No. 25-113

IN THE

Supreme Court of the United States

BREANNA RENTERIA, *et al.*,

Petitioners,

v.

NEW MEXICO OFFICE OF THE SUPERINTENDENT OF INSURANCE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ERWIN CHEMERINSKY
Counsel of Record
University of California, Berkeley
School of Law
Law Building 215
Berkeley, CA 94720
(510) 642-6483
echemerinsky@berkeley.edu

STEPHEN P. THIES
General Counsel
NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE
1120 Paseo de Peralta
Santa Fe, NM 87501

Counsel for Respondents

120637

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Tenth Circuit adhered to well established precedent in concluding that the Free Exercise Clause of the First Amendment was not infringed because the New Mexico Office of the Superintendent of Insurance was applying a neutral law of general applicability in regulating insurance companies.

2. Whether the United States Court of Appeals for the Tenth Circuit correctly concluded that the actions of the New Mexico Office of the Superintendent of Insurance were not preempted in applying the State's insurance law to a health care sharing ministry that was engaged in selling insurance in New Mexico.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes

INTRODUCTION

State governments are empowered to regulate insurance to protect consumers. McCarran-Ferguson Act, 15 U.S.C. § 1012 ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States[.]") New Mexico statutes are detailed in regulating health insurance companies for this purpose. N.M.S.A. §§ 59A-, *et. seq.* The New Mexico legislature has declared that "it is concerned with the protection of residents of this state against acts by insurers not authorized to do an insurance business in this state, [and with] the maintenance of fair and honest insurance markets." N.M.S.A. § 59A-15-1.

Under a provision enacted as part of the Patient Protection and Affordable Care Act (ACA), individuals may create a health care sharing ministry (HCSM). 26 U.S.C. § 5000A(d)(2)(B). HCSMs allow individuals to meet the ACA's requirement for having health insurance, but through a mechanism that does not include coverage for matters that might violate their religious beliefs. The Internal Revenue Code ("IRC") defines HCSMs as tax-exempt § 501(c)(3) organizations, "members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs[.]" 26 U.S.C. § 5000A(d)(2)(B)(ii)(II). An HCSM must share expenses "without regard to the State in which a member resides or is employed," must allow members to "retain membership even after they develop a medical condition," and must have existed and shared expenses "continuously and without interruption since at least December 31, 1999[.]" *Id.* § 5000A(d)(2)(B)(ii)(I)-(IV).

But HCSMs are not insurance companies. They are not legally required to pay for health care costs as insurance companies must. They do not have to provide coverage for a myriad of costs that health insurance companies must pay for under the ACA. HCSMs exist to coordinate voluntary sharing of costs. As a result, HCSMs cannot hold themselves out as insurance plans or enter into contracts to provide insurance. If they do, they must meet the states' requirements for health insurance carriers.

The New Mexico Office of the Superintendent of Insurance (OSI) found that Gospel Light Mennonite Church Medical Aid Plan ("Gospel Light") was presenting itself as a health insurance plan and entering into legally binding contracts for health care without meeting the requirements of New Mexico law. OSI applied New Mexico law and imposed fines on Gospel Light for violating state law. Gospel Light was ordered to cease and desist representing itself as an insurance company and from entering into legally binding insurance contracts.

Gospel Light sought a preliminary injunction against OSI's actions, which the District Court denied. App. to Pet. Writ Cert. (Pet. App.) 69a. The United States Court of Appeals for the Tenth Circuit affirmed. *Id.* 1a.

This is a classic instance of the application of a neutral law of general applicability. There is thus no violation of the Free Exercise Clause of the First Amendment. *See Employment Division v. Smith*, *Department of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). New Mexico insurance officials expressed no expression of hostility to religion; their public statements were just that some HCSMs were presenting themselves as and acting as

insurance companies without meeting the requirements of state laws. Nor was Gospel Light treated differently from any similarly situated entity. In fact, it is difficult to see how there is a substantial burdening of religion in requiring Gospel Light to meet the conditions imposed on insurance companies when it operated as one.

Contrary to Petitioners' assertion, the United States Court of Appeals for the Tenth Circuit applied well established law under the Free Exercise Clause and not any form of a "heightened" standard. Moreover, there is no split among the Circuits warranting review by this Court. Indeed, there are few cases in any federal courts involving HCSMs and free exercise of religion. And the Circuits across the country apply the same test for determining whether there is a violation of the Free Exercise Clause under *Employment Division v. Smith* and this Court's decisions which have applied it.

This case thus involves a straightforward application of the principle that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability. It does so in an area where states have clear and important authority to regulate insurance to protect consumers.

This case presents a particularly poor vehicle for addressing the First Amendment and preemption issues raised in the Petition for a Writ of Certiorari ("Pet."). Because this case is on appeal of the denial of a request for a preliminary injunction, there has been no fact finding. There is nothing in the record to show a substantial burdening of Petitioners'—two members of Gospel Light—religious beliefs. Nor is there anything in the record that shows that comparable secular entities are

engaged in similar behavior and are being treated any differently. And crucial to any assessment of equitable relief, there is not yet a record about the important state interests served by the regulation of those engaged in presenting themselves as providing health insurance. Perhaps this issue will arise in the future and become a matter warranting this Court's attention, but not yet and not in this case.

STATEMENT OF THE CASE

There, of course, is no dispute in this litigation that a state has an important interest in protecting consumers who are purchasing health insurance. In furtherance of this goal, the New Mexico Office of the Superintendent of Insurance issued warnings about Health Care Sharing Ministries operating in New Mexico. In a press release dated December 3, 2019, OSI stated:

> A few health care sharing ministries (also known as health care sharing organizations) operate in New Mexico. These organizations do not offer insurance, but may present plans in a way that look and feel similar to a health insurance plan. Members of these organizations "share" health costs on a voluntary basis. Consumers should be aware that these plans have no obligation to pay for any medical services and have no requirement to cover any particular categories of health care services, such as preventive care.

Pet. App. 3a. There is no dispute over the factual accuracy of this statement.

On March 26, 2020, OSI issued another press release that described HCSMs as "an unauthorized insurance product that likely will not provide the protections of an authorized, regulated, and [Affordable Care Act (ACA)] compliant major medical plan; listed examples of potential gaps in coverage a consumer could face; and urged consumers to purchase an ACA compliant plan." *Id.* 4a (internal quotation marks omitted).

Finally, OSI issued a "Consumer Advisory" in March of 2021 that stated:

> As the Special Enrollment Period gets underway, OSI wants consumers to know that there are scammers trying to lure people into purchasing low-quality health insurance or health insurance-like products. These low-quality products DO NOT meet the requirements of the ACA because they offer extremely limited coverage. These might be short-term plans, trade association plans, health care sharing ministries or other limited plans. These bad plans can leave consumers stuck with huge medical bills from doctors and hospitals. These non-ACA plans deny and limit health care coverage by:
>
> - Limiting coverage for pre-existing conditions
> - Limiting prescription coverage
> - Limiting coverage for hospitalizations and emergency rooms
> - Limited or no coverage for mental health / behavioral health treatment
> - Limiting coverage for outpatient / same-day surgery

Pet. App. 4a-5a. Again, there is no dispute over the accuracy of this statement, nor about the State's interest in consumers knowing what they are receiving when they purchase health care coverage.

Gospel Light is a healthcare sharing ministry ("HCSM") offering a cost-sharing arrangement "by which religiously like-minded members voluntarily share each other's health costs." *Id.* 93a. In exchange for monthly share payments, Gospel Light exists "to coordinate voluntary contributions for the sharing of qualifying health care costs between members based on shared ethical and religious beliefs." *Id.* Gospel Light maintains that it is not an insurance provider because it bears no ultimate obligation to indemnify any health care bill.

Petitioners Breanna Renteria and Laura Smith are members of Gospel Light. Gospel Light is not a Petitioner before this Court, though it was a plaintiff in the District Court.

On July 1, 2020, OSI received a consumer complaint in which a Gospel Light member asserted that the HCSM was "continuing to take money and not give [the consumer his] reimbursement." Pet. App. 5a. On May 12, 2021, OSI received another consumer complaint in which a different member asserted that despite paying her premiums on time, Gospel Light canceled a payment for a hospital bill after sending it to the wrong address and subsequently put the consumer " back on the 6 month wait." *Id.*

After investigating these complaints, OSI initiated an administrative enforcement action. It also ordered Gospel Light "'to cease and desist from transacting

insurance business in New Mexico,' to provide OSI with data on Gospel Light's plans sold in New Mexico, and to show cause why OSI should not fine Gospel Light for each unauthorized insurance transaction." *Id. 6a.*

The presiding hearing officer made extensive findings that Gospel Light entered into legally enforceable contracts with its members to pay for health care and thus determined it to be an insurance carrier under New Mexico law. N.M.S.A. § 59A-1-5. By selling unregistered health benefit plans in New Mexico since 2014 without the requisite certificate of authority, Gospel Light violated the New Mexico Code of Insurance (NMIC). N.M.S.A. § 59A-16-21.2(A). The hearing examiner found that "Gospel Light fell within the state's definition of a 'health insurance carrier,'" but "was operating without the requisite certificate of authority." Pet. App. 95a-96a.

The hearing officer recommended OSI order Gospel Light to cease operations in New Mexico until compliance with the NMIC could be established, as well as to issue a fine of $10,040,000. *Id.* 6a. On November 23, 2021, OSI issued preliminary findings ordering Gospel Light to cease operations, though greatly reduced the hearing officer's suggested fine to $2,510,000. *Id.* 125a, 6a.

On March 31, 2023, Petitioners, along with Gospel Light, filed suit in the U.S. District Court for the District of New Mexico requesting a preliminary injunction that would halt the enforcement of OSI's final cease and desist order. The District Court denied the request on July 14, 2023, finding Gospel Light's cost-sharing model "falls squarely within the ambit" of the New Mexico's Code of Insurance. *Id.* 80a. The District Court also concluded

that New Mexico law was not preempted because nothing in the ACA creating health care sharing ministries precludes state regulation when they are operating as insurance carriers. *Id.* 110a. The District Court found that plaintiffs did not meet the requirements for a preliminary injunction. *Id.* 89a-90a.

Petitioners filed a motion for reconsideration which was denied on October 12, 2023. *Id.* 69a.

Petitioners sought review in the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the district court's decision, concluding that Gospel Light operated as an insurance company within the meaning of New Mexico law, but that it failed to comply with the requirements imposed on insurance companies. *Id.* 1a. The Court of Appeals concluded that under *Employment Division v. Smith*, there was no basis under the Free Exercise Clause for creating an exception to the New Mexico laws regulating insurance companies. *See* 494 U.S. at 879 (1990); Pet. App. 25a. The Court of Appeals also concluded that New Mexico's insurance law and its application to Gospel Light were not preempted by federal law. *Id.* 28a-32a.

Petitioners sought rehearing and rehearing *en banc*. Both were denied. *Id.* 133a.

REASONS FOR DENYING THE WRIT

Petitioners do not dispute the factual findings of the hearing examiner, the Office of the Superintendent of Insurance, and the District Court: Gospel Light entered into legally enforceable contracts with its members to provide health care benefits and thus was an insurance carrier under New Mexico law. N.M.S.A. § 59A-1-5. Nor is it disputed that by selling unregistered health benefit plans in New Mexico since 2014 without the requisite certificate of authority, Gospel Light violated the New Mexico Code of Insurance. N.M.S.A. § 59A-16-21.2(A). As the Court of Appeals explained:

> Out of the gate, the OSI Hearing Officer made extensive findings that Gospel Light entered into a legally enforceable contract with its members (payment of monthly share amounts in exchange for a promise of reimbursement for medical expenses), that Gospel Light 'provides coverage in this state for health benefits' and is thus 'subject to the provisions' of the NMIC, and that Gospel Light 'is a health insurance carrier.' The hearing officer's findings were adopted by OSI.

Pet. App. 30a. (citation omitted). These findings are not in dispute.

The issues in this case are solely whether applying New Mexico law to Gospel Light violates the Free Exercise Clause or is preempted by federal law. Neither presents an issue warranting review by this Court.

I. There Is Not an Issue Concerning the Free Exercise Clause that Warrants Review by this Court.

A. The Court of Appeals' Decision Is Consistent With This Court's Precedents.

Petitioners argue that the Court of Appeals misapplied *Employment Division v. Smith*. 494 U.S. 872 (1990); Pet. 2-3. Specifically, Petitioners contend that the Court of Appeals "reimagined" *Smith* to require a "heightened" standard for determining neutrality, establishing animus, and showing a lack of general applicability. Pet. 3; 18.

Quite the contrary, there is nothing in the Court of Appeals' decision that suggests a "heightened" standard for determining "neutrality" or what is a law of "general applicability." Both the District Court and the Court of Appeals held that Gospel Light was contracting for health care coverage and that this made it an insurance carrier within the meaning of New Mexico law. There is no dispute that Gospel Light was not meeting the requirements of New Mexico law for insurance companies. New Mexico insurance law is the quintessential neutral law of general applicability and thus the application of it to Gospel Light raises no First Amendment issues warranting this Court's review.

1. The New Mexico Law Is "Neutral" and There Was No Hostility to Religion.

There is no claim that New Mexico insurance statutes were motivated by hostility to religion. They are classic state regulations of insurance meant to protect consumers.

Rather, Petitioners claim that insurance regulators in New Mexico expressed hostility to religion. Pet. 28. Petitioners support this by pointing to statements by the New Mexico Office of Superintendent of Insurance.

On close examination, though, the statements make no mention of religion or of Gospel Light. They are warnings to consumers to beware of those who are seeming to provide insurance coverage without actually doing so. The Court of Appeals came to exactly this conclusion:

> 'Disdain' is hard to find in this press release which, again, does not mention Gospel Light, its members, or any religious beliefs. Indeed, the best reading is that OSI intended to caution consumers about HCSMs that do not comply with the ACA, do not cover pre-existing conditions, leave members uncovered to pay their own medical bills. . . . After all, that is precisely what was said in this press release.

Pet. App. 19a.

To illustrate "official expressions of hostility," Petitioners point to the OSI's March 26, 2020, press release, and its March 2021 consumer advisory. Pet. 22-24. But neither of these statements express any hostility to religion; they are warnings to consumers to be sure that they are actually purchasing insurance when they seek to do so. Petitioners also claim that New Mexico's lawyers "mocked" religion during this litigation. *Id.* 23. Animus is about what was said in enacting legislation or making regulatory decisions, not to lawyers litigating an enforcement action. Even if statements by lawyers during

litigation could be seen as evidence of animus, that is not what occurred here.

The March 26, 2020, press release cautioned consumers that HCSMs do not provide the protections of an "authorized, regulated, and ACA compliant major medical plan." Pet. 11-12. It did not mention Gospel Light or any religious beliefs; it merely clarified that HCSMs are not equivalent to Affordable Care Act compliant plans. This is a factually accurate statement. It also is important for consumers to understand this as they are making health coverage choices. Pet. App. 84a.

The consumer advisory issued a year later in March 2021 warned consumers of "scammers trying to lure people into purchasing low-quality health insurance or health insurance-like products." *Id.* 4a. Gospel Light has themselves acknowledged the existence of fraudulent HCSMs. *Id.* 20a. As aptly identified by the District Court, "HCSMs, just like secular healthcare payment structures, are not immune to abuse by bad actors." *Id.* 115a. "Such an observation does not demonstrate animus against religion," and "an identical statement from OSI, grounded in fact, cannot rise to an official expression of hostility." *Id.* 115a, 20a. As the District Court concluded, "[n]othing in the press release demonstrates (or even suggests) that the Superintendent is hostile to religion." *Id.* 85a.

Petitioners also claim that OSI's lawyer's mention of "GoFundMe" as a possible cost sharing alternative for effectuating private donations, "mocked" Petitioners' religious beliefs. Pet. 23. But here, too, the District Court explained why this did not reflect any animus to religion: "the Court does not read the relevant briefing as 'mocking

Plaintiffs' religious practices'—OSI was simply raising the possibility that Gospel Light members could practice their religious obligation to bear each other's burdens in other ways that complied with the law." Pet. App. 115a.

Petitioners assert that a lawyer for the state "mocked Petitioners' beliefs, asking whether there is 'anywhere in the scripture that says something about, along the lines that, thou shall be a member of a healthcare sharing ministry.'" Pet. 2. Even assuming that animus to religion can be found based on a question asked by a lawyer in litigation, the underlying basis for the lawyer's question is justified and important: is there a substantial burden on free exercise of religion by requiring that a health care sharing ministry comply with insurance laws? As explained below, there has been no finding that having to comply with the requirements of New Mexico law places a substantial burden on Petitioners' religious beliefs.

Petitioners consistently refer to the "anti-Christian animus" held by New Mexico insurance officials by pointing to Respondents' statements during litigation. Pet. 1, 14. To be sure, throughout the litigation Respondents have disputed that there is a substantial burdening of Petitioners' religious beliefs. But litigation is inherently adversarial, and more importantly, nothing was said that was hostile to Petitioners' religious beliefs or that could be seen as an expression of animus.

Petitioners' state: "OSI has already admittedly targeted Petitioners because of their religious beliefs in public documents. No further fact-finding is necessary." *Id*. 17 n.2. No such targeting has occurred and OSI certainly never admitted that it had done so. Petitioners

do not point to a single factual statement that was untrue or a single statement that expressed hostility to religion. Moreover, because this comes before this Court in review of a preliminary injunction, there has been no fact-finding in this case. As explained below, that makes this case a particularly poor vehicle for Supreme Court review.

2. New Mexico Insurance Law Is of "General Applicability".

According to Petitioners, the NMIC is not neutral because it grants exemptions to multiple comparable secular organizations and "operates to create a religious gerrymander around them." Pet. 24. Petitioners rely on this Court's statement that "government regulations are not neutral . . . when they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); Pet. 24-25.

But there is no evidence in the record that secular entities in New Mexico are actually engaged in the conduct that led to the sanctions against Gospel Light. Quite crucially, the Court of Appeals noted: "[T]here are not *facts* or *evidence* in the record before us as to whether the non-comparable benefit societies or labor unions are engaged in helping members pay medical bills." Pet. App. 23a n.9. This, then, is a poor vehicle to consider whether there was discrimination against religion because there is no evidence that secular entities were engaged in the same activities as Gospel Light.

Moreover, Petitioners ignore the fundamental distinction drawn in New Mexico law between entities that exist to provide health care coverage and those that

as an "incidental" part of their operations issue health benefit certificates to members in times of "illness, injury, or need." N.M.S.A. § 59A-1-16(A). Importantly, this distinction in the law is not based on religion. Any entity, religious or secular, that has a primary purpose of providing insurance coverage must comply with New Mexico insurance law. Any entity, religious or secular, that provides insurance "incidental" to its other activities, need not comply with these requirements. There is thus no disfavored treatment of religion in any way, let alone the application of a "heightened standard" as Petitioners argue. Pet. 24.

Put another way, the State of New Mexico made the judgment that it is appropriate to treat entities that provide health benefits incidental to other functions differently from those that exist to provide health benefits. As the Court of Appeals explained:

> Plaintiffs still have not shown that NMIC is not generally applicable. It is not enough for a secular activity to be treated more favorably than religious exercise, the secular activity must also be *comparable* to the religious activity. Comparability 'must be judged against the asserted government interest that justifies the regulation at issue.' Gospel Light's sole purpose is to act as an HCSM. By contrast, any medical payments provided by the fraternal benefit societies or labor organizations is to their other, primary purposes for being.

Pet. App. 23a. (citations omitted). So, while Petitioners are correct that this Court's precedents "bar[] even

subtle departures from neutrality on matters of religion," the NMIC presents no such departure. Pet. 18 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018)).

In assigning the OSI's actions a label of "religious gerrymandering," Petitioners rely on *Church of Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (holding an ordinance underinclusive for granting exemptions for secular purposes of animal killing, but not religious, even though they posed identical health risks). Pet. 19-20. But in *Lukumi*, the "net result of the gerrymander" of exemptions was punishing *only* those who engaged in targeted activity for religious reasons. 508 U.S. at 536. The NMIC, however, is violated by *anyone* who does not have the requisite certificate of authority. Thus, the exemptions were made "without regard to religious beliefs" and do not create an effect of "religious gerrymandering." Pet. App. 82a. It is the basic difference between a law that singles out religion as opposed to a general law applying to all who are engaged in an activity. Pet. 24.

Petitioners argue that the exemptions convey "that they are outsiders, not full members of the political community," similarly amounting to the favoritism seen in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238, 248 (2025). Pet. 2. However, the Wisconsin law in question in *Catholic Charities* explicitly based exemption eligibility on whether organizations operated "primarily for religious purposes" and were "supported by a church." Wis. Stat. § 108.02(15)(h)(2) (2023-2024). Strict scrutiny was applied because the law directly showed favoritism among religious sects,

differentiating "based on the content of their religious doctrine." *Catholic Charities*, 605 U.S. 238, 248. No such differentiation exists in the NMIC. *Catholic Charities* reaffirmed that the government cannot discriminate among religions unless it meets strict scrutiny. *Id.* 251. There is no claim in this case of discrimination among religions. Nor is there evidence that secular activities engaged in the same conduct as Gospel Light actually were treated differently in any way.

Petitioners quote this Court as saying that activities "are comparable if they 'undermine[] the government's asserted interest in a similar way.'" Pet. 25 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). But unlike *Fulton*, New Mexico's government officials have no discretion to create an exemption from the general law. Pet. App. 81a n. 6. Also, unlike the law at issue in *Fulton*, the New Mexico legislature made an express determination that organizations that have the "incidental" activity of providing health benefits are different in the need for regulation from those that exist only for that purpose. *See, e.g.*, N.M.S.A. § 59A-1-16(A) (labor unions). Further, it is not true that the OSI has made secular organizations "wholly exempt" from regulation; the NMIC expressly lists eleven provisions that apply to fraternal benefit societies. *Id.* § 59A-44-41; Pet. 27.

As *Employment Division v. Smith* 494 U.S. 872, 879 (1990) made clear, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability[.]'" Efforts to challenge neutral and generally applicable regulations such as the NMIC have continuously failed in front of this

Court. In *United States v. Lee* 455 U.S. 252, 261 (1982), the Court held that the "tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." Similarly, in *Bob Jones University v. United States* 461 U.S. 574, 604 (1983), the Court found that the governmental interest in tax collection "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Employment Division v. Smith* thus was a reflection of this Court's long-standing refusal to create exemptions to neutral laws of general applicability for religion.

Petitioners are wrong in asserting that the Court of Appeals imposed a heightened standard for determining what is a law of general applicability. Quite the contrary, the Court of Appeals applied well established law that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.

B. There Is No Conflict Among the Federal Courts.

Health Care Shared Ministries have existed since the Affordable Care Act. Yet it is notable that this is the first federal court of appeals decision to consider a question with regard to the Free Exercise Clause and HCSMs. This is a paradigm instance where it would make great sense for this Court to wait to see if this is a matter of national importance and if so, to allow the issue to percolate.

Moreover, as explained, there is no conflict between the Court of Appeals' decision and any precedent from this Court.

Petitioners argue that the Court of Appeals has widened an existing circuit split on the fundamental meaning of *Smith*. Pet. 20. According to Petitioners, although Circuits agree that under *Lukumi* the "object" of a law cannot be to suppress religious conduct, they divide over the meaning of "object." *Id*. Petitioners contend that the Tenth Circuit has joined the Second and Third Circuits in adopting a subjective approach to neutrality, treating "object" as a pure question of subjective intent and requiring proof of clear animus "that focuses exclusively on the motives of government officials." *Id*. Instead, Petitioner believes the Seventh and Eleventh Circuits have adopted the correct standard for neutrality, asking "whether the law targets religious conduct through its text, operation, or enforcement." *Id*. 22.

But on close examination, there is not a split among the Circuits. All of the Circuits will allow subjective intent to be a basis for a finding of animus, and all will look at the text, operation, and enforcement of the law. The Third Circuit case cited by Petitioners (Pet. 20) does not actually limit its neutrality inquiry in the way Petitioners suggests:

> To answer this question, we search for anti-religious animus on the face of the policy itself and in the circumstances of its enactment. But we also look for subtler signs that policymakers targeted religion. For instance, arbitrary distinctions between religious and secular conduct suggest anti-religious bias. Likewise, open-ended, discretionary exemptions permit government officials to mask discrimination against religion.

Spivack v. City of Philadelphia, 109 F.4th 158, 167 (3d Cir. 2024).

Nor does the Second Circuit case pointed to by Petitioners (Pet. 20-21) stand for the proposition that Petitioners assert. The case involved the *repealing* of an existing religious exemption, which the Second Circuit determined to be a neutral act, considering much more than "exclusively" (Pet. 20) the motives of officials. *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 148-150 (2d Cir. 2023). The Petitioners' stated holding of the case (that plaintiffs "must demonstrate" government officials' "hostility," "animosity," "distrust," or "a negative normative evaluation," which "denote a subjective state of a mind on a government actor's part," to show non-neutrality") is simply incorrect. Pet. 21. The sentence Petitioners cite is immediately followed by more analysis: "[t]o determine whether the government has acted neutrally, courts look to factors such as the background of the challenged decision, the sequence of events leading to its enactment, and the legislative or administrative history." *We the Patriots USA*, 76 F.4th at 145.

Petitioners have invented a Circuit split to attract this Court's attention. But there is none warranting review.

C. This Case Is Not a Good Vehicle for Review of Important First Amendment Questions.

As already mentioned, there are many reasons why this case is not a desirable vehicle for reviewing the issues presented. At this stage, the District Court has denied a motion for a preliminary injunction, a ruling which

was upheld by the Court of Appeals. There has been no fact finding. This case involves many factual questions concerning what Gospel Light was doing and its effects on consumers in New Mexico. Without this fact finding it would be premature for this Court to decide whether there has been an infringement of free exercise of religion and whether the State's actions were justified.

Moreover, there has been no fact finding as to the State's interest in regulating HCSMs to protect consumers. Petitioner maintains that "because Gospel Light is not insurance, recognition of its HCSM status under the ACA and an NMIC exemption would pose no harm and would, in fact, further 'proper regulation of the insurance industry.'" Pet. 28. This "fact" has not been established. The balance of the equities, crucial to the assessment of any equitable relief, cannot be assessed at this stage of the litigation.

Nor is there any finding that secular organizations, which Petitioners say were treated differently, actually were engaged in the same behavior as Gospel Light. The Court of Appeals made exactly this point. Pet. App. 23a n.9 ("The extent to which other organizations are getting 'a better deal' for activity that may or may not be occurring was not developed by Gospel Light below and is not a part of the record in this appeal."). It cannot be said that comparable activities occurred and were treated any differently in New Mexico.

Quite importantly, there are no findings and no basis in the record for determining whether applying New Mexico law to Gospel Light would be a substantial burden on its religious beliefs. Petitioners point to the NMIC's

non-discrimination provision, arguing that if enforced, Gospel Light would have to change its membership criteria and thus open their religious practices to those who do not share their beliefs and values. Pet. at 10; NMSA § 59A-16-12. But there is nothing in the record to support this assertion. Moreover, as the Court of Appeals noted, this issue was not raised in the District Court and was not to be considered on appeal. Pet. App. 27a n.11. There is nothing in the record that supports the claim that applying New Mexico law to Petitioners would infringe their free exercise of religion.

The Petitioners in this case are two individuals—Breanna Renteria and Laura Smith. There is nothing in the record to indicate that they could not be part of an HCSM if Gospel Light was required to comply with New Mexico insurance law. It is speculative whether Gospel Light would be prevented from functioning as an HCSM if it had to comply with New Mexico law, and it is even more uncertain whether these two individuals would be denied the ability to be part of another HCSM if Gospel Light no longer was available to them.

Additionally, out of the 131,117 Gospel Light members nationwide, only 490 reside in New Mexico. Pet. App. 118a. As correctly surmised by the District Court, even the hypothetical loss of New Mexico's members "is not sufficiently 'great and immediate'" to establish the kind of injury warranting interference. *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)). As has been continually established, Petitioners' alleged irreparable harm is too uncertain and speculative to satisfy the harm requirement for preliminary injunction. Petitioners have not shown the requisite irreparable injury for preliminary injunctive

relief in attempting to point to a speculative, subjective chilling effect. There is not an "imperative question of national importance" warranting this Court's review. Pet. 31.

II. There Is Not an Issue Concerning Preemption that Warrants Review by This Court.

Petitioners contend that New Mexico law is preempted because it "create[s] an irreconcilable conflict" with the Affordable Care Act ("ACA") and the Internal Revenue Code ("IRC"), producing an "overwhelming obstacle to Congress's purposes and objectives"—a decision which would "effectively render HCSMs extinct and unravel Congress's entire compromise." Pet. 36, 31. Specifically, Petitioner argues that requiring Gospel Light to cease operations in New Mexico would (1) violate the ACA's uniformity requirement and (2) force Gospel Light to lose its nonprofit status because the IRC prohibits nonprofits from providing commercial insurance.

But OSI ruled only that Gospel Light could not operate in New Mexico if it contracted for health insurance without complying with New Mexico law regulating insurance companies. Gospel Light can continue operations in New Mexico either by ceasing to operate as an insurance company or by complying with New Mexico law. Nothing in federal law precludes New Mexico from forcing Gospel Light to make this choice.

Petitioners argue that Congress expressed a clear intent to guarantee conscience protections to HCSMs. 26 U.S.C. § 5000A(d)(2)(B)(ii); Pet. at 33. As the District Court points out, however, the provision referenced to is

by no means central to the legislation. Pet. App. 110a-111a. While Petitioners emphasize that "Congress spilled much ink (906 pages to be exact) in drafting the ACA," (Pet. at 30) Petitioner fails to acknowledge that the topic of HCSMs does not even make up one of the 906 pages. Thus, it cannot be said that ACA was "carefully calibrated to protect HCSM members" as the "heart" of its scheme. Pet. 33. The comprehensiveness of the ACA instead points to Congress' focus on implementing safeguard measures for healthcare consumers, a mission furthered by OSI's role in New Mexico.

Most importantly, there is no conflict between the ACA and New Mexico law. An HCSM can operate under the ACA and not comply with New Mexico regulations of insurance companies so long as it is not entering into legally enforceable contracts for providing health care coverage. Once an HCSM chooses to function as an insurance company, then it must comply with state regulations. There is nothing in federal law that prevents the application of state insurance law to an entity functioning as an insurance company. Gospel Light thus has a choice: operate as an insurance company and comply with New Mexico law, or operate as an HCSM without legally enforceable contracts for insurance coverage and not need to comply with New Mexico law. The ACA does not preclude New Mexico from requiring that Gospel Light make this choice. As the Court of Appeals observed, quoting the District Court, "although the ACA defines and exempts HCSMs from the federally imposed individual mandate, states are free to regulate HCSMs, and the ACA does not cabin state oversight of HCSM operations." Pet. App. 28a n.12. This means that there is no issue of preemption warranting review by this Court.

Petitioners additionally state that the Ninth Circuit has already determined that the ACA individual mandate preempts conflicting state laws. *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014); Pet. 31-32. In *Coons*, however, the Arizona statute at issue impeded the federal objective to *expand* minimum essential health coverage nationwide. 762 F.3d at 902. The key distinction in the present case is that Petitioners seek a *reduction* in coverage requirements. By their own argument, under *Coons*, what Petitioners seek constitutes a further impediment to the federal objective of expanded minimum coverage. *See Id. Coons* involved a conflict between the ACA and state law; in this case no such conflict exists.

As for Petitioner's contention that Gospel Light could lose its nonprofit status, the Court of Appeals correctly deemed this a baseless argument:

> [A]ny nonprofit could flout state law by arguing that compliance would cause their organization to land outside of the IRC's definition of a nonprofit. The answer is not to deem the NMIC preempted by federal law, but rather for Gospel Light to choose between functioning as a nonprofit or selling commercial insurance.

Pet. App. 28a-29a. The OSI Hearing Officer "made extensive findings" that Gospel Light entered into legally enforceable contracts with its members to pay for health coverage. *Id*. 30a. This made them an insurance company under New Mexico law. There is nothing to the contrary in federal law. Nor is there anything in federal law which says that insurance companies cannot be regulated by the state by virtue of calling themselves health care sharing

ministries. Gospel Light has a choice: it can operate as an insurance company and comply with state law, or it can choose not to conduct itself as an insurance company and operate as a health care sharing ministry. But nothing in federal law gives it the right to operate as an insurance company and get an exemption from state legal regulations. There is thus no conflict between federal law and state law, and thus no issue of preemption.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Erwin Chemerinsky
Counsel of Record
University of California, Berkeley
School of Law
Law Building 215
Berkeley, CA 94720
(510) 642-6483
echemerinsky@berkeley.edu

Stephen P. Thies
General Counsel
New Mexico Office of Superintendent of Insurance
1120 Paseo de Peralta
Santa Fe, NM 87501

Counsel for Respondents