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 STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents continue to insist that neither *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), nor this Court's other Free Exercise decisions over the last two decades have any relevance—instead, they say, this case remains governed by *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). Respondents' effort to explain away the 3-2 split among lower courts regarding *Fulton*'s application only confirms their profound disregard for religious interests, the First Amendment's protections, and this Court's guidance.

Take, for example, Respondents' insistence that the Abortion Mandate's "religious employer" exemption turns on "objective" criteria regarding the employer's "activities" and "business structure." Opp.12, 18, 22-23, 25. In fact, those criteria—which ask whether religious organizations "primarily serve" and "employ" "co-religionists," and whether "the purpose" of the organizations is "the inculcation of religious values"—raise difficult religious questions the government is ill-suited to resolve.

Similarly, Respondents insist this case can have only "minimal consequences," suggesting the Religious Ministries' objections are not worthy because the Abortion Mandate is supposedly cost-neutral for employers—ignoring the profound religious objections at stake. Opp.3. Respondents also misunderstand the appropriate remedy, which would be enjoining the Abortion Mandate's application to Petitioners, not rewriting the statute to make them "religious employers." The stakes here are anything but *de minimis*.

Beyond these errors, Respondents fail to refute that the decision below reflects persistent lower-court confusion regarding *Smith* and *Fulton*. The Court should thus grant certiorari to resolve the first question presented. Alternatively, if *Smith* allows the Abortion Mandate, *Smith* should be overruled.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY "GENERAL APPLICABILITY."

The decision below both sharpens and deepens persistent "confusion about the meaning of *Smith*'s holding [regarding] exemptions from generally applicable laws," *Fulton*, 593 U.S. at 609 (Alito, J., concurring), including a 3-2 split on the general-applicability analysis. Pet.20-22.

A. The Lower Courts Are Divided and Confused.

New York remains on the wrong side of a split regarding application of strict scrutiny based on selective religious exemptions. Three circuits have enjoined laws for allowing some, but not all, religious exemptions. *Kane v. DeBlasio*, 19 F.4th 152, 160 (2d Cir. 2021) (religious exemptions available unless applicant's "religious organization has spoken publicly in favor of the vaccine[s]"); *Dahl v. Tr. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (religious exemptions expressly allowed under written policy but denied to plaintiffs); *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (religious exemption applied only to university staff deemed "sufficiently religious"). Yet the New York Court of Appeals here and the Supreme Court of California in *Catholic Charities of Diocese of Sacramento, Inc. v.*

Superior Court, 85 P.3d 67 (Cal. 2004), have upheld laws that do the same thing. That undisputed split alone justifies this Court's review.

Respondents try to explain away the split based on alleged factual distinctions. But there is no principled way to square these cases.

To start, *Kane* and *Dahl* each make clear that *Fulton* applies in full force where the exemptions at issue are religious—and that even purportedly objective criteria for such exemptions may undermine general applicability and trigger strict scrutiny. As the Religious Ministries have long argued, the criteria New York relies on are in reality far from objective. *See infra* Part I.B. They should thus trigger strict scrutiny for the same reasons as the exemptions at issue in *Dahl* and *Kane*.

Similarly, in *Duquesne*, the D.C. Circuit held that the NLRB's application of a religious exemption improperly intruded on religious matters where it inquired into "what counts as a 'religious role' or a 'religious function.'" 947 F.3d at 834-35. This was much like the inquiry here into whether "the purpose" of an organization is "the inculcation of religious values," plus whether it "primarily employs" and "serves" co-religionists. Respondents cast *Duquesne* as irrelevant because it supposedly focused on a different issue—religious "entanglement" rather than "discriminat[ion]." Opp.13-15. But entanglement was merely part of the court's explanation for why the NLRB's attempts to distinguish among religious groups was problematic—and exactly the same problems exist here.

In short, *Dahl*, *Kane*, and *Duquesne* all reflect the broader principle underlying *Fulton*'s analysis: *Employment Division v. Smith* applies only to laws that are "generally applicable"—*i.e.*, "across-the-board." 494 U.S. 872, 884-86 (1990). Thus, when "*any* comparable" activity is treated "more favorably than religious exercise," strict scrutiny is triggered. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). An exception that deliberately exempts some religious organizations and not others—despite harm to the same government interest—triggers strict scrutiny *a fortiori*. Such religious differentiation is at the heart of the rule, not the edge. *See Fulton*, 593 U.S. at 536.

Refusal to recognize this principle underlies the "persistent confusion" reflected in the Tenth Circuit's divergent post-*Fulton* cases and various district court rulings, Pet.22-23, forcing Respondents to concede in at least one instance "a questionable application of [the required] analysis to the particular facts." Opp.20. While Respondents claim none of this suggests "confusion about the proper analysis," *id.*, they never explain why—and this Court's guidance is required given the lower courts' struggle to apply the *Fulton*/*Smith* framework in a consistent, coherent fashion.

In short, the real split is between those courts that faithfully apply the general-applicability standard, and those—like New York—that do not.

B. The Decision Below Is Wrong.

Beyond deepening a split in authority, the decision below is also wrong. The Abortion Mandate is not generally applicable under *Fulton*, because its religious exemption both (a) incorporates substantial

discretion and (b) accommodates conduct (refusing abortion coverage) that undermines the government's interests while refusing to accommodate the same conduct by the Religious Ministries.

Respondents fail to justify New York's intransigent refusal to recognize these flaws. Instead, they insist the two aspects of *Fulton* must be kept "distinct" with no "conflating" allowed, Opp.21. But nothing in *Fulton* justifies dissecting its two prongs for loopholes. *Fulton's* consideration of "individualized" and "secular" exceptions identified two ways of rooting out the same problem: "burden[ing] … religious exercise … through policies that do not meet the requirement of being … generally applicable." *Fulton*, 593 U.S. at 533. Particularly with that underlying principle in mind, the errors in Respondents' reasoning are obvious.

First, Respondents ignore New York's own guidance in order to claim that the religious exemption criteria are not individualized—and so do not implicate *Fulton*'s first prong. Respondents assert that "the certification procedure relies principally on the exercise of judgment by the religious entity itself rather than any government official," because "the entity seeking the accommodation is required to certify that it is a 'religious employer,' as defined." Opp.23. But official guidance regarding the identically-worded exemption to New York's contraceptive mandate states that insurers may *not* "rely solely on a self-attestation from an employer," but "should request proof" that the employer qualifies. DFS, Supplement No. 2 to Insurance Circular Letter No. 1 (May 1, 2019), https://perma.cc/M5YE-DU78. And the buck eventually stops with the State: As the

guidance warns, DFS will "monitor" compliance, *id.*, thus deciding which insurer-blessed "self-attestations" are acceptable.

Next, Respondents assert that *Fulton*'s second prong—focused on exemptions that undermine the State's interest in a similar way—is irrelevant to religious exemptions. Respondents' sole justification for this distinction is that *Fulton*'s "comparability" test is inapplicable because "[r]eligious accommodations by their very nature are not intended to further the government's regulatory interests." Opp.26. That makes no sense. Exceptions are very rarely intended to *further* a law's purposes—the secular lockdown exceptions in *Tandon*, for example, were not intended to reduce the spread of disease. Instead, the exceptions reflected a desire to balance competing interests—just like the exceptions here. *Fulton* incorporates this commonsense point: the question is whether the exempted conduct "undermines the government's asserted interests in a similar way" to the proposed religious conduct. *Fulton*, 593 U.S. at 534. That test only ever has teeth if the exemption at issue undermines the State's asserted interest—it is not triggered if the exception advances the interests underlying the regulation itself.

In short, where the government allows conduct that undermines its interests in similar ways—whether religious or secular—but refuses to accommodate someone's religious conduct, it reflects a decision that the religious conduct is not worthy of solicitude. And under *Fulton*, it has to justify that choice under strict scrutiny.

Indeed, this Court has long recognized that an overly-narrow religious exemption is at least an

aggravating factor in a First Amendment case. In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, this Court found the "unconstitutionality" of the law at issue was "compounded by the religious discrimination which [the] general statutory scheme necessarily effect[ed]" by exempting some, but not all, religious conduct. *Id.* at 406. Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court recognized that the government cannot deny a religious exemption to one group—while granting it to others—simply because it "has conventions that are different from the practices of other religious groups." *Id.* at 69.

Much the same was true in *Larson v. Valente*, 456 U.S. 228 (1982), which Respondents fail to distinguish. In *Larson*, a law that was facially neutral among denominations was nonetheless held unconstitutional because its effect was to discriminate among them. *Id.* The same is true here: the criteria here inevitably favor certain denominations and approaches to religion over others—in particular, and as in *Larson*, the criteria inevitably favor groups that keep to themselves.

Respondents argue that *Larson* is distinguishable because the criteria in this case "are based on an organization's activities and business structure, not beliefs." Opp.25. But if there is any distinction to be made here, it runs in the opposite direction: New York's exemption expressly requires resolving religious questions by asking whether the organization's "purpose" is "the inculcation of religious values" and interrogating who qualifies as a "co-religionist." *Cf. Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 761 (2020) ("Are Orthodox Jews and non-Orthodox Jews

coreligionists? … Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?"). The regulation at issue in *Larson*, meanwhile, focused solely on the organization's finances and fund-raising structure, and yet the Court still found it invalid. Respondents' argument on this point thus falls flat.

II. *SMITH* SHOULD BE REEVALUATED.

Respondents offer no meaningful response to the Religious Ministries' contention that, if *Smith* permits the Abortion Mandate, it should be revisited. To the contrary, Respondents trumpet that the outcome of this case makes little difference to them. Opp.4, 28. Of course, that claim rests on a mistaken view of the remedy should the Religious Ministries prevail, *see infra* Part III. But the point is that on the Government's own view, imposing the Abortion Mandate on the Religious Ministries is completely gratuitous.

If *Smith* condones *unnecessary* burdens on religion, then *Smith* should surely be reconsidered—something this Court has already recognized. *Fulton*, 593 U.S. at 540. Given the persistent confusion following *Fulton* and the heavy, ongoing burden imposed on the Religious Ministries here, the time has come to reach that issue.

III. THIS CASE IS AN IDEAL VEHICLE.

This case turns entirely on whether strict scrutiny applies to the Abortion Mandate, since Respondents have *never* argued that the law could survive strict scrutiny. That makes this case an ideal vehicle to clarify how *Smith* and *Fulton* trigger strict scrutiny in light of a subjective, entangling religious exemption.

Respondents' arguments to the contrary are unavailing.

1. Respondents focus first on this matter's pre-enforcement posture, arguing there is a lack of record evidence regarding how the religious exemption operates in practice. Opp.30. But that purported concern is misplaced. Cases about sensitive First Amendment rights are regularly reviewed by this Court in a pre-enforcement posture (or very close to it). *Fulton* itself is just one example. *See also, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

Further, not only are the Abortion Mandate's constitutional problems evident on its face, but existing authority confirms the law will be interpreted according to its problematic terms.

In particular, the insurance circular discussed above—which has never been withdrawn and remains on DFS's website[1]—makes clear that self-certification is not sufficient to qualify for the religious exemption. *See* Supplement No. 2 to Insurance Circular Letter No. 1. Instead, insurers are required to obtain "proof" that an organization qualifies. *Id.* And that "proof" must align with the State's view of what types of organizations qualify, which categorically excludes religious nursing homes and schools like many of the Religious Ministries. *Id.*; Pet.App.96a-97a, 100a, 120a-122a. And the New York Court of Appeals has held that other Petitioners—including the Catholic Charities of the Diocese of Albany and the Catholic

[1] *See* Circular Letters Issued from 2001 through 2020, https://www.dfs.ny.gov/industry_guidance/circular_letters/2001_2020 (last visited Dec. 21, 2024).

Charities of the Diocese of Ogdensburg—do not qualify. *Serio*, 7 N.Y.3d at 520.

Respondents nonetheless apparently believe the Religious Ministries should falsely certify that they qualify and then sue only if unable to obtain an exemption that way. Opp.30. But the Religious Ministries need not violate their conscience to protect it. Their decision to instead bring a proper pre-enforcement challenge poses no obstacle to this Court's review.

Second, Respondents argue this is a poor vehicle because, in their view, there are "minimal consequences" to either the Religious Ministries or the State regardless of who prevails, Opp.3. This argument, however, betrays Respondents' fundamental misunderstanding of both the problem here and the appropriate remedy.

As to the problem, Respondents suggest that being denied a religious exemption is unimportant because providing abortion coverage is supposedly cost-neutral. Opp.28-29. But the Religious Ministries have never objected to the Abortion Mandate for *financial* reasons—their objections are *religious*. Respondents' suggestion that those objections are somehow *de minimis* confirms their disregard for the religious interests at stake here.

As to the remedy, Respondents mistakenly suggest that if Petitioners prevail, they will be treated as "religious employers" under the law's existing framework, with employees automatically receiving the same abortion coverage via a different channel. Opp.28-30. That too is wrong. If this Court finds that the law triggers and fails strict scrutiny, the Religious

Ministries would simply not be subject to the Abortion Mandate.[2] A federal constitutional ruling by this Court cannot convert the Religious Ministries into "religious employers" under the existing law—after all, the Court cannot rewrite New York's statute. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 823 (2000) (where statute fails strict scrutiny, "appropriate remedy [is] not to repair the statute, it [is] to enjoin" it).

New York may or may not later pass a new law that includes the Religious Ministries within the current religious exemption. The religious exemption to New York's contraceptive mandate, for example, works very differently. *Serio*, 7 N.Y.3d at 519. If the legislature does respond with a new law, the Religious Ministries could then evaluate how any such law squares with their religious beliefs and the First Amendment. *Cf. Zubik v. Burwell*, 578 U.S. 403, 408-09 (2016) (acknowledging that the details of an exemption scheme may make a material difference to the religious burden at issue). But the possibility that a *future* statute may raise similar concerns is no impediment to this Court's review of the *existing* statute.

In any event, Respondents' new argument that the religious exemption is not meaningfully different from being subject to the mandate only underlines that the

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[2] Respondents' mistaken view of the remedy may be tied to their attempt to change, in a footnote, which law the Religious Ministries are challenging. Opp.24 n.11. The Religious Ministries' challenge has always been to the Abortion Mandate, not its religious exemption. The exemption simply shows the Abortion Mandate is not generally applicable.

State has no conceivable interest in defining the exemption so narrowly.

2. The Court should not hold this case for *Catholic Charities Bureau, Inc. v. State of Wisconsin Labor and Industry Review Commission*, No. 24-154.

Unlike this case, the petition in *Catholic Charities Bureau* does not focus on *Smith* or *Fulton*. Moreover, Wisconsin has argued that its approach is justified by the purportedly unique religious tax exemption context. *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n*, 411 Wis. 2d 1, 46 (2024). Thus, to the extent there is any overlap in the cases, granting both would give the Court a more complete basis to resolve issues of religious discrimination and provide clear direction to lower courts.

And clear, direct resolution is absolutely necessary here. Both the opposition brief and the New York Courts' decisions below make plain that any decision short of directly overruling New York's on-point precedent will not lead the State's executive or judicial branches to properly evaluate the Abortion Mandate under this Court's precedents. The courts below already denied *Fulton*'s relevance based on paper-thin logic, and are sure to do the same if this case were remanded following *Catholic Charities Bureau*. Respondents themselves insist that cases involving government entanglement and religious autonomy are *irrelevant* to this case. *See* Opp.30-31. Holding this case for a second GVR in light of *Catholic Charities Bureau* would thus achieve nothing but further delay in this already-eight-year-long litigation—and inevitably would lead to a *third* cert petition after another futile round of litigation in state court.

Such delay is particularly problematic given that, as the opposition brief itself emphasizes, New York's definition of "religious employers" dates to 2002, Opp.1-2—and the State has already doubled down by codifying the Abortion Mandate into a statute since this case began. Opp.2. The urgency is further compounded by the fact that New York is not alone in applying these criteria: Oregon, California, Hawaii, and North Carolina all have similar laws selectively imposing religious burdens based on the same criteria. Nearly a quarter of the country's population is now subject to a regime like that at issue here—and if New York's decision is allowed to stand, there is nothing stopping more States from adopting this approach.

CONCLUSION

The Court should grant the petition.

DECEMBER 23, 2024

Respectfully submitted,

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