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 OF COMPASSCARE PREGNANCY SERVICES, CATHOLIC MEDICAL ASSOCIATION, NATIONAL CATHOLIC BIOETHICS CENTER, AND NATIONAL ASSOCIATION OF CATHOLIC NURSES, USA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*.[1]

Amicus **CompassCare Pregnancy Services** ("CompassCare") is a religiously motivated non-profit pregnancy care center with a principal place of business in Rochester, New York. CompassCare serves women and men of all religions or no religion at all. Thus, it does not qualify for New York's narrow "religious employer exemption" from the mandate that group health insurance plans cover "medically necessary" abortions, including abortion in the cases of rape, incest, or "fetal malformation" ("Abortion Mandate"). *As a result, CompassCare has dropped its group health insurance plan and only offers its employees to join a healthcare sharing ministry given the lack of a moral alternative*—which has substantially limited its hiring pool.

CompassCare recognizes that all human life is a gift from God made in His image, and that every abortion claims an innocent human life. It strives to enable women facing unplanned pregnancies to carry their unborn children to term. Its services include clinical pregnancy testing, ultrasound exams, gestational age determinations, STD testing and treatment, abortion pill reversal education and referrals, and other medical, insurance, and community support referrals. It also provides accurate and comprehensive information concerning

1. No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than these *amici*, their members, or their counsel contributed money intended to fund the brief. Counsel were notified of this filing pursuant to Supreme Court Rule 37.2 on October 10, 2024, more than 10 days before Respondent's October 21, 2024 deadline for filing its brief in opposition.

prenatal development, pregnancy and childbirth, abortion procedures and risks, and alternatives to abortion.

CompassCare views its work as an outreach ministry of Jesus Christ through His church. Thus, during every interaction with a patient, CompassCare staff offer to share the Gospel message of God's love and hope to those who wish or agree to hear it. CompassCare thus only hires employees who agree with and personally adhere to its core religious beliefs about sexual morality and abortion. All those who serve the organization must agree to never refer or advise any woman to have an abortion, and also themselves must refrain from having, and helping others to procure, abortions. Accordingly, CompassCare "qualif[ies] as [an] expressive association" whose employees "join[] together to express an opposition to abortion" and "to encourage others to adopt a particular religious faith or set of religious practices." *CompassCare* v. *Cuomo*, 465 F. Supp. 3d 122, 147 (N.D.N.Y. 2020). Yet, New York's Abortion Mandate still required CompassCare's group health insurance plan to provide its employees with coverage for abortion, which it has accordingly been forced to abandon.

Amicus **Catholic Medical Association** ("CMA") has over 2,000 physicians and hundreds of allied health members nationwide, and in New York alone 349 members who align with its mission. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person's conscience and religious freedoms should be protected. Members provide healthcare through a variety of corporate arrangements in which the physician is part of the corporate team providing employee benefits

to those employed. These corporations have a variety of sponsorships, from both faith-based and non-faith-based entities. Regardless, conscience rights are foundational to management and employees alike, many of whom would have serious ethical, philosophical, and religious objections to cooperating with direct abortion through arranging for its funding. The CMA's mission includes defending its members' right to follow their consciences and Catholic teachings in their professional work. The CMA thus files this brief in support of these conscience rights.

Amicus **National Catholic Bioethics Center** ("NCBC") is a nonprofit research and educational institute committed to applying the principles of natural moral law, consistent with many traditions including the teachings of the Catholic Church, to ethical issues arising in health care and providing healthcare in accordance with the moral, ethical, and social teachings of Jesus Christ and His Church through ongoing evangelization, education, advocacy, and mutual support. It provides a certification program in bioethics, bioethical consultation services, publications, and Catholic Identity and Ethics Reviews for health care agencies who wish to maintain their Catholic identity consistent with the teachings of the Catholic Church. Such identity is compromised by policies that force these entities to fund, and thus cooperate in, direct abortion, as is required by New York's Abortion Mandate. Indeed, complying with this Mandate would force them to violate the very foundation for their existence as providers of healthcare.

Amicus **National Association of Catholic Nurses, USA** ("NACN-USA") is a nonprofit professional organization of Catholic nurses committed to supporting

nurses through guidance, support, and networking, thus enabling them to engage in the delivery of health care consistent with Catholic moral principles which inform conscience. NACN-USA focuses on promoting professional development, fostering the integration of faith and the healthcare sciences in the delivery of care that protects human life from conception (fertilization) to natural death. NACN-USA opposes cooperation with direct abortion, not only because it contradicts Catholic teaching, but also because it is contrary to human and Hippocratic values. Freedom of conscience is critical to engaging in healthcare consistent with these values. Nurses function in a variety of agency leadership roles, including the overseeing of employee benefit policies. NACN-USA opposes the forcing of healthcare entities and their leadership to cooperate in policies that violate life as well as conscience.

SUMMARY OF ARGUMENT

The First Amendment's minimum requirement of equal treatment for religious observers includes equality not only between comparable religious and *secular* activities, but also between and among *the diversity of religions*. *See*, *e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532-33, 537-38, 542-43 (1993) (citing *Emp. Div., Dep't of Hum. Res. of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *Larson* v. *Valente*, 456 U.S. 228 (1982)). Anything less triggers a suspicion that government has *devalued* the non-exempt religious exercise in comparison to the exempted activity (whether secular or religious)—thus requiring the Court to "survey meticulously the circumstances of [the chosen] categories." *See Lukumi*, 508 U.S. at 537-38.

New York's Abortion Mandate gives rise to precisely such concerns. Its blunt application to service-oriented religious organizations like CompassCare—whose employees must refrain from seeking abortions—while exempting inward-oriented religious organizations whose employees likewise (presumably) oppose abortion, treats similarly situated religious organizations differently relative to the state's interest in expanding abortion access for employees. In other words, the Abortion Mandate's application to religious pro-life *expressive associations* reveals its substantial *overinclusivity*—raising concern that New York views pro-life religious organizations as "dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing [such] religio[us]" activities. *Espinoza* v. *Montana Dep't of Rev.*, 591 U.S. 464, 494 (2020) (Thomas, J., concurring). The Abortion Mandate thus must undergo strict scrutiny, which New York has never attempted to satisfy. This Court should grant the petition and reverse.

Further, the Abortion Mandate's selective exemption for only *some* religious organizations violates this Court's bedrock recognition that government may not deny an otherwise available religious exemption merely because the organization "has conventions that are different from the practices of other religious groups." *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953). Doing so "amounts to the state preferring some religious groups over" others, *id.*, in violation of the "clearest command" of the First Amendment's Religion Clauses, *Larson*, 456 U.S. at 244. The New York Court of Appeals' holding to the contrary should be reversed.

Finally, this case shows why *Smith* should be overruled. Its promise of formal religious "equality" is rife for abuse by governments and courts, as manifested in this case. It collapses the Free Exercise Clause into the Equal Protection Clause, thus failing to ensure the kind of *substantive* equality intended by the former's guarantee of religious *liberty*, which recognizes that religious believers may face *special burdens* under otherwise neutral rules. True equality requires removing those burdens within the limits of strict scrutiny.

ARGUMENT

I. The Abortion Mandate is Not Neutral or Generally Applicable Because it Expressly Discriminates Against Similarly Situated Religious Exercise.

A. The Religion Clauses prohibit underinclusive *and overinclusive* religious inequality.

As one scholar put it, "*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule . . . to an equality rule, under which religious practice is entitled to a kind of most-favored-nation-status." Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 880 (2001). Accordingly, the Religion Clauses require heightened scrutiny whenever a law burdening religious exercise is either underinclusive *or overinclusive* with respect to the interests it allegedly furthers. Both give rise to a suspicion that government has impermissibly *devalued* the burdened religious activity. And overinclusivity is on full display where the law exempts comparable *religious* activity.

As this Court recognized in *Lukumi*, "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." 508 U.S. at 542. This is true particularly where the exempted activity is "comparable" to the non-exempt religious exercise. *See Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021). "[C]omparability" is "judged against the asserted government interest that justifies the regulation at issue." *Id.* Where a law "fail[s] to prohibit nonreligious conduct that endangers [government interests] in a similar or greater degree than [the prohibited religious conduct] does," it is "underinclusive for those ends." *Lukumi*, 508 U.S. at 543.

Critically, as then-Judge Alito put it, such a law "raises concern because it indicates that the [government] has made a *value judgment* that" the motivations underlying the exempted activity "are important enough to overcome its general interest [allegedly furthered by the policy] but that religious motivations are not." *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (emphasis added). That kind of selectivity "is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.* at 365.

To be sure, this framework derives from cases involving challenges to *underinclusive* laws featuring comparable *secular* exemptions. Hence this Court's recitation that a law is not neutral or generally applicable if it treats "comparable *secular* activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62 (emphasis added); *see also Fulton* v. *City of Philadelphia, Pennsylvania*, 593 U.S. 522, 534 (2021) (same). *Tandon* and *Fulton* based this

standard on the general applicability analysis in *Lukumi*. *See Tandon*, 593 U.S. at 62 (citing *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67-68 (2020) (citing *Lukumi*, 508 U.S. at 533, 546)); *see also Fulton*, 593 U.S. at 534 (citing *Lukumi*, 508 U.S. at 542-46). In turn, *Lukumi*'s analysis focused on the government's failure to advance its asserted interests "with respect to conduct that is not motivated by religious conviction." 508 U.S. at 544.

But *Lukumi*'s logic hinged on whether a law's selectivity indicates an impermissible "devalu[ing]" of the burdened religious exercise, not on a binary government distinction between religious versus secular activity. *See Lukumi*, 508 U.S. at 537. Indeed, *Lukumi* expressly did "not define with precision" the general applicability standard itself, as the ordinances there "f[e]ll well below the minimum standard to protect First Amendment rights." *Id.* at 543. And elsewhere it recognized that "general applicability" is "*interrelated*" with "[n]eutrality," such that "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531 (emphasis added).

Thus, a law's general applicability should be understood in light of its neutrality *vel non*. But *Lukumi*'s neutrality analysis focused not only on whether the challenged ordinances "targeted" religious activity; it "also used the language of equal protection and nondiscrimination law." Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 8 (2016). The Court thus found a lack of neutrality in part because of the challenged ordinances' *overinclusivity*. Specifically, the Court noted the government's interests in public

health and preventing animal cruelty "could be addressed by regulations stopping far short of a flat prohibition of all Santeria sacrificial practice." *Lukumi*, 508 U.S. at 538. Indeed, rather than creating regulations targeting the "the disposal of organic garbage," "these broad ordinances prohibit Santeria sacrifice **even when it does not threaten the city's interest in public health**." *Id.* at 538-39 (emphasis added). Such blatant overinclusivity rendered the law's neutrality "suspect"—because it restricted "First Amendment freedoms . . . to prevent isolated collateral harms [e.g., sanitary disposal] not themselves prohibited by direct regulation." *Id.*

In short, the touchstone of a non-neutral or non-generally applicable law is its possession of characteristics that "reflect[] an implicit judgment" that the exempted activity is more "important" than the restricted religious exercise, thus "devalu[ing]" the burdened religious activity. *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting) (quoting *Lukumi*). And, critically, those characteristics are present when a law is religiously *overinclusive*, including because it burdens *some* religious groups while exempting other "comparable" religious groups. If neither category of religious group threatens the government's asserted interests, the law's "categories of selection" are suspect. *Lukumi*, 508 U.S. at 543, 547.

Indeed, if the First Amendment's Religion Clauses mean anything, it's that *parochial* biases are at least as pernicious as *secular* ones. *See Larson*, 456 U.S. at 244-46. Thus, government value judgments in favor of *some* religious groups over others are necessarily verboten—just as "the Free Speech Clause prohibit[s] content-based

restrictions because they 'value some forms of speech over others.'" *Espinoza*, 591 U.S. at 494 (Thomas, J., concurring) (quoting *City of Ladue* v. *Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)). Disparate treatment of similarly situated religious organizations signals precisely such bias.

This Court expressly indicated as much in *Lukumi*, where it found impermissible targeting in part because the challenged ordinances specifically exempted "kosher slaughter." 508 U.S. at 536. While the Court declined to "discuss whether this differential treatment of two religions is itself an independent constitutional violation," it immediately pointed to its precedent on denominational discrimination. *Id.* (citing *Larson*, 456 U.S. at 244-46). In turn, *Larson* recognizes that "[t]he First Amendment **mandates governmental neutrality between religion and religion**." 456 U.S. at 245-46 (emphasis added) (internal quotes omitted). Thus, *Lukumi* strongly implied the kosher-slaughter exemption also triggered strict scrutiny—i.e., that comparable religious exemptions are just as suspect as comparable *secular* exemptions. *Accord Lukumi*, 508 U.S. at 532 ("[D]iscriminat[ion] against some ... religious beliefs" triggers strict scrutiny).

Multiple Circuits have effectively recognized as much. For example, the Third Circuit required strict scrutiny of an ordinance forbidding Orthodox Jews from "plac[ing] *lechis* on utility poles in order to construct an *eruv*, a ceremonial demarcation of an area within which Orthodox Jews may push or carry objects on the Sabbath"; critically, the local government had allowed both secular *and religious exemptions*, including for "signs pointing the way to area churches"; thus, "the ordinance violate[d]

the neutrality principle of *Lukumi* and *Fraternal Order of Police* because it 'devalues' *Orthodox Jewish reasons* for posting items on utility poles." *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 208-09 (3d Cir. 2004) (Alito) (emphasis added) (quoting *Tenafly Eruv Ass'n, Inc.* v. *Burrough of Tenafly*, 309 F.3d 144, 151 (3d Cir. 2002)).

Similarly, the Tenth Circuit found evidence of religious inequality where a university required a devoutly religious plaintiff to perform improvisational exercises that violated her religious beliefs while exempting another student so he could observe Yom Kippur. *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). Cognizable inequality thus included disparate treatment of religious activities.

In short, the logic of *Smith* and *Lukumi* means that discrimination between comparable religious activities evinces the kind of religious *overinclusivity*, and a corresponding impermissible value judgment, at odds with the promise of equal treatment under the Religion Clauses. Thus, government may not treat religious exercise differently than similarly situated secular *or religious* activity without surviving strict scrutiny.

B. The Abortion Mandate's application to expressive associations like CompassCare is substantially *overinclusive*.

Accordingly, the Abortion Mandate is plainly *overinclusive.* It applies to pro-life religious organizations like CompassCare—whose employees must promise to uphold pro-life values—while exempting "comparable" religious organizations whose employees New York predicts will likewise not support abortion. Thus, both are

similarly situated with respect to the interests underlying the Abortion Mandate. Treating these religious groups differently thus gives rise to a suspicion that New York is *devaluing* non-exempt pro-life religious organizations, triggering strict scrutiny.

As noted, comparability depends on the state interest "that justifies the regulation at issue." *Tandon*, 593 U.S. at 62. New York alleges its Abortion Mandate furthers "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better healthcare, and the disproportionate impact on lack of access to reproductive health services on women in low income families," which it says is more important "than the interest of business corporations to assert religious beliefs." (Pet. at 9 (quoting Pet.App.181a-182a).) In other words, the Mandate seeks to expand access to abortion for employees throughout New York.

But the nature of that interest does not apply to pro-life expressive associations like CompassCare, whose employees adhere to its pro-life religious values, including to "refrain from having, and helping other[s] to procure, abortions." *CompassCare*, 465 F. Supp.3d at 136 (internal quotes omitted). Thus, CompassCare's employees inherently have *no* interest in obtaining or helping others obtain abortions. Yet the Abortion Mandate still applies to CompassCare given its mission to serve *all* women regardless of their "age, sex, marital status, *or religious preference*." *Id.* at 134 (emphasis added). *See* N.Y. Comp. Codes R. & Regs. Tit. 11, 52.2(y) (exemption available only if organization "primarily" "serves" co-religionists).

The Abortion Mandate is thus woefully overinclusive. In the words of *Lukumi*, New York could address its

interests in promoting abortion access for employees "by restrictions stopping far short of a flat [mandate] [on] *all*" group health insurance plans—including those of religious expressive associations whose employees must oppose abortion. 508 U.S. at 538 (emphasis added).[2]

The Mandate's overinclusion is confirmed by the interests underlying the partial religious exemption itself. As Petitioners note, "[t]his is the same short-lived exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraceptive mandate litigation." (Pet. at 8.) In defense of the contraceptive mandate's identical "religious employer exemption," the federal government stated that "the employees of the employers availing themselves of the exemption would be less likely to use contraceptives even if contraceptives were covered under their health plans." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). Thus, it found the "religious employer exemption . . . does not undermine the overall benefits" of the contraceptive mandate. *Id.*

But the same is true of covered religious organizations like CompassCare with respect to New York's Abortion

2. The New York Court of Appeals recognized the potential for this problem in a challenge to New York's identical "religious employer exemption" from its contraception health insurance mandate in 2006; the Court there noted "[t]his would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception." *Catholic Charities of Diocese of Albany* v. *Serio*, 7 N.Y.3d 510, 662 (2006). That reasoning directly applies here, where the Abortion Mandate unquestionably *does* apply to religious pro-life expressive associations throughout New York.

Mandate. CompassCare has already been deemed an "expressive association" of "persons joining together to express an opposition to abortion." *CompassCare*, 465 F. Supp. 3d at 148. Its employees "must pledge" to oppose and avoid abortion. *Id.* at 135-36. New York thus has no interest in requiring CompassCare to provide group health insurance that covers abortion. Therefore, given the interests underlying both the Abortion Mandate and its religious employer exemption, CompassCare is "comparable" to religious organizations that qualify for the partial exemption. *See Tandon*, 593 U.S. at 62. Treating them differently "raises concern because it indicates that [New York] has made a value judgment" disfavoring non-exempt religious expressive associations whose pro-life activities reach beyond the four walls of a house of worship. *Fraternal Order*, 170 F.3d at 366.

CompassCare is not an outlier in this regard. The National Institute for Family and Life Advocates ("NIFLA") is a "Christian, non-denominational ministry with member pregnancy centers located across the nation, including 51 centers in New York." *Nat'l Inst. for Family and Life Advocs. ("NIFLA")* v. *James*, No. 24-cv-514-JLS, 2024 WL 3904870, at *2 (W.D.N.Y. Aug. 22, 2024) (internal quotes omitted). These centers likewise oppose abortion and exist "to empower women and men" of all faiths who are "facing unplanned pregnancy to choose life." *Id.* (internal quotes omitted). The same is true of other pro-life pregnancy centers across New York. *Id.* at *3. These organizations' "reason for being is to oppose abortion," among other things, *CompassCare*, 465 F. Supp. 3d at 156, by providing religiously motivated services like pregnancy tests, parenting and relationship classes, material support, options counseling, post-abortion support, and referrals,

NIFLA, 2024 WL 3904870 at *2; *see also Slattery* v. *Hochul*, 61 F.4th 278, 283, 287 (2d Cir. 2023) (recognizing "The Evergreen Association" "has operated a network of pregnancy crisis centers throughout New York City since 1985," and is a religious expressive association under the First Amendment). But New York still requires these organizations to comply with its Abortion Mandate if they provide group health insurance—even though their employees "would be less likely to [obtain abortions] even if [abortion] were covered under their health plans." 77 Fed. Reg. at 8728. The breadth of Mandate's overinclusion is thus "substantial, not inconsequential," *Lukumi*, 508 U.S. at 543, raising a suspicion of government prejudice.[3]

Accordingly, New York's disparate treatment of similarly situated religious exercise (relative to the Abortion Mandate's purpose) "suggests" that it has "judg[ed]" religious organizations engaged in service-oriented pro-life outreach "to be of lesser import than" exempted religious organizations. *Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting) (quoting *Lukumi*, 508 U.S. at 537-38). Strict scrutiny is thus required to ensure New York is not attempting to "tilt[] society in favor of devaluing" the non-exempt pro-life religious organizations and their beliefs. *Espinoza*, 591 U.S. at 494 (Thomas, J., concurring). But New York has effectively conceded the Mandate cannot pass strict scrutiny. This Court should thus grant the petition and hold as much.

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3. This prejudice is all but confirmed by New York's recent legal attack on NIFLA and Heartbeat International's promotion of abortion pill reversal, i.e., progesterone treatment, in New York. *See NIFLA*, 2024 WL 3904870 (preliminarily enjoining New York Attorney General's attempt to censor such speech in violation of First Amendment).

II. The Abortion Mandate Also Violates the First Amendment's Bar on Disparate Treatment *Simpliciter* Between Religions.

The Abortion Mandate's application to religious organizations *not* organized as expressive associations triggers its own First Amendment concerns, given the Mandate's partial exemption for *other* religious organizations. That's because this Court has long recognized an "absolute" prohibition on "favoritism among sects," *Larson*, 456 U.S. at 246, including discrimination among "religious practices" that "amounts to" denominational preference, *Fowler*, 345 U.S. at 69. As noted, this means **government may not deny a religious exemption to a religious group merely because it "has conventions that are different from the practices of other religious groups."** *Id.* (emphasis added). Here, unfortunately, the Abortion Mandate's exclusionary religious exemption violates this "clearest" of "commands." *Larson*, 456 U.S. at 244.

This Court has explained the First Amendment's Religion Clauses effectuate Madison's vision of a "multiplicity of sects," such that "every denomination would be equally at liberty to exercise and propagate its beliefs." *Id.* at 245 (internal quotes omitted). Under that vision, "the fullest realization of true religious liberty requires that government effect no favoritism among sects and that it work deterrence of no religious belief." *Id.*

Accordingly, this Court has long been skeptical of line-drawing between types of *religious activity*. In *Fowler*, the City of Pawtucket, Rhode Island barred making "address[es]" to "any political or religious meeting in

any public park," but in practice it allowed ministers and priests to preach at "Protestant . . . church services" and "Catholic[] . . . mass[es]," respectively. 345 U.S. at 69. The City nonetheless arrested a visiting Jehovah's Witness minister who gave an expressly religious address to a more informal gathering of Jehovah's Witnesses (and others) in the same public park. *Id.* at 68.

Pawtucket's double-standard blatantly violated the First Amendment: "For it shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects," which "*amounts to* the state preferring some religious groups over this one." *Id.* at 69 (emphasis added). "To call the words which one mini[s]ter speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an *indirect* way of preferring one religion over another." *Id.* at 70 (emphasis added).

So, too, here. The Abortion Mandate's partial religious exemption "amounts to" a denominational preference by expressly burdening sects whose religious beliefs motivate them to "Go . . . make disciples of all nations." (Matthew 28:19.) Not all religious groups or individuals hold such beliefs. *See*, *e.g.*, Shmuley Boteach, "It's Time for the Jews to Proselytize," The Times of Israel (Aug. 1, 2016) (arguing "Jews stopped proselytizing . . . because of pressure from Christian and then Muslim rulers, beginning in 407 C.E. when the Roman Empire outlawed conversion to Judaism under penalty of death").[4] *See also* YouTube, Matt Fradd,

4. https://blogs.timesofisrael.com/its-time-for-the-jews-to-proselytize/.

"Ben Shapiro Talks About Why [He] [Doesn't] Want Converts @ Ben Shapiro Sunday Special Clip" (August 12, 2024).[5] *Cf. CompassCare*, 465 F. Supp. 3d at 135 (noting CompassCare staff seek to evangelize to "people who agree to hear it"). Moreover, *Smith* itself confirmed that government may not "impose special disabilities on the basis of religious views." 494 U.S. at 877. Thus, New York's narrow religious exemption to the detriment of religious organizations whose beliefs include evangelizing non-coreligionists raises concern that it "is merely an indirect way of preferring one religion over another." *Fowler*, 345 U.S. at 70.

The New York Court of Appeals attempted to avoid this conclusion by arguing the Abortion Mandate's narrow religious exemption "depends on the nature of an employer's activities and business structure, not its 'denominations.'" *Roman Cath. Diocese of Albany* v. *Vullo*, 42 N.Y.3d 213, 2024 WL 2278222, at *11 (May 21, 2024) (cleaned up). But this Court rejected a similar argument in *Fowler*, which forbade Pawtucket from denying a minister an otherwise available religious exception based on "the nature of [his religious group's] activities"—specifically, its "less ritualistic, more unorthodox, less formal" "conventions that are different from the practices of [exempted] religious groups." *Fowler*, 345 U.S. at 69. That holding remains in harmony with succeeding precedents, because discriminating based on the nature of religious activities *effectively* "work[s] deterrence of [a corresponding] religious belief." *Larson*, 456 U.S. at 245; *see also McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) ("[T]he right to the free exercise of religion unquestionably encompasses the right to . . . proselyte.").

5. https://www.youtube.com/watch?v=RqgKxHoSbSg.

Further, this Court has already rejected an *inverse* potential "use of a social welfare yardstick as a significant element" in determining whether churches "qualify for [an] exemption." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970). The *Walz* Court recognized that "[t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of government evaluation and standards as to the worth of particular social welfare programs," which "could conceivably give rise to confrontations that could escalate to constitutional dimensions." *Id.* The same is true here, in reverse. *Denying* an exemption to religious organizations based on their engagement in social welfare gives rise to similar constitutional concerns.

The New York Court of Appeals also insisted that by "accommodat[ing] religious beliefs in some cases," the Abortion Mandate "*favors* religious exercise rather than discriminates against it." *Diocese of Albany*, 2024 WL 2278222, at *10 (emphasis added). But as Justice Alito recently put it, "respecting some First Amendment rights is not a shield for violating others." *Calvary Chapel*, 140 S. Ct. at 2607-08 (Alito, J., dissenting). Indeed, if the Court of Appeals were correct, Pawtucket would have prevailed in *Fowler*. Yet this Court easily recognized Pawtucket's purported religious benevolence for *some* religions was "merely an indirect way of preferring one religion over another." 345 U.S. at 69. The same is true here.

Accordingly, because the Abortion Mandate's narrow religious exemption indicates a de facto preference for certain religious groups over others, it must undergo strict scrutiny for this independent reason, as well.

III. The New York Court of Appeals' Binary and Formalistic Application of "Equality" Shows Why *Smith* Should be Overruled.

This case is a clear example of why *Smith* should be overruled. As noted, *Smith* "transformed" free exercise of religion "[in]to an equality rule." Duncan, *Free Exercise*, 3 U. Pa. J. Const. L. at 880. But here, unsurprisingly, the New York Court of Appeals misappropriated that concept by insisting on a kind of "binary" equality only between the religious Petitioners and *secular* actors, and only insofar as both sides are subject to (or freed of) the same burdens *from the government's perspective*. *See Diocese of Albany*, 2024 WL 2278222, at *10.

This faulty understanding of equality reveals a "workability" problem laden in *Smith* and *Lukumi*'s focus on equal treatment between religious and secular conduct. And it confirms that a "*Smith*-ified" Free Exercise Clause essentially collapses into the Equal Protection Clause, rendering the former a superfluity and overlooking the *unique* burdens suffered by religious believers. *See Smith*, 494 U.S. at 894, 901-02 (O'Connor, J., concurring). Indeed, overruling *Smith* would actually restore *substantive* equality to religious believers—allowing them to seek reprieve from the *special burdens* they can suffer from generally applicable rules.

As to workability, the New York Court of Appeals' analysis confirms the unwieldiness of *Smith* and its progeny. It focused solely on the rule against prohibiting "religious conduct while permitting secular conduct that undermines the government's asserted interests

in a similar way." *Diocese of Albany*, 2024 WL 2278222, at *10 (quoting *Fulton*, 592 U.S. at 533). But it entirely ignored the *raison d'être for that principle*—i.e., the First Amendment's protection against impermissible value judgments that disfavor religion. That rationale applies at least as much (if not more so) to government discrimination *between or among religious groups*, as discussed above. Unfortunately, *Smith* and *Lukumi* do not elaborate on this underlying rationale. *Cf. Fraternal Order*, 170 F.3d at 366 (Alito); *Calvary Chapel*, 140 S. Ct. at 2614 (Kavanaugh).

It's no wonder that "[p]ost-*Smith* cases have [] struggled with the task of determining whether a purportedly neutral rule 'targets' religious exercise or has the restriction of religious exercise as its 'object'"; or with "the meaning of *Smith*'s holding on exemptions from generally applicable laws." *Fulton*, 593 U.S. at 603, 605, 609 (Alito, J., concurring) (observing *Smith* has "serious problems" of workability). That struggle is on full display in the New York Court of Appeals' opinion, which deemed clear evidence of denominational discrimination a complete non-issue under the Free Exercise Clause, contrary to nearly a century of this Court's precedent. That *Smith* led to such an "emperor with no clothes" is all the more reason to overrule it.

As to free exercise as equality, the *Smith* progeny's emphasis on *formal* equality (i.e., ensuring that religious observers and their comparators are subject to the same rules) confirms Justice O'Connor's point that *Smith* has "relegate[d] a serious First Amendment value to

the barest level of minimum scrutiny that the Equal Protection Clause already prohibits." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Indeed, *Smith*'s general-applicability requirement essentially calls for a rational-basis analysis already prescribed by the Equal Protection Clause. *See*, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564-65 (2000) ("[T]raditional equal protection analysis" prohibits "irrational and wholly arbitrary" treatment between a "class of one" and "others similarly situated"). This test is effectively dispositive under *Smith*. If exemptees are *not* similarly situated, the disparate treatment is "rational" and thus constitutional; but if they *are*, "the selective regulatory scheme will be reviewed under a compelling interest test that is strict in theory and usually fatal in fact." Duncan, *Free Exercise*, 3 U. Pa. J. Const. L. at 881.

As Justice O'Connor observed, however, this Court has long "recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause," including because "the language of the Clause itself makes clear" that "an individual's free exercise of religion is a *preferred* constitutional activity." *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring) (emphasis added). That's currently not true under *Smith*, which instead presents a "free-exercise *or equal-treatment* question" and requires applying "[t]he Court's free-exercise *and equal-treatment* precedents." *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) (emphasis added). *Smith* effectively renders the Free Exercise Clause a superfluity. And it is wholly at odds with the Clause's text, whose "absence of any language referring to equal treatment is striking." *Fulton*, 583 U.S. at 569-70 (Alito, J., concurring).

Moreover, restoring the Free Exercise to a "liberty rule" would paradoxically restore religious observers' ability to obtain *substantive* equality. Under *Smith* and *Lukumi*, the premise of "equal treatment" is that religious and secular individuals are equally burdened by generally applicable laws. But that premise "contradicts both constitutional tradition and common sense." *Smith*, 494 U.S. at 885. For example, during the Prohibition "the Federal Government exempted" "the sacramental use of wine by the Roman Catholic Church" "from its general ban on possession and use of alcohol." *Id.* at 913 n.6 (Blackmun, J., dissenting). Absent an exemption, that general ban undoubtedly would have burdened Catholic individuals *more* than non-Catholics, and the state "could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion." *Id.* (Blackmun, J., dissenting). The same was true in *Wisconsin* v. *Yoder*, where the state's compulsory education law plainly burdened members of traditional Amish faith *more* than others who did not share the same religious practices; in the end, the state lacked a sufficiently compelling interest to require the Amish petitioners to bear that greater burden. 406 U.S. 205, 207-13, 222-29 (1972).

Thus, treating the Free Exercise Clause as the "liberty rule" that it is actually restores *substantive* equality for religious believers. As the Seventh Circuit observed with respect to the analogous religious accommodation requirement under Title VII of the Civil Rights Act of 1964, accommodating religion "does not confer a benefit on those accommodated, but rather relieves those individuals of a *special burden* that others do not suffer." *Nottelson* v. *Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643

F.2d 445, 454 (7th Cir. 1981) (emphasis added). Title VII removes these burdens in the workplace by giving religious practices "favored treatment" with respect to "otherwise neutral policies," unless the employer can establish an "undue hardship" defense. *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015).

The same should be true under the Free Exercise Clause—whose pre-*Smith* jurisprudence notably served as the very model for Title VII's expansive protection of religious practices in the workplace. *See* 118 Cong. Rec. 705 (1972) (statement of Senate sponsor Sen. Randolph explaining that Section 701(j), *codified at* 42 U.S.C. §2000e(j), reflects "the same concepts as are included in the first amendment," and is "intended to the protect the same rights in private employment as the Constitution protects in Federal, State, or local governments").

In sum, *Smith*'s purported guarantee of equal treatment for religious believers has instead resulted in unworkable and formalistic standards of religious equality—as manifested in the New York Court of Appeals' decision below. These problems confirm that *Smith* should finally be overruled and the Free Exercise Clause restored to a rule of *liberty*—consistent with its text, history, and *substantive* equality for religious believers.

CONCLUSION

The petition for certiorari should be granted.

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