

No. 26-438

In The
Supreme Court of the United States

JOSEPH MILLER; EZRA WENGERD; JONAS SMUCKER;
DYGERT ROAD SCHOOL; PLEASANT VIEW SCHOOL; SHADY
LANE SCHOOL,

Petitioners,

v.

JAMES V. McDONALD, in his official capacity as
Commissioner of Health of the State of New York;
BETTY A. ROSA, in her official capacity as
Commissioner of Education of the State of New York,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit*

BRIEF FOR *AMICI CURIAE* UPPER MIDWEST LAW CENTER,
NATIONAL LEGAL FOUNDATION, MINNESOTA
PARTNERSHIP FOR ACHIEVEMENT, MOMS FOR LIBERTY,
CENTER OF THE AMERICAN EXPERIMENT, AND INDIANA
FAMILY INSTITUTE IN SUPPORT OF PETITIONERS

CHARLES BRENT ROBBINS

Counsel of Record

UPPER MIDWEST LAW CENTER
12600 Whitewater Dr., Ste. 140
Minnetonka, MN 55343
763-213-9428
brent.robbs@umlc.org
Counsel for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*¹

The Upper Midwest Law Center (“UMLC”) is a nonpartisan public-interest law firm headquartered in Minnetonka, Minnesota which litigates for individual liberty and religious freedom and against governmental and special interest overreach. UMLC regularly represents litigants in cases involving religious Free Exercise, including laws which may be deemed as “neutral and generally applicable” under *Employment Division v. Smith*, 494 U.S. 472 (1990). Such cases have included pharmacists seeking religious accommodation from dispensing sexual identity or abortion-related drugs and churches forced to close their doors during COVID when other similar entities (like bars and big box stores) were allowed by the government to remain open. In such cases, UMLC has challenged the constitutionality of government actions as presented here. UMLC has also recently filed an *amicus curiae* brief in support of Petitioner in *Polk v. Montgomery County Public Schools, et al.*, No. 26-8 (2026), another case that questions the continued viability of *Smith*.

The National Legal Foundation (“NLF”) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in New York, seek to ensure that free

¹ Counsel provided timely notice to all parties of *amici*’s intent to file this brief. No counsel for any party authored this brief in any party; no person or entity other an *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

speech and free exercise of religion are protected in all places.

The Minnesota Partnership for Achievement (“MPFA”) is a nonprofit organization based in Minnetonka, Minnesota dedicated to improving K–12 education by educating, empowering, and uniting champions for student achievement. MPFA equips K–12 stakeholders, particularly reform-minded school board members, with the information and guidance needed to make well-informed decisions regarding education policy, curriculum, instruction, governance, and district finance. A key part of MPFA’s mission is to support and empower parents in the K–12 education process because of their central role as caregivers and educators to their children.

Moms for Liberty is a leading national parental rights advocacy organization empowering parents to defend their fundamental right to direct the upbringing, education, and care of their children at all levels of government. They have 130,000 members across 49 states, including their New York chapters located in Erie, Greene, Monroe, Nassau, Queens, Rensselaer, Rockland, Suffolk, Westchester, and Yates counties.

The Center of the American Experiment (“CAE”) researches and produces papers on Minnesota’s economy, education, energy, health care, public safety, and state and local governance. It also crafts and proposes creative solutions that emphasize free enterprise, limited government, personal responsibility and government accountability. Key focus areas for CAE center on advancing the rights of parents to raise their children according to their

beliefs and values, which includes the freedom to make medical decisions for their children, and to choose the educational institutions best suited for them.

The Indiana Family Institute (“IFI”) opened its doors in 1990 as a nonpartisan, nonprofit public education and research organization. IFI works in association with forty other Family Policy Councils across the nation, advocating for religious liberty and parents’ rights. It believes that parents have the right to raise their children as they see fit. IFI also sees religious liberty as fundamental to the American experiment and is committed to protecting the right of every Hoosier to freely live out their faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

We write this brief on Halloween eve, a time when many believe that evil spirits roam the land. One ghoulish 14th Century Norse myth involves the Draugr, an evil man-spirit that lies mostly dormant after death. However, when discovered and provoked, the Draugr rises and creates destruction. See G.A. Hight, *The Saga of Grettir the Strong* 43-44 (J.M. Dent & Sons 1914).² Common attempts to kill the Draugr prove unavailing. Only decapitation, followed by a burning of the body, and a burying of its ashes “far away from man or beast” can fully destroy the Draugr and stop its reign of terror. *Id.* at 48.

² Pagination is to the online version found at
19<https://openchapter.io/reader/ss3g5mR>

Employment Division v. Smith is a modern-day, legal, Draugr. It arose unexpectedly, threatening to wreak havoc on Free Exercise claims. Understanding its potential for harm, this Court has allowed *Smith* to lie functionally dormant since it was decided. In fact, this Court has never turned away a Free Exercise claim based on *Smith* and created several doctrines to mitigate its impact. Five members of this Court (and two others who have retired) have already recognized that *Smith* should be revisited. *Fulton v. City of Philadelphia*, 593 U.S. 522, 543-567 (2022) (Barrett, J., concurring & Alito, J., concurring).³ But, unfortunately, this Court has failed to overturn *Smith*. This failure has allowed most Courts of Appeal, like the Second Circuit in this case, to reawaken the *Smith*/Draugr beast, and allow it to do its destruction.

This case involves a decision by the State of New York to remove a longstanding religious exemption from its mandatory school vaccination policy. Forty-five other states have this exemption, and it is an important way for states to acknowledge and protect the religious rights of parents and students. Petition for Writ of Cert. 8-9, *Miller v. McDonald*, No. 26-438 (2026). The removal of this exemption seriously burdens the Free Exercise rights of Amish parents in New York, who now must choose between sending their children to public school, or *violating* their historic religious beliefs, including the belief that aborted fetuses are inextricably intertwined with the

³ Justice Souter also called for *Smith*'s reconsideration in *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 559-577 (1993) (Souter, J., concurring).

creation of vaccines. *Id.* In suppressing the Amish parents’ Free Exercise rights, the Second Circuit resurrected the *Smith*/Draugr beast, found New York’s law to be constitutional because it was a “valid and neutral law of general applicability,” and therefore constitutional under *Smith*. *Miller v. McDonald*, 180 F.4th 420, 427 (2d Cir. 2026)

Given this continued mischief, it is time for this Court to finally slay the *Smith*/Draugr monster once and for all. This case provides the perfect opportunity for it to do so.

ARGUMENT

I. **Ghoulish Precedents Have Created Harm Before**

Smith is not the first “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad.” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Another specter that haunted the legal landscape was *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which dealt with the question of when a government law or action violated the Establishment Clause of the First Amendment. Under *Lemon*, a statute had to meet the following three prongs to avoid an Establishment Clause violation:

1. A secular legislative purpose;
2. Its principal effect must neither advance nor inhibit religion; and
3. It must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13. *Lemon* proved unworkable for several reasons. First, its abstract and ahistorical approach invited chaos in lower courts, producing differing results in materially identical cases and creating confusion and complexity for legislators. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). Members of this Court criticized *Lemon* as susceptible to manipulation to produce desired, and often anti-religious, outcomes. *Shurtleff v. City of Boston*, 596 U.S. 243, 284-85 (2022) (Kavanaugh, J., concurring). Justices also criticized *Lemon* because many lower courts used it to create a modified heckler’s veto under which perceived endorsement or discomfort permitted the suppression of religious activity. *Kennedy*, 597 U.S. at 534.

As a result, this Court began to systematically ignore and sidestep *Lemon* and issued multiple Establishment Clause opinions without using the *Lemon* test. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983). However, because the Court refused to overturn *Lemon*, courts could, in cases where it was convenient to do, resurrect *Lemon* and apply it against unsuspecting plaintiffs. It was indeed, “a docile and useful monster” that could be employed as desired. *Lamb’s Chapel*, 508 U.S. at 399 (Scalia, J., concurring). Not until 2022 did the *Kennedy* opinion finally abandon and inter *Lemon* for good. *Kennedy*, 597 U.S. at 534.

II. Another Fiend Has Entered the Landscape

Smith held that laws of general applicability, neutrally applied, cannot give rise to a Free Exercise violation. *Smith*, 494 U.S. at 878-79. It landed into

this Court’s jurisprudence like a bolt of lightning. *Smith* functionally overturned the longstanding precedent of *Sherbert v. Verner*, 374 U.S. 398 (1963), led to the enactment of two laws meant to limit its impact,⁴ and was subject to immediate, withering scholarly criticism.⁵ *Smith* initially appeared to have turned the Free Exercise Clause into a mere non-discrimination provision, with governments let loose to substantially burden free exercise so long as it did so in a neutral manner. *Fulton v. City of Philadelphia*, 593 U.S. 522, 567 (2022) (Alito, J., concurring).

Ever since, however, the Court, realizing the negative consequences of the original *Smith* rule, began to back away from its strict neutrality principle. That process began in *Smith* itself and has continued for the past thirty-five years. While the following list is no doubt incomplete, there are at least six ways in which *Smith* has been cabined, distinguished, limited, or deemed to be inapplicable.

1. **Hybrid Rights** – Announced first in *Smith*, the hybrid rights doctrine posits that a Free Exercise claim is reviewed under “strict scrutiny” if it is made in conjunction with other constitutional claims, such as free speech or parents’ rights. *Smith*, 494 U.S. at 881. The Court made no case for why Free Exercise must

⁴ The Religious Freedom Restoration Act, 42 USC § 2000bb (1993), and The Protection of Religious Exercise in Land Use and Institutionalized Personal Act, 42 USC § 2000cc (2000).

⁵ See, e.g., Michael McConnell, *Religious Freedom at a Crossroads*, 59 U Chicago Law Review 115 (1992); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 Geo Wash L R 841 (1992).

be paired with another right to gain protection, and this theory has been widely criticized both within the Court and by scholars. *See, e.g. Fulton*, 593 U.S. at 599-600 (Alito, J., concurring); Michael McConnell, *Free Speech Revisionism and the Smith Decision*, 57 University of Chicago Law Review 1109, 1121-22 (1990). Furthermore, it is usually quite possible for a plaintiff to cast a Free Exercise claim as a hybrid Free Speech claim. *Id.*

2. ***Unemployment Claims*** – *Smith* also distinguished allegations of religious discrimination in unemployment claims, the context in which *Sherbert v. Verner*, 374 U.S. 398 (1963) was decided. As noted by the concurrence in *Smith*, *Sherbert* had in fact been applied more broadly than the unemployment context. *Id.* at 898 (O'Connor, Brennan, Marshall, & Blackmun, J., concurring). Additionally, *Smith* did not develop a principled reason why the unemployment context was importantly different than other situations. *Id.* at 884-85
3. ***Religious Hostility*** – Soon after *Smith*, the Court confronted a facially neutral city law that prohibited animal sacrifices in *Lukumi*. Despite this apparent neutrality, the Court cited to evidence of “significant hostility” of a particular religious sect by city officials and determined that such hostility amounted to “suppression of religion.” *Lukumi*, 494 U.S. at 540-41. This, the Court held, made *Smith*

inapplicable. *Id.* at 546; see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617, 640 (2018).

4. ***Ministerial Exception*** – In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) the Court determined that, under the Free Exercise and Establishment Clauses, religious entities are exempt from complying with employment discrimination laws in the selection of their ministry personnel when the laws are in conflict with their beliefs, faith, and mission. *Id.* at 196. See also *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732 (2020). The Court acknowledged that the employment discrimination laws were neutral as in *Smith*, but distinguishable because *Smith* involved only “outward physical acts” while *Hosanna-Tabor* dealt with matters related to the “faith and mission of the church itself.” *Hosanna-Tabor*, 565 U.S. at 190. The Court made no doctrinal attempt to reconcile the (irreconcilable) decisions.
5. ***Favoring Secular Entities (“Most Favored Nation”)*** – In *Tandon v. Newsom*, 593 U.S. 61 (2021), the Court held that the Free Exercise Clause was violated if any comparable secular activity was allowed and a religious activity prohibited. *Id.* at 62. The Court did not address the potential conflict with *Smith*.

6. ***Discretionary Exemptions*** – As most fully explained in *Fulton*, the Court has held on numerous occasions that if officials have actual or potential discretion over the application of an apparently neutral law or policy, then *Smith* does not apply. *Fulton*, 593 U.S. at 537. This applies even if discretion has never been in fact applied or is hard to discern. *Id.*

The net effect of these carve-outs and exceptions is that this Court has not used *Smith* to rule against any Free Exercise claim in the thirty-five years since it was rendered. Yet, like the Draugr, *Smith* remains in the legal landscape and can arise to do harm.

III. ***Smith* Should be Overturned Because Lower Courts Routinely Use it to Undermine the Free Exercise of Religion.**

While this Court has found ways to distinguish and avoid the ill effects of *Smith*, leaving it available as a precedent has given lower courts the ability to use *Smith* to limit Free Exercise rights. Many have accepted the invitation. *See, e.g., Crosspoint Church v. Makin*, 180 F.4th 354 (1st Cir. 2026); *Doe v. Mills*, 16 F.4th 20 (1st Cir. 2021); *We are the Patriots United States v. Conn. Office of Early Childhood Dev.*, 76 4th 130 (2d Cir. 2023); *Spivack v. City of Philadelphia*, 109 F.4th 158 (3d Cir. 2024); *Perry v. Marteney*, 172 F.4th 315 (4th Cir. 2026); *Polk v. Montgomery County Public Schools*, 166 F.4th 400 (4th Cir. 2026); *Kentucky ex. rel. Danville Christian Academy Inc. v. Beshear*, 981 F.3d 505 (6th Cir. 2020); *Illinois Bible Colleges Association v. Anderson*, 870 F.3d 631 (7th Cir. 2017); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Truth v. Grohe*,

499 F.3d 999 (9th Cir. 2007); *St. Mary's Catholic Parish in Littleton v. Roy*, 154 F.4th 752 (10th Cir. 2025); *Thai Meditation Association of Alabama v. City of Mobile*, 83 F.4th 922 (11th Cir. 2023); *Henderson v. McMurray*, 987 F.3d 997 (11th Cir. 2021); *Archdiocese of Washington v. Washington Metro Area Transit Authority*, 897 F.3d 314 (D.C. Cir. 2018).

A review of the cases listed above leaves it hard to escape the conclusion that, like *Lemon* before it, *Smith* is being used in a results-oriented manner to rule against Free Exercise claims. *Id.*; cf. *Shurtleff*, 596 U.S. at 284-85 (Kavanaugh, J., concurring). This seems especially true in this case where the Second Circuit held to its view that *Smith* justified denying Amish parents their Free Exercise rights despite this Court reversing it once and asking it to reconsider its decision in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). *Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025), *rev'd and vacated*, 146 S. Ct. 879 (2025). *Mahmoud* had specifically endorsed and revived *Yoder v. Wisconsin*, 406 U.S. 205 (1972), which also involved protecting Amish parents' religious liberty concerns. *Mahmoud*, 606 U.S. at 526. Despite this Court's direction, the Second Circuit applied *Smith* once again and upheld New York's refusal to vindicate the Amish parents' Free Exercise rights.

A deeper dive into two recent cases from other Circuits also highlights the need for this Court to finally overturn *Smith*. In *St. Mary's*, Colorado created a pre-school education program (worth on average \$6300 per child) and allowed private entities to participate. To obtain the benefit, schools had to certify compliance with Colorado's broad anti-

discrimination laws. *St. Mary's*, 154 F.4th at 759. Given the Catholic Church's historic and biblical teachings on marriage being between one man and one woman, and that there are two immutable sexes, male and female, Colorado Catholic schools could not comply. *Id.* at 760.

While Colorado was unyielding to those Catholic schools, it offered exceptions to the same rules to its preferred ideological groups, allowing other schools to serve only students with disabilities or to discriminate based on income. *Id.* at 773. Despite the obvious *Tandon* problem, the Tenth Circuit upheld the program, finding that the income and disability exceptions “are fundamentally different than suspect classifications.” *St. Mary's*, 154 F.4th at 774. Not only is this holding incorrect under *Tandon*, it is essentially pre-judging the merits of the case, as it decides at a preliminary stage that protecting LGBTQ+ persons is more important than protecting Free Exercise (despite that right being protected by the First Amendment). As such, it will likely be overturned by this Court, but in its *cert* grant the Court rejected the invitation to consider whether “*Employment Division v. Smith* should be overruled.”⁶ The Court should accept the same invitation in this case and overturn *Smith*.

Crosspoint Church, 180 F.4th 354 (2026), a successor case to *Carson v. Makin*, 596 U.S. 767 (2022), is another illustrative example. In *Carson*, this Court found that Maine had violated parents' Free Exercise rights by excluding religious schools

⁶ This Court accepted *cert.* in *St. Mary's* on April 20, 2026.

from an otherwise generally available tuition reimbursement program. *Id.* at 785. After *Carson*, the Maine legislature amended its tuition reimbursement program to again exclude religious schools by requiring them to accept LGBTQ+ non-discrimination provisions contrary to their religious doctrine. *Crosspoint*, 180 F.4th at 360-61. This, according to Maine's House Speaker, was an explicit attempt to evade what he called *Carson's* "ludicrous decision from the far right." *Id.* at 361-62. Despite this clear religious animus, and direct attempt to evade this Court's decisions (among other issues), the First Circuit found no Free Exercise violation, citing *Smith*. *Id.*

In these two decisions, along with many others, the lower courts have ignored this Court's obvious discomfort with *Smith* and used it to bar otherwise meritorious Free Exercise claims.

CONCLUSION

Like the First Circuit in *Crosspoint*, and Tenth Circuit in *St. Mary's*, and as in other decisions across the country, the Second Circuit here has ignored this Court's repeated attempts to limit the deleterious impact of *Smith*. Instead, it applied a robust version of *Smith* and used it to undermine the sincerely held belief of Amish parents that requiring their children to be injected with some vaccines violate their religious beliefs. The decision is causing real harm to the Amish community in New York. Thus, *Smith*, like the Norse Draugr, continues to arise and cause devastation across the land. Many members of this Court, including five current members, have already acknowledged that *Smith* was wrongly decided and

doing harm. To prevent vindicate the Free Exercise rights of Amish parents here, and to prevent future infringements on religious liberty, it is time for this Court to decapitate *Smith*, burn it, and spread its ashes “far away from man or beast.”

Respectfully submitted,

CHARLES BRENT ROBBINS

Counsel of Record

Upper Midwest Law Center
12600 Whitewater Dr., Ste. 140
Minnetonka, MN 55343
763-213-9428
brent.robbsins@umlc.org

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