No. 20-1501

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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State Defendants-Appellees' Answering Brief and Opposition to Renewed Motion for Injunction Pending Appeal, *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 150974 (9th Cir. Jan. 7, 2021).....5

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https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1 (last accessed May 27, 2021) 4

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia.[1] Amici States have an interest in the uniform application of First Amendment principles and in the invaluable social services provided by religious organizations. Amici States value the work done by religious groups like Petitioners in their communities. New York's abortion-coverage mandate threatens the continued operation of such organizations by making it impossible for them to employ people of other faiths, serve their communities without regard to recipients' religion, or even to provide social services rather than "inculcat[ing] religious values." Because the decision below implicates these interests, Amici States urge the Court to grant the petition for certiorari.

INTRODUCTION

When the government orders a church to pay for abortions, the Free Exercise Clause surely has something to say. Yet many lower courts read this Court's precedent to the contrary. Three decades ago, this Court held that the First Amendment allows neutral and generally applicable laws to burden religious exercise. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). That has emboldened New York and five other States to mandate abortion coverage

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On May 17, 2021, counsel of record for all parties received notice of amici's intention to file this brief.

in religious organizations' employee health insurance plans. When churches bring suit to protect their rights, these States defend their mandates as "neutral and generally applicable laws" permitted by the First Amendment.

Part of *Smith*'s underpinning was the expectation that lawmakers would nevertheless be "solicitous" to religious freedom. *Id.* at 890. And the Court has since emphasized that such "special solicitude" is, indeed, embodied in the text of the First Amendment. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012). But *Smith*'s expectation has, in too many places, proved overly optimistic. The Court should grant the petition and revisit *Smith*.

SUMMARY OF ARGUMENT

I. For the religious citizens of some States, the First Amendment's special solicitude has become difficult to find. During the COVID-19 pandemic, many public-health measures have ignored burdens on religious exercise or, worse, targeted religious exercise as such. And California recently tried to force crisis pregnancy centers to violate their religious beliefs by requiring the centers to promote abortion to the women they serve. In some States, hostility, not solicitude, is increasingly common.

II. Emboldened by *Smith*'s rule, New York and a handful of other States recently have mandated that all employee insurance plans provide coverage for abortion procedures. These mandates are purportedly neutral and generally applicable. But for religious organizations like Petitioners here, providing coverage for abortion is complicity in a grave sin—there is no dispute that it violates their sincerely held religious beliefs. Some mandates, like New York's, provide an exemption for

"religious employers"—a term defined so narrowly it excludes plainly religious organizations like the Roman Catholic Diocese of Albany. Worse, in some of these States not even churches are exempt. And these States have not unknowingly overlooked the burden their mandates place on religious exercise—instead, relying on *Smith*, they forthrightly impose those burdens. This is not the solicitude that the First Amendment demands.

III. Some courts read *Smith* to say the Free Exercise Clause provides protection only from laws deliberately aimed at restricting religious practice. *See* 494 U.S. at 878-79. That is not the religious liberty the founding generation understood. And because *Smith*'s premise of solicitude has unfortunately proved faulty, the Court should revisit *Smith*'s holding. Amici States urge the Court to reconsider and overrule *Smith*. If the Court does not reach the issue in *Fulton v. City of Philadelphia*, No. 19-123, it should do so in this case.

ARGUMENT

I. Many States Do Not Treat Religious Exercise with the Special Solicitude Enshrined in the First Amendment.

In *Smith*, the Court held that the First Amendment does not require strict scrutiny of "neutral and generally applicable" laws that burden religious exercise. 494 U.S. at 878-79. The *Smith* Court "expected," however, "a society that believes in the negative protection accorded to religious belief . . . to be solicitous of that value in its legislation as well." *Id.* at 890. But for the citizens of some States, such solicitude is lamentably rare. For example, New York and California have been unapologetic about burdening religious exercise through uneven public-health regulations aimed at mitigating the impact of COVID-19. And five States join New York in

mandating that religious organizations provide abortion coverage in their employee health insurance plans—California's and Washington's laws lack an exemption even for churches.

A. New York's COVID-19 mitigation efforts have been marked by hostility toward religious exercise. In November 2020, this Court enjoined enforcement of New York Executive Order 202.68, which set lower capacity limits for religious services than for businesses deemed "essential," including acupuncture facilities, manufacturing plants, and liquor stores. In "red zones," attendance at religious services was restricted to ten individuals even in the largest cathedrals and synagogues; yet businesses deemed to be "essential" had no capacity restrictions whatsoever. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). Before issuing his executive order, Governor Cuomo made no secret that it was designed to target religious practice, saying that "religious institutions have been a problem" for the State's COVID-19 mitigation efforts and that if religious communities do not comply, "then we'll close the institutions down."[2]

Enjoining enforcement of that order, the Court explained that the applicants made a "strong showing that [New York's] restrictions violate[d] 'the minimum requirement of neutrality' to religion." *Id.* at 67. As Justice Gorsuch noted, "[t]he only explanation for treating religious places differently [from secular places] seem[ed] to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces." *Id.* at 69 (Gorsuch, J., concurring).

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[2] *See* https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1 (last accessed May 27, 2021).

B. New York is not the only State to disregard the free exercise rights of religious communities during the COVID-19 pandemic. This Court has "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise" five times since last November. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). In each case, the Court has granted relief to the religious petitioners. *See id.*; *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020).

As the pandemic has progressed, California has only grown more hostile to religious practice. Although, at first, houses of worship were permitted to operate at 25% capacity, *see Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 73 (Kavanaugh, J., concurring), the State ultimately "forb[ade] any kind of indoor worship"—even as it "allow[ed] most retail operations to proceed indoors with 25% occupancy, and other business to operate at 50% occupancy or more." *S. Bay*, 141 S. Ct. at 717 (statement of Gorsuch, J.).

In every case, California has argued its restrictions on religious exercise were merely neutral and generally applicable regulations permitted by *Smith*.[3] The Court

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[3] *See, e.g.*, State Appellees' Answering Brief, *Tandon v. Newsom*, No. 21-15228, 2021 WL 1499787, at *22-25 (9th Cir. Apr. 6, 2021); State Defendants-Appellees' Answering Brief and Opposition to Renewed Motion for Injunction Pending Appeal, *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 150974, at *29-31 (9th Cir. Jan. 7, 2021); State Defendants-Appellees' Answering Brief, *Gateway City Church v. Newsom*, No. 21-15189, 2021 WL 1306156, at *41 (9th Cir. Mar. 29, 2021); State Defendants-Appellees' Answering Brief, *Gish v. Newsom*, No. 20-

correctly rejected that contention. But California's argument found significant purchase in the lower courts, illustrating the need for this Court to restore robust protection for religious liberty. As the Chief Justice observed, California's "determination . . . that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *S. Bay*, 141 S. Ct. at 717 (Roberts, C.J., concurring). A rule that lower courts could read to allow such restrictions reflects a misreading of the Free Exercise Clause.

C. Religious opposition to abortion also faces hostility from some state governments, and not only in the context of employee health insurance. In recent memory, California tried to force crisis pregnancy centers—"largely Christian belief-based[] organizations"—to promote abortion to the women they serve. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018); *id.* at 2380 (Breyer, J., dissenting) (noting that petitioners "object to abortion for religious reasons"). The California Legislature made no secret of its hostility to the centers' beliefs. *See id.* at 2379 (Kennedy, J., concurring) ("The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of 'forward thinking.'"). Indeed, the author of the legislation considered it "unfortunate[]" that there were "nearly 200 licensed and unlicensed crisis pregnancy centers in California." *Id.* at 2368 (majority op.)

56324, 2021 WL 150982, at *39 (9th Cir. Jan. 7, 2021); Answering Brief, *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 6999458, at *41-42 (9th Cir. Nov. 18, 2020).

(quotation marks omitted). The Court rightly concluded California's law violated the free speech protections of the First Amendment. *Id.* at 2378; *cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in the denial of certiorari) ("Petitioner's decision to rely primarily on his free speech claims as opposed to [his free exercise claim] may be due to certain decisions of this Court."). The episode is emblematic of *Smith*'s unfortunately faulty premise—in some States, religious belief is met not with solicitude, but hostility.

II. The Court Should Act Before More States Impermissibly Burden Religious Exercise Through Abortion-Coverage Mandates.

New York is not the only jurisdiction where religious organizations are compelled by law to cover abortions through their employee health insurance—something they cannot do without violating their sincerely held beliefs. *See* Pet. 11. In addition to New York, four States recently enacted abortion-coverage mandates for private health insurance plans. These States are Illinois, *see* 215 I.L.C.S. 5/356z.4a; Maine, *see* Me. Stat. tit. 24-A § 4320-M; Oregon, *see* O.R.S. § 743A.067; and Washington, *see* Wash. Rev. Code §§ 48.43.072, .073. Additionally, California has read its statutory requirement that health insurance plans cover all "basic health care services" to require abortion coverage.[4]

Three of these States do not exempt even churches, let alone other religious employers. In California, although there is a statutory exemption from covering

[4] *See* Letter from Michelle Rouillard, Director of the California Department of Managed Health Care, to Mark Morgan, California President of Anthem Blue Cross, August 22, 2014, https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf (last accessed May 11, 2021).

contraceptive methods "contrary to [a] religious employer's religious tenets," Cal. Health & Safety Code § 1367.25(b), no such exemption exists for abortion. Statutory exemptions are also lacking in Illinois's and Washington's recently enacted abortion-coverage mandates. *Compare* 215 I.L.C.S. 5/356z.4a, *with* 215 I.L.C.S. 5/356m; Wash. Rev. Code §§ 48.43.072, .073.[5]

When these mandates are challenged, *Smith* is the vanguard of the state government's defense. In a case currently pending before the Ninth Circuit, the district court dismissed a church's free-exercise challenge to California's abortion-coverage mandate because, it reasoned, the mandate does not target religion and its burdens are not selectively placed on only religiously motivated conduct. *See Foothill Church v. Rouillard*, 371 F. Supp. 3d 742, 750-53 (E.D. Cal. 2019), *appeal docketed* No. 19-15658 (9th Cir. April 8, 2019), *submission vacated pending Fulton* (9th Cir. Nov. 24, 2020). That is, California defends the mandate as a neutral and generally applicable law.[6] Similarly, Washington has cited *Smith* to argue it may require a church to provide abortion coverage in its employee health plans.[7]

Yet the Free Exercise Clause surely has something to say when state governments require *churches* to pay

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[5] In *Cedar Park Assembly of God v. Kreidler*, No. 20-35507 (9th Cir.), Washington's litigation position is that even though its abortion-coverage mandate admits of no exceptions, its "conscience objection statute," Wash. Rev. Code § 48.43.067(3)(a), would allow a church to exclude abortion coverage from its employee health insurance. *See* Defendants-Appellees' Answering Brief 3-4, 9-10 (9th Cir. Dec. 2, 2020).

[6] *See* Appellee's Answering Brief 14-15, *Foothill Church v. Rouillard*, No. 19-15658 (9th Cir. Dec. 4, 2019).

[7] *See* Defendants-Appellees' Answering Brief 36-43, *supra* n.5.

for abortions. *Cf. Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring in the denial of certiorari).

Even where exemptions do exist, their protection is paltry. New York, for example, provides no protection for petitioner Catholic Charities, merely because the organization provides social services without regard to the recipients' faith. *See* Pet. 10-11; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(3). Maine and Oregon have adopted similarly narrow exemptions. *See* Me. Stat. tit. 24-A § 4320-M(4); O.R.S. §§ 743A.066(4). Yet religious organizations like Catholic Charities make invaluable contributions to the communities in which they operate, often providing essential social services in partnership with state and local governments. Their continued existence is threatened when they cannot operate without violating their sincerely held beliefs. The Court should grant the petition to protect such organizations from the increasing threat posed by these sweeping abortion-coverage mandates.

III. The Time Is Ripe to Revisit *Smith.*

A. There is confusion in the lower courts about what qualifies as a neutral and generally applicable law under *Smith*. As evidenced in the Court's pandemic-related orders this term, *see supra* Part I.B, some States and lower courts take an unduly expansive view of what counts as a "neutral and generally applicable" law. The Court should clarify that *Smith*'s "neutral and generally applicable" standard does not permit New York or any other State to require religious organizations to subsidize abortions through their employee health insurance.

B. Further, as many of the Amici States have previously argued, there are "strong grounds" for overturning *Smith*. *Janus v. Am. Fed'n of State, County,*

& Mun. Employees, Council 31, 138 S. Ct. 2448, 2478 (2018); *see* Brief for the States of Texas et. al. as Amici Curiae in Support of Petitioners 13-21, *Fulton v. City of Philadelphia*, No. 19-123 (U.S. June 3, 2020) ("States' *Fulton* Brief").

First, as the States' amicus brief in *Fulton* explains in greater detail, *Smith* "was not well reasoned," *Janus*, 138 S. Ct. at 2481, in that its "negative protection" from discrimination is a faint shadow of the religious liberty recognized by the founding generation. *See* States' *Fulton* Brief at 4-14. At the Founding, freedom of religion was understood as "a natural and inalienable right—a God-given sphere of liberty over which the state has no proper jurisdiction." Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 Pepp. L. Rev. 1159, 1183–84 (2013); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1451-55 (1990). Indeed, religious liberty was recognized as one of the few natural rights that "cannot be surrendered" to the state. *Essays of Brutus*, reprinted in 2 Herbert J. Storing, ed., *The Complete Anti-Federalist* 372, 373 (1981).

Moreover, *Smith* has been eroded by subsequent developments. In *Hosanna-Tabor*, the Court held that "the Free Exercise Clause prevents [government] from interfering with the freedom of religious groups to select their own [ministers]." 565 U.S. at 184; *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). That carveout is hard to square with *Smith* itself. The employment discrimination statutes at issue in *Hosanna-Tabor* and *Our Lady of Guadalupe* would seem to fit comfortably within *Smith*'s general rule allowing "neutral and generally applicable" laws to

burden religious exercise. And yet the Court determined that the First Amendment required an exception to those laws. *See* States' *Fulton* Brief at 16-17.

Finally, *Smith* has not engendered reliance interests. To the contrary: As recent events have highlighted, its foundational expectation of solicitude toward religious exercise has proven too optimistic in many jurisdictions. *See supra* Part I. By leaving religious exercise at the mercy of politics, *Smith* has permitted troubling infringements of religious liberty, *see supra* Part I, particularly for those holding minority beliefs. *See* States' *Fulton* Brief at 27-30.

In all events, overruling *Smith* will not create new liabilities for government actors. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019). Most States and the federal government already protect religious liberty by requiring a compelling government interest, whether under a religious freedom restoration act or as a matter of state constitutional law. *See* States' *Fulton* Brief at 24-29. And for those that presently do not, other doctrines would prevent liability for policies that were lawful under *Smith* at the time the government acted. For example, the *Monell* doctrine would limit liability for municipalities with policies that comply with *Smith* today, and municipalities will be able to modify their policies to properly protect religious liberty in the future. *See* States' *Fulton* Brief at 19-20.

Given *Smith*'s faulty premise, the Court's ongoing paring back of *Smith*'s holding, and the decision's "depart[ure] from . . . this Court's precedents and the common law before that," *stare decisis* does not mandate that the Court prolong *Smith*'s "30-year window." *Edwards v. Vannoy*, No. 19-5807, 2021 WL 1951781, at *20 n.7 (U.S. May 17, 2021) (Gorsuch, J., concurring); *see*

Smith, 494 U.S. at 891 (O'Connor, J., concurring in the judgment) (recognizing that the majority "dramatically depart[ed] from well-settled First Amendment jurisprudence"). The Court should use this opportunity to set aside *Smith* and reaffirm a standard more consistent with the original public meaning of the Free Exercise Clause: The government must provide a religious exemption when its actions burden religious exercise unless it can show a compelling reason to override the religious practice and could not achieve that interest in some less restrictive way. *See* States' *Fulton* Brief at 21. Should the Court decline to reach the issue in *Fulton*, it should grant the petition and do so in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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