No. 24-319

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, et al.,
Petitioners,

v.

ADRIENNE A. HARRIS, Superintendent,
New York Department of Financial Services, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

New York State has under a longstanding regulation prohibited health insurance policies issued in the State from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. A 2017 regulation made explicit what was implicit in that nonexclusion regulation: health insurance policies issued in the State that cover medically necessary hospital, surgical, or medical expenses cannot exclude coverage for medically necessary abortion services. The 2017 regulation, now codified in statute, provides a denominationally neutral accommodation for "religious employers," defined by specified objective criteria to include houses of worship and similar organizations, that permits such employers to obtain health insurance policies that exclude coverage for abortion services, while ensuring that their employees receive such coverage directly from the insurer at no cost. The questions presented are:

1. Whether New York's accommodation for "religious employers" as defined, rather than for all religiously affiliated employers, renders the regulation not generally applicable for purposes of analysis under the Free Exercise Clause of the First Amendment to the United States Constitution.

2. Whether the Court should revisit *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in the event the Court concludes that *Smith* permits the State to enforce the law at issue here.

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INTRODUCTION

When New York employers offer employees health insurance by purchasing insurance policies, those policies must under state law be approved by the New York Superintendent of Financial Services. Under her statutory authority to regulate such polices, the Superintendent has long had a regulation in place that prohibits health insurance policies issued in the State from limiting or excluding coverage based on "type of illness, accident, treatment or medical condition," except for narrow exclusions expressly permitted. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c).

In 2017, the Superintendent promulgated a regulation to make explicit what was implicit in that preexisting regulation: health insurance policies issued in the State that cover medically necessary hospital, surgical, or medical expenses cannot lawfully exclude coverage for medically necessary abortion services. The 2017 regulation additionally accommodates "religious employers," defined by specified objective criteria to include houses of worship and similar organizations, by permitting such employers to obtain health insurance policies that exclude coverage for these services, while requiring the issuing insurers to provide such coverage directly to employees at no cost.

The definition of "religious employers" mirrors the one that the New York Legislature used fifteen years earlier for the religious accommodation provided in a contraceptives-coverage requirement. *See* Women's Health and Wellness Act, ch. 554, 2002 N.Y. Laws 3458 (codified in part at Insurance Law §§ 3221(*l*)(16)(E)(1), 4303(cc)(5)(A)). In adopting that same definition, the Superintendent was guided by the Legislature's previously expressed policy judgment that, in the area of

reproductive health care, a limited accommodation strikes the appropriate balance between the interests of religious employers in the free exercise of religion, on one hand, and the interests of employees in access to essential reproductive health care and equality in health care regardless of sex, on the other. The regulation has since been codified in statute,[1] alongside the original regulation which has not been repealed.

Petitioners are religious and religiously affiliated organizations. They contend, but did not allege in their complaint, that they do not satisfy all the criteria for the "religious employer" accommodation and thus are subject to the coverage requirement, in violation of their rights under the Free Exercise Clause. After New York's intermediate appellate court (the Appellate Division) rejected petitioners' free exercise claim on the basis of stare decisis, and the State's high court (the Court of Appeals) declined further review, this Court summarily granted petitioners' petition for certiorari, vacated the state court's judgment, and remanded for further consideration in light of its decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). On remand, the State's high court affirmed denial of that claim after engaging in such consideration. Petitioners now seek review of that decision. They argue that by providing an accommodation that does not extend to them, the Superintendent has created a coverage requirement that is not generally applicable under *Fulton*, 593 U.S. 522, and is thus subject to strict scrutiny, which it cannot satisfy. And petitioners argue further that, to the extent this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872

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[1] Ch. 57, pt. R, 2022 N.Y. Laws (amending N.Y. Insurance Law §§ 3216(i)(36), 3221(k)(22), and 4303(ss)).

(1990), shields the regulation from strict scrutiny, the Court should revisit that precedent.

The decision of the court below does not warrant this Court's review for three reasons. *First*, the decision does not implicate a split of authority or confusion among the lower courts regarding how to apply this Court's precedents. To the contrary, petitioners seek an extension of this Court's recent precedents involving general applicability that would benefit from further percolation among the lower courts. *Second*, the decision below was correctly decided under the Court's existing precedents; the provision of a religious accommodation defined by specified objective criteria—and not by an organization's denomination or religious beliefs—does not defeat a law's general applicability, and a contrary ruling would disincentivize the use of religious accommodations. *Third*, this case presents a weak vehicle to review petitioner's religious-accommodation challenge, and thus, in turn, to revisit *Smith*, among other reasons because the differential treatment that petitioners identify has minimal consequences for petitioners: whether or not any or all of petitioners qualify for the religious accommodation, their employees receive abortion coverage if they purchase health insurance policies in the State, either as part of those policies or through separate no-cost riders.

STATEMENT

A. Statutory and Regulatory Background

Health insurance policies issued for delivery in the State must be approved by the New York Superintendent of Financial Services. N.Y. Insurance Law § 3201. Under the Superintendent's authority to promulgate regulations establishing minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies, *id.* § 3217(a), the Superintendent has long had a regulation in place that prohibits health insurance policies issued in the State from limiting or excluding coverage based on "type of illness, accident, treatment or medical condition," except for narrow exclusions expressly permitted. N.Y. Comp. Codes R. & Regs tit. 11 (11 N.Y.C.R.R.) § 52.16(c). This nonexclusion regulation serves the important legislative purpose of standardizing and simplifying coverage so that consumers can understand and make informed comparisons among policies. *See* Insurance Law § 3217(b)(1); Bill Jacket for ch. 554 (N.Y. Sess. L. 1971), at 4 (internet).[2]

In 2017, the Superintendent promulgated the regulation at issue here to make explicit what was implicit in that more general nonexclusion regulation: policies that provide medically necessary hospital, surgical, or medical expense coverage may not "limit or exclude coverage for abortions that are medically necessary."[3]

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[2] For authorities available on the internet, URLs appear in the Table of Authorities.

[3] An insurer is generally required to cover only treatments that are medically necessary, unless the policy provides otherwise. Medical necessity is not defined by statute or regulation, and is not determined by the Superintendent. It is a determination "regularly made

(*continues on next page*)

11 N.Y.C.R.R. § 52.16(o)(1) (at Pet. App. 196a); *see also id.* § 52.1(p)(1) (at Pet. App. 194a) (explaining that the preexisting nonexclusion rule already prohibited limitation or exclusion of abortion coverage in such policies). The Superintendent determined that an explicit coverage requirement was necessary because inconsistent plan application of such coverage "was leading to improper coverage exclusion and consumer misunderstanding." (Pet. App. 185a-186a.)

At the same time, the Superintendent sought to accommodate the concerns of religious employers. The Superintendent did so by authorizing "religious employers," as defined, to obtain group policies that exclude coverage for medically necessary abortions. 11 N.Y.C.R.R. § 52.16(o)(2) (at Pet. App. 196a). The 2017 regulation defines a "religious employer" as an entity for which each of the following is true: (1) its purpose is to inculcate religious values, (2) it primarily employs persons who share its religious tenets, (3) it primarily serves persons who share those tenets, and (4) it is a nonprofit organization described in § 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code, which exempts churches, their integrated auxiliaries, and the exclusively religious activities of any religious order from the requirement to file an annual return. 11 N.Y.C.R.R. § 52.2 (at Pet. App. 195a). The New York Legislature had used that definition for the religious accommodation it incorporated into an earlier-enacted contraceptives coverage statute. *See* Insurance Law §§ 3221(*l*)(16)(E), 4303(cc)(5)(A) (as amended). In adopt-

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in the normal course of insurance business by a patient's healthcare provider in consultation with the patient, subject to the utilization review and external appeal procedures" provided for by state law. (Pet. App. 183a.)

ing the same definition for the 2017 regulation, the Superintendent embraced the Legislature's policy judgment that a limited accommodation provided an appropriate balance between, on one hand, the interests of religious employers in the State in the free exercise of religion and, on the other hand, the interests of employees in access to essential reproductive health care and equality in health care regardless of sex. (Pet. App. 181a, 184a, 186a.)

Under the regulation, an employer invokes the accommodation by certifying to its insurer that it is a "religious employer," as defined. 11 N.Y.C.R.R. § 52.16(o)(2)(i) (at Pet. App. 196a). The insurer then issues a policy to the employer that excludes the coverage and a rider to each employee providing coverage for medically necessary abortion services, at no cost to either the employee or the employer. *Id.* § 52.16(o)(2)(ii) (at Pet. App. 196a). And insurers are required in turn to notify the Superintendent when they issue a policy under the accommodation. *Id.* § 52.16(o)(2)(iii) (at Pet. App. 197a).

The new regulation was "necessary to implement New York's policy and law supporting women's full access to health care services," and the accommodation, while recognizing the interests of religious employers, minimized the harms to employees who may not agree with their employer's religious beliefs. (Pet. App. 182a, 186a.) By promulgating a more limited accommodation while seeking to ensure the availability of coverage through no-cost riders, the Superintendent minimized the risk that consumer confusion resulting from issuance of separate riders might lead to improper coverage exclusion and potential loss of access to services, a recognized risk sought to be addressed by the regulation. (Pet. App. 185a-186a.)

The regulation places no requirements on employers. It regulates only the health insurance policies that insurers issue in the State. While it affects employers indirectly if they choose to provide their employees with health insurance policies issued in the State, New York does not require employers to provide health insurance at all, let alone insurance that is covered by the regulation.

Petitioners' repeated description of the regulation as an "abortion mandate" that requires them to "subsidize" abortion services is thus misleading. The record contains no evidence that by purchasing policies that include abortion coverage, employers "subsidize" or "fund" abortion services, as petitioners claim (Pet. 1, 34). To the contrary, the Department of Financial Services advises that an employer that purchases a policy excluding coverage of abortion services under the religious-employer accommodation pays the same amount as it would had it not invoked the accommodation.[4] While the federal Affordable Care Act imposes certain penalties on "large employers," as defined, for failing to provide employee health insurance, *see* 26 U.S.C. § 4980H(a), other employers face no such penalties. And such large employers can avoid those penalties by choosing to self-insure the health coverage they provide to employees through an ERISA plan. When they do

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[4] The Department additionally advises that the cost of including coverage for abortion services in a comprehensive health insurance policy is minimal. *See* M. Schaler-Haynes et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 Univ. of Pa. J.L. & Social Change 323, 384-85 (2012) (recognizing low cost of such coverage). But that does not mean, as petitioners assert (Pet. 33 n.3), that when a State, in effect, self-insures the provision of abortion services on a standalone basis, the cost of that coverage is similarly minimal.

that, the health insurance they offer is not subject to state regulation. *See* 29 U.S.C. § 1144(a), (b)(2)(B).[5]

B. State Court Proceedings

1. Original state court proceedings

Petitioners include dioceses, churches, a religious order of women, and religiously affiliated service organizations that object on religious grounds to providing coverage for medically necessary abortions.[6] (Pet. App. 116a-122a, 129a-132a.) Their complaint challenges the 2017 regulation, arguing that the regulation violates their rights under the Free Exercise Clause by providing a religious accommodation that does not extend to all religious organizations, and thus "target[s] the practices of certain religious employers for discriminatory treatment." (Pet. App. 156a.[7]) Petitioners brought the proceeding without first seeking to invoke the religious accommodation or even alleging in their complaint that it does not apply to them, let alone identifying which, if

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[5] Studies have shown that large employers tend to be the best-positioned to self-insure. *See, e.g.*, KFF, *2020 Employer Health Benefits Survey*, sec. 10 (Oct. 8, 2020) (internet).

[6] Another petitioner is an employee of an organizational petitioner. (Pet. App. 133a.) And an additional entity, Murnane Building Contractors, participated as a plaintiff below but has since discontinued its participation.

[7] Petitioners had earlier filed an action in state court challenging the terms of a standard health insurance policy template issued by the Superintendent that, in accordance with the long-standing nonexclusion regulation, included coverage of medically necessary abortions as part of the coverage of essential benefits. (*See* Pet. App. 3a.) After petitioners commenced the second action challenging the 2017 regulation, the two actions were joined. (Pet. App. 3a-5a.)

any, criteria they do not meet.[8] (Pet. App. 28a, 116a-122a, 129a.)

The state trial court granted respondents' motion for summary judgment dismissing the complaint (Pet. App. 50a-63a), and the Appellate Division affirmed (Pet. App. 36a-49a). The Appellate Division held that petitioners' claims under the Free Exercise Clause were controlled by the decision of the New York Court of Appeals in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), *cert. denied,* 552 U.S. 816 (2007). (Pet. App. 41a-43a.) *Serio* had rejected a free-exercise challenge to the analogous law requiring contraceptives coverage while accommodating "religious employers," defined by the same criteria. 7 N.Y.3d at 522-24. The New York Court of Appeals dismissed petitioners' appeal as of right in this case and denied petitioners' motion for discretionary leave to appeal. (Pet. App. 64a.)

2. Petitioner's prior petition for certiorari

Petitioners sought this Court's review of the Appellate Division's judgment. The Court summarily granted certiorari, vacated that judgment, and remanded for further consideration in light of *Fulton*,

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[8] While the petitioner churches, dioceses, and religious orders may serve some individuals who do not share their tenets through outreach programs (*see* Pet.11), they may nonetheless primarily employ and serve individuals who do share their tenets. Additionally, while a few of the petitioners' declarations refer to requests for policies that did not cover abortion services, those requests were made before the promulgation of the 2017 regulation which, for the first time, established a religious-employer accommodation. (*See, e.g.,* Pet. App. 71a (referring to exhibit at App. Div. Record on Appeal R430, No. 529350, NYSCEF Doc. 6).)

593 U.S. 522, which the Court had decided while the petition was pending. (Pet. App. 203a.)

3. Subsequent state court proceedings

Following supplemental briefing, the Appellate Division again affirmed. It reasoned that *Fulton* did not explicitly or implicitly overrule the New York Court of Appeals' decision in *Serio,* which thus remained controlling precedent. (Pet. App. 35a.)

The New York Court of Appeals affirmed. It recognized that *Fulton* had confirmed two features that render a government policy not generally applicable: (1) when the policy invites "'the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions,'" and (2) when the policy prohibits "'religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" (Pet. App. 13a-14a (quoting 593 U.S. at 533-34).) After careful examination, the court concluded that the challenged regulation contained neither feature.

The court explained that the religious-employer accommodation was fundamentally different from the purely discretionary mechanism for exemptions considered in *Fulton*. By allowing the government to consider individual circumstances in its discretion, the mechanism at issue in *Fulton* invited the government to consider whether the requestor's "noncompliance with the policy is 'worthy of solicitude.'" (Pet. App. 18a (quoting *Fulton*, 593 U.S. at 537).) Here, in contrast, the accommodation is available based on "objective criteria delineated in the regulation itself," as certified to by the employer. (Pet. App. 17a-18a.) And the fact that the application of those criteria to the facts of a particular

case may be difficult is not sufficient at this stage to warrant a searching analysis of whether the criteria defining religious employer are the most narrowly tailored, as petitioners urged. (Pet. App. 24a.) Doing so, the court explained, "would effectively incorporate strict scrutiny through the back door," while the purpose of assessing general applicability is to determine whether strict scrutiny applies to a government policy in the first place. (Pet. App. 24a.)

The court further explained that the challenged regulation also did not exhibit the second feature identified in *Fulton*, and elucidated by its application in *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam). That feature looks to whether the challenged policy "prohibit[s] 'religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" (Pet. App. 25a (quoting *Fulton*, 593 U.S. at 534).) The Court of Appeals noted that this feature, as articulated by this Court, is limited by its terms to the consideration of comparable *secular* conduct, and accordingly concluded that it was not implicated by either the existence of the religious-employer accommodation alone or its availability to only "religious employers" as defined by specified objective criteria. (Pet. App. 25a-28a.) The Court of Appeals rejected petitioners' argument that the challenged regulation must be found to lack general applicability in the absence of a close fit between the criteria defining "religious employer" and the state interests served by the coverage requirement. (Pet. App. 27a.) Petitioners had argued that the lack of such a fit would demonstrate that the accommodation reflected a special "solicitude" for certain religious beliefs. (Pet. App. 27a.) This argument, however, mistakenly conflated the two standards for general applicability identified in *Fulton* (Pet. App.

28a & n.9) and ignored the fact that "the creation of any religious accommodation necessarily requires the government to distinguish the types of entities or activities that are covered, from those that are not" (Pet. App. 28a).

Finally, the Court of Appeals rejected petitioners' argument that the particular criteria used to define a religious employer here defeated the regulation's general applicability by incorporating denominational preferences or involving government entanglement. The statute's criteria for identifying a "religious employer" do not differentiate on the basis of the employer's denominations or beliefs, but rather on the basis of the nature of the employer's activities and business structure. (Pet. App. 29a.) Thus, the criteria do not involve any "assessments regarding 'the centrality of particular beliefs or practices to a faith.'" (Pet. App. 28a-29a (quoting *Smith*, 494 U.S. at 887).)

Having found that the challenged regulation contained neither of the features delineated in *Fulton*, the Court of Appeals held that *Fulton* did not disturb its precedent in *Serio* and, thus, upheld as constitutional the parallel religious-employer accommodation at issue here. (Pet. App. 30a.) That decision is consistent with this Court's precedents and the decisions of other courts, was properly decided, and presents a poor vehicle to consider the questions presented.

REASONS TO DENY THE PETITION

I. THIS CASE IMPLICATES NEITHER A SPLIT IN AUTHORITY NOR CONFUSION AMONG THE LOWER COURTS.

There is no conflict, let alone a deepening one (Pet. 19), among the lower courts on the question whether the Free Exercise Clause requires strict scrutiny of a law that provides an accommodation to some but not all religious organizations on the basis of nondenominational objective criteria. In arguing to the contrary, petitioners rely principally on three circuit-court decisions: *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir.), *reh'g denied*, 975 F.3d 13 (2020), *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728 (6th Cir. 2021), and *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021). Those decisions, however, are readily reconciled with the ruling of the New York Court of Appeals in this case, that court's earlier ruling in *Serio,* and an earlier ruling of California's high court, which, like *Serio,* upheld an accommodation for "religious employers," defined as here, for purposes of that State's contraceptives coverage requirement, *see Catholic Charities of Sacramento v. Superior Ct.*, 32 Cal. 4th 527, *cert. denied*, 543 U.S. 816 (2004). And the additional federal decisions on which petitioners rely do not establish that the decision below has exacerbated any confusion. Petitioners are left with a novel argument that has yet to percolate among the lower courts and thus does not warrant a grant of certiorari at this time.

1. The decision in this case does not conflict with *Duquesne*, because the decision there rested entirely on findings that the law at issue required the government to become excessively entangled in the affairs of a reli-

gious institution—an issue that was not presented to or addressed by the state court here.

In *Duquesne*, the D.C. Circuit invalidated the second part of a two-part test used by the National Labor Relations Board (NLRB) to determine whether it could exercise jurisdiction over alleged collective-bargaining violations by a religious university in connection with a particular faculty position. Under the test, the NLRB examined not just whether the university as a whole held itself out to the public as a religious institution, but also whether the university held out to current or potential students and faculty members, and the community at large, the subject faculty position—an adjunct position—as performing a specific role in establishing or maintaining the university's "religious educational environment." 947 F.3d at 831. The court concluded that this additional criterion impermissibly intruded into religious matters, because it required the NLRB to decide in each case "what counts as a 'religious role' or a 'religious function.'" *Id.* at 834-35. And making that decision would necessarily lead to an "intrusive inquiry," with the NLRB "trolling through the beliefs of the University, making determinations about its religious mission and whether certain faculty members contribute to that mission." *Id.* at 835 (quotation marks omitted).

Duquesne did not, as petitioners imply (Pet. 21-22), turn on a finding that the NLRB's test impermissibly discriminated among religious institutions. Petitioners misplace their reliance on the court's statement that the NLRB had "'impermissibly sided with a particular view of religious functions,'" under which "'[i]ndoctrination is sufficiently religious, but supporting religious goals is not, and especially not when faculty enjoy academic freedom.'" (Pet. 22 (quoting *Duquesne*, 947 F.3d at 835).) That reference was intended merely to illustrate the

court's point that the NLRB had improperly intruded into religious matters by adopting a test requiring it to examine whether a particular faculty position performed a sufficiently religious role. *See Duquesne,* 947 F.3d at 835. The decision in *Duquesne* is thus consistent with a line of cases, commencing with this Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in which courts have found that NLRB determinations that it may exercise jurisdiction over employment disputes involving teachers at religiously operated or affiliated schools implicate concerns of excessive entanglement. *See Duquesne*, 947 F.3d at 828-31, 836 (discussing line of cases); *see also Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 746 (2020) (emphasizing religious-autonomy concerns implicated when the government seeks to oversee employment disputes between religious educational institutions and their teachers).

Duquesne thus does not establish a conflict with the ruling of the court below, which involved a pre-enforcement challenge and did not present a claim of excessive entanglement. (*See* Pet. App. 7a, 30a.) *See also Serio*, 7 N.Y.3d 510, *aff'g* 28 A.D.3d 115, 131 (3d Dep't 2006) (expressly noting that the issue of excessive entanglement was not before the court); *Catholic Charities of Sacramento*, 32 Cal. 4th at 546-47 (same).[9]

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[9] Petitioners previously argued that *Duquesne* established a split in authority even if the New York and California high courts declined to address excessive-entanglement claims because the decisions of those courts nonetheless addressed free-exercise claims more broadly. *See* Pet. Reply 7-8, *Roman Catholic Diocese of Albany v. Emani*, 142 S. Ct. 421 (2021) (No. 20-1501). They were mistaken. Decisions that reach different results in cases that do not address the same issues do not conflict.

2. Nor does the Court of Appeals' decision conflict with *Dahl* and *Kane,* two post-*Fulton* decisions in which courts credited arguments that a vaccine mandate was not generally applicable because it provided an individualized religious exemption. Neither of those decisions provides a basis to find tension let alone a conflict among the decisions of the lower courts, because, as the New York Court of Appeals correctly recognized (Pet. App. 20a), the religious accommodation here, available on the basis of specified objective criteria, is qualitatively different from the individualized and discretionary exemptions analyzed in those decisions.

In *Dahl*, the Sixth Circuit declined to stay an injunction pending appeal where the mechanism for granting or denying medical and religious exemptions was based, not on objective criteria, but on a process by which exemption requests would be considered "on an individual basis" and could be granted or denied, in whole or in part, in the decisionmaker's discretion. 15 F.4th at 730, 733. As in *Fulton*, then, the exemption provided no standards to cabin the decisionmaker's exercise of discretion and thus invited the decisionmaker to decide which *reasons* for seeking an exemption from the vaccine policy "are worthy of solicitude." *Id.* at 734 (quoting *Fulton*). *Dahl* was thus squarely controlled by *Fulton* and is readily distinguishable from the religious accommodation at issue here, where the objective criteria are not based on the reason an employer seeks the accommodation and there is no governmental decisionmaker deciding as a matter of discretion whether those criteria are satisfied.

The Second Circuit's decision in *Kane* is similarly distinguishable. There, the court found two reasons to reverse the denial of a preliminary injunction to plaintiffs who had challenged a vaccine requirement, as

applied to them, on free-exercise grounds. First, the court had "grave doubts" that the standards for the religious exemption—which the defendant conceded were "constitutionally suspect"—were neutral on their face. 19 F.4th at 162, 168-69. Exemption requests were granted only for beliefs associated with "recognized and established religious organizations" and were denied if the leader of the religious organization had spoken publicly in favor of the vaccine. *Id.* at 168 & n.16. Thus, if the objector's religious beliefs about the vaccine failed to match the views of an organized religion's leader, those beliefs were deemed "illegitimat[e]" and the extension request was denied. *Id.* at 168-69. The applicable standards thus ran directly afoul of this Court's precedents prohibiting an evaluation of the "centrality of particular beliefs or practices to a faith, or the *validity of particular litigants' interpretations of those creeds*." *Id.* (emphasis in original).

Second, the court noted the evidence in *Kane* that the suspect standards had been applied in an individualized manner that yielded inconsistent results. Specifically, the arbitrators reviewing denials of exemption requests exercised "substantial discretion" in determining whether and how the standards were applied, and the evidence suggested that the arbitrators' exercise of discretion had resulted in individualized and, thus, inconsistent application of the standards that reflected, among other things, denominational distinctions. *Id.* at 169.

The religious accommodation challenged here involves neither of the problems identified in *Kane*. The objective criteria used to identify employers who qualify for the religious accommodation do not examine "'the centrality of particular beliefs or practices to a faith,'" as in *Kane*. (Pet. App. 28a-29a (quoting *Smith*, 494 U.S.

at 887).) The accommodation may be invoked regardless of the basis for the employer's objection to medically necessary abortion services, the relation of that objection to the employer's tenets, or the reason the employer objects to providing its employees with insurance that covers such services. Instead, as the Court of Appeals recognized (Pet. App. 18a, 20a-21a), the delineated criteria concern the nature of the employers' activities and business structure, not its denomination or beliefs. And, unlike in *Kane,* there is no evidence here to suggest that the challenged system for religious accommodations has been applied in an individualized, and thus inconsistent, manner, let alone one that results in denominational distinctions. Indeed, because petitioners chose to bring their challenge on a pre-enforcement basis without seeking to invoke the religious accommodation first (Pet. App. 21a n.8, 28a n.10), there is no record evidence about how the criteria apply to them. And the little information that is available about how the criteria are applied to others provides no reason to think that the regulatory scheme permits inconsistent consideration of the criteria, as in *Kane*.[10]

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[10] That information involved the analogous contraceptives coverage accommodation in instances where insurers would have understood from the face of employers' certifications that accommodations were not warranted. *See* N.Y. Department of Fin. Servs., Press Release, *DFS Takes Action Against Health Insurers for Violations of Insurance Law Related to Contraceptive Coverage* (May 3, 2019) (internet) (certifications had been accepted from "a wood floor refinisher, a café, a chimney cleaning service, a gastroenterologist, a tax consultant, and a construction company"). And the Department took swift action following those enforcement proceedings to remind insurers that the accommodation was available to those employers who met the established criteria and advised to look first to the employer's name, which may be sufficient to determine whether the certifying employer is a religious employer, as defined. N.Y. Depart-

(*continues on next page*)

3. The additional federal decisions on which petitioners rely (Pet. 22-23) fail to support their claim that the decision below exacerbates persistent post-*Fulton* confusion on the question whether a law can be generally applicable if it exempts some but not all religious objectors. To the contrary, the courts in all of the cited cases applied the teachings of *Fulton* and reached different conclusions about general applicability that turned on the specific nature of the religious exemption or accommodation at issue.

In the two Tenth Circuit decisions on which petitioners rely—*Does 1-11 v. Board of Regents of University of Colorado*, 100 F.4th 1251 (10th Cir. 2024), and *303 Creative LLC v. Elenis,* 6 F.4th 1160, 1184, 1188 (10th Cir. 2021), *rev'd on free-exxercise grounds*, 143 S. Ct. 2298 (2023)—the courts analyzed very different religious exemptions. In *Does*, the court found a religious exemption to a vaccine mandate individualized, and thus not generally applicable, because, as in *Kane*, the exemption was available on a case-by-case basis based on "why the [individual] held her religious beliefs." *Does,* 100 F.4th at 1268, 1273. And in *303 Creative,* the court analyzed an exemption from a public accommodation law for all places "principally used for religious purposes" that applied across the board, and thus implicated no concerns regarding its general applicability. 6 F.4th at 1187 & n.9.

Likewise, the cited district court decisions involve only application to the particular facts of the features that defeat general applicability under *Fulton*. *See Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*, 683 F. Supp. 3d 1172, 1184-86 (W.D. Wash. 2023)

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ment of Fin. Servs., *Supplement No. 2 to Insurance Circular Letter No. 1* (May 2019) (internet).

(neither *Fulton* feature implicated where two religious accommodations differed on basis of objective criteria, not reason accommodation sought); *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-cv-0424, 2022 U.S. Dist. LEXIS 201835, at *38 (S.D. Ca. 2022) (system not individualized where particulars of a religious accommodation varied on basis of objective criteria). And petitioners misplace their reliance on *Ferrelli v. State Unified Ct. Sys.*, No. 22-cv-0068, 2022 U.S. Dist. LEXIS 39929 (N.D.N.Y. 2022). The district court there concluded that the criteria used to grant a religious accommodation were neutral, while *Kane* had questioned the neutrality of similar criteria. That difference, however, would establish no confusion about the proper analysis under the Free Exercise Clause, but at most a questionable application of that analysis to the particular facts.

II. THE CASE WAS PROPERLY DECIDED.

The issue that petitioners pressed below and that the State's high court decided is whether the State's 2017 regulation, along with the later-enacted statute, is rendered not generally applicable, and thus subject to strict scrutiny, by its provision of a religious accommodation that extends to some but not all religious organizations on the basis of nondenominational objective criteria. That issue was correctly decided under governing precedent.

"[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 593 U.S. at 533. For purposes of that principle, *Fulton* confirmed the two features that render a governmental policy not generally applicable: (1) when the policy "invites the government to consider the partic-

ular reasons for a person's conduct by providing a mechanism for individualized exemptions" and (2) when the policy "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 533-34. Petitioners misstate the teaching of *Fulton* by conflating these two features. (Pet. 24-26; *see also* Pet. App. 28a n.9 (recognizing as much).) But this Court has recently reconfirmed that they are two distinct features, either of which will defeat general applicability. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (citing *Fulton*, 593 U.S. at 533-34). The federal courts of appeals have consistently applied them as such. *See, e.g., We the Patriots USA v. Connecticut Office of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023); *Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021); *303 Creative*, 6 F.4th at 1184, 1188. And here, the Court of Appeals correctly concluded that the regulation at issue contained neither feature, rendering the regulation generally applicable for purposes of analysis under the Free Exercise Clause.

1. The court below correctly concluded that the religious-employer accommodation does not exhibit the first *Fulton* feature because it does not involve a mechanism for individualized exemptions. (Pet. App. 17a-25a.) As *Fulton* explained, a mechanism for individualized exemptions that defeats general applicability is one that allows the decisionmaker to exercise discretion in determining whether to grant or deny an exemption on a case-by-case basis, thereby allowing consideration of the particular reason the objector seeks the exemption and inviting the government to decide which reasons are "worthy of solicitude." 593 U.S. at 533-34, 536-37. The mechanism at issue in *Fulton* was such a mechanism

because it permitted exemptions in the decisionmaker's "sole discretion." *Id.* at 533-36.

The risk posed by a mechanism for individualized exemptions with which *Fulton* was concerned is that the government could "decid[e] that *secular* motivations are more important than religious motivations," *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (emphasis added). Accommodating religion with a mechanism that distinguishes among religious organizations does not pose that same risk. Regardless, the court below correctly recognized that the mechanism used to determine the availability of the religious-employer accommodation is "fundamentally different" from the mechanism for individualized exemptions invalidated in *Fulton*. (Pet. App. 17a-18a.) The mechanism here uses specified objective criteria that concern "the nature of an employer's activities and business structure," not its "denominations or beliefs." (Pet. App. 29 (quotation marks omitted); *see also* Pet. App. 195a-196a (setting forth criteria).) As long as those criteria are satisfied, the religious accommodation is available; no exercise of discretion is contemplated. The mechanism thus does not allow case-by-case decisionmaking involving exercises of discretion.

Nor is that mechanism individualized and discretionary merely because the determination whether the defined objective criteria are satisfied may be difficult to answer in a particular case. Notwithstanding any such difficulty, the determination does not risk an individualized determination whether the particular objector's "reasons for requesting an exemption are meritorious." *We the Patriots USA*, 76 F.4th at 150-51; *see also 303 Creative*, 6 F.4th at 1187 (recognizing that a mechanism with objective criteria is qualitatively

different from one with subjective criteria). As the court below recognized, a contrary rule would subject to strict scrutiny any law that provided a religious accommodation requiring the application and interpretation of regulatory terms (Pet. App. 22a) and, as a practical matter, "society must have some way to create regulatory and statutory definitions that meet the general applicability test" (Pet. App. 23a).

Petitioners nonetheless argue (Pet. 30-32) that the mechanism for determining the availability of the religious-employer accommodation is individualized because the definition of a "religious employer" uses criteria that invite intrusive inquiries into matters of religion in the exercise of governmental judgment, an argument the court below correctly rejected. (*See* Pet. App. 28a-29a.) Petitioners ignore the fact that the certification procedure relies principally on the exercise of judgment by the religious entity itself rather than any government official; the entity seeking the accommodation is required to certify that it is a "religious employer," as defined. Petitioners, who have not sought an accommodation themselves, point to no evidence that insurers engage in an evaluation, much less a searching one, of the religious entity's certification or, as petitioners hypothesize (Pet. 31-32), that any state enforcement of the accommodation will involve intrusive adjudications concerning an entity's religious practices. Indeed, the little information that is available suggests no such intrusion. (See *supra* at 18 n.10) (describing information). And, as the court below found, because the denominationally neutral criteria differentiate based on the nature of the employer's activities and business structure, the accommodation does not involve any individualized determination on the basis of the requestors' "denominations or beliefs." (Pet. App. 28a, 29a (quotation marks

omitted)). *See also Serio*, 7 N.Y.3d at 528-29 (explaining same). Accordingly, the court below correctly reasoned that the religious-employer accommodation does not involve a mechanism for individualized exemptions.

2. The court below also correctly concluded that the religious accommodation does not implicate the second *Fulton* feature, because it does not distinguish between religious conduct and comparable secular conduct. (Pet. App. 25a-27a.[11]) As *Fulton* explained, a law that prohibits "religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" is not generally applicable. 593 U.S. at 534. The religious accommodation at issue here does no such thing; it extends an accommodation only to religious employers, and not to any secular employers.

Petitioners nonetheless argue that *Fulton* clarified the concept of general applicability by requiring 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.*" (Pet. 24 (emphasis added.)) *Fulton* did not address an exemption for religious conduct. It expressly explained that government policies are not generally applicable if they "prohibit[] religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way." 593 U.S. at 534 (emphasis added); *see also Tandon*, 593 U.S. at 62 (making same point); *Kennedy*, 597 U.S. at 526

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[11] Petitioners do not dispute the conclusion of the court below (Pet. App. 18a-19a) that the coverage requirement itself is generally applicable because it applies to all employers who purchase comprehensive New York regulated health insurance policies. Petitioners' challenge is to the general applicability of the religious accommodation.

(same). And neither *Fulton* nor any of the other decisions of this Court cited by petitioners for their broader view of *Fulton*'s language (*see* Pet. 24-26) involved a religious exemption or accommodation.

What petitioners in effect seek is an extension of *Fulton* to a religious accommodation available to some but not all religious organizations. As the court below correctly reasoned, however, "[t]he creation of any religious accommodation necessarily requires the government to distinguish the types of entities or activities that are covered from those that are not." (Pet. App. 28a.) As that court explained: "Although a State may not distinguish between religious denominations or entangle itself in assessments regarding the centrality of particular beliefs or practices to a faith, that is not what the [accommodation] does." (Pet. App. 28a-29a (citation omitted).)

Citing *Larson v. Valente,* 456 U.S. 228 (1982), petitioners nonetheless argue that the accommodation impermissibly discriminates among religious organizations on the basis of their "religious missions." (Pet. 28-29.) But as the court below found, the objective criteria delineated in the regulation that define the "religious employers" who may invoke the accommodation are based on an organization's activities and business structure, not beliefs. The accommodation is thus facially neutral, and petitioners have never alleged that it was intended to target the beliefs of organizations that engage in charitable works in the community at large.

Larson addressed a different issue. The law at issue in *Larson* defined the religious organizations that were exempt from generally applicable registration and reporting requirements with a seemingly neutral funding criterion: organizations that received more than half

of their funding from members or affiliates were exempt. 456 U.S. at 230. But *Larson* concluded that the law selectively favored established denominations (with large numbers of members and affiliates) over emerging denominations, and was intentionally designed for that purpose. *Id.* at 253-55. *Larson* thus involved no principles of general applicability or impacts of denominationally neutral criteria. Indeed, *Larson* noted that contrast between the challenged statutory scheme and a "facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." *Id.* at 246 n.23.

Moreover, and contrary to petitioners' argument (Pet. 26-27, 29-30), the analysis conducted under *Fulton*'s second feature—involving comparability that is "judged against the asserted government interest that justifies the regulation," *Tandon,* 593 U.S. at 62—cannot be applied in like manner to a religious accommodation that is available to some but not all religious organizations. In attempting to apply that analysis here, petitioners contend that the court below was required to consider the fit between the criteria that define a "religious employer" and the State's asserted regulatory interests in requiring abortion coverage—i.e., promoting access to abortion services and gender equality—and that the absence of a close fit demonstrates that the challenged regulation is not generally applicable. (Pet. 29-30.) That inquiry is inapt. Religious accommodations by their very nature are not intended to further the government's regulatory interests. The government elects to provide a religious accommodation to further a different interest, promoting the free exercise of religion, which this Court has long held the government may do. *See, e.g., Walz v. Tax Comm'n of City of N.Y.*, 397

U.S. 664, 669 (1970) (upholding principle that States may act with "benevolent neutrality" toward religion).

Certainly, the government may, as here, reasonably elect to limit a religious accommodation to those entities whose noncompliance will be least likely to undermine its regulatory interests. However, as the court below recognized, *requiring* a close relationship between the criteria that define those accommodated and the government's regulatory interests would "effectively incorporate strict scrutiny through the back door," while the "purpose of the general applicability test is to decide whether a law must be *subjected* to strict scrutiny in the first instance." (Pet. App. 24a.) Indeed, petitioners' proffered rule would discourage the enactment of broader accommodations, because such accommodations would often result in a less close fit.

The decision of the court below is supported by still stronger policy considerations. Invalidating a regulatory requirement because it provides a denominationally neutral accommodation that is not all-inclusive would "call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all." *Serio,* 7 N.Y.3d at 529. It would place a government policy with *no* religious accommodation "on stronger footing under the Free Exercise clause than rules that provide exceptions on religious grounds. *George*, 2022 U.S. Dist. LEXIS 201835, at *38-39. Invalidating the accommodation here would thus "restrict, rather than promote, freedom of religion." *Serio*, 7 N.Y.3d at 522.

The Court has long recognized that there is "play in the joints" between the Religion Clauses that allows the State to accommodate religion beyond what the Free

Exercise Clause requires. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Walz*, 397 U.S. at 669. Consistent with that principle, the court below concluded that a regulatory requirement does not lack general applicability because the government has elected to provide a religious accommodation that includes some but not all religious organizations, and delineates on the basis of specific objective and neutral characteristics that apply evenhandedly across denominational lines. That determination does not warrant further review.

III. THIS CASE PRESENTS A POOR VEHICLE TO ADDRESS THE EFFECT ON GENERAL APPLICABILITY OF AN ACCOMMODATION THAT DIFFERENTIATES AMONG RELIGIOUS ORGANIZATIONS OR TO REEXAMINE *SMITH*.

Even if the Court were otherwise inclined to consider the effect on general applicability of an accommodation that differentiates among religious organizations, this case would provide a poor vehicle for doing so. And because petitioners' second question for review—whether the Court should reexamine *Smith*—would require the Court first to address that differentiation issue, this case similarly provides a poor vehicle for reexamining *Smith*.

1. As explained (*supra* at 6), when a religious employer purchasing a comprehensive group health insurance policy for its employees invokes the accommodation, each of its employees receive a rider directly from the insurer, at no cost to employee or employer, that provides the same coverage for medically necessary abortion services, subject to the same rules, that the employee would have received had the accommodation not been invoked. (Pet. App. 196a-197a.) And as further explained (*supra* at 7), there is no evidence that

employers that purchase comprehensive group health insurance policies that include abortion coverage pay more than they would pay by purchasing such policies without abortion coverage. Indeed, the Department of Financial Services advises that an employer that purchases a policy excluding coverage of abortion services under the religious-employer accommodation pays the same amount as it would had it not invoked the accommodation. Accordingly, qualifying and nonqualifying religious employers are similarly situated in the sense that, if they choose to purchase comprehensive group policies, their employees receive the same abortion coverage and the cost to them is no different.

It is true that, when the coverage is provided through a no-cost rider, the rider must note that the religious employer does not administer the medically necessary abortion benefits and must also provide the insurer's contact information for questions. (Pet. App. 197a.) The Department advises, however, that when the coverage is provided in a comprehensive group policy purchased by an employer not covered by the religious accommodation, there similarly are no statutory or regulatory administrative duties imposed on the employer.

In determining to provide a limited accommodation, the State sought to balance the important interests served by the challenged regulation—the interest of employees in access to and equality in reproductive health care and the interests of religious employers. (See *supra* at 5-6.) It did so by accommodating a group of religious employers that are readily identified by criteria already in use in New York, other States, and the federal government in connection with similar accommodations, while minimizing the risk that employees might lose access to critical reproductive health services as a result of confusion or administrative burdens

associated with individual riders, as well as the administrative burdens imposed on insurers. The resulting differential treatment between employers that may invoke the accommodation and those that may not, however, is minimal, rendering this case a poor vehicle to weigh the effect of the accommodation on the regulation's general applicability.

Difficult questions can be presented by an effort to put reasonable limits on an exemption or accommodation for religion. To the extent the Court seeks to review a case involving differential treatment among religious organizations, it should await a vehicle in which the impact of that differential treatment is more significant. There are, for example, cases challenging differentiations among religious organizations for the purpose of receiving government benefits or exemptions from employment discrimination laws. Those cases implicate more consequential differential treatment than that presented here. And those cases would thus provide a better context for evaluating the sensitive balancing of competing interests implicated by government efforts to place reasonable limits on the applicability of its laws and regulations to religious entities.

Relatedly, facts that would assist in understanding the context in which the State sought to conduct that sensitive balancing are missing in this case. As earlier explained (see *supra* at 8-9), petitioners brought this lawsuit as a pre-enforcement proceeding without first seeking an accommodation. (Pet. App. 7a.) And they did not thereafter disclose any details about why they fail to satisfy any or all the criteria. Petitioners nonetheless contend that certain criteria distinguish on the basis of religious mission and that they are treated differently from comparable groups. (Pet. 26-28, 29-30.) As a pre-enforcement challenge, the record is also devoid of

evidence of the process by which an employer's certification as a religious employer is reviewed, and there is little other information regarding that process (see *supra* at 18 n.10). Yet, petitioners conclusorily assert that some of the criteria used to define "religious employers" permit intrusive inquiries into matters of religious doctrine that implicate excessive government entanglement and religious autonomy.[12] (Pet. 29-32.) An evaluation of the delicate balancing of competing interests that occurred in establishing the limitation on the religious accommodation at issue here would benefit from a more fully developed record.

Finally, a ruling about the specific criteria here would have limited impact in any event. While contending that review should be granted because this case involves a "critical legal question" (Pet. 35), petitioners acknowledge that only a handful of States have laws governing coverage of reproductive health services that include an accommodation defining accommodated religious employers by analogous criteria, and only one of

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[12] To the extent petitioners attempt to pursue a separate claim of excessive entanglement or to resurrect a religious-autonomy claim they raised for the first time in this case in their earlier petition for certiorari, *see* Pet. 28-31, *Roman Catholic Diocese of Albany* (No. 20-1501), this case presents an especially poor vehicle to address any such claims. No such claims were pressed or passed on below. In addition, the record is devoid of evidence to assess any such alleged entanglement. And while petitioners seek a significant expansion of this Court's religious-autonomy doctrine with the argument that the religious-employer accommodation could potentially influence organizations' decisions about whom they hire or serve (Pet. 30), petitioners have never averred that they were so potentially influenced, and there is no evidence in any event of any such alleged potential influence.

those laws requires coverage of abortion services. (*See* Pet. 36-37.[13])

2. Because this case provides a poor vehicle to consider the effect on general applicability of an accommodation that differentiates among religious organizations, it provides a poor vehicle to reexamine *Smith,* because any such reexamination would require the Court first to address that differentiation issue.

Moreover, like the narrow challenge to this particular statute, any such reexamination is best performed in a case where relevant facts are fully developed so that any potential new approach can be considered in context. The record here is devoid of information about many potentially relevant facts that bear on the nature and extent of the burdens allegedly imposed on petitioners' religious rights. As noted, the record contains little information about the nature of the petitioner institutions that allegedly do not qualify for the accommodation. Additionally, without knowing how particular petitioners might avoid any indirect burden imposed by regulation (see *supra* at 7-8 (discussing nature of coverage requirement and situations to which it does not apply)), the extent of any such indirect burden is unknown. Without proper development of these issues, the Court would be left to reexamine the free-exercise principles set forth in *Smith* in a legal vacuum and without the ability to consider the implication of any new approach in a fully developed factual context.

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[13] Of the four cited laws, only one applies to the coverage of abortion services. *See* Or. Rev. Stat. Ann. § 743A.066. The other three apply to the coverage of contraceptives. *See* Cal. Health & Safety Code § 1367.25; Haw. Rev. Stat. Ann. § 431:10A-116.7; N.C. Gen. Stat. Ann. § 58-3-178.

CONCLUSION

The petition for a writ of certiorari should be denied.

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