acted quickly with executive orders that … implemented physical and social distancing practices." Trudy Henson, *Safe at Home? Legal and Liberty Concerns with Stay-at-Home Orders*, 28 GEO. MASON L. REV. 509, 514 (2021). Executive orders expanded to mandate home-quarantining, business and school shutdowns, gathering restrictions, and vaccine, facemask, social distancing, and sanitation protocols. *Id.*

These campaigns were supposed to last for 15 days. *15 Days to Slow the Spread*, *supra*. But as 15 days turned to 30—and stretched into months—measures like social distancing mandates tore "at the social fabric that affords people support and comfort in distressing times." Mary Ann Glynn, *'15 Days to Slow the Spread': Covid-19 and Collective Resilience*, 58 J. MANAGE. STUD. 265 (2020). "Government edicts to implement social distancing and self-isolation" resulted in "wide-scale layoffs, skyrocketing unemployment, and the grinding to a halt of many sectors of the economy." Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. 193, 199 (2021).

B. Unfortunately, certain States eyed COVID as an opportunity to crack down on not only social events and business operations, but also worship services. Thankfully, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 19 (2020) (per curiam). "[T]he forefathers omitted" from our Constitution the notion that "necessity knows no law." *Youngstown Sheet*

& Tube Co. v. *Sawyer*, 343 U.S. 579, 646, 650 (1952). "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." *Home Bldg. & L. Ass'n* v. *Blaisdell*, 290 U.S. 398, 425 (1934).

At the height of COVID, many States distinguished regulated and non-regulated activities by categorizing activities as "essential" or "non-essential." See Virgil H. Storr et al., *Essential or Not? Knowledge Problems and COVID-19 stay-at-home Orders*, 87 S. ECON. J. 1229 (2021), *available at* https://tinyurl.com/y36tjyne. When an activity was "essential," it could "continue operating." *Id.* When it was "non-essential," the activity was severely limited or even shut down. *Id.* Some States labeled religious gatherings as "non-essential" activities and thus subjected them to strict restrictions. Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 643-44 (2021). Houses of worship challenged the regulations on free-exercise grounds. See *id.*

In considering these challenges, this Court affirmed—as it should now—that free exercise of religion is "essential" and doesn't take a backseat when the government declares an emergency. The Court limited the permission *Smith* gave governments to regulate religious exercise. It explained in no uncertain terms that a law cannot "treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. Weighing religious and secular activities "against the asserted government interest," the government must show that "measures less restrictive" of its burdens on religious exercise "could not address its interest in reducing the spread of COVID." *Id.* at 62-63. So "[w]here the government permits other activities to proceed with

precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Id.* at 63. And regulations that "contain[] myriad exceptions and accommodations for comparable activities" must undergo strict scrutiny. *Id.* at 64.

Of most relevance here, a regulation is impermissible if it treats "some comparable secular activities more favorably than … religious exercise. *Tandon*, 593 U.S. at 63. For example, a regulation restricting at-home religious exercise to no more than three households at a time but "permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time" doesn't clear this high bar. *Tandon*, 593 U.S. at 63. That's because such a regulation isn't "neutral and generally applicable" and "the risks [those] various activities pose" are similar. *Id.* at 62.

The Court has repeatedly invalidated laws restricting free exercise during COVID. For example, in *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, New York imposed "severe restrictions on attendance at religious services," but left open "essential" businesses like "acupuncture facilities, camp grounds, [and] garages." 592 U.S. at 15-17. The Court cut down that regulation. *Id.* at 20. And it granted, vacated, and remanded similar cases in California and Colorado. *Harvest Rock Church, Inc.* v. *Newsom*, 141 S. Ct. 889 (Dec. 3, 2020); *High Plains Harvest Church* v. *Polis*, 141 S. Ct. 527 (Dec. 15, 2020). California is a repeat offender. The Court enjoined California's enforcement of a prohibition on indoor worship services. *South Bay United Pentecostal Church* v. *Newsom* (*South Bay II*), 141 S. Ct. 716 (2021). And

again, it granted, vacated, and remanded even more free exercise challenges from California. *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460 (Feb. 26, 2021); *Gish* v. *Newsom*, 141 S. Ct. 1290 (Feb. 8, 2021).

The government cannot "assume the worst when people go to worship but assume the best when people go to work." *Tandon*, 593 U.S. at 64 (cleaned up). Even during a pandemic, the Free Exercise Clause "is not watered down; it really means what it says." *Id.* at 65 (cleaned up). But judging from the decision below, lower courts need yet another reminder that religious exercise is at least as vital as physical exercise.

III. California's Regulations Unconstitutionally Burden Calvary Chapel's Free Exercise.

The County's COVID orders burdened Calvary Chapel's religious exercise. Under *Smith* and *Tandon*, that burden wouldn't violate the First Amendment had the County applied its rules across the board. But it didn't. The County exempted all sorts of secular activities—without explaining how religious worship posed a greater public health threat. Those comparable-secular-activity exceptions should have been subjected to strict scrutiny. But the lower court dismissed any notion that athletics, for example, are comparable to singing praises. That misapplication of *Smith* comes with dire consequences. The government dropped the hammer, imposing more than $1 million in fines—and making an example out of a house of worship.

The Court should grant the petition to remind lower courts that secular-activity comparisons rise and fall on the government's asserted interest and not on apples-to-apples activity categorization.

A. During the pandemic, the County issued a "safety measures order" requiring "[a]ll persons" to "follow the health officer's mandatory directive on use of face coverings." Pet.App.33a. And the mandatory directive said "[a]ll residents, businesses, and governmental entities must follow the California Department of Public Health's guidance for use of face coverings." Pet.App.33a. That guidance, in turn, imposed varying masking requirements dependent on vaccination status and whether a person was indoors or outdoors. Pet.App.33a-34a.

These directives might seem generally applicable on first blush, but the devil's in the details. The state guidance exempted "specific settings" from "face covering requirements"—bureaucratic speak for a rule rife with exceptions. Pet.App.34a. People undergoing medical or even cosmetic services involving the nose or face were exempted. Pet.App.34a. Hearing-impaired people were exempted. Pet.App.35a. Young children, too. Pet.App.34a. The County also exempted certain activities. Restaurant customers could "remove their face coverings once their food or drinks [were] served and … leave them off until" their meal was finished. Pet.App.38a. Like the state guidance, the County's directive permitted mask removal "while receiving a personal care service indoors or outdoors." Pet.App.39a. And, coincidentally, in the home county of the San Francisco 49ers, collegiate and professional athletes could "remove their face coverings … while … actively engaged in athletic activity." Pet.App.38a.

Religious worship, however, was absent from both the state's and county's exemptions lists. That exclusion is a subtle—but unmistakable—"religious gerrymander." *Lukumi*, 508 U.S. at 535 (cleaned up). Commercial

activities received favored status. But religious worship was cast aside.

B. Calvary Chapel refused to comply with the directives. And for good reason. The church believes in a literal reading of the apostle Paul's letter to the Corinthians: "And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit." 2 Corinthians 3:18 (New International Version). So the church believed the directives infringed on its "form of worship." *Cantwell*, 310 U.S. at 303.

The lower court disagreed. It took a cursory look at the exempted individuals and activities—"children, collegiate and professional athletic activity, restaurant customers while eating, … and individuals while undergoing personal services involving the face"—and concluded that "these secular activities were [not] comparable to the church activities." Pet.App.39a. But that analysis misapplies *Smith* and *Tandon*.

The lower court erred by comparing the activities rather than their contagion-spreading risks. As this Court has explained—repeatedly—"whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 593 U.S. at 62 (cleaned up). "A law … 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. Put another way, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather." *Tandon*, 593 U.S. at 62 (cleaned up).

How did the lower court contrast COVID-transmission risk from salon facial services with the risk posed by religious worship? It didn't. Despite acknowledging that the County's interest was a "local health emergency" from "a highly contagious viral disease," the lower court never engaged with transmission risk. Pet.App.2a. That absent analysis was necessary. Without it, the lower court's decision cannot stand.

C. It's not hard to conclude the County's exempted activities pose a similar transmission risk to religious worship. A simple hypothetical illustrates the point.

NFL teams dress 48 players each week. Nick Igbokwe, *How many players can dress for an NFL game? Revisiting the league's new rules and regulations for 2023*, SPORTSKEEDA, https://tinyurl.com/yc455uvu (May 31, 2024, 8:11 a.m. GMT). And seven officials referee each game. *Officials' Responsibilities & Positions*, NFL, https://tinyurl.com/435c3s7v (last visited Jan. 13, 2026). Those 103 individuals come together for hours each Sunday during the season. They huddle up, call plays, crash into each other, call fouls, and hand or throw a ball to one another. State and county guidance permits all that without a mask. But if those same 103 individuals entered a church, sat in pews, heard a minister preach, sang worship songs, and prayed together, then they violate that same guidance. And could be on the hook for substantial fines.

That's not right. A football exemption favors athletic exercise over religious exercise. And considering the other exemptions, it favors commercial exercise over religious exercise. So the state and county orders aren't generally applicable.

D. Because the COVID orders aren't generally applicable, strict scrutiny applies. *South Bay II*, 141 S. Ct. at 717-18 (statement of Gorsuch, J.) (stating that strict scrutiny applies when the government "impose[s] more stringent regulations on religious institutions than on many businesses").

"Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher* v. *Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that the law is "justified by a compelling governmental interest and … narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32.

The State and County can't satisfy that burden. For starters, their "purpose is belied … by the provisions of the" orders because they are "underinclusive." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 793 (1978). Both state and county guidance exempt myriad activities involving individuals in close quarters. They're "not as concerned with the close physical proximity of hairstylists … to their customers, whom they touch and remain near for extended periods." *South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.). That's the sort of "telltale sign[] this Court has long used to identify laws that fail strict scrutiny." *Id.*

Neither government explains why "narrower options" like cleaning, plexiglass barriers, or "a reasonable limit on the length of indoor religious gatherings would fail to meet its concerns." *South Bay II*, 141 S. Ct. at 719 (statement of Gorsuch, J.). If those options are fine for personal care services, then they're sufficient for religious worship, too. And the governments could have required COVID-19 testing protocols—like the State did when it exempted

Hollywood from its guidance. *South Bay United Pentecostal Church* v. *Newsom*, 985 F.3d 1128, 1145 (9th Cir. 2021), *vacated by* 141 S. Ct. 2563. A policy that relaxes regulation for solely economic reasons—to the exclusion of religious reasons—can't be "narrowly tailored" to "advance[] interests of the highest order." *Mahmoud*, 606 U.S. at 565 (cleaned up).

The Court should grant the petition to fix the lower court's error.

IV. If Need Be, *Smith* Should Be Overruled.

When a law is neutral and generally applicable, this Court has at times upheld it. See, *e.g.*, *Smith*, 494 U.S. at 878-82. This case does not involve a neutral and generally applicable law given California's many comparable carve-outs. But if the Court believes otherwise, this case shows exactly why *Smith* is "ripe for reexamination." *Fulton*, 593 U.S. at 545 (Alito, J., concurring). At least six factors demand overturning *Smith*.

A. *First*, *Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause." *Fulton*, 593 U.S. at 553 (Alito, J., concurring). As previously explained, the Free Exercise Clause's text prohibits government from making any law hindering acts of worship expressed privately or publicly in virtue or a system of faith. See pp. 3-4, *supra*. This broad formulation of free exercise contravenes *Smith*, which allows laws to burden free exercise so long as they equally burden activities not found in the Bill of Rights. 494 U.S. at 879. If the First Amendment doesn't provide any greater protection to religious exercise than is generally afforded to, say, indoor dining, then what's the point?

Second, *Smith* is inconsistent with the structure of the First Amendment and Bill of Rights. The First Amendment was meant to grant individuals broad free-exercise rights and place hardline limits on how the government treated religion. See p. 4, *supra*. Its place at the front of the Bill of Rights reveals even more. The Bill of Rights was passed to act as a powerful restraint on government regulations after the stench of monarchy assailed the law. See pp. 4-5, *supra*. Yet, *Smith* greenlights capacious "generally applicable" regulations. 494 U.S. at 878.

Third, *Smith* doesn't align with "prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Fulton*, 593 U.S. at 553 (Alito, J., concurring). Founding-era actors were well-aware of broad free-exercise rights. See pp. 5-6, *supra*. They sought to preserve that understanding in the First Amendment. See p. 6, *supra*. *Smith* undercuts that understanding by allowing the government to trample free exercise rights so long as they do not appear targeted or discriminatory. See *Lukumi*, 508 U.S. at 532.

Fourth, *Smith* is inconsistent with precedents before it and after it. *Smith* supplanted cases holding every law burdening religious liberty to strict scrutiny. See, *e.g.*, *Sherbert*, 374 U.S. at 406. And now, *Smith*'s standard has led to inconsistent applications where exemptions are granted despite seeming neutrality and general applicability. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 190 (exception to the Americans with Disabilities Act); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 762 (2020) (same and exception to Age Discrimination in Employment Act). So *Smith* does not settle the score—it distracts from the First Amendment's plain meaning.

Fifth, *Smith* has "not provided a clear-cut rule that is easy to apply." *Fulton*, 593 U.S. at 553-54 (Alito, J., concurring). It has created confusion. Because the Court uses language like "hybrid rights" to describe free exercise exemptions, it must come up with rules to discern whether a rule "targets" religion, and must define the appropriate nature and scope of exemptions. *Id.* at 603-09. *Smith* has not led to clarity, but more uncertainty.

Sixth, "experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to anarchy." *Fulton*, 593 U.S. at 554 (Alito, J., concurring) (cleaned up). On the contrary, Federal and State legislatures have long since sought to "abandon[]" this standard. *Kennedy*, 597 U.S. at 534. *Smith*'s ink had scarcely dried before Congress passed the Religious Freedom Restoration Act. Congress recounted that the Framers "recogniz[ed] free exercise of religion as an unalienable right" and "secured its protection in the First Amendment." 42 U.S.C. § 2000bb(a)(1) (cleaned up). It therefore sought to overturn *Smith* by "restor[ing] the compelling interest test set forth" in *Sherbert* and *Yoder*. *Id.* § 2000bb(b)(1). It expanded the compelling interest test's coverage when it passed the Religious Land Use and Institutionalized Persons Act. *Id.* § 2000cc. In droves, States have passed free religious exercise laws subjecting the government to a strict-scrutiny-like inquiry.[2] And

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[2] See ALA. CONST. art. I, § 3.01; ARK. CODE ANN. § 16-123-404; CONN. GEN. STAT. ANN. § 52-571b; FLA. STAT. § 761.03; GA. CODE ANN. § 50-15A-1; IDAHO CODE ANN. § 73-402; 775 ILL. COMP. STAT. 35/15; IND. CODE § 34-13-9-8; IOWA CODE ANN. § 675.4; KAN. STAT. ANN. § 60-5304; KY. REV. STAT. ANN. § 446.350; LA. STAT. ANN. § 13:5233; MISS. CODE ANN. § 11-61-1; MO. ANN. STAT. § 1.302; MONT. CODE ANN. § 27-33-105; NEB. REV. STAT. § 20-703; N.D. CENT. CODE ANN. § 14-02.4-08.1; OKLA. STAT. tit. 51, § 253; 71 PA. CONS. STAT. § 2404; 42 R.I. GEN. LAWS § 80.1-3; S.C. CODE ANN. § 1-32-40; S.D. CODIFIED LAWS

many more States' highest courts require a strict scrutiny standard under State law.[3] So the federal and State political and State judicial branches have abandoned *Smith*. Yet, "[l]ike some ghoul in a late-night horror movie" *Smith* "stalks" this Court's free-exercise jurisprudence. *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

For these reasons, even *stare decisis* can't save *Smith*. See *Fulton*, 593 U.S. at 595-614 (Alito, J., concurring).

B. "Yet what should replace *Smith*?" *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). Fortunately, the Court doesn't have to look far.

Many scholars have debated a *Smith* replacement. Some propose a text, history, and tradition test. Branton J. Nestor, *Revisiting* Smith*: Stare Decisis and Free Exercise Doctrine*, 44 HARV. J. L. & PUB. POL'Y 403, 455 (2021). Others believe there should be a "balance between burdens on religion and government, with a thumb on the scale for protecting religion." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2021 CATO SUP. CT. REV. 33, 56.

But perhaps the simplest avenue is just returning to what worked before. The Court explored levels of

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§ 1-1A-4; TENN. CODE ANN. § 4-1-407; TEX. CIV. CODE ANN. § 110.003; UTAH CODE ANN. § 63L-5-201; VA. CODE ANN. § 57-2.02; W. VA. CODE § 35-1A-1; WYO. STAT. ANN. § 9-29-103.

[3] See *James* v. *Heinrich*, 960 N.W.2d 350, 369 (Wis. 2021); *In Matter of Tiffany O.*, 467 P.3d 1076, 1081-82 (Alaska 2020); *Hawai'i* v. *Armitage*, 319 P.3d 1044, 1066-68 (Haw. 2014); *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000); *Munns* v. *Martin*, 930 P.2d 318, 321-22 (Wash. 1997); *Attorney General* v. *Desilets*, 418 Mass. 316, 320-23 (Mass. 1994); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-67 (Maine 1992); *Cooper* v. *French*, 460 N.W.2d 2, 8-10 (Minn. 1990).

scrutiny nearly a century ago in *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938). That inquiry led the Court to develop the rational-basis test. *Id.* at 152 ("[R]egulatory legislation affecting ordinary commercial transactions is not … unconstitutional unless" its character "preclude[s] the assumption that it rests upon some rational basis."). And the famous "footnote 4" suggested a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." *Id.* at 152 n.4. It wasn't long before the Court started speaking of "suspect" classifications and the need for "the most rigid scrutiny." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964) (cleaned up). And the Court eventually announced that "a law that imposes a substantial burden on the exercise of religion must be *narrowly tailored to serve a compelling interest.*" *Fulton*, 593 U.S. at 556 (Alito, J., concurring) (emphasis added) (citing *Sherbert*, 374 U.S. at 403, 406). In other words, pre-*Smith*, laws substantially burdening free exercise had to satisfy strict scrutiny.

The Court could return to *Sherbert* and stop there. Strict scrutiny is a good fit for free exercise challenges. The Free Exercise Clause's text ensures that government cannot hinder acts of personal or public worship. And the structure of the Free Exercise Clause's placement in the First Amendment points to restraining government action—not the worshipper. So free exercise rights should be understood as "protected reason[s]" for exclusion from certain government regulation. Stephanie Barclay, *Constitutional Rights as Protected Reasons*, 92 U. CHI. L. REV. 1179, 1183 (2025). The Free Exercise Clause operates as a high barrier the government must scale. Strict scrutiny is Everest-like—not insurmountable, but a fierce test for those bold enough to

endeavor. It's also the test applied to regulations aimed at other First Amendment rights.

Sherbert's threshold substantial-burden inquiry may require factfinding, but courts do that regularly. And this Court need not iron out every wrinkle now. Returning Free Exercise Clause jurisprudence to its textual and historical understanding is enough.

Strict scrutiny protects religious exercise from disfavored treatment absent narrowly tailored means justified by compelling ends. Reestablishing this framework cuts off any notion that the First Amendment "offers nothing more than protection from discrimination." *Fulton*, 593 U.S. at 543 (Barrett, J., concurring).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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