No. 19-66

In the Supreme Court of the United States

GEORGE Q. RICKS,

Petitioner,

v.

STATE OF IDAHO CONTRACTORS BOARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, petitioner submits this supplemental brief to address the relevance of *Fulton* v. *City of Philadelphia*, No. 19-123 (June 17, 2021), *Tandon* v. *Newsom*, 141 S. Ct. 1294 (2021), and *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020). In *Fulton*, the Court ruled that the standard of *Employment Division* v. *Smith* did not apply to Philadelphia's exclusion of a Catholic agency from its foster care system. It concluded that because Philadelphia's "contractual non-discrimination requirement * * * [did] not qualify as generally applicable," "the City's actions [were] therefore examined under the strictest scrutiny regardless of *Smith*." Slip op. at 13. In *Tandon* and *Diocese of Brooklyn*, the Court held that under *Smith*, "government regulations * * * trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," and the restrictions at issue were thus subject to strict scrutiny regardless of *Smith*. *Tandon*, 141 S. Ct. at 1296 (citing *Diocese of Brooklyn*, 141 S. Ct. at 67-68).

Fulton, *Tandon*, and *Diocese of Brooklyn* starkly emphasize the need for the Court to start the process of revisiting *Employment Division* v. *Smith*. While the Court did not need to displace the *Smith* standard to resolve *Fulton*, five Justices agreed that "the textual and structural arguments against *Smith* are more compelling," with three Justices calling for its immediate overruling. *Fulton*, slip op. at 1 (Barrett, J., concurring); *see Fulton*, slip op. at 77 (Alito, J., concurring). And *Tandon*, *Diocese of Brooklyn*, and the host of other emergency docket appeals concerning COVID worship restrictions over the last year show that

Smith does not provide a workable rule of decision in most cases.

The petition gives the Court the opportunity to revisit *Smith* without having to address every possible permutation of Free Exercise jurisprudence in the first instance. It cleanly presents the question whether *Smith* should be overruled for a narrow category of Free Exercise Clause claims involving direct, government-imposed burdens on individuals' ability to obtain work without violating their religious beliefs. Thus to decide this case, the Court need determine only whether the Free Exercise Clause—in light of its text, history, and structure—provides protection from neutral and generally applicable laws for individuals like Ricks. Indeed, by embracing text, history, and structure as a guide to deciding Free Exercise claims, the Court need not replace *Smith*'s "categorical" standard with an "equally categorical" standard but instead with a *process* for judges to consider Free Exercise claims as they arise. *Fulton*, slip op. at 1-2 (Barrett, J., concurring). Looking to text, structure, and historical practices and understandings allows courts to decide Free Exercise claims without looking for a magic bullet.

Moreover, because the case arises on a motion to dismiss, the Court would not need to decide what level of scrutiny is required for claimants like Ricks. If at least *some* level of heightened scrutiny is required, the decision would be reversed. Plenary review would thus allow the Court to address the question it found worthy of *certiorari* in *Fulton* but did not reach.

In the alternative, should the Court deem plenary review inadvisable, it should grant the petition, vacate

the decision below, and remand for reconsideration in light of *Fulton*, *Diocese of Brooklyn*, and *Tandon*.

ARGUMENT

1. *Fulton* only underscores the need for this Court to revisit *Smith*, and this case presents an ideal vehicle to do so. Idaho law makes it illegal for petitioner George Ricks to work as a contractor unless he violates his religious beliefs by submitting his Social Security number to the State. Pet. 7-9. That requirement burdens Ricks's free exercise of religion by requiring him to choose between his livelihood and his faith. Yet the Idaho courts—citing *Smith*—denied relief, based on nothing more than the fact that would-be contractors with no religious compunctions were also required to submit their numbers.

Results like this explain why this Court considered in *Fulton* whether *Smith* "should be revisited." Pet. i. In *Fulton*, however, the Court ultimately found it unnecessary to decide that question, because Philadelphia's "contractual non-discrimination requirement * * * [did] not qualify as generally applicable" and "the City's actions [were] therefore examined under the strictest scrutiny regardless of *Smith*." Slip op. at 13.

Fulton improves the landscape for free exercise claimants by clarifying when *Smith* does not apply. But it doesn't solve the *Smith* problem. *Fulton* makes clear that any "mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." Slip op. at 10. But, under *Fulton*, it remains the case that a law that is *truly* neutral and generally applicable escapes anything more than rational-basis review under the

First Amendment. Here, for example, the Idaho Supreme Court upheld the law because—on its face—there is no exception from its mandate that individuals must provide their Social Security number to register as a general contractor, even though there is an easy workaround to avert the otherwise dire consequences for Ricks. And that is the fundamental problem with *Smith*—the First Amendment by its terms is just as concerned with incidental prohibitions on free exercise as it is with targeted ones. Pet. 15-21.

Unfortunately, governments sometimes are willing simply to bite the bullet and impose broad rules arguably insulated by *Smith* in order to mandate conduct deeply antithetical to traditional religious beliefs. In 2017, for example, New York began requiring that almost all employers pay for their employees to obtain abortions; last year New York courts upheld the requirement against Free Exercise challenge on the ground that it is a neutral law of general applicability. See *Roman Catholic Diocese of Albany* v. *Vullo*, 185 A.D.3d 11 (N.Y. App. Div. 2020), cert pet. docketed, No. 20-1501 (Apr. 27, 2021) (relying on *Catholic Charities of Diocese of Albany* v. *Serio*, 7 N.Y.3d 510, 522 (N.Y. 2006), cert. denied, 552 U.S. 816 (2007)). Because of *Smith*, then, the Catholic Church may soon have to reconsider its millennia-old teaching against abortion, stop providing insurance for its employees (and thereby incur other penalties), or cease carrying out its mission in the Nation's fourth-largest State. It's hard to think of a clearer demonstration of the fact that one of *Smith*'s core premises—that lawmakers "can be expected to be solicitous of" religious freedom—is wrong now, if ever it was right. 490 U.S. 872, 890 (1990).

2. This case is the ideal vehicle for addressing *Smith*'s continued vitality. As the petition explains, although Idaho law permits applicants for many other licenses to avoid supplying any Social Security number if they lack one, no one can become a registered contractor without submitting their number. Pet. 8-9. The case thus isolates the key question—whether that requirement should trigger something more than rational basis scrutiny by virtue of its direct penalty on a countervailing religious exercise.

Moreover, this case perfectly illustrates the governmental arbitrariness and callousness toward religious liberty fostered by *Smith*. No state "interest[] of the highest order," *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), requires Ricks to give the State a number it almost certainly already has access to through other means. No identifiable third parties would suffer unless he does. The only reason the State has insisted on crushing Ricks's free exercise is its pursuit of administrative convenience—the very interest rejected in a factually similar case decided just before *Smith*. *Bowen* v. *Roy*, 476 U.S. 693, 726, 730-731 (1986).

Ricks also seeks a very narrow exemption—the right to use a form of identification other than his Social Security number for purposes of obtaining employment. He does not seek an exemption from paying any tax, Social Security or otherwise. Cf. *United States* v. *Lee*, 455 U.S. 252 (1982). And he does not seek to stop the State from using his Social Security number for its own purposes. Cf. *Bowen*, 476 U.S. at 699-701. He seeks only an exemption from the requirement that *he* provide his Social Security number to the State to register as a contractor.

Further, this case poses a particularly acute injustice. Ricks has now been prevented from engaging in his chosen profession for seven years, from his early *pro se* efforts to the year-and-a-half this petition has been pending. And what justifies this severe imposition? The simple unwillingness of a state government to provide an easy accommodation if no court will compel it. Whatever the hard questions posed by heightened scrutiny in other cases, it cannot be that the Free Exercise Clause does not protect the simple freedom to exercise a minority religious belief that thwarts no significant government purposes and poses no harm to others. If the Court agrees, it should grant this petition now, rather than trigger an unnecessary multi-year process of remand and second petition.

Finally, plenary review in this appeal would allow the Court to address *Smith*'s continued validity in a controlled fashion. Using the text, history, and structure of the First Amendment as a guide, the Court can decide whether *Smith* is valid with respect to a discrete subset of Free Exercise claims—*individuals* facing *direct burdens* on their ability to work. See, *e.g.*, *Fulton*, slip op. at 2 (Barrett, J., concurring) (contrasting "entities" and "individuals" and "indirect and direct burdens"). And given the posture of this appeal, the Court would not have to decide "[w]hat forms of scrutiny should apply[.]" *Ibid.* But the Court could also decide *Smith*'s validity with respect to a broader set of claims should that appear appropriate. This case is thus a particularly useful vehicle because it would allow the Court to broaden or narrow the scope of decision as the Court deems fit.

3. Alternatively, if the Court does not set the case for plenary review, it should grant the petition, vacate

the decision below, and remand for further consideration in light of *Fulton*, *Tandon*, and *Diocese of Brooklyn*.

CONCLUSION

The Court should grant the petition. The Court should further set the case for plenary review; if it does not, it should vacate the decision below and remand for further consideration in light of *Fulton*, *Tandon*, and *Diocese of Brooklyn*.

Respectfully submitted.

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JUNE 2021