No. 20-____

IN THE

Supreme Court of the United States

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

v.

LINDA A. LACEWELL, 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

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 provides an exemption for certain religious organizations: tax-exempt entities that have the "purpose" of "inculcat[ing] … religious values" and primarily "employ[]" and "serve[]" those of the same religious persuasion. *Id.* § 52.2(y). But religious organizations that have a broader purpose, such as serving the poor, or that employ or serve members of other faiths or no faith, must cover abortions in their health plans. The questions presented are:

1. Is New York's mandate, which burdens a subset of religious organizations by forcing them to cover abortions, "neutral" and "generally applicable" under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)?

2. Does New York's mandate interfere with the autonomy of religious entities, in violation of the Religion Clauses of the First Amendment?

3. If, under the rule announced in *Smith*, the Free Exercise Clause of the First Amendment allows states to demand that religious entities opposing abortions subsidize them, 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; Trustees of The Diocese Of Albany; Sisterhood of St. Mary; Catholic Charities, Diocese of Brooklyn; Catholic Charities of the Diocese Of Albany; Catholic Charities of The Diocese of Ogdensburg; St. Gregory The Great 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.; Teresian House Housing Corporation; Depaul Housing Management Corporation; and Renee Morgiewicz.

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 Linda A. Lacewell, Superintendent, New York State Department of Financial Services,* and the New York State Department of Financial Services. One other plaintiff in the state court proceedings, Murnane Building Contractors, Inc., is not a Petitioner here, and thus is a Respondent under Rule 12.6.

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* During the state court proceedings, the superintendent of the New York State Department of Financial Services was Maria T. Vullo.

LIST OF RELATED PROCEEDINGS

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, &c. 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

In a 2017 regulation, the New York State Department of Financial Services mandated that employers fund abortions through their employee health insurance plans. This regulatory command exempts religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists. But religious organizations must cover abortions if they have a broader religious mission (such as service to the poor) or if they employ or serve people regardless of their faith.

Needless to say, this regulation imposes enormous burdens on the countless religious entities opposed to abortion as a matter of longstanding and deep-seated religious conviction. To take one example, the Catholic Church's opposition to abortion is well known. Yet under New York's regulation, Catholic Charities, which serves the poor, must cover abortions. Catholic-affiliated religious orders, like the Carmelite Sisters who operate the Teresian Nursing Home, dedicated to the elderly and infirm, must do likewise. The same is true of the Episcopalian, Lutheran, and Baptist groups who are also parties to this challenge.

Because New York's regulation forces these organizations to violate their religious beliefs, they filed suit in New York state court seeking to enjoin this abortion mandate as a violation of the Religion Clauses of the First Amendment. They argued that the mandate runs afoul of the Free Exercise Clause because it imposes severe burdens on their religious

exercise, and that it runs afoul of both Religion Clauses because it interferes with religious autonomy.

New York's Appellate Division, Third Department, nevertheless upheld the regulation. In that court's view, the mandate is a "neutral and generally applicable" law under this Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Thus, it declined to subject the mandate to strict scrutiny and rejected Petitioners' challenge.

But that decision was erroneous, and it exacerbates *two* splits of authority on how to determine whether a law is "neutral and generally applicable." *First*, some courts, including the appellate division here, the Third Circuit, Ninth Circuit, and California Supreme Court, hold that a law is "neutral and generally applicable," regardless of how many exemptions it includes, unless it specifically targets religious conduct. Other courts, including the Second, Sixth, Tenth, and Eleventh Circuits, use a different approach: a law is "neutral and generally applicable" only if it pursues its interests across the board, without material exemptions. *Second*, most courts recognize that a government cannot pick and choose which religious entities will be burdened by its laws—but New York and California courts allow religious exemptions limited to preferred religious entities, provided that the law is not, in their view, intended to discriminate against religion.

The appellate division is on the wrong side of both of these splits, which are of enormous significance not

just to Petitioners and many other religious entities across the country, but to the very fabric of this Court's First Amendment jurisprudence. The provision of exemptions for some preferred organizations *but not others* necessarily undermines a law's "general applicability," because it means a government "decide[d] that the … interests it seeks to advance are worthy of being pursued only against" certain "religious[ly] motivat[ed] … conduct." *Lukumi*, 508 U.S. at 542–43. Indeed, this Court's recent decision in *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507 (U.S. Apr. 9, 2021), reinforces that a regulation is not generally applicable if it has "*any*" exemption that undermines "the asserted government interest that justifies the regulation." *Id.* at *1. That the abortion mandate undermines New York's interest in ensuring comprehensive coverage by exempting some religious organizations but not others should thus be more than sufficient to trigger strict scrutiny.

The appellate division's second error was just as clear. Exempting only certain religious organizations while imposing burdens on others necessarily triggers strict scrutiny. "[N]o State can 'pass laws' … that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982). Imposing burdens on some religious entities while exempting others flouts the "constitutional prohibition of denominational preferences." *Id.* at 245.

For these reasons alone, this Court's plenary review of New York's regulation is essential, but this case raises additional issues that warrant this Court's review. New York's mandate is also invalid because it impermissibly "interfere[s]" with internal religious governance and doctrine, which "obviously violate[s]"

the Religion Clauses. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Indeed, "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* Yet that is exactly what New York has done, by exerting pressure on religious groups to employ only coreligionists, serve only coreligionists, and limit their "purpose" to inculcating religious values.

Finally, if there is a question as to whether the Free Exercise Clause protects religious entities against this mandate under *Smith*, the Court should revisit that decision. Indeed, this Court has already decided that the continuing vitality of *Smith* is a question worth answering. *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020). But if the Court does not reach that question 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.

OPINIONS BELOW

The order of the New York Court of Appeals, denying leave to appeal, is reported at 36 N.Y.3d 927, 160 N.E.3d 321, and reproduced in the appendix at Pet.App.29a. The 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 in the appendix at Pet.App.1a. The decision of the Supreme Court of New York is unpublished, reported at 2018 WL 11149776, and reproduced in the appendix at Pet.App.15a.

JURISDICTION

The New York Court of Appeals denied Petitioners' motion for leave to appeal on November 24, 2020, Pet.App.29a, thus leaving in place the decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The New York regulatory provisions at issue, N.Y. Comp. Codes R. & Regs. tit. 11, §§ 52.2(y), 52.16(o), are included in the Appendix at Pet.App.159a.

STATEMENT

A. Statutory and Regulatory Background

New York regulates the content of employer health insurance plans both by statute and through regulations promulgated by Respondent, the Superintendent of the New York State Department of Financial Services. *See* N.Y. Ins. Law § 3217 ("The superintendent shall issue such regulations he deems necessary or desirable to establish minimum standards … for the form, content and sale of accident and health insurance policies."). New York statutory law includes various substantive requirements of group insurance plans and insurance providers. *See, e.g.*, *id.* § 3221; *id.* § 4303.

At the same time, the Superintendent also regulates the content of group health insurance plans. 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]." N.Y. Comp. Codes R. & Regs. tit. 11,

§ 52.16(c). Care for many foot, vision, and dental conditions, for example, can be excluded from coverage. *Id.* § 52.16(c)(6), (9), (10). Other regulatory exceptions are more complicated, allowing a variety of maladies to be excluded to varying degrees, such as "mental [and] emotional disorders." *Id.* § 52.16(c)(2).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule that would require group health insurance plans to cover "medically necessary abortions." Pet.App.68a. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibited "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 new 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.69a.

Accordingly, the Superintendent proposed a new regulatory subsection, § 52.16(o), which would 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.71a.

The proposed regulation and the eventual published version do not define "medically necessary abortions." But in "model language" for health insurance contracts, the Superintendent stated that "medically necessary abortions" include at least

"abortions in cases of rape, incest or fetal malformation." Pet.App.19a. And in responses 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.148a. The mandate thus appears to cover abortions of babies afflicted with Down Syndrome and other maladies.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent proposed to include a religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s] may exclude coverage for medically necessary abortions" if they followed certain procedures. Pet.App.71a. And "[q]ualified religious organization[s]" would include any organization that "opposes medically necessary abortions on account of a firmly-held religious belief" and 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.69a–70a. That definition largely tracked the scope of federal religious liberty 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); *see also* Pet.App.77a (Superintendent "decided to use the current definition because it is more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new regulation ("Abortion Mandate"). Pet.App.140a.

Between the time of proposal and the time of promulgation, however, the religious exemption was eviscerated. The Superintendent otherwise promulgated the rule as proposed but removed the exemption for qualified religious organizations. Pet.App.140a. Instead, the religious exemption applies only to "[r]eligious employer[s]," defined as "an entity 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.141a; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This is the same 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).

The Superintendent abandoned the broader exemption after "request[s]" by "hundreds" of commenters. Pet.App.145a–46a. In the Superintendent's view, "[n]either State nor Federal law require[d]" any exemption. Pet.App.146a. And the exemption she chose was "analogous to existing state law." Pet.App.158a. 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.146a–47a.

C. Petitioners and Their Objections to the Mandate

A number of religious organizations with employee health plans challenged the Abortion Mandate in New York state court. The plaintiffs—Petitioners here—include religious orders, churches, and services organizations. They employ from dozens to hundreds of people, often of varied religious backgrounds, both for propagating their faith and for charitable service in their communities.

For instance, the Teresian Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. Pet.App.60a–62a. The "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being." Pet.App.61a. The Teresian House employs over 400 people; it provides healthcare coverage to over 200 full-time employees, because of its "moral" and "religious" obligations to "pay just wages." Pet.App.62a.

The other Petitioners are of a piece. 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, deaf ministry, education ministry, athletic activities, day care and pre-school and mission ministry." Pet.App.65a, 85a. 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.82a–83a. Other Petitioners, including two Catholic Dioceses (Albany and Ogdensburg), an Episcopal Diocese (Albany), and Our Savior's Lutheran Church, also engage in ministries and missions within New York or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. Pet.App.33a–35a; Pet.App.81a–85a.

Some of the Petitioners are service organizations. For instance, three subdivisions of Catholic Charities (Albany, Ogdensburg, and Brooklyn) provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life," as part of the "charitable and social justice ministry" of the Catholic Church. Pet.App.83a–84a. And DePaul Management Corporation is a non-profit organization, associated with the Catholic Diocese of Albany, that manages senior living facilities. Pet.App.86a–87a.

All of these organizations are religiously opposed to abortion; no one has questioned the sincerity of those 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.95a. The Church has taught and believes

that "modern genetic science offers clear confirmation," that from the moment of conception, a new living person exists. *Id.* The other Petitioners share similar beliefs. *E.g.*, Pet.App.57a ("The Episcopal Diocese of Albany resolutely affirms the sanctity of human life as a gift from God from conception until natural death"); Pet.App.66a (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Petitioners "cannot religiously or morally accept or sanction." Pet.App.97a.

Petitioners 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.36a; (Roman Catholic Diocese of Albany); Pet.App.62a (Teresian House); Pet.App.66a (First Bible Baptist Church). Indeed, for just the calendar year 2021, the federal fines for failing to provide health insurance would be $2,700 per employee.[1] Just as one example, for the Teresian House, which provides health coverage to over 200 employees, Pet.App.61a, those fines would reach over a half million dollars per year.

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[1] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (Sept. 24, 2020), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

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

In their consolidated suit,[2] Petitioners 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 and against 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.98a. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." Pet.App.125a. Petitioners also challenged the Abortion Mandate as interfering with religious autonomy under both Religion Clauses. Pet.App.117a, Pet.App.127a–31a.

The trial court granted summary judgment in favor of Respondents. Pet.App.15a–28a. The trial

[2] Petitioners filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of a "[m]odel [l]anguage" insurance policy, which covered "medically necessary abortions." Pet.App.3a–4a. In 2017, after the Superintendent promulgated the Abortion Mandate, Petitioners filed a second complaint that challenged that regulation directly. Pet.App.78a. The trial court consolidated the suits. Pet.App.4a. In their relevant holdings, neither the trial court nor the appellate division distinguished between Petitioners' First Amendment challenges. Pet.App.1a–28a.

court believed itself to be bound by a decision of the New York Court of Appeals that upheld a similar law respecting contraception coverage. *Cath. Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). In *Serio*, a group of religious entities had challenged a New York statute mandating that health insurance plans must include contraceptives. That statute contained a religious exemption materially identical to the exemption in the Abortion Mandate. *Id.* at 519. The *Serio* court rejected both Free Exercise and Establishment Clause claims. With respect to the Free Exercise Clause, the court held that the mandate was "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not specifically "target religious beliefs as such." *Id.* at 522 (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, *Serio* involved the "same" claims, and so it barred Petitioners' challenges to the Abortion Mandate. Pet.App.22a.

The appellate division likewise believed itself to be bound by *Serio*. "The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases." Pet.App.8a. Accordingly, it affirmed judgment in favor of the Respondents. Pet.App.14a.

The New York Court of Appeals then denied leave to appeal on November 24, 2020, with Judge Fahey dissenting. Pet.App.29a–30a.

REASONS FOR GRANTING THE PETITION

In the three decades since this Court decided *Smith*, lower courts have taken patently conflicting approaches to state impositions on religious liberty. In *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. But the lower courts have been unable to agree on what those terms mean. Indeed, this case presents two distinct splits of authority on how to determine whether a law is "neutral and generally applicable." Some courts hold that exemptions undermine a law's general applicability, and thus strict scrutiny applies; some do not. 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 clarify the law. New York's Abortion Mandate explicitly exempts religious entities that focus on inculcating religious values among coreligionists, while imposing burdens on groups that view service to those outside their faith as a core part of their religious mission. If such a law is "neutral and generally applicable," nearly every law must be, but that is not right. As this Court has recently held, laws are not neutral and generally applicable when they treat certain "activity more favorably than religious exercise." *Tandon*, 2021 WL 1328507, at *1. Clearly, then, laws that provide exemptions for some—but not all—should not be held generally applicable either.

The consequences could hardly be more severe, should this Court not intervene. New York churches

and religious ministries will be forced to cooperate in what they consider to be grave evil—or stop operating. Before that happens, the Court should at least consider whether the Constitution allows it.

I. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER NEW YORK'S ABORTION MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

The appellate division's decision implicates two splits over how to determine whether a law is "neutral and of general applicability," for purposes of review under the Free Exercise Clause. *Lukumi*, 508 U.S. at 531. New York is on the wrong side of each split.

First, the appellate division's decision implicates a "deep and wide" split regarding whether exemptions undermine a law's "general applicability." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 15 (2016). In New York, California, and the Third and Ninth Circuits, granting exemptions to *some* entities but not *others* is insufficient to require strict scrutiny under *Lukumi*. By contrast, in at least in the Second, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, a law is ordinarily *not* "generally applicable" if it allows exemptions for some but not others.

Second, New York and California courts have held that even where a law specifically exempts some religious entities but not other religious entities (expressly on the basis of their religious views or status), it is still "neutral and generally applicable." This view conflicts with that of numerous courts, which have held that the Religion Clauses require "the

equal treatment of all religious faiths without discrimination or preference." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.).

The appellate division erred with respect to both of these splits. As this Court has clarified in its COVID-based, emergency application decisions, governments cannot selectively burden religious practice as compared to non-religious practice; thus, exemptions necessarily undermine a law's general applicability. Moreover, this Court has long held that governments cannot differentiate among religions in disbursing benefits or protections from burdensome laws. Either of these errors is sufficient to warrant this Court's review and to reverse the judgment below.

A. Courts Are Split on Whether Exemptions Preclude a Law From Being "Generally Applicable."

The appellate division held the Abortion Mandate to be "generally applicable," even in the face of its exemptions for some entities, because it concluded the mandate did not "target" religious practice. The Ninth Circuit, Third Circuit, and California Supreme Court would hold the same. But numerous other courts, including the Second Circuit, hold that exemptions undermine a law's "general applicability," regardless of whether the law "targets" religion. Petitioners' rights would thus not only be adjudicated differently throughout the country, they would be adjudicated differently *in New York*, had the Petitioners filed suit in federal court.

1. The appellate division believed itself bound by the New York Court of Appeals' prior decision in *Serio*,

Pet.App.8a. In that case, the court held that a similar law (mandating contraceptive services) was neutral and generally applicable even though "some … organizations … [were] exempt" while others were not. *Serio*, 7 N.Y.3d at 522. New York's courts will apply strict scrutiny only if a law specifically "target[s]" religious entities. *Id*.

The Supreme Court of California came to a similar conclusion when faced with a similar California law, under which "certain health and disability insurance contracts must cover prescription contraceptives." *Cath. Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 73 (Cal. 2004). That law included an exemption that was virtually identical to the exemption here. *See* Cal. Health & Safety Code § 1367.25. The California court held that the state's contraceptive mandate was neutral and generally applicable anyway, because of its tautological view that "nonexempt [religious] organizations are treated the same as all other" nonexempt organizations. *Cath. Charities of Sacramento*, 85 P.3d at 87. In other words, a law is "generally applicable" regardless of its exemptions for some entities but not others.

The Ninth Circuit signed onto this unduly narrow view of the Free Exercise Clause in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015), a decision that three Members of this Court declared to be "an ominous sign." *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from denial of certiorari). In *Stormans*, the Ninth Circuit reviewed a Washington law that required pharmacists to dispense all prescription drugs, regardless of any moral or religious objections. "The rules permit[ted] pharmacies to deny delivery for certain business

reasons. … But … the rules require[d] a pharmacy to deliver all prescription medications, even if the owner of the pharmacy ha[d] a religious objection." *Stormans*, 794 F.3d at 1071. The Ninth Circuit upheld this set of rules because they "ma[d]e no reference to any religious practice, conduct, belief, or motivation," and because, in the Ninth Circuit's view, the various secular exemptions were justified by secular reasons. *Id.* at 1076, 1080. Unless Washington specifically targeted religious "motivation[s]," strict scrutiny would not apply. *Id.* at 1078.

The Third Circuit, too, followed this approach in *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020). In that case, the court held that laws are subject to strict scrutiny under *Smith* and *Lukumi* only if the government "targeted [a litigant] for its religious beliefs," regardless of whether laws had exemptions. *Id.* at 147.

2. By contrast, in other courts, a law is not "generally applicable" if it *exempts* some entities or similar conduct. *Lukumi*, 508 U.S. at 544–45. The Abortion Mandate, as applied to Petitioners, would *not* survive in these courts.

The Second Circuit, to start, has held that laws exempting certain entities are *not* "generally applicable," regardless of whether there is any targeted religious "animus." *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014). In *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020), for example, the Second Circuit examined Governor Cuomo's emergency COVID-19 restrictions,

which included percentage capacity limits on various entities. These regulations exempted so-called "essential" businesses, "while imposing greater restrictions on 'non-essential' activities," including "religious worship." *Id.* The Second Circuit held that these limits "lack[ed]" "general applicability" and were "subject to strict scrutiny." *Id.* The Second Circuit did not find it necessary to hold that the order targeted religious conduct—the series of exemptions was sufficient. *See also, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 197 (holding that a law regulating a certain type of circumcision for the supposed purpose of reducing neonatal HSV infections was not generally applicable, even though it applied to "any" person, because the state had not regulated other conduct directed at reducing neonatal HSV infections).

The Sixth Circuit has held the same. For instance, a school cannot enforce an "exception-ridden policy" that generally allows counselors to refer patients to other counselors, except when the reason for refusal was religious. *Ward v. Polite*, 667 F.3d 727, 738–40 (6th Cir. 2012). And like the Second Circuit, the Sixth Circuit has held that a law is not "neutral and generally applicable" if it does not regulate activity that is "comparable" to the burdened religious activity. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020).

The Tenth Circuit also recognizes that a law is not "neutral and generally applicable" where it uses individual exemptions or "systems that are designed

to make case-by-case determinations." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004).[3]

And the Eleventh Circuit has held that a "law is not neutral or generally applicable if it treats similarly situated … assemblies differently." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004). Thus, where a zoning law precluded churches but allowed private clubs, strict scrutiny applied. *Id.* at 1222, 1233. Although focusing on RLUIPA, the Court also held that the town "violated Free Exercise requirements of neutrality and general applicability," *id.* at 1232.

Finally, the Iowa Supreme Court has refused to enforce laws that contain exemptions. In *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012), for instance, the Iowa Supreme Court examined a county "ordinance [that] forb[ade] driving" vehicles with "steel cleats" on the highways. *Id.* at 3. That ordinance was problematic for certain Mennonites, who were required by their faith to drive tractors only if their "wheels are equipped with steel cleats." *Id.* The Iowa Supreme Court held that the law was "not generally applicable" because it had exemptions (e.g.,

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[3] Although recognizing that individualized exemptions preclude a law from being generally applicable, the Tenth Circuit has also held that "statutes that … contain express exceptions for objectively defined categories of persons" are still "generally applicable." *Axson-Flynn*, 356 F.3d at 1298. No other court appears to ascribe to this counterintuitive separation of "case-by-case" and "categori[cal]" exemptions. *Id. Cf., e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) ("If anything," a "categorical exemption" is of greater "concern" than "individualized exemptions[.]"). And it is not clear how the Tenth Circuit would distinguish between these two concepts.

for school buses), and thus it was subject to strict scrutiny (which it failed to satisfy). *Id.* at 15–17.

B. Courts Are Split On Whether a Law That Differentiates Between Religions Is Subject to Strict Scrutiny.

The appellate division also stepped into another split. Both the New York Court of Appeals and the California Supreme Court have held that an exemption that discriminates *between* religious entities is "neutral and generally applicable," and thus not subject to strict scrutiny. *Serio*, 7 N.Y.3d at 522 (law is neutral and generally applicable even if "some religious organizations … [were] exempt" and others were not); *Cath. Charities of Sacramento*, 85 P.3d at 87. This is true even where the law demands an intrusive inquiry into whom an organization hires or serves. Other courts hold the opposite, applying strict scrutiny to such laws because the Religion Clauses demand "the equal treatment of all religious faiths without discrimination or preference." *Weaver*, 534 F.3d at 1257.

In *Weaver*, for instance, the Tenth Circuit rejected a Colorado prohibition on the use of public funds for "pervasively sectarian" universities. *Id.* at 1250. "By giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions." *Id.* at 1258 (footnote omitted).

Relying on the same principles, the D.C. Circuit has rejected the NLRB's attempts to "assert[] jurisdiction over [religious schools] and their teachers," because the NLRB's attempts to do so

privileged certain visions of religion over others. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828 (D.C. Cir. 2020). For instance, 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.* at 835. *See also*, *e.g.*, *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.").

C. The Appellate Division's Decision Is Wrong.

The appellate division erred with respect to both of these issues. After correcting either error, the Abortion Mandate is not neutral and generally applicable, which means it must satisfy strict scrutiny, which it cannot.

1. Exemptions 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." Laycock & Collis, *supra*, at 9. Indeed, in *Lukumi*, the Court treated exemptions as showing "underinclusive[ness] on [the law's] face." 508 U.S. at 545. When a state grants an exemption of some sort while denying a religious exemption, it "devalues religious" concerns "by judging them to be of lesser import than nonreligious" concerns. *Id.* at 537.

This Court's recent decision in *Tandon v. Newsom*, 2021 WL 1328507, reaffirms this view. In that case, California imposed a three-family limit on gatherings in homes—including gatherings for religious purposes—ostensibly to limit the spread of COVID-19. *Id.* at *2. But at the same time, California declined to impose a three-family limit on "salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* The Court granted the petitioners' emergency application for injunctive relief, because "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.* at *1. California's COVID system "contain[ed] myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny." *Id.* at *2.

To be sure, *Tandon* was in an emergency posture, but the Court's holding is still telling: governments must treat religious entities and religious practice at least as well as they treat *all others*; otherwise, the law is not neutral and generally applicable. *Tandon*'s holding thus greatly undermines the view that generally applicable laws can include exemptions for some while denying them to religious entities. And at the very least, *Tandon* rejects the view that the Free Exercise Clause protects only against "targeting" of religion, which the Court did not rely on whatsoever.

Accordingly, the appellate division should have applied strict scrutiny to the Abortion Mandate here. The mandate exempts some religious entities but not others; it is, therefore, simply not generally applicable.

And that is especially so where, as here, New York's complicated scheme of mandated insurance coverage, *see supra* at 5–6, has "myriad exceptions," further undermining any claim it has to general applicability. *Tandon*, 2021 WL 1328507, at *2.

2. The appellate division also erred in another respect. In this case, the Abortion Mandate includes a discriminatory *religious* exemption. The exemption applies to those non-profits whose "purpose" is to inculcate "religious values," and who "primarily employ[and serve] persons who share the religious tenets of the entity." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Regardless of one's view on whether exemptions ordinarily require strict scrutiny, they certainly do when they discriminate *between religions*.

This Court has held in the clearest terms that "[t]h[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*, 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. The Court held the law invalid. The Court explained that "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs." *Id.* at 245. But "such

equality would be impossible in an atmosphere of official denominational preference." *Id.* After all, "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. And that was true even though the law at issue in *Larson* differentiated among religious entities by objective funding criteria, *id.* at 230, not religious doctrine.

New York has created the same problem here. By limiting the Abortion Mandate's exemption to religious non-profits that hire and serve coreligionists, New York has necessarily preferred certain types of religious entities: namely, religious entities that do not, as part of their religious missions, employ and serve individuals of other faiths or of no faith. For instance, the exemption does not apply to First Bible Baptist Church, a "family of faith which includes individuals of varied religious backgrounds." Pet.App.65a. Likewise, it does not apply to Catholic Charities, which aims to serve all those in need, regardless of their religion. By contrast, religious organizations that focus only on formal worship are more likely to satisfy the requirements, since they are more likely to hire and serve primarily coreligionists. New York has no "compelling reason" to make these distinctions. *Smith*, 494 U.S. at 884.

Moreover, an exemption scheme of this sort has another fatal constitutional flaw: it requires the state to engage in the "business of evaluating … differing religious claims." *Id.* at 887. That is, New York has to decide *which* entities "employ[]" or "serve[]" primarily coreligionists, and which have the "purpose" of

inculcating religious values. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). But a government inquiry into internal religious doctrine is "not only unnecessary but also offensive." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is well established … that courts should refrain from trolling through a person's or institution's religious beliefs." *Weaver*, 534 F.3d at 1261. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (governments may not "discriminat[e] in the distribution of public benefits based upon religious status"). That is because the "very process of inquiry" into religious questions can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979); *see also Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 719 (1976) (it is "error" for courts to "intru[de]" into a "religious thicket").

For instance, the Tenth Circuit in *Weaver* noted that Colorado's "criteria" for identifying "pervasively sectarian" institutions were especially problematic because they asked whether a school included "students, faculty, trustees, or funding sources that are 'exclusively,' 'primarily,' or 'predominantly,' of 'one religious persuasion.'" 534 F.3d at 1261, 1264. That "requires government officials to decide which groups of believers count as 'a particular religion' or 'one religious persuasion,' and which groups do not," and that would require the government to impose its own "ecclesiology." *Id.* at 1264–65 (footnote omitted); *see also, e.g.*, *Duquesne*, 947 F.3d at 833–34 (rejecting NLRB's "substantial religious character" test because it required the government to make religious distinctions); *Spencer v. World Vision, Inc.*, 633 F.3d

723, 729 (9th Cir. 2011) (O'Scannlain, J., concurring) (rejecting view of religious exemption that would result in governmental preferences between religions).

New York's exemption for only privileged religious entities entails exactly these problems. What does it mean for a religious organization to have a "purpose" of inculcating "religious values"? Does "caring for orphans and widows" count? *James* 1:27. And how will New York decide who counts as a coreligionist? "Are Orthodox Jews and non-Orthodox Jews coreligionists? … Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Our Lady*, 140 S. Ct. at 2068–69. How many elderly residents must the Carmelite Sisters evict from their nursing homes to qualify? All non-Christians? All non-Catholics? If a Jewish organization serves non-practicing Jews, is it outside the exemption? "Deciding such questions would risk judicial entanglement in religious issues." *Id.* From *Smith* to *Larson* and everywhere in between, this Court's cases have reaffirmed that governmental "probing" into such questions is "profoundly troubling." *Mitchell*, 530 U.S. at 828. That is true here as well.

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Because the mandate is not neutral and generally applicable, strict scrutiny applies, and New York could not hope to satisfy that standard. Even assuming some sort of compelling interest (which is not a given), 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). The Court should grant review and hold that the Abortion Mandate cannot be applied to health plans for objecting religious entities.

II. The Court Should Grant the Petition to Decide Whether New York's Abortion Mandate Impermissibly Interferes With the Internal Operations of Religious Entities.

The appellate division's decision also merits review because it ignores this Court's 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*, 140 S. Ct. at 2055 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The Abortion Mandate is a pernicious form of "[s]tate interference" in internal religious governance and doctrine and therefore violates the Religion Clauses. *Id.* at 2060.

1. The Religion Clauses "radiate[]" a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Thus, government action that interferes with "church administration, the operation of the churches[] [or] the appointment of clergy, … prohibits the free exercise of religion." *Id.* at 107–08. Likewise, when governments interfere in matters of church "governance," they also violate "the Establishment Clause, which prohibits government involvement" in "ecclesiastical decisions."

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012). Simply put, governments should not 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).

Accordingly, "religious institutions" enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060. They are entitled to enforce their "own rules and regulations for internal discipline and government." *Milivojevich*, 426 U.S. at 724.

2. The Abortion Mandate conflicts with these principles. It interferes with internal religious organization and it attempts to influence religious doctrine. Either is fatal to the Abortion Mandate's legality, as applied to religious entities.

To start, the Abortion Mandate interferes with religious entities' relationships with their own employees, that is, their "internal management decisions." *Our Lady*, 140 S. Ct. at 2060. Religious groups may define their spiritual mission to include people who have diverse religious views. First Bible Baptist Church, for example, is a "family of faith which includes individuals of varied religious backgrounds." Pet.App.65a. But the Abortion Mandate forces such religious organizations to choose between narrowing its members to coreligionists or participating in "grave sin." Pet.App.97a. Thus, by coercing religious organizations to hire only coreligionists, the exemption effectively "displaces one church administrator with another." *Kedroff*, 344 U.S. at 119.

The Abortion Mandate's exemption for only certain kinds of religious groups also unduly attempts to "influence" religious doctrine. *Our Lady*, 140 S. Ct. at 2060. The exemption is essentially a prohibition on serving non-coreligionists, but that is a deeply problematic thumb on the scale of religious doctrine. The First Bible Baptist Church, for instance, believes its mission is "to proclaim and witness the Gospel of Jesus Christ through ministries of Christian love." Pet.App.65a. Catholic Charities of Albany, motivated by "Scriptural values," seeks "to address basic human need at all stages of life regardless of race, religious belief, ethnicity, or lifestyle."[4] Many Christian traditions hold service of others to be a religious *command*, not merely an option. *Cf. 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)).

Churches and religious ministries cannot abide by those beliefs while serving only those who "share" their "religious tenets." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(3). The Abortion Mandate's exemption thus forces religious entities to choose between fundamentally altering basic church doctrine—by limiting their ministry to coreligionists—or violating basic religious beliefs. That is the type of "influence" that no government should be allowed to exert over religious doctrine. *Our Lady*, 140 S. Ct. at

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[4] Catholic Charities of the Diocese of Albany, *About Us*, http://www.ccrcda.org/about_us/ (last visited Apr. 21, 2021).

2060. The Court should grant review to confirm as much.

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

If there is any chance that *Smith* allows New York to compel religious organizations to fund what, in their view, is a grave moral evil, 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*, 139 S. Ct. 2067, 2074 (2019).

This Court has already determined that *Smith* should be reconsidered. *Fulton*, 140 S. Ct. 1104. But if the Court does not ultimately resolve that question in *Fulton*, it should do so here. The need is urgent, given the harm to religious entities in New York. And this is a clean vehicle with which to address the issue: New York has explicitly mandated that numerous religious entities cover a procedure that is undisputedly contrary to their religious beliefs.

IV. THE QUESTION OF WHETHER STATES CAN FORCE RELIGIOUS ENTITIES WHICH OPPOSE ABORTIONS TO FUND THEM IS IMMENSELY IMPORTANT.

It is hard to imagine a more critical legal question for Petitioners 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 enterprises of the civil authority."[5] Petitioners submit that no provision ought to be *clearer*, either.

1. It is undisputed that Petitioners have a sincere religious belief that abortion is wrong, but that hardly does justice to the gravity of the situation. In the view of the Petitioners, abortion is among the most significant of moral wrongs.

To take the Catholic Church as an example, it has, "[s]ince the first century[,] … affirmed" its view of "the moral evil of every procured abortion." Catechism of the Catholic Church § 2271. That is because it believes "[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life." *Id.* § 2270. As Bishop Scharfenberger (Catholic Diocese of Albany) explained in this litigation, "'[t]he moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely innocent could be imagined.'" Pet.App.38a (quoting Pope John Paul II, *Evangelium Vitae* §§ 57, 58).

The other Petitioners share similar beliefs. Bishop Love (Episcopal Diocese of Albany) explained that his

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

Diocese "resolutely affirms the sanctity of human life as a gift from God from conception until natural death." Pet.App.57a. Thus, "[c]oerced subsidization of abortion procedures … is in direct violation of religious and moral teachings and beliefs." *Id.* 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." Pet.App.66a (citing *Job* 3:16; *Psalms* 51:5, 139:14–16; *Isaiah* 44:24; 49:1, 5; *Jeremiah* 1:5; 20:15–18; *Luke* 1:44). The "Baptist 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.96a. Even the appellate division recognized the particular "religious fervency" respecting opposition to abortion, noting that "this particular 'medically necessary' procedure has been among the most divisive issues in our politics for several decades." Pet.App.6a.

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 in New York if the Teresian House stops serving the elderly, or Catholic Charities stops serving the poor. At the very least, before that happens, this Court should decide whether New York can put them to that choice without violating the First Amendment.

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 New Yorkers—they are important to everyone.

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 many states (New York included) do not have similar protections, and congressional religious protections are not set in stone.[6] Thus, the reach of the Religion Clauses is in urgent need of clarification.

Indeed, if this Court's COVID-related emergency cases have shown anything, it is that the lower courts are hopelessly divided on these issues, thus requiring repeated intervention by this Court in a series of emergency applications, on rushed schedules, often with factual and legal events changing by the day. This case provides an ideal vehicle to address these issues in a systematic manner, after full briefing and argument, and thus provide clear guidance to the lower courts. The Court should take that opportunity.[7]

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[6] Julie Zauzmer, *Top Senate Democrats introduce bill to amend Religious Freedom Restoration Act*, Washington Post (May 22, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/22/top-senate-democrats-introduce-bill-to-amend-religious-freedom-restoration-act/.

[7] Although this case warrants plenary review given the importance of the issues at stake, at the very least, the Court should grant, vacate, and remand, in light of *Fulton*, *Tandon*, or both. If the Court either overturns *Smith* or otherwise clarifies the scope of the Free Exercise Clause in *Fulton*, that would

CONCLUSION

The Court should grant the petition.

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directly affect the issues presented here. Similarly, *Tandon* has clear application to the issues in this case.