

No. 24-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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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.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

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

The questions presented are:

1. Whether a law is “neutral” and “generally applicable” under *Employment Division v. Smith* where it exempts certain religious organizations—but not others—based on narrow and subjective religious criteria unrelated to the law’s purpose, as New York and California hold, or whether such laws are subject to strict scrutiny under *Smith*, as the Second, Sixth, and D.C. Circuits hold.
2. If the First Amendment permits such discrimination among religious organizations under the rule announced in *Smith*, should *Smith* be overruled?

**PARTIES TO THE PROCEEDING AND  
RULE 29.6 DISCLOSURE STATEMENT**

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

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

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

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

## LIST OF RELATED PROCEEDINGS

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

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

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

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

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

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

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## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

#### OPINIONS BELOW

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

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

## **JURISDICTION**

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

## **PROVISIONS INVOLVED**

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

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

## **STATEMENT**

### **A. Statutory and Regulatory Background**

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

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

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

### **B. Promulgation of the Abortion Mandate**

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

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

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

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

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

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

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

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

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

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

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

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

### **C. Petitioners and Their Objections to the Mandate**

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

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

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

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

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

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

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

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

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

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

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

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

#### **D. Procedural History**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **E. Codification of the Abortion Mandate**

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

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

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

### **REASONS FOR GRANTING THE PETITION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

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

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

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

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

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

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

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

### **III. THE QUESTIONS PRESENTED HERE ARE IMMENSELY IMPORTANT.**

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

The Court should grant the petition.

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