No. 20-1501

IN THE

Supreme Court of the United States

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

v.

SHIRIN EMAMI, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York, Appellate Division, Third Department

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents do not contest the importance of this issue and this case. New York mandates that religious entities cover abortion to "simplify[]" consumer "comparisons" of health insurance policies. Opp. 5. And New York exempts from that requirement only those religious entities that "employ" and "serve" coreligionists for the primary purpose of "inculcating" religious values. The mandate and exemption thus violate the Free Exercise Clause both by imposing substantial burdens on religious entities and by discriminating *among* religious entities.

Respondents actually affirm the importance of this Petition by repeatedly noting that the exemption here is one that New York has used multiple times before, emphasizing the Legislature's longstanding "policy judgment" that most religious employers do not deserve a meaningful exemption from laws that burden religious beliefs. *Id.* at 1, 6, 29. But the fact that New York has repeatedly violated the rights of religious entities in the past underscores the need for this Court's review now, since it all but guarantees that New York—and other states, like California, which follow New York's lead—will continue to trample upon those rights unless and until this Court intervenes.

Respondents aim to distract rather than explain why the Petition is unworthy of review. Respondents first try to slice and dice the lower court disagreements into artificial categories that do not reflect the decisions' actual holdings and reasoning. In Respondents' view, lower courts disagree not about whether exemptions undermine a law's general

applicability but whether certain *kinds* of exemptions do. Yet Respondents ignore that the Appellate Division here did not make the distinctions they try to inject into the case, and its clear holding that the abortion mandate is "generally applicable" cannot be reconciled with decisions from numerous other courts. That is particularly true given the numerous comparable, secular exemptions from mandated health coverage that New York provides—podiatry and dental care, for instance, are *not* mandated, even as abortions are.

Respondents also try to minimize the importance of the abortion mandate's discrimination *between* religious entities, but the lower courts' disagreements speak for themselves. Respondents assert that distinctions between "houses of worship" and other religious organizations are viable. Opp. 17. That is not only false, it is irrelevant. New York's abortion mandate does not single out houses of worship. And Respondents' repeated contention that the regulation is "denominationally neutral," *id.* at 11, 18 n.15, 28-29, cannot be reconciled with the regulation itself or the decisions in this area. Instead, the regulation favors those religious entities that serve and employ coreligionists for the purpose of inculcating religious values—as opposed to those organizations that have broader missions and more diverse employees. The Appellate Division's endorsement of this discrimination conflicts with other courts' holdings, though it would be a critical question to review even if it did not.

Respondents' remaining arguments are likewise unavailing. They claim that Petitioners did not raise a church autonomy argument, but that is wrong.

Likewise, this is an ideal vehicle to resolve the cleanly presented legal questions. Finally, the Petition provides an opportunity to reevaluate *Smith* in the (unlikely) event this Court were to conclude that existing jurisprudence allows New York to force religious entities to facilitate a procedure that is directly contrary to their most deeply held religious convictions.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY "GENERAL APPLICABILITY" UNDER *SMITH*.

The Appellate Division stepped into two splits that underscore the "confusion about the meaning of *Smith*'s holding [regarding] exemptions from generally applicable laws." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1921 (2021) (Alito, J, concurring). The Petition thus provides the Court the opportunity to bring further clarity to a deeply contested area of law, particularly on the issues of comparability and the effect of preferential religious exemptions. Respondents quibble around the edges, but none of their arguments detract from the Petition's primary point: in other courts, New York's rule would not be generally applicable, on two different grounds.

A. The Court Should Review the Appellate Division's Decision that the Abortion Mandate Is Generally Applicable.

Petitioners already explained the extensive confusion among lower courts regarding exemptions and general applicability under *Smith*. Pet. 16-21. This Petition provides an ideal opportunity to bring greater clarity to this dispute.

Respondents try to reframe the confusion as a dispute over the relevance of "*secular* exemptions" or "individualized *discretionary* exemptions," Opp. 12, rather than *religious* exemptions. But dividing the split into little pieces makes no sense, and it does nothing to detract from the point that the Court's guidance is needed.

To start, the Appellate Division did not make the distinctions on which Respondents now rely. Based on *Serio*, the Appellate Division held that the abortion mandate is neutral and generally applicable because it does not "target" religious entities. *Cath. Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 522 (2006); Pet.App.8a. The Appellate Division did not distinguish between religious exemptions and "secular exemptions" or "individualized discretionary exemptions" (whatever that even means). Lest there be any confusion, this is the view of Respondents, even now: they argue that because "any burden on petitioners' free exercise is not the *object* of the regulation," it is not subject to strict scrutiny. Opp. 26 (emphasis added). That is precisely the view that numerous other courts have rejected. Pet. 19-21.

The court's holding thus falls on one side of the dueling views of *Smith* that Petitioners identified. Pet. 16-21. And while the cases do not always involve *religious* exemptions specifically, Respondents do not and cannot explain why this is a meaningful distinction. If secular exemptions undermine a law's general applicability, how could preferential religious exemptions *not* undermine a law's general applicability? Favoring secular over religious activity is no worse than favoring certain religions over other religions. Respondents view such religious

discrimination as permissible because it supposedly "does not disfavor religion." Opp. 14. But this extreme position at least deserves review.

On top of that, as Petitioners explained, the abortion mandate is part of a regulatory scheme that is rife with secular exemptions, too. Pet. 6, 24.[1] Respondents protest that "the courts below did not address the effect of any such secular exemptions," Opp. 14, but that is the point; the issues were not addressed, because the courts below did not believe that exemptions mattered. There was no call to examine New York's labyrinthine regulatory scheme—which allows greater freedom to refuse covering foot care than abortions, N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c)—*because* of the Appellate Division's mistaken understanding of the Free Exercise Clause.[2]

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[1] New York's complicated regulatory scheme of exceptions to mandated coverage disproves Respondents' claim that New York has "long … prohibit[ed] health insurance policies … from excluding coverage based on type of illness, accident, treatment or medical condition." Opp. 1. It also disproves Respondents' contention that this complicated scheme, along with the abortion mandate, is necessary for consumers to *avoid* being confused by "fine print" in insurance policies. Opp. 15, 16 & n.14.

[2] Respondents argue that Petitioners did not "press[]" a "claim" regarding secular exemptions, Opp. 14, but that is misleading and irrelevant. The *claim* Petitioners pressed below is based on the Free Exercise Clause. Pet.App.119a. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010). Given *Serio*, which rejected the relevance of exemptions, Petitioners understandably chose to focus on other rationales.

Respondents next argue that the Court resolved the relevant split in *Tandon v. Newsom*, 141 S.Ct. 1294 (2021), and *Fulton*, 141 S.Ct. 1868.[3] Yet, even applying *Tandon* and *Fulton*, Respondents contend that New York's numerous exemptions (both religious and secular) are still insufficient to trigger strict scrutiny. In Respondents' view, a concern for "consumer understanding" is sufficient to support the abortion mandate, but somehow does not militate in support of requiring dental or vision coverage. Opp. 16. Indeed, Respondents offer varied justifications for *all* the exemptions from mandated health coverage. *Id.* This confirms that, *even now*, Respondents do not believe that exemptions actually undermine the abortion mandate's general applicability—though such a system improperly "invite[s] the government to decide which reasons … are worthy of solicitude," *Fulton*, 141 S.Ct. at 1879. Respondents' view is *wrong*, but more importantly, it requires review.

[3] To the extent that is true, it means that Respondents are tacitly admitting that, at the very least, the Court should grant, vacate, and remand in light of those decisions—since the Appellate Division's decision conflicts with one side of the supposedly "resolve[d]" split. Opp. 12. And the Court certainly should GVR in light of *Tandon* and *Fulton*, rather than deny. The Appellate Division's decision—based on *Serio*, a fifteen-year-old case—is not consistent with this Court's broader understanding of the Free Exercise Clause. Nevertheless, Respondents' cramped understanding of *Tandon* and *Fulton*—and their longstanding opposition to the clear trend in this Court's Free Exercise jurisprudence—underscores why plenary review is required.

B. The Court Should Review the Appellate Division's Refusal to Apply Strict Scrutiny to the Abortion Mandate Even Though It Discriminates Among Religious Entities.

The next split of authority is just as important: can a state discriminate *between* objecting religious entities in doling out exemptions? Again, New York and California have said "yes," while numerous other courts have said "no." Pet. 21. The Court should resolve this disagreement, too.

Respondents, however, try to change the subject. First, they aim to reframe the question as whether states can limit their "accommodat[ions]" to "houses of worship." Opp. 17. Yet the abortion mandate's exemption does not do that. Instead, it relies on whom the entity employs and serves, and what its mission is, as well as whether it fits within certain IRS definitions, N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)—definitions not limited to "houses of worship." *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

Moreover, Respondents' contention that this distinction is "long-standing" and unworthy of review is incorrect. Opp. 29. Respondents point to five vacated decisions from courts of appeals, not one of which is more than seven years old ("long-standing," indeed). *Id.* at 30. New York is trying to speak this distinction into existence, but even if it *were* the relevant distinction here (and it is not), whether it is a *valid* distinction would be worthy of review.

Second, Respondents—without any sound basis—resist the notion that other courts are in conflict with New York (and California). In Respondents' view,

Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008), *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), and similar cases, are not about "discrimination" between religion, but avoiding state "entanglement" with religion. Opp. 18-20. But entanglement was merely one of the *reasons* these courts invalidated state attempts to discriminate among religious entities (or privilege certain visions of religion). Petitioners already made that very argument, explaining that New York cannot possibly decide, consistent with the Constitution, who counts as a coreligionist, or whether a religious entity has the primary purpose of inculcating religious values. Pet. 27. This is a reason for *granting* cert, not denying it.

Undaunted, Respondents press forward, contending that Petitioners should have raised a specific "claim" for "entanglement." Opp. 20. But the *claim* is that New York violates Petitioners' Free Exercise rights by discriminating among religious entities; avoiding state entanglement is a *reason* other courts have accepted similar claims, but it is neither the only supporting reason nor need it be a distinct "claim."

Regardless, even Respondents admit that *Weaver*—and this Court's decision in *Larson v. Valente*, 456 U.S. 228 (1982)—invalidated laws that discriminated between religious entities much like the abortion mandate. Their attempts to distinguish those cases are baseless. They assert, for instance, that *Weaver* involved religious discrimination to "deny an otherwise generally available public benefit," whereas the instant case involves an "accommodation [for] some from the generally applicable requirement

that is imposed equally on all others." Opp. 22. But if there is a difference of constitutional import between a state imposing a mandate (while discriminating among religious entities in granting exemptions) and a state granting a public benefit (while discriminating among religious entities in denying that benefit), Respondents never say what it is.

Respondents go even further in attempting to distinguish *Larson*, which they assert involved a "denominational preference," Opp. 27. Not so. The law at issue in *Larson* "impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers." *Larson*, 456 U.S. at 230. Despite its apparent religious neutrality, the Court recognized that "the provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members', on the one hand, and 'churches which are new and lacking in a constituency, or which, *as a matter of policy*, may favor public solicitation over general reliance on financial support from members.'" *Id.* at 246 n.23 (emphasis added).

New York's "accommodation" is materially identical and is not "denominationally neutral." Opp. 11, 18 n.15, 28-29. It privileges religious entities of a certain type—those involving more formal worship, less service, and less evangelism—in exactly the same way the law in *Weaver* favored religious entities that were only *somewhat* (not "pervasively") sectarian and the law in *Larson* favored religious entities that were mostly member-funded. But the abortion mandate goes further: it *explicitly* requires the government to distinguish among religions and various expressions

of religious doctrines. Pet. 27. At the very least, the question whether this is permissible is important, and Respondents' arguments do not establish otherwise. The Court should grant review.

II. THE COURT SHOULD DECIDE WHETHER THE ABORTION MANDATE INTERFERES WITH THE AUTONOMY OF RELIGIOUS ORGANIZATIONS.

As to Petitioners' autonomy argument, Respondents invent a distinction between "direct" and "indirect" interference with church autonomy. Opp. 24 & n.17. But this Court has held that "*any* attempt by government to dictate or *even to influence* [matters of internal church governance] would constitute one of the central attributes of an establishment of religion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020) (emphases added). Regardless, Respondents do not deny this is an important question, worthy of review.

Respondents assert that Petitioners did not raise this argument. Yet Petitioners explicitly argued that the "abortion mandate infringes not only upon individual rights to free exercise, but also upon the institutional autonomy of Church organizations." Br. for Appellants, *Roman Cath. Diocese of Albany v. Vullo*, 127 N.Y.S.3d 171 (2019) (No. 529350), 2019 WL 9042651, at *19. The Complaint likewise made clear that Petitioners challenged the abortion mandate under the Religion Clauses because it, *inter alia*, "coerc[ed] them to decide between their religious beliefs or suffer a draconian penalty," while compliance with the law would make "Churches" seem "hypocritical," as they tried to preach one thing but behave otherwise. Pet.App.128a-129a. Litigation

does not "demand the incantation of particular words." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Petitioners made clear in their argument that their internal practices were being coerced in violation of the Religion Clauses. And the Appellate Division did nothing to suggest it was not on "notice," *id.*, of the argument; to the contrary, the *Serio* court rejected a similar argument and the Appellate Division adopted the *Serio* opinion wholesale, Pet. 13.

III. *SMITH* SHOULD BE REEVALUATED.

Since the filing of the Petition, three Justices have called for the outright overruling of *Smith*. *Fulton*, 141 S.Ct. at 1926 (Alito, J., concurring). Two more have indicated that, "[a]s a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination." *Id.* at 1882 (Barrett, J., concurring). This case is an ideal vehicle to reconsider or reshape *Smith*, as the Court could address how the Free Exercise Clause applies to a particular type of entity (religious institutions) facing a recurring type of burden (insurance mandate). Review here thus presents the opportunity to begin working through the issues raised in Justice Barrett's *Fulton* concurrence. *Id.* (Barrett, J., concurring).

IV. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

Though Respondents raise a few factual contentions in their Opposition, this case cleanly presents the legal questions warranting review. For instance, Respondents assert (without evidence) that some Petitioners might fit within the exemption and

thus suffer no burden—but Respondents also admit that they did not "affirmatively challenge" Petitioners on this point because at least some Petitioners clearly do *not* satisfy the exemption. Opp. 9 & n.9. Respondents also suggest that some of the Petitioners could decline to *offer* insurance to their employees, *id.* at 3, but they do not challenge that Petitioners "have religious reasons for providing health-insurance coverage for their employees" and that it would substantially burden their religious beliefs to force them drop that coverage. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014); Pet.App.128a. Finally, Respondents assert that the abortion mandate only indirectly affects Petitioners, as the regulation is directed at health insurers. Opp. 3, 31. But as this Court has held, that has no legal relevance, *see, e.g.*, *Burwell*, 573 U.S. at 723 (rejecting argument that regulatory command was too "attenuated" to constitute substantial burden); *Fulton*, 141 S.Ct. at 1878 (relevant provision was in a contract rather than a direct regulatory prohibition or mandate). That New York *provided* a religious exemption (albeit, a gerrymandered, insufficient one) shows that New York, too, acknowledges that it burdens religious institutions.

Regardless, the Appellate Division did not rely on *any* of these points. It made a clear, direct holding, as a matter of law, that Petitioners' Free Exercise claims fail because the abortion mandate is neutral and generally applicable. As explained, that holding is clearly wrong, implicates two circuit splits, and directly implicates an immensely important and recurring issue. The Court should review that misguided holding.

CONCLUSION

The Court should grant the Petition.

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