

[J-91-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

MOHAMAD ALSYRAWAN,	:	No. 87 MAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court at No. 111 CD
v.	:	2023 dated May 20, 2024 Affirming
	:	the Order of the Department of
	:	Human Services, Bureau of
	:	Hearings and Appeals at No.
DEPARTMENT OF HUMAN SERVICES,	:	514410449-002 dated January 9,
	:	2023
Appellee	:	
		ARGUED: November 19, 2025

OPINION

JUSTICE McCAFFERY

DECIDED: October 5, 2026

In this discretionary appeal, we consider the sole question of whether a litigant, alleging a violation of the Free Exercise Clause of the First Amendment,¹ must demonstrate, as a threshold matter, a “substantial burden” on their religious exercise. Today, we hold that such litigants do not need to prove that their religious exercise has been substantially burdened. Instead, litigants claiming a violation of the Free Exercise Clause need only show a “burden” on their religious exercise. Because the Commonwealth Court required Appellant, Mohamad Alsyrwan, to present evidence of a “substantial burden” to sustain his free exercise claim, we reverse the order of the Commonwealth Court and remand for further proceedings.

¹ U.S. CONST. amend. I

I. Medicaid Waivers and Home and Community-Based Services

Alsyrwan's Free Exercise claim arises from his request for an exception to the rules governing a home and community-based services waiver program. Waiver programs — otherwise referred to as waivers — are authorized under Medicaid. See *Rehab. & Cmty. Providers Ass'n v. Dep't of Hum. Servs. Off. of Developmental Programs*, 283 A.3d 260, 262 (Pa. 2022). One category of waiver programs is referred to as Home and Community-Based Services (HCBS). See *id.* Generally speaking, HCBS waivers allow states to design programs, operating outside of federal Medicaid rules, to provide long-term care services and support for eligible individuals in their home or community rather than an institutional setting. See *id.* at 262-263.

In Pennsylvania, the Commonwealth's Department of Human Services (the Department) funds and manages services provided pursuant to its HCBS waiver programs. See *Rehab.*, 283 A.3d at 262. All waiver programs must be approved at the federal level by the Centers for Medicare & Medicaid Services (CMS). See *id.* at 262. One of the several HCBS waiver programs administered by the Department is called the Consolidated Waiver program, and it is a "[f]ederally approved ... waiver program designed to help individuals with an intellectual disability or autism of any age ... live more independently in their homes and communities." Department of Human Services, *Individual Support Plan Manual*, Bulletin No. 00-22-05, at 276 (updated January 8, 2026) (ISP Manual), <https://www.pa.gov/content/dam/copapwp-pagov/en/dhs/documents/docs/publications/documents/forms-and-pubs-omap/bulletin-00-22-05-attachment-1-isp-manual.pdf> (last accessed Mar. 24, 2026).

Individuals receiving assistance under the Consolidated Waiver program are eligible to receive Companion and In-Home and Community Support services. See ISP

Manual at 81. Companion services are “direct services provided to individuals age 18 and older who live in private homes for the limited purposes of providing supervision or assistance that is designed to ensure the individual’s health, safety and welfare or to perform activities of daily living for the individual.” *Id.* at 86. In-Home and Community Support services are “direct service[s] provided in home and community settings to assist participants in acquiring, maintaining and improving the skills necessary to live in the community, to live more independently, and to participate meaningfully in community life.” *Id.* at 136. In summary, Companion services help waiver recipients with their daily life, and In-Home and Community Support services aid waiver recipients in developing long-term skills.

The Consolidated Waiver program allows for relatives and legal guardians to be paid for providing Companion and In-Home and Community Support services pursuant to the waiver recipient’s individual support plan (ISP). See ISP Manual at 249.² An individual support plan is an “individual’s summary of planned services (as well as preferences, outcomes, health, safety and medical information), identified as a result of review by the individual, family and plan team members.” *Id.* at 277. Essentially, in order for relatives and legal guardians to receive compensation, the Department must ensure that provision of these services to Medicaid recipients *via* relatives and legal guardians is in the recipient’s best interest. See *id.* at 249.

² In order for relatives and legal guardians to be compensated for providing such services, certain conditions have to be satisfied. For example, the services must not be of the type that would be “normally provide[d] ... without charge” to the waiver recipient. ISP Manual at 249.

II. Facts & Procedural History

Alsyrawan is a non-verbal adult male who has been diagnosed with Down syndrome and autism as well as various other conditions. See N.T., 9/13/2022, at 248, 264. He resides with his mother (Mother) in Philadelphia. For his safety, Alsyrawan needs constant supervision,³ and he requires varying degrees of assistance with daily life activities (washing, using the toilet, dressing), doctor's appointments, in-home activities, and outside activities. See *id.* at 256-258. Mother and Alsyrawan's sister (Sister) are his primary caretakers. Alsyrawan, Mother, and Sister emigrated from Syria to the United States in 2001, and all three are practicing Muslims.⁴

In July 2016, after Alsyrawan turned 21 years old, the Department re-evaluated his ISP and approved him for 133 hours of Companion and In-Home Community Support⁵ services per week through the Department's Consolidated Waiver program. The Department also authorized Alsyrawan to join a day program at the Center for Creative Works (the Center).⁶ Mother and Sister were approved to be compensated for care

³ For example, Mother testified that if Alsyrawan is not supervised during the nighttime, he may turn on the stove, put a spoon in the microwave, or eat food from the refrigerator. See N.T., 9/13/2022, at 258.

⁴ This Court does not have direct testimony from Alsyrawan concerning his religious beliefs and obligations. The Department understandably did not challenge Mother's sincerity or her interpretation of Alsyrawan's religious convictions. In this situation, where a dependent adult's religious views have been conveyed to this Court by a close relative, it would be wholly inappropriate for this Court to question the validity of said beliefs. *Cf. Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." (citation omitted)).

⁵ In 2016, this service was called Home and Community Habilitation. See N.T., 7/19/2022, at 17. For clarity, we will consistently refer to this service by its current name, In-Home Community Support.

⁶ Alsyrawan regularly attended this program from November 15, 2016 to February 10, 2020, when he stopped attending due to the COVID-19 pandemic.

provided to Alsyrawan. Mother was paid for care provided between 6:00 a.m. and 5:00 p.m. (on the days he was unable to attend the day program at the Center or the Center was not open), and Sister was paid for care provided between 10:00 p.m. and 6:00 a.m.⁷ In short, under the terms of the Alsyrawan's re-evaluated ISP, Mother and Sister were to be fully compensated under Pennsylvania's Consolidated Waiver program for providing Alsyrawan with more than 60 hours of care each week.

However, on June 30, 2016, the Department applied to CMS, seeking an amendment to its Consolidated Waiver program, so it could "[i]mplement a limit on the amount of [in-home and community support] and/or companion services that can be provided by relatives and legal guardians." Application for a §1915(c) Home and Community-based Services Waiver, 6/30/2016, at 2. The Department sought to cap the maximum amount of hours that a relative or legal guardian could be paid for providing HCBS services to 40 hours for a single caretaker and 60 hours for multiple caretakers. See *id.* at 4. This policy change has been referred to as "the 40/60 Rule." See *Alsyrawan v. Dep't of Hum. Servs.*, 316 A.3d 1076, 1082 (Pa. Cmwlth. 2024) (citation omitted). On July 13, 2016, CMS approved the 40/60 Rule effective February 1, 2017. See *id.* (citation omitted). On September 16, 2016, the Department issued ISP Manual Bulletin No. 00-16-06, announcing the 40/60 Rule, as follows:

[A]ny one relative or legal guardian may provide a maximum of 40 hours per week of authorized [HCBS and Companion services]. Further, when multiple relatives and/or legal guardians provide the service(s)[,] each individual may receive no more than 60 hours per week ... from all relatives and legal guardians[].

An exception [to the 40/60 Rule] may be made ... when there is an emergency or an unplanned departure of a regularly scheduled worker for up to 90 calendar days in any fiscal year.

⁷ From 5:00 p.m. to 10:00 p.m., Mother would take care of Alsyrawan without pay. See Adjudication, 10/28/2022, at 18.

Id. (emphasis and citations omitted).⁸ Notably, the bulletin did not indicate there were any **permanent exceptions** to the 40/60 Rule.

On January 10, 2017, Mother filed an agency appeal on Alsyrawan's behalf, requesting a permanent exception to the 40/60 Rule, so Mother and Sister could continue to be fully compensated for providing Alsyrawan with more than 60 hours of weekly care. Mother asserted she wanted to "keep [Alsyrawan] under her care and **provide and serve his needs for religious purposes**[" Certified Record (C.R.) at 91, Agency Appeal Cover Sheet (emphasis added). On March 27, 2017, Administrative Law Judge (ALJ) Clarissa M. Edu dismissed Alsyrawan's appeal for want of jurisdiction because the appeal did not pertain to a denial, suspension, or discontinuance of benefits. See Adjudication, 3/27/2017, at 11-12. The Department's Bureau of Hearings and Appeals (BHA) then affirmed ALJ Edu's adjudication. See Final Administrative Action Order, 3/29/2017, at 1 (unpaginated). After the Secretary of the Department upheld the BHA's decision, Alsyrawan appealed to the Commonwealth Court, and the Court remanded the matter back to the BHA. At a subsequent hearing, Alsyrawan and the Department entered into

⁸ The bulletin further clarified that exceptions to the 40/60 Rule are permitted in the following situations:

- Unexpected circumstances such as inclement weather, sudden illness, or the unplanned extension of medical leave, that prevent a regularly scheduled worker from arriving at the job site and where another worker/caregiver is not immediately available to work;
- Situations where a regularly scheduled worker is terminated or refuses to provide care without providing adequate notice (e.g.,] the worker notifies the employer that he or she refuses to work on the day he or she is scheduled to provide the service or is dismissed due to gross non-compliance or misconduct); or
- The sudden loss of a caregiver who provided uncompensated support that kept the provision of services by relatives at or below 40/60 hours per week.

Alsyrawan, 316 A.3d at 1082 (citations omitted).

a Stipulation of Settlement, where the Department agreed to “reassess [Alsyrawan’s] eligibility for [an] exception to the family cap under HCBS[.]” Adjudication, 2/12/2018, at 1 (unpaginated). On April 25, 2018, the Department again denied Alsyrawan’s request for an exception, and the following day, Alsyrawan appealed this denial.

As this case twisted its way through the appellate process, the global COVID-19 pandemic placed the litigation on pause. Furthermore, in March 2020, due to the public health emergency, the Department issued Appendix K, providing a temporary exception to the 40/60 Rule. See *Alsyrawan*, 316 A.3d at 1084 (citation omitted). Appendix K permitted relatives to be paid in excess of the 60-hour cap for home care services provided under the Consolidated Waiver program. See *id.* (citation omitted). While Appendix K was in effect, Mother and Sister were fully paid for all care provided to Alsyrawan above the 60-hour limit, in accordance with his ISP. See *id.* (citation omitted).

Eventually, litigation resumed, and ALJ Nadiola Logan-Thomas conducted several hearings in 2021 and 2022. During these hearings, Mother testified she was seeking a permanent exception to the 40/60 Rule under religious grounds. See N.T., 9/13/2022, at 261. Mother explained that Alsyrawan adheres to Islamic law, as established in the Quran, which forbids unrelated males and females from being alone together and prohibits unrelated males from offering personal care concerning nudity or uncovered private parts to other males. See *id.* at 261-264. As articulated by Mother, due to Alsyrawan’s religious obligations, only immediate relatives (such as sisters, brothers, father, mother, and grandparents) are permitted to administer private personal care to him. See *id.* Mother testified further that even if an unrelated male aide did not provide Alsyrawan with private personal care — thus, not breaching Alsyrawan’s religious obligations — her religious beliefs prohibit her from being alone with an unrelated male, even if this unrelated male is taking care of Alsyrawan. See *id.* at 287, 292-293. Without

an exception to the 40/60 Rule, Mother stressed that she would not permit an unrelated caregiver to provide care for Alsyrawan, and instead, she and Sister would continue to solely provide his care, without compensation for hours in excess of the 40/60 Rule. See *id.* at 266. Specifically, Mother averred that she has no other choice concerning Alsyrawan's care because she cannot allow Alsyrawan to sin. See *id.*

ALJ Logan-Thomas denied Alsyrawan's appeal on October 28, 2022. ALJ Logan-Thomas determined the Department properly refused to grant Alsyrawan an exception to the 40/60 Rule because there were ways for unrelated caregivers to provide care that would conform to Alsyrawan and his family's religious beliefs and requirements.⁹ Alsyrawan requested reconsideration of this decision, and on January 9, 2023, the Secretary of the Department issued a Final Order upholding the BHA decision. Alsyrawan then appealed to the Commonwealth Court.

Before the Commonwealth Court, Alsyrawan raised two questions: (1) whether the Department's refusal to grant an exception violates the Free Exercise Clause, and (2) whether Pennsylvania's Religious Freedom Protection Act (RFPA)¹⁰ requires the Department to grant an exception to the 40/60 Rule.

III. Religious Accommodation and the Free Exercise Clause

Before moving forward, it is necessary to explain the statutory and constitutional backdrop governing religious accommodations. The "Big Bang" for modern Free Exercise

⁹ For example, ALJ Logan-Thomas suggested that an unrelated male aide could care for Alsyrawan at the house "while [Mother] goes out to run errands, such as but not limited to shopping and handling her affairs[.]" without violating Islamic laws. Adjudication, 10/28/2022, at 17. ALJ Logan-Thomas also faulted Alsyrawan and his family for not exploring whether another program with the Center could "be a proper fit for [Alsyrawan] at this current stage of his life, [thus,] circumventing the need for [Alsyrawan's] family to get paid for 133 hours of his weekly care." *Id.* at 18.

¹⁰ 71 P.S. §§ 2401-2408.

Clause jurisprudence occurred in 1990 with the Supreme Court's seminal decision in *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). In this pivotal case, Justice Scalia's Majority Opinion attempted to synthesize decades of rather jumbled Free Exercise jurisprudence into a clear, applicable standard. As summarized by the Supreme Court in a subsequent case, the *Smith* decision "largely repudiated the method of analysis used in prior free exercise cases[.]" *Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (citations omitted).

Prior to *Smith*, a litigant seeking to prove a violation of the Free Exercise Clause, first had to establish that state action substantially burdened their right to freely exercise their religion. See *Sherbert v. Verner*, 374 U.S. 398, 403-406 (1963) (finding that the state's denial of unemployment benefits to a claimant who refused to work on Saturdays, due to her religious beliefs, was a substantial burden on her religious exercise); see also *Wisconsin v. Yoder*, 406 U.S. 205, 217-218 (1972) (finding that the state's compulsory education law, requiring children to attend public or private high school until age sixteen, was a substantial burden on Amish parents' religious exercise). Only if state action **substantially burdened** the litigant's free exercise was the state required to demonstrate that its law or conduct was necessary to further a compelling state interest. See *Sherbert*, 374 U.S. at 406-407 (finding that the state's requirement that all individuals be available to work on Saturdays in order to receive unemployment benefits was not necessary to further a compelling state interest); see also *Yoder*, 406 U.S. at 228-229 (finding that compulsory high school education for Amish children was not a compelling state interest). Essentially, under this line of precedent, substantial burdens on free exercise were subject to strict scrutiny. See *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); see also

Hernandez, 490 U.S. at 699 (“The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.” (citations omitted)). While some academics have described this legal regime as “[m]ore demanding on paper than in practice,” the governing law prior to *Smith* required a litigant to make a threshold showing of a substantial burden on their religious free exercise. See Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 847 (2022).

With *Smith*, the Supreme Court inaugurated a sea-change in this jurisprudence. Justice Scalia’s Majority Opinion restructured the test established by *Sherbert* and *Yoder* and held that, under the Free Exercise Clause, government action pursuant to a “neutral law of general applicability” does not need to satisfy strict scrutiny, even if it incidentally burdens the free exercise of religion. See *Smith*, 494 U.S. at 878-880; see also *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” (citation omitted)). Thus, government action, as long as it is neutral and generally applicable, is subject to rational basis review.¹¹ See *Spivack v. City of Philadelphia*, 109 F.4th 158, 166 (3d Cir. 2024). *Smith* also rejected the inquiry endorsed in *Sherbert* and *Yoder* of evaluating burdens on religious practices and weighing whether said burdens were justified by a compelling state interest. As stated by this Court, the *Smith* decision “eliminated the ‘compelling interest’ test for laws of general applicability, neutral towards religion.” *Commonwealth v. Stewart*, 690 A.2d 195, 201 n.5 (Pa. 1997) (citation omitted). Instead, *Smith* instructed courts to

¹¹ Rational basis is a “deferential standard that only requires the government’s action to be **rationaly related** to a **legitimate** interest.” *Spivack*, 109 F.4th at 166 (citation omitted; emphasis in original).

ascertain whether state action specifically targeted religious activity, compared to similar secular activities. See *Lukumi*, 508 U.S. at 535-536.

The Supreme Court's decision in *Smith* sparked a reaction. In short order, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb – 2000bb-4. RFRA explicitly states that its purpose is to restore the compelling interest test, established in *Sherbert* and *Yoder*, for actions and conduct of the federal government.¹² See 42 U.S.C. § 2000bb; see also *City of Boerne*, 521 U.S. at 512 (“Congress enacted RFRA in direct response to [this] Court’s decision in [*Smith*].”). With the passage of RFRA, litigants had a statutory avenue to pursue claims that had been constitutionally foreclosed by *Smith*. Thus, even if a federal law or policy was “neutral” and “generally applicable” — satisfying the inquiry under *Smith* — a litigant alleging a violation of their religious exercise still could prevail under RFRA.

After *City of Boerne*, many states enacted state equivalents to RFRA.¹³ In 2002, the Pennsylvania General Assembly passed RFPa. RFPa is the RFRA-equivalent for Pennsylvania, and the statute applies to Commonwealth agencies.¹⁴ See 71 P.S. § 2404 (“[A]n agency shall not substantially burden a person’s free exercise of religion, including

¹² The original version of RFRA restored the compelling interest test for state actions as well. See 42 U.S.C. § 2000bb-2. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court determined RFRA’s provisions binding state governments exceeded Congress’ enforcement power under Section 5 of the Fourteenth Amendment. See *id.* at 536 (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

¹³ Between 1998 and 2000, ten states passed statutes similar to RFRA, providing litigants with statutory avenues for free exercise claims against state governments. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 474 (2010).

¹⁴ RFPa defines “agency” as a “Commonwealth agency or a non-Commonwealth agency[.]” which does not “include the courts of this Commonwealth or a grand jury acting pursuant to 42 Pa.C.S. § 4548[.]” 71 P.S. § 2403.

any burden which results from a rule of general applicability.”). Like RFRA, RFPa provides the substantial burden test, established in *Sherbert* and *Yoder*, for statutory challenges. See 71 P.S. § 2402(1) (“[N]either State nor local government should substantially burden the free exercise of religion without compelling justification.”). With the passage of RFPa, Pennsylvania agencies must adhere to **constitutional requirements** (Free Exercise Clause) and **statutory requirements** (RFPa) governing the free exercise of religion.

In theory, RFPa and RFRA are designed to be more protective of religious liberties than the Constitution; it is the very justification for their existence. However, in recent years, the Supreme Court’s application of *Smith* and its interpretation of the “generally applicable” requirement have been more solicitous to religious claimants.¹⁵ See Lund, *Second-Best*, 861 (“But, as now applied, *Smith* is probably **more** protective of free exercise than *Sherbert-Yoder*.” (emphasis in original)); see also Micah Schwartzman, Richard Schragger, Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 211 (2025) (“At this point, the picture is reasonably clear. The Supreme Court has greatly expanded the scope of the Free Exercise Clause.”). Consequently, the Supreme Court’s recent decisions have resulted in a paradoxical situation where *Smith* and the Free Exercise Clause are arguably more expansive than the statutory measures designed to address their supposed deficiencies. In essence, a constitutional floor has been hoisted above a statutory ceiling.

Turning back to the matter before us, Alsyrwan appealed the Department’s denial of his request for an exception to the 40/60 Rule under the Free Exercise Clause of the

¹⁵ In fact, some academics have argued that the Supreme Court has practically *sub silentio* overruled *Smith*. See Stephen M. Feldman, *The Roberts Court’s Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 539 (2022) (“The Roberts Court has not explicitly overruled *Smith*, but it has in effect repudiated most of its doctrinal significance.”).

federal constitution¹⁶ and Pennsylvania's RFPA. Specifically, Alsyrawan asked: (1) did the Department's refusal to grant an exception violate the Free Exercise Clause, and (2) did Pennsylvania's RFPA require the Department to grant an exception to the 40/60 Rule.

IV. The Commonwealth Court's Decision

Before the Commonwealth Court, Alsyrawan contended the Department, by not granting him a permanent exception to the 40/60 Rule, violated the Free Exercise Clause and RFPA. For his constitutional claim, Alsyrawan argued the 40/60 Rule burdened his free exercise of religion, and it did not satisfy the neutral or generally applicable standard under *Smith*. For this reason, the 40/60 Rule should be subjected to strict scrutiny, not rational basis review. In support of this contention, Alsyrawan noted the Department already granted another individual an exception to the 40/60 Rule in *Jalil v. Dep't of Hum. Servs.*, 250 A.3d 550 (Pa. Cmwlth. 2021) (unreported).¹⁷ Alsyrawan also pointed to the Department's suspension of the 40/60 Rule, pursuant to Appendix K, during the duration

¹⁶ Alsyrawan did not appeal the Department's ruling on the basis of Pennsylvania's Constitution. See Pa. CONST. art. I, § 3. Therefore, this decision does not discuss nor does it necessarily apply to Article I, Section 3.

¹⁷ *Jalil* involved a litigant seeking a permanent exception to the 40/60 Rule under the Free Exercise Clause and RFPA. The Commonwealth Court recognized that the Department granted the litigant's sibling an exception to the 40/60 Rule. See *Jalil*, 250 A.3d at *2 ("A representative of [the Department] acknowledged that an exception to the 40/60 Rule was made for Recipient's brother ... who suffers from similar medical complications as Recipient[.]"). The *Jalil* Court emphasized that "no evidence was presented which established the type of exception granted or the reasons for the exception." *Id.* at *4 (citation omitted).

Here, Alsyrawan and the Department both stipulated that the Department had "previously granted an exception to the Consolidated Waiver provision limiting the maximum number of hours per week ... which can be provided[.]" and that this "exception was based on individualized circumstances and not based on an emergency or unplanned departure of a regularly scheduled worker." Parties' Stipulation of Fact, 9/13/2022, at 1 (unpaginated).

of the COVID-19 emergency. Therefore, according to Alsyrwan, the 40/60 Rule is not a “neutral law of general applicability,” and following *Smith*, the Department’s refusal to grant him an exception based on his religious beliefs must satisfy strict scrutiny. In Alsyrwan’s view, the Department failed to provide a compelling interest for the 40/60 Rule, and thus, did not satisfy its burden under strict scrutiny. See Alsyrwan’s Brief to the Commonwealth Court, 8/3/2023, at 34-35 (“There is nothing in this record to suggest that denying the requested exemption serves any interest of the Department, much less a compelling one.”).

As to his statutory claim under RFPA, Alsyrwan claimed record evidence verified that the Department’s 40/60 Rule imposed a substantial burden upon his religious exercise, and the alternatives suggested by ALJ Logan-Thomas, purportedly assuaging his religious objections, were contrary to the record. Like his constitutional argument, Alsyrwan asserted the Department failed to demonstrate that denying him an exemption to the 40/60 Rule served a compelling interest, as required under RFPA when a state policy imposes a substantial burden upon religious exercise.

In response, the Department averred substantial evidence corroborated the conclusion that “services could be provided [to Alsyrwan] in a manner that allows his family to comply with Islamic law.” Department’s Brief to the Commonwealth Court, 9/5/2023, at 11. The Department asserted the constitutional protections of the Free Exercise Clause are only pertinent if the government **substantially burdens** an individual’s religious practice. According to the Department, the 40/60 Rule did not substantially burden Alsyrwan’s ability to exercise his religion, and thus, the Department did not violate the Free Exercise Clause and Alsyrwan was not entitled to relief. See *id.* at 21 (“BHA appropriately held that [Alsyrwan] can be served by an unrelated male without violating his religious beliefs; therefore, the 40/60 Rule does not substantially

burden [Alsyrawan's] religious exercise or otherwise implicate the protections of the First Amendment.").

The Department also contended that it did not violate RFPA because, as detailed above, the 40/60 Rule did not **substantially burden** Alsyrawan's free exercise of religion. Therefore, Alsyrawan could not satisfy his burdens in order to receive relief under RFPA. The Department resolved that both Alsyrawan's constitutional and statutory arguments failed because he did not satisfy his initial burden of demonstrating that government action imposed a substantial burden on his free exercise of religion.

In its opinion, after recapitulating the legal precedent governing the Free Exercise Clause, the Commonwealth Court summarily determined the 40/60 Rule was not generally applicable. See *Alsyrawan*, 316 A.3d at 1090 ("Although a facially neutral policy can fail to be neutral in application, this Court need not reach that question because the 40/60 Rule is not generally applicable." (citations and some punctuation omitted)). But the Court then stated that "before [it] may reach whether the Department had a compelling interest in denying [Alsyrawan] an exception, [Alsyrawan] first must establish that the application of the 40/60 Rule substantially burden[ed his] free exercise of religion." *Id.* at 1091-1092 (footnote and internal quotation marks omitted) (*citing St. Elizabeth's Child Care Ctr. v. Dep't of Pub. Welfare*, 989 A.2d 52, 55 (Pa. Cmwlth. 2010)). The Commonwealth Court cited precedent from the Third Circuit defining a substantial burden and relied upon this definition in its analysis of whether a substantial burden existed for Alsyrawan's **constitutional claim**. See *id.* at 1092 (*citing Anspach ex. rel. Anspach v. City of Phila., Dep't of Pub. Health*, 503 F.3d 256, 272 (3d Cir. 2007)). Furthermore, in applying the substantial burden requirement to Alsyrawan's constitutional claim, the Commonwealth Court explicitly referred to the statutory definition of substantial burden outlined in RFPA. See *id.* at 1092-1093. With this statutory definition in hand, the Court

determined “substantial record evidence supports that the Department’s implementation of the 40/60 Rule ‘did not change the number of services available to meet [Alsyrawan’s] assessed needs.’” *Id.* at 1093 (citation omitted). The Court concluded that the implementation of the 40/60 Rule — resulting in Mother and Sister no longer receiving compensation for care provided beyond 60-hour cap — failed to impose a “legally cognizable burden on [Alsyrawan’s] religious rights.” *Id.* at 1095. Ultimately, the Court found that Alsyrawan failed to “meet his initial burden of proving that the application of the 40/60 Rule substantially burdens his free exercise of religion **under the Free Exercise Clause or the RFPA**[,]” and his request for an exception did not merit relief. *Id.* at 1095 (emphasis added).

V. Issue

Alsyrawan petitioned this Court for allowance of appeal, which we granted, in part, and rephrased as follows:

- (1) Did the Commonwealth Court improperly conflate its First Amendment Free Exercise analysis with its disposition of Petitioner’s Pennsylvania Religious Freedom Protection Act (RFPA) claim?

Alsyrawan v. Dep’t of Hum. Servs., 329 A.3d 448 (Pa. Nov. 7, 2024).¹⁸

¹⁸ Notably, this Court declined to grant *allocatur* on whether the lower court erred in its conclusion that the 40/60 Rule does not impose a substantial burden on Alsyrawan’s free exercise of religion. Nor was this Court asked to reconsider the lower court’s determination that the 40/60 Rule is not a rule of general applicability. This Court granted *allocatur* solely to consider whether the Commonwealth Court erred in requiring evidence of a substantial burden for Alsyrawan’s **constitutional** claim.

Nevertheless, we acknowledge in *Dunkelberger v. DHS*, 360 A.3d 13 (Pa. Cmwlth. 2026), the Commonwealth Court recently held the May 2024 version of the 40/60 Rule “null and void” as an “unpromulgated regulation[.]” *Dunkelberger*, 360 A.3d at 28. The Department did not seek allowance of appeal in that case. Here, the parties did not address *Dunkelberger* (which was published in February, after the parties filed their initial briefs), nor did they explore how its holding impacted the version of the 40/60 Rule in effect when the current controversy arose (the September 2016 version). Absent briefing (continued...)

VI. Arguments of the Parties

Alsyrawan insists the Commonwealth Court erred by grafting the required showing of a “substantial burden” under RFPA onto his free exercise claim. Alsyrawan interprets recent Supreme Court decisions in the Free Exercise context as evincing a general skepticism of government policies with individualized exceptions that affect religious exercise, regardless of the burden imposed. See Alsyrawan’s Brief at 24. According to Alsyrawan, the Supreme Court has determined that if disparate treatment is found in the government’s practice of allowing exceptions to government policies, then “the government policy is as suspect as if it had been created to disadvantage people of faith and can only be upheld if satisfies strict scrutiny.” *Id.*

Alsyrawan explains that prior to the doctrinal shift wrought by *Smith*, “governmental actions that **substantially burden[ed]** a religious practice had to be justified by a compelling governmental interest.” Alsyrawan’s Brief at 24 (emphasis added; punctuation omitted) (*citing Smith*, 494 U.S. at 883). Alsyrawan reads *Smith* as having eliminated the substantial burden requirement, which was necessary for litigants arguing Free Exercise violations under *Yoder* and *Sherbert*. See *id.* at 24, 26. In support, he observes that *Smith* does not include any discussion or analysis of a substantial burden in its pronouncement of a new test governing religious free exercise. See *id.* at 26.

Alsyrawan further argues that the Supreme Court, in recent cases interpreting the Free Exercise Clause, “clearly [does] not use [the substantial burden] test.” Alsyrawan’s

on the issue of mootness, we presume the issues in the case are still live. This is especially so since it appears the Department is still implementing the 40/60 Rule, albeit by different means, and could still promulgate the exact same regulation struck down in *Dunkelberger*. See Ed Mahon, *Shapiro Admin Rules for Medicaid Recipients Spark Lawsuit from People with Disabilities*, Spotlight PA (Sept. 18, 2026), <https://www.spotlightpa.org/news/2026/09/pennsylvania-medicaid-work-hour-travel-rules-disabilities-health/> (last accessed September 28, 2026).

Brief at 26. For example, Alsyrawan highlights the Court's opinion *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021),¹⁹ does not employ the word "substantial" to describe the burden imposed by the government's policy. See Alsyrawan's Brief at 26. Instead, the *Fulton* Court described the burden on the litigant's religious free exercise, as follows:

As an initial matter, it is plain that the City's actions **have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.** The City disagrees. ... But CSS believes that certification is tantamount to endorsement. And religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Id. (emphasis in original; some punctuation omitted) (*citing Fulton*, 593 U.S. at 532). Markedly missing from *Fulton* was any language describing the degree of burden that is required.

Next, Alsyrawan cites the Court's opinion in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022),²⁰ for additional support. In Alsyrawan's interpretation, the *Kennedy* Court's analysis of the litigant's burden under the Free Exercise Clause only required that the litigant's "preferred religious practice genuinely conflicted with the school's policies[.]"

¹⁹ In *Fulton*, Catholic Social Services (CSS) — a foster care agency in Philadelphia — sought an exception to the City of Philadelphia's requirement that foster care agencies cannot reject prospective foster parents based upon their sexual orientation. See *Fulton*, 593 U.S. at 526, 535.

²⁰ In *Kennedy*, an assistant football coach for a public high school was leading prayers on the football field immediately after games. See *Kennedy*, 597 U.S. 507 at 514-515. The school district requested the coach modify his prayers to ensure that reasonable observers would not interpret the school district as having endorsed religion because a "[d]istrict employee, on the field only by virtue of his employment with the [d]istrict, still on duty[,] engaged in overtly religious conduct." *Id.* at 519 (citation and internal quotation marks omitted). After several disruptive incidents involving the coach's continued public prayer, the school district placed the coach on paid administrative leave. See *id.* The Supreme Court determined the school district, "in forbidding [the coach's] brief prayer," did not act pursuant to a neutral and generally applicable rule. *Id.* at 526. Therefore, the school district's conduct had to satisfy strict scrutiny, and the Court found it did not. See *id.* at 532.

Alsyrawan's Brief at 26. Alsyrawan cites the following portion of *Kennedy* as supporting his position: "That Mr. Kennedy **has discharged his burdens is effectively undisputed**. No one questions that he seeks to engage in a sincerely motivated religious exercise." *Id.* at 27 (emphasis added) (*citing Kennedy*, 597 U.S. at 525). Lastly, Alsyrawan points to *Carson as next friend of O.C. v. Makin*, 596 U.S. 767, 778 (2022),²¹ as another example of the Supreme Court finding state action impermissibly burdened religious exercise without any discussion of the substantiality of the burden. *See id.* (citation omitted).

Besides this Supreme Court precedent, Alsyrawan argues the Third Circuit Court of Appeals explicitly held that a showing of a substantial burden is not required under *Smith* and its progeny. *See* Alsyrawan's Brief at 27. Alsyrawan quotes this language from the Third Circuit:

Under *Smith* and *Lukumi*, however, there is no substantial burden requirement when government discriminates against religious conduct. Instead, the plaintiffs need to show only "a sufficient interest in the case to meet the normal requirement of constitutional standing," *Hartmann v. Stone*, 68 F.3d 973, 979 n. 4 (6th Cir. 1995) (rejecting substantial burden requirement)[.]

Id. at 27-28 (emphasis and internal citations omitted) (*citing Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 170 (3d Cir. 2002)). Alsyrawan pointedly notes that the Commonwealth Court's opinion cited and relied upon *Smith*, *Fulton*, *Kennedy*, *Carson*, and *Tenaflly* in its analysis of the neutral and generally applicable prongs of the

²¹ In *Carson*, the Supreme Court found that a government program providing tuition assistance payments to students attending non-religious private schools, but not students attending religious private schools, violated the Free Exercise Clause. *See Carson*, 596 U.S. at 789.

Smith test, but the Court inexplicably did not cite these authorities in its analysis of whether Alsyrawan demonstrated a substantial burden. See *id.* at 28 (citations omitted).²²

After resolving that the Commonwealth Court’s analysis contradicts this case law, Alsyrawan suggests it erred by requiring evidence of a substantial burden for his constitutional claim, and the court improperly comingled its Free Exercise Clause analysis with its RFPA analysis. See Alsyrawan’s Brief at 29. He comments that RFPA is a “statutory mandate to allow exceptions to laws and policies of general applicability when those laws or rules **substantially burden** an individual’s religious exercise.” *Id.* at 29-30 (emphasis added). Alsyrawan maintains RFPA contains different burdens, mandated by statute, which are wholly dissimilar from the legal analysis required under the Free Exercise Clause. He insists the Commonwealth Court’s decision carelessly cited pre-*Smith* cases, post-*Smith* cases, and RFPA cases without recognizing the fundamental, conceptual differences of these frameworks. See *id.* at 29-31.

In particular, Alsyrawan rejects the Department’s reliance on *Anspach ex rel. Anspach v. City of Phila., Dep’t of Pub. Health*, 503 F.3d 256 (3d Cir. 2007), to justify the Commonwealth Court’s application of a substantial burden requirement to his free exercise claim. See Alsyrawan’s Brief at 32. According to Alsyrawan, “*Anspach* is not a case about a request for exemption from government policy. It therefore does not rely upon or even cite to the *Smith* line of cases[, and] contains no discussion of whether a law is ‘neutral’ and ‘generally applicable’ or of a plaintiff’s burden in seeking an exception

²² Further underscoring these omissions, Alsyrawan notes that the Commonwealth Court cited *Religious Rights Found. of PA v. State Coll. Area Sch. Dist.*, 2023 WL 8359957 [No. 23-CV-01144] (M.D. Pa. Dec. 1, 2023) (*Religious Rights*), in its analysis of whether the 40/60 Rule was generally applicable. See Alsyrawan’s Brief at 28 n.6. But the Court, again, failed to recognize the federal district court also stated: “[T]here is no substantial burden requirement when government discriminates against religious conduct ... [b]ecause more recent case law is clear that even an incidental burden on religious conduct violates the Free Exercise Clause if it is not imposed through a neutral and generally applicable policy[.]” *Id.* (citing *Religious Rights*, 2023 WL 8359957, at *4).

to a government rule, because that is not the type of [f]ree [e]xercise claim it addresses.” *Id.* He also dismisses the Department’s emphasis on *Stewart, supra*. See *id.* at 35 (citation omitted). Alsyrwan concludes that any language in *Stewart* describing a substantial burden requirement is solely concerned with a “plaintiff’s burden under the Religious Freedom Restoration Act which, like Pennsylvania’s RFPA, requires a showing of substantial burden[.]”²³ *Id.* (internal quotation mark omitted).

In response to Alsyrwan’s arguments, the Department contends the Commonwealth Court properly required, as a threshold matter to a free exercise claim, that Alsyrwan demonstrate the 40/60 Rule substantially burdened his free exercise. See Department’s Brief at 9. The Department avers that courts have “repeatedly recognized the need for a plaintiff to first establish as a threshold matter that the application of a challenged action imposes a substantial burden to his or her free exercise of religion before determining if the challenged action violates plaintiff’s constitutional right[.]”²⁴ *Id.* at 11-12 (citations omitted).

The Department also dismisses Alsyrwan’s reliance on *Fulton*. It maintains the *Fulton* Court recognized that the litigant’s religious exercise had been burdened, but the

²³ A significant portion of Alsyrwan’s brief challenges the Commonwealth Court’s determination that the 40/60 Rule does not impose a substantial burden on his religious exercise. See Alsyrwan’s Brief at 38-50. Likely in an abundance of caution, the Department, while correctly recognizing that this argument is beyond the grant of *allocatur*, briefed and countered Alsyrwan’s contentions. See Department’s Brief at 22, 27-31. As discussed *supra*, this Court declined to grant *allocatur* to consider the Commonwealth Court’s determination that the 40/60 Rule does not substantially burden Alsyrwan’s religious exercise. See n.18.

²⁴ In support, the Department presents a lengthy string-cite of cases. See Department’s Brief at 11-12 (citing *St. Elizabeth’s Child Care*, 989 A.2d at 55; *Stewart*, 609 A.2d at 201; *Kaur v. Singh*, 259 A.3d 505, 510 (Pa. Super. 2021); *Commonwealth v. Parente*, 956 A.2d 1065, 1072-1073 (Pa. Cmwlth. 2008); *Anspach*, 503 F.3d at 272; *Piskanin v. Rendell*, 2008 WL 4442004, at *4 [No. 06-129J] (W.D. Pa. Sept. 30, 2008); *Thompson v. Ferguson*, 849 F. App’x 33, 36 (3d Cir. 2021)).

Court did not state the extent of this burden. See Department's Brief at 13, 14 ("[T]he *Fulton* Court does not ... indicate what level of burden was required[.]"). Thus, the Department insists "*Fulton* is not dispositive of the issue that the burden must be substantial." *Id.* at 13. The Department advances a similar argument to reject Alsyrawan's reliance on *Kennedy*. See *id.* at 14 ("The [*Kennedy*] Court then found that it was undisputed that the plaintiff 'discharged his burdens,' without extrapolating on what type of burden was required." (citation omitted)). It also asserts that any language in *Tenafly*, rejecting a substantial burden requirement, was effectively repudiated by the Third Circuit's subsequent decision in *Anspach*. See *id.* 14-15 n.2. Lastly, the Department cites this Court's decision in *Stewart* as proof that a litigant has the "initial burden of establishing that a rule of general applicability constitutes a substantial burden on his or her free exercise of religion." *Id.* at 15 (citing *Stewart*, 690 A.2d at 201).

VII. Analysis

A. Substantial Burden

The question before this Court is straightforward: must litigants alleging a violation of the Free Exercise Clause demonstrate a substantial burden upon their religious exercise?²⁵ It is undisputed that prior to *Smith*, evidence of a **substantial burden** was

²⁵ Justice Mundy argues this Court granted review on the entirety of Alsyrawan's free exercise claim. This is incorrect. This Court only granted review on whether the Commonwealth Court improperly grafted RFPA's substantial burden requirement onto Alsyrawan's free exercise claim. See *supra* n.18, n.23. Thus, her analysis of whether the 40/60 Rule is neutral and generally applicable and application of rational basis review is wholly outside the scope of our review. See Justice Mundy's Concurring and Dissenting Opinion at 8-10. Likewise, this Court expressly denied allocatur on Alsyrawan's issue seeking review of the Commonwealth Court's application of RFPA. See *Alsyrawan*, 329 A.3d at 449. Therefore, Justice Mundy's lengthy analysis of RFPA, which would reaffirm the Commonwealth Court's decision on this point, strays far afield from the ambit of our review. See Justice Mundy's Concurring and Dissenting Opinion at 5-8.

required for such constitutional arguments. See *Sherbert*, 374 U.S. at 403-406; see also *Yoder*, 406 U.S. at 217-218. It is also undisputed that evidence of a substantial burden is required for claims under RFRA and RFPA. See 42 U.S.C. § 2000bb-1(a) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability[.]”); 71 P.S. § 2402(1) (“[N]either State nor local government should substantially burden the free exercise of religion without compelling justification.”). Therefore, this Court’s sole inquiry is to assess *Smith* and post-*Smith* precedent to determine if a substantial burden is required for a constitutional free exercise claim. If it is, then the Commonwealth Court did not err in applying the same threshold inquiry to Alsyrawan’s constitutional and statutory claims. However, if a substantial burden is **not** required for free exercise claims — despite being necessary for RFPA claims — then the Commonwealth Court incorrectly conflated its analysis of Alsyrawan’s two avenues for relief. Ultimately, we hold that a substantial burden on religious exercise is not necessary to prove a violation of the Free Exercise Clause.

Naturally, we begin with the Free Exercise Clause²⁶ and relevant Supreme Court precedent, which binds this Court. As a preliminary matter, it cannot be denied that in recent years, the Supreme Court’s interpretation of the Free Exercise Clause has been in flux. See Lund, *Second-Best Free Exercise*, 844 (“Free Exercise is in the middle of a revolution.”). Unfortunately, recent Supreme Court decisions concerning the Free Exercise Clause are not models of clarity. See Schwartzman, et.al., *The Structure of Religious Preference*, 212 (“Many of the Court’s recent religious freedom decisions are based on the revival or resuscitation of individual precedents that had not been invoked in decades and that had limited, if any, extensions or applications. But rather than explain

²⁶ “Congress shall make no law ... prohibiting the free exercise thereof.” U.S. CONST. amend. I.

how these precedents are connected, and rather than draw clear lines between them, the Court has moved from one to the next, leaving the future of each undeveloped and uncertain.”) (footnote omitted); see also *Pandora’s Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1178 (2023) (arguing that the Supreme Court’s recent precedent on the Free Exercise Clause has been “haphazard and sloppy, leaving lower courts with little meaningful guidance on how to evaluate the constitutionality of laws burdening religion”).

Furthermore, while certain precedents, such as *Smith*, remain seemingly good law, in practice, the meaning of these precedents appears to be shifting quite dramatically. See *Pandora’s Box*, 1184 (arguing that recent decisions have “departed from the heart of *Smith*”); see also Feldman, *The Roberts Court’s Transformative Religious Freedom Cases*, 539 (“The Roberts Court has not explicitly overruled *Smith*, but it has in effect repudiated most of its doctrinal significance.”); Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J. FORUM 436, 436-437 (2023) (“[S]ince *Smith* was decided, the Supreme Court has steadily lessened its reach.”). Despite this turmoil and radical change, it is this Court’s duty to review and apply the Supreme Court precedent when dealing with a federal constitutional challenge. See *Hall v. Pa. Bd. of Prob. & Parole*, 851 A.2d 859, 863 (Pa. 2004) (“It is beyond cavil that this Court is bound by the determinations of the United States Supreme Court on issues of federal law, including the construction and interpretation of the federal constitution.”). To understand whether a substantial burden is still required for free exercise claims, we first turn to the most recent, relevant precedent from the United States Supreme Court, *Mahmoud v. Taylor*, 606 U.S. 522 (2025).²⁷

At issue in *Mahmoud* was a school board’s introduction of “LGBTQ+ inclusive” books into the district’s elementary school curriculum. See *Mahmoud*, 606 U.S. at 528-

²⁷ Briefing in this case was submitted prior to the Supreme Court’s decision in *Mahmoud*, so neither party had the opportunity to address *Mahmoud* in their arguments.

529. A group of parents filed suit, asserting that this curriculum, in conjunction with the board's decision not to approve opt-out requests from parents, burdened their religious exercise. See *id.* at 530. The Supreme Court agreed with the parents and concluded that the school board's policy placed an unconstitutional burden on the parents' right to freely exercise their religious beliefs. See *id.* at 546. The Court found that it has "long recognized the rights of parents to direct the religious upbringing of their children" and has held that "those rights are violated by government policies that substantially interfere with the religious development of children." *Id.* (citations and internal quotation marks omitted). To reach this conclusion, the Supreme Court offered the following analysis regarding acceptable burdens on free exercise:

Under our precedents, the government is **generally free to place incidental burdens on religious exercise so long as it does so** pursuant to a neutral policy that is generally applicable. Thus, in most circumstances, **two questions remain after a burden on religious exercise is found.** First, a court must ask if the burdensome policy is neutral and generally applicable. Second, if the first question can be answered in the negative, a court will proceed to ask whether the policy can survive strict scrutiny.

Id. at 564 (emphases added; citation omitted).²⁸ This paragraph is telling. First, the Court classifies the threshold inquiry as evaluating only whether there is a "burden on religious exercise" not a substantial burden. Second, the Court avers that "incidental" burdens on religious exercise are "generally" permissible, as long as these burdens are a result of a neutral, generally applicable policy. *Id.* at 564. It is appropriate to infer from this precept that incidental burdens on religious exercise, due to policies that **are not** neutral or generally applicable, **are generally not permissible**, as they are subject to the rigors of

²⁸ The *Mahmoud* Court ultimately did not analyze its case under the *Smith* framework of neutrality and general applicability. See *Mahmoud*, 606 U.S. at 564 ("When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny."). While the Court found *Smith* inapplicable, the Court's discussion of the burdens required for free exercise claims also considered burdens analyzed under the *Smith* framework. See *id.* at 564-565.

strict scrutiny.²⁹ Otherwise, it would be unclear why the Court saw the need to specify the burden as “incidental.” From this language, we must deduce that even incidental burdens are subject to the *Smith* analysis of neutrality and general applicability.

This depiction of the requisite burden for a Free Exercise Clause violation is not an outlier. The *Mahmoud* Court also stated: “We need only decide whether — if teachers act according to the clear and undisputed instructions of the Board — a **burden on religious exercise will occur.**” *Mahmoud*, 606 U.S. at 560 (emphasis added). In addition, the *Mahmoud* Court commented that “[p]ublic education is a public benefit, and the government cannot condition its availability on parents’ willingness to accept a **burden on their religious exercise.**” *Id.* at 561 (emphasis added; citation and internal quotation marks omitted). At no point did the *Mahmoud* Court state that a substantial burden is required for a free exercise claim.³⁰ While the *Mahmoud* Court did not issue an explicit holding on this point, the Court’s decision strongly suggests evidence of a substantial burden is no longer required for a free exercise claim.

Admittedly, if Alsyrawan could point only at *Mahmoud* for evidence, he would be resting upon a rather slender reed. It is possible the contrary language in *Mahmoud* could

²⁹ Justice Mundy argues that “incidental” in this context does not refer to the burden’s “weight,” but instead, it is a description of the burden as an “incidental effect” of the government’s action. Justice Mundy’s Concurring and Dissenting Opinion at 2 n.3. We disagree. The usage of “incidental” both indicates the burden is a consequence of government’s action, **and** it also suggests the relative degree of the burden, especially in contrast to pre-*Smith* case law requiring proof of a “substantial burden.” Moreover, even if the *Mahmoud* Court’s usage of the word “incidental” has no bearing on the weight of the burden, the next sentence in *Mahmoud* refers to the requisite burden as merely a “burden on religious exercise” which is further evidence *Smith* discarded the substantial burden threshold. *Mahmoud*, 606 U.S. at 564.

³⁰ The *Mahmoud* Court, at several times, stated the school board’s policy “substantially interfere[d] with the religious development of [the parents’] children[.]” *Mahmoud*, 606 U.S. at 550. However, the Court was clearly borrowing this specific phrase from *Yoder*, which it relied upon heavily in its decision. See *id.* (citing *Yoder*, 406 U.S. at 218). We do not equate substantial interference with substantial burden.

be an accident or confined to the unique facts of that case. However, other post-*Smith* precedent from the United States Supreme Court firmly implies this conclusion as well. See *Church of Lukumi*, 508 U.S. at 546 (“A law **burdening** religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” (emphasis added)); *Fulton*, 593 U.S. at 532 (“As an initial matter, it is plain that the City’s actions have **burdened** CSS’s religious exercise[.]” (emphasis added)); *Kennedy*, 597 U.S. at 525 (“Under this Court’s precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has **burdened** his sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” (emphasis added; citation omitted)). The post-*Smith* cases consistently refer to “burdens” on free exercise, not substantial burdens.

The Department is correct that these cases do not expressly define the weight of the burden, but the conspicuous disappearance of the phrase “substantial burden” is revealing. This post-*Smith* precedent is in striking contrast to pre-*Smith* cases, which are replete with references to substantial burdens.³¹ See *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384-385 (1990) (“Our cases have established that the free exercise inquiry asks whether government has placed a **substantial burden** on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.” (emphasis added; citation and some punctuation omitted)); *Hernandez*, 490 U.S. at 699 (same); *Thomas*, 450 U.S. at 718 (“While the compulsion may be indirect, the infringement upon free exercise is nonetheless **substantial**.” (emphasis added)); *Sherbert*, 374 U.S. at 406 (“We must next

³¹ Admittedly, not all pre-*Smith* cases employed the precise phrase “substantial burden.” See generally *United States v. Lee*, 455 U.S. 252 (1982). But *Lee* has been interpreted as employing the substantial burden requirement. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006).

consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the **substantial infringement** of appellant's First Amendment right." (emphasis added)). From these tea leaves, it is evident the "substantial burden" requirement vanished in *Smith*.

Some federal circuit courts reviewing this case law have also arrived at this destination, especially in recent years.³² The Third Circuit explicitly held that "[u]nder *Smith* and *Lukumi*, ... there is no substantial burden requirement when government discriminates against religious conduct."³³ *Tenaflly*, 309 F.3d at 170 (citation omitted). Of particular note is the Second Circuit's decision in *Kravitz v. Purcell*, 87 F.4th 111 (2d Cir. 2023), which concurs with our analysis. There, the Second Circuit acknowledged the continued ambiguity of the required burden under the Free Exercise Clause. See *Kravitz*,

³² This Court reads inferior federal court decisions as persuasive, but not binding authority. See *Commonwealth v. Hicks*, 208 A.3d 916, 936 n.13 (Pa. 2019). The United States Supreme Court is the ultimate arbiter of federal constitutional law. See *id.*

³³ We agree with Alsyrwan that any statements to the contrary in the Third Circuit's later decision in *Anspach* are unpersuasive. While the *Anspach* Court does aver the First Amendment is "only implicated if the governmental burden on religion is substantial[.]" its support for this position is not compelling. *Anspach*, 503 F.3d at 272 (citation and internal quotation mark omitted). The *Anspach* Court only cites to precedent issued **prior to *Smith*** for this substantial burden language. *Id.* (citing *Hernandez*, 490 U.S. 680).

By contrast, in *Tenaflly*, the Third Circuit analyzed *Smith* and subsequent precedent to arrive at its conclusion that the substantial burden threshold was no longer good law. See *Tenaflly*, 309 F.3d at 170 (citations omitted). This holding in *Tenaflly* has been validated by the Supreme Court's recent decisions in *Fulton*, *Kennedy*, and *Mahmoud*. Ultimately, *Tenaflly*'s interpretation of *Smith* aligns with this Court's analysis and, on its face, is more persuasive than *Anspach*.

Similarly, we find the Department's reliance on *Thompson v. Ferguson*, 849 F. App'x 33 (3d Cir. 2021), an unpublished circuit court decision, also unpersuasive. In *Thompson*, the Third Circuit determined a litigant's free exercise claim was deficient because he did not argue the government conduct substantially burdened his exercise of religion. See *Thompson*, 849 F. App'x at 36. The Court's sole citation for this assertion is *Anspach*, which as we determined above, is not persuasive authority, especially when compared to *Tenaflly*. See *id.*

87 F.4th at 121 (“[W]e have recognized that, since *Smith*, the legal validity of the substantial burden test remains an open question.”). After extensive analysis, the Second Circuit, relying upon *Kennedy*, *Fulton*, and *Church of Lukumi*, determined that “since *Smith*[,] the Supreme Court has treated a showing of the plaintiff’s sincerity to be sufficient to establish a *prima facie* free exercise violation and has not referenced a substantial burden requirement.” *Id.* at 124 (citations omitted). The Court then concluded that when government actions are not neutral or generally applicable, “there is no justification for requiring a plaintiff to make a threshold showing of substantial burden.” *Id.*

The Second and Third Circuits are not alone in declining to apply a substantial burden requirement. See *Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (stating that litigants “need not demonstrate a substantial burden on the practice of their religion” and only need to “demonstrate a sufficient interest in the case to meet the normal requirement of constitutional standing”); *World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009) (“If a state or local government deliberately discriminated against a religious organization (or against religion in general), it would be violating the free exercise clause even if the burden that the discrimination imposed on the plaintiff was not ‘substantial[.]’” (citations omitted)). In another case, the Fourth Circuit, while finding it unnecessary to identify the exact burden necessary for a violation of the Free Exercise Clause, raised doubt about the continued viability of the substantial burden requirement. See *Firewalker-Fields v. Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023) (“Yet our Circuit still applies a ‘substantial burden’ threshold test, and while that may have made sense for a few years in the 1980s, it no longer does.”).

Admittedly, there are other circuits courts where the substantial burden requirement endures. See *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (“[T]he First Amendment is implicated when a law or regulation imposes a substantial, as

opposed to inconsequential, burden on the litigant’s religious practice.”); *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053 (8th Cir. 2020) (“[The litigant] must show the challenged regulation ‘substantially burdens’ his sincerely held belief.” (citation omitted)); *Williams v. Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021) (stating that a “substantial burden” requirement is part of the inquiry under the Free Exercise Clause); *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 101 (1st Cir. 2013) (same).

This split amid the circuit courts reveals a lack of consensus on this issue. However, from our vantage point in 2026,³⁴ with the surfeit of recent Supreme Court precedent before us, it is clear that the Supreme Court has discarded the substantial burden threshold, and its precedent controls our analysis under the First Amendment.

The Department is correct that Pennsylvania’s lower courts have determined a substantial burden is a prerequisite for a free exercise claim. See *St. Elizabeth’s Child Care*, 989 A.2d at 55 (concluding that the claimant had not “satisfied its threshold burden” of establishing that the state regulations “substantially burden[ed the claimant’s] free exercise of religion”); *Kaur*, 259 A.3d at 510 (“[T]he First Amendment is only implicated if the governmental burden on an individual’s religious practice is **substantial**.” (emphasis in original) (citing *Anspach*, 505 F.3d at 272)). However, this Court has never cited either of these cases nor adopted their conclusions.

Despite the Department’s arguments to the contrary, our holding does not conflict with past decisions from this Court. *Stewart* is the only case the Department cites in support of its position, but upon a closer read, it does not offer succor to the Department. Any reference in *Stewart* to a substantial burden concerned the litigant’s RFRA claims — a statutory challenge. The *Stewart* Court explicitly relied upon RFRA for its definition of

³⁴ It is telling that the Second Circuit, the latest circuit to weigh in on this question, with the benefit of the Supreme Court’s decisions in *Fulton* and *Kennedy*, arrived at this conclusion as well.

substantial burden. See *Stewart*, 690 A.2d at 201 (citing 42 U.S.C. § 2000bb–1(b)). Moreover, the Court’s statement that the “plaintiff has the initial burden of establishing that a rule of general applicability constitutes a substantial burden on his or her free exercise of religion[.]” in context, was elaborating the analysis under RFRA. *Id.* The above language is, in fact, derived from the portion of a federal district court decision evaluating a RFRA claim.³⁵ *Id.* (citing *Muslim*, 891 F.Supp. at 229). Furthermore, the *Stewart* Court resolved the litigant’s free exercise and RFRA claims in the same sentence and concluded that “the **burden** on the [litigant’s] religious freedom furthers a compelling governmental interest by the least restrictive means available.” *Id.* at 291 (emphasis added). The *Stewart* Court opted to not evaluate whether the government’s action was neutral and generally applicable, pursuant to *Smith*, because it determined that, regardless, the government’s conduct satisfied strict scrutiny.

Therefore, *Stewart* does not stand for the proposition that a substantial burden is required for litigants pursuing constitutional free exercise claims. Any references to substantial burdens in *Stewart* concern the legal analysis required under RFRA, and as such, do not apply to constitutional claims under the Free Exercise Clause. In conclusion, this Court’s precedent has not endorsed a substantial burden requirement post-*Smith*, and any suggestion, among our lower courts, that such a requirement continues to apply is improper.

B. Burden

Having found that evidence of a substantial burden is not required for a free exercise claim, logically, the next question is then, what burden is required? Once more,

³⁵ The full quote from the district court reads as follows: “Under the test established by RFRA, the plaintiff bears the initial burden of establishing that a rule of general applicability constitutes a ‘substantial burden’ on his or her free exercise of religion.” *Muslim v. Frame*, 891 F.Supp. 226, 229 (E.D. Pa. 1995).

our gaze turns towards the Supreme Court. The High Court’s recent decisions have found litigants’ religious free exercise burdened by government action, but the Court has not expressly provided a straightforward statement defining what burden is required for these claims.³⁶ Nevertheless, we can discern a leitmotif among the Court’s jurisprudence in the context of procuring government benefits – a litigant is burdened when the government “put[s] [them] to the choice” of receiving the benefit or upholding one’s religious principles. *Fulton*, 593 U.S. at 532. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (*Trinity Lutheran*), a state agency’s policy put the religious organization “to a choice: It may participate in an otherwise available benefit program or remain a religious institution.” *Trinity Lutheran*, 582 U.S. at 462. Subsequently, in *Fulton*, the Supreme Court renewed the “choice” language and held that it was “plain that the City’s actions ... burdened [the foster care agency’s] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.” *Id.* More recently, in *Mahmoud*, the Court determined that a challenged policy “put [parents] to a choice: either risk their child’s exposure to burdensome instruction, or pay substantial sums for alternative educational services” and that “that choice unconstitutionally burdens the parents’ religious exercise[.]” *Mahmoud*, 606 U.S. at 569.³⁷

³⁶ For example, in *Kennedy*, the Court stated that a plaintiff “bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses.” *Kennedy*, 597 U.S. at 524.

³⁷ Federal courts of appeals have generally recognized this rule. See, e.g., *A.H. v. French*, 985 F.3d 165, 180 (2d Cir. 2021) (holding that state’s reliance on a “publicly funded” requirement as a condition for an education program imposed a “penalty on the free exercise of religion” because it forced the university to choose whether to participate in the program or remain a religious institution and it required the litigant to choose between attending the religious school or receiving such benefits); *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 731 (6th Cir. 2021) (“Accordingly, a policy that forces a person to choose between observing her religious beliefs and receiving a generally available government benefit for which she is otherwise qualified burdens her free exercise rights.”); *Janny v. Gamez*, 8 F.4th 883, 912 (10th Cir. 2021) (claimant sufficiently (continued...))

Accordingly, a litigant satisfies the threshold showing of a burden on their religious practice by demonstrating that they must choose between receiving a government benefit or abiding by their religious beliefs. In other words, they must make a “forced choice” – the state actor does not provide a benefit option where the litigant can have both.

VIII. Conclusion

RFPA and the Free Exercise Clause are different legal routes for litigants to allege violations of their right to freely exercise their religion. The Supreme Court’s recent decisions indicate that a violation of the Free Exercise Clause may occur only when an individual’s religious exercise is simply burdened, as opposed to substantially burdened as required prior to *Smith*. Therefore, analysis of constitutional claims under the U.S. Constitution and statutory claims under RFPA cannot be conflated. Evidence of a substantial burden is required for claims under RFPA, but only a burden is required for such claims under the Free Exercise Clause. The appropriate standard of review — strict scrutiny or rational basis — is determined by assessing whether the burden is imposed by government policy or conduct that is not neutral or generally applicable. See *Kennedy*, 597 U.S. at 525 (citation omitted). If a litigant demonstrates that the government policy or conduct, imposing the burden, is not neutral or generally applicable, under *Smith* and its progeny, the litigant is entitled to relief, unless the government can satisfy strict scrutiny by demonstrating that its conduct was justified by a compelling state interest and narrowly tailored in pursuit of that interest. See *id.*

set forth a free exercise clause violation against a government actor, a parole officer, where the officer’s policy “indisputably burdened [claimant’s] exercise of his religion” because it made him, as a condition of his parole, choose between attending “Christian worship services and bible study to avoid being sent [back] to jail[.]”).

Here, the Commonwealth Court erred by requiring Alsyrawan to prove a **substantial burden** on his religious practice under the Free Exercise Clause. Alsyrawan must only show evidence of a burden on his religious practice by demonstrating that the Department's policy required him to make a "forced choice" — forgo the benefits or abide by his religious beliefs. Accordingly, the order of the Commonwealth Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

Chief Justice Todd and Justices Donohue, Dougherty and Brobson join the opinion.

Justice Wecht files a concurring and dissenting opinion.

Justice Mundy files a concurring and dissenting opinion.