No. 20-1501

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, et al.
Petitioners,

v.

LINDA A. LACEWELL, Superintendent, New York Department of Financial Services, et al.
Respondents.

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

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 the pre-existing 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 provides an accommodation for "religious employers," defined to include houses of worship and similar organizations, that permits such employers to obtain health insurance policies that exclude coverage for these services. The questions presented are:

1. Whether New York's accommodation for religious employers prevents the regulation concerning insurance coverage for medically necessary abortion services from qualifying as neutral and generally applicable for purposes of analysis under the Free Exercise Clause of the First Amendment to the U.S. Constitution.

2. Whether the Court should review petitioners' contention that the requirement to cover medically necessary abortion services interferes with the autonomy of religious organizations, where no such issue was pressed or passed on below.

3. Whether the Court should revisit *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in the event that case permits the State to require petitioners to provide coverage for medically necessary abortion services if they choose

to purchase health insurance policies for their employees and do not qualify for the accommodation for "religious employers."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Laws

Laws **Page(s)**

Regulations

Miscellaneous Authorities

INTRODUCTION

New York has long had a regulation prohibiting health insurance policies issued in the State from excluding coverage based on type of illness, accident, treatment or medical condition. The nonexclusion regulation serves the important purpose of standardizing and simplifying coverage so that consumers can understand and make informed comparisons among policies. In 2017, the New York State Superintendent of Financial Services promulgated a new regulation to make explicit what was implicit in the pre-existing nonexclusion regulation: health insurance policies issued in New York that cover medically necessary hospital, surgical, or medical expenses cannot exclude coverage for medically necessary abortion services. The new regulation provides an express accommodation for "religious employers," defined to include houses of worship and similar organizations, permitting such employers to request health insurance policies that exclude coverage for these services.

The definition of "religious employers" mirrors the one that the New York Legislature used fifteen years earlier for the religious accommodation provided in the Women's Health and Wellness Act,[1] a statute that required health insurance policies providing prescription drug coverage to include coverage for contraceptive drugs and devices. In adopting the same definition for purposes of the regulatory accommodation for abortion services at issue here, the Superintendent was guided by the Legislature's previously expressed policy judg-

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[1] Ch. 554, 2002 N.Y. Laws 3458 (codified in part at N.Y. Insurance Law §§ 3221(l)(16)(E)(1), 4303(cc)(5)(A)).

ment that in the area of reproductive health care a limited accommodation provides the appropriate balance between the important objectives of ensuring access to reproductive health and fostering equality in health care, on one hand, and accommodating religious beliefs, on the other.

Petitioners are religious and religiously affiliated organizations that assert they do not all satisfy the criteria for the "religious employer" accommodation. Petitioners claim that the 2017 regulation violates their rights under the Free Exercise Clause because it requires them to provide insurance coverage for, and thereby fund, certain abortion services, in violation of the tenets of their faith. Petitioners acknowledge the regulation's accommodation for "religious employers," but argue that by providing an accommodation that does not extend to all organizations asserting a religious objection, the Superintendent has created a coverage requirement that is not neutral or generally applicable, as required by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), to avoid review under strict scrutiny. Petitioners additionally argue that the regulation interferes with the autonomy of religious organizations that are not accommodated, in violation of their rights under the Religion Clauses. Finally, petitioners argue that, to the extent this Court's decision in *Smith* shields the regulation from strict scrutiny, the Court should revisit that precedent.

Preliminarily, petitioners mistakenly assert, Pet. 1, 31, 33, that the 2017 regulation requires them to provide health insurance for the designated abortion services, and thereby fund those services. First, the requirements of the challenged regulation apply only to insur-

ance companies issuing comprehensive health insurance in New York; the 2017 regulation places no requirements on employers. Further, nothing in New York law requires employers to provide health insurance. Those petitioners who feel compelled to provide health insurance by what they see as a "moral obligation," Pet. 11, or by the federal penalties imposed on "large employers" who fail to provide health insurance, can avoid the coverage requirements of New York law by choosing to create a self-insured plan for their employees, as authorized by 29 U.S.C. §§ 1001–1461, commonly known as ERISA. Such plans are not subject to regulations of the Department of Financial Services. Even if the challenged regulation placed any requirements on the petitioners—which it does not—the record contains no evidence that policies that include the subject coverage would cost more than those that do not. The record thus contains no evidence that by purchasing policies that include the subject coverage, a purchaser funds, even indirectly, medically necessary abortion services.

In any event, none of petitioners' arguments warrants this Court's review. *First*, the judgment at issue does not implicate any split of authority, notwithstanding petitioners' contrary claim. The court below held that when the State provided a religious accommodation to an otherwise neutral and generally applicable law, it did not thereby undermine the neutrality and general applicability of that law and trigger strict scrutiny. There is no conflict on that issue. *Second,* certiorari is not warranted to review petitioners' religious-autonomy claim, because no such claim was pressed or passed on below. *Third*, the decision challenged here was correctly decided under the Court's

governing precedent. And the decision provides a poor vehicle to revisit *Smith*.

STATEMENT

A. Statutory and Regulatory Background

This case presents a challenge to a 2017 regulation promulgated by the New York State Superintendent of Financial Services governing health insurance policies issued in New York. The regulation places no requirements on employers; it affects them only indirectly if they choose to provide their employees with health insurance policies issued in the State. New York law does not require employers in the State to offer health insurance that is covered by the regulation. First, state law does not require employers to provide health coverage at all. And 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. Second, employers may choose to self-insure the health coverage they provide to employees through an ERISA plan. When they do that, the health insurance they offer is not subject to state regulation, *see* 29 U.S.C. § 1144(a), (b)(2)(B), and they satisfy federal requirements and thus do not face federal penalties for large employers who do not provide employee health insurance.[2]

When New York employers provide health insurance to their employees by purchasing insurance policies, those policies are subject to the Superintendent's

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

approval, pursuant to N.Y. Insurance Law § 3201. Section 3217(a) directs the Superintendent to issue regulations establishing "minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies." To that end, 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.[3] 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* N.Y. Insurance Law § 3217(b)(1); Bill Jacket to N.Y. Sess. L. 1971, c. 554, at 4 (internet).

In 2017, the Superintendent promulgated the regulation at issue here to make explicit what was implicit in the pre-existing nonexclusion regulation: policies that provide hospital, surgical, or medical expense coverage may not "limit or exclude coverage for abortions that are medically necessary."[4] 11 N.Y.C.R.R. § 52.16(o)(1) (at Pet.App. 161a); *see also id.* § 52.1 (p)(1) (explaining that the pre-existing nonexclusion rule

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[3] See *infra* at 14-17 (discussing these permitted exclusions and petitioners' failure to raise a free exercise claim based on them).

[4] 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 Department. It is a determination "regularly made in the 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. 148a.

already prohibited limitation or exclusion of abortion coverage in such policies) (at Pet.App. 159a). 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. 150a-151a.

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. 161a). 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 26 U.S.C. § 6033(a)(3)(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. 160a). That definition is the same one used by the New York Legislature for purposes of the religious accommodation in the Women's Health and Wellness Act, a statute that required health insurance policies providing prescription drug coverage to include coverage for contraceptive drugs and devices. *See* Pet.App. 146a, 157a-158a. In adopting the same definition, the Superintendent embraced the Legislature's policy judgment that a limited accommodation provided an appropriate balance between the interests of religious employers in the State and the interests of employees in access to essential reproductive health

care and equality in health care between the sexes. Pet.App. 146a, 149a, 151a. 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 the employer's religious beliefs. Pet.App. 147a, 151a.

A religious organization invokes the accommodation by certifying to its insurer that it is a "religious employer," as defined. 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 religious employer. 11 N.Y.C.R.R. § 52.16(o)(2)(i), (ii) (at Pet.App. 161a-162a). The record contains no evidence that policies that include the subject coverage cost more than those that do not, and studies suggest that the cost of health insurance is not affected by the inclusion of coverage for medically necessary abortion services.[5] Insurers are required to

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[5] For example, a 2012 study found that the price for a separate abortion benefit sold on the healthcare exchange pursuant to the requirements of the federal Affordable Care Act would be between 11 and 33 cents per member per month when calculated, as required by federal law, without accounting for any potential cost savings from avoided costs for coverage of prenatal and delivery services. *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. and Social Change 323, 384-85 (2012). The Department advises, however, that the cost of covering abortion services as part of a health plan that provides hospital, surgical, or medical expense coverage, if calculated to account for such cost savings, would be even lower, such that

notify the Superintendent when they issue a policy under the accommodation. *Id.* § 52.16(o)(2)(iii) (at Pet. App. 162a).

B. State Court Proceedings

Petitioners include dioceses, churches, a religious order of women, and religiously affiliated service organizations that provide social or community services, all of which object to providing coverage for medically necessary abortions.[6] Pet.App. 81a-87a, 95a-97a. They filed this action in state court to challenge the 2017 regulation.[7] In addition to raising claims not pursued here, petitioners argued that the regulation violates their rights under the Free Exercise Clause because the religious accommodation does not extend to all religious organizations, and thus "target[s] the practices of certain religious employers for discriminatory treatment." Pet. App. 121a.

The complaint alleged no facts demonstrating either that any petitioner fails to satisfy the requirements for a "religious employer," within the meaning of the 2017 regulation, or that any petitioner requested and was

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including coverage for abortion services as part of such a health plan is cost-neutral.

[6] Another petitioner is an employee of an organizational petitioner, Pet.App. 86a, and one plaintiff below, Murnane Building Contractors, did not join the petition to this Court.

[7] Petitioners had earlier filed an action in state court challenging the terms of a standard health insurance policy template issued by the Department that, in accordance with the pre-existing 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 regulation, the two actions were joined. Pet.App, 3a-5a.

denied an exempt policy by an insurer.[8] Indeed, some of the petitioners likely satisfy the requirements for a "religious employer"[9]—for example, the diocese, the religious order, and the churches.[10]

The state trial court granted the respondents' motion for summary judgment dismissing the complaint, Pet.App. 15a-28a, and the state intermediate appellate court (the Appellate Division) affirmed, Pet. App. 1a-14a. The Appellate Division held that petitioners' claims under the Free Exercise Clause were governed by the decision of the New York Court of Appeals in *Catholic Charities of Diocese of Albany v. Serio* (*Serio*), 7 N.Y.3d 510 (2006), *cert. denied,* 552 U.S. 816 (2007). *See* Pet.App. 7a-8a. In *Serio,* New York's highest court rejected claims under the Free Exercise Clause challenging an analogous requirement that (a) required health insurance policies issued in the State to cover contraceptive drugs and devices if prescription drug coverage was provided, and (b) provided an accommodation for qualifying "religious employers," as defined. *See* 7 N.Y.3d at 522-24.

In particular, the Appellate Division relied on *Serio*'s conclusion that the contraceptive-coverage statute at

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[8] While two petitioners requested policies that excluded abortion coverage in 2015, N.Y. App. Div. Record 392-395, 430, that was before the 2017 regulation was promulgated, and thus before the State provided an accommodation for religious employers.

[9] Other petitioners may not satisfy those requirements; for that reason respondents questioned but did not affirmatively challenge petitioners' standing in the courts below.

[10] The three petitioner churches may employ and serve *some* individuals who do not share their tenets through their education and day-care programs and community or human service ministries, Pet. 9-10; Pet.App. 85a, but these churches may nonetheless *primarily* employ and serve individuals who do share their tenets.

issue in that case was "a neutral directive" that was "to be uniformly applied without regard to religious belief or practice, except for those who qualified for a narrowly tailored religious exemption." Pet.App. 7a-8a. The Appellate Division held that the same analysis applied to the challenged regulation because it too is "a neutral regulation that treats, in terms of insurance coverage, medically necessary abortions the same as any other medically necessary procedure," and, as *Serio* held, the regulatory "distinction between qualifying 'religious employers' and other religious entities for purposes of the exemption is not a denominational classification." Pet.App. 8a & n.7.

The New York Court of Appeals dismissed, on its own motion, petitioners' appeal as of right, finding no substantial constitutional question directly involved, and in the same order, denied petitioners' motion for discretionary leave to appeal. Pet.App. 29a.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Implicate a Split in Authority.

The ruling at issue[11] does not implicate any split in authority, as petitioners argue. The state court held that the Free Exercise Clause is not violated where a valid and neutral law of general applicability affirmatively accommodates certain religious organizations. Petitioners cite no case that conflicts with this holding. And understandably so, as a denominationally neutral religious accommodation does not disfavor religion.

A. This case does not implicate a split in authority on the question whether secular exemptions or mechanisms for individualized discretionary exemptions defeat a law's general applicability.

1. Petitioners argue that the ruling at issue deepens a purported split in authority on the question whether any kind of exemption undermines a law's

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[11] There is some question as to whether certiorari is properly sought in this case to the state intermediate appellate court or to the New York Court of Appeals, which in a single order denied leave to appeal as a matter of discretion and also dismissed petitioners' appeal as of right "on the ground that no substantial constitutional question is directly involved." Pet.App. 29a. This Court has sometimes treated a dismissal for lack of substantial constitutional question as a judgment on the merits subject to this Court's review, *see R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 138-39 (1986), and sometimes not, *see Santosky v. Kramer*, 455 U.S. 745 (1982), but any such uncertainty is immaterial here, because the petition is timely no matter which court's ruling is deemed the proper subject of the petition here, and the Court has the power to substitute the correct ruling, if appropriate. *See Foster v. Chatman*, 578 U.S. 1023, 136 S. Ct. 1737, 1746 n.2 (2016).

general applicability for purposes of applying the test outlined in *Smith*. *See* Pet. 16-20. But the purported division of authority petitioners identify concerns the question whether *secular* exemptions, or mechanisms for individualized *discretionary* exemptions, undermine a law's generally applicability for purposes of applying the *Smith* test. That arguable split of authority has no bearing here, where the purported exemption at issue is an accommodation for religious institutions.

For example, as petitioners point out, the Sixth and Tenth Circuits have held that a regulation burdening religion was not "generally applicable" where secular exemptions were widely available. In *Monclova Christian Academy v. Toledo-Lucas County Health Dept.*, 984 F.3d 477, 482 (6th Cir. 2020), the court held that an emergency health resolution that closed all schools, including the plaintiff religious schools, to combat the spread of COVID-19 was not generally applicable because the health department allowed gyms, tanning salons, office buildings, and a casino to remain open. In *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004), the court held that the plaintiff raised a question of fact whether a university department's curriculum requirements were generally applicable in light of record evidence that the department had a system to authorize individualized exemptions from those requirements.

In contrast, the Ninth Circuit held in *Stormans. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016), that pharmacy delivery rules that prohibited a pharmacy from refusing to deliver a drug for religiously motivated reasons were generally applicable, even though the rules allowed refusals for certain secular reasons and despite language in the

rules that effectively permitted additional individualized exemptions.

But this Court has already resolved any tension among these cases. In *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), the Court held that the "inclusion of a formal system of entirely discretionary exceptions" renders a government policy "not generally applicable." *Id.* at 1878. And in its per curiam order in *Tandon,* the Court ruled that a government regulation is "not neutral and generally applicable" if it treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam)). The Court explained that comparability between secular and religious activity "must be judged against the asserted government interest that justifies the regulation at issue" and "is concerned with the risks various activities pose." *Tandon*, 141 S. Ct. at 1296. Thus, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Both decisions reflect the principle that laws that disfavor religion must be narrowly tailored to serve a compelling government interest. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543, 546 (1983).

These decisions not only resolve the purported split that petitioners seek to invoke, but also do not address the question presented by this petition, namely whether general applicability is defeated by a religious accommodation. And the rationale of *Fulton* and *Tandon* sheds no light on that question. Those cases were animated by a concern about laws that disfavor religion, a concern

that is not presented by the accommodation for qualifying religious entities at issue here. That accommodation does not implicate a law's "general applicability" because it does not disfavor religion.

2. This case also does not present an appropriate vehicle to examine further the effect of a law's secular exemptions on its general applicability. While petitioners now appear to suggest that the 2017 regulation implicates secular exemptions that could defeat its general applicability, *see* Pet. 6, 24, no such claim was pressed or passed upon below. Petitioners never cited to, or based argument on, any purported secular exemptions in their complaint, motion papers, or appellate briefs.[12] And the courts below did not address the effect of any such secular exemptions.[13] The only exemption that petitioners relied on in claiming a violation of their

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[12] In suggesting otherwise, petitioners misleadingly cherry-pick two sentences from the complaint, one from the background section and one describing an equal-protection claim not pursued here, but neither referring to secular organizations or activities. *See* Pet. 12 (citing Pet.App. 98a, 125a). And even if the complaint had raised a claim based on secular exemptions, which it did not, any such claim was abandoned when petitioners failed to pursue it in their motion papers or appellate briefs. *See, e.g., Martin Assoc., Inc. v. Illinois Natl. Ins. Co.*, 188 A.D.3d 572, 573 (1st Dep't 2020) (finding claim abandoned for failure to raise in opposition to motion to dismiss); *Kammerer v. Mercado,* 195 A.D.3d 1513, 1514 (4th Dep't 2021) (finding claims abandoned for failure to address them on appeal of order granting defendant summary judgment).

[13] Petitioners imply that the court below adhered to New York precedent addressing this issue, *see* Pet. 17, but they are mistaken. The precedent they quote says that the law at issue was neutral, notwithstanding that some *religious* organizations were accommodated; it does not, as petitioners suggest, address the effect of secular exemptions on the law's general applicability. *See Serio,* 7 N.Y.3d at 522.

right to free exercise (or any other right) was the regulation's accommodation for religious employers—an exemption they sought to expand. *See* Pet.App. 119a-121a.

Because petitioners did not rely on any allegedly comparable secular exemptions in challenging the general applicability of the 2017 regulation, the State had no occasion to demonstrate that the subject exemptions are not comparable to the expanded religious accommodation petitioners seek. Given the opportunity, the State would demonstrate that the purported secular exemptions are not comparable to that requested expansion, because—as explained below—an expanded religious accommodation based on an employer's objection would undermine the State's purpose, while the purported secular exceptions do not. *See Fulton*, 141 S. Ct. at 1877.

The 2017 regulation makes explicit what was already required by the pre-existing nonexclusion regulation set forth in 11 N.Y.C.R.R. § 52.16(c), which prohibits insurance policies issued in the State from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. The purpose of that regulation is to standardize coverage so that consumers can understand and make informed comparisons among policies. Consumers thus need not examine the fine print of potentially voluminous policy documentation to determine what is or is not covered. Allowing employers not covered by the regulatory accommodation to exclude medically necessary abortions or any other services from their policies would leave consumers uncertain about the scope of coverage and potentially without coverage for objected-to conditions or treatments, and would thus undermine the purpose of the nonexclusion regulation.

The concern for consumer understanding is not implicated by any of the permitted exclusions provided in 11 N.Y.C.R.R. § 52.16(c) because the regulation itself notifies consumers of the conditions or treatments that may be excluded from coverage. Further, those exclusions generally serve one of three purposes, none of which is implicated by the expanded religious accommodation petitioners seek. Some of the permitted exclusions avoid duplicating coverage that is available through other types of insurance or insurance programs. For example, separate coverage for routine dental care and treatment and eyeglasses is widely available for purchase, and treatments and conditions covered by workers' compensation programs, employer's liability insurance, and no-fault automobile insurance are excluded because coverage is already separately available. Some treatments and conditions may be excluded because they would be cost prohibitive, such as illnesses, accidents, treatments or medical conditions arising out of acts of war, or because they would not be readily amenable to cost-calculation, such as treatments outside the United States, Canada, and Mexico. And still others do not involve the coverage of insurance risks, but instead involve coverage based on consumer choices, such as cosmetic surgery.[14] All of these permitted exclusions serve specific insurance purposes necessary to protect consumers and ensure the proper functioning of the insurance market. In

[14] A number of the permitted regulatory exclusions have been superseded by statute and are now required under certain conditions. These include maternity care, N.Y. Insurance Law §§ 3216(i)(10), 3221(k)(5), 4303(c)(1), chiropractic care, N.Y. Insurance Law §§ 3216(i)(21)(c), 3221(k)(11), 4303(y), and mental health services, § 3216(i)(30), (31); *id.* § 3221(l)(5), (6), (7); *id.* § 4303(g), (k), (*l*).

contrast, an exclusion based on an employer's religious objection is not comparable to those other exclusions because it does not serve any purpose relating to these insurance regulation concerns.

Because these issues were not raised or addressed below, this Court's "longstanding rule" counsels against considering them now. *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *accord Howell v. Mississippi*, 543 U.S. 440, 445-46 (2005) (dismissing the writ of certiorari as improvidently granted on this ground); *see also Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019) (declining to review reformulated question that was not argued or addressed in the state courts). Indeed, the Court's traditional rule has particular force when the petitioner seeks to raise for the first time here a challenge to a state court decision upholding the validity of a state enactment. *See generally McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Certiorari should thus not be granted to examine whether the Court's recent rulings on secular exemptions affect the validity of the challenged regulation.

B. There is no split in authority on the question whether a law that accommodates houses of worship and not other religious institutions impermissibly discriminates against religion.

Contrary to petitioners' argument, Pet. 21-22, there is no split in authority on the question whether laws that accommodate houses of worship and similar organizations, but not other religious organizations, impermissibly discriminate against religion and are

therefore subject to strict scrutiny.[15] Petitioners claim that two decisions—*Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir.), *rehearing denied*, 975 F.3d 13 (D.C. Cir. 2020), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)—conflict with the ruling in this case, the *Serio* precedent on which that ruling relied, and *Catholic Charities of Sacramento v. Superior Ct.*, 32 Cal. 4th 527, *cert. denied*, 543 U.S. 816 (2004), which upheld an accommodation for "religious employers," defined as here, from that State's contraceptive coverage requirement. But *Duquesne* and *Weaver* are readily reconciled with these New York and California rulings.

1. The decision in *Duquesne* rests entirely, and the decision in *Weaver* rests alternatively, on findings that the laws at issue required the government to become excessively entangled in the affairs of religious institutions—an issue that was not addressed by the state court here, the state court precedent on which it was based (*Serio*), or *Catholic Charities of Sacramento*. Neither decision thus demonstrates any court split warranting certiorari.

In *Duquesne,* the D.C. Circuit invalidated the second part of a two-step test used by the National Labor Rela-

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[15] To the extent petitioners intended to identify a split involving the standard to be applied to a law that "differentiates between religions," Pet. 21 (argument heading), the Court long ago resolved that question. Where a law grants "a denominational preference," Free Exercise and Establishment Clause principles require that the law be treated "as suspect" and subjected to "strict scrutiny in adjudging its constitutionality." *Larson v. Valente,* 456 U.S. 228 (1982). The challenged regulation, however, is denominationally neutral, for the reasons we explain, *infra* at 28-30, and as the Appellate Division held, Pet.App. 8a n.7.

tions Board to determine whether it could exercise jurisdiction over collective bargaining violations asserted by faculty at a religious university. Under the test, the Board 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 specific position at issue—here, adjunct faculty—as involved in establishing or maintaining the university's "religious educational environment." 947 F.3d at 831. The court concluded that this additional criterion "impermissibly intrudes into religious matters," by requiring the Board to decide "what counts as a 'religious role' or a 'religious function.'" *Id.* at 834-35. Making that decision would lead to an "intrusive inquiry," with the Board "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 Board's test impermissibly discriminated among religious institutions. Petitioners rely on the court's statement that the Board "'had impermissibly sided with a particular view of religious functions,'" under which "'[i]ndoctrination is sufficiently religious, but supporting religious goals is not.'" Pet. 22 (quoting *Duquesne*, 947 F.3d at 835). But that reference was intended merely to illustrate the court's point that the Board had improperly intruded into religious matters by adopting a test requiring it to examine whether the adjunct faculty performed a sufficiently religious role. *See Duquesne,* 947 F.3d at 835.

Weaver similarly addressed an entanglement issue. At issue was a state program providing scholarships to

eligible students attending any accredited college in the State—public or private, secular or religious—except for those institutions the State deemed "pervasively sectarian." *Weaver*, 534 F.3d at 1250. To determine whether a school was "pervasively sectarian," state officials were required to examine, among other factors, whether school policies adhered "too closely to religious doctrine," whether students and faculty shared a single "religious persuasion," and whether the contents of college theology courses tended to "indoctrinate." *Id.* The court held that the State's "pervasively sectarian" inquiry test was unconstitutional because it entailed intrusive inquiry into, and thus excessive entanglement in, religious matters. *Id*. at 1261-66.

Neither of these holdings conflicts with the ruling at issue here, the New York precedent on which it was based or the comparable California precedent, none of which addressed a claim of excessive entanglement. Indeed, the Appellate Division decision in *Serio* stated expressly that the issue of excessive entanglement was not properly before the court because no plaintiff had even sought the religious accommodation offered, let alone been subject to any allegedly intrusive government inquiry. *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 131 (3d Dep't 2006), *aff'd*, 7 N.Y.3d 510; *see also Catholic Charities of Sacramento*, 32 Cal. 4th at 547 (same).

The same is true of petitioners here. Petitioners brought suit without seeking to invoke the religious accommodation offered by certifying their status as qualifying "religious employers" to their insurers. See *supra* at 8. The record thus provides no information on what steps, if any, the government might take if it had reason to question an insurer's reliance on an employer's certification.

2. Petitioners additionally rely on an alternative holding in *Weaver* for their claim that there is a split of authority between *Weaver* and the decision in this case, but an alternative holding is a weak and uncertain basis for finding a split. *See Hillman v. Maretta*, 569 U.S. 483, 497 (2013) (alternative grounds to support the judgment are "not necessary components of the holdings"). *Weaver* faulted the state scholarship program not only for requiring excessive state entanglement with religion, but also for discriminating against religious institutions on the basis of "religiosity," 534 F.3d at 1259, a form of discrimination that the court equated to denominational discrimination, *id.* at 1259-60. That analytical leap has not been broadly followed,[16] and for good reason. First, *Weaver* notes that it might be permissible to distinguish among religious institutions in some circumstances. *Id.* at 1261. Second, *Weaver* implicitly recognizes the weakness of its finding of discrimination among religions by providing an alternative independent rationale for invalidating the program on the basis of excessive entanglement.

Weaver's finding of discrimination is in any event not applicable here. In *Weaver,* the distinction between "pervasively sectarian" and other religiously affiliated schools was invoked to deny students at the former "the

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[16] Petitioners cite only a single concurring opinion following this aspect of *Weaver*'s analysis. *See* Pet. 22 (citing *A.H. v. French*, 985 F.3d 165, 186 (2d Cir. 2021) (Menashi, concurring)). While research reveals one other concurring opinion citing the analysis, *see Spencer v. World Vision, Inc.*, 633 F.3d 723, 728-29 (9th Cir.) (O'Scanlain, concurring), *cert. denied*, 565 U.S. 816 (2011), that opinion was later criticized by the same court, *see Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016), *rev'd on other grounds sub nom.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

equal benefits of public support for higher education" available to students who attend other than pervasively sectarian schools. 534 F.3d at 1264. Here, in contrast, the distinction among types of religiously affiliated institutions is invoked not to deny an otherwise generally available public benefit, but to grant an accommodation to some from the generally applicable requirement that is imposed equally on all others. *See Serio*, 7 N.Y.3d at 522 (explaining this point); *Catholic Charities of Sacramento*, 32 Cal. 4th at 551-52 (same). The specific distinction drawn here between houses of worship and other religious organizations is "a long-recognized and permissible distinction" for purposes of granting a religious accommodation. *Priests for Life v. U.S. Health and Human Servs.*, 772 F.3d 229, 272 (D.C. Cir. 2014) (specifically distinguishing *Weaver* as a case involving a denominational distinction), *vacated on other grounds, Zubik v. Burwell,* 136 S. Ct. 1557 (2016). See cases cited *infra* at 30.

For all these reasons *Weaver*'s alternative holding about pervasively sectarian schools does not establish a split of authority with the instant case, sufficient to warrant this Court's review.

II. Certiorari Should Not Be Granted to Address a Religious-Autonomy Claim That Was Neither Pressed nor Passed on Below.

This case does not present an appropriate vehicle to address petitioners' claim that the 2017 regulation interferes with petitioners' religious autonomy because no such claim was pressed or passed on below. Indeed, the impropriety of this Court's review of an unpreserved claim seems especially glaring in a case like this one, where petitioners seek a significant expansion of existing precedent.

Under the church-autonomy doctrine, the Court has protected religious organizations from direct interference in disputes over the control of church property and the appointment of church leadership, *see Serbian E. Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U. S. 696 (1976); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952), and control over the employment of individuals who play a "'role in conveying the Church's message and carrying out its mission,'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2062 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012)).

In each of these cases, the Court invalidated government action that directly interfered with church governance or matters of church doctrine. In *Kedroff*, for example, the Court invalidated a statute that purported to transfer control of a New York church from Russian church authorities to American church authorities, and thus sought to regulate directly the operation and administration of a religious body. 344 U.S. at 107. The Court emphasized that the statute directly intruded on matters of church governance, explaining that "[b]y fiat it displaces one church administrator with another." *Id.* at 119. The interference with church governance was likewise direct in *Serbian Eastern Orthodox Diocese*, 426 U.S. 696, where the state court sought to resolve a dispute over whether a bishop had been properly removed by ecclesiastical authorities. The Court held that the state court had improperly interfered with internal church operations with its ruling that the removal proceedings were deficient. *Id.* at 718-20.

And in *Hosanna-Tabor,* the Court recognized a "ministerial exception" that precludes certain key employees of a religious organization from pursuing an employment discrimination claim against their employer. The exception was intended to prevent direct interference by secular authorities into a matter of church governance, namely the selection of those "who will personify its beliefs." 565 U.S. at 188. The Court explained that the exception was warranted to protect the "freedom of a religious organization to select its own ministers." *Id.*

Existing precedent on the protection of church autonomy thus stays the government's hand from reaching into matters of church governance by adjudicating disputes between church factions or between a religious institution and its ministers. The claim that petitioners press here, in contrast, seeks a significant expansion of the Court's church-autonomy doctrine. Petitioners argue that the limited accommodation they challenge could potentially influence the internal decisions that religious institutions make regarding whom they hire and serve.[17] *See* Pet. 29-30. But that claim has no reasonable stopping point: many government actions have the potential to influence the decisions of institutions, for example by making some actions more costly

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[17] Amici religious organizations led by the Church of Jesus Christ of Latter-Day Saints raise a different religious-autonomy claim, Br. 6-12, 14, which would likewise require an expansion of this Court's precedents. Amici argue, at 7, that the regulation invades the sphere of internal church management by requiring religious organizations that choose to purchase health insurance policies, but oppose abortion, to provide coverage of medically necessary abortion services. The Court has not applied the religious-autonomy doctrine to prevent an indirect effect of a generally applicable regulatory requirement.

and others less so. The Constitution does not protect religious institutions from the mere possibility that government action may influence their decisions.

In any event, petitioners raised no such claim below. Petitioners claim otherwise, Pet. 12, but they rely on paragraphs of the complaint alleging that the religious accommodation at issue constitutes impermissible "religious gerrymandering," in violation of the Establishment Clause, *see* Pet.App. 117a, and "forced association" with abortion supporters and discriminatory "target[ing]" of certain religious institutions, in violation of their hybrid rights under various provisions of the federal constitution, *see* Pet.App. 127a-131a, not interference with religious autonomy.

Nor did petitioners assert any such claim in their motion papers in the trial court or the Appellate Division.[18] Because no claim alleging unconstitutional interference with religious autonomy was pressed or passed upon below, review of that claim by this Court is inappropriate. *See, e.g., Heath*, 474 U.S. at 87; *Howell v. Mississippi*, 543 U.S. at 445-46; *McGoldrick*, 309 U.S. at 434. And it is especially inappropriate to consider a claim seeking to expand existing doctrine, in a case where the parties have not had "the opportunity to test

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[18] Petitioners did make fleeting references to "institutional autonomy" and to "principles of autonomy" in their opening brief to the Appellate Division (pp. 19, 61), but they properly have not claimed that those references were sufficient to place their religious-autonomy claim before the state courts, which thus did not address it. *See, e.g., Dunn v. Northgate Ford, Inc.*, 16 A.D.3d 875, 878 (3d Dep't 2005) (mere reference to statute in brief insufficient to raise claim); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (declining to address federal constitutional claim where petitioner had not cited federal constitution as source of claimed right in state court).

and refine their positions before reaching this Court," *Adams v. Robertson*, 520 U.S. 83, 91 (1997), and the state courts have not had the opportunity to consider the claim that the state regulation infringes the federal Constitution in this manner, *McGoldrick*, 309 U.S. at 434.

III. The Case Was Properly Decided.

The issue that petitioners pressed below is whether the State may create an accommodation for some religious entities and not others without undermining a neutral and generally applicable regulation. That issue was correctly decided under governing precedent.

The Free Exercise Clause of the First Amendment to the U.S. Constitution permits evenhanded enforcement of general, neutral laws, even if the laws have the incidental effect of burdening religion. *Smith*, 494 U.S. at 878. Contrary to petitioners' assertion, Pet. 22-25, an otherwise generally applicable law should not be rendered invalid by the creation of an accommodation for religious employers, where, as here, that accommodation expresses no denominational preference.

Here, the state court correctly held that the 2017 regulation is a valid and neutral rule of general applicability. *See* Pet.App. 7a-8a. The regulation affects petitioners, like all other employers other than those qualifying for the religious accommodation, not because of their religious beliefs or motivations, but because they employ workers and choose to purchase New York-regulated health insurance policies. Because any burden on petitioners' free exercise is not the object of the regulation, but "merely the incidental effect of a generally applicable and otherwise valid provision, the First

Amendment has not been offended." *Smith*, 494 U.S. at 878.

Petitioners nonetheless argue that the regulation cannot be upheld under *Smith* because it grants certain religious entities an accommodation from the generally applicable regulatory requirement. Preliminarily, they claim, Pet. 22-23, that any exemption, even a religious one, renders a law not generally applicable. But as we have explained, *supra* at 13-14, the general applicability requirement focuses on whether religion is treated less favorably than secular considerations or whether a mechanism for individualized exemptions invites discrimination. General applicability is not at issue when the government grants a religious accommodation that expresses no denominational preference, even if that accommodation does not extend to all religious organizations.

Petitioners fare no better with their claim, Pet. 24-25, that the accommodation impermissibly discriminates among religious organizations. Their attempt to analogize the accommodation for religious employers to the limitation on an exemption struck down as a religious gerrymander in *Larson* fails. Petitioners attach significance to the fact, Pet. 25, that the law at issue in *Larson* defined the religious organizations that remained subject to the generally applicable registration and reporting requirements by an objective funding criterion—whether the religious organizations solicited more than fifty percent of their funds from nonmembers, 456 U.S. at 230. This Court, however, found that the statutory scheme in *Larson* constituted an impermissible denominational preference. *Id.* at 255; *see also Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,

483 U.S. 327, 339 (1987) (describing *Larson* as indicating "that laws discriminating among religions are subject to strict scrutiny"). The legislative history demonstrated that the challenged law's express design and purpose was to burden the plaintiff Unification Church and other relatively new religious denominations, while exempting the Roman Catholic Church and other traditional denominations. *Larson*, 456 U.S. at 253-55. Because the Court found the statute specifically targeted disfavored religious groups, it was not a "facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." *Id.* at 246 n.23.

In contrast, the accommodation for "religious employers" here does not distinguish "between denominations, but between religious organizations based on the nature of their activities," which is "not what *Larson* condemns." *Serio*, 7 N.Y.3d at 529; *accord Catholic Charities of Sacramento*, 32 Cal. 4th at 554. The accommodation does not categorically include or exclude all activities of any particular religion. To the extent it excludes certain religious organizations, it does so on the basis of denominationally neutral characteristics that apply evenhandedly across denominational lines.

The accommodation here more closely resembles the statute upheld by this Court in *United States v. Lee*, 455 U.S. 252 (1982). At issue in *Lee* was a federal statute that exempted from social security taxes individual self-employed members of a religious sect that conscientiously opposed the receipt and payment of public insurance funds, but did not exempt employers or employees. *Id.* at 255. Like the 2017 regulation, the statutory scheme in *Lee* created an exemption for religions with a conscientious objection, but imposed a limitation on that exemption. The limitation in *Lee*, like

the limitation in this case, could conceivably have the effect of imposing greater burdens on some religious sects than others, depending on the employment practices of their members, but the record did not establish that the limitation in fact drew any denominational lines, either on its face or in practical effect. As the Court observed in *Lee*, the statute exempted the self-employed Amish but not all Amish employers and employees. *Id.* at 261. And the Free Exercise Clause did not require the government to exempt a religious employer from social security taxes, because such an exemption for employers would "impose the employer's religious faith on the employees." *Id.*

The same is true here. The Superintendent could reasonably follow the Legislature's determination to provide an accommodation in the regulation for those religious employers that principally interact with members of their own religion, and not those who employ or serve substantial numbers of nonmembers. The regulation thereby accommodates religious organizations whose employment practices and operations minimize the harms that the regulation addresses, as determined by broad and objective denominationally neutral criteria. Thus, the "neutrality" of the regulation is "not altered because the Legislature chose to exempt some religious institutions and not others." *Serio*, 7 N.Y.3d at 522. Indeed, as the New York Court of Appeals explained, to hold otherwise would be "to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion." *Serio*, 7 N.Y.3d at 522.

Moreover, the distinction drawn here does not tread new ground. As we have explained, there is a long-standing distinction between houses of worship and the like and other religious organizations for purposes of

granting a statutory exemption. *See Priests for Life*, 772 F.3d at 272. Numerous federal laws have historically drawn that distinction. *See Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016) (citing statutes), *rev'd on other grounds sub nom.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). And courts have upheld that distinction when made, as here, on the basis of "neutral, objective organizational criteria." *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1199-1201 (10th Cir. 2015) (upholding distinction under the Affordable Care Act rules between complete exemption for churches and accommodation for other religious organizations), *vacated on other grounds sub nom., Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *accord Geneva Coll. v. Secretary U.S. Health & Human Servs.*, 778 F.3d 422, 443 (3d Cir. 2015), *vacated on other grounds sub nom., Zubik v. Burwell,* 136 S. Ct. 1557 (2016); *Priests for Life*, 772 F.3d at 272-73; *University of Notre Dame v. Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014), *vacated on other grounds sub nom.*, *University of Notre Dame v. Burwell*, 575 U.S. 901 (2015).

In promulgating the 2017 regulation, the Superintendent followed this historical practice to strike a constitutionally valid balance between the important objectives of ensuring access to reproductive health and fostering equality in health care, on one hand, and accommodating religious beliefs, on the other. 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 v. Tax Comm'n. of City of N.Y.*, 397 U.S. 664, 669 (1970). The balance struck here is consistent with that principle and does not warrant further review.

Contrary to petitioners' argument—and that of amici curiae supporting petitioners—this case does not provide a good vehicle to reevaluate the free exercise principles set forth in *Smith*. Any such reevaluation 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, however, is devoid of information about many potentially relevant facts. More particularly, there was no record development about the nature and extent of the burdens allegedly imposed on petitioners' religious rights. For example, many of the petitioners, including the churches, appear to qualify for the existing religious accommodation, and thus face no burden at all, and there is little information about the nature of the petitioner institutions that allegedly do not qualify. See *supra* at 8-9. In addition, the fact that petitioners are not required to purchase insurance policies governed by the regulation, see *supra* at 4, suggests that any burden imposed is at most indirect, and without knowing how particular petitioners might avoid application of the regulation, the extent of any indirect burden is unknown. There also is no evidence supporting petitioners' contention that, when they purchase policies governed by the regulation, they thereby "fund" objected-to abortion services. See *supra* at 7. And petitioners now seek to rely expressly, but for the first time, on the potential indirect influence that the regulation allegedly imposes on their internal decisionmaking. See *supra* at 24. Without proper development of these issues, the Court would be left to reevaluate 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2021

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