STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

KRIS W. KOBACH
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

December 19, 2024

Danny Martinez
American Oversight
1030 15th St NW
Washington, DC 20005

RE: Request for Records

Dear Danny Martinez:

On October 29, 2023, we received your letter dated October 29, 2024 requesting records in the possession of this office. In your letter, you request the following:

> American Oversight requests that your office produce the following records within three business days:
>
> All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) sent by the Office of the Attorney General officials listed below and containing any of the key terms listed below.
>
> Office of the Attorney General Officials:
> 1. Kris Kobach, Attorney General
> 2. Charles Dalton, Chief of Staff
> 3. Dan Burrows, Chief Deputy Attorney General
> 4. Anthony Powell, Solicitor General
> 5. Robert Hutchinson, Deputy Attorney General
> 6. Abhishek Kambli, Deputy Attorney General
> Key Terms:
> a. Mifepristone
> b. Misoprostol
> c. “Alliance for Hippocratic Medicine”

d. “medication abortion”
e. “abortion medication”
f. Comstock
g. Kacsmaryk
h. “abortion pill”
i. “plan b”
j. “emergency contraception”

In an effort to accommodate your office and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by the listed officials. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. For example, both Attorney General Kobach’s response to an email containing a listed key term and the initial received message are responsive to this request and should be produced. Please provide all responsive records from July 1, 2024, through the date the search is conducted.

The Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq*., establishes a framework for responding to requests for public records, as well as providing access to or copies of records in the possession of a public agency. However, it does not require a public agency to answer questions asking for information. Likewise, the KORA does not require that a public agency create a document to respond to a request for information. A public agency is only required to produce copies of records in existence at the time of the request, subject to any statutory restrictions.

This letter is written to acknowledge receipt of your request and provide you with information concerning its status, in accordance with K.S.A. 45-218(d).

We have completed our search of records that are responsive to your request. There were forty (40) email communications that occurred containing the search terms of your request in the time period identified in your request.

Thirty (30) of these records are closed under K.S.A. 45-221(a)(1) due to being closed records under the rules of the Kansas Supreme Court and other sections of Kansas state statute. These same records also constitute attorney work product and are closed under K.S.A. 45-221(a)(25).

Ten (10) records are responsive to your request and considered records open to the public under the Kansas Open Records Act. These records will be sent to you electronically to the email account records@americanoversight.org.
If you require any additional assistance regarding this request for records, please feel free to contact our office.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
KRIS W. KOBACH

Matt Bingesser
Assistant Attorney General

Bingesser, Matt

From: Courts Law360 Pulse <newsletters@law360.com>
Sent: Friday, October 25, 2024 4:03 PM
To: Kambli, Abhishek
Subject: Ex-Judge Can't Hide Bank Records In Romance Cash Probe

LAW360 | Pulse

Courts

FRIDAY, OCTOBER 25, 2024

Ex-Judge Can't Hide Bank Records In Romance Cash Probe

By Emily Sawicki

A Texas federal bankruptcy court on Friday shot down a former federal judge's bid to shield his banking records from a U.S. Trustee's Office inquiry into his concealed romantic relationship with a former Jackson Walker LLP partner, giving Bank of America NA one week to provide six years of the former judge's bank statements.

2 documents attached | Read full article ?? | Save to favorites ??

Woman Accused Of Threatening To Kill Judge Kacsmaryk

By Spencer Brewer

Prosecutors have indicted a woman who allegedly threatened death on a Texas federal judge a week after he blocked federal approval of the abortion drug mifepristone, saying the woman sent communications promising murder and assault around April 2023, according to an unsealed indictment.

2 documents attached | Read full article ?? | Save to favorites ??

NYC Bar Rates 4 Sitting Judges 'Not Approved' For Reelection

By Frank G. Runyeon

The New York City Bar Association announced Friday that four sitting judges in state and city courts seeking reelection had failed to show the qualifications needed to perform their duties, a rebuke that hasn't been seen in recent years.

Read full article ?? | Save to favorites ??

Adams Rips Feds, Calling Explanation For Leaks 'Far-Fetched'

By Elliot Weld

Attorneys for New York City Mayor Eric Adams on Friday renewed their claims that the prosecutors handling his bribery and corruption case leaked secret grand jury information to the press, arguing that the alternative explanation that either Adams or his co-defendants made the leaks was a "far-fetched claim."

Memorandum attached | Read full article ?? | Save to favorites ??

LAW FIRMS IN TODAY'S NEWS

Bondurant Mixson
Bowles Law Firm
Caldwell Carlson
Christian & Barton
Daspit Law Firm
Dykema
Hall Booth
Jackson Walker LLP
James A. Yancey Jr. Attorney at Law
Jones Day
Kramon & Graham
Marc J. Bern & Partners
Norton Rose
Offit Kurman
Pierson Law LLC
Quinn Emanuel
Rui Attorneys
Rusty Hardin & Associates
Smith Gambrell

COMPANIES IN TODAY'S NEWS

Amegy Bank NA
American Bar Association
Bank of America Corp.
Baylor University

Congress Urged To Further Inspect FBI's Kavanaugh Probe

By Katie Buehler

More than 50 civil rights groups have called on members of the U.S. Congress to further investigate the Trump White House's role in restricting the FBI's investigation into sexual misconduct allegations lodged against U.S. Supreme Court Justice Brett Kavanaugh during his 2018 confirmation process.

Letter attached | Read full article ?? | Save to favorites ??

Trump Co-Defendants Stuck In Ga. State Court, 11th Circ. Says

By Kelcey Caulder

The Eleventh Circuit on Thursday rejected attempts from four co-defendants of former President Donald Trump to have their Georgia election interference cases moved from state to federal court.

2 documents attached | Read full article ?? | Save to favorites ??

Baldwin 'Rust' Judge Rejects State's Bid To Revive Case

By Phillip Bantz

A New Mexico judge declined to reconsider a decision throwing out the "Rust" movie shooting case against actor-producer Alec Baldwin based on prosecutorial misconduct, according to an order released Friday.

Order attached | Read full article ?? | Save to favorites ??

4th Circ. Backs Sanctioning Firm $1M For 'Defiance' Of Court

By Lauren Berg

The Fourth Circuit on Thursday upheld a roughly $1 million sanction against the law firm of New York plaintiffs attorney Paul J. Napoli for its purportedly frivolous filings in a battle with another firm over asbestos litigation client referrals, saying the firm's misconduct was in "direct defiance" of a Maryland federal court's authority.

Opinion attached | Read full article ?? | Save to favorites ??

Ga. Atty Can't Beat Contempt Charge Over Trial Tardiness

By Emily Johnson

The Georgia Court of Appeals on Friday rejected an attorney's argument that his due process rights were violated when he was found in contempt, finding that his tardiness to a trial ??? where the judge sent the jury home due to the absence of the lawyer and his client ??? was direct contempt.

Opinion attached | Read full article ?? | Save to favorites ??

The Candidates In Surprise Texas Criminal Court Matchups

By Lynn LaRowe

Three sets of Republican and Democratic candidates are facing off next month to join the top criminal court in Texas after GOP incumbents suffered "unprecedented" primary losses amid a barrage of criticism over their earlier ruling in an election fraud case.

Read full article ?? | Save to favorites ??

Ga. Court Admin Says Retaliation Suit Must Go Ahead In Full

Meadow
National Women's Law Center
New York Post
People For the American Way
State Bar of Georgia
The New York Times Co.
The State University of New York
Yale University
Zions Bancorp.

GOVERNMENT AGENCIES IN TODAY'S NEWS

California Supreme Court
Equal Employment Opportunity Commission
Federal Bureau of Investigation
Food and Drug Administration
Georgia Attorney General's Office
Georgia Court of Appeals
Texas Department of Licensing and Regulation
Texas Judicial Branch
Texas Lottery Commission
Texas Supreme Court
U.S. Attorney's Office
U.S. Attorney's Office for the Northern District of California
U.S. Attorney's Office for the Northern District of Texas
U.S. Attorney's Office for the Southern District of New York
U.S. Court of Appeals for the Eleventh Circuit
U.S. Court of Appeals for the Fourth Circuit
U.S. Department of Justice
U.S. District & Bankruptcy Courts of Southern District of Texas
U.S. District Court for the Northern District of Georgia
U.S. District Court for the Northern District of Texas
U.S. District Court for the Southern District of New York
U.S. Marine Corps
U.S. Supreme Court

By Chart Riggall

A former Georgia municipal court administrator who said she was forced out of her position after reporting corruption by a city council member has asked a federal judge to preserve her suit in full, arguing a federal magistrate misapplied a sexual harassment standard to what was better characterized as retaliation claims.

Brief attached | Read full article ?? | Save to favorites ??

Voir Dire: Law360 Pulse's Weekly Quiz

By Xiumei Dong

The legal industry had another action-packed week as firms prepared for increased lobbying activity in anticipation of the upcoming election, while lawyers nationwide came together to support a nonpartisan initiative focused on protecting the electoral process. Test your legal news savvy here with Law360 Pulse's weekly quiz.

Read full article ?? | Save to favorites ??

Bingesser, Matt

From: Hawver's Capitol Report <hawversreport@stateaffairs.com>
Sent: Tuesday, October 22, 2024 7:47 AM
To: Dalton, Charles
Subject: Kansas Daily News Wire

Read Online

HAWVER'S CAPITOL REPORT / STATE AFFAIRS

Kansas Daily News Wire

STATE

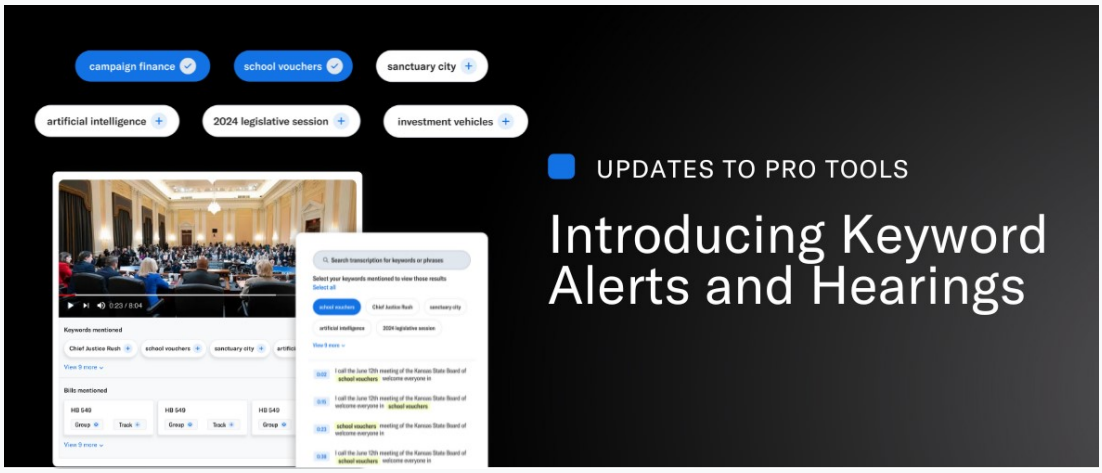
Kelly optimistic about prospects of extinguishing GOP supermajorities: With Election Day rapidly approaching, Gov. Laura Kelly expressed increased optimism that Democrats are on track to break the GOP-controlled Legislature's long-held supermajorities in the House and Senate. (Resnick, *State Affairs*)

Kansas AG joins suit against abortion pill access: Kansas Attorney General Kris Kobach is continuing a legal battle with the Food and Drug Administration to ban mifepristone, one of two drugs used for medicated abortions, after the U.S. Supreme Court rejected an earlier version of the lawsuit in June. (*Topeka Capital-Journal*)

Evergy to build new natural gas plants in Sumner, Reno counties: Evergy will build two new natural gas plants in Sumner and Reno counties by the end of the decade, the electric utility company announced Monday. (Stover, *State Affairs*)

Kansas physicians emphasize drug costs, health care access in 3rd District congressional race: Kansas pediatrician Trevena Moore says federal policy influencing access to quality and affordable health care for her patients is a pivotal issue in the 3rd District congressional race. (*Kansas Reflector*)

STATE AFFAIRS



Discover news and bills from your keywords. Get alerts when your keywords surface in articles, bills and hearings. Whether you're tracking competitors, clients, companies or legislators – we can be your eyes and ears of the Statehouse.

LOCAL

Record first-day turnout for in-person advanced voting in Shawnee County: Voters lined up bright and early Monday morning at the Shawnee Co. Elections Office for in-person advanced voting prior to the upcoming election. (WIBW)

In-person advance voting turnout in Douglas County is trending high; mail ballots 'moving quickly': A few days into advance voting ahead of the Nov. 5 general election, the county's in-person early voting numbers are "trending higher than any election right now," according to Douglas County Clerk Jamie Shew. (*The Lawrence Times*)

KC Star, Wichita Eagle win Scripps Howard Award for Marion newspaper raid coverage: The Kansas City Star and The Wichita Eagle have been recognized with a prestigious national journalism award for their combined coverage of a police raid on a small town Kansas newspaper. (*The Kansas City Star*)

How cold will it be this winter in Wichita? See what forecasters predict for Kansas: The Wichita area is expected to see above normal temperatures November through January, according to the National Weather Service's Climate Prediction Center. But according to one local forecaster, there's not a strong forecast either way. (*The Wichita Eagle*)

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Bingesser, Matt

From: William Cole <William.Cole@oag.texas.gov>
Sent: Friday, October 18, 2024 6:16 PM
To: Barrett.Bowdre@AlabamaAG.gov; Powell, Anthony J.; Edmund.LaCour@AlabamaAG.gov; Katherine.Robertson@AlabamaAG.gov; robert.tambling@alabamaag.gov; ben.hofmeister@alaska.gov; Chris.Robison; cori.mills@alaska.gov; david.wilkinson@alaska.gov; Pickett, Jeff G (LAW); jessie.alloway@alaska.gov; ninia.dizon@alaska.gov; Amanda Wentz; dylan.jacobs@arkansasag.gov; Nicholas.Bronni@arkansasag.gov; christopher.baum@myfloridalegal.com; daniel.bell@myfloridalegal.com; henry.whitaker@myfloridalegal.com; james.percival@myfloridalegal.com; jeffrey.desousa@myfloridalegal.com; kathryn.inman@myfloridalegal.com; natalie.christmas@myfloridalegal.com; JWatson@LAW.GA.GOV; rbergethon@law.ga.gov; spetrany@law.ga.gov; tjohnson@law.ga.gov; Alan Hurst; isaac.considine@ag.idaho.gov; Jack Corkery; Kimi White; Michael Zarian; Betsy.DeNardi@atg.in.gov; Corrine.Youngs@atg.in.gov; Cory Voight; james.barta@atg.in.gov; Lorence, Jenna M; Lori.Torres@atg.in.gov; eric.wessan@ag.iowa.gov; leif.olson@ag.iowa.gov; Powell, Anthony J.; Kambli, Abhishek; Gaide, Erin; Carswell, Dwight; Desch, Nikki; Aaron.Silletto@ky.gov; christopher.thacker@ky.gov; Jacob Abrahamson; lindsey.keiser@ky.gov; Matt.Kuhn@ky.gov; Victor.Maddox; Ben Aguinaga; Larry Frieman; mcphees@ag.louisiana.gov; Morgan Brungard; shortt@ag.louisiana.gov; anthony.shults@ago.ms.gov; Hart Martin; justin.matheny@ago.ms.gov; scott.stewart@ago.ms.gov; whitney.lipscomb@ago.ms.gov; jay.atkins@ago.mo.gov; Josh.Divine@ago.mo.gov; maria.lanahan@ago.mo.gov; samuel.freedlund@ago.mo.gov; brent.mead2@mt.gov; Christian.Corrigan@mt.gov; derek.oestreicher@mt.gov; Peter.Torstensen@mt.gov; william.selph@mt.gov; eric.hamilton@nebraska.gov; Strobl, Grant; Viglianco, Zachary; cjness@nd.gov; ctitus@nd.gov; dwrigley@nd.gov; pjaxt@nd.gov; Eilliot Gaiser; Mathura Sridharan; Michael Hendershot; Ohio SG; Audrey.Weaver@oag.ok.gov; Garry.Gaskins@oag.ok.gov; Jennifer.Lewis@oag.ok.gov; zach.west@oag.ok.gov; bcook@scag.gov; ESmith@scag.gov; josephspate@scag.gov; mgates@scag.gov; thomashydrick@scag.gov; Flynn, Grant; Swedlund, Paul; andree.blumstein@ag.tn.gov; brandon.smith@ag.tn.gov; gabriel.krimm@ag.tn.gov; matt.rice@ag.tn.gov; Whitney Hermandorfer; chrisbates@agutah.gov; rcantrell@agutah.gov; Scott St. John; Stanford Purser; kgallagher@oag.state.va.us; kkilgore@oag.state.va.us; mminot@oag.state.va.us; frankie.a.dame@wvago.gov; grant.a.newman@wvago.gov; Michael.R.Williams@wvago.gov; ag.amicus@wyo.gov; ryan.schelhaas@wyo.gov; travis.jordan@wyo.gov; rcorriea@oag.state.va.us
Cc: Aaron Nielson; Brendan Fugere
Subject: RE: Amicus Opportunity --Roman Catholic Diocese of Albany v. Harris (U.S., No. 24-319)
Attachments: Diocese of Albany - States' Amicus (CIRCULATION DRAFT).docx; 2024.09.18 - Petition for a Writ of Certiorari.pdf

Friends:

Thanks very much to everyone who has joined to far. To clarify my e-mail below, we are asking for joins for this coming Monday, **October 21 at 8am CT**, as that is when the brief is due.

Thanks very much, and have a nice weekend.

All the best,

Billy

William F. Cole
Deputy Solicitor General
Office of the Texas Attorney General
(512) 936-2725
William.Cole@oag.texas.gov

From: William Cole
Sent: Wednesday, October 16, 2024 6:13 PM
To: Barrett.Bowdre@AlabamaAG.gov; Powell, Anthony J. <Anthony.Powell@ag.ks.gov>; bethany.lee@alabamaag.gov; Edmund.LaCour@AlabamaAG.gov; Katherine.Robertson@AlabamaAG.gov; robert.tambling@alabamaag.gov; ben.hofmeister@alaska.gov; charles.brasington@alaska.gov; Chris.Robison <Chris.Robison@alaska.gov>; cori.mills@alaska.gov; david.wilkinson@alaska.gov; Pickett, Jeff G (LAW <jeff.pickett@alaska.gov>; jessie.alloway@alaska.gov; ninia.dizon@alaska.gov; Amanda Wentz <Amanda.Wentz@ArkansasAG.gov>; dylan.jacobs@arkansasag.gov; heather.jones@arkansasag.gov; michael.cantrell@arkansasag.gov; Nicholas.Bronni@arkansasag.gov; christopher.baum@myfloridalegal.com; daniel.bell@myfloridalegal.com; henry.whitaker@myfloridalegal.com; james.percival@myfloridalegal.com; jeffrey.desousa@myfloridalegal.com; joseph.hart@myfloridalegal.com; kathryn.inman@myfloridalegal.com; natalie.christmas@myfloridalegal.com; JWatson@LAW.GA.GOV; rbergethon@law.ga.gov; spetrany@law.ga.gov; tjohnson@law.ga.gov; Alan Hurst <alan.hurst@ag.idaho.gov>; isaac.considine@ag.idaho.gov; Jack Corkery <jack.corkery@ag.idaho.gov>; josh.turner@ag.idaho.gov; Kimi White <Kimi.White@ag.idaho.gov>; Michael Zarian <michael.zarian@ag.idaho.gov>; Betsy.DeNardi@atg.in.gov; Corrine.Youngs@atg.in.gov; Cory Voight <cory.voight@atg.in.gov>; james.barta@atg.in.gov; Jenna Lorance <Jenna.Lorance@atg.in.gov>; Lori.Torres@atg.in.gov; melinda.holmes@atg.in.gov; eric.wessan@ag.iowa.gov; leif.olson@ag.iowa.gov; Anthony.Powell@ag.ks.gov; Kambli, Abhishek <Abhishek.Kambli@ag.ks.gov>; Gaide, Erin <Erin.Gaide@ag.ks.gov>; Carswell, Dwight <Dwight.Carswell@ag.ks.gov>; Desch, Nikki <Nikki.Desch@ag.ks.gov>; Aaron.Silletto@ky.gov; christopher.thacker@ky.gov; Jacob Abrahamson <Jacob.Abrahamson@ky.gov>; lindsey.keiser@ky.gov; Matt.Kuhn@ky.gov; Victor.Maddox <Victor.Maddox@ky.gov>; Ben Aguinaga <AguinagaJ@ag.louisiana.gov>; Larry Frieman <FriemanL@ag.louisiana.gov>; mcphees@ag.louisiana.gov; Morgan Brungard <BrungardM@ag.louisiana.gov>; shortt@ag.louisiana.gov; anthony.shults@ago.ms.gov; Hart Martin <Hart.Martin@ago.ms.gov>; justin.matheny@ago.ms.gov; scott.stewart@ago.ms.gov; whitney.lipscomb@ago.ms.gov; jay.atkins@ago.mo.gov; Josh.Divine@ago.mo.gov; maria.lanahan@ago.mo.gov; samuel.freedlund@ago.mo.gov; brent.mead2@mt.gov; Christian.Corrigan@mt.gov; derek.oestreicher@mt.gov; Peter.Torstensen@mt.gov; william.selph@mt.gov; eric.hamilton@nebraska.gov; Strobl, Grant <Grant.Strobl@nebraska.gov>; Viglianco, Zachary <Zachary.Viglianco@nebraska.gov>; cjness@nd.gov; ctitus@nd.gov; dwrigley@nd.gov; nicolai@nd.gov; pjaxt@nd.gov; Eilliot Gaiser <Thomas.Gaiser@OhioAGO.gov>; Mathura Sridharan <mathura.sridharan@ohioago.gov>; Michael Hendershot <Michael.Hendershot@OhioAGO.gov>; Ohio SG <Amicus@OhioAGO.gov>; Audrey.Weaver@oag.ok.gov; Garry.Gaskins@oag.ok.gov; Jennifer.Lewis@oag.ok.gov; zach.west@oag.ok.gov; bcook@scag.gov; ESmith@scag.gov; josephspate@scag.gov; mgates@scag.gov; thomashydrick@scag.gov; Flynn, Grant <Grant.Flynn@state.sd.us>; Swedlund, Paul <Paul.Swedlund@state.sd.us>; andree.blumstein@ag.tn.gov; brandon.smith@ag.tn.gov; gabriel.krimm@ag.tn.gov; matt.rice@ag.tn.gov; Whitney Hermandorfer <Whitney.Hermandorfer@ag.tn.gov>; chrisbates@agutah.gov; rcantrell@agutah.gov; Scott St. John <scottstjohn@agutah.gov>; Stanford Purser <spurser@agutah.gov>; cslemp@oag.state.va.us; kgallagher@oag.state.va.us; kkilgore@oag.state.va.us; mminot@oag.state.va.us; frankie.a.dame@wvago.gov; grant.a.newman@wvago.gov; Michael.R.Williams@wvago.gov; ag.amicus@wyo.gov; henry.dobson@wyo.gov; ryan.schelhaas@wyo.gov; travis.jordan@wyo.gov

Cc: Aaron Nielson <Aaron.Nielson@oag.texas.gov>; Brendan Fugere <Brendan.Fugere@oag.texas.gov>
Subject: Amicus Opportunity --Roman Catholic Diocese of Albany v. Harris (U.S., No. 24-319)

Friends:

I'm writing to invite you to join the attached cert-stage amicus brief that Texas intends to file this coming Monday in SCOTUS in *Roman Catholic Diocese of Albany v. Harris* (U.S., No. 24-319). This case, which has now returned to SCOTUS after its first trip up to the Court was GVR'd following *Fulton v. City of Philadelphia*, involves a New York law that requires abortion procedures to be covered in employee health-insurance plans. The law has a "religious employer" exception, but it is drawn so narrowly that the abortion-coverage mandate still includes, for example, Catholic nuns who serve the infirm and elderly, ecumenical religious schools, and other service-based religious ministries (all of which are Petitioners here). With the aid of Jones Day and the Becket Fund, the Petitioners have long been arguing that the law is not neutral and generally applicable within the meaning of *Employment Division v. Smith*, but the New York courts have long disagreed—going so far this time to say that nothing in *Fulton* changes this conclusion. The attached brief reprises one that Texas filed—and which many of you joined—three years ago before *Fulton* in No. 20-1501. In the brief we argue that one of the central premises of *Smith*—that governments would treat religious exercise with solicitude—has not panned out in practice in many States, and we again invite the Court to overrule *Smith*.

Because we need to file this brief on Monday, I'd ask for your joins by no later than **Monday, 11/21 at 8 a.m. CT.**

Thanks very much for your consideration, and please let me know if you have any questions.

All the best,

Billy

William F. Cole
Deputy Solicitor General
Office of the Texas Attorney General
(512) 936-2725
William.Cole@oag.texas.gov

No. 24-____

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

ERIC S. BAXTER
MARK L. RIENZI
DANIEL H. BLOMBERG
LORI H. WINDHAM
DANIEL D. BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
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Washington, D.C.

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Minneapolis, MN 55402

Counsel for Petitioners

QUESTIONS PRESENTED

In 2017, New York promulgated a regulation mandating that employer health insurance plans cover abortions. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o). The regulation narrowly exempts certain religious organizations: tax-exempt entities that have the "purpose" of "inculcat[ing] … religious values" and that primarily "employ[]" and "serve[]" those of the same religious persuasion. *Id.* § 52.2(y). But religious organizations with broader religious missions, such as serving the poor, must cover abortions in their health plans. So too must religious organizations that employ or serve members of other faiths or no faith at all.

The questions presented are:

1. Whether a law is "neutral" and "generally applicable" under *Employment Division v. Smith* where it exempts certain religious organizations—but not others—based on narrow and subjective religious criteria unrelated to the law's purpose, as New York and California hold, or whether such laws are subject to strict scrutiny under *Smith*, as the Second, Sixth, and D.C. Circuits hold.

2. If the First Amendment permits such discrimination among religious organizations under the rule announced in *Smith*, should *Smith* be overruled?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners, who were plaintiffs in the state court proceedings, are the Roman Catholic Diocese of Albany; the Roman Catholic Diocese of Ogdensburg; Sisterhood of St. Mary; Catholic Charities, Diocese of Brooklyn; Catholic Charities of the Diocese of Ogdensburg; St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y.; First Bible Baptist Church; Our Savior's Lutheran Church, Albany, N.Y.; Teresian House Nursing Home Company, Inc.; Renee Morgiewicz; Teresian House Housing Corporation; and Depaul Housing Management Corporation.

No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were defendants in the state court proceedings, are Adrienne A. Harris, Superintendent, New York State Department of Financial Services,* and the New York State Department of Financial Services. One plaintiff below, Catholic Charities of the Diocese of Albany, is not a petitioner here and so is deemed a respondent.

* At various earlier stages of this case, the superintendent and/or acting superintendent of the New York State Department of Financial Services was Maria T. Vullo, Linda A. Lacewell, or Shirin Emami. Two entities, Murnane Building Corporation and the Trustees of the Diocese of Albany, were plaintiffs at an earlier stage of the case but were no longer parties at the time of the New York Court of Appeals proceedings.

LIST OF RELATED PROCEEDINGS

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., New York Court of Appeals, No. 45 (May 21, 2024).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., Supreme Court of New York, Appellate Division, 3rd Department, Case No. 529350 (June 2, 2022).

Roman Catholic Diocese of Albany, et al. v. Shirin Emami, et al., United States Supreme Court, No. 20-1501 (Nov. 1, 2021).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., New York Court of Appeals, Mo. No. 2020-549 (Nov. 24, 2020).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, as Superintendent of Financial Services, et al., Supreme Court of New York, Appellate Division, 3rd Department, Case No. 529350 (July 2, 2020).

The Roman Catholic Diocese of Albany, N.Y., et al. v. Maria T. Vullo, Superintendent, New York State Department of Financial Services, et al., Supreme Court of New York, Index Nos. 2070-16, 7536-17 (Jan. 10, 2019).

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INTRODUCTION

This case is here for a second time, after the Court previously reversed and remanded for further consideration in light of *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), with three Justices having voted to grant plenary review. *Roman Catholic Diocese of Albany v. Emami*, 142 S. Ct. 421, 421 (2021).

Petitioners (the "Religious Ministries") first sought this Court's intervention over three years ago to stop New York from forcing them to subsidize abortions in their employee health plans (the "Abortion Mandate") over their deep religious objections. Although that mandate exempts religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists, religious organizations with a broader religious mission (such as serving the poor) or that employ or serve people regardless of their faith are not exempt.

At the time, *Fulton*, which raised similar Free Exercise issues, was pending before the Court. After *Fulton* recognized that a law's exemptions trigger strict scrutiny when they undermine the government's asserted interests in a similar way as prohibited religious conduct, the Court granted certiorari, vacated, and remanded this case for further consideration.

On remand, the New York courts insisted that nothing had changed. Rather than thoughtfully applying *Fulton* and this Court's other intervening Free Exercise holdings, the New York courts asserted that *Fulton* had no impact on this case and re-affirmed their own pre-*Fulton* precedent, including the case

they had originally relied on in ruling against the Religious Ministries.

As a result, this Court's intervention is now urgently needed, both to safeguard the Religious Ministries' religious liberty and to resolve a persistent split about when laws burdening religious exercise trigger strict scrutiny. New York is joined by California in allowing selective religious exemptions limited to preferred religious organizations, holding that such laws trigger strict scrutiny only when they intentionally target religion as such. That conflicts not only with *Fulton* but also with the Second, Sixth, and D.C. Circuits. These Circuits recognize that selective religious exemptions undermine general applicability at least as much as the secular exemptions discussed in *Fulton* do. The New York Court of Appeals is on the wrong side of this split, and its decision below confirms that *Fulton* had no impact on its analysis.

The New York courts' doctrinal error goes to the heart of this Court's First Amendment jurisprudence. By definition, giving exemptions to preferred organizations *but not others*—even though both undermine the government's asserted interests in a similar way—destroys a law's "general applicability." No one would reasonably say a law is generally applicable if it exempts a religious nursing home that serves only Lutherans, but not one that serves indigent elderly of all faiths. But that is precisely the position adopted by the New York courts.

Indeed, if anything, a selective religious exemption—preferring some religions and religious practices over others—makes a law even more

pernicious. It is, after all, a fundamental rule that "no State can 'pass laws' … that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982). New York's decision to exempt some religious groups while burdening others based on "whether and how [each] pursues its [religious] mission" constitutes forbidden "denominational favoritism." *Carson v. Makin*, 596 U.S. 767, 787 (2022) (citing *Larson*). New York, therefore, must at least justify its choice to exempt some but not others under strict scrutiny—something it has never even attempted to do during this now seven-year-old litigation.

The New York Court of Appeals' error, moreover, has enormous impact. To start, New York's mandate imposes immense burdens on countless religious entities opposed to abortion as a matter of deep-seated religious conviction. To take just one example, under New York's regulation, Catholic-affiliated religious orders, like the Carmelite Sisters who operate the Teresian Nursing Home, are deemed insufficiently religious to qualify for a religious exemption—and so are forced to cover abortions in their employee health plans over their religious objections. The same is true of the other Petitioners here, including not just other Catholic organizations, but also Lutheran, Episcopalian, and Baptist groups. And because New York's approach is not unique, religious groups face similarly onerous burdens across the country, even while some preferred religious groups are exempted.

For these reasons, the Court should grant this petition to resolve the underlying split and correct the error the New York courts refused to rectify.

Finally, if there is a question as to whether the Free Exercise Clause protects the Religious Ministries under *Smith*, the Court should revisit that decision. This Court has already acknowledged the need to resolve *Smith's* continuing vitality. *Fulton*, 593 U.S. at 540. While the Court did not reach that question given the facts in *Fulton*, it should consider it here. It cannot be that the Constitution allows New York to require religious groups to participate in a practice so fundamentally in conflict with their religious beliefs without at least justifying that choice under strict scrutiny. To the extent *Smith* suggests otherwise, it should be overruled.

OPINIONS BELOW

The decision of the New York Court of Appeals, affirming the dismissal of Petitioners' challenge, is reported at ___ N.E.3d ___, 2024 WL 2278222, and reproduced at Pet.App.1a. The decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, is reported at 206 A.D.3d 1074, 168 N.Y.S.3d 598, and reproduced at Pet.App.31a.

The pre-remand decision of the New York Court of Appeals, denying Petitioners leave to appeal, is reported at 36 N.Y.3d 927, 160 N.E.3d 321, and reproduced at Pet.App.64a. The pre-remand decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, is reported at 185 A.D.3d 11, 127 N.Y.S.3d 171, and reproduced at Pet.App.36a. The decision of the Supreme Court of New York is unpublished, reported at 2018 WL 11149776, and reproduced at Pet.App.50a.

JURISDICTION

The New York Court of Appeals affirmed the dismissal of Petitioners' claims on May 21, 2024. Pet.App.1a. Petitioners timely sought an extension on July 22, 2024, which was granted on July 26, 2024, extending the time to seek certiorari to September 18, 2024. No. 24A90. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The New York regulatory provisions at issue, 11 N.Y.C.R.R. §§ 52.2(y), 52.16(o), are included in the Appendix at Pet.App.194a.

The New York statutes at issue, N.Y. Ins. Law §§ 3221(k)(22), 4303(ss) (mandate) and N.Y. Ins. Law §§ 3221(l)(16)(E)(1), 4303(cc)(5)(A) (religious exemption), are included in the Appendix at Pet.App.198a.

STATEMENT

A. Statutory and Regulatory Background

New York regulates employer health insurance plans both by statute and through regulations. New York statutes provide various substantive requirements of group insurance plans and insurance providers. *See, e.g.*, N.Y. Ins. Law § 3221; *id.* § 4303. Respondents, the Superintendent of the New York State Department of Financial Services and the Department itself, also regulate the content of group health insurance plans. *See* N.Y. Ins. Law § 3217(a).

As a general matter, the Superintendent's regulations require that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition," save with respect to

a number of specified "except[ions]," including many foot, vision, and dental conditions. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule requiring group health insurance plans to cover "medically necessary abortions." Pet.App.103a. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibit "health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition," and "[n]one of the exceptions apply to medically necessary abortions." *Id.* The proposed regulation would "make[] explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage…shall not exclude coverage for medically necessary abortions." Pet.App.104a.

Accordingly, the Superintendent proposed a new regulation, § 52.16(o), to provide that "[n]o policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary." Pet.App.106a.

Neither the proposed regulation nor the eventual published version define "medically necessary abortions." But the Superintendent's "model language" for health insurance contracts stated that "medically necessary abortions" include at least "abortions in cases of rape, incest *or fetal malformation*." Pet.App.5a (emphasis added). The mandate thus appears to cover abortions of babies

with nonfatal abnormalities such as Down Syndrome. Moreover, in response to comments on the proposed rule, the Superintendent explained that "[m]edical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient." Pet.App.183a. In other words, "medical necessity" is left largely to the discretion of individual doctors.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent's initial proposal included a broad religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s]" would have been permitted to "exclude coverage for medically necessary abortions" if they followed certain procedures. Pet.App.106a. A "[q]ualified religious organization" would have included any organization that "oppose[d] medically necessary abortions on account of a firmly-held religious belief" and that was either (i) a nonprofit that "holds itself out as a religious organization" or (ii) a closely held for-profit that "adopted a resolution…establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs." Pet.App.104a-105a. That definition largely tracked the scope of federal religious exemptions created after this Court's rulings in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and upheld in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). *See* 80 Fed. Reg. 41318, 41343-41347 (July 14, 2015); *see also* Pet.App.112a (Superintendent "decided to use the [initial] definition

because it [was] more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new regulation. Pet.App.175a. Between proposal and promulgation, however, the religious exemption was eviscerated. In its place, a narrow religious exemption was introduced that applies only to "[r]eligious employer[s]" "for which each of the following is true":

> (1) The inculcation of religious values is the purpose of the entity.
>
> (2) The entity primarily employs persons who share the religious tenets of the entity.
>
> (3) The entity serves primarily persons who share the religious tenets of the entity.
>
> (4) The entity is a [tax-exempt] nonprofit organization…

Pet.App.176a; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This is the same short-lived exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraception mandate litigation. *Compare* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original exemption), *with* 78 Fed. Reg. 39,870 (July 2, 2013) (later exemption). It is also the same exemption found in the New York state contraception mandate, which had previously been upheld under *Smith* by the New York Court of Appeals in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), and is similar to a California exemption upheld in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 86-87 & n.10 (Cal. 2004).

The Superintendent abandoned the broader exemption after concluding that "[n]either State nor Federal law require[d]" any exemption, and the exemption she chose was "analogous to existing state law." Pet.App.181a. The Superintendent stated that she rejected the initially proposed religious exemption because "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of business corporations to assert religious beliefs." Pet.App.181a-182a.

A guidance document issued by the Department in 2019 explains the scope of the identically worded contraception-mandate exemption. As it explains, the exemption is a "narrow" one. DFS, Supplement No. 2 to Insurance Circular Letter No. 1 (May 1, 2019), https://perma.cc/M5YE-DU78. For example, the exemption does not cover "[e]mployers such as religious schools, religious nursing homes, and religious health care facilities." *Id.* Nor may insurers "rely solely on a self-attestation from an employer" that it qualifies. Rather, insurers "may be able to discern from the [employer's] name itself that the employer is not a religious employer." *Id.* And where the insurer is uncertain, it "should request proof…by requesting relevant documents…including articles of incorporation, bylaws, charters, mission statements, brochures, and nonprofit determination letters." *Id.* The circular then concludes with an ominous warning: the "Department will monitor" insurance companies' "granting of a religious employer exemption[s]" and

"take action against an issuer for *any failure* to adhere" to the Department's requirements. *Id.* (emphasis added).

C. Petitioners and Their Objections to the Mandate

The Religious Ministries are religious organizations with employee health plans, and one individual. All object to the Abortion Mandate on religious grounds. They include religious orders, churches, and services organizations. They employ dozens to hundreds of people, often of varied religious backgrounds, for propagating their faith, including through charitable service in their communities.

For instance, three Petitioners provide nursing home services and housing for the indigent elderly: The Teresian House Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. Pet.App.94a-97a. "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being" and employs over 400 people. Pet.App.96a. It provides healthcare coverage to over 200 full-time employees because of its "moral" and "religious" obligations to "pay just wages." Pet.App.97a. Similarly, Teresian House Housing Corporation operates a retirement community affiliated with the Roman Catholic Diocese of Albany. Pet.App.121a. And DePaul Management Corporation is a non-profit that manages several senior living apartment communities in affiliation with the Diocese of Albany. Pet.App.121a-122a.

Two of the Religious Ministries run schools as part of their religious missions: The First Bible Baptist

Church employs over "sixty people," has a congregation with "individuals of varied religious backgrounds," and engages in "human services outreach," including "youth ministry, adult ministry, death ministry, education ministry, athletic activities, day care and pre-school and mission ministry." Pet.App.100a, Pet.App.120a. Among its ministries is a K-12 school, the Northstar Christian Academy. Pet.App.100a. St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y. similarly not only serves as a parish but also operates St. Gregory's School. Pet.App.120a.

Other Religious Ministries provide service to their communities in diverse ways. The Sisterhood of St. Mary is an "Anglican/Episcopal Order" of religious sisters who "live a traditional, contemplative expression of monastic life through a disciplined life of prayer set within a simple agrarian lifestyle and active ministries in their local communities." Pet.App.117a-118a. Two Catholic Dioceses (Albany and Ogdensburg) and Our Savior's Lutheran Church also engage in ministries or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. Pet.App.116a; Pet.App.120a.

And the Catholic Charities of Ogdensburg and Brooklyn provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life"—all as part of the "charitable and social justice ministry" of the Catholic Church. Pet.App.119a.

All these organizations are religiously opposed to abortion; no one has questioned the sincerity of their

beliefs. The Catholic Church, for instance, teaches that abortion is an "unspeakable crime," because it ends the life of a "new human being." Pet.App.130a. The Church believes that "modern genetic science offers clear confirmation," that, from the moment of conception, a new living person exists. *Id.* The other Religious Ministries share similar beliefs. *E.g.*, Pet.App.101a (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"); Pet.App.131a ("Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures."). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Religious Ministries "cannot religiously or morally accept or sanction." Pet.App.132a.

The Religious Ministries also share the belief that providing "fair, adequate and just employment benefits" is a "moral obligation." *Id.* And, in the absence of providing health insurance to their employees, they face the prospect of severe financial penalties. *E.g.*, Pet.App.71a (Diocese of Albany); Pet.App.97a (Teresian House); Pet.App.101a (First Bible Baptist Church). Indeed, for just the calendar year 2023, the federal fines for failing to provide health insurance were $2,880 per employee.[1] Just as one example, for the Teresian House, which provides

[1] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (Aug. 16, 2022), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

health coverage to over 200 employees, Pet.App.96a, those fines would reach over $500,000 per year, a crippling amount for the organization.

Accordingly, with no other options, Petitioners sued the Superintendent and New York State Department of Financial Services, seeking to enjoin the Abortion Mandate.

D. Procedural History

1. *Initial proceedings in New York state courts.* In this consolidated suit,[2] the Religious Ministries challenged the Abortion Mandate as a violation of numerous federal and state laws. As relevant here, they argued that the Abortion Mandate violates the Free Exercise Clause because it substantially burdens and discriminates among certain religious entities without justification. The Abortion Mandate was "promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption." Pet.App.133a. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." Pet.App.160a.

The trial court granted summary judgment in favor of Respondents. Pet.App.61a. The trial court believed itself to be bound by the earlier decision of the

[2] The Religious Ministries filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of "[m]odel [l]anguage" covering "medically necessary abortions." Pet.App.5a. In 2017, after the Superintendent promulgated the Abortion Mandate, the Religious Ministries filed a second complaint that challenged that regulation directly. Pet.App.7a. The trial court consolidated the suits. *Id.* In their relevant holdings, no court has distinguished between the two First Amendment challenges. Pet.App.1a-65a.

New York Court of Appeals in *Serio*, which had upheld the identical religious exemption found in New York's contraception mandate. 7 N.Y.3d at 519. In *Serio*, the court rejected a group of religious entities' Free Exercise and Establishment Clause challenges to the religious exemption as favoring some religious organizations over others. With respect to the Free Exercise Clause, the court held that the mandate was both "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not "target religious beliefs as such." *Id.* at 522, 525 (alteration omitted). And it rejected an Establishment Clause claim based on church autonomy because the mandate "merely regulates one aspect of the relationship between plaintiffs and their employees." *Id.* at 524. In the trial court's view, because *Serio* involved the "same" claims, it barred the Religious Ministries' challenges to the Abortion Mandate. Pet.App.57a.

The Appellate Division likewise believed itself to be bound by *Serio*. Accordingly, it affirmed judgment in favor of the Respondents. Pet.App.40a-43a.

The New York Court of Appeals denied leave to appeal and dismissed the Religious Ministries' appeal "upon the ground that no substantial constitution question is directly involved," with Judge Fahey dissenting. Pet.App.64a-65a.

2. *First petition for certiorari.* The Religious Ministries then filed a petition for certiorari in this Court, seeking plenary review. But because the Court had already granted certiorari in *Fulton* to address similar issues regarding application of the Free Exercise Clause, the Religious Ministries also asked,

in the alternative, that the Court grant certiorari, vacate the judgment, and remand the case in light of *Fulton*. On November 1, 2021, the Court did just that, vacating and remanding for further consideration in light of *Fulton*. Pet.App.203a. Justices Thomas, Alito, and Gorsuch would have granted plenary review. *Id.*

3. *Proceedings after remand.* On remand, the Appellate Division affirmed its original judgment "for the reasons stated in [its] original opinion and order." Pet.App.35a. It reasoned that *Serio* remained controlling because *Fulton* neither "explicitly overrule[d]" *Serio* nor "revisit[ed] or overturn[ed] the existing rule" that neutral, generally applicable laws are "ordinarily not subject to strict scrutiny." Pet.App.33a (quotation omitted).

The Religious Ministries again both sought leave to appeal and filed a notice of appeal as of right to the New York Court of Appeals. This time that court agreed that a substantial constitutional question was involved and accepted the appeal as of right. Pet.App.10a.

After briefing and argument, the Court of Appeals affirmed the Appellate Division's decision, concluding that *Fulton* did not "impair[] *Smith* in a way that undoes *Serio* in whole or in part." Pet.App.11a. First, the court suggested that New York's four-part exemption probing a religious group's "purpose" and comparing its religious beliefs with the beliefs of those it employs or serves contains no more room for discretion than the federal test asking only whether an entity "objects[] based on its sincerely held religious beliefs." Pet.App.22a. The court otherwise "decline[d] to engage in a searching analysis" of the "religious

employer" definition, reasoning that closely reviewing those criteria would amount to strict scrutiny. Pet.App.24a.

Next, the court concluded that *Fulton*'s discussion of exemptions that undermine a law's purpose was irrelevant, because "[t]aking *Fulton*'s test as written," general applicability is concerned only with "secular conduct," and so is not implicated by a "regulation [that] favors religious exercise rather than discriminates against it" by providing an exemption applicable to some religious entities but not others. Pet.App.25a. The court thus refused "to extend the language in *Fulton* to a different situation: one in which the comparison is not of religious versus secular employers, but among different types of religious employers." Pet.App.26a. The court similarly concluded that *Tandon v. Newsom,* 593 U.S. 61, 62 (2021) (per curiam), was irrelevant because it "focuses exclusively on distinctions between secular and religious conduct." Pet.App.27a.

Ultimately, then, the court held that "the 'religious employer' exemption is generally applicable under both tests delineated in *Fulton*." Pet.App.29a. It thus affirmed the dismissal of the Religious Ministries' challenge.

E. Codification of the Abortion Mandate

While this case was pending before the Appellate Division on remand, the State notified the court by letter that New York had recently "codifie[d] in statute the abortion health insurance coverage regulatory requirement and religious employer accommodation at issue in this case" and that the "challenged regulation remains in effect." NYSCEF 55, Case No.

529350 (3d Dept. Apr. 14, 2022); *see also* N.Y. Ins. Law §§ 3221(k)(22), 4303(ss) (mandate); N.Y. Ins. Law §§ 3221(1)(16)(E)(1), 4303(cc)(5)(A) (religious exemption). The statute became effective in January 2023, with the regulatory abortion mandate, including its religious exemption, remaining in force in parallel with the new statute. *See* N.Y. Comp. Codes R. & Regs. tit. 11, §§ 52.16(o), 52.2(y).

In briefing before the New York Court of Appeals, the State confirmed that the statute and regulation are "co-extensive as to both the scope of the coverage requirement and the religious accommodation." APL-2022-00089, Resp.Br.19 (N.Y. Sept. 28, 2023). It further confirmed that, because "the legislation is subject to challenge on the basis of the same 'alleged infirmities,'" it "does not appear to moot this appeal." *Id*. at 19. The New York Court of Appeals addressed both the statute and the regulation in its decision. Pet.App.9a.

REASONS FOR GRANTING THE PETITION

In *Employment Division v. Smith*, the Court held for the first time that "neutral and generally applicable laws" were not subject to strict scrutiny, even if they burdened religious practice. 494 U.S. 872 (1990). In the decades since, lower courts have taken conflicting approaches as to what those terms mean.

Four years ago, this Court granted certiorari in *Fulton* to provide clarity. Unfortunately, confusion remains. This case presents the resulting split of authority on how to determine whether a law is "neutral and generally applicable." Even after *Fulton*, some courts hold that a law that discriminates among

religious entities is subject to strict scrutiny; some do not.

This case provides an ideal opportunity for the Court to resolve this disagreement and further clarify the law. New York's Abortion Mandate explicitly treats similar religious organizations differently even though they implicate the government's asserted interests in a similar way. Indeed, the only difference between favored and disfavored religious organizations is that the former primarily serve and employ co-religionists and have the purpose of inculcating religious beliefs (whatever that means), whereas the latter view service to *anyone* in need as a core part of their religious mission. For example, a religious nursing home that serves only indigent Catholics is exempt, whereas one that serves indigent elderly of all faiths or no faith is not. That distinction makes no sense *vis-à-vis* the government's asserted interest in providing abortion access. Therefore, it is the antithesis of a *generally applicable* law: by definition, it treats similarly situated organizations differently.

Because the New York Court of Appeals nonetheless blessed this distinction, and in doing so, exacerbated a split in authority on whether selective religious exemptions trigger strict scrutiny, certiorari (and ultimately reversal) is warranted.

I. THE COURT SHOULD GRANT THE PETITION AND CONFIRM THAT NEW YORK'S ABORTION MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

Fulton, and this Court's other recent religious liberty precedents, have clarified that a law is not "neutral" and "generally applicable" if it permits

exemptions that undermine its stated purpose while refusing to accommodate sincere religious objections. That repeated holding ought to be sufficient to show that a religious exemption that protects some religious organizations but not others—based solely on characteristics unrelated to the law's underlying purpose—is subject to strict scrutiny. As this Court has repeatedly explained, exemptions for some but not others necessarily undermine a law's general applicability when both implicate the government's asserted interests in a similar way. And a law is less defensible, not more so, when it picks religious winners and losers, limiting its benefits or protections to some religious organizations but not others. Many courts have recognized this. But others, including the New York Court of Appeals, have not, reflecting a lingering error in certain lower courts that requires this Court's intervention.

A. Courts Are Split on Whether a Law that Differentiates Between Religions is Subject to Strict Scrutiny.

1. The decision below confirms that, even after *Fulton* and the Court's vacatur and remand in this case, New York remains on the wrong side of a split regarding the application of strict scrutiny based on selective religious exemptions.

As explained above, the New York Court of Appeals' recent ruling reaffirmed its pre-*Fulton* decision in *Serio,* in which it held that a law is neutral *and* generally applicable even if "some religious organizations…[were] exempt" and others were not. *Serio*, 7 N.Y.3d at 522; Pet.App.29a. In doing so, the court expressly held that, even after *Fulton*, selective

religious exemptions that undermine the law's purpose in the same way as the proposed religious conduct do not trigger strict scrutiny. Pet.App.27a-28a. Thus, despite *Fulton*, New York's courts will apply strict scrutiny based on religious discrimination only if the challenger can prove that a law intentionally "target[s]" religion. *Serio*, 7 N.Y.3d at 522. That is, in New York state courts, religious exemptions can be relevant only to a law's neutrality and never to its general applicability under *Smith*. Pet.App.28a.

The California Supreme Court has held the same, concluding that a narrow religious exemption cannot trigger strict scrutiny on general applicability grounds. *Cath. Charities of Sacramento*, 85 P.3d at 86-87 & n.10. This is true even where, as here and under California's similar statute, the law demands an intrusive inquiry into an organization's religious tenets and who it hires and serves. There is no indication that California courts will reconsider this holding after *Fulton*.

2. Other courts, in contrast, have recognized that religious exemptions *can* render a law not generally applicable and therefore trigger strict scrutiny. In *Kane v. DeBlasio*, 19 F.4th 152 (2d Cir. 2021) (per curiam), for example, the Second Circuit recognized that an arbitration award regarding a vaccine mandate was neither neutral nor generally applicable in light of the religious accommodation it created. On its face, the mandate did not contain any medical or religious accommodations, and the Second Circuit thus held that the mandate itself was generally applicable. *Id.* at 165-66. Following union arbitration, however, the arbitrator established a process for

providing religious accommodations to individual employees. *Id.* at 160. That process required that the employee's religious objection be "documented in writing by a religious official (e.g., clergy)"; permitted only requests by "recognized and established religious organizations"; and held that requests would be denied if the leader of the relevant religious organization had "spoken publicly in favor of the vaccine." *Id.*

The Second Circuit held that this process was not generally applicable. *Id.* at 168-69. Although the accommodation standards purportedly created objective criteria, the Second Circuit recognized that, in practice, they left substantial room for discretion and could not be considered generally applicable under *Fulton*. *Id.* at 169. The Second Circuit also noted that the law impermissibly required the decisionmaker to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 168. Thus, strict scrutiny applied.

Much the same was true in *Dahl v. Tr. of W. Mich. U.*, 15 F.4th 728 (6th Cir. 2021) (per curiam). There, Western Michigan University required student athletes to be vaccinated against COVID-19 to "maintain full involvement in the athletic department." *Id.* at 730. The policy further provided that "religious exemptions and accommodations will be considered on an individual basis." *Id.* The policy thus necessarily opened the door to discrimination among religious beliefs and believers, allowing the decisionmaker to pick and choose which religious concerns would be accommodated. And after several students sought and were denied religious

exemptions, they sued. Reasoning that "like the city in *Fulton*," the University "retain[ed] discretion to extend exemptions in whole or in part," the Sixth Circuit found the policy not generally applicable and thus subject to strict scrutiny. *Id.* at 732-34.

Likewise, the D.C. Circuit, relying on the same principles even before *Fulton*, rejected the NLRB's attempts to "assert[] jurisdiction over [certain religious schools] and their teachers" while exempting others, finding that they privileged certain visions of religion over others. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828 (D.C. Cir. 2020). In *Duquesne*, the D.C. Circuit rejected any criteria for identifying religious schools that would require government decisionmakers to "make determinations about [a school's] religious mission and about the centrality of [certain work] to that mission," noting that such governmental inquiries are "incompatib[le] with the Religion Clauses." *Id.* at 835. To illustrate the problem, the court noted that in attempting to assert jurisdiction over adjunct faculty at Duquesne University, the NLRB "impermissibly sided with a particular view of religious functions: Indoctrination is sufficiently religious, but supporting religious goals is not, and especially not when faculty enjoy academic freedom." *Id.*

3. Other lower court decisions, too, reflect persistent confusion on this question. The Tenth Circuit's post-*Fulton* cases, for example, reflect intra-circuit tension: that court concluded in *303 Creative LLC v. Elenis*, that a law was "generally applicable despite exempting some religious exercise," 6 F.4th 1160, 1187 n.9 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023), but recently held the opposite in

Does 1-11 v. Bd. of Regents of Univ. of Colorado, 100 F.4th 1251, 1273 (10th Cir. 2024) (policy was not generally applicable where it "provided 'individualized exemptions' to applicants whose religious beliefs, in the Administration's discretion, justified an exemption"). Similarly, even after the Second Circuit's holding in *Kane*, at least one district court within the Second Circuit has held that a selective religious exemption was nonetheless generally applicable. *Ferrelli v. Unified Ct. Sys.*, No. 1:22-CV-0068, 2022 WL 673863, at *6 (N.D.N.Y. Mar. 7, 2022).

District courts within the Ninth Circuit, too, have issued similar rulings after *Fulton*. *See, e.g., George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-cv-0424, 2022 WL 16722357, at *14 (S.D. Cal. Nov. 4, 2022); *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, 683 F. Supp. 3d 1172, 1184-86 (W.D. Wash. 2023). Indeed, the *Cedar Park* ruling means that religious groups in Washington, like those in California and New York, are required to provide coverage for abortions over their profound religious objections. *Id.*

Far from self-correcting, then, the error reflected in the decision below is spreading.

B. The New York Court of Appeals Decision Is Wrong.

Although the Court clarified the circumstances that trigger strict scrutiny in *Fulton*—and even granted certiorari, vacated, and remanded this case for further review in light of that decision—the Court of Appeals ruling reflects continued lower court confusion (or intransigence) about what types of laws must be evaluated under strict scrutiny. The Court

should grant review here to close what the New York Court of Appeals erroneously treated as a loophole in the *Fulton* decision. With that error corrected, it is clear that the Abortion Mandate is not generally applicable. And because it cannot satisfy strict scrutiny, it cannot be enforced over religious objections.

The decision below fundamentally misapplies *Fulton*. As an initial matter, the concept of general applicability, as clarified in *Fulton*, requires strict scrutiny whenever a law burdening religious exercise has exemptions that undermine the purpose of the law, regardless of whether those exemptions are for religious or secular conduct. The Court of Appeals was able to avoid this result only by taking individual words from each prong of *Fulton*'s test for general applicability out of context to require strict scrutiny only in narrow circumstances. It also required the court to ignore the substantial discretion involved in applying the religious exemption's religious criteria. That flawed approach is particularly egregious here, where it led the court to treat discrimination between religions as a loophole, rather than an aggravating factor, under the First Amendment.

1. After *Fulton*, exemptions that undermine the purpose of a law should be all but fatal to a holding of general applicability. Of course, "[i]n ordinary English, a generally applicable law is one that applies to everybody, in all similar situations—or at least to nearly everybody and nearly all similar situations." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 9 (2016). Indeed, in *Lukumi Church of the Babalu Aye, Inc. v. City of Hialeah*, the Court

treated exemptions as showing "underinclusive[ness] on [the law's] face." 508 U.S. 520, 545 (1993). When a state grants an exemption to some while denying it to religious adherents, it "devalues religious" concerns "by judging them to be of lesser import" than other concerns deemed worthy of an exception. *Id.* at 537-38.

This Court reaffirmed this view in a series of cases addressing Covid-19-related restrictions. As articulated in one such case, *Tandon v. Newsom*, those "decisions…made the following points clear." 593 U.S. at 62. "First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* It is thus irrelevant if the state "treats some…other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* "Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* That is, "[c]omparability is concerned with the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Id.* Any "comparable" activity that falls outside a law's scope, then—as measured by the government's asserted interest in the law—is an exception that triggers strict scrutiny.

The Court confirmed and expanded on these principles in *Fulton*. While not purporting to articulate an exhaustive list of circumstances that would undermine "general applicability," the Court explained that the policy at issue there was not

generally applicable for at least two reasons: First, "[a] law…lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534. Second, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* at 533.

The Court reiterated these principles in *Kennedy v. Bremerton School District*, 597 U.S. 507, 526-27 (2022), finding a policy "fail[ed] the general applicability test" where applied to punish a coach's religious conduct but not comparable conduct by others.

As these cases make clear, *Smith* allows a government policy to escape strict scrutiny only if the policy does not create either individualized or categorical exceptions that undermine its stated purpose in a similar way as the religious conduct at issue. Any such mechanism necessarily requires the State to make decisions about "which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537. And if the State decides that some religious objections are not "worthy of solicitude," it must justify that stance under strict scrutiny.

Accordingly, the New York Court of Appeals should have applied strict scrutiny here. The Abortion Mandate includes a discretion-laden system for exempting some religious entities but not others, and it does so for reasons entirely disconnected from the State's asserted interests: from the perspective of the

government's interest in providing abortion coverage, there is no difference between a religious nursing home that serves patients of many religions and one that serves patients of only one religion. Put simply, the mandate is not *generally* applicable.

2. Rather than following *Fulton*'s reasoning here, the New York Court of Appeals took language from *Fulton* out of context in a bid to dramatically narrow the case's import. As to *Fulton*'s first prong, the court treated the fact that the exemptions at issue here are religious as a way to avoid strict scrutiny after *Fulton*, latching on to the word "secular" in *Fulton*'s instruction that a law triggers strict scrutiny if it prohibits "religious conduct while permitting *secular conduct* that undermines the government's asserted interests in the same way." Pet.App.25a (emphasis added). On the Court of Appeals' view, differentiation among religions never triggers strict scrutiny under this test, and instead is relevant only to neutrality—the Court of Appeals views such a law as problematic only to the extent "*the object of [the] law* is to infringe upon or restrict practices because of their religious motivation." Pet.App.28a (emphasis added). Consequently, a law that required religious nursing homes to provide abortion coverage in their insurance policies unless the religious nursing home served only elderly people of a single religion (and hired only employees of that religion) qualified as a generally applicable law.

That is wrong. While *Fulton* naturally focused on comparable secular conduct given the policy at issue, the reasoning of *Fulton* cannot support exempting a law from strict scrutiny where it permits some religious conduct but forbids other religious conduct

that undermines the State's asserted interest in a similar way.

To the contrary, permitting religious conduct for only some preferred subset of religious groups is a particularly pernicious form of discrimination under the First Amendment. "Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245-47 ; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("[L]aws discriminating *among* religions are subject to strict scrutiny.").

In *Larson*, for example, the Court examined a "Minnesota statute[] [that] impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers." 456 U.S. at 230. That law did not, on its face, prefer one denomination over another; instead, it preferred religions structured in one way over differently structured religions. The Court nevertheless held it invalid, explaining that the law's effect was the same: it "effectively distinguishe[d] between 'well-established churches'" and "churches which are new and lacking in a constituency." *Id.* at 246 n.23. As the Court explained, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at 245-46.

The Religion Clauses thus demand "the equal treatment of all religious faiths without

discrimination or preference," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008), and the State cannot privilege certain visions of religion over others. *Duquesne Univ. of the Holy Spirit*, 947 F.3d at 828, 834-35.

New York has created the precise problem that this Court and others warned about. By limiting the Abortion Mandate's exemption to religious non-profits that hire and serve coreligionists, New York privileges certain types of religious entities: namely, those that do not, as part of their religious missions, employ and serve individuals of other faiths or of no faith. It thus places special burdens on religious traditions holding service of others to be a religious command. *See Luke* 10:27 ("You shall love…your neighbor as yourself."); Pope John Paul II, *Evangelium Vitae* § 87 (1995) ("As disciples of Jesus, we are called to become neighbours to everyone, and to show special favour to those who are poorest, most alone and most in need." (citation omitted)). For instance, the exemption does not apply to the Teresian Nursing Home, Teresian Housing Corporation, or Depaul Housing Management Corporation, who hire and serve individuals of different faiths. Nor does it apply to First Bible Baptist Church, a "family of faith which includes individuals of varied religious backgrounds." Pet.App.100a. And it similarly excludes Catholic Charities, which aims to serve all those in need, regardless of their religion. Indeed, Mother's Teresa's Missionaries of Charity would not have qualified for the exemption because Calcutta's poor were not predominantly Catholic. By contrast, religious organizations that only employ and serve their own *do* qualify for the State's solicitude. New York has no

"compelling reason" to make these distinctions. *Smith*, 494 U.S. at 884.

The pernicious effects of New York's law, moreover, are exacerbated because they pressure religious organizations to alter other aspects of their governance and doctrine in order to qualify for the exemption. Such coercion ignores the foundational holding that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 737 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The State therefore cannot intrude upon questions of "church doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). Indeed, even just "scrutinizing" such questions of how a religious group pursues its religious mission threatens impermissible "state entanglement with religion." *Carson*, 596 U.S. at 787. Instead, a religious organization must enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 591 U.S. at 746.

These precedents belie the Court of Appeals' position that laws remain outside the reach of strict scrutiny *because* they treat some religions better than others. New York's law requires the State to engage in the "offensive" business of discriminating among religions based on their perceived level of religiosity. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality); *cf. A.H. ex rel. Hester v. French*, 985 F.3d 165, 186 (2d Cir. 2021) (Menashi, J., concurring) ("The exclusion of

certain types of religious institutions…is discrimination on the basis of religious status."). This makes New York's narrow and malleable approach less defensible, not more so.

3. The Court of Appeals also took an unduly narrow approach to *Fulton*'s holding regarding individualized exemptions. *See Fulton*, 593 U.S. at 533. In effect, the Court of Appeals narrowed this aspect of *Fulton* to its facts, reading "individualized" to mean "entirely discretionary," Pet.App.17a. That is, on the Court of Appeals' view, if there are any criteria in place to guide decisions regarding exemptions, a law is generally applicable, no matter how much discretion remains. Pet.App.21a-22a.

This is not an exaggeration: the criteria the Court of Appeals found sufficient to render the law here non-individualized accord enormous discretion to pick religious winners and losers. Consider, for example, the requirements that the organization "primarily" "employs" and "serves" people "who share [its] religious tenets." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(2)-(3). Those standards embed numerous discretionary judgments. An adjudicator must first determine an employer, employee, and client's "religious tenets." Then, it must determine if they sufficiently overlap such that the employer "primarily serves" and "primarily employs" people who "share" the employer's "religious tenets." Even that, however, may be insufficient if the State concludes that "the purpose" of the employer is not "the inculcation of religious values" (whatever that means).

If these criteria are not discretionary, it is hard to know what is. As this Court has noted, "determining

whether a person is a 'co-religionist' will not always be easy." *Our Lady of Guadalupe*, 591 U.S. at 761. "Are Orthodox Jews and non-Orthodox Jews coreligionists? …. Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Id*. Or to put a finer point on it: How many residents must the Carmelite Sisters evict from their nursing homes, and how many employees must they fire, to qualify for the exemption? All non-Christians? All non-Catholics? Likewise, what does it mean for the "inculcation of religious values" to be "*the purpose* of the entity"? Does "caring for orphans and widows" count? James 1:27. What of St. Francis of Assisi's famous admonition, "Preach the Gospel always, and if necessary, use words!" Pope Francis, *Homily at the Holy Mass and Blessing of the Sacred Palladium for the New Metropolitan Archbishops* (June 29, 2015), https://perma.cc/Q22E-R7YK. There are obviously no "objective" answers to these questions. Yet, they are all for the State to decide.

The exemption's criteria thus accord the State tremendous discretion. And in doing so, they require the State to deeply intrude on matters of religious doctrine—governmental "probing" which this Court has repeatedly found "profoundly troubling." *Mitchell*, 530 U.S. at 828; *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("very process of inquiry" into religious questions "impinge[s] on rights guaranteed by the Religion Clauses"); *see also Colo. Christian*

Univ., 534 F.3d at 1261 ("It is well established…that courts should refrain from trolling through a person's or institution's religious beliefs.").

4. Because the mandate is not generally applicable, strict scrutiny applies. New York cannot satisfy that standard—and has never even argued it could. Indeed, even though the Religious Ministries have repeatedly argued, in detail, that the law fails strict scrutiny, the State has never put forth a single piece of evidence or argument to the contrary. It is easy to see why. Even assuming some sort of compelling interest in forcing compliance with the abortion mandate by these religious organizations (which is far from obvious), New York could easily use a less restrictive means of achieving its interest: it could (among other things) simply pay for "medically necessary abortions" itself, rather than require religious entities to cover them. *See Hobby Lobby Stores*, 573 U.S. at 728 (detailing less restrictive alternatives in a similar context).[3]

* * *

From *Smith* to *Larson* to *Fulton* to *Our Lady of Guadalupe* to *Carson*, and everywhere in between, this Court has made clear that the approach taken by the New York Court of Appeals below is improper. In other words, that court—despite a second opportunity afforded by this Court's remand—has ruled in a

[3] The State has conceded that the cost of doing so is *de minimus*. *See* Brief in Opposition, at 7 n.5, *Roman Catholic Diocese of Albany*, 142 S. Ct. 421 (No. 20-1501) (suggesting costs "between 11 and 33 cents per member per month when calculated…without accounting for any potential cost savings" and that, accounting for savings, "coverage for abortion services as part of…a health plan is cost-neutral").

manner that is both "incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012). Thus, the Court should grant review, resolve the split, and hold at long last that the Abortion Mandate cannot be applied to health plans for objecting religious entities.

II. THE COURT SHOULD GRANT THE PETITION TO RECONSIDER *SMITH*.

If there is any chance that *Smith* allows New York to compel some religious organizations to fund what, in their view, is a grave moral evil, while exempting others from that burden, the Court should reexamine *Smith*. Surely, such a world is not "a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019).

This Court has already recognized that *Smith* should be reconsidered. *Fulton*, 593 U.S. at 540. But the Court ultimately declined to reach the issue in *Fulton* because strict scrutiny applied there even under *Smith*. *Id.* at 541. As five Justices acknowledged in concurrences, though, *Fulton*'s holding did not undermine the need to reevaluate *Smith*. *See id.* at 543 (Barrett, J., joined by Kavanaugh); *id.* at 545-46 (Alito, J., joined by Thomas and Gorsuch).

Given the ongoing harm to religious entities in New York and elsewhere, the need is urgent. And this is a clean vehicle with which to address the issue: New York has explicitly mandated that religious entities cover a procedure that is undisputedly contrary to

their religious beliefs, and the State has never even argued it could satisfy strict scrutiny if it applies.

III. THE QUESTIONS PRESENTED HERE ARE IMMENSELY IMPORTANT.

It is hard to imagine a more critical legal question for Petitioners and similar religious organizations than whether New York can force them to cover abortions in their employee health plans. And although the impact on religious adherents in New York alone would support review, the importance of this issue travels well beyond New York's borders—this case presents critical questions about a fundamental constitutional right. Thomas Jefferson once declared that "[n]o provision in our Constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprizes of the civil authority."[4] Rights of conscience are at the very center of this case, and this Court's guidance is dearly needed.

1. It is undisputed that to Petitioners, abortion is among the most significant of moral wrongs.

The Catholic Church, for example, has, "[s]ince the first century[,] … affirmed" its view of "the moral evil of every procured abortion." Catechism of the Catholic Church § 2271. The other Petitioners share similar beliefs. Kevin Pestke (Pastor of the First Bible Baptist Church), explained that his church's "Articles of Faith teach that…abortion constitutes the unjustified, unexcused taking of unborn human life."

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[4] *Letter from Thomas Jefferson to Richard Douglas*, National Archives, Founders Online (Feb. 4, 1809) https://founders.archives.gov/documents/Jefferson/99-01-02-9714.

Pet.App.101a. And "Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures." Pet.App.131a.

If New York's mandate remains in place, Petitioners and like-minded religious organizations will be in an intolerable position. They will have to violate core beliefs, cease offering health insurance (a financially and morally fraught outcome), or shut down altogether. Surely, no one is better served if the Teresian House stops serving the elderly, or Catholic Charities stops serving the poor. Before that happens, this Court should decide whether New York can put them to that choice.

The importance of this challenge has only grown since it was last before this Court. Indeed, the State's choice to codify the regulatory mandate in a statute makes clear that New York will offer the Religious Ministries no relief—in the face of a shifting religious liberty landscape, the State has doubled down.

2. As this Court's numerous religious liberty decisions have established, the increasing reach of regulators and administrators means that government demands and religious beliefs are increasingly likely to clash. These questions are thus not merely important to the Religious Ministries—they are important to everyone.

First, as the State has acknowledged, the Abortion Mandate's religious exemption was modelled on other religious exemptions included in New York law and mirrored in the laws of other states. *See, e.g.*, Cal. Health & Safety Code § 1367.25; Or. Rev. Stat. Ann. § 743A.066; Haw. Rev. Stat. Ann. § 431:10A-116.7;

N.C. Gen. Stat. Ann. § 58-3-178. Thus, any decision in this case would have direct implications for religious liberty in many other contexts, including in two of the most populous States in the nation.

More broadly, at the federal level, statutory protections have often obviated the need to further define the scope of the Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 573 U.S. 682; *Holt v. Hobbs*, 574 U.S. 352 (2015). But statutory protections are not set in stone, and many states (New York included) lack similar protections. Thus, the reach of the Religion Clauses themselves is of paramount importance.

While *Fulton* clarified the role of exemptions in the First Amendment analysis, its reference to "secular" exemptions left an opening that has been exploited to defend selective religious exemptions, despite their obvious inconsistency with *Fulton*'s reasoning and other precedents of this Court, including *Larsen* and *Our Lady of Guadalupe*. The decision below, along with other post-*Fulton* cases sidestepping the need for strict scrutiny in similar circumstances, have made obvious that further clarification is needed.

This case provides an ideal vehicle to address this issue, as it squarely presents the outstanding issue regarding the impact of selective religious exemptions. The Court should take the opportunity by granting this petition and reversing the New York Court of Appeals.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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No. 24-319

In the Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE STATES OF TEXAS, ___, AND ___ AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici States have an interest in the uniform application of First Amendment principles and in the invaluable social services provided by religious organizations. Amici States likewise value the work done by religious groups like Petitioners in their communities. But New York's abortion-coverage mandate threatens the continued operation of such organizations by making it impossible for them to employ people of other faiths, serve their communities without regard to recipients' religion, or even to provide social services. Because the decision below implicates these interests and vitiates fundamental First Amendment freedoms, Amici States urge the Court to grant the petition for a writ of certiorari.[1]

INTRODUCTION

When the government orders churches to pay for abortions, the Free Exercise Clause surely has something to say. Yet many state governments read this Court's precedent to the contrary. Three decades ago, this Court held that the First Amendment allows neutral and generally applicable laws to burden religious exercise. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). That principle has emboldened New York and five other States to mandate abortion coverage in certain religious organizations' employee health insurance plans. But New York does not apply its policy equally to all religious groups. To wit, New York purports to exempt from that abortion-coverage mandate those "[r]eligious employer[s]," whose "purpose" is "[t]he

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On October 9, 2024, counsel of record for all parties received notice of amici's intention to file this brief.

inculcation of religious values," who "serve[] primarily persons who share the religious tenets of the entity," and who "primarily employ[] persons who share" those religious tenets. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Under that unduly cramped—and malleably vague—exemption, Catholic nuns devoted to tending to the elderly and infirm, ecumenical religious schools, and other service-based religious ministries remain subject to New York's abortion-coverage mandate notwithstanding their longstanding and sincerely held objections to abortion.

For more than seven years, New York has stridently defended that mandate against Petitioners' First Amendment challenge, going so far as to codify that regulation by statute just last year. Yet three years ago, this Court explained that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable," because "it 'invite[s]' the government to decide which reason for not complying with the policy are worthy of solicitude.'" *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021) (quoting *Smith*, 494 U.S. at 884). Although this Court remanded this case back to the New York courts following *Fulton*, the New York Court of Appeals neverthless concluded that *Fulton* changed nothing. That court reasoned that, while this Court's precedent now makes clear that the government may not treat secular activities more favorably than religious exercise, the First Amendent erects no barrier to the state treating some religious adherents better than others. Pet.App.26a-29a.

Petitioners' certiorari petition amply demonstrates why the decision below entrenches a split of authority and cannot be sustained under existing First Amendment doctrine. But the New York Court of Appeals' intransigence points to a more fundmenatal problem

playing out in many jurisdictions across the country. A central premise undergirding *Smith*'s holding that the government may burden religious exercise through neutral laws of general applicability was the expectation that lawmakers would nevertheless be "solicitous" of religious freedom. *Smith*, 494 U.S. at 890. The Court has since emphasized that such "special solicitude" is, indeed, embodied in the text of the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). But *Smith*'s expectation has, in too many places, proved overly optimistic. The Court should grant the petition and, if necessary, revisit *Smith*.

SUMMARY OF ARGUMENT

I. For the religious citizens of some States, the First Amendment's special solicitude has become hard to find. Perhaps no greater example exists than the COVID-19 pandemic, during which "we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 142 S.Ct. 1312, 1315 (2023) (Gorsuch, J., statement). "Executive officals across the country issued emergency decrees on a breathatking scale," many of which ignored burdens on religious exercise or, worse, targeted religious exercise as such. *Id.* Some state or local governments "closed churches even as they allowed casinos and other favored businesses to carry on." *Id.*; *see Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam). Others "surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct." *Arizona*, 143 S.Ct. at 1314 (citing *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020) (per curiam)).

But such religious antagoanism is not limited to once-in-a-generation pandemics. California recently tried to force crisis pregnancy centers to violate their religious beliefs by requiring the centers to promote abortion to the women they serve. *See infra* at X-X. Colorado recently prohibited medical professionals from offering care that could potentially save the life of an unborn baby, without exception for those whose religion compelled them to provide such care. *See infra* at X-X. And the Attorneys General of both California and New York have sought to enjoin religious organizations from promoting the same treatment. *See infra* at X-X. Clearly, in some States hostility, not solicitude, is increasingly common.

Emboldened by *Smith*'s rule, New York and several other States have mandated that all employee insurance plans provide coverage for abortion procedures. These mandates purport to be neutral and generally applicable. But for religious organizations like Petitioners here, providing coverage for abortion is complicity in a grave sin—there is no dispute that it violates their sincerely held religious beliefs. Some mandates, like New York's, provide an exemption for "religious employers"—a term defined so narrowly it excludes plainly religious organizations like the Petitioners here, which include nuns devoted to serving the elderly and infirm, ecumenial churches, and other service-based religious ministries. Worse, in some of these States not even churches are exempt. And these States have not unknowingly overlooked the burden their mandates place on religious exercise—instead, relying on *Smith*, they forthrightly impose those burdens. This is not the solicitude that the First Amendment demands.

II. Some courts read *Smith* to say the Free Exercise Clause provides protection only from laws deliberately aimed at restricting religious practice. *See* 494 U.S. at

878-79. That is not the religious liberty the founding generation understood. And because *Smith*'s premise of solicitude has unfortunately proved faulty, the Court should revisit *Smith*'s holding.

ARGUMENT

I. Many States Do Not Treat Religious Exercise with the Special Solicitude Enshrined in the First Amendment.

In *Smith*, the Court held that the First Amendment does not require strict scrutiny of "neutral and generally applicable" laws that burden religious exercise. 494 U.S. at 878-79. The *Smith* Court "expected," however, "a society that believes in the negative protection accorded to religious belief . . . to be solicitous of that value in its legislation as well." *Id.* at 890. But for the citizens of some States, such solicitude is lamentably rare.

A. Consider first New York's COVID-19 mitigation efforts, which were marked by hostility toward religious exercise. In November 2020, this Court enjoined enforcement of New York Executive Order 202.68, which set lower capacity limits for religious services than for businesses deemed "essential," including acupuncture facilities, manufacturing plants, and liquor stores. In "red zones," attendance at religious services was restricted to ten individuals even in the largest cathedrals and synagogues; yet businesses deemed to be "essential" had no capacity restrictions whatsoever. *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 66. Before issuing his executive order, then-Governor Cuomo made no secret that it was designed to target religious practice, saying that "religious institutions have been a problem" for the State's COVID-19 mitigation efforts and that if religious

communities do not comply, "then we'll close the institutions down."[2]

Enjoining enforcement of that order, this Court explained that the applicants made a "strong showing that [New York's] restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 67. As Justice Gorsuch noted, "[t]he only explanation for treating religious places differently [from secular places] seem[ed] to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces." *Id.* at 69 (Gorsuch, J., concurring).

Similarly, when it came to New York's vaccine mandate, "[t]he State began with a plan to exempt religious objectors [but] later changed course." *Dr. A. v. Hochul*, 142 S.Ct. 552, 555 (2021) (Gorsuch, J., dissenting). The New York Governor "admitted that the revised mandate 'left off' a religious exemption 'intentionally[,]'" and "offered an extraordinary explanation for the change," saying, "'God wants' people to be vaccinated—and that those who disagree are not listening to 'organized religion' or 'everybody from the Pope on down.'" *Id.* As a result, New York's mandate "prohibit[ed] exemptions for religious reasons while [it] permit[ed] exemptions for medical reasons." *Id.* at 556.

New York was hardly the only State to disregard the free-exercise rights of religious communities during the COVID-19 pandemic. This Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" five times within five months. *Tandon*, 593 U.S. at 61; *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *Gish v. Newsom*, 141 S.Ct. 1290

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[2] *See Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, GOVERNOR.NY.GOV (Oct. 5, 2020) https://tinyurl.com/2r4v3pvf.

(2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S.Ct. 889 (2020). In each case, the Court granted relief to the religious petitioners.

Throughout the pandemic, California "openly imposed more stringent regulations on religious institutions than on many businesses." *S. Bay*, 141 S.Ct. at 717 (statement of Gorsuch, J.). As time went on, California only grew more hostile to religious practice. Although, at first, California permitted houses of worship to operate at 25% capacity, *see Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 73 (Kavanaugh, J., concurring), the State ultimately "forb[ade] any kind of indoor worship"—even as it "allow[ed] most retail operations to proceed indoors with 25% occupancy, and other business to operate at 50% occupancy or more." *S. Bay*, 141 S.Ct. at 717 (statement of Gorsuch, J.).

In every case, California argued its restrictions on religious exercise were merely neutral and generally applicable regulations permitted by *Smith*.[3] The Court correctly rejected that contention. But California's argument found significant purchase in the lower courts, illustrating the need for this Court to restore robust protection for religious liberty. As the Chief Justice

[3] *See, e.g.*, State Appellees' Answering Brief, *Tandon v. Newsom*, No. 21-15228, 2021 WL 1499787, at *22-25 (9th Cir. Apr. 6, 2021); State Defendants-Appellees' Answering Brief and Opposition to Renewed Motion for Injunction Pending Appeal, *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 150974, at *29-31 (9th Cir. Jan. 7, 2021); State Defendants-Appellees' Answering Brief, *Gateway City Church v. Newsom*, No. 21-15189, 2021 WL 1306156, at *41 (9th Cir. Mar. 29, 2021); State Defendants-Appellees' Answering Brief, *Gish v. Newsom*, No. 20-56324, 2021 WL 150982, at *39 (9th Cir. Jan. 7, 2021); Answering Brief, *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 6999458, at *41-42 (9th Cir. Nov. 18, 2020).

observed, California's "determination . . . that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *S. Bay*, 141 S.Ct. at 717 (Roberts, C.J., concurring). A rule that lower courts could read to allow such restrictions reflects a misreading of the Free Exercise Clause.

Though New York and California may have been the most blatant violators of religious exercise during the COVID-19 pandemic, they were by no means alone. Consider just a sampling of the following representative examples:

- Colorado imposed occupancy limits on houses of worship, but exempted "meat-packing plants, distribution warehouses, P-12 schools, grocery stores, liquor stores, marijuana dispensaries, and firearms stores." *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 832 (D. Colo. 2020). Colorado also made "a total of eight exemptions" to its mask mandate, "none of which appl[ied] to worship services." *Id.* at 833.

- Illinois restricted houses of worship and religious organizations to gatherings of no more than 10 people, while permitting hardware stores, garden centers, cannabis dispensaries, and other secular establishments to cap occupancy at 50 percent of store capacity. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343-44 (7th Cir. 2020); Illinois Executive Order 2020-32.

- Maine allowed exemptions to its vaccination mandate for those expressing "mere *trepidation* over vaccination . . . but only so long as it is phrased in medical and not religious terms." *Doe v.*

Mills, 142 S.Ct. 17, 19 (2021) (Gorsuch, J. dissenting).

- Nevada "treat[ed] numerous secular activities and entities significantly better than religious worship services" by allowing "[c]asinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities [up] to 50% of fire-code capacity," while limiting "houses of worship . . . to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020).

- At the same time Oregon allowed the reopening of restaurants, bars, and gyms without occupancy limits so long as six-foot distancing between parties could be maintained, it prohibited "faith-based gatherings of more than 25 people," in addition to imposing distancing requirements, backed by the threat of a $1,250 fine and jail time of up to thirty days for anyone who attended. *See* Phase One Reopening Guidance - Specific Guidance for Restaurants, Bars, Breweries, Brewpubs, Wineries, Tasting Rooms and Distilleries, OHA 2342B, Oregon Health Authority, May 7, 2020, https://tinyurl.com/mr2wwnh4; Oregon Executive Order No. 20-25, May 14, 2020, https://tinyurl.com/54ryyuuh; Oregon Executive Order No. 20-65, Nov. 17, 2020, https://tinyurl.com/bdc55ese.

- During "Phase 2" of Washington State's "Reopening," "religious organizations were [] subject to [a] 25% capacity or 200-person cap[], whichever was less," while "offices, restaurants, and taverns in Phase 2 were allowed occupancy of 50% of their building capacity and did not face any

per person caps." *Harborview Fellowship v. Inslee*, 521 F. Supp. 3d 1040, 1043–44 (W.D. Wash. 2021). Washington's initial Phase 2 guidance also limited spiritual gatherings to "no more than 5 people outside your household per week," while restaurants were allowed "<50% capacity." Safe Start Washington - A Phased Approach to Recovery, May 4, 2020, https://tinyurl.com/2p8mt4dr. Phase 1 forbade indoor spiritual gatherings entirely, while "cannabis retail" and "liquor stores that sell food" were allowed to open as "essential businesses." *Id.*; WA Essential Critical Infrastructure Workers, March 23, 2020, Proclamation 20-25, Appendix, https://tinyurl.com/24fnsvep.

Other States also imposed restrictions on religious gatherings with varying degrees of severity. *See* Most states have religious exemptions to COVID-19 social distancing rules, PEW RESEARCH CENTER, April 27, 2020, https://tinyurl.com/4rd7jz5b; UPDATE: Banning Religious Assemblies to Stop the Spread of COVID-19, Congressional Research Service, Updated June 1, 2020, https://tinyurl.com/ms5mrth4.

B. It is not only once-in-a-generation pandemics that trigger governmental hostility to religious exercise, however. In recent years, this Court has frequently confronted governmental decisions that burden religious exercise out of a misguided attempt to ensure government "neutrality." For example, two terms ago, this Court reversed on Free Exercise Clause grounds a Ninth Circuit decision affirming a school district's termination of a longtime high school football coach for "kne[eling] at midfield after games to offer a quiet prayer of thanks." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 512, 524-26 (2022). In rejecting the school district's

argument that it disciplined the coach because it feared that permitting him to quietly pray would violate the Establishment Clause, this Court remarked that it was "aware of no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion' in this way." *Id.* at 541 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

That same term the Court rejected a City's refusal to "fly a Christian flag" on a flagpole even though the City had previously "approved hundreds of requests to raise dozens of different flags" without objection. *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022). And the Court has repeatedly reversed lower court decisions affirming state-government decisions denying generally available public benefits to religious observers that were made available to secular persons. *See Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 778-81 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 473-79 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458-64 (2017).

Religious opponents of abortion also face hostility from some state governments, and not only in the context of employee health insurance. In recent memory, Washington State adopted regulations requiring pharmacies to stock and sell abortifacient drugs. *See Storman's, Inc. v. Wiesman*, 136 S.Ct. 2433, 2434 (2016) (Alito, J., dissenting from denial of certiorari). Though that regulation contained an exception permitting pharmacies to refer purchasers to other pharmacies for a host of secular reasons, it expressly forbade pharmacies to refuse to deliver such drugs "on religious, moral, or other personal grounds." *Id.* As the district court in that case found, the regulation was "adopted with the predominant purpose to stamp out the right to refuse to

dispense emergency contraceptives for religious reasons." *Id.* (quotations omitted). Indeed, the State's Governor prevailed on the state regulators to make those with personal or conscientious objections nevertheless subject to the regulation—going so far as to threaten those regulators with removal from the State Board of Pharmacy should they refuse. *Id.* The State Human Rights Commission even threatened regulators "with personal liability if they passed a regulation permitting referral for religious or moral reasons." *Id.* Yet when it came time to defend this regulation in Court, Washington retreated to *Smith*, arguing it was merely a neutral rule of general applicability. *See* Brief in Opposition at 21-27*, Storman's, Inc. v. Wiseman*, No. 15-862 (U.S. Mar. 7, 2016).

Even more recently, California tried to force crisis pregnancy centers—"largely Christian belief-based[] organizations"—to promote abortion to the women they serve. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2368 (2018); *id.* at 2380 (Breyer, J., dissenting) (noting that petitioners "object to abortion for religious reasons"). The California Legislature made no secret of its hostility to the centers' beliefs. *See id.* at 2379 (Kennedy, J., concurring) ("The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of 'forward thinking.'"). Indeed, the author of the legislation considered it "unfortunate[]" that there were "nearly 200 licensed and unlicensed crisis pregnancy centers in California." *Id.* at 2368 (majority op.) (quotation marks omitted). The Court rightly concluded that California's law violated the free-speech protections of the First Amendment. *Id.* at 2378.

More recently, California has joined with Colorado and New York in further attacks on crisis pregnancy centers' First Amendment rights, including by preventing

medical professionals from treating pregnant women with progesterone—a medication that can be used to reverse the effects of "the abortion pill" and potentially save the lives of unborn babies—in spite of those medical professionals' religious convictions obligating them to provide such treatment. *See Bella Health & Wellness v. Weiser*, 699 F. Supp. 3d 1189, 1197 (D. Colo. 2023); *see also* Colo. Rev. Stat. § 12-30-120(1)(c)–(2)(a). As one federal district court explained in issuing a preliminary injunction, Colorado's "prohibition on medication abortion reversal," "treats comparable secular activity more favorably than [the plaintiff's] religious activity," and its "object and effect is to burden religious conduct in a way that is not neutral." *Bella Health*, 699 F. Supp. 3d at 1212. The court found that, "the legislature knew that the burden of this prohibition, in operation, would primarily fall on religious adherents" but enacted it anyway. *Id.* at 1215. And even worse, though the regulation supplied a mechanism for individualized exemptions, *id.* at 1214, there were no exemptions for organizations like the plaintiff there who "considers it a religious obligation to provide treatment for pregnant mothers and to protect unborn life if the mother seeks to stop or reverse an abortion," *id.* at 1999, 1218.

Similarly, in California, the Attorney General sued faith-based pregnancy resource centers, alleging that the organizations' efforts to provide abortion-pill reversal information and access constituted false or misleading statements and unfair competition in violation of state law. *See* Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief at 4–5, 26–28, *California v. Heartbeat International*, No. 23CV044940 (Cal. Super. Ct. filed Sept. 21, 2023). Indeed, California sought to enjoin the organizations from even *telling* the public about potentially life-saving progesterone

treatment. *Id.* at 28–29; *see also* Verified Complaint for Injunctive and Declaratory Relief and Attorneys' Fees and Costs and Demand for Jury Trial at 3, *Nat'l Inst. for Family & Life Advocates v. Bonta*, No. 2:24-cv-08468 (C.D. Cal. filed Oct. 2, 2024). And it sought civil penalties of up to $2,500 for "each violation." Complaint at 29, *Heartbeat*, No. 23CV044940.

In New York, too, the Attorney General "commenced a civil enforcement action" against several "faith-based, pro-life pregnancy centers[.]" *Nat'l Inst. for Fam. & Life Advocs. v. James*, No. 24-CV-514 (JLS), 2024 WL 3904870, at *3 (W.D.N.Y. Aug. 22, 2024). Like California, New York alleged that the pregnancy resource centers' promotion of abortion-pill-reversal treatments constituted false and misleading advertizing, in violation of New York law. *Id.*. Similar faith-based, pro-life organizations sued the Attorney General for, and obtained, a preliminary injuction, because their "religiously motivated and constitutionally protected pro-life speech [was] chilled by the Attorney General's unlawful selective enforcement." *Id.* at *4-6. The court in that case ensured that New York could not use intimidation and prosecution to prevent religious organizations from helping "women to access and receive information that may lead to saving the lives of their unborn children." *Id.* at *10.

C. New York's abortion-coverage mandate, at issue in this case, is of a piece with the foregoing examples of hostility to religious exercise that are regrettably common throughout the country. But New York is not the only jurisdiction where religious organizations are compelled by law to cover abortions through their employee health insurance—something they cannot do without violating their sincerely held beliefs. *See* Pet. 7. In addition to New York, nine States mandate abortion-

coverage for private health-insurance plans. These States include California, Colorado, Illinois, Maine, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Washington. *See* Letter from Michelle Rouillard, Director of the California Department of Managed Health Care, to Mark Morgan, California President of Anthem Blue Cross (Aug. 22, 2014), https://tinyurl.com/yck3wx9m; Colo. Rev. Stat. § 10-16-104; 215 I.L.C.S. 5/356z.4a; Me. Stat. tit. 24-A § 4320-M; Md. Code Ann., Ins. § 15-857; Mass. Ann. Laws ch. 175, § 47F; N.J. Admin. Code § 11:24-5A.1; O.R.S. § 743A.067; 8 V.S.A. § 4099e; Wash. Rev. Code §§ 48.43.072, .073.

Four of these States—California, Illinois, Vermont, and Washington—do not even exempt churches, let alone other religious employers. In California, although there is a statutory exemption from covering contraceptive methods "contrary to [a] religious employer's religious tenets," Cal. Health & Safety Code § 1367.25(b), no such exemption exists for abortion. Statutory exemptions are also lacking in Illinois's, Vermont's, and Washington's abortion-coverage mandates. *Compare* 215 I.L.C.S. 5/356z.4a, *with* 215 I.L.C.S. 5/356m; Wash. Rev. Code §§ 48.43.072, .073; 8 V.S.A. § 4099e.[4] Critically, when these types of mandates are challenged, *Smith* is regularly the vanguard of the state government's defense.[5]

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[4] In *Cedar Park Assembly of God v. Kreidler*, No. 20-35507 (9th Cir.), Washington's litigation position is that even though its abortion-coverage mandate admits of no exceptions, its "conscience objection statute," Wash. Rev. Code § 48.43.067(3)(a), would allow a church to exclude abortion coverage from its employee health insurance. *See* Defendants-Appellees' Answering Brief 3-4, 9-10 (9th Cir. Dec. 2, 2020).

[5] *See, e.g.*, Appellee's Answering Brief 14-15, *Foothill Church v. Rouillard*, No. 19-15658 (9th Cir. Dec. 4, 2019); Defendants-Appellees' Answering Brief 36-43, *supra* n.4; Appellee's Answering

Even where exemptions do exist, their protection is paltry. As Petitioners explain, New York's abortion-coverage mandate provides no protection for a host of religious organizations, merely because the organizations provide charity to the public, without regard to the recipients' faith. *See* Pet. 29-30; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(3). Maine and Oregon have adopted similarly narrow exemptions. *See* Me. Stat. tit. 24-A § 4320-M(4); O.R.S. §§ 743A.066(4). Yet religious organizations like Petitioners make invaluable contributions to the communities in which they operate, often providing essential social services in partnership with state and local governments. Their continued existence is threatened when they cannot operate without violating their sincerely held beliefs.

II. The Time Is Ripe to Revisit *Smith*.

A. Even after *Fulton*, there is confusion in the lower courts about what qualifies as a neutral and generally applicable law under *Smith*. As evidenced in the Court's pandemic-related orders, *see supra* Part I.A, some States and lower courts take an unduly expansive view of what counts as a "neutral and generally applicable" law. The Court should clarify that *Smith*'s "neutral and generally applicable" standard does not permit New York or any other State to require religious organizations to subsidize abortions through their employee health insurance.

B. In the alternative, as many of the Amici States have previously argued, *Smith* is an "erroneous constitutional decision" in need of being "settled right." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022); *see, e.g.,* Brief for the States of Texas et. al. as Amici Curiae in

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Brief 50, *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 959 F.3d 341 (9th Cir. May 13, 2020).

Support of Petitioners at 13–21, *Fulton v. City of Phila.*, 593 U.S. 522 (2021) (No. 19-123) ("States' *Fulton* Brief").

For one, *Smith* stands on "weak grounds." *Dobbs*, 597 U.S. at 268, 270. In addition to the havoc *Smith* has wrought on free exercise rights, *see supra* Part I, its "negative protection" from discrimination is a faint shadow of the religious liberty recognized by the founding generation. *See* States' *Fulton* Brief at 4–14. Indeed, *Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Fulton*, 593 U.S. at 553 (Alito, J., concurring).

"That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States." *Id.* at 582. Because religious liberty was so central to the Founding generation, "colonial and state legislatures were willing to grant exemptions" "[w]hen there were important clashes between generally applicable laws and the religious practices of particular groups"—"even when the generally applicable laws served critical state interests." *Id*. For example, religious objectors were exempted from taking legally required oaths before testifying, voting, or even assuming public office, *id.* at 582-83; objectors were "granted exemptions from the requirement that individuals remove their hats in court," *id.* at 584; religious objectors were exempted from mandatory militia service and conscription, because "violence to [objectors'] consciences" was deemed more essential than "the very survival of the new Nation," *id.* at 583-84. These exemptions are "strong evidence of the founding era's understanding of the free-exercise right," *id.* at 585 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1119

(1990)), and were born out of the Framers' unflagging belief in "the inviolability of conscience," Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1997). Thus, *Smith*'s "constitutional analysis was far outside the bounds" on the First Amendment's "text, history, or precedent." *Dobbs*, 597 U.S. at 268, 270.

Furthermore, "[t]his Court's jurisprudence since" *Smith* "has 'eroded' [its] 'underpinnings[.]'" *Id.* at 350 (Roberts, C.J., concurring). In *Hosanna-Tabor*, the Court held that "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own [ministers]." 565 U.S. at 184; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020). That carveout is hard to square with *Smith* itself. The employment discrimination statutes at issue in *Hosanna-Tabor* and *Our Lady of Guadalupe* would seem to fit comfortably within *Smith*'s general rule allowing "neutral and generally applicable" laws to burden religious exercise. And yet the Court—rightly—determined that the First Amendment required an exception to those laws. *See* States' *Fulton* Brief at 16–17.

Additionally, laws are not generally applicable "'whenever they treat any comparable secular activity more favorably than religious exercise.'" Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise under Smith and after Smith*, 2020-2021 Cato Sup. Ct. Rev., 2021, at 35 (quoting *Tandon*, 593 U.S. at 62). *Smith* thus has been significantly limited by *Tandon*. But despite this limitation, *Fulton* still allows governments to "rewrite their rules to eliminate discretionary exceptions," *id.* at 37, sometimes "[e]ven if a rule serves no important

purpose and has a devastating effect on religious freedom," *Fulton*, 593 U.S. at 545 (Alito, J., concurring); *see id.* at 543 (Barrett, J., concurring) ("Under *Smith*, a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise.") Thus, *Smith* is the worst of all worlds: It is no longer logically coherent, *and* it still infringes on rights the Constitution obviously protects.

Finally, overruling *Smith* will not "upend substantial reliance interests." *Dobbs*, 597 U.S. at 287. To the contrary, it will vindicate them. As recent events have highlighted, *Smith*'s expectation of solicitude toward religious exercise has proven too optimistic in many jurisdictions. *See supra* Part I. By leaving religious exercise at the mercy of politics, *Smith* has permitted troubling infringements of religious liberty, *see id.*, particularly for those holding minority beliefs. *See* States' *Fulton* Brief, *supra*, at 27–30.

Given *Smith*'s faulty premise, the Court's ongoing pruning of *Smith*'s holding, and the decision's "depart[ure] from a century of this Court's precedents and the common law before that," *stare decisis* does not mandate that the Court prolong *Smith*'s "30-year window." *Edwards v. Vannoy*, 593 U.S. 255, 294 n.7 (Gorsuch, J., concurring); *see Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment) (recognizing that the majority "dramatically depart[ed] from well-settled First Amendment jurisprudence"). The Court should use this opportunity to set aside *Smith* and reaffirm a standard more consistent with the original public meaning of the Free Exercise Clause. *See* States' *Fulton* Brief at 21. Otherwise, governments will remain free to trample upon Americans' most fundamental

rights. Because the Court declined to reach the issue in *Fulton*, it should grant the petition and do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2024

Counsel for Additional Amici States:

Bingesser, Matt

From: Burrows, Daniel
Sent: Friday, October 18, 2024 11:20 AM
To: Herbert, Danedri; Dalton, Charles
Subject: RE: NYT story about amended complaint in mifepristone lawsuit

I think a lot of this would reveal privileged mental impressions, conclusions, opinions, and legal theories. Therefore, we cannot comment at this time. And we can't speculate on what other states may or may not do.

However, I think we could get an answer on #6. Ask Abhi about it. It'd basically be a simple as saying a federal agency cannot purport to authorize things that Congress has explicitly made illegal, and mailing abortifacients has been a crime for 150 years.

From: Herbert, Danedri <Danedri.Herbert@ag.ks.gov>
Sent: Friday, October 18, 2024 11:13 AM
To: Burrows, Daniel <Daniel.Burrows@ag.ks.gov>; Dalton, Charles <Charles.Dalton@ag.ks.gov>
Subject: FW: NYT story about amended complaint in mifepristone lawsuit

Dan,

Why do we have standing? Is it an argument worth repeating in the NYT? Are any of the legal questions below worth repeating in the NY Times?

Otherwise, I think we simply say: Even the FDA's own label says that roughly 1 in 25 women who take this drug will end up in the emergency room. The FDA's data also showed that hospitalizations from using mifepristone increased by 300% when taken without in-person doctor's visits. We're pursuing this case to protect Kansas women.

Danedri Herbert | Director of Communications
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From: Herbert, Danedri
Sent: Thursday, October 17, 2024 4:24 PM
To: Burrows, Daniel <Daniel.Burrows@ag.ks.gov>
Cc: Dalton, Charles <Charles.Dalton@ag.ks.gov>
Subject: FW: NYT story about amended complaint in mifepristone lawsuit

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danedri.herbert@ag.ks.gov | www.ag.ks.gov

From: Pam Belluck <belluck@nytimes.com>
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To: Herbert, Danedri <Danedri.Herbert@ag.ks.gov>
Subject: Re: NYT story about amended complaint in mifepristone lawsuit

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> ***This communication, and any attachments, is private and confidential and for the exclusive use of the intended recipient. The information contained herein as well as any attachments is confidential and privileged under the joint prosecution or investigation privilege, attorney-client privilege, work product privilege, joint defense privilege, or any other applicable privilege or immunity. If you are not the intended recipient and have received this communication in error, please notify the sender immediately and destroy the original message and all copies. Any unauthorized disclosure, copying, distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. Receipt by anyone other than the intended recipient is not a waiver of any protection,***

privilege, or immunity. Please note also that the Kansas Open Records Act provides that public records, including correspondence to me via email, may be subject to disclosure unless otherwise protected by law.

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Please let me know — thanks very much,

Pam Belluck

Pam Belluck

Health and Science Writer

The New York Times

Belluck@nytimes.com

212-556-7422

New York Times / Pam Belluck

Bingesser, Matt

From: Kambli, Abhishek
Sent: Friday, October 18, 2024 11:19 AM
To: Herbert, Danedri; Powell, Anthony J.
Subject: RE: NYT story about amended complaint in mifepristone lawsuit

I wouldn't provide any answers beyond letting the complaint speak for itself.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Herbert, Danedri" <Danedri.Herbert@ag.ks.gov>
Date: 10/18/24 11:15 AM (GMT-06:00)
To: "Powell, Anthony J." <Anthony.Powell@ag.ks.gov>, "Kambli, Abhishek" <Abhishek.Kambli@ag.ks.gov>
Subject: FW: NYT story about amended complaint in mifepristone lawsuit

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New York Times / Pam Belluck

Bingesser, Matt

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New York Times / Pam Belluck

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Cc: Aaron Nielson; Brendan Fugere
Subject: Amicus Opportunity --Roman Catholic Diocese of Albany v. Harris (U.S., No. 24-319)
Attachments: Diocese of Albany - States' Amicus (CIRCULATION DRAFT).docx; 2024.09.18 - Petition for a Writ of Certiorari.pdf

Friends:

I'm writing to invite you to join the attached cert-stage amicus brief that Texas intends to file this coming Monday in SCOTUS in *Roman Catholic Diocese of Albany v. Harris* (U.S., No. 24-319). This case, which has now returned to SCOTUS after its first trip up to the Court was GVR'd following *Fulton v. City of Philadelphia*, involves a New York law that

requires abortion procedures to be covered in employee health-insurance plans. The law has a "religious employer" exception, but it is drawn so narrowly that the abortion-coverage mandate still includes, for example, Catholic nuns who serve the infirm and elderly, ecumenical religious schools, and other service-based religious ministries (all of which are Petitioners here). With the aid of Jones Day and the Becket Fund, the Petitioners have long been arguing that the law is not neutral and generally applicable within the meaning of *Employment Division v. Smith*, but the New York courts have long disagreed—going so far this time to say that nothing in *Fulton* changes this conclusion. The attached brief reprises one that Texas filed—and which many of you joined—three years ago before *Fulton* in No. 20-1501. In the brief we argue that one of the central premises of *Smith*—that governments would treat religious exercise with solicitude—has not panned out in practice in many States, and we again invite the Court to overrule *Smith*.

Because we need to file this brief on Monday, I'd ask for your joins by no later than **Monday, 11/21 at 8 a.m. CT.**

Thanks very much for your consideration, and please let me know if you have any questions.

All the best,

Billy

William F. Cole
Deputy Solicitor General
Office of the Texas Attorney General
(512) 936-2725
William.Cole@oag.texas.gov

No. 24-____

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2017, New York promulgated a regulation mandating that employer health insurance plans cover abortions. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o). The regulation narrowly exempts certain religious organizations: tax-exempt entities that have the "purpose" of "inculcat[ing] … religious values" and that primarily "employ[]" and "serve[]" those of the same religious persuasion. *Id.* § 52.2(y). But religious organizations with broader religious missions, such as serving the poor, must cover abortions in their health plans. So too must religious organizations that employ or serve members of other faiths or no faith at all.

The questions presented are:

1. Whether a law is "neutral" and "generally applicable" under *Employment Division v. Smith* where it exempts certain religious organizations—but not others—based on narrow and subjective religious criteria unrelated to the law's purpose, as New York and California hold, or whether such laws are subject to strict scrutiny under *Smith*, as the Second, Sixth, and D.C. Circuits hold.

2. If the First Amendment permits such discrimination among religious organizations under the rule announced in *Smith*, should *Smith* be overruled?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners, who were plaintiffs in the state court proceedings, are the Roman Catholic Diocese of Albany; the Roman Catholic Diocese of Ogdensburg; Sisterhood of St. Mary; Catholic Charities, Diocese of Brooklyn; Catholic Charities of the Diocese of Ogdensburg; St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y.; First Bible Baptist Church; Our Savior's Lutheran Church, Albany, N.Y.; Teresian House Nursing Home Company, Inc.; Renee Morgiewicz; Teresian House Housing Corporation; and Depaul Housing Management Corporation.

No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were defendants in the state court proceedings, are Adrienne A. Harris, Superintendent, New York State Department of Financial Services,* and the New York State Department of Financial Services. One plaintiff below, Catholic Charities of the Diocese of Albany, is not a petitioner here and so is deemed a respondent.

* At various earlier stages of this case, the superintendent and/or acting superintendent of the New York State Department of Financial Services was Maria T. Vullo, Linda A. Lacewell, or Shirin Emami. Two entities, Murnane Building Corporation and the Trustees of the Diocese of Albany, were plaintiffs at an earlier stage of the case but were no longer parties at the time of the New York Court of Appeals proceedings.

LIST OF RELATED PROCEEDINGS

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., New York Court of Appeals, No. 45 (May 21, 2024).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., Supreme Court of New York, Appellate Division, 3rd Department, Case No. 529350 (June 2, 2022).

Roman Catholic Diocese of Albany, et al. v. Shirin Emami, et al., United States Supreme Court, No. 20-1501 (Nov. 1, 2021).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, et al., New York Court of Appeals, Mo. No. 2020-549 (Nov. 24, 2020).

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, as Superintendent of Financial Services, et al., Supreme Court of New York, Appellate Division, 3rd Department, Case No. 529350 (July 2, 2020).

The Roman Catholic Diocese of Albany, N.Y., et al. v. Maria T. Vullo, Superintendent, New York State Department of Financial Services, et al., Supreme Court of New York, Index Nos. 2070-16, 7536-17 (Jan. 10, 2019).

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INTRODUCTION

This case is here for a second time, after the Court previously reversed and remanded for further consideration in light of *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), with three Justices having voted to grant plenary review. *Roman Catholic Diocese of Albany v. Emami*, 142 S. Ct. 421, 421 (2021).

Petitioners (the "Religious Ministries") first sought this Court's intervention over three years ago to stop New York from forcing them to subsidize abortions in their employee health plans (the "Abortion Mandate") over their deep religious objections. Although that mandate exempts religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists, religious organizations with a broader religious mission (such as serving the poor) or that employ or serve people regardless of their faith are not exempt.

At the time, *Fulton*, which raised similar Free Exercise issues, was pending before the Court. After *Fulton* recognized that a law's exemptions trigger strict scrutiny when they undermine the government's asserted interests in a similar way as prohibited religious conduct, the Court granted certiorari, vacated, and remanded this case for further consideration.

On remand, the New York courts insisted that nothing had changed. Rather than thoughtfully applying *Fulton* and this Court's other intervening Free Exercise holdings, the New York courts asserted that *Fulton* had no impact on this case and re-affirmed their own pre-*Fulton* precedent, including the case

they had originally relied on in ruling against the Religious Ministries.

As a result, this Court's intervention is now urgently needed, both to safeguard the Religious Ministries' religious liberty and to resolve a persistent split about when laws burdening religious exercise trigger strict scrutiny. New York is joined by California in allowing selective religious exemptions limited to preferred religious organizations, holding that such laws trigger strict scrutiny only when they intentionally target religion as such. That conflicts not only with *Fulton* but also with the Second, Sixth, and D.C. Circuits. These Circuits recognize that selective religious exemptions undermine general applicability at least as much as the secular exemptions discussed in *Fulton* do. The New York Court of Appeals is on the wrong side of this split, and its decision below confirms that *Fulton* had no impact on its analysis.

The New York courts' doctrinal error goes to the heart of this Court's First Amendment jurisprudence. By definition, giving exemptions to preferred organizations *but not others*—even though both undermine the government's asserted interests in a similar way—destroys a law's "general applicability." No one would reasonably say a law is generally applicable if it exempts a religious nursing home that serves only Lutherans, but not one that serves indigent elderly of all faiths. But that is precisely the position adopted by the New York courts.

Indeed, if anything, a selective religious exemption—preferring some religions and religious practices over others—makes a law even more

pernicious. It is, after all, a fundamental rule that "no State can 'pass laws' … that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982). New York's decision to exempt some religious groups while burdening others based on "whether and how [each] pursues its [religious] mission" constitutes forbidden "denominational favoritism." *Carson v. Makin*, 596 U.S. 767, 787 (2022) (citing *Larson*). New York, therefore, must at least justify its choice to exempt some but not others under strict scrutiny—something it has never even attempted to do during this now seven-year-old litigation.

The New York Court of Appeals' error, moreover, has enormous impact. To start, New York's mandate imposes immense burdens on countless religious entities opposed to abortion as a matter of deep-seated religious conviction. To take just one example, under New York's regulation, Catholic-affiliated religious orders, like the Carmelite Sisters who operate the Teresian Nursing Home, are deemed insufficiently religious to qualify for a religious exemption—and so are forced to cover abortions in their employee health plans over their religious objections. The same is true of the other Petitioners here, including not just other Catholic organizations, but also Lutheran, Episcopalian, and Baptist groups. And because New York's approach is not unique, religious groups face similarly onerous burdens across the country, even while some preferred religious groups are exempted.

For these reasons, the Court should grant this petition to resolve the underlying split and correct the error the New York courts refused to rectify.

Finally, if there is a question as to whether the Free Exercise Clause protects the Religious Ministries under *Smith*, the Court should revisit that decision. This Court has already acknowledged the need to resolve *Smith's* continuing vitality. *Fulton*, 593 U.S. at 540. While the Court did not reach that question given the facts in *Fulton*, it should consider it here. It cannot be that the Constitution allows New York to require religious groups to participate in a practice so fundamentally in conflict with their religious beliefs without at least justifying that choice under strict scrutiny. To the extent *Smith* suggests otherwise, it should be overruled.

OPINIONS BELOW

The decision of the New York Court of Appeals, affirming the dismissal of Petitioners' challenge, is reported at ___ N.E.3d ___, 2024 WL 2278222, and reproduced at Pet.App.1a. The decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, is reported at 206 A.D.3d 1074, 168 N.Y.S.3d 598, and reproduced at Pet.App.31a.

The pre-remand decision of the New York Court of Appeals, denying Petitioners leave to appeal, is reported at 36 N.Y.3d 927, 160 N.E.3d 321, and reproduced at Pet.App.64a. The pre-remand decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, is reported at 185 A.D.3d 11, 127 N.Y.S.3d 171, and reproduced at Pet.App.36a. The decision of the Supreme Court of New York is unpublished, reported at 2018 WL 11149776, and reproduced at Pet.App.50a.

JURISDICTION

The New York Court of Appeals affirmed the dismissal of Petitioners' claims on May 21, 2024. Pet.App.1a. Petitioners timely sought an extension on July 22, 2024, which was granted on July 26, 2024, extending the time to seek certiorari to September 18, 2024. No. 24A90. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The New York regulatory provisions at issue, 11 N.Y.C.R.R. §§ 52.2(y), 52.16(o), are included in the Appendix at Pet.App.194a.

The New York statutes at issue, N.Y. Ins. Law §§ 3221(k)(22), 4303(ss) (mandate) and N.Y. Ins. Law §§ 3221(l)(16)(E)(1), 4303(cc)(5)(A) (religious exemption), are included in the Appendix at Pet.App.198a.

STATEMENT

A. Statutory and Regulatory Background

New York regulates employer health insurance plans both by statute and through regulations. New York statutes provide various substantive requirements of group insurance plans and insurance providers. *See, e.g.*, N.Y. Ins. Law § 3221; *id.* § 4303. Respondents, the Superintendent of the New York State Department of Financial Services and the Department itself, also regulate the content of group health insurance plans. *See* N.Y. Ins. Law § 3217(a).

As a general matter, the Superintendent's regulations require that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition," save with respect to

a number of specified "except[ions]," including many foot, vision, and dental conditions. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule requiring group health insurance plans to cover "medically necessary abortions." Pet.App.103a. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibit "health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition," and "[n]one of the exceptions apply to medically necessary abortions." *Id.* The proposed regulation would "make[] explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage…shall not exclude coverage for medically necessary abortions." Pet.App.104a.

Accordingly, the Superintendent proposed a new regulation, § 52.16(o), to provide that "[n]o policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary." Pet.App.106a.

Neither the proposed regulation nor the eventual published version define "medically necessary abortions." But the Superintendent's "model language" for health insurance contracts stated that "medically necessary abortions" include at least "abortions in cases of rape, incest *or fetal malformation*." Pet.App.5a (emphasis added). The mandate thus appears to cover abortions of babies

with nonfatal abnormalities such as Down Syndrome. Moreover, in response to comments on the proposed rule, the Superintendent explained that "[m]edical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient." Pet.App.183a. In other words, "medical necessity" is left largely to the discretion of individual doctors.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent's initial proposal included a broad religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s]" would have been permitted to "exclude coverage for medically necessary abortions" if they followed certain procedures. Pet.App.106a. A "[q]ualified religious organization" would have included any organization that "oppose[d] medically necessary abortions on account of a firmly-held religious belief" and that was either (i) a nonprofit that "holds itself out as a religious organization" or (ii) a closely held for-profit that "adopted a resolution…establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs." Pet.App.104a-105a. That definition largely tracked the scope of federal religious exemptions created after this Court's rulings in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and upheld in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). *See* 80 Fed. Reg. 41318, 41343-41347 (July 14, 2015); *see also* Pet.App.112a (Superintendent "decided to use the [initial] definition

because it [was] more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new regulation. Pet.App.175a. Between proposal and promulgation, however, the religious exemption was eviscerated. In its place, a narrow religious exemption was introduced that applies only to "[r]eligious employer[s]" "for which each of the following is true":

> (1) The inculcation of religious values is the purpose of the entity.
>
> (2) The entity primarily employs persons who share the religious tenets of the entity.
>
> (3) The entity serves primarily persons who share the religious tenets of the entity.
>
> (4) The entity is a [tax-exempt] nonprofit organization…

Pet.App.176a; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This is the same short-lived exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraception mandate litigation. *Compare* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original exemption), *with* 78 Fed. Reg. 39,870 (July 2, 2013) (later exemption). It is also the same exemption found in the New York state contraception mandate, which had previously been upheld under *Smith* by the New York Court of Appeals in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), and is similar to a California exemption upheld in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 86-87 & n.10 (Cal. 2004).

The Superintendent abandoned the broader exemption after concluding that "[n]either State nor Federal law require[d]" any exemption, and the exemption she chose was "analogous to existing state law." Pet.App.181a. The Superintendent stated that she rejected the initially proposed religious exemption because "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of business corporations to assert religious beliefs." Pet.App.181a-182a.

A guidance document issued by the Department in 2019 explains the scope of the identically worded contraception-mandate exemption. As it explains, the exemption is a "narrow" one. DFS, Supplement No. 2 to Insurance Circular Letter No. 1 (May 1, 2019), https://perma.cc/M5YE-DU78. For example, the exemption does not cover "[e]mployers such as religious schools, religious nursing homes, and religious health care facilities." *Id.* Nor may insurers "rely solely on a self-attestation from an employer" that it qualifies. Rather, insurers "may be able to discern from the [employer's] name itself that the employer is not a religious employer." *Id.* And where the insurer is uncertain, it "should request proof…by requesting relevant documents…including articles of incorporation, bylaws, charters, mission statements, brochures, and nonprofit determination letters." *Id.* The circular then concludes with an ominous warning: the "Department will monitor" insurance companies' "granting of a religious employer exemption[s]" and

"take action against an issuer for *any failure* to adhere" to the Department's requirements. *Id.* (emphasis added).

C. Petitioners and Their Objections to the Mandate

The Religious Ministries are religious organizations with employee health plans, and one individual. All object to the Abortion Mandate on religious grounds. They include religious orders, churches, and services organizations. They employ dozens to hundreds of people, often of varied religious backgrounds, for propagating their faith, including through charitable service in their communities.

For instance, three Petitioners provide nursing home services and housing for the indigent elderly: The Teresian House Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. Pet.App.94a-97a. "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being" and employs over 400 people. Pet.App.96a. It provides healthcare coverage to over 200 full-time employees because of its "moral" and "religious" obligations to "pay just wages." Pet.App.97a. Similarly, Teresian House Housing Corporation operates a retirement community affiliated with the Roman Catholic Diocese of Albany. Pet.App.121a. And DePaul Management Corporation is a non-profit that manages several senior living apartment communities in affiliation with the Diocese of Albany. Pet.App.121a-122a.

Two of the Religious Ministries run schools as part of their religious missions: The First Bible Baptist

Church employs over "sixty people," has a congregation with "individuals of varied religious backgrounds," and engages in "human services outreach," including "youth ministry, adult ministry, death ministry, education ministry, athletic activities, day care and pre-school and mission ministry." Pet.App.100a, Pet.App.120a. Among its ministries is a K-12 school, the Northstar Christian Academy. Pet.App.100a. St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y. similarly not only serves as a parish but also operates St. Gregory's School. Pet.App.120a.

Other Religious Ministries provide service to their communities in diverse ways. The Sisterhood of St. Mary is an "Anglican/Episcopal Order" of religious sisters who "live a traditional, contemplative expression of monastic life through a disciplined life of prayer set within a simple agrarian lifestyle and active ministries in their local communities." Pet.App.117a-118a. Two Catholic Dioceses (Albany and Ogdensburg) and Our Savior's Lutheran Church also engage in ministries or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. Pet.App.116a; Pet.App.120a.

And the Catholic Charities of Ogdensburg and Brooklyn provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life"—all as part of the "charitable and social justice ministry" of the Catholic Church. Pet.App.119a.

All these organizations are religiously opposed to abortion; no one has questioned the sincerity of their

beliefs. The Catholic Church, for instance, teaches that abortion is an "unspeakable crime," because it ends the life of a "new human being." Pet.App.130a. The Church believes that "modern genetic science offers clear confirmation," that, from the moment of conception, a new living person exists. *Id.* The other Religious Ministries share similar beliefs. *E.g.*, Pet.App.101a (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"); Pet.App.131a ("Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures."). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Religious Ministries "cannot religiously or morally accept or sanction." Pet.App.132a.

The Religious Ministries also share the belief that providing "fair, adequate and just employment benefits" is a "moral obligation." *Id.* And, in the absence of providing health insurance to their employees, they face the prospect of severe financial penalties. *E.g.*, Pet.App.71a (Diocese of Albany); Pet.App.97a (Teresian House); Pet.App.101a (First Bible Baptist Church). Indeed, for just the calendar year 2023, the federal fines for failing to provide health insurance were $2,880 per employee.[1] Just as one example, for the Teresian House, which provides

[1] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (Aug. 16, 2022), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

health coverage to over 200 employees, Pet.App.96a, those fines would reach over $500,000 per year, a crippling amount for the organization.

Accordingly, with no other options, Petitioners sued the Superintendent and New York State Department of Financial Services, seeking to enjoin the Abortion Mandate.

D. Procedural History

1. *Initial proceedings in New York state courts.* In this consolidated suit,[2] the Religious Ministries challenged the Abortion Mandate as a violation of numerous federal and state laws. As relevant here, they argued that the Abortion Mandate violates the Free Exercise Clause because it substantially burdens and discriminates among certain religious entities without justification. The Abortion Mandate was "promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption." Pet.App.133a. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." Pet.App.160a.

The trial court granted summary judgment in favor of Respondents. Pet.App.61a. The trial court believed itself to be bound by the earlier decision of the

[2] The Religious Ministries filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of "[m]odel [l]anguage" covering "medically necessary abortions." Pet.App.5a. In 2017, after the Superintendent promulgated the Abortion Mandate, the Religious Ministries filed a second complaint that challenged that regulation directly. Pet.App.7a. The trial court consolidated the suits. *Id.* In their relevant holdings, no court has distinguished between the two First Amendment challenges. Pet.App.1a-65a.

New York Court of Appeals in *Serio*, which had upheld the identical religious exemption found in New York's contraception mandate. 7 N.Y.3d at 519. In *Serio*, the court rejected a group of religious entities' Free Exercise and Establishment Clause challenges to the religious exemption as favoring some religious organizations over others. With respect to the Free Exercise Clause, the court held that the mandate was both "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not "target religious beliefs as such." *Id.* at 522, 525 (alteration omitted). And it rejected an Establishment Clause claim based on church autonomy because the mandate "merely regulates one aspect of the relationship between plaintiffs and their employees." *Id.* at 524. In the trial court's view, because *Serio* involved the "same" claims, it barred the Religious Ministries' challenges to the Abortion Mandate. Pet.App.57a.

The Appellate Division likewise believed itself to be bound by *Serio*. Accordingly, it affirmed judgment in favor of the Respondents. Pet.App.40a-43a.

The New York Court of Appeals denied leave to appeal and dismissed the Religious Ministries' appeal "upon the ground that no substantial constitution question is directly involved," with Judge Fahey dissenting. Pet.App.64a-65a.

2. *First petition for certiorari.* The Religious Ministries then filed a petition for certiorari in this Court, seeking plenary review. But because the Court had already granted certiorari in *Fulton* to address similar issues regarding application of the Free Exercise Clause, the Religious Ministries also asked,

in the alternative, that the Court grant certiorari, vacate the judgment, and remand the case in light of *Fulton*. On November 1, 2021, the Court did just that, vacating and remanding for further consideration in light of *Fulton*. Pet.App.203a. Justices Thomas, Alito, and Gorsuch would have granted plenary review. *Id.*

3. *Proceedings after remand.* On remand, the Appellate Division affirmed its original judgment "for the reasons stated in [its] original opinion and order." Pet.App.35a. It reasoned that *Serio* remained controlling because *Fulton* neither "explicitly overrule[d]" *Serio* nor "revisit[ed] or overturn[ed] the existing rule" that neutral, generally applicable laws are "ordinarily not subject to strict scrutiny." Pet.App.33a (quotation omitted).

The Religious Ministries again both sought leave to appeal and filed a notice of appeal as of right to the New York Court of Appeals. This time that court agreed that a substantial constitutional question was involved and accepted the appeal as of right. Pet.App.10a.

After briefing and argument, the Court of Appeals affirmed the Appellate Division's decision, concluding that *Fulton* did not "impair[] *Smith* in a way that undoes *Serio* in whole or in part." Pet.App.11a. First, the court suggested that New York's four-part exemption probing a religious group's "purpose" and comparing its religious beliefs with the beliefs of those it employs or serves contains no more room for discretion than the federal test asking only whether an entity "objects[] based on its sincerely held religious beliefs." Pet.App.22a. The court otherwise "decline[d] to engage in a searching analysis" of the "religious

employer" definition, reasoning that closely reviewing those criteria would amount to strict scrutiny. Pet.App.24a.

Next, the court concluded that *Fulton*'s discussion of exemptions that undermine a law's purpose was irrelevant, because "[t]aking *Fulton*'s test as written," general applicability is concerned only with "secular conduct," and so is not implicated by a "regulation [that] favors religious exercise rather than discriminates against it" by providing an exemption applicable to some religious entities but not others. Pet.App.25a. The court thus refused "to extend the language in *Fulton* to a different situation: one in which the comparison is not of religious versus secular employers, but among different types of religious employers." Pet.App.26a. The court similarly concluded that *Tandon v. Newsom,* 593 U.S. 61, 62 (2021) (per curiam), was irrelevant because it "focuses exclusively on distinctions between secular and religious conduct." Pet.App.27a.

Ultimately, then, the court held that "the 'religious employer' exemption is generally applicable under both tests delineated in *Fulton*." Pet.App.29a. It thus affirmed the dismissal of the Religious Ministries' challenge.

E. Codification of the Abortion Mandate

While this case was pending before the Appellate Division on remand, the State notified the court by letter that New York had recently "codifie[d] in statute the abortion health insurance coverage regulatory requirement and religious employer accommodation at issue in this case" and that the "challenged regulation remains in effect." NYSCEF 55, Case No.

529350 (3d Dept. Apr. 14, 2022); *see also* N.Y. Ins. Law §§ 3221(k)(22), 4303(ss) (mandate); N.Y. Ins. Law §§ 3221(1)(16)(E)(1), 4303(cc)(5)(A) (religious exemption). The statute became effective in January 2023, with the regulatory abortion mandate, including its religious exemption, remaining in force in parallel with the new statute. *See* N.Y. Comp. Codes R. & Regs. tit. 11, §§ 52.16(o), 52.2(y).

In briefing before the New York Court of Appeals, the State confirmed that the statute and regulation are "co-extensive as to both the scope of the coverage requirement and the religious accommodation." APL-2022-00089, Resp.Br.19 (N.Y. Sept. 28, 2023). It further confirmed that, because "the legislation is subject to challenge on the basis of the same 'alleged infirmities,'" it "does not appear to moot this appeal." *Id*. at 19. The New York Court of Appeals addressed both the statute and the regulation in its decision. Pet.App.9a.

REASONS FOR GRANTING THE PETITION

In *Employment Division v. Smith*, the Court held for the first time that "neutral and generally applicable laws" were not subject to strict scrutiny, even if they burdened religious practice. 494 U.S. 872 (1990). In the decades since, lower courts have taken conflicting approaches as to what those terms mean.

Four years ago, this Court granted certiorari in *Fulton* to provide clarity. Unfortunately, confusion remains. This case presents the resulting split of authority on how to determine whether a law is "neutral and generally applicable." Even after *Fulton*, some courts hold that a law that discriminates among

religious entities is subject to strict scrutiny; some do not.

This case provides an ideal opportunity for the Court to resolve this disagreement and further clarify the law. New York's Abortion Mandate explicitly treats similar religious organizations differently even though they implicate the government's asserted interests in a similar way. Indeed, the only difference between favored and disfavored religious organizations is that the former primarily serve and employ co-religionists and have the purpose of inculcating religious beliefs (whatever that means), whereas the latter view service to *anyone* in need as a core part of their religious mission. For example, a religious nursing home that serves only indigent Catholics is exempt, whereas one that serves indigent elderly of all faiths or no faith is not. That distinction makes no sense *vis-à-vis* the government's asserted interest in providing abortion access. Therefore, it is the antithesis of a *generally applicable* law: by definition, it treats similarly situated organizations differently.

Because the New York Court of Appeals nonetheless blessed this distinction, and in doing so, exacerbated a split in authority on whether selective religious exemptions trigger strict scrutiny, certiorari (and ultimately reversal) is warranted.

I. THE COURT SHOULD GRANT THE PETITION AND CONFIRM THAT NEW YORK'S ABORTION MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

Fulton, and this Court's other recent religious liberty precedents, have clarified that a law is not "neutral" and "generally applicable" if it permits

exemptions that undermine its stated purpose while refusing to accommodate sincere religious objections. That repeated holding ought to be sufficient to show that a religious exemption that protects some religious organizations but not others—based solely on characteristics unrelated to the law's underlying purpose—is subject to strict scrutiny. As this Court has repeatedly explained, exemptions for some but not others necessarily undermine a law's general applicability when both implicate the government's asserted interests in a similar way. And a law is less defensible, not more so, when it picks religious winners and losers, limiting its benefits or protections to some religious organizations but not others. Many courts have recognized this. But others, including the New York Court of Appeals, have not, reflecting a lingering error in certain lower courts that requires this Court's intervention.

A. Courts Are Split on Whether a Law that Differentiates Between Religions is Subject to Strict Scrutiny.

1. The decision below confirms that, even after *Fulton* and the Court's vacatur and remand in this case, New York remains on the wrong side of a split regarding the application of strict scrutiny based on selective religious exemptions.

As explained above, the New York Court of Appeals' recent ruling reaffirmed its pre-*Fulton* decision in *Serio,* in which it held that a law is neutral *and* generally applicable even if "some religious organizations…[were] exempt" and others were not. *Serio*, 7 N.Y.3d at 522; Pet.App.29a. In doing so, the court expressly held that, even after *Fulton*, selective

religious exemptions that undermine the law's purpose in the same way as the proposed religious conduct do not trigger strict scrutiny. Pet.App.27a-28a. Thus, despite *Fulton*, New York's courts will apply strict scrutiny based on religious discrimination only if the challenger can prove that a law intentionally "target[s]" religion. *Serio*, 7 N.Y.3d at 522. That is, in New York state courts, religious exemptions can be relevant only to a law's neutrality and never to its general applicability under *Smith*. Pet.App.28a.

The California Supreme Court has held the same, concluding that a narrow religious exemption cannot trigger strict scrutiny on general applicability grounds. *Cath. Charities of Sacramento*, 85 P.3d at 86-87 & n.10. This is true even where, as here and under California's similar statute, the law demands an intrusive inquiry into an organization's religious tenets and who it hires and serves. There is no indication that California courts will reconsider this holding after *Fulton*.

2. Other courts, in contrast, have recognized that religious exemptions *can* render a law not generally applicable and therefore trigger strict scrutiny. In *Kane v. DeBlasio*, 19 F.4th 152 (2d Cir. 2021) (per curiam), for example, the Second Circuit recognized that an arbitration award regarding a vaccine mandate was neither neutral nor generally applicable in light of the religious accommodation it created. On its face, the mandate did not contain any medical or religious accommodations, and the Second Circuit thus held that the mandate itself was generally applicable. *Id.* at 165-66. Following union arbitration, however, the arbitrator established a process for

providing religious accommodations to individual employees. *Id.* at 160. That process required that the employee's religious objection be "documented in writing by a religious official (e.g., clergy)"; permitted only requests by "recognized and established religious organizations"; and held that requests would be denied if the leader of the relevant religious organization had "spoken publicly in favor of the vaccine." *Id.*

The Second Circuit held that this process was not generally applicable. *Id.* at 168-69. Although the accommodation standards purportedly created objective criteria, the Second Circuit recognized that, in practice, they left substantial room for discretion and could not be considered generally applicable under *Fulton*. *Id.* at 169. The Second Circuit also noted that the law impermissibly required the decisionmaker to "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 168. Thus, strict scrutiny applied.

Much the same was true in *Dahl v. Tr. of W. Mich. U.*, 15 F.4th 728 (6th Cir. 2021) (per curiam). There, Western Michigan University required student athletes to be vaccinated against COVID-19 to "maintain full involvement in the athletic department." *Id.* at 730. The policy further provided that "religious exemptions and accommodations will be considered on an individual basis." *Id.* The policy thus necessarily opened the door to discrimination among religious beliefs and believers, allowing the decisionmaker to pick and choose which religious concerns would be accommodated. And after several students sought and were denied religious

exemptions, they sued. Reasoning that "like the city in *Fulton*," the University "retain[ed] discretion to extend exemptions in whole or in part," the Sixth Circuit found the policy not generally applicable and thus subject to strict scrutiny. *Id.* at 732-34.

Likewise, the D.C. Circuit, relying on the same principles even before *Fulton*, rejected the NLRB's attempts to "assert[] jurisdiction over [certain religious schools] and their teachers" while exempting others, finding that they privileged certain visions of religion over others. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828 (D.C. Cir. 2020). In *Duquesne*, the D.C. Circuit rejected any criteria for identifying religious schools that would require government decisionmakers to "make determinations about [a school's] religious mission and about the centrality of [certain work] to that mission," noting that such governmental inquiries are "incompatib[le] with the Religion Clauses." *Id.* at 835. To illustrate the problem, the court noted that in attempting to assert jurisdiction over adjunct faculty at Duquesne University, the NLRB "impermissibly sided with a particular view of religious functions: Indoctrination is sufficiently religious, but supporting religious goals is not, and especially not when faculty enjoy academic freedom." *Id.*

3. Other lower court decisions, too, reflect persistent confusion on this question. The Tenth Circuit's post-*Fulton* cases, for example, reflect intra-circuit tension: that court concluded in *303 Creative LLC v. Elenis*, that a law was "generally applicable despite exempting some religious exercise," 6 F.4th 1160, 1187 n.9 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023), but recently held the opposite in

Does 1-11 v. Bd. of Regents of Univ. of Colorado, 100 F.4th 1251, 1273 (10th Cir. 2024) (policy was not generally applicable where it "provided 'individualized exemptions' to applicants whose religious beliefs, in the Administration's discretion, justified an exemption"). Similarly, even after the Second Circuit's holding in *Kane*, at least one district court within the Second Circuit has held that a selective religious exemption was nonetheless generally applicable. *Ferrelli v. Unified Ct. Sys.*, No. 1:22-CV-0068, 2022 WL 673863, at *6 (N.D.N.Y. Mar. 7, 2022).

District courts within the Ninth Circuit, too, have issued similar rulings after *Fulton*. *See, e.g., George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-cv-0424, 2022 WL 16722357, at *14 (S.D. Cal. Nov. 4, 2022); *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, 683 F. Supp. 3d 1172, 1184-86 (W.D. Wash. 2023). Indeed, the *Cedar Park* ruling means that religious groups in Washington, like those in California and New York, are required to provide coverage for abortions over their profound religious objections. *Id.*

Far from self-correcting, then, the error reflected in the decision below is spreading.

B. The New York Court of Appeals Decision Is Wrong.

Although the Court clarified the circumstances that trigger strict scrutiny in *Fulton*—and even granted certiorari, vacated, and remanded this case for further review in light of that decision—the Court of Appeals ruling reflects continued lower court confusion (or intransigence) about what types of laws must be evaluated under strict scrutiny. The Court

should grant review here to close what the New York Court of Appeals erroneously treated as a loophole in the *Fulton* decision. With that error corrected, it is clear that the Abortion Mandate is not generally applicable. And because it cannot satisfy strict scrutiny, it cannot be enforced over religious objections.

The decision below fundamentally misapplies *Fulton*. As an initial matter, the concept of general applicability, as clarified in *Fulton*, requires strict scrutiny whenever a law burdening religious exercise has exemptions that undermine the purpose of the law, regardless of whether those exemptions are for religious or secular conduct. The Court of Appeals was able to avoid this result only by taking individual words from each prong of *Fulton*'s test for general applicability out of context to require strict scrutiny only in narrow circumstances. It also required the court to ignore the substantial discretion involved in applying the religious exemption's religious criteria. That flawed approach is particularly egregious here, where it led the court to treat discrimination between religions as a loophole, rather than an aggravating factor, under the First Amendment.

1. After *Fulton*, exemptions that undermine the purpose of a law should be all but fatal to a holding of general applicability. Of course, "[i]n ordinary English, a generally applicable law is one that applies to everybody, in all similar situations—or at least to nearly everybody and nearly all similar situations." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 9 (2016). Indeed, in *Lukumi Church of the Babalu Aye, Inc. v. City of Hialeah*, the Court

treated exemptions as showing "underinclusive[ness] on [the law's] face." 508 U.S. 520, 545 (1993). When a state grants an exemption to some while denying it to religious adherents, it "devalues religious" concerns "by judging them to be of lesser import" than other concerns deemed worthy of an exception. *Id.* at 537-38.

This Court reaffirmed this view in a series of cases addressing Covid-19-related restrictions. As articulated in one such case, *Tandon v. Newsom*, those "decisions…made the following points clear." 593 U.S. at 62. "First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* It is thus irrelevant if the state "treats some…other activities as poorly as or even less favorably than the religious exercise at issue." *Id.* "Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* That is, "[c]omparability is concerned with the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Id.* Any "comparable" activity that falls outside a law's scope, then—as measured by the government's asserted interest in the law—is an exception that triggers strict scrutiny.

The Court confirmed and expanded on these principles in *Fulton*. While not purporting to articulate an exhaustive list of circumstances that would undermine "general applicability," the Court explained that the policy at issue there was not

generally applicable for at least two reasons: First, "[a] law…lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534. Second, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* at 533.

The Court reiterated these principles in *Kennedy v. Bremerton School District*, 597 U.S. 507, 526-27 (2022), finding a policy "fail[ed] the general applicability test" where applied to punish a coach's religious conduct but not comparable conduct by others.

As these cases make clear, *Smith* allows a government policy to escape strict scrutiny only if the policy does not create either individualized or categorical exceptions that undermine its stated purpose in a similar way as the religious conduct at issue. Any such mechanism necessarily requires the State to make decisions about "which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537. And if the State decides that some religious objections are not "worthy of solicitude," it must justify that stance under strict scrutiny.

Accordingly, the New York Court of Appeals should have applied strict scrutiny here. The Abortion Mandate includes a discretion-laden system for exempting some religious entities but not others, and it does so for reasons entirely disconnected from the State's asserted interests: from the perspective of the

government's interest in providing abortion coverage, there is no difference between a religious nursing home that serves patients of many religions and one that serves patients of only one religion. Put simply, the mandate is not *generally* applicable.

2. Rather than following *Fulton*'s reasoning here, the New York Court of Appeals took language from *Fulton* out of context in a bid to dramatically narrow the case's import. As to *Fulton*'s first prong, the court treated the fact that the exemptions at issue here are religious as a way to avoid strict scrutiny after *Fulton*, latching on to the word "secular" in *Fulton*'s instruction that a law triggers strict scrutiny if it prohibits "religious conduct while permitting *secular conduct* that undermines the government's asserted interests in the same way." Pet.App.25a (emphasis added). On the Court of Appeals' view, differentiation among religions never triggers strict scrutiny under this test, and instead is relevant only to neutrality—the Court of Appeals views such a law as problematic only to the extent "*the object of [the] law* is to infringe upon or restrict practices because of their religious motivation." Pet.App.28a (emphasis added). Consequently, a law that required religious nursing homes to provide abortion coverage in their insurance policies unless the religious nursing home served only elderly people of a single religion (and hired only employees of that religion) qualified as a generally applicable law.

That is wrong. While *Fulton* naturally focused on comparable secular conduct given the policy at issue, the reasoning of *Fulton* cannot support exempting a law from strict scrutiny where it permits some religious conduct but forbids other religious conduct

that undermines the State's asserted interest in a similar way.

To the contrary, permitting religious conduct for only some preferred subset of religious groups is a particularly pernicious form of discrimination under the First Amendment. "Th[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245-47 ; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("[L]aws discriminating *among* religions are subject to strict scrutiny.").

In *Larson*, for example, the Court examined a "Minnesota statute[] [that] impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers." 456 U.S. at 230. That law did not, on its face, prefer one denomination over another; instead, it preferred religions structured in one way over differently structured religions. The Court nevertheless held it invalid, explaining that the law's effect was the same: it "effectively distinguishe[d] between 'well-established churches'" and "churches which are new and lacking in a constituency." *Id.* at 246 n.23. As the Court explained, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at 245-46.

The Religion Clauses thus demand "the equal treatment of all religious faiths without

discrimination or preference," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008), and the State cannot privilege certain visions of religion over others. *Duquesne Univ. of the Holy Spirit*, 947 F.3d at 828, 834-35.

New York has created the precise problem that this Court and others warned about. By limiting the Abortion Mandate's exemption to religious non-profits that hire and serve coreligionists, New York privileges certain types of religious entities: namely, those that do not, as part of their religious missions, employ and serve individuals of other faiths or of no faith. It thus places special burdens on religious traditions holding service of others to be a religious command. *See Luke* 10:27 ("You shall love…your neighbor as yourself."); Pope John Paul II, *Evangelium Vitae* § 87 (1995) ("As disciples of Jesus, we are called to become neighbours to everyone, and to show special favour to those who are poorest, most alone and most in need." (citation omitted)). For instance, the exemption does not apply to the Teresian Nursing Home, Teresian Housing Corporation, or Depaul Housing Management Corporation, who hire and serve individuals of different faiths. Nor does it apply to First Bible Baptist Church, a "family of faith which includes individuals of varied religious backgrounds." Pet.App.100a. And it similarly excludes Catholic Charities, which aims to serve all those in need, regardless of their religion. Indeed, Mother's Teresa's Missionaries of Charity would not have qualified for the exemption because Calcutta's poor were not predominantly Catholic. By contrast, religious organizations that only employ and serve their own *do* qualify for the State's solicitude. New York has no

"compelling reason" to make these distinctions. *Smith*, 494 U.S. at 884.

The pernicious effects of New York's law, moreover, are exacerbated because they pressure religious organizations to alter other aspects of their governance and doctrine in order to qualify for the exemption. Such coercion ignores the foundational holding that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 737 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The State therefore cannot intrude upon questions of "church doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). Indeed, even just "scrutinizing" such questions of how a religious group pursues its religious mission threatens impermissible "state entanglement with religion." *Carson*, 596 U.S. at 787. Instead, a religious organization must enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 591 U.S. at 746.

These precedents belie the Court of Appeals' position that laws remain outside the reach of strict scrutiny *because* they treat some religions better than others. New York's law requires the State to engage in the "offensive" business of discriminating among religions based on their perceived level of religiosity. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality); *cf. A.H. ex rel. Hester v. French*, 985 F.3d 165, 186 (2d Cir. 2021) (Menashi, J., concurring) ("The exclusion of

certain types of religious institutions…is discrimination on the basis of religious status."). This makes New York's narrow and malleable approach less defensible, not more so.

3. The Court of Appeals also took an unduly narrow approach to *Fulton*'s holding regarding individualized exemptions. *See Fulton*, 593 U.S. at 533. In effect, the Court of Appeals narrowed this aspect of *Fulton* to its facts, reading "individualized" to mean "entirely discretionary," Pet.App.17a. That is, on the Court of Appeals' view, if there are any criteria in place to guide decisions regarding exemptions, a law is generally applicable, no matter how much discretion remains. Pet.App.21a-22a.

This is not an exaggeration: the criteria the Court of Appeals found sufficient to render the law here non-individualized accord enormous discretion to pick religious winners and losers. Consider, for example, the requirements that the organization "primarily" "employs" and "serves" people "who share [its] religious tenets." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(2)-(3). Those standards embed numerous discretionary judgments. An adjudicator must first determine an employer, employee, and client's "religious tenets." Then, it must determine if they sufficiently overlap such that the employer "primarily serves" and "primarily employs" people who "share" the employer's "religious tenets." Even that, however, may be insufficient if the State concludes that "the purpose" of the employer is not "the inculcation of religious values" (whatever that means).

If these criteria are not discretionary, it is hard to know what is. As this Court has noted, "determining

whether a person is a 'co-religionist' will not always be easy." *Our Lady of Guadalupe*, 591 U.S. at 761. "Are Orthodox Jews and non-Orthodox Jews coreligionists? …. Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Id*. Or to put a finer point on it: How many residents must the Carmelite Sisters evict from their nursing homes, and how many employees must they fire, to qualify for the exemption? All non-Christians? All non-Catholics? Likewise, what does it mean for the "inculcation of religious values" to be "*the purpose* of the entity"? Does "caring for orphans and widows" count? James 1:27. What of St. Francis of Assisi's famous admonition, "Preach the Gospel always, and if necessary, use words!" Pope Francis, *Homily at the Holy Mass and Blessing of the Sacred Palladium for the New Metropolitan Archbishops* (June 29, 2015), https://perma.cc/Q22E-R7YK. There are obviously no "objective" answers to these questions. Yet, they are all for the State to decide.

The exemption's criteria thus accord the State tremendous discretion. And in doing so, they require the State to deeply intrude on matters of religious doctrine—governmental "probing" which this Court has repeatedly found "profoundly troubling." *Mitchell*, 530 U.S. at 828; *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("very process of inquiry" into religious questions "impinge[s] on rights guaranteed by the Religion Clauses"); *see also Colo. Christian*

Univ., 534 F.3d at 1261 ("It is well established…that courts should refrain from trolling through a person's or institution's religious beliefs.").

4. Because the mandate is not generally applicable, strict scrutiny applies. New York cannot satisfy that standard—and has never even argued it could. Indeed, even though the Religious Ministries have repeatedly argued, in detail, that the law fails strict scrutiny, the State has never put forth a single piece of evidence or argument to the contrary. It is easy to see why. Even assuming some sort of compelling interest in forcing compliance with the abortion mandate by these religious organizations (which is far from obvious), New York could easily use a less restrictive means of achieving its interest: it could (among other things) simply pay for "medically necessary abortions" itself, rather than require religious entities to cover them. *See Hobby Lobby Stores*, 573 U.S. at 728 (detailing less restrictive alternatives in a similar context).[3]

* * *

From *Smith* to *Larson* to *Fulton* to *Our Lady of Guadalupe* to *Carson*, and everywhere in between, this Court has made clear that the approach taken by the New York Court of Appeals below is improper. In other words, that court—despite a second opportunity afforded by this Court's remand—has ruled in a

[3] The State has conceded that the cost of doing so is *de minimus*. *See* Brief in Opposition, at 7 n.5, *Roman Catholic Diocese of Albany*, 142 S. Ct. 421 (No. 20-1501) (suggesting costs "between 11 and 33 cents per member per month when calculated…without accounting for any potential cost savings" and that, accounting for savings, "coverage for abortion services as part of…a health plan is cost-neutral").

manner that is both "incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012). Thus, the Court should grant review, resolve the split, and hold at long last that the Abortion Mandate cannot be applied to health plans for objecting religious entities.

II. THE COURT SHOULD GRANT THE PETITION TO RECONSIDER *SMITH*.

If there is any chance that *Smith* allows New York to compel some religious organizations to fund what, in their view, is a grave moral evil, while exempting others from that burden, the Court should reexamine *Smith*. Surely, such a world is not "a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019).

This Court has already recognized that *Smith* should be reconsidered. *Fulton*, 593 U.S. at 540. But the Court ultimately declined to reach the issue in *Fulton* because strict scrutiny applied there even under *Smith*. *Id.* at 541. As five Justices acknowledged in concurrences, though, *Fulton*'s holding did not undermine the need to reevaluate *Smith*. *See id.* at 543 (Barrett, J., joined by Kavanaugh); *id.* at 545-46 (Alito, J., joined by Thomas and Gorsuch).

Given the ongoing harm to religious entities in New York and elsewhere, the need is urgent. And this is a clean vehicle with which to address the issue: New York has explicitly mandated that religious entities cover a procedure that is undisputedly contrary to

their religious beliefs, and the State has never even argued it could satisfy strict scrutiny if it applies.

III. THE QUESTIONS PRESENTED HERE ARE IMMENSELY IMPORTANT.

It is hard to imagine a more critical legal question for Petitioners and similar religious organizations than whether New York can force them to cover abortions in their employee health plans. And although the impact on religious adherents in New York alone would support review, the importance of this issue travels well beyond New York's borders—this case presents critical questions about a fundamental constitutional right. Thomas Jefferson once declared that "[n]o provision in our Constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprizes of the civil authority."[4] Rights of conscience are at the very center of this case, and this Court's guidance is dearly needed.

1. It is undisputed that to Petitioners, abortion is among the most significant of moral wrongs.

The Catholic Church, for example, has, "[s]ince the first century[,] … affirmed" its view of "the moral evil of every procured abortion." Catechism of the Catholic Church § 2271. The other Petitioners share similar beliefs. Kevin Pestke (Pastor of the First Bible Baptist Church), explained that his church's "Articles of Faith teach that…abortion constitutes the unjustified, unexcused taking of unborn human life."

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[4] *Letter from Thomas Jefferson to Richard Douglas*, National Archives, Founders Online (Feb. 4, 1809) https://founders.archives.gov/documents/Jefferson/99-01-02-9714.

Pet.App.101a. And "Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures." Pet.App.131a.

If New York's mandate remains in place, Petitioners and like-minded religious organizations will be in an intolerable position. They will have to violate core beliefs, cease offering health insurance (a financially and morally fraught outcome), or shut down altogether. Surely, no one is better served if the Teresian House stops serving the elderly, or Catholic Charities stops serving the poor. Before that happens, this Court should decide whether New York can put them to that choice.

The importance of this challenge has only grown since it was last before this Court. Indeed, the State's choice to codify the regulatory mandate in a statute makes clear that New York will offer the Religious Ministries no relief—in the face of a shifting religious liberty landscape, the State has doubled down.

2. As this Court's numerous religious liberty decisions have established, the increasing reach of regulators and administrators means that government demands and religious beliefs are increasingly likely to clash. These questions are thus not merely important to the Religious Ministries—they are important to everyone.

First, as the State has acknowledged, the Abortion Mandate's religious exemption was modelled on other religious exemptions included in New York law and mirrored in the laws of other states. *See, e.g.*, Cal. Health & Safety Code § 1367.25; Or. Rev. Stat. Ann. § 743A.066; Haw. Rev. Stat. Ann. § 431:10A-116.7;

N.C. Gen. Stat. Ann. § 58-3-178. Thus, any decision in this case would have direct implications for religious liberty in many other contexts, including in two of the most populous States in the nation.

More broadly, at the federal level, statutory protections have often obviated the need to further define the scope of the Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 573 U.S. 682; *Holt v. Hobbs*, 574 U.S. 352 (2015). But statutory protections are not set in stone, and many states (New York included) lack similar protections. Thus, the reach of the Religion Clauses themselves is of paramount importance.

While *Fulton* clarified the role of exemptions in the First Amendment analysis, its reference to "secular" exemptions left an opening that has been exploited to defend selective religious exemptions, despite their obvious inconsistency with *Fulton*'s reasoning and other precedents of this Court, including *Larsen* and *Our Lady of Guadalupe*. The decision below, along with other post-*Fulton* cases sidestepping the need for strict scrutiny in similar circumstances, have made obvious that further clarification is needed.

This case provides an ideal vehicle to address this issue, as it squarely presents the outstanding issue regarding the impact of selective religious exemptions. The Court should take the opportunity by granting this petition and reversing the New York Court of Appeals.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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No. 24-319

In the Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE STATES OF TEXAS, ___, AND ___ AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici States have an interest in the uniform application of First Amendment principles and in the invaluable social services provided by religious organizations. Amici States likewise value the work done by religious groups like Petitioners in their communities. But New York's abortion-coverage mandate threatens the continued operation of such organizations by making it impossible for them to employ people of other faiths, serve their communities without regard to recipients' religion, or even to provide social services. Because the decision below implicates these interests and vitiates fundamental First Amendment freedoms, Amici States urge the Court to grant the petition for a writ of certiorari.[1]

INTRODUCTION

When the government orders churches to pay for abortions, the Free Exercise Clause surely has something to say. Yet many state governments read this Court's precedent to the contrary. Three decades ago, this Court held that the First Amendment allows neutral and generally applicable laws to burden religious exercise. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). That principle has emboldened New York and five other States to mandate abortion coverage in certain religious organizations' employee health insurance plans. But New York does not apply its policy equally to all religious groups. To wit, New York purports to exempt from that abortion-coverage mandate those "[r]eligious employer[s]," whose "purpose" is "[t]he

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On October 9, 2024, counsel of record for all parties received notice of amici's intention to file this brief.

inculcation of religious values," who "serve[] primarily persons who share the religious tenets of the entity," and who "primarily employ[] persons who share" those religious tenets. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Under that unduly cramped—and malleably vague—exemption, Catholic nuns devoted to tending to the elderly and infirm, ecumenical religious schools, and other service-based religious ministries remain subject to New York's abortion-coverage mandate notwithstanding their longstanding and sincerely held objections to abortion.

For more than seven years, New York has stridently defended that mandate against Petitioners' First Amendment challenge, going so far as to codify that regulation by statute just last year. Yet three years ago, this Court explained that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable," because "it 'invite[s]' the government to decide which reason for not complying with the policy are worthy of solicitude.'" *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021) (quoting *Smith*, 494 U.S. at 884). Although this Court remanded this case back to the New York courts following *Fulton*, the New York Court of Appeals neverthless concluded that *Fulton* changed nothing. That court reasoned that, while this Court's precedent now makes clear that the government may not treat secular activities more favorably than religious exercise, the First Amendent erects no barrier to the state treating some religious adherents better than others. Pet.App.26a-29a.

Petitioners' certiorari petition amply demonstrates why the decision below entrenches a split of authority and cannot be sustained under existing First Amendment doctrine. But the New York Court of Appeals' intransigence points to a more fundmenatal problem

playing out in many jurisdictions across the country. A central premise undergirding *Smith*'s holding that the government may burden religious exercise through neutral laws of general applicability was the expectation that lawmakers would nevertheless be "solicitous" of religious freedom. *Smith*, 494 U.S. at 890. The Court has since emphasized that such "special solicitude" is, indeed, embodied in the text of the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). But *Smith*'s expectation has, in too many places, proved overly optimistic. The Court should grant the petition and, if necessary, revisit *Smith*.

SUMMARY OF ARGUMENT

I. For the religious citizens of some States, the First Amendment's special solicitude has become hard to find. Perhaps no greater example exists than the COVID-19 pandemic, during which "we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 142 S.Ct. 1312, 1315 (2023) (Gorsuch, J., statement). "Executive officals across the country issued emergency decrees on a breathatking scale," many of which ignored burdens on religious exercise or, worse, targeted religious exercise as such. *Id.* Some state or local governments "closed churches even as they allowed casinos and other favored businesses to carry on." *Id.*; *see Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam). Others "surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct." *Arizona*, 143 S.Ct. at 1314 (citing *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020) (per curiam)).

But such religious antagoanism is not limited to once-in-a-generation pandemics. California recently tried to force crisis pregnancy centers to violate their religious beliefs by requiring the centers to promote abortion to the women they serve. *See infra* at X-X. Colorado recently prohibited medical professionals from offering care that could potentially save the life of an unborn baby, without exception for those whose religion compelled them to provide such care. *See infra* at X-X. And the Attorneys General of both California and New York have sought to enjoin religious organizations from promoting the same treatment. *See infra* at X-X. Clearly, in some States hostility, not solicitude, is increasingly common.

Emboldened by *Smith*'s rule, New York and several other States have mandated that all employee insurance plans provide coverage for abortion procedures. These mandates purport to be neutral and generally applicable. But for religious organizations like Petitioners here, providing coverage for abortion is complicity in a grave sin—there is no dispute that it violates their sincerely held religious beliefs. Some mandates, like New York's, provide an exemption for "religious employers"—a term defined so narrowly it excludes plainly religious organizations like the Petitioners here, which include nuns devoted to serving the elderly and infirm, ecumenial churches, and other service-based religious ministries. Worse, in some of these States not even churches are exempt. And these States have not unknowingly overlooked the burden their mandates place on religious exercise—instead, relying on *Smith*, they forthrightly impose those burdens. This is not the solicitude that the First Amendment demands.

II. Some courts read *Smith* to say the Free Exercise Clause provides protection only from laws deliberately aimed at restricting religious practice. *See* 494 U.S. at

878-79. That is not the religious liberty the founding generation understood. And because *Smith*'s premise of solicitude has unfortunately proved faulty, the Court should revisit *Smith*'s holding.

ARGUMENT

I. Many States Do Not Treat Religious Exercise with the Special Solicitude Enshrined in the First Amendment.

In *Smith*, the Court held that the First Amendment does not require strict scrutiny of "neutral and generally applicable" laws that burden religious exercise. 494 U.S. at 878-79. The *Smith* Court "expected," however, "a society that believes in the negative protection accorded to religious belief . . . to be solicitous of that value in its legislation as well." *Id.* at 890. But for the citizens of some States, such solicitude is lamentably rare.

A. Consider first New York's COVID-19 mitigation efforts, which were marked by hostility toward religious exercise. In November 2020, this Court enjoined enforcement of New York Executive Order 202.68, which set lower capacity limits for religious services than for businesses deemed "essential," including acupuncture facilities, manufacturing plants, and liquor stores. In "red zones," attendance at religious services was restricted to ten individuals even in the largest cathedrals and synagogues; yet businesses deemed to be "essential" had no capacity restrictions whatsoever. *Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 66. Before issuing his executive order, then-Governor Cuomo made no secret that it was designed to target religious practice, saying that "religious institutions have been a problem" for the State's COVID-19 mitigation efforts and that if religious

communities do not comply, "then we'll close the institutions down."[2]

Enjoining enforcement of that order, this Court explained that the applicants made a "strong showing that [New York's] restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 67. As Justice Gorsuch noted, "[t]he only explanation for treating religious places differently [from secular places] seem[ed] to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces." *Id.* at 69 (Gorsuch, J., concurring).

Similarly, when it came to New York's vaccine mandate, "[t]he State began with a plan to exempt religious objectors [but] later changed course." *Dr. A. v. Hochul*, 142 S.Ct. 552, 555 (2021) (Gorsuch, J., dissenting). The New York Governor "admitted that the revised mandate 'left off' a religious exemption 'intentionally[,]'" and "offered an extraordinary explanation for the change," saying, "'God wants' people to be vaccinated—and that those who disagree are not listening to 'organized religion' or 'everybody from the Pope on down.'" *Id.* As a result, New York's mandate "prohibit[ed] exemptions for religious reasons while [it] permit[ed] exemptions for medical reasons." *Id.* at 556.

New York was hardly the only State to disregard the free-exercise rights of religious communities during the COVID-19 pandemic. This Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" five times within five months. *Tandon*, 593 U.S. at 61; *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *Gish v. Newsom*, 141 S.Ct. 1290

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[2] *See Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, GOVERNOR.NY.GOV (Oct. 5, 2020) https://tinyurl.com/2r4v3pvf.

(2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S.Ct. 889 (2020). In each case, the Court granted relief to the religious petitioners.

Throughout the pandemic, California "openly imposed more stringent regulations on religious institutions than on many businesses." *S. Bay*, 141 S.Ct. at 717 (statement of Gorsuch, J.). As time went on, California only grew more hostile to religious practice. Although, at first, California permitted houses of worship to operate at 25% capacity, *see Roman Catholic Diocese of Brooklyn*, 141 S.Ct. at 73 (Kavanaugh, J., concurring), the State ultimately "forb[ade] any kind of indoor worship"—even as it "allow[ed] most retail operations to proceed indoors with 25% occupancy, and other business to operate at 50% occupancy or more." *S. Bay*, 141 S.Ct. at 717 (statement of Gorsuch, J.).

In every case, California argued its restrictions on religious exercise were merely neutral and generally applicable regulations permitted by *Smith*.[3] The Court correctly rejected that contention. But California's argument found significant purchase in the lower courts, illustrating the need for this Court to restore robust protection for religious liberty. As the Chief Justice

[3] *See, e.g.*, State Appellees' Answering Brief, *Tandon v. Newsom*, No. 21-15228, 2021 WL 1499787, at *22-25 (9th Cir. Apr. 6, 2021); State Defendants-Appellees' Answering Brief and Opposition to Renewed Motion for Injunction Pending Appeal, *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 150974, at *29-31 (9th Cir. Jan. 7, 2021); State Defendants-Appellees' Answering Brief, *Gateway City Church v. Newsom*, No. 21-15189, 2021 WL 1306156, at *41 (9th Cir. Mar. 29, 2021); State Defendants-Appellees' Answering Brief, *Gish v. Newsom*, No. 20-56324, 2021 WL 150982, at *39 (9th Cir. Jan. 7, 2021); Answering Brief, *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 6999458, at *41-42 (9th Cir. Nov. 18, 2020).

observed, California's "determination . . . that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *S. Bay*, 141 S.Ct. at 717 (Roberts, C.J., concurring). A rule that lower courts could read to allow such restrictions reflects a misreading of the Free Exercise Clause.

Though New York and California may have been the most blatant violators of religious exercise during the COVID-19 pandemic, they were by no means alone. Consider just a sampling of the following representative examples:

- Colorado imposed occupancy limits on houses of worship, but exempted "meat-packing plants, distribution warehouses, P-12 schools, grocery stores, liquor stores, marijuana dispensaries, and firearms stores." *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 832 (D. Colo. 2020). Colorado also made "a total of eight exemptions" to its mask mandate, "none of which appl[ied] to worship services." *Id.* at 833.

- Illinois restricted houses of worship and religious organizations to gatherings of no more than 10 people, while permitting hardware stores, garden centers, cannabis dispensaries, and other secular establishments to cap occupancy at 50 percent of store capacity. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343-44 (7th Cir. 2020); Illinois Executive Order 2020-32.

- Maine allowed exemptions to its vaccination mandate for those expressing "mere *trepidation* over vaccination . . . but only so long as it is phrased in medical and not religious terms." *Doe v.*

Mills, 142 S.Ct. 17, 19 (2021) (Gorsuch, J. dissenting).

- Nevada "treat[ed] numerous secular activities and entities significantly better than religious worship services" by allowing "[c]asinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities [up] to 50% of fire-code capacity," while limiting "houses of worship . . . to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020).

- At the same time Oregon allowed the reopening of restaurants, bars, and gyms without occupancy limits so long as six-foot distancing between parties could be maintained, it prohibited "faith-based gatherings of more than 25 people," in addition to imposing distancing requirements, backed by the threat of a $1,250 fine and jail time of up to thirty days for anyone who attended. *See* Phase One Reopening Guidance - Specific Guidance for Restaurants, Bars, Breweries, Brewpubs, Wineries, Tasting Rooms and Distilleries, OHA 2342B, Oregon Health Authority, May 7, 2020, https://tinyurl.com/mr2wwnh4; Oregon Executive Order No. 20-25, May 14, 2020, https://tinyurl.com/54ryyuuh; Oregon Executive Order No. 20-65, Nov. 17, 2020, https://tinyurl.com/bdc55ese.

- During "Phase 2" of Washington State's "Reopening," "religious organizations were [] subject to [a] 25% capacity or 200-person cap[], whichever was less," while "offices, restaurants, and taverns in Phase 2 were allowed occupancy of 50% of their building capacity and did not face any

per person caps." *Harborview Fellowship v. Inslee*, 521 F. Supp. 3d 1040, 1043–44 (W.D. Wash. 2021). Washington's initial Phase 2 guidance also limited spiritual gatherings to "no more than 5 people outside your household per week," while restaurants were allowed "<50% capacity." Safe Start Washington - A Phased Approach to Recovery, May 4, 2020, https://tinyurl.com/2p8mt4dr. Phase 1 forbade indoor spiritual gatherings entirely, while "cannabis retail" and "liquor stores that sell food" were allowed to open as "essential businesses." *Id.*; WA Essential Critical Infrastructure Workers, March 23, 2020, Proclamation 20-25, Appendix, https://tinyurl.com/24fnsvep.

Other States also imposed restrictions on religious gatherings with varying degrees of severity. *See* Most states have religious exemptions to COVID-19 social distancing rules, PEW RESEARCH CENTER, April 27, 2020, https://tinyurl.com/4rd7jz5b; UPDATE: Banning Religious Assemblies to Stop the Spread of COVID-19, Congressional Research Service, Updated June 1, 2020, https://tinyurl.com/ms5mrth4.

B. It is not only once-in-a-generation pandemics that trigger governmental hostility to religious exercise, however. In recent years, this Court has frequently confronted governmental decisions that burden religious exercise out of a misguided attempt to ensure government "neutrality." For example, two terms ago, this Court reversed on Free Exercise Clause grounds a Ninth Circuit decision affirming a school district's termination of a longtime high school football coach for "kne[eling] at midfield after games to offer a quiet prayer of thanks." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 512, 524-26 (2022). In rejecting the school district's

argument that it disciplined the coach because it feared that permitting him to quietly pray would violate the Establishment Clause, this Court remarked that it was "aware of no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion' in this way." *Id.* at 541 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

That same term the Court rejected a City's refusal to "fly a Christian flag" on a flagpole even though the City had previously "approved hundreds of requests to raise dozens of different flags" without objection. *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022). And the Court has repeatedly reversed lower court decisions affirming state-government decisions denying generally available public benefits to religious observers that were made available to secular persons. *See Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 778-81 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 473-79 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458-64 (2017).

Religious opponents of abortion also face hostility from some state governments, and not only in the context of employee health insurance. In recent memory, Washington State adopted regulations requiring pharmacies to stock and sell abortifacient drugs. *See Storman's, Inc. v. Wiesman*, 136 S.Ct. 2433, 2434 (2016) (Alito, J., dissenting from denial of certiorari). Though that regulation contained an exception permitting pharmacies to refer purchasers to other pharmacies for a host of secular reasons, it expressly forbade pharmacies to refuse to deliver such drugs "on religious, moral, or other personal grounds." *Id.* As the district court in that case found, the regulation was "adopted with the predominant purpose to stamp out the right to refuse to

dispense emergency contraceptives for religious reasons." *Id.* (quotations omitted). Indeed, the State's Governor prevailed on the state regulators to make those with personal or conscientious objections nevertheless subject to the regulation—going so far as to threaten those regulators with removal from the State Board of Pharmacy should they refuse. *Id.* The State Human Rights Commission even threatened regulators "with personal liability if they passed a regulation permitting referral for religious or moral reasons." *Id.* Yet when it came time to defend this regulation in Court, Washington retreated to *Smith*, arguing it was merely a neutral rule of general applicability. *See* Brief in Opposition at 21-27*, Storman's, Inc. v. Wiseman*, No. 15-862 (U.S. Mar. 7, 2016).

Even more recently, California tried to force crisis pregnancy centers—"largely Christian belief-based[] organizations"—to promote abortion to the women they serve. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2368 (2018); *id.* at 2380 (Breyer, J., dissenting) (noting that petitioners "object to abortion for religious reasons"). The California Legislature made no secret of its hostility to the centers' beliefs. *See id.* at 2379 (Kennedy, J., concurring) ("The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of 'forward thinking.'"). Indeed, the author of the legislation considered it "unfortunate[]" that there were "nearly 200 licensed and unlicensed crisis pregnancy centers in California." *Id.* at 2368 (majority op.) (quotation marks omitted). The Court rightly concluded that California's law violated the free-speech protections of the First Amendment. *Id.* at 2378.

More recently, California has joined with Colorado and New York in further attacks on crisis pregnancy centers' First Amendment rights, including by preventing

medical professionals from treating pregnant women with progesterone—a medication that can be used to reverse the effects of "the abortion pill" and potentially save the lives of unborn babies—in spite of those medical professionals' religious convictions obligating them to provide such treatment. *See Bella Health & Wellness v. Weiser*, 699 F. Supp. 3d 1189, 1197 (D. Colo. 2023); *see also* Colo. Rev. Stat. § 12-30-120(1)(c)–(2)(a). As one federal district court explained in issuing a preliminary injunction, Colorado's "prohibition on medication abortion reversal," "treats comparable secular activity more favorably than [the plaintiff's] religious activity," and its "object and effect is to burden religious conduct in a way that is not neutral." *Bella Health*, 699 F. Supp. 3d at 1212. The court found that, "the legislature knew that the burden of this prohibition, in operation, would primarily fall on religious adherents" but enacted it anyway. *Id.* at 1215. And even worse, though the regulation supplied a mechanism for individualized exemptions, *id.* at 1214, there were no exemptions for organizations like the plaintiff there who "considers it a religious obligation to provide treatment for pregnant mothers and to protect unborn life if the mother seeks to stop or reverse an abortion," *id.* at 1999, 1218.

Similarly, in California, the Attorney General sued faith-based pregnancy resource centers, alleging that the organizations' efforts to provide abortion-pill reversal information and access constituted false or misleading statements and unfair competition in violation of state law. *See* Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief at 4–5, 26–28, *California v. Heartbeat International*, No. 23CV044940 (Cal. Super. Ct. filed Sept. 21, 2023). Indeed, California sought to enjoin the organizations from even *telling* the public about potentially life-saving progesterone

treatment. *Id.* at 28–29; *see also* Verified Complaint for Injunctive and Declaratory Relief and Attorneys' Fees and Costs and Demand for Jury Trial at 3, *Nat'l Inst. for Family & Life Advocates v. Bonta*, No. 2:24-cv-08468 (C.D. Cal. filed Oct. 2, 2024). And it sought civil penalties of up to $2,500 for "each violation." Complaint at 29, *Heartbeat*, No. 23CV044940.

In New York, too, the Attorney General "commenced a civil enforcement action" against several "faith-based, pro-life pregnancy centers[.]" *Nat'l Inst. for Fam. & Life Advocs. v. James*, No. 24-CV-514 (JLS), 2024 WL 3904870, at *3 (W.D.N.Y. Aug. 22, 2024). Like California, New York alleged that the pregnancy resource centers' promotion of abortion-pill-reversal treatments constituted false and misleading advertizing, in violation of New York law. *Id.*. Similar faith-based, pro-life organizations sued the Attorney General for, and obtained, a preliminary injuction, because their "religiously motivated and constitutionally protected pro-life speech [was] chilled by the Attorney General's unlawful selective enforcement." *Id.* at *4-6. The court in that case ensured that New York could not use intimidation and prosecution to prevent religious organizations from helping "women to access and receive information that may lead to saving the lives of their unborn children." *Id.* at *10.

C. New York's abortion-coverage mandate, at issue in this case, is of a piece with the foregoing examples of hostility to religious exercise that are regrettably common throughout the country. But New York is not the only jurisdiction where religious organizations are compelled by law to cover abortions through their employee health insurance—something they cannot do without violating their sincerely held beliefs. *See* Pet. 7. In addition to New York, nine States mandate abortion-

coverage for private health-insurance plans. These States include California, Colorado, Illinois, Maine, Maryland, Massachusetts, New Jersey, Oregon, Vermont, and Washington. *See* Letter from Michelle Rouillard, Director of the California Department of Managed Health Care, to Mark Morgan, California President of Anthem Blue Cross (Aug. 22, 2014), https://tinyurl.com/yck3wx9m; Colo. Rev. Stat. § 10-16-104; 215 I.L.C.S. 5/356z.4a; Me. Stat. tit. 24-A § 4320-M; Md. Code Ann., Ins. § 15-857; Mass. Ann. Laws ch. 175, § 47F; N.J. Admin. Code § 11:24-5A.1; O.R.S. § 743A.067; 8 V.S.A. § 4099e; Wash. Rev. Code §§ 48.43.072, .073.

Four of these States—California, Illinois, Vermont, and Washington—do not even exempt churches, let alone other religious employers. In California, although there is a statutory exemption from covering contraceptive methods "contrary to [a] religious employer's religious tenets," Cal. Health & Safety Code § 1367.25(b), no such exemption exists for abortion. Statutory exemptions are also lacking in Illinois's, Vermont's, and Washington's abortion-coverage mandates. *Compare* 215 I.L.C.S. 5/356z.4a, *with* 215 I.L.C.S. 5/356m; Wash. Rev. Code §§ 48.43.072, .073; 8 V.S.A. § 4099e.[4] Critically, when these types of mandates are challenged, *Smith* is regularly the vanguard of the state government's defense.[5]

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[4] In *Cedar Park Assembly of God v. Kreidler*, No. 20-35507 (9th Cir.), Washington's litigation position is that even though its abortion-coverage mandate admits of no exceptions, its "conscience objection statute," Wash. Rev. Code § 48.43.067(3)(a), would allow a church to exclude abortion coverage from its employee health insurance. *See* Defendants-Appellees' Answering Brief 3-4, 9-10 (9th Cir. Dec. 2, 2020).

[5] *See, e.g.*, Appellee's Answering Brief 14-15, *Foothill Church v. Rouillard*, No. 19-15658 (9th Cir. Dec. 4, 2019); Defendants-Appellees' Answering Brief 36-43, *supra* n.4; Appellee's Answering

Even where exemptions do exist, their protection is paltry. As Petitioners explain, New York's abortion-coverage mandate provides no protection for a host of religious organizations, merely because the organizations provide charity to the public, without regard to the recipients' faith. *See* Pet. 29-30; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(3). Maine and Oregon have adopted similarly narrow exemptions. *See* Me. Stat. tit. 24-A § 4320-M(4); O.R.S. §§ 743A.066(4). Yet religious organizations like Petitioners make invaluable contributions to the communities in which they operate, often providing essential social services in partnership with state and local governments. Their continued existence is threatened when they cannot operate without violating their sincerely held beliefs.

II. The Time Is Ripe to Revisit *Smith*.

A. Even after *Fulton*, there is confusion in the lower courts about what qualifies as a neutral and generally applicable law under *Smith*. As evidenced in the Court's pandemic-related orders, *see supra* Part I.A, some States and lower courts take an unduly expansive view of what counts as a "neutral and generally applicable" law. The Court should clarify that *Smith*'s "neutral and generally applicable" standard does not permit New York or any other State to require religious organizations to subsidize abortions through their employee health insurance.

B. In the alternative, as many of the Amici States have previously argued, *Smith* is an "erroneous constitutional decision" in need of being "settled right." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022); *see, e.g.,* Brief for the States of Texas et. al. as Amici Curiae in

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Brief 50, *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 959 F.3d 341 (9th Cir. May 13, 2020).

Support of Petitioners at 13–21, *Fulton v. City of Phila.*, 593 U.S. 522 (2021) (No. 19-123) ("States' *Fulton* Brief").

For one, *Smith* stands on "weak grounds." *Dobbs*, 597 U.S. at 268, 270. In addition to the havoc *Smith* has wrought on free exercise rights, *see supra* Part I, its "negative protection" from discrimination is a faint shadow of the religious liberty recognized by the founding generation. *See* States' *Fulton* Brief at 4–14. Indeed, *Smith* "can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Fulton*, 593 U.S. at 553 (Alito, J., concurring).

"That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States." *Id.* at 582. Because religious liberty was so central to the Founding generation, "colonial and state legislatures were willing to grant exemptions" "[w]hen there were important clashes between generally applicable laws and the religious practices of particular groups"—"even when the generally applicable laws served critical state interests." *Id*. For example, religious objectors were exempted from taking legally required oaths before testifying, voting, or even assuming public office, *id.* at 582-83; objectors were "granted exemptions from the requirement that individuals remove their hats in court," *id.* at 584; religious objectors were exempted from mandatory militia service and conscription, because "violence to [objectors'] consciences" was deemed more essential than "the very survival of the new Nation," *id.* at 583-84. These exemptions are "strong evidence of the founding era's understanding of the free-exercise right," *id.* at 585 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1119

(1990)), and were born out of the Framers' unflagging belief in "the inviolability of conscience," Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1997). Thus, *Smith*'s "constitutional analysis was far outside the bounds" on the First Amendment's "text, history, or precedent." *Dobbs*, 597 U.S. at 268, 270.

Furthermore, "[t]his Court's jurisprudence since" *Smith* "has 'eroded' [its] 'underpinnings[.]'" *Id.* at 350 (Roberts, C.J., concurring). In *Hosanna-Tabor*, the Court held that "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own [ministers]." 565 U.S. at 184; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020). That carveout is hard to square with *Smith* itself. The employment discrimination statutes at issue in *Hosanna-Tabor* and *Our Lady of Guadalupe* would seem to fit comfortably within *Smith*'s general rule allowing "neutral and generally applicable" laws to burden religious exercise. And yet the Court—rightly—determined that the First Amendment required an exception to those laws. *See* States' *Fulton* Brief at 16–17.

Additionally, laws are not generally applicable "'whenever they treat any comparable secular activity more favorably than religious exercise.'" Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise under Smith and after Smith*, 2020-2021 Cato Sup. Ct. Rev., 2021, at 35 (quoting *Tandon*, 593 U.S. at 62). *Smith* thus has been significantly limited by *Tandon*. But despite this limitation, *Fulton* still allows governments to "rewrite their rules to eliminate discretionary exceptions," *id.* at 37, sometimes "[e]ven if a rule serves no important

purpose and has a devastating effect on religious freedom," *Fulton*, 593 U.S. at 545 (Alito, J., concurring); *see id.* at 543 (Barrett, J., concurring) ("Under *Smith*, a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise.") Thus, *Smith* is the worst of all worlds: It is no longer logically coherent, *and* it still infringes on rights the Constitution obviously protects.

Finally, overruling *Smith* will not "upend substantial reliance interests." *Dobbs*, 597 U.S. at 287. To the contrary, it will vindicate them. As recent events have highlighted, *Smith*'s expectation of solicitude toward religious exercise has proven too optimistic in many jurisdictions. *See supra* Part I. By leaving religious exercise at the mercy of politics, *Smith* has permitted troubling infringements of religious liberty, *see id.*, particularly for those holding minority beliefs. *See* States' *Fulton* Brief, *supra*, at 27–30.

Given *Smith*'s faulty premise, the Court's ongoing pruning of *Smith*'s holding, and the decision's "depart[ure] from a century of this Court's precedents and the common law before that," *stare decisis* does not mandate that the Court prolong *Smith*'s "30-year window." *Edwards v. Vannoy*, 593 U.S. 255, 294 n.7 (Gorsuch, J., concurring); *see Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment) (recognizing that the majority "dramatically depart[ed] from well-settled First Amendment jurisprudence"). The Court should use this opportunity to set aside *Smith* and reaffirm a standard more consistent with the original public meaning of the Free Exercise Clause. *See* States' *Fulton* Brief at 21. Otherwise, governments will remain free to trample upon Americans' most fundamental

rights. Because the Court declined to reach the issue in *Fulton*, it should grant the petition and do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AARON L. NIELSON
Solicitor General

WILLIAM F. COLE
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OCTOBER 2024

Counsel for Additional Amici States:

Bingesser, Matt

From: Public Policy Law360 <news-alt@law360.com>
Sent: Tuesday, October 15, 2024 3:40 AM
To: Kambli, Abhishek
Subject: High Court's TCPA Grant Set To Broaden Loper Bright's Blow

LAW360

Public Policy

TUESDAY, OCTOBER 15, 2024

TOP NEWS

Analysis

High Court's TCPA Grant Set To Broaden Loper Bright's Blow

By Allison Grande

On the heels of the U.S. Supreme Court dealing a major blow to the power of federal agencies to interpret laws, the justices are poised to again boost judicial authority and potentially release a torrent of litigation challenging the established tome of regulations crafted under the Telephone Consumer Protection Act.

Read full article Â» | Save to favorites Â»

Analysis

More Ga. PFAS Suits Are Coming. Here's How Attys Prepare

By Kelcey Caulder

Leading attorneys in PFAS litigation say new regulations and ever-increasing lawsuits require attorneys to think carefully about proactive measures clients can take to limit PFAS use, and about the latest scientific research into how the so-called forever chemicals impact humans and the environment.

Read full article Â» | Save to favorites Â»

Up Next At High Court: CBD Injuries & The Clean Water Act

By Katie Buehler

The U.S. Supreme Court will be closed Monday, but the justices will return to the bench Tuesday to hear arguments over whether the federal Racketeering Influenced and Corrupt Organizations Act allows litigants to pursue claims of economic harm tied to personal injuries, and how specific pollutant discharge limits have to be under the Clean Water Act.

Read full article Â» | Save to favorites Â»

DOJ Tells Judge Boeing Plea Is 'The Best The Gov't Could Do'

By Catherine Marfin

The federal government told a Texas federal judge Friday that its proposed deal with The Boeing Co. over allegations that it lied to safety regulators about the 737 Max 8's development is "the best the government could do," pushing back against vehement objection from crash victims' families, who called the deal "rotten" and "morally reprehensible."

Read full article Â» | Save to favorites Â»

ELECTION FIGHTS

Cornel West's Ballot Bid Too Late For Pennsylvania

By Matthew Santoni

A Pennsylvania federal judge has denied third-party presidential candidate Cornel West's bid to be added to the Keystone State's election ballots, ruling Thursday that the court's concerns about the constitutionality of stricter rules for minor parties were outweighed by the likely disruption of adding new candidates after voting was already underway.

Memorandum attached | Read full article Â» | Save to favorites Â»

BANKING & SECURITIES

Judge Doubts FTX Alum Needs Further Dog Bite Recovery

By Elliot Weld

A Manhattan federal judge has denied a bid from former FTX executive Ryan Salame to further postpone the start of his 7Â½-year prison sentence, saying he had

LAW FIRMS IN TODAY'S NEWS

Ahmad Zaffarese
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already benefited from "extremely generous" delays, and agreeing with prosecutors that Salame appeared to have largely recovered from a dog bite that he said he suffered in June.

Order attached | Read full article Â» | Save to favorites Â»

With Swipe At Attys, CFPB's Chopra Defends Use Of Guidance

By Jon Hill

At a tough-talking appearance in Utah on Friday, Consumer Financial Protection Bureau Director Rohit Chopra said he doesn't sweat potential legal challenges to his agency's rules and suggested some industry-side attorneys can be "leeches" who relish compliance uncertainty if it boosts their billable hours.

Read full article Â» | Save to favorites Â»

Bitnomial Suit Says SEC Is Muscling Into CFTC's Crypto Turf

By Jessica Corso

Cryptocurrency platform Bitnomial Exchange LLC is suing the U.S. Securities and Exchange Commission in Illinois federal court, alleging that the regulator is overstepping its jurisdiction by attempting to block it from listing futures contracts for Ripple Labs' token XRP despite a court ruling that such secondary sales are valid.

Complaint attached | Read full article Â» | Save to favorites Â»

Ill. Restaurants Fire Back At Banks' Bid To Halt Swipe Fee Law

By Katryna Perera

Trade groups for restaurants and retailers have urged an Illinois federal judge to reject a proposed preliminary injunction to block a first-of-its-kind state law restricting swipe fees, arguing that relief from such fees is badly needed for small family businesses and consumers.

Brief attached | Read full article Â» | Save to favorites Â»

ENERGY & ENVIRONMENTAL

Feds Designate 3rd-Largest Marine Sanctuary Off Calif. Coast

By Tom Lotshaw

The Biden administration on Friday said the National Oceanic and Atmospheric Administration is designating more than 4,500 square miles of ocean off California's central coast as the Chumash Heritage National Marine Sanctuary.

Read full article Â» | Save to favorites Â»

Xcel, Colo. Co-Op Reach Deal To End Power Plant Appeal

By Daniel Ducassi

Xcel Energy and a Colorado electric cooperative have told an intermediate state appellate court that they've reached a settlement in principle to avoid further appeals of a $26 million jury verdict against Xcel in a fight over the closure of a power plant.

3 documents attached | Read full article Â» | Save to favorites Â»

6th Circ. Blocks Work On Tenn. Pipeline For TVA Gas Plant

By Tom Lotshaw

A split Sixth Circuit panel on Friday temporarily blocked construction of a Kinder Morgan unit's pipeline that would serve a Tennessee Valley Authority natural gas-

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fired power plant in Cumberland City, as conservation groups challenge Clean Water Act permits Tennessee and the U.S. Army Corps of Engineers issued for the pipeline.

2 documents attached | Read full article Â» | Save to favorites Â»

FERC Defends Keeping Calif. In Hydro Permitting Role

By Keith Goldberg

The Federal Energy Regulatory Commission defended its conclusion that California's water board didn't waive its Clean Water Act permitting authority over two hydroelectric dams, telling the D.C. Circuit there's nothing to suggest there was a coordinated effort to string out the permitting process.

Brief attached | Read full article Â» | Save to favorites Â»

DOI Defends Offshore Lease Schedule At DC Circ.

By Madeline Lyskawa

The U.S. Department of the Interior defended its scaled-back offshore leasing program for 2024-2029 from dueling challenges at the D.C. Circuit, arguing it relied on "extensive quantitative and qualitative analyses" that it prepared over several years to reach its decision.

Brief attached | Read full article Â» | Save to favorites Â»

Unions Say EPA Rule Contains Protective Wear Loophole

By Madeline Lyskawa

Two major trade unions told the D.C. Circuit that the U.S. Environmental Protection Agency promulgated a rule that lets the agency consider the use of personal protective equipment when conducting risk evaluations, in violation of federal law.

2 documents attached | Read full article Â» | Save to favorites Â»

HEALTH & LIFE SCIENCES

Texan Who Sued Ex's Colleagues Over Abortion Drops Suit

By Mike Curley

A Texas man who filed a wrongful-death suit against his ex-wife's co-workers that alleged that they helped her obtain pills to terminate her pregnancy has dropped the suit on the eve of trial, saying in a notice Friday that the parties have settled.

Notice attached | Read full article Â» | Save to favorites Â»

Dem AGs Urge Judge To Rule Now On FDA Abortion Pill Regs

By Greg Lamm

Washington and 16 other states with Democratic attorneys general are pressing a federal judge to force the U.S. Food and Drug Administration to lift restrictions on access to mifepristone, arguing that the agency is swayed by the controversy swirling around the abortion medication that has been proved to be safer than Tylenol, Viagra and insulin.

Motion attached | Read full article Â» | Save to favorites Â»

IP & TECHNOLOGY

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Wilkinson Barker
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Wolf Haldenstein
gunnercooke LLP

Swiss Officials Clear Novartis IP Suits As 'Common Practice'

By Adam Lidgett

Swiss authorities have dropped their antitrust probe into patent suits Novartis lodged against rival Eli Lilly and others over psoriasis treatment Cosentyx, saying Novartis' actions were aboveboard.

Read full article Â» | Save to favorites Â»

MEDIA & ENTERTAINMENT

Elon Musk's X Drops Unilever From Advertising Boycott Suit

By Bonnie Eslinger

X Corp. has dropped Unilever from its antitrust suit accusing the global consumer goods company and others of conspiring to withhold advertising revenue from the social media platform, announcing in a post Friday that it's "pleased to have reached an agreement with Unilever" and "we look forward to more resolution."

Notice attached | Read full article Â» | Save to favorites Â»

INSURANCE

Quinn Emanuel Gets Trimmed $92M Fee In ACA Cases

By Lauren Berg

Quinn Emanuel Urquhart & Sullivan LLP will get $92 million in fees from a $3.7 billion win in two class actions against the government over risk corridor payments under the Affordable Care Act, a U.S. Court of Federal Claims judge ruled Thursday, trimming the firm's renewed $185 million request.

Opinion attached | Read full article Â» | Save to favorites Â»

EMPLOYMENT & BENEFITS

Analysis

Cornell Case Gives Justices Chance To Curb ERISA Litigation

By Kellie Mejdrich

The U.S. Supreme Court's recent decision to hear a retirement fee suit from Cornell workers means new precedent is coming that could harmonize an uneven set of circuit standards for what it takes to pursue a prohibited transaction claim under federal benefits law, attorneys say.

Read full article Â» | Save to favorites Â»

Seattle Police Guild Tells Judge Shooting Didn't Warrant Firing

By Rachel Riley

A Seattle police officers' union argued in Washington state court on Friday a former cop acted reasonably when she shot at a suspect fleeing in a stolen vehicle, defending an arbitrator's decision to downgrade her firing to a 60-day suspension amid a challenge by the city.

2 documents attached | Read full article Â» | Save to favorites Â»

COMPETITION

COMPANIES IN TODAY'S NEWS

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ACA Connects - America's Communications Association
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American Chemistry Council Inc.
American Federation of Labor & Congress of Industrial Organizations
American Fuel & Petrochemical Manufacturers
American Petroleum Institute Inc.
Appalachian Mountain Advocates
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Chemical Abstracts Service Inc.
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Earthjustice
Eli Lilly & Co.
Epic Games Inc.
Ethiopian Airlines Enterprise
Exxon Mobil Corp.
FMR LLC
FTI Technology LLC

FTC's Republicans Take Aim At Agency Merger Data

By Matthew Perlman

The Federal Trade Commission's two Republican members criticized a long-standing agency policy of reporting "abandoned" transactions that were never notified to the antitrust agencies as wins, while dissenting from an annual congressional report on merger reviews.

4 documents attached | Read full article Â» | Save to favorites Â»

Google Says High Court Shouldn't Pause Ad Tech Subpoena

By Matthew Perlman

Google told the U.S. Supreme Court on Friday that there's no need to pause a South Carolina agency's bid to quash a document request in a case accusing the tech giant of monopolizing key digital ad technology, saying the agency has no chance of succeeding.

Response attached | Read full article Â» | Save to favorites Â»

CONSUMER PROTECTION

Dems Ask FTC About Price-Gouging Ban After Hurricanes

By Courtney Bublï¿½

The ravaging of the Southeast U.S. by Hurricanes Helene and Milton has left affected communities desperate for basic necessities, leading to concerns of price-gouging, and a group of Democratic lawmakers wants the Federal Trade Commission to weigh in on whether there should be a federal ban on the practice.

Letter attached | Read full article Â» | Save to favorites Â»

PERSONAL INJURY & MEDICAL MALPRACTICE

Wash. DOT Settles Deadly Highway Tree Fall Suit For $775K

By Rachel Riley

The Washington State Department of Transportation will pay $775,000 to the surviving members of a family who sued the agency after a Douglas fir fell on their vehicle while they were traveling along a state highway on the Olympic Peninsula in 2017, causing two deaths and devastating injuries to the survivors.

4 documents attached | Read full article Â» | Save to favorites Â»

AEROSPACE & DEFENSE

DOD Finalizes High-Profile Contractor Cybersecurity Rule

By Daniel Wilson

The U.S. Department of Defense on Friday finalized a rule implementing its sweeping Cybersecurity Maturity Model Certification program, which will attach a minimum cybersecurity requirement to nearly all DOD contracts.

Final Rule attached | Read full article Â» | Save to favorites Â»

INTERNATIONAL TRADE

Forterra Inc.
Google LLC
Great American Insurance Co.
Holtec International Inc
Illinois Bankers Association
Illinois Credit Union League Inc.
Kinder Morgan Inc.
Mars Inc.
McKesson Corp.
Merced Irrigation District
Meta Platforms Inc.
Monsanto Co.
NASDAQ Inc.
Nascar Digital Media LLC
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NextGear Capital Inc.
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PG&E Corp.
Pacific Legal Foundation
Pew Research Center
PricewaterhouseCoopers LLP
Restaurant Law Center
Retail Industry Leaders Association Inc.
Ripple Labs Inc.
Robert Half Inc.
Schools Health & Libraries Broadband Coalition
Sierra Club
Southern Environmental Law Center
Spark Therapeutics Inc.
State Bar of California
T-Mobile US Inc.

US Law 'Wins,' Judge Says, Nixing Treaty Challenge To Duties

By Alyssa Aquino

The U.S. Court of International Trade has rejected a steel importer's arguments that U.S. antidumping duties need reworking to comply with the General Agreement on Tariffs and Trade, stating that U.S. law "wins" when in conflict with an international treaty.

Decision attached | Read full article Â» | Save to favorites Â»

IMMIGRATION

EB-5 Investor Urges Rollback Of Immigration Fee Hikes

By Grace Dixon

An EB-5 immigrant investor urged a Colorado federal judge to set aside controversial immigration fee increases that took effect in April, arguing that a 2022 law required a study from the U.S. Department of Homeland Security before the immigrant investor program fees could be raised.

Motion attached | Read full article Â» | Save to favorites Â»

WHITE COLLAR

Secret Docs May Delay Foreign Agent Case, Ex-Fla. Rep Says

By David Minsky

A former Florida congressman told a Miami federal judge on Friday that he's requested evidence from prosecutors that may exonerate him on criminal charges of failing to register as a foreign agent while lobbying for Venezuela, saying the discovery implicates classified information that may delay proceedings in his case.

Read full article Â» | Save to favorites Â»

Indicted NJ Power Broker Says Civil Suit Belongs In Biz Court

By George Woolston

Indicted Garden State power broker George E. Norcross III has asked a New Jersey state judge to transfer the civil racketeering suit brought against him and his attorney brother by a Philadelphia developer to the state's complex business litigation program.

1 document attached | Read full article Â» | Save to favorites Â»

NATIVE AMERICAN

11th Circ. Reinstates, Remands Alabama Burial Ground Fight

By Crystal Owens

An Eleventh Circuit panel on Friday vacated and remanded a lower court's order in a fight between two Alabama tribes over a sacred burial site, saying it failed to review the litigation's sovereign immunity issues on a claim-by-claim basis.

Opinion attached | Read full article Â» | Save to favorites Â»

Parties Look To Vacate 40-Year-Old Ore. Tribal Fishing Decree

By Crystal Owens

Teachers Insurance & Annuity Association of America
Tesla Inc.
Texas Public Policy Foundation
The Bank of New York Mellon Corp.
The Boeing Co.
The Center for Reproductive Rights Inc.
The Florida Bar
The Seattle Times
The Whitlock Co.
TikTok Inc.
Toronto-Dominion Bank
Trout Unlimited Inc.
Twitter Inc.
U.S. Hemp Roundtable Inc.
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United Steelworkers
Universal Service Administrative Co.
Vertex Pharmaceuticals Inc.
Walmart Inc.
World Economic Forum
Xcel Energy Inc.

GOVERNMENT AGENCIES IN TODAY'S NEWS

Bank of England
California Attorney General's Office
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California Environmental Protection Agency
California Supreme Court
Coeur d'Alene Tribe
Commodity Futures Trading Commission
Companies House
Confederated Tribes of Siletz Indians
Consumer Financial Protection Bureau
Equal Employment Opportunity Commission
European Commission

The U.S. government, Oregon and a Native American tribe are asking a federal court to vacate a 1980 agreement that established hunting and fishing rights for the tribe, arguing that the consent decree was a product of its time and represented a distorted view on tribal sovereignty.

Motion attached | Read full article Â» | Save to favorites Â»

Tribes, Enviro Orgs. Can Defend EPA In Pebble Mine Row

By Joyce Hanson

A federal judge in Alaska has allowed a slew of environmental groups and Alaskan tribes to defend the U.S. Environmental Protection Agency's decision to block the planned creation of the controversial Pebble Mine, saying they made a convincing argument that intervention is warranted.

Order attached | Read full article Â» | Save to favorites Â»

TELECOMMUNICATIONS

FCC Pressed To Revisit Local Network Unbundling Rules

By Jared Foretek

An organization representing schools and libraries is once again urging the Federal Communications Commission to restore unbundling rules for local telecom incumbents, telling the agency that the FCC's Trump-era move to loosen the regulations has reduced competition among E-rate providers.

4 documents attached | Read full article Â» | Save to favorites Â»

5th Circ. Broke Precedent In FCC Subsidy Case, Justices Told

By Christopher Cole

The Fifth Circuit not only split with two other appeals courts when it overturned the revenue base for the Federal Communications Commission's telecom subsidy programs, but also broke with U.S. Supreme Court precedent, advocacy groups told justices Friday.

Petition attached | Read full article Â» | Save to favorites Â»

Phone Unlocking Advances Digital Equity, Civic Group Says

By Nadia Dreid

Setting federal rules that dictate when mobile providers have to unlock a customer's device, allowing people to switch providers without having to buy a new phone, would improve digital equity, says a group that promotes Black civic participation.

Letter attached | Read full article Â» | Save to favorites Â»

Cable Biz Says Feds Need To Remove Barriers To Broadband

By Christopher Cole

The cable industry is making its case at the Federal Communications Commission that while advanced telecom service is being deployed in a "reasonable and timely" fashion, the feds should remove regulatory barriers to hasten deployment.

2 documents attached | Read full article Â» | Save to favorites Â»

CANNABIS

European Union
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Federal Aviation Administration
Federal Bureau of Investigation
Federal Bureau of Prisons
Federal Communications Commission
Federal Deposit Insurance Corp.
Federal Energy Regulatory Commission
Federal Reserve System
Federal Trade Commission
Financial Conduct Authority
Food and Drug Administration
Georgia Supreme Court
Illinois Attorney General's Office
National Institute of Standards and Technology
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
New Jersey Court
North Carolina Department of Health and Human Services
Occupational Safety and Health Administration
Office of Disability Employment Policy
Office of the Comptroller of the Currency
Oregon Department of Fish & Wildlife
Oregon Department of Justice
Pennsylvania Department of State
Pennsylvania Supreme Court
Poarch Band of Creek Indians
Santa Ynez Band of Chumash Mission Indians
Tennessee Department of Environment and Conservation
Tennessee Valley Authority
U.S. Air Force
U.S. Army
U.S. Army Corps of Engineers
U.S. Attorney's Office
U.S. Attorney's Office for the Central District of California

Court Allows Calif. Hemp Ban To Remain In Effect

By Sam Reisman

A California state judge on Friday ruled that the Golden State's new ban on hemp products with THC will remain in effect, rejecting a bid by a leading hemp industry trade organization and the cannabis brand fronted by stoner comedians Cheech and Chong to halt the emergency rules.

2 documents attached | Read full article Â» | Save to favorites Â»

EXPERT ANALYSIS

Cos. Should Focus On State AI Laws Despite New DOL Site

Because a new U.S. Department of Labor-sponsored website about the disability discrimination risks of AI hiring tools mostly echoes old guidance, employers should focus on complying with the state and local AI workplace laws springing up where Congress and federal regulators have yet to act, say attorneys at Littler.

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State Of The States' AI Legal Ethics Landscape

Over the past year, several state bar associations, as well as the American Bar Association, have released guidance on the ethical use of artificial intelligence in legal practice, all of which share overarching themes and some nuanced differences, say Eric Pacifici and Kevin Henderson at SMB Law Group.

6 documents attached | Read full article Â» | Save to favorites Â»

What's Inside Feds' Latest Bank Merger Review Proposals

Recent bank merger proposals from a trio of federal agencies highlight the need for banks looking to grow through acquisition to consider several key issues much earlier in the planning process than has historically been necessary, say attorneys at Simpson Thacher.

3 documents attached | Read full article Â» | Save to favorites Â»

Can SEC's Consolidated Audit Trail Survive Post-Chevron?

The U.S. Securities and Exchange Commission is currently in a showdown at the Eleventh Circuit over its authority to maintain a national market system and require that the industry spend billions to maintain its consolidated audit trail, a case that is further complicated by the Loper Bright decision, says Daniel Hawke at Arnold & Porter.

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Deadline Extension Highlights PFAS Reporting Complexities

The U.S. Environmental Protection Agency's recent extension of reporting and recordkeeping timelines for per- and polyfluoroalkyl substances under the Toxic Substances Control Act offers relief to the regulated community, but the unprecedented volume of data required means that businesses must remain diligent in their data collection efforts, say attorneys at Alston & Bird.

Read full article Â» | Save to favorites Â»

HSR Amendments Intensify Merger Filing Burdens, Data Risk

The antitrust agencies' long-awaited changes to premerger notification rules under the Hart-Scott-Rodino Act stand to significantly increase the time and cost involved in preparing an initial HSR notification, and will require more proactive attention to data issues, says Andrew Szwez at FTI Technology.

U.S. Attorney's Office for the District of Alaska

U.S. Attorney's Office for the District of Massachusetts

U.S. Attorney's Office for the Northern District of Texas

U.S. Attorney's Office for the Southern District of New York

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LEGAL INDUSTRY

California High Court Rejects Bar Exam Alternative Program

By Jake Maher

The California Supreme Court has rejected a proposal that would have allowed bar applicants to submit a portfolio of work they did with real clients under supervision instead of taking the bar exam.

Order attached | Read full article Â» | Save to favorites Â»

Hurricane Effects Prompt More NC Court Deadline Extensions

By Ryan Harroff

Chief North Carolina Supreme Court Justice Paul Newby on Friday gave litigants in the state's western counties another two-week extension on their court deadlines as they deal with Hurricane Helene, writing in his order that the region is still plagued by "catastrophic conditions" due to the severe weather and flooding.

Order attached | Read full article Â» | Save to favorites Â»

Attys Ordered To Apologize For Neighborhood 'Scream Test'

By James Boyle

A Pennsylvania federal judge has ordered attorneys representing a plaintiff in a civil rights suit to go door-to-door and issue written apologies to residents and business owners after subjecting a South Philadelphia neighborhood to a looped recording of a woman screaming as part of an acoustics test last month.

Opinion attached | Read full article Â» | Save to favorites Â»

Apple Judge OKs New Schedule But Pans 'Burden' To Court

By Bonnie Eslinger

A California federal judge Friday issued an order in antitrust litigation against Apple that permits the plaintiffs and the tech giant to push out discovery deadlines, but said the change "shifts the burden to the court," so they'll have to prepare for trial "with or without" rulings on filed motions.

U.S. District Court for the Western District of Pennsylvania

U.S. Environmental Protection Agency

U.S. Securities and Exchange Commission

U.S. Supreme Court

United States District Court for the District of Colorado

Wage and Hour Division

Washington Attorney General's Office

Washington State Department of Transportation

Order attached | Read full article Â» | Save to favorites Â»

Ex-Girardi Keese CFO Pleads Guilty In Calif. Wire Fraud Cases

By Craig Clough

Girardi Keese's former Chief Financial Officer Christopher K. Kamon pled guilty Friday in California federal court to two counts of wire fraud, admitting that he conspired with the firm's disgraced co-founder Tom Girardi to steal millions from a client, while also stealing millions from the firm behind Girardi's back.

Read full article Â» | Save to favorites Â»

Boston Bomber Says Judge's Praise For Jury DQs Him

By Julie Manganis

A Massachusetts federal judge's public comments praising the jury that delivered a conviction and death sentence for Boston Marathon bomber Dzhokhar Tsarnaev disqualify him from reviewing alleged juror misconduct, the defendant's lawyers said in a filing unsealed Friday.

3 documents attached | Read full article Â» | Save to favorites Â»

Lin Wood Slams Ga. Atty Fee Statute As Unconstitutional

By Emily Johnson

Retired Georgia attorney L. Lin Wood has doubled down on his argument that a state law violates the state and U.S. constitutions by favoring plaintiffs in awarding attorney fees, urging a Georgia federal judge to let him escape paying his former law partners' fees after they won a $3.75 million defamation verdict.

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Law360's Legal Lions Of The Week

By Tracey Read

Cravath Swaine & Moore LLP and Faegre Drinker Biddle & Reath LLP top this week's edition of Law360 Legal Lions after a California federal judge wrapped up a high-profile antitrust fight filed by Epic Games against Google that began in 2020.

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GC Cheat Sheet: The Hottest Corporate News Of The Week

By Michele Gorman

Deputy Attorney General Lisa Monaco warned compliance officers that TD Bank's historic settlement this month with U.S. authorities over anti-money laundering violations should serve as a lesson, and a report found the country's BigLaw firms have accelerated their environmental sustainability efforts but lack in areas like diversity, equity and inclusion. These are among the stories in corporate legal news you may have missed in the past week.

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UK Litigation Roundup: Here's What You Missed In London

By Max Austin

This past week in London has seen billionaire Lakshmi Mittal sue steel magnate Sanjeev Gupta in a long-running clash to claw back â‚¬140 million ($153 million) of debt, a high-profile AI researcher take action against the Intellectual Property Office to register his software as a listed patent inventor and troubled housing trust Home

Reit face a claim by a real estate developer. Here, Law360 looks at these and other new claims in the U.K.

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In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

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