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.

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

BRIEF OF THE ALLIANCE OF HEALTH CARE SHARING MINISTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL MURRAY
Counsel of Record
WILLIAM MAHONEY
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
michaelmurray@paulhastings.com

Counsel for Amicus

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

BACKGROUND 4

ARGUMENT 7

A. THIS COURT'S PRECEDENTS MANDATE STRICT SCRUTINY FOR GOVERNMENT POLICIES THAT DISTINGUISH BETWEEN RELIGIOUS AND SECULAR ACTIVITIES THAT POSE SIMILAR RISKS 7

B. THE PANEL MAJORITY IDENTIFIED NO SOUND BASIS FOR DISREGARDING THIS COURT'S DECISIONS AND ADOPTING AN OUTLIER POSITION AMONG THE COURTS OF APPEALS 10

C. THE *TANDON* REQUIREMENT SUBJECTING TO STRICT SCRUTINY GOVERNMENT POLICIES THAT DISTINGUISH BETWEEN RELIGIOUS AND SECULAR ACTIVITIES THAT POSE SIMILAR RISKS PROVIDES IMPORTANT CLARITY AND PROTECTION 12

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

303 Creative v. Elenis,
600 U.S. 570 (2023) 12-13

Bethel Conserv. Mennonite Church v. Comm'r,
746 F.2d 388 (7th Cir. 1984) 5

Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Comm'n,
605 U.S. 238 (2025) 12

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) 7-9

Does 1-6 v. Mills,
16 F.4th 20 (1st Cir. 2021) 9, 10

Employment Division, Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990) 3, 4, 7, 13, 16, 17

*Fellowship of Christian Athletes v. San Jose Unified School Dist*rict,
82 F.4th 664 (9th Cir. 2023) 8, 9

Fulton v. City of Philadelphia, Pa.,
593 U.S. 522 (2021) 4, 7, 11, 13, 16

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022) 7, 13

Mahmoud v. Taylor,
145 S. Ct. 2332 (2025) 12

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
584 U.S. 617 (2018) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Monclova Christian Academy v. Toledo-Lucas County Health Department, 984 F.3d 477 (6th Cir. 2020) 9

Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020) 13

Spivack v. City of Philadelphia, 109 F.4th 158 (3d Cir. 2024) 10

Tandon v. Newsom, 593 U.S. 61 (2021) 2-4, 8-16

We the Patriots v. Hochul, 17 F.4th 266 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) 10

Constitutional Provisions

U.S. Const. amend. I 4, 12

Statutes

26 U.S.C. § 5000A(d)(2)(B) 6

26 U.S.C. § 5000A(d)(2)(B)(ii)(II) 6

Other Authorities

Alliance of Health Care Sharing Ministries, Data and Statistics (Sept. 10, 2025), https://ahcsm.org/about-us/data-and-statistics/ 5, 6

Alliance of Health Care Sharing Ministries, Frequently Asked Questions (Sept. 10, 2025), https://ahcsm.org/faq/ 5, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

American Humanist Association, What you NEED To Know about Health Care Sharing Programs RIGHT NOW! (May 5, 2025), tinyural.com/4h3vh752 16

Galatians 6:2 5

Memorandum Opinion and Order Granting in Part Motion to Dismiss and Denying Motion for Preliminary Injunction, *Gospel Light Mennonite Church Medical Aid Plan et al. v. New Mexico Office of the Superintendent of Insurance et al.*, No. 1:23-cv-00276-MLC/KK, Dkt. No. 38 (July 14, 2023) 2

Order Granting Motion for Leave to File Amicus Brief, *Gospel Light Mennonite Church Medical Aid Plan et al. v. New Mexico Office of the Superintendent of Insurance et al.*, No. 1:23-cv-00276-MLC/KK, Dkt. No. 29 (June 14, 2023) 2

STATEMENT OF INTEREST*

The Alliance of Health Care Sharing Ministries is dedicated to protecting the liberty of its member ministries and their individual members to exercise their religious beliefs in all aspects of health care. A Section 501(c)(6) trade organization, the Alliance represents five of the nine nationwide health care sharing ministries. These ministries, which are recognized by the U.S. Department of Health and Human Services, serve approximately two thirds of all health care sharing ministry members in the United States.

An important function of the Alliance is to represent the interests of its members in matters before Congress, the Executive Branch, the federal courts, and state governments. To that end, the Alliance routinely engages with federal and state governments on behalf of its members in order to provide accurate and timely information on health care sharing ministries and the religious liberty protections that the law affords to such ministries and their members. As part of that engagement, the Alliance regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's health care sharing ministries.

---

* Counsel for amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel for amicus further state that counsel of record for petitioners and respondents have acknowledged that they received timely notice of the intent to file this brief.

The Alliance filed *amicus* briefs in support of Petitioners in the district court and the Tenth Circuit proceedings below. The district court, in granting the Alliance's motion to file its amicus brief, concluded that the Alliance's "brief includes information relevant to the dispute at hand. The Alliance of Health Care Sharing Ministries has knowledge and experience regarding how healthcare sharing ministries serve as a manifestation of sincere religious belief, and therefore, its brief can provide useful insights to the Court." *See* Order Granting Motion for Leave to File Amicus Brief, *Gospel Light Mennonite Church Medical Aid Plan et al. v. New Mexico Office of the Superintendent of Insurance et al.*, No. 1:23-cv-00276-MLC/KK, Dkt. No. 29, at 1-2 (June 14, 2023). In its preliminary injunction opinion, the district court approvingly cited the Alliance's brief for "further discuss[ing] the role of spiritual support and prayer in HCSMs." *See* Pet. App. 100a (Memorandum Opinion and Order Granting in Part Motion to Dismiss and Denying Motion for Preliminary Injunction, *Gospel Light Mennonite Church Medical Aid Plan et al. v. New Mexico Office of the Superintendent of Insurance et al.*, No. 1:23-cv-00276-MLC/KK, Dkt. No. 38, at 6 n.3 (July 14, 2023)).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), this Court clearly held that government policies trigger strict scrutiny for not being generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise" and that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged

against the asserted government interest that justifies the regulation at issue." *Id.* at 62 (emphasis in original). As this Court put it, interpreting the progeny of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), "[c]omparability is concerned with the risks various activities pose, not the reasons why" people engage in them. 593 U.S. at 62. Applying this principle, this Court issued an injunction pending appeal against a COVID restriction in California because it distinguished between at-home religious exercise, where households could not gather, and hair salons and similar commercial enterprises, where they could. *Id.* at 63-64.

This *Tandon* rule—that comparability is determined by the risks that activities pose to government interests, not the reasons for the activities—was universally applied by the circuits in a variety of cases, until this case. Instead of applying this rule, the panel majority created a new "primary purpose" test, by which it assesses whether the "primary purpose" of the religious believer is the same as the "primary purpose" of the secular actor. Pet. App. 23a. In applying that rule, the panel majority concluded that a Swiss cheese of exemptions from the insurance code for secular organizations that make medical payments were acceptable because for those organizations, unlike the religious petitioners to which the code was applied, medical payments are "incidental or ancillary to their other, primary purposes for being." Pet. App. 23a.

Judge Carson, in dissent, properly criticized this approach: "No court has previously recognized this novel distinction." Pet. App. 52a. As Judge Carson

explained, this "primary purpose" or "'ancillary conduct' distinction rests on a misinterpretation of the *Tandon* rule." Pet. App. 52a. *Tandon* requires that courts "judge the similarity by whether the allegedly comparable activity objectively carries the same risk of which the government complains—here, public safety—not by the similarity of the organization or how many other activities the organization also conducts." Pet. App. 53a.

The *Tandon* rule is important to First Amendment protections. It provides clarity and holds the government to a consistent standard. In addition, as several justices stated in a concurrence in *Fulton*, "judges across the country continue to struggle to understand and apply *Smith*'s test," but "this Court began to resolve at least some of the confusion surrounding *Smith*'s application in *Tandon*." *Fulton v. City of Philadelphia, Pa.*, 593 U.S. 522, 626 (2021) (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in the judgment). This Court should grant the petition in this case to restore the *Tandon* rule. To the extent that this Court is not inclined to do so, this case presents a viable vehicle to reconsider or overrule *Smith*. *Tandon*, after all, "treated the symptoms, not the underlying ailment." *Id.*

The Court should step in now before the circumvention of its precedent or the confusion wrought by *Smith* goes any further.

BACKGROUND

Health care sharing ministries are a common, flourishing, and sincere exercise of religious belief. Although the term health care sharing ministry developed in the 20th century, the concept of health care sharing ministries is hundreds of years old among

Christians, drawing on Abrahamic traditions. Health care sharing ministries are the latest nomenclature for the mutual aid plans established by various Christian denominations, particularly Mennonites, Amish, and Anabaptists, to implement their understanding of the biblical admonition to "[b]ear one another's burdens." *Bethel Conserv. Mennonite Church v. Comm'r*, 746 F.2d 388, 392 (7th Cir. 1984) (quoting Galatians 6:2).

As described by the undersigned amicus curiae, "Health Care Sharing Ministries allow faith-centered people to come together as a community to share each other's medical expenses." *See* Alliance of Health Care Sharing Ministries, Frequently Asked Questions (Sept. 10, 2025), https://ahcsm.org/faq/. They also "share more than health expenses," for "they offer spiritual support with prayer over the phone, encouraging notes, and community prayer requests for members." *Id*. Each ministry performs these acts in different ways, but in general they "welcome any like-minded individuals" and have a "statement of beliefs that everyone in the community agrees to uphold." *Id*. That statement "ensures that the community, and the ministry it operates, maintains its identity rooted in shared faith and values." *Id*.

Health care sharing ministries are common and flourishing. There are over one hundred health care sharing ministries in the United States, nine of which have large, national membership. *See* Alliance of Health Care Sharing Ministries, Data and Statistics (Sept. 10, 2025), https://ahcsm.org/about-us/data-and-statistics/. Over one and a half million Americans are members of health care sharing ministries. *See* Alliance of Health Care Sharing Ministries, Frequently

Asked Questions (Sept. 10, 2025), https://ahcsm.org/faq/. Members are located in every state. *See* Alliance of Health Care Sharing Ministries, Data and Statistics (Sept. 10, 2025), https://ahcsm.org/about-us/data-and-statistics/. Together, these members and ministries have shared billions of dollars in medical expenses, sharing $1.05 billion in expenses in 2024 alone. *Id.* Although more common among Christian traditions, there also is a Jewish health care sharing ministry, and there have been efforts to establish a health care sharing ministry for followers of Islam.

Health care sharing ministries also are recognized by numerous governmental bodies as sincere exercises of religious belief. Congress recognized health care sharing ministries in the Affordable Care Act. That Act exempts those individuals enrolled in a health care sharing ministry from the mandate requiring minimum essential coverage. 26 U.S.C. § 5000A(d)(2)(B). The Act defines a health care sharing ministry as, in relevant part, an organization "members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs." *Id.* § 5000A(d)(2)(B)(ii)(II).

The U.S. Department of Health and Human Services, consistent with this congressional recognition, has recognized one hundred and seven health care sharing ministries as satisfying these criteria. *See* Alliance of Health Care Sharing Ministries, Data and Statistics (Sept. 10, 2025), https://ahcsm.org/about-us/data-and-statistics/.

Petitioners here are a part of this common, flourishing, and sincere exercise of religious belief.

ARGUMENT

A. THIS COURT'S PRECEDENTS MANDATE STRICT SCRUTINY FOR GOVERNMENT POLICIES THAT DISTINGUISH BETWEEN RELIGIOUS AND SECULAR ACTIVITIES THAT POSE SIMILAR RISKS.

1. This Court long has imposed strict scrutiny upon government policies that amount to "unequal treatment" of religious conduct. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993). One way for a religious individual or organization to establish unequal treatment is to show "that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

A government policy can fail the general applicability requirement in at least two different ways. First, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton v. City of Philadelphia, Pa.*, 593 U.S. 522, 533 (2021) (quoting *Smith*, 494 U.S. at 884); *see Kennedy*, 597 U.S. at 526 (same). Second, "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Kennedy*, 597 U.S. at 526 (quoting *Fulton*, 593 U.S. at 534).

This second way is concerned with whether the policy is "underinclusive." *Hialeah*, 508 U.S. at 543.

Underinclusivity is a significant concern because it indicates that religious observers are receiving "unequal treatment." *Id.* at 542.

This is a strict test. As this Court recently explained, government policies trigger strict scrutiny "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (emphasis in original).

"[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* That is, "[c]omparability is concerned with the risks various activities pose, not the reasons why" people engage in them. *Id.* In *Tandon*, for example, this Court enjoined pending appeal a COVID restriction in California because it distinguished between at-home religious exercise, where households could not gather, and hair salons and similar commercial enterprises, where they could. *Id.* at 63-64.

2. As the petition explains, the other courts of appeals have recognized this principle. *See* Pet. 25 ("The Tenth Circuit departed from this Court as well as every other circuit to reach the issue by solely comparing secular and religious organizations' purposes."). As did Judge Carson in dissent. *See* Pet. App. 48a-54a.

In *Fellowship of Christian Athletes v. San Jose Unified School Dist*rict, 82 F.4th 664 (9th Cir. 2023) (en banc), for example, the Ninth Circuit recognized that "in making these comparisons [among two activities], the Court 'is concerned with the risks various activities pose.'" *Id.* at 689 (quoting *Tandon*, 593 U.S.

at 62). There, the government tried to justify its refusal to approve a student group that required leaders to affirm a statement of faith that arguably foreclosed certain students from participating from its approval of other groups with sex or race membership requirements by distinguishing between "school-operated and student-operated programs." *Id.* The court concluded, however, that it was "only concerned with the risk involved," and the "asserted interest here is ensuring equal access for all students to all programs," such that various groups' "exclusionary membership requirements pose an identical risk to the District's stated interest." *Id.* at 689-90. The Ninth Circuit consequently subjected the policy to strict scrutiny. *Id.* at 690.

In *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020), similarly, the Sixth Circuit recognized that "comparability is measured against the *interests* the State offers in support of its restrictions on conduct," and, "[s]pecifically, comparability depends on whether the secular conduct 'endangers these interests in a similar or greater degree than' the religious conduct does." *Id.* at 480 (emphasis in original) (quoting *Hialeah*, 508 U.S. at 543). For that reason, the court compared the state's restrictions to slow COVID-19 regarding private schools not just to its rules to slow COVID-19 regarding public schools, but also to its rules to slow COVID-19 regarding other organizations. *Id.* at 482.

Other circuits have conducted the same analysis while ruling against the religious observer. For example, in *Does 1-6 v. Mills*, 16 F. 4th 20 (1st Cir. 2021), the First Circuit focused on the interests asserted by

Maine for its vaccination policy and whether the exemption sought by the plaintiffs would risk those interests in the same way as other exemptions. *Id*. at 32-33 ("Providing a medical exemption does not undermine any of Maine's three goals, let alone in a manner similar to the way permitting an exemption for religious objectors would."). Regardless of whether the First Circuit's analysis is entirely correct, it properly framed the methodological question required by *Tandon*.

The Second and Third Circuits conducted a similar analysis in *We the Patriots v. Hochul*, 17 F. 4th 266, 286 (2d Cir.), *opinion clarified*, 17 F. 4th 368 (2d Cir. 2021); *Spivack v. City of Philadelphia*, 109 F. 4th 158, 175–77 (3d Cir. 2024). They recognized that comparability turns on the risks to the government's interest of the secular and religious activities, and then faulted the plaintiffs for failing to properly address that question. *We the Patriots*, 17 F. 4th at 287; *Spivack*, 109 F. 4th at 175. Regardless of whether that analysis is entirely correct, the Second Circuit and Third Circuit recited the proper methodological question required by *Tandon*.

B. THE PANEL MAJORITY IDENTIFIED NO SOUND BASIS FOR DISREGARDING THIS COURT'S DECISIONS AND ADOPTING AN OUTLIER POSITION AMONG THE COURTS OF APPEALS.

The panel majority's decision is inconsistent with this Court's precedent and numerous courts of appeals decisions. It identified no sound basis for adopting its outlier position.

The panel majority adopted, without citing any authority and unique among the circuits, a "primary

purpose" test. Although it properly cited and quoted *Tandon*, it held that health care sharing ministries are not comparable to other organizations that provide medical payments, such as labor organizations or fraternal benefit societies, because for those latter organizations medical payments are "incidental or ancillary to their other, primary purposes for being." Pet. App. 23a. Consequently, the panel majority concluded, the state's activity "was not because of [Petitioners'] religious beliefs." *Id.*

As an initial matter, the panel majority's conclusion neither follows from its "primary purpose" test nor has any relationship to the established doctrine regarding the requirement of general applicability. As this Court has repeatedly explained, whether a law is generally applicable is distinct from whether the state enacted the law "because of" religious conduct. *See, e.g.*, *Fulton*, 593 U.S. at 533. Otherwise, the neutrality and general applicability concepts would collapse into one amorphous inquiry.

More fundamentally, Judge Carson's dissent correctly responds that "[n]o court has recognized this novel distinction" and it "rests on a misinterpretation of the *Tandon* rule." Pet. App. 52a. As Judge Carson explained, "*Tandon* does not instruct [courts] to ask about an organization's *purpose*." Pet. App. 52a (emphasis in original). Rather, "comparability . . . is concerned with the risks various *activities* pose, not the reasons why people [engage in the activity]." Pet. App. 52a-53a (emphasis added by Judge Carson, quoting *Tandon*, 503 U.S. at 62). An inquiry into the "primary purpose" of the religious organization is simply another way of asking "the reasons why," which is forbidden by *Tandon*.

The "primary purpose" test also creates potentially absurd results. Under that test, the same activity is treated differently depending on whether it is conducted by an organization with multiple functions or one with one function. For example, under the panel majority's test, the at-home religious exercise at issue in *Tandon* could be treated differently depending on whether it was engaged in by an organization that "primarily" focused on at-home religious exercise or, instead, an organization that engaged in such exercise as one among many types of religious exercise. That makes little sense and turns *Tandon* on its head. Or, as Judge Carson put it, "We must judge the similarity by whether the allegedly comparable activity objectively carries the same risk of which the government complains—here, public safety—not by the similarity of the organization or how many other activities the organization also conducts." Pet. App. 53a.

C. THE *TANDON* REQUIREMENT SUBJECTING TO STRICT SCRUTINY GOVERNMENT POLICIES THAT DISTINGUISH BETWEEN RELIGIOUS AND SECULAR ACTIVITIES THAT POSE SIMILAR RISKS PROVIDES IMPORTANT CLARITY AND PROTECTION.

This Court's rule in *Tandon* regarding general applicability plays an essential function in ensuring that the First Amendment serves its intended role to protect religious liberty. The First Amendment provides significant protection for religious exercise, protection that this Court has had to increasingly make clear over the recent years. *See, e.g.*, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025); *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Comm'n*, 605 U.S. 238 (2025); *303 Creative v. Elenis*, 600 U.S. 570

(2023); *Kennedy*, 597 U.S. at 507; *Fulton*, 593 U.S. at 522; *Tandon*, 593 U.S. at 61; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). The *Tandon* rule provides clear guidance to courts and parties because it keeps neutrality and general applicability distinct and focuses on objective criteria. In addition, the rule is particularly important to health care sharing ministries that are increasingly subject to state policies that distinguish them from organizations with similar activities and thus risks.

1. This Court's decision in *Tandon* helped to provide a clear rule to implement *Smith*. As Justice Gorsuch, writing for himself and Justices Thomas and Alito in *Fulton*, explained, although "judges across the country continue to struggle to understand and apply *Smith*'s test," "this Court began to resolve at least some of the confusion surrounding *Smith*'s application in *Tandon*." *Fulton*, 593 U.S. at 626 (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in the judgment).

That rule is that comparability is assessed based on the risks created by secular and religious activities to the state's asserted interest. The benefit of this rule is at least twofold. First, it provides a clear test for the general applicability concept, and one that is distinct analytically from the neutrality concept. This Court in *Fulton* emphasized that these are separate concepts both in word and deed. It listed them separately and then concluded that the government policy at issue violated the general applicability principle without considering the neutrality principle. 593 U.S. at 533-34.

Second, the *Tandon* rule avoids a gerrymandering problem analogous to that raised by Justice Gorsuch

in his concurrence in *Masterpiece Cakeshop*. There, Justice Gorsuch explained that a government can, by "adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views," engineer desired results that harm religious observers. *Masterpiece Cakeshop*, 584 U.S. at 652 (Gorsuch, J., joined by Alito, J., concurring) (emphasis in original). This problem is addressed at least in part by the *Tandon* rule. That is because *Tandon* requires the state to assess the same interest in justifying the policy overall, the risk of the exemptions, and the risk of an exemption for religious observance. The state cannot perform a gerrymander as easily.

This advantage of the *Tandon* rule is confirmed by an analogous weakness in the "primary purpose" test proposed by the panel majority. The panel majority simply "finetuned" the state's interest depending on whether it was assessing the secular or religious activity. For the religious activity of health care sharing ministries, the panel majority asserted that the state's interest was that the insurance code did not apply to their activities. Pet. App. 24a ("OSI's enforcement action here was not because of Gospel Light's religious beliefs, it was because they operated outside of the bounds of the NMIC [insurance code] that applied to their business activities."). In assessing the exemptions for fraternal benefit societies or labor organizations, however, the panel majority held that the state's interest was in regulating insurance organizations. Pet. App. 24a ("In other words, OSI's asserted interests were to protect New Mexico consumers by regulating the insurance industry, not to burden or regulate religious conduct.").

To put it differently, in the same paragraph of the panel majority opinion, the analysis shifted from a government interest in regulating insurance activity to an interest in regulating the insurance industry. For the ministries, the purported concern of the state is their insurance-like "business activities," but for the fraternal benefit societies or labor organizations, the purported concern of the state is no longer "activities" but the "insurance industry." (Indeed, the Respondents offer yet another fine-tuning now, Br. in Opp. 15, that the state's true interest, found in a narrow statutory provision that applies only to labor organizations, is in organizations that do not incidentally provide insurance.)

The primary purpose test encourages this type of shift because it directs attention to the organization instead of only the government's interest. Specifically, for the primary purpose test, the organization is the focus for what is restricted while the government interest is the focus for what is not restricted. That allows for "finetuning" by the government. The *Tandon* rule, by contrast, focuses on the government's interest for both what is and what is not regulated. That makes it harder to manipulate.

2. The clarity and protection of the *Tandon* rule is particularly important to health care sharing ministries in light of current regulatory structures and current regulatory attempts. Current regulatory structures in over thirty states provide safe harbor laws clarifying that health care sharing ministries are exempt from the state insurance code and may operate subject only to the general legal requirements appli-

cable to charities. These states, in other words, generally do not subject ministries to laws that are not generally applicable.

But an increasing number of states have taken the opposite tack. A few states, such as New Mexico, have tried to challenge some ministries as constituting insurance, notwithstanding exemptions for other comparable organizations engaged in similar activities from their insurance codes. Still other states, such as Colorado, have subjected ministries to unique regulatory regimes applicable neither to insurance companies nor to other similar medical payment arrangements, such as pre-planned crowdfunding or direct primary care. Motivated and backed by the American Humanist Association, these measures utilize a series of exceptions to treat ministries unequally, with legislative participants explicitly stating that the ministries seek "religious freedom" and "we can't let that happen." *See* American Humanist Association, What you NEED To Know about Health Care Sharing Programs RIGHT NOW! (May 5, 2025), tinyural.com/4h3vh752. The *Tandon* rule when properly understood, applied, and litigated prevents these attempts.

3. The *Tandon* rule is, as Justice Gorsuch explained, an improvement on the state of the law in the lower courts after *Smith*. But the dispute between the panel majority and the dissent in this case indicates that, as Justice Gorsuch also explained, "*Tandon* treated the symptoms, not the underlying ailment." *Fulton*, 593 U.S. at 626. It did not, nor could not, resolve all of the confusion wrought by *Smith*. To the extent this Court is not inclined to try to further treat

the symptoms, this case presents a viable vehicle for reconsidering *Smith*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. MURRAY
Counsel of Record
WILLIAM MAHONEY
PAUL HASTINGS LLP
2050 M Street, N.W.
Washington, DC 20036
(202) 551-1700
michaelmurray@
paulhastings.com

Counsel for Amicus

September 15, 2025