No. 19-66

In the Supreme Court of the United States

GEORGE Q. RICKS,
Petitioner,

v.

IDAHO CONTRACTORS BOARD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Idaho Court of Appeals

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should revisit its holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause generally requires no religious exemptions from laws that are neutral and generally applicable.

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INTEREST OF *AMICUS CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems.

The staff at Buckeye accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus curiae* to file this brief. All parties consented to the filing of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the First Amendment's Free Exercise clause does not generally require exemptions to neutral laws of general applicability. Concerned that a contrary rule could lead to an unmanageable flood of exemption requests, the Court held that the protection of free exercise rights of religious minorities was properly left to "the political process." *Id.* at 888-90. After *Smith*, that political process led to federal and state Religious Freedom Restoration Acts (RFRAs) to protect the religious freedom that *Smith* de-constitutionalized. In the nearly thirty years since *Smith*, those statutes have not led to the unworkable scheme of exemptions that *Smith* predicted.

Meanwhile, over the same three decades, the Nation has witnessed a dramatic expansion of the administrative state. With no corner of American life ungoverned by bureaucratic rules and regulations, religious adherents now increasingly seek exemptions not from statutory law, but from administrative schemes that are authored, implemented, and adjudicated by the same body. While all Americans are disadvantaged by the lack of political accountability in these bureaucratic bodies, religious individuals are especially vulnerable to agencies that make law without any consideration of their religious freedoms.

In addition to the reasons highlighted by Petitioner and other *amici*, the intervening rise of the administrative state warrants revisiting *Smith*.

Religious Americans' rights are not protected by bureaucratic processes in which they have little or no say, and the changing political winds that affect statutory free exercise rights are inadequate to protect a right that our Constitution makes fundamental. Although *Smith* did not directly grapple with the burgeoning rise of administrative burdens, it declined to overrule the Court's earlier precedents that recognized that greater judicial scrutiny and protection of free exercise may be warranted within such administrative schemes. This case, arising out of an administrative scheme for occupational licensing, thus presents an ideal vehicle for reevaluating *Smith* in light of the exponential rise of the administrative state.

ARGUMENT

I. The Three Decades Since *Smith* Have Witnessed A Vast Expansion Of The Administrative State.

In the decades since *Smith*, the scope of the administrative state has exploded. With literally "hundreds of federal agencies poking into every nook and cranny of daily life," "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). While it is common knowledge that the administrative state has expanded steadily since the New Deal, even more dramatic has been its expansion in the thirty years since this Court's decision in *Smith*. From then until 2010, the Code of Federal Regulations grew by 40,000 pages to a total of 146,000 pages. Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL

ANALYSIS 121, 126 (2016). Approximately 250,000 federal regulations have been added in those thirty years, bringing the corpus of federal administrative law alone to a total of over 1 million regulations. Mark L. Rienzi, *Administrative Power and Religious Liberty at the Supreme Court*, 69 CASE W. RES. L. REV. 355, 381 (2018). Today's administrative state is truly leviathan.

This bureaucratic behemoth "hold[s] enormous power over the economic and social life of the United States." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Administrative law "constrain[s] Americans in all aspects of their lives, political, economic, social, and personal," having become "the government's primary mode of controlling Americans." PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014). Administrative processes—with their attendant demands and threats—intrude upon many facets of American life that may well have been thought the proper province of private life and business, including brushing one's teeth, 606 C.M.R. § 7.11(11)(d); selling fresh milk, Stephen Dinan, *Feds Shut Down Amish Farm for Selling Fresh Milk*, WASH. TIMES (Feb. 13, 2012); or filling holes on one's land, *see Sackett v. EPA*, 566 U.S. 120, 124-25 (2012). Modern administrative schemes require permits and licenses for "everything from a dog house in the back yard to a nuclear power plant." Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995).

The growing power and pervasiveness of this politically unaccountable rulemaking is questionable within our constitutional tradition. *See generally*

HAMBURGER, *supra*. While the Framers carefully separated the legislative, executive, and judicial functions, administrative agencies have blended them in new and dangerous ways. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2437-39 (Gorsuch, J., dissenting). And with that blending comes "a significant threat to individual liberty." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). In particular, state and federal governments have now created numerous administrative agencies vested with legislative, executive, and judicial powers—the power to promulgate law, the power to investigate and prosecute violations of that law, and the quasi-judicial power to impose penalties, sometimes substantially in excess of remedies available in court. *E.g.*, 12 U.S.C. §§ 5491 *et. seq.* (Consumer Financial Protection Bureau); 15 U.S.C. §§ 7211 *et. seq.* (Public Company Accounting Oversight Board); 84 Stat. 2086-89 (Environmental Protection Agency); 16 U.S.C. §§ 1533, 1540 (Department of Interior); 15 U.S.C. §§ 78d *et. seq.* (Securities and Exchange Commission); 21 U.S.C. §§ 335b, 371, 374, 393 (Food and Drug Administration); 42 U.S.C. §§ 2000e-4 *et. seq.* (Equal Employment Opportunity Commission); N.M. STAT. ANN. §§ 28-1-3 *et. seq.* (New Mexico Human Rights Commission); 43 PA. STAT. §§ 956 *et. seq.* (Pennsylvania Human Rights Commission); IOWA CODE §§ 216.3 *et. seq.* (Iowa Civil Rights Commission); MONT. CODE ANN. § 2-15-1706 (Montana Commission for Human Rights); SAN FRANCISCO CHARTER, art. IV, § 4.107 (San Francisco Human Rights Commission). Without checks or balances or direct accountability to the public, such agencies remain above the democratic fray—in fact, that is often the very purpose of their design.

The pernicious effect of the administrative state's pervasive encroachment on American life has been particularly acute in occupational licensing regimes like those at issue here. "[N]early a third of American workers [today] must obtain a state occupational license to perform their jobs legally." Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 151 (2014). The modern state requires licenses for everything "from doctors and lawyers to barbers, florists, and even fortune tellers." Orphe Divounguy, Greg R. Lawson, & Bryce Hill, *Still Forbidden to Succeed: The Negative Effects of Occupational Licensing on Ohio's Workforce*, at 4 (Dec. 18, 2017). The requirements for these licensing schemes often bespeak a "disturbing arbitrariness"—for example, in Ohio, only a month of training is needed for EMTs, but nearly a year is required for cosmetologists, and more than a year for barbers and auctioneers. *Id.* The natural cause of these incongruities, of course, is that they are promulgated by members of the profession they regulate, who have obvious incentives to erect barriers to entry from additional competition. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1095-96 (2014). The proceedings of those occupational licensing authorities are often opaque, failing to post their minutes online, to list their members, and even to comply with the laws that create them. *See* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1567, 1577-78 (2017).

In addition to driving up costs to consumers from decreased competition in the marketplace, there is growing evidence that these licensing requirements directly harm the most vulnerable members of society. Because of the time and money necessary to obtain such a license, these requirements disproportionately harm low-income workers, the unemployed, members of the military, and immigrants. National Conference of State Legislatures, *The State of Occupational Licensing: Research, State Policies and Trends*, at 7-8 (October 11, 2017). Perhaps most of all, they harm those with criminal records, who "can be denied an occupational license in half the states, regardless of whether their criminal record relates to the job they are seeking or how long ago the conviction occurred." *Id.* at 8. And because licenses are needed for so many jobs, these requirements may in turn lead to an outsized effect on rates of recidivism for those with no other reasonably available opportunity to earn a living.

II. The Administrative State's Increasing Intrusions On Religious Freedom Warrant Revisiting *Smith*.

The burden posed by the growing body of administrative law falls disproportionately on religious Americans. "[T]he growth of federal administrative power . . . leaves Americans, including religious Americans, no opportunity to vote for or against their administrative lawmakers." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1920 (2015). As administrative burdens grow, so do the number of

people seeking to cast off their weight. Increasingly, the religious freedom claims before this Court and others target agency actions, not legislative enactments. Rienzi, *supra*, at 377-80. That development—unanticipated by *Smith*—warrants revisiting it nearly thirty years hence.

The administrative threat to religious liberty extends far beyond arcane matters of religious observance. When agencies run roughshod over religious objections, often as a matter of sheer "bureaucratic inflexibility," the consequences are at times severe. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U.L. REV. 221, 226 (1993). In one particularly egregious example, a state medical examiner performed an autopsy on a Hmong man over the family's religious objections—for "medical curiosity," not social need. *Id.* And, in an even more extreme case, administrative intransigence led to a deadly result, where a state agency's refusal to allow a Jehovah's Witness to travel out of state for a bloodless liver transplant cost the patient her life. Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 974-75 & n.66 (2018) (discussing *Stinemetz v. Kansas Health Policy Auth.*, 252 P.3d 141, 143-44 (Kan. Ct. App. 2011)). Similar examples abound. *E.g.*, *id.* at 976 (school refusing to allow a Native American student to have long hair); *Holt v. Hobbs*, 574 U.S. 352 (2015) (prison refusing to allow a Muslim prisoner to have a beard). And, in other recent litigation, the EEOC itself has taken positions against religious exercise that this Court unanimously described as not only "remarkable," but "untenable." *Hosanna-Tabor*

Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 189 (2012).

The impact of administrative law on religious observance has been particularly notable for state-law occupational requirements like those at issue here. Although "the government may not force people to choose between participation in a public program and their right to free exercise of religion," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Thomas, J., concurring), the inflexibility of state occupational licensing programs has done just that. Indeed, the burdens of such schemes are heightened for Americans who view their work as intimately intertwined with their religious beliefs. *See* Paul Barker, Note: *Religious Exemptions and the Vocational Dimension of Work*, 119 COLUM. L. REV. 169, 185 & n.104 (2019) (collecting statements about vocations for Jews, Catholics, and Protestants alike). After all, "churches for centuries have treated education, and care of the sick and the destitute, as part of their missions." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 873 (2014). But the obligation to perform a job in service of one's Creator can become a moral dilemma when permit and licensing requirements are interposed. "Once [a] permit is required, the individual citizen becomes a supplicant before the government," hoping that he will be able to perform his religious commitments. *See* Epstein, *supra*, at 412. The ever-expanding number of regulations on any given occupation leaves many Americans increasingly caught between their religious vocations and their secular duties.

The growing inequality of access to the administrative and political processes by religious Americans—particularly by potentially disfavored religious minorities—lends considerable doubt to the notion that the "neutral law[s] of general applicability" that *Smith* inoculated from free exercise challenges truly remain neutral. *Smith*, 494 U.S. at 879 (citation omitted); Hamburger, *Exclusion and Equality*, *supra*, at 1920. *Smith* was notably careful to state that the Court may not "punish the expression of religious doctrines it believes to be false." *Smith*, 494 U.S. at 877 (citing *United States v. Ballard*, 322 U.S. 78, 86-88 (1944)). Yet that is inevitably what occurs when inflexible bureaucracies run roughshod over adherents' constitutionally protected religious beliefs. *See* Hamburger, *Exclusion and Equality*, *supra*, at 1921; Comment, *Judgmental Neutrality: When the Supreme Court Inevitably Implies That Your Religion Is Just Plain Wrong*, 38 SETON HALL L. REV. 715, 737 (2008). While laying claim to neutrality, *Smith* has ushered in a regime that is decidedly not neutral, by elevating the universal application of administrative schemes over sincere religious beliefs.

III. *Smith*'s Reliance On The Political Process Is An Inadequate Check On Administrative Burdens.

Smith did not meaningfully grapple with the harm that the rise of the administrative behemoth has inflicted on religious freedom. Instead, it suggested that the democratic process would operate as a check on such pressures: "[A] society that believes in the negative protection accorded to religious belief can be

expected to be solicitous of that value in its legislation as well." *Smith*, 494 U.S. at 890.

However, notwithstanding the efforts of the federal government and some states to pass RFRAs, *Smith* leaves religious minorities exposed to the whims of political majorities. The solution to the problem of the administrative state is not reliance on the very political processes that have allowed its troubling expansion. The promise of the First Amendment is "to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities." *Smith*, 494 U.S. at 902-03 (O'Connor, J., dissenting) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Judicial review under the First Amendment thus provides "an independent judiciary" that protects unpopular minorities "from the arbitrary use of governmental power." *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., dissenting).

Popular opinion as to religion in particular is fleeting, for it may often protect and celebrate one moment what it excoriated a moment earlier. "One need only recall the mob violence attending the pilgrimage of the Mormons across the country or against immigrant Catholics in urban centers during the nineteenth century" to see the kinds of discrimination our own country has inflicted on religious minorities. Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence From Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1024 (2005). Those seeking to suppress other religions often harnessed the political process to

advance their discriminatory objectives: Blaine Amendments, for example, were a common way to express "anti-Catholic bigotry." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, 118 HARV. L. REV. 155, 187-88 (2004). And religious tests were once used to exclude atheists from public office. *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

Moreover, time has shown that the democratic process is not an adequate check on the growing administrative state—especially not for religious Americans. Administrative rulemaking shields the quasi-legislative process from the significant political checks offered by bicameralism and presentment. "That result, of course, is a function of design and not an accident," and one which regrettably has negative effects on civil liberties. Robert Alt, *The Administrative Threat to Civil Liberties*, 2018 Bradley Symposium Lecture (May 15, 2018), *available at* https://herit.ag/30OM0fW. Although "[p]rotection from the burdens of general laws . . . comes in the political process," the pervasive force of administrative law "significantly excludes Americans and especially religious Americans from this process." Hamburger, *Exclusion and Equality*, *supra*, at 1926. While religious Americans can vote for, petition, "or otherwise lobby members of Congress," they have "no hope of even identifying most administrative lawmakers," let alone voting them out of office. *Id.* at 1939. "[T]he administrative lawmaking process is a closed world." *Id.* at 1942. It is even more closed to religious Americans, who by virtue of the federal tax code are excluded from institutional advocacy regarding even

the limited political checks available on the administrative process. *Id.* at 1921.

* * *

Finally, reconsideration of *Smith* in this context is warranted because, viewed as a whole, this Court's free exercise jurisprudence permits religious exemptions from professional licensing schemes and similar administrative burdens. While *Smith* upheld a "generally applicable criminal law" against a free exercise challenge, 494 U.S. at 884, the Court declined to overrule earlier decisions that had granted exemptions to state administrative schemes that "substantially burden[ed] a religious practice." *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd. of Indiana Emp. Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987)); *see also* Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 536 (2006); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO STATE L.J. 65, 89 (1996). The principles embodied in those decisions warrant accommodation of religious objections with regard to the professional licensing scheme at issue here.

But, in the years since *Smith*, the lower courts have struggled to reconcile *Smith*'s holding regarding generally applicable criminal statutes with the Court's earlier holdings in *Sherbert* and *Thomas* that permitted exemptions from overly burdensome administrative schemes. As a result, those courts

typically have applied *Smith*'s holding categorically to bar free exercise claims in every context. *See, e.g.*, *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015) (requiring pharmacists to stock certain drugs despite religious objections), *cert. denied*, 136 S. Ct. 2433 (2016); *Montgomery v. Cty. of Clinton*, 743 F. Supp. 1253, 1259-60 (W.D. Mich. 1990) (refusing to enjoin an unnecessary autopsy over family's religious objections). Likewise, here, the lower courts sweepingly applied *Smith*'s holding without grappling with the still-valid precedents that preceded it nor the significant practical developments that have followed it. *See Ricks v. State of Idaho Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2018). This case is thus an ideal vehicle for revisiting *Smith*'s outdated analysis, and reorienting free exercise doctrine to provide reasonable protections against bureaucratic processes disinclined to respect religious liberty.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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