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Does The First Amendment Allow States To Require Religious Organizations To Pay for Abortions?

Topics: Religious Liberties
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New York issued a new mandate that requires houses of worship to pay for abortions. Now, a diverse group of religious ministries have asked the Supreme Court to intervene and fix a grave violation of religious liberty occasioned by confusion over one of its more infamous precedents: *Employment Division v. Smith*. Numerous amici—including law professors such as Douglas Laycock and Michael McConnell, some of the nation's largest denominations, Jewish and other minority faith groups, and a coalition of 21 states led by Texas—have likewise asked the Court to step in.

In *Smith*, the Supreme Court held that "neutral" and "generally applicable" laws do not violate the Free Exercise Clause, even if they burden religious practice. For three decades, lower courts have been trying to figure out what those terms mean, increasingly in conflict with one another, and with little guidance from the Supreme Court itself. In the past few years, the ever-expanding reach of state laws has forced courts to grapple with these questions in numerous controversial spheres, including in the high profile case currently pending in the Supreme Court, *Fulton v. City of Philadelphia*, which addresses whether Philadelphia can force Catholic foster services to place children with same-sex couples. Similarly, the Supreme Court has had to address various state COVID-related restrictions in emergency litigation, such as *Tandon v. Newsom*, where the Court held that California cannot impose a three-family limit on in-home Bible studies when it does not limit comparable secular activity to the same degree.

Last month, New York churches, dioceses, and nuns from a variety of religious backgrounds filed a cert petition that provides an important opportunity for the Supreme Court to resolve questions unanswered in the wake of *Smith*. The case, *Roman Catholic Diocese of Albany v. Lacewell*, arises, as many recent religious liberty cases have, out of a state attempt to mandate certain health insurance coverage for employers. But this one is much more controversial. For one, unlike the Obama administration's much-litigated contraceptive coverage mandate, the New York's Department of Financial Services requires churches and other religious groups to cover *abortions*. And, as relevant to *Smith*, New York carved out an extraordinarily narrow exemption. As initially proposed, the mandate included a religious exemption for "qualified religious organizations," including non-profits and closely-held for-profits. But when ultimately *issued*, the rule included only an exemption for "religious employers," defined as non-profits who have the "purpose" of "inculcat[ing]" religious values," while also "employ[ing]" and "serv[ing]" "primarily persons who share the religious tenets of the entity."

Given this limited exemption, a number of religious entities—including a nursing home run by Catholic nuns, a Baptist church, several religious charitable organizations, and a number of dioceses—sued to enjoin the mandate in New York state court. Because they employ or serve people of all faiths, the plaintiffs did not qualify for the limited exemption. But they deeply oppose the practice of abortion on religious grounds. Thus, they argued that, under the Free Exercise Clause, New York cannot selectively exempt *some* religious entities but not others—that is, the mandate is not "generally applicable" because it explicitly exempts certain religious organizations while burdening others (like the plaintiffs) *who have the exact same religious objections*. On top of that, the mandate discriminates *among* religious entities by preferring entities with the sole purpose of inculcating religion among coreligionists and employing coreligionists.

New York state courts rejected these arguments. They held that the mandate was "generally applicable" under *Smith*, even though it contained an exemption —and even though that exemption discriminated *among* religions—because it did not "target" religious beliefs. So the courts refused to apply strict scrutiny and rejected the religious entities' claims.

Lawyers with Jones Day and the Becket Fund, along with Michael Costello (who represented petitioners in the state courts), filed a petition for certiorari in the Supreme Court, asking the Court to take up this case and to clarify several First Amendment questions. As noted religious liberty scholars have put it, there is a "deep and wide" split among lower courts regarding whether exemptions undermine a law's "general applicability" under *Smith*. Some courts, like those in New York, California, and the Ninth Circuit, have held that exemptions do not trigger strict scrutiny under *Smith*—unless a law goes out of its way to target religion and thus evinces religious animus, it is "generally applicable." It was on the basis of this view, for instance, that the Ninth Circuit, in *Stormans, Inc. v. Wiesman*, upheld Washington regulations that forced pharmacists, against their religious beliefs, to dispense drugs—even as pharmacists could decline to

dispense drugs for nearly every imaginable secular reason. But other courts, such as the Second, Sixth, and Eleventh Circuits, have held that exemptions *can* undermine a law's claim to "general applicability." That split is directly implicated here because the mandate exempts some, but not all, from its burdens.

Another split involves discrimination *among* religions. New York and California courts have held that exemptions favoring certain types of religious entities or practice, while burdening others, are constitutionally permissible. But nearly every other court to consider the question has concluded, as then-Judge McConnell did in *Colorado Christian University v. Weaver*, that the Religion Clauses require "the equal treatment of all religious faiths without discrimination or preference." This split, too, is implicated by New York's mandate, which differentiates between religious organizations that primarily employ and serve coreligionists (while also having the purpose of inculcating religious values), to the exclusion of religious organizations with a broader mission.

In this case, the religious organizations argue the New York courts got it wrong on both counts. As the Supreme Court confirmed in *Tandon*, targeting religion is not a prerequisite for the application of strict scrutiny under *Smith*. In the context of comparators with secular activities, the Court held that where comparable activity is exempted, a law is not generally applicable. By that logic, an exemption that covers only *some* comparable religious entities is also not generally applicable. Moreover, a religious exemption that discriminates among religious organizations should rarely, if ever, be constitutionally valid. New York cannot selectively prefer insular religious entities that keep to themselves while burdening service-oriented expressions of faith. And even asking the questions necessary to identify the entities with a "purpose" of inculcating religion among coreligionists would entangle courts in questions they cannot answer. As the Supreme Court itself rhetorically wondered in *Our Lady of*

Guadalupe School v. Morrissey-Berru, "[a]re Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?"

The petition also raises an argument based on religious autonomy. It is well-established that government attempts to interfere with or influence internal church doctrine are verboten. But what is New York's mandate—which pressures religious entities into violating their own beliefs by conditioning the ability to practice their faith on whom they both hire and serve—if not an attempt to interfere with internal religious affairs? The question deserves review, especially as regulators increasingly try to micromanage the internal operations of religious entities.

Finally, the petition raises the question whether *Smith* should be overruled. The Supreme Court already granted that question in *Fulton*. But if the Court declines to reach (or does not need to reach) that question there, this petition gives it another opportunity to do so. It cannot be that the Constitution allows states to compel religious organizations to directly fund what, in their view, is a grave moral evil. To the extent *Smith* allows such a counterintuitive outcome, the Court should examine whether *Smith* is truly in line with the Constitution, or an aberration warranting overruling.

In sum, this petition raises fundamental questions about the First Amendment, the place of religion in America, and thirty-year-old Supreme Court precedents that produce divisive conflicts to this day.

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