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, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, WEST VIRGINIA, AND WYOMING 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. Div., Dep't of Hum. 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,

[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.

New York purports to exempt from that abortion-coverage mandate those "[r]eligious employer[s]," whose "purpose" is "[t]he 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 reasons 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*, 143 S.Ct. 1312, 1315 (2023) (Gorsuch, J., statement). "Executive officals across the country issued emergency decrees on a breathtaking scale," many of which ignored burdens on religious exercise or, worse, targeted religious exercise as such. *Id.* at 1314. 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 those centers to promote abortion to the women they serve. *See infra* at 12-13. 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 13-14. And the Attorneys General of both California and New York have sought to enjoin religious organizations from promoting the same treatment. *See infra* at 14-15. 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 that 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 66. 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.

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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.

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-19 restrictions on religious exercise" five times within five months. *Tandon*, 593 U.S. at 64; *Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *Gish v. Newsom*, 141 S.Ct. 1290 (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 businesses 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

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[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-

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 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

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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).

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." *Does 1-3 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* Virginia Villa, *Most states have religious exemptions to COVID-19 social distancing rules*, PEW RESEARCH CENTER, April 27, 2020, https://tinyurl.com/4rd7jz5b; Valerie C. Brannon, Cong. Rsch. Serv., LSB10450, 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* Br. in Opp'n, *Storman's, Inc. v. Wiseman*, No. 15-862, 2016 WL 880305 at *21-27 (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 Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 761 (2018); *id.* at 781 (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 780 (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 761 (majority op.) (quotation marks omitted). The Court rightly concluded that California's law violated the free-speech protections of the First Amendment. *Id.* at 778-79.

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 abortion pill 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 "consider[ed] 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 1212.

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 Int'l*, No. 23CV044940 (Cal. Super. Ct. Sept. 21, 2023) ("*Heartbeat* Complaint"). 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 Fam. & Life Advocs. v. Bonta*, No. 2:24-cv-08468 (C.D. Cal. Oct. 2, 2024). And it sought civil penalties of up to $2,500 for "each violation." *Heartbeat* Complaint, *supra,* at 29.

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, 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.*.

But 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. 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, ten 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 Ill. Comp. Stat. 5/356z.4a; Me. Stat. tit. 24-A § 4320-M; Md. Code Ann., Ins. § 15-857; Mass. Gen. Laws Ann. ch. 175, § 47F; N.J. Admin. Code § 11:24-5A.1; Or. Rev. Stat. § 743A.067; 8 Vt. Stat. Ann. § 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. For example, 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(c)(1), no such exemption exists for abortion. Statutory exemptions are also lacking in Illinois's, Vermont's, and Washington's abortion-coverage mandates. *Compare* 215 Ill. Comp. Stat. 5/356z.4a, *with id.* 5/356m; Wash. Rev. Code §§ 48.43.072, .073; 8 Vt. Stat. Ann. § 4099e.[4] Critically, when these types of mandates are challenged, *Smith* is regularly the vanguard of the state government's defense.[5]

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); Or. Rev. Stat. § 743A.066(4). Yet

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[4] In *Cedar Park Assembly of God v. Kreidler*, No. 20-35507 (9th Cir.), Washington's litigation position was that even though its abortion-coverage mandate admits of no exceptions, its "conscience objection statute," Wash. Rev. Code § 48.43.065(3)(a), would allow a church to exclude abortion coverage from its employee health insurance. *See* Defendants-Appellees' Answering Brief, 2020 WL 7266146, at *3-*4, *9-*10 (9th Cir. Dec. 2, 2020).

[5] *See, e.g.*, Appellee's Answering Brief, *Foothill Church v. Rouillard*, No. 19-15658, 2019 WL 6792279, at *14-15 (9th Cir. Dec. 4, 2019); Defendants-Appellees' Answering Brief at *36-43, *supra* n.4; Appellee's Answering Brief, *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 2018 WL 6791786, at *50 (9th Cir. Dec. 14, 2018).

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 by the Court's pandemic-related orders, *see supra* Section 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 Support of Petitioners, *Fulton v. City of Philadelphia*, No. 19-123, 2020 WL 3078498, at *13-21 (U.S. June 3, 2020) ("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, *supra*, 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 (1998). 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*, 591 U.S. 732 (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, *supra*, at *16-17.

Additionally, laws are not generally applicable "'whenever they treat any comparable secular activity more favorably than religious exercise.'" Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise under Smith and after Smith*, Cato Sup. Ct. Rev. 2020-2021, 33, 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 (2021) (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, *supra*, 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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