

**In the Supreme Court of the United States**

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CATHARINE MILLER & CATHY'S CREATIONS, INC.,  
*Petitioners,*

v.

CIVIL RIGHTS DEPARTMENT,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,  
FIFTH APPELLATE DISTRICT

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the preparation and commercial sale of a plain white cake for a same-sex wedding reception is activity protected by the First Amendment's Free Speech Clause, where the cake was not customized for any particular event but was instead predesigned for a wide variety of uses, including birthdays, baby showers, and wedding celebrations.

2. Whether California's public accommodations statute, called the Unruh Civil Rights Act, is a neutral and generally applicable law for purposes of the Free Exercise Clause.

3. Whether this Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

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## STATEMENT

1. California’s Unruh Civil Rights Act “stands as a bulwark protecting each person’s inherent right to ‘full and equal’ access to ‘all business establishments.’” Pet. App. 16a (quoting *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 167 (2007)). The Act prohibits business establishments from discriminating in their “accommodations, advantages, facilities, privileges, or services” based on “sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status.” Cal. Civ. Code § 51(b). California courts have also extended the Act’s protection to categories of persons not enumerated in the statute—for example, the elderly and families with minor children. Pet. App. 17a-19a.

For purposes of *unenumerated* characteristics, courts consider whether the differential treatment at issue is “arbitrary, invidious, or unreasonable.” Pet. App. 18a. In undertaking that inquiry, courts ask whether “compelling societal interests justify a difference in treatment.” *Id.* at 45a. For *enumerated* characteristics, however, courts do not undertake any such inquiry. *Id.* at 18a. Discrimination on the basis of an enumerated characteristic is considered *per se* arbitrary, invidious, and unreasonable as a matter of law. *Id.*; *see also id.* at 44a-46a. Indeed, the Unruh Civil Rights Act contains no “discretionary exemptions or any other system for obtaining individualized exemptions” from enumerated characteristics. *Id.* at 87a. Nor does it “draw any distinctions between secular and religious activities.” *Id.* at 90a.

2. Catherine Miller owns and operates Tastries, a bakery in Bakersfield, California. Pet. App. 7a. Tastries sells a daily assortment of baked goods from a display case in its store and also accepts preorder requests for baked goods. *Id.* Tastries considers all of its preordered items to be “custom,” regardless of product type or design. *Id.* Even a preorder for a cake “identical to one in the daily display case” is considered by Tastries to be a “custom” good. *Id.* at 7a-8a.

Miller, who is a Christian, developed design standards to reflect her beliefs. Pet. App. 9a-10a. The design standards “apply to all baked goods,” including preorder requests. *Id.* at 10a, 22a. Those standards prohibit designs that, for instance, portray explicit sexual content or present anything offensive, demeaning, or violent. *Id.* at 10a, 22a. Miller added a separate standard in 2015, providing that Tastries will not accept “[r]equests that violate fundamental Christian princip[les]; wedding cakes must not contradict God’s sacrament of marriage between a man and a woman.” *Id.* at 10a, 22a. Under that standard, Tastries will not provide “any preordered baked good for use in the celebration of same-sex marriage, including engagements, weddings, and anniversaries, . . . no matter its design.” *Id.* at 10a-11a; *see also id.* at 22a.

In August 2017, Eileen and Mireya Rodriguez-Del Rio, a same-sex couple, approached Tastries about producing a cake for their wedding reception. Pet. App. 12a. They had gotten married in a small ceremony several months earlier and were planning a celebration with a larger group. *Id.*

At their initial visit, the Rodriguez-Del Rios worked with a Tastries employee to choose a cake based on “a preexisting, inedible sample cake” displayed in the store. Pet App. 12a. The cake was a “simple and popular design”—round with three tiers and white frosting, with no writing, symbols, engravings, images, or toppers—“sold for many different types of events,” including birthdays, baby showers, quinceañeras, and weddings. *Id.* at 5a, 6a, 12a. This is a photo of the cake as it appeared when ordered for a baby shower (left) and for a wedding (right):



*Id.* at 6a. This type of cake was to be delivered about an hour in advance of an event. *Id.* at 12a.

At the employee’s suggestion, the couple later returned to Tastries to taste flavors for their cake’s filling and frosting. Pet. App. 12a-13a. They met with Miller, who asked who the groom was. *Id.* at 13a. When Miller learned that the Rodriguez-Del Rios were a same-sex couple, she informed them that Tastries would not supply them with a cake for their wedding celebration. *Id.* at 13a.

3. In October 2017, the Rodriguez-Del Rios filed a complaint with the California Civil Rights Department. Pet. App. 156a. One year later, following an

administrative investigation, the Civil Rights Department filed suit against Tastries, its owner Cathy's Creations, Inc., and Miller (petitioners here), for violating the Unruh Civil Rights Act. Pet. App. 2a-3a, 14a. Petitioners asserted affirmative defenses under the First Amendment on free speech and free exercise grounds. *Id.* at 2a-3a.

Following a bench trial, the trial court concluded that the Civil Rights Department failed to prove a violation of the Unruh Civil Rights Act as a matter of state law. Pet. App. 15a. The trial court's theory was that petitioners did not discriminate on the basis of sexual orientation because their policy against selling preordered baked goods for same-sex wedding celebrations applied to all persons, regardless of sexual orientation. *Id.* In the alternative, the trial court accepted petitioners' free speech defense. *Id.* at 15a-16a. It held that petitioners' wedding cakes constitute pure speech and expressive conduct, and that the State failed to satisfy strict scrutiny. *Id.* at 15a-16a. The court rejected petitioners' free exercise defense. *Id.* at 15a (citing *North Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal.4th 1145, 1158 (2008)).

4. The court of appeal reversed. As a matter of state law, it rejected the trial court's application of the Unruh Civil Rights Act. Pet. App. 4a, 22a. The court of appeal concluded that petitioners' refusal to provide cakes for same-sex wedding celebrations was a form of discrimination on the basis of sexual orientation. *Id.* at 20a-32a. The court also rejected petitioners' First Amendment defenses. *See id.* at 78a-79a, 99a-100a.

With respect to free speech, the court rejected petitioners' argument that being "forc[ed]" to provide

“*any* preordered wedding cake for a same-sex wedding” would “compel” them “to speak a message with which they disagree.” Pet. App. 48a. The court “acknowledge[d] that, in some circumstances, a wedding cake or select services like cake cutting at the wedding celebration may be expressive, and in those cases, First Amendment speech protections may apply.” *Id.* at 79a. For example, the “preparation and assembly” of cakes with “significant and apparent . . . expressive elements” could be considered “an act of self-expression by the baker.” *Id.* at 70a.

But the cake “at issue here” did not have those expressive features. Pet. App. 64a. It was “a generic, multi-purpose,” “popularly ordered predesign” of “a plain, three-tiered white cake,” “suitable for different events beyond weddings.” *Id.* at 64a-65a, 69a. Accordingly, it was “no different than a multitude of other predesigned, routinely generated and multi-purpose consumer products”—such as “a charcuterie board, a fruit bouquet, or a cheese platter.” *Id.* at 70a. And if the supply of those types of products triggered First Amendment concerns, “a host of [other] non-expressive products or services provided for a same-sex wedding reception”—such as “flatware, chairs and linens, etc.”—“could be deemed to convey a message” as well. Pet. App. 65a; *see id.* at 66a (“The mere fact these products are prepared for and provided to a same-sex wedding in a routine economic transaction does not transform them into . . . self-expression.”).

Turning to free exercise, the court of appeal held that the Unruh Civil Rights Act is “a ‘valid and neutral law of general applicability.’” Pet. App. 81a. As relevant here, the Act contains no “discretionary exemptions or any other system for obtaining individ-

ualized exemptions,” and “does not draw any distinctions between secular and religious activities.” *Id.* at 87a, 90a. As a matter of state law, the court rejected petitioners’ contention that “discretionary exemptions are built into the statute.” *Id.* at 87a. Petitioners argued that the Act requires an examination of whether disparate treatment is “arbitrary, invidious or unreasonable.” *Id.* But California courts perform that inquiry only in the context of discrimination involving *unenumerated* classifications, like age or parental status. *Id.* at 87a-89a; *supra* p. 1. With respect to *enumerated* categories, including sexual orientation, no such inquiry is undertaken. *Id.* at 18a, 87a.

The court of appeal vacated the trial court’s order and remanded for further proceedings. Pet. App. 100a. It also denied petitioners’ petition for rehearing. *Id.* at 101a-106. The California Supreme Court denied a petition for review. *Id.* at 1a.

## ARGUMENT

This Court recently reaffirmed “the vital role public accommodations laws play in realizing the civil rights of all Americans.” *303 Creative, LLC v. Elenis*, 600 U.S. 570, 590 (2023). And “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *E.g., Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021). The court of appeal’s decision here is consistent with those principles and does not conflict with the decisions of any other appellate courts. Although certain factual scenarios in the context of same-sex wedding ceremonies undoubtedly present free speech concerns, *see, e.g., 303 Creative*, 600 U.S. at 592, the factual circumstances here do not. This case involves the preparation, commercial sale, and pre-event delivery of a multi-purpose,

predesigned, plain white cake that is materially indistinguishable from “a host of non-expressive products or services,” Pet. App. 65a, from “a charcuterie board, a fruit bouquet, or a cheese platter,” *id.* at 70a, to “flatware, chairs and linens,” *id.* at 65a.

Nor does petitioners’ free exercise claim implicate a conflict in the lower courts or otherwise warrant review. Petitioners’ free exercise analysis is premised on a misunderstanding of state law. And this Court has denied several recent requests to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). There is no reason to take a different approach here.

# **I. PETITIONERS’ FREE SPEECH ARGUMENTS DO NOT WARRANT REVIEW**

The decision below correctly rejected petitioners’ free speech claims. The court of appeal held that the cake at issue was a predesigned, plain white cake without any writing or adornments, regularly prepared and sold for several different occasions. Pet. App. 12a. Applying those facts in light of settled First Amendment principles, the court concluded that the cake itself was not a form of protected speech. *Id.* at 63a-71a. And it further held that the cake’s preparation, sale, and pre-event delivery did not amount to First Amendment-protected expressive *conduct* because those activities are materially indistinguishable from the preparation, sale, and delivery of a multitude of other commercial products and services. *Id.* at 73a-79a. Petitioners contend that both aspects of the decision warrant review. They are incorrect.

1. Petitioners first argue that the decision below conflicts with “multiple foundational free speech cases involving ceremonies.” Pet. 25 (citing *303 Creative*, 600 U.S. 570; *W. Va. State Bd. of Educ. v. Barnette*,

319 U.S. 624 (1943)).<sup>1</sup> In their view, those cases establish that wedding cakes are “inherently symbolic.” Pet. 26. But petitioners correctly acknowledge that the Court has never adopted any such categorical rule. *Id.* Indeed, the Court recently emphasized in *303 Creative* that a highly fact-specific inquiry is required to assess whether an application of a public accommodations law violates the First Amendment. *See 303 Creative*, 600 U.S. at 587-588, 591-594, 596, 599-600 & n.6; *see id.* at 599 (explaining that “First Amendment protections” followed from “the parties’ stipulations about the case” and distinguishing “hypotheticals about photographers, stationers, and others” because “those cases are not *this case*”).

Petitioners compare the cake in this case to the custom wedding websites deemed protected speech in *303 Creative*. Pet. 26. But petitioners do not argue that the California court of appeal’s fact-intensive discussion of the particular cake in this case implicates any division of authority in the lower courts. And the features of the websites discussed by this Court in *303 Creative* show why the cake here is not comparable.

In *303 Creative*, the parties stipulated that the websites would “contain ‘images, words, symbols, and other modes of expression’”; each website would be the petitioner’s “‘original, customized’ creation”; and the websites would “communicate ideas—namely, to ‘celebrate and promote the couple’s wedding and unique love story’ and to ‘celebrat[e] and promot[e] what [the petitioner] understands to be a true marriage.’” 600 U.S. at 587. In contrast, the cake in

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<sup>1</sup> Petitioners focus on ceremonies. *See* Pet. 20-25. But their policy is not limited to ceremonies: they will not provide preordered baked goods for any type of event that celebrates same-sex marriage, including engagements and anniversaries. Pet. App. 11a.

this case contains “no writing, drawings, images, engravings, symbols or any other modes of expression”; it is “a facsimile from a popularly ordered pre-design,” not a “customized creation”; and, as Miller herself testified, it is regularly requested and sold for many occasions, not just weddings. Pet. App. 64a-65a, 69a. The “generic, multi-purpose” cake here was not inherently a wedding cake; it became “a wedding cake *only* because the Rodriguez-Del Rios were going to use it that way.” *Id.* at 66a-67a.

The court of appeal accepted that certain cakes produced for a wedding may constitute speech, such that the government could not compel their production, sale, and delivery consistent with the First Amendment. Pet. App. 79a (“We acknowledge that, in some circumstances, a wedding cake or select services like cake cutting at the wedding celebration may be expressive, and in those cases, First Amendment speech protections may apply.”). But the court also correctly recognized that “[t]he mere fact that . . . products are prepared for and provided to a same-sex wedding in a routine economic transaction does not transform them into the self-expression of the vendor.” *Id.* at 66a; *see also* 303 *Creative*, 600 U.S. at 593 (vendor did “*not* seek to sell an ordinary commercial good”). Were the law otherwise, “a host of nonexpressive products or services provided for a same-sex wedding reception could be deemed to convey a message merely because they were provided for the event—e.g., flatware, chairs and linens, etc.” Pet. App. 65a.

2. Petitioners also challenge the court of appeal’s refusal to treat petitioners’ preparation, sale, and pre-event delivery of the cake as expressive conduct. Pet. 20-25, 27. Petitioners argue that there is a conflict

among the lower courts on the question of whether conduct “must be viewed as an endorsement by a reasonable observer in order to qualify for First Amendment protection.” Pet. 2; *id.* at 20-25. But the court of appeal correctly conducted the relevant First Amendment inquiry, and the claimed conflict is illusory.

a. The First Amendment protects conduct that is “sufficiently imbued with elements of communication” to warrant protection as speech. *Spence v. Washington*, 418 U.S. 405, 409 (1974). Conduct is sufficiently expressive where there is “[a]n intent to convey a particularized message” and “in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.” *Id.* at 410-411. For example, burning a flag as a form of protest qualifies as a form of protected expression. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 403-404 (1989). But the Court has been careful to avoid treating conduct as protected speech merely because “the person engaging in the conduct intends thereby to express an idea.” E.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006). “Instead, [the Court has] extended First Amendment protection only to conduct that is *inherently expressive*.” *Id.* at 66 (emphasis added).

The decision below comports with those principles. See Pet. App. 71a-78a. The court of appeal concluded that petitioners “could not have intended to send [a] particularized message . . . of support for the sacrament of marriage” through the cake at issue “because this predesigned cake was requested and sold for a variety of parties and gatherings” and “bore no evidence of that intent.” *Id.* at 74a. The court also concluded that a viewer was unlikely to understand the cake’s provision to “convey[] any message about

marriage generally or an endorsement and celebration of same-sex marriage in particular.” *Id.* at 75a. The court reasoned that “[a]ny rational viewer knows that retailers and vendors who provide services and products for wedding receptions are engaged in a for-profit transaction” and “would have no reason to assume a vendor was conveying any message at all—especially through a multi-purpose product that bears no indicia it was customized for this specific wedding.” *Id.* at 76a; *see id.* at 75a (pointing out that the cake “conveyed nothing in support or opposition of same-sex marriage or marriage at all”).

b. Petitioners argue that courts have divided in same-sex marriage-related cases on the question whether the expressive-conduct inquiry requires a showing that “third parties would view [the relevant conduct] as expressing an endorsement of the ceremony.” Pet. 21. That is incorrect.

Three of the five cases invoked by petitioners (at 23-35) did not even address expressive-conduct claims. In two of those cases, the courts did not undertake an expressive-conduct analysis because they held that the activity at issue was pure speech: wedding videos over which producers “exercise substantial ‘editorial control and judgment’” to communicate “‘ideas’ about marriage,” *Telescope Media Group v. Lucero*, 936 F.3d 740, 747, 750-751 (8th Cir. 2019), and individualized wedding invitations featuring “hand-drawn words” and “hand-painted images and original artwork” over which creators “retain artistic control,” *Brush & Nib Studio, LLC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019); *see also id.* at 911-912 (distinguishing the “test[s] for expressive conduct” and “pure speech” and explaining that “[w]hether a third party is able to discern any articulable ‘message’ in

pure speech . . . is simply irrelevant in terms of whether it is protected under the First Amendment”).

A third case, *Emilee Carpenter, LLC v. James*, 107 F.4th 92 (2d Cir. 2024), is similarly inapposite. It was pending when this Court decided *303 Creative*. Because the wedding-photographer plaintiff had alleged facts “substantially similar to the relevant facts stipulated by the parties in *303 Creative*,” the Second Circuit held that the plaintiff had plausibly alleged a free speech claim. *Id.* at 100-101. The Second Circuit remanded to the district court to determine, based on “a developed factual record,” whether the plaintiff’s services were “expressive activity” or “predominantly nonexpressive activity of a commercial nature.” *Id.* at 106; *see also id.* at 96. “Whether a third party would view [the plaintiff’s] participation as an endorsement of the ceremony did not factor into the Second Circuit’s analysis” (Pet. 24), because the Second Circuit did not conduct *any* analysis of the free speech claim.

Petitioners also invoke *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021), and *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014). In *Arlene’s Flowers*, the Washington Supreme Court conducted a fact-intensive, case-specific inquiry consistent with this Court’s precedent. The court first rejected the argument that floral arrangements for a same-sex wedding ceremony qualified as pure speech. *See* 441 P.3d at 1225, 1228 n.19. It then asked whether the sale of those arrangements was expressive conduct. *Id.* at 1225. Like the court of appeal here, *see, e.g.*, Pet. App. 75a-78a, the Washington high court considered what “an outside observer” would perceive, 441 P.3d at 1226. Under this Court’s

decisions, *supra* p. 10, that factor is highly relevant in addressing the ultimate question whether conduct “*inherently* express[es] a message.” 441 P.3d at 1226 (emphasis added). For example, in *Rumsfeld*, 547 U.S. at 66, this Court addressed whether law schools’ on-campus recruitment practices were “inherently expressive” by examining the conduct from the perspective of “an observer.” Because an observer would have had “no way of knowing” what message the schools were intending to convey, the Court treated the conduct as non-expressive. *Id.*

In *Elane Photography*, 309 P.3d at 72, the New Mexico Supreme Court rejected a compelled speech claim that arose long before this Court’s recent decision in *303 Creative*. The plaintiff was a photography company required by a public accommodations law to offer services at same-sex weddings. *Id.* at 58-59. The court concluded at the time that “no precedent . . . suggest[s] that First Amendment protections allow” individuals who “engage in speech” or “create speech for others . . . to violate antidiscrimination laws.” *Id.* at 71. If a similar case arose today, its analysis would necessarily be different. *Cf. Emilee Carpenter*, 107 F.4th at 106. Petitioners do not identify any decisions that have relied on *Elane Photography* in the wake of *303 Creative*. To the contrary, four of the cases petitioners invoke in alleging a conflict pre-date *303 Creative*, and a fifth remanded to the district court to apply that decision in the first instance. There is no need for the Court to provide guidance already offered by *303 Creative*—particularly in this case, where the court of appeal carefully applied that guidance.

## II. PETITIONERS' FREE EXERCISE ARGUMENTS DO NOT WARRANT REVIEW

1. Petitioners contend that review is also warranted to resolve a conflict about how to determine whether a law is generally applicable under the Free Exercise Clause. Pet. 28. They maintain that courts are divided over whether to consider “all discretion and exemptions allowed by a regulatory scheme” or only “unfettered discretion or exemptions for identical secular conduct.” *Id.* (emphasis omitted). Petitioners argue that the asserted conflict is implicated here because, in their view, the court of appeal “ignored” that California’s Unruh Civil Rights Act contains discretionary exemptions for “reasonable” discrimination, as well as exemptions for disparate treatment based on age at senior housing facilities and differential treatment when otherwise allowed by law. *Id.* at 34.

Petitioners’ argument is based on a misunderstanding of the decision below and its application of California law. The court of appeal did not “ignore” any exemptions. It held as a matter of state law that there *are no* exemptions to the Unruh Civil Rights Act’s prohibition on sexual orientation. Pet. App. 87a-91a. The court’s resolution of that state law question is not subject to further review by this Court. *See, e.g., Henry v. State of Miss.*, 379 U.S. 443, 446 (1965) (“It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions.”). And where a law has no relevant exemptions, the federal free exercise analysis is straightforward: the challenged law plainly qualifies as neutral and generally applicable. *See Fulton*, 593 U.S. at 533-534.

In renewing their argument that the Unruh Civil Rights Act is not neutral or generally applicable, *see* Pet. App. 45a, 87a, petitioners first contend that the Act “exempts *all* discrimination which California courts find to be ‘reasonable,’ consistent with ‘public policy,’ and thus not ‘arbitrary,’” Pet. 34. But the court of appeal rejected that reading of the statute. The court held that the Act does not permit case-by-case exemptions to its prohibition on disparate treatment based on characteristics enumerated in the statute, including sexual orientation. Pet. App. 18a-19a, 44a-45a, 84a, 87a. “[P]olicies that make a facial distinction based on an enumerated protected characteristic” are categorically “unlawful as arbitrary, invidious or unreasonable discrimination.” *Id.* at 18a. The court of appeal explained that a court considers reasonableness, public policy objectives, or arbitrariness only with respect to differential treatment based on characteristics “*not* expressly enumerated in the statute,” such as age or parental status. *Id.* at 84a (emphasis added); *supra* p. 1.<sup>2</sup>

The court of appeal also rejected petitioners’ reliance on statutory provisions preserving housing for senior citizens. Pet. App. 90a-91a. Those provisions apply only in cases involving claims asserting age-based discrimination in the specific context of housing.

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<sup>2</sup> Contrary to petitioners’ assertion, the court of appeal did not evaluate whether petitioners’ reason for refusing to provide a cake was “compelling.” Pet. 35. The court did the opposite: it explained that “[t]he issue is not *why* [petitioners] created and applied the policy, but that it facially precludes some services based on a protected characteristic.” Pet. App. 28a-29a; *see id.* at 29a (“when the design standard is rightfully understood as facially discriminatory, the fact that [petitioners] adoption of the discriminatory policy was driven by . . . sincerely held religious beliefs rather than malice or ill will is irrelevant”).

Pet. App. 87a-88a, 90a-91a; *see* Cal. Civ. Code §§ 51.2-51.4, 51.10-51.12. They do not apply in cases—like this one—asserting discrimination based on sexual orientation (or any other enumerated characteristic). Indeed, they have nothing to do with discrimination based on sexual orientation.

Unsurprisingly, then, petitioners provide no reason to view those provisions as comparable to the exemption that they seek from the Act’s prohibition on sexual orientation-based discrimination. *Cf. Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021) (“the inclusion of a religious accommodation procedure” in school district’s *employee* vaccination mandate was not evidence that its *student* vaccination mandate was not generally applicable); *Emilee Carpenter*, 107 F.4th at 110-111 (exceptions to prohibition on sex discrimination are not comparable to exception to prohibition on sexual orientation discrimination because “New York’s interests in prohibiting discrimination on different protected grounds are not identical”).

Finally, the court of appeal rejected petitioners’ reliance on the Unruh Civil Rights Act’s statement that the statute should “not be construed to confer any right or privilege on a person that is conditioned or limited by law.” Pet. App. 91a (quoting Cal. Civ. Code § 51(c)). As the court held as a matter of state law, that statement is not an exception to *anything*; it is simply a conflict-of-laws provision. *See id.* The statement “merely provides guidance as to which law applies in the event of a conflict” with the Unruh Civil Rights Act. *Id.* Because petitioners “point to no California law that permits disparate treatment on the basis of sexual orientation,” *id.*, they have failed to demonstrate that the statement has any bearing on this case whatsoever. And because petitioners’ free

exercise claim rests on arguments that are incorrect as a matter of state law, there is no need to consider their asserted conflict.<sup>3</sup>

2. Petitioners also ask the Court to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). Pet. 37. The Court should decline that request. Just a few Terms ago, this Court granted a petition for a writ of certiorari asking it to overrule *Smith*. See *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). But the Court did not do so. See, e.g., *id.* Instead, it applied the rule from *Smith* that laws are “ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Id.* As Justice Barrett explained in a separate opinion, it would not be sensible for “strict scrutiny [to] apply whenever a neutral and generally applicable law burdens religious exercise.” *Id.* at 543 (Barrett, J., concurring). Many “garden-variety laws” long viewed as constitutional would be subject to challenge. *Id.* at 544 (citing *Smith*, 494 U.S. at 888-889).

Since *Fulton*, the Court has repeatedly denied requests to overrule *Smith*. See, e.g., *We The Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 144 S. Ct. 2682 (2024) (No. 23-643); *Tingley v. Ferguson*, 144 S. Ct. 33 (2023) (No. 22-942); *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (No. 21-1143); *Ricks v. Idaho Contractors Bd.*, 141 S. Ct. 2850 (2021) (No. 19-66);

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<sup>3</sup> It would make no difference if the Court considered the alleged conflict. Other parties have recently explained why the same alleged conflict is overstated and provides no basis for granting certiorari. See, e.g., Br. in Opp. 21-25, *Dr. A. v. Hochul*, No. 21-1143 (Apr. 1, 2022), *cert. denied*, 142 S. Ct. 2569 (2022); Br. of State Resp. in Opp. 15-28, *We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, No. 23-643, (May 20, 2024), *cert. denied*, 144 S. Ct. 2682 (2024).

*Calvary Chapel of Bangor v. Mills*, 142 S. Ct. 71 (2021) (No. 20-1346); *see also 303 Creative LLC v. Elenis*, No. 21-476, (U.S. Feb. 22, 2022) (limiting cert grant to non-*Smith* question). The Court should follow the same course here.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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