No. 25-581

IN THE

Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, ET AL.,
Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY CHILDHOOD, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* LIMANDRI & JONNA LLP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae **LiMandri & Jonna LLP** is a general civil litigation firm located in Southern California focusing on personal injury, business, and pro bono religious liberty litigation. Through its religious liberty practice, LiMandri & Jonna LLP has participated in many of the major religious liberty decisions issued by courts in California, from defending local war memorials with a Christian theme, *San Diegans for Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers), to fighting for the right of churches to hold worship services during the coronavirus pandemic, *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021) (mem.), to protecting the rights of parents to direct religious upbringing of their children. *Mirabelli* v. *Bonta*, 607 U.S. 492 (2026) (per curiam).

Beyond these high-profile cases, LiMandri & Jonna LLP has significant experience litigating religious liberty cases in the California court system. See, *e.g.*, *Parisenkova* v. *Bright Horizons Children's Ctr., LLC*, No. 22BBCV00756 (Cal. Super. Ct., L.A. Cty., Oct. 13, 2022); *Californians for Equal Rts. Found.* v. *California*, No. 37-2021-37896 (Cal. Super. Ct., S.D. Cty., Sept. 3, 2021); *Burfitt* v. *Newsom*, No. BCV-20-102267 (Cal. Super. Ct., Kern Cty., Sept. 29, 2020); *Cty. of Los Angeles* v. *Grace Cmty. Church of the*

[1] No counsel for any party authored this brief in whole or in part, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief.

Valley, No. 20STCV30695 (Cal. Super. Ct., L.A. Cty., Aug. 14, 2020); *Children of the Immaculate Heart* v. *Johnson*, No. 37-2019-61761 (Cal. Super. Ct., S.D. Cty., Nov. 19, 2019); *Harrison* v. *Gilligan*, No. BCV-10-102587 (Cal. Super. Ct., Kern Cty., Sept. 11, 2019); *Ghiotto* v. *City of San Diego*, No. 37-2007-73878 (Cal. Super. Ct., S.D. Cty., Aug. 28, 2007); *Paulson* v. *Abdelnour*, No GIC849667 (Cal. Super. Ct., S.D. Cty., June 24, 2005).

Unfortunately, as highlighted by Petitioner's Brief on the Merits, California courts generally look first to *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and look no further, ignoring this Court's many other streams of religious liberty jurisprudence. As a practical matter, confusion among California courts is hampered by their obligation to follow a trilogy of decisions from the California Supreme Court interpreting this Court's Free Exercise jurisprudence that are woefully out of date. See *North Coast Women's Care Med. Grp.* v. *Superior Ct.*, 189 P.3d 959 (Cal. 2008); *Cath. Charities of Sacramento, Inc.* v. *Superior Ct.*, 85 P.3d 67 (Cal. 2004); *Smith* v. *Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996).

Thus, LiMandri & Jonna LLP now submits this *amicus curiae* brief to provide the Court with its perspective on the need for clear, bright-line rules to resolve the "administrability" problem posed by *Employment Division* v. *Smith*. See Pet., p. 32. *Amicus* urges the Court to not cabin its analysis to whether "the *Carson* trilogy of cases" apply, Op. Br., p.27, but to provide further clarity for lower courts regarding

why Colorado's regime is not neutral and generally applicable under *Smith*.

SUMMARY OF ARGUMENT

In April 1990, this Court issued its decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). As announced therein, heightened scrutiny does not apply to adjudicating a religious objection to "a neutral, generally applicable regulatory law." *Id.* at 880. Since that time, as explained by Petitioner, this Court has adjudicated seventeen Free Exercise cases, and has only once ruled against the religious objector on the basis that the law is neutral and generally applicable. Op. Br., p.21.

Yet as indicated in Petitioner's original petition, the opposite is true in California courts. See Pet., pp.20-21 (citing *North Coast Women's Care Med. Grp.* v. *Superior Ct.*, 189 P.3d 959 (Cal. 2008); *Civil Rts. Dep't* v. *Cathy's Creations, Inc.*, 109 Cal. App. 5th 204 (Cal. Ct. App. 2025)). Rather, since *Employment Division* v. *Smith*, there has not been a single case in which the religious objector has prevailed in a published decision. In the two (and only two) instances where the religious objector did win, the California Supreme Court quickly ordered the case de-published. See *People* v. *Calvary Chapel San Jose*, 298 Cal. Rptr. 3d 262 (Cal. Ct. App. 2022), depublished, No. S276560 (Cal. Nov. 30, 2022); *Donahue* v. *Fair Emp't & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991), depublished, No. S024538 (Cal. Dec. 16, 1993).

Within the California court system, there have been only three major series of religious liberty cases, dealing with (1) religious objections to California's anti-discrimination statutes, (2) religious objections to California's COVID-19 orders, and (3) church autonomy objections to California's mandates. The results in all three major fights would have come out differently under this Court's jurisprudence.

Below, *amicus* recounts these significant Free Exercise cases in California courts before closing with a plea that this Court clarify bright-line rules that are easily administrable so that neither California governments, nor California courts, can gerrymander away Free Exercise rights by finding that the government regulation is "generally applicable."

ARGUMENT

I. Cases Addressing Religious Objections to Compliance with California's Unruh Civil Rights Act.

A. History and Background of California's Unruh Civil Rights Act.

In 1959, California passed the modern version of its Unruh Civil Rights Act, Cal. Civ. Code, § 51. As originally enacted, it provided that, "All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry or national origin, are entitled to the full and equal accommodations, advantages, facilities, privileges, or

services in all business establishments of every kind whatsoever. 1959 Cal. Stats., ch. 1866, § 1, p. 4424. However, it further provided that, "This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens of every color, race, religion, ancestry, or national origin." *Id.* Other than the addition of more protected characteristics, this language remains practically the same today.

In interpreting the Unruh Civil Rights Act, the California Supreme Court later explained that "a business generally open to the public may not *arbitrarily* exclude a would-be customer from its premises." *In re Cox*, 474 P.2d 992, 999 (Cal. 1970) (emphasis added). This result occurred because the Unruh Civil Rights Act merely codified the "common law doctrine" creating a duty for public accommodations "to serve all customers on reasonable terms without discrimination." *Marina Point, Ltd.* v. *Wolfson*, 640 P.2d 115, 121 (Cal. 1982) (emphasis omitted) (quoting *In re Cox*, 474 P.2d at 997).

Thus, although the Civil Rights Act lists certain enumerated protected characteristics, these are merely "illustrative." *Id.* All arbitrary discrimination is prohibited, regardless of whether it is based on an enumerated characteristic or not. Conversely, non-arbitrary discrimination, even if based on an enumerated characteristic, is permitted. *Isbister* v. *Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 222 (Cal. 1985). Under this same reasoning, California courts held that discrimination based on a certain

characteristic is per se arbitrary, and have judicially added that characteristic as an unenumerated yet protected characteristic. See *Tulare Med. Ctr. Prop. Owners Ass'n* v. *Valdivia*, 119 Cal. App. 5th 967, 999-1005 (Cal. Ct. App. 2026) (decision to have an abortion as an unenumerated protected characteristic).

Thus, under the Civil Rights Act, "not *all* discrimination is prohibited." *Candelore* v. *Tinder, Inc.*, 19 Cal. App. 5th 1138, 1145 (Cal. Ct. App. 2018) "Neither the language of Unruh itself nor the interpretation of the Unruh Civil Rights Act by the California courts have held that *all* distinctions based on [protected characteristics] are unlawful." *Sargoy* v. *Resol. Tr. Corp.*, 8 Cal. App. 4th 1039, 1043 (Cal. Ct. App. 1992). Rather, the Unruh Act only prohibits "arbitrary" discrimination, understood as either "invidious or unreasonable discrimination." *Id.*; see also *Pizarro* v. *Lamb's Players Theatre*, 135 Cal. App. 4th 1171, 1174 (Cal. Ct. App. 2006) ("The objective of the Act is to prohibit businesses from engaging in unreasonable, arbitrary or invidious discrimination.")

Prohibited unreasonable or invidious discrimination "'emphasizes irrelevant differences' or 'perpetuates irrational stereotypes.'" *Georges* v. *Bank of Am., N.A.*, 845 F. App'x 490, 491 (9th Cir. 2021) (brackets omitted) (quoting *Koire* v. *Metro Car Wash*, 707 P.2d 195, 201-02 (Cal. 1985)). Thus, the Civil Rights Act does not prohibit distinctions that do not "emphasize an irrelevant difference, [or] perpetuate an irrational stereotype." *Cohn* v. *Corinthian Colleges, Inc.*, 169 Cal. App. 4th 523, 528 (Cal. Ct. App. 2008).

"This is consistent with the 'fundamental purpose' of the Unruh Act, which is 'the elimination of antisocial discriminatory practices—not the elimination of socially beneficial ones.'" *Georges*, 845 F. App'x at 491 (quoting *Sargoy*, 8 Cal. App. 4th at 1049).

And consistent with the instructions of the California Supreme Court, California courts have determined facially discriminatory policies are nonetheless nonarbitrary discrimination in a variety of different factual circumstances. See *Sargoy*, 8 Cal. App. 4th at 1046 (nonarbitrary discrimination to offer higher interest rates to senior citizens); *Pizarro*, 135 Cal. App. 4th at 1177 (nonarbitrary discrimination to offer "discounted theater admission" to "'baby-boomers' to attend a musical about that generation"); *Sunrise Country Club Ass'n* v. *Proud*, 190 Cal. App. 3d 377, 382 (Cal. Ct. App. 1987) (nonarbitrary discrimination for condominium to exclude families with children from using certain community pools); *Cohn*, 169 Cal. App. 4th 523 (nonarbitrary discrimination to offer Mother's Day gifts to women but not men).

In response to the California Supreme Court's announcement that all "arbitrary" discrimination is prohibited (in *In re Cox*, *Marina Point*, and *Isbister*), California amended the Unruh Civil Rights Act. Specifically, because the Act provides that it does not "confer any right or privilege on a citizen which is conditioned or limited by law," Cal. Civ. Code § 51, California added a new section to the Act "to clarify the holdings in *Marina Point*" and to permit certain

age discrimination in housing. 1984 Cal. Stats., ch. 787, p. 2780; see *Schmidt* v. *Superior Ct.*, 769 P.2d 932, 940 (Cal. 1989) (discussing history).

Over time, the Unruh Civil Rights Act's exemption for "other laws" has led to myriad exceptions. While the insurance industry is subject to the Act, the many facially discriminatory distinctions made by insurers are permitted so long as they are based on "sound actuarial principles" or related to "actual and reasonably anticipated experience," as allowed by California insurance laws. *Chabner* v. *United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1050 (9th Cir. 2000). And the Act cannot be used to force car rental companies to stop engaging in age discrimination, because the California Vehicle Code allows them to do so. *Lazar* v. *Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (Cal. Ct. App. 1999).

B. The History of Failed Free Exercise Challenges to California's Unruh Civil Rights Act Despite its Individualized and Categorical Exemptions.

In *Employment Division* v. *Smith*, this Court explained that a religious objection to a "a neutral, generally applicable regulatory law" does not trigger heightened scrutiny. 494 U.S. 872, 880 (1990). At the same time, however, the Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884 (quoting *Bowen* v. *Roy*, 476 U.S.

693, 708 (1986)). And, a few years later, this Court advised lower courts that a law lacks general applicability if it "underinclusive" in its pursuit of the government's ends in a manner that burdens religion. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543-45 (1993).

1. Despite these instructions, California courts have repeatedly rejected Free Exercise defenses to application of the Unruh Civil Rights Act. California courts first dealt with a Free Exercise objection to the Civil Rights Act in *Smith* v. *Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996). In that case, California's Fair Employment and Housing Commission had prosecuted a Christian woman for refusing to rent to unmarried couples and held that her concern about facilitating "immoral conduct" was "unreasonable and arbitrary." *Fair Emp't & Hous. Comm'n* v. *Smith*, No. 89-11, 1989 WL 260138 (F.E.H.C. Aug. 10, 1989). The Court of Appeal then reversed. The Court did not feel the need to address whether Ms. Smith's refusal to rent to unmarried couples was arbitrary, but rather held that she was protected under the hybrid-rights doctrine outlined in *Employment Division* v. *Smith*. See *Smith* v. *Fair Emp't & Hous. Comm'n*, 30 Cal. Rptr. 2d 395, 400-02 (Cal. Ct. App. 1994).[2]

[2] The case involved the Unruh Act as incorporated into the Fair Employment and Housing Act. See *Smith* v. *Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 913 n.3 (Cal. 1996).

The California Supreme Court ultimately took up the case and held, without significant analysis, that the Unruh Civil Rights Act was neutral and generally applicable because "it prohibits all discrimination without reference to motivation." *Smith* v. *Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 919 (Cal. 1996) (plurality). Although the decision was fractured—with a lengthy analysis of the California Constitution and RFRA—a majority of justices agreed on the First Amendment analysis. See *id.* at 977 (Baxter, J., concurring in part and dissenting in part).[3] The Court completely ignored Ms. Smith's argument that she should be treated no differently than universities, which may have housing reserved for married couples—a fact that was undisputed but apparently deemed irrelevant. Answer to Petition for Review, *Smith* v. *Fair Emp't & Hous. Comm'n*, No. S040653 (Cal. July 14, 1994), 1994 WL 16047723, at *17; Reply to Answer to Petition for Review, *Smith* v. *Fair Emp't & Hous. Comm'n*, No. S040653 (Cal. July 20, 1994), 1994 WL 16047722, at *15 n.20.

2. The California Supreme Court next addressed the Unruh Civil Rights Act in *North Coast Women's Care Medical Group, Inc.* v. *Superior Court*, 189 P.3d 959 (Cal. 2008). There, a member of a physician group objected to artificially inseminating one member of a

[3] The primary holding of the California Supreme Court was that a mere monetary penalty—as opposed to an injunction against religious activity—was not a "substantial burden" on religion, so neither the California Free Exercise clause nor RFRA were triggered. See *People* v. *Peck*, 52 Cal. App. 4th 351, 359 (Cal. Ct. App. 1996).

lesbian couple. At the trial court level, the plaintiff sought summary judgment striking the doctor's Free Exercise affirmative defense, which the trial court granted. *Benitez* v. *North Coast Women's Care Med. Grp., Inc.*, No. GIC770165, 2004 WL 5047112 (Cal. Super. Ct. Oct. 28, 2004).

The doctor then filed a petition for writ of mandate, which the Court of Appeal granted. The doctor argued that the Unruh Civil Rights Act lacked general applicability because of its exceptions, namely "because it exempts specified senior citizen housing facilities from the Act's ban on discrimination against families with children." Return to Order to Show Cause, *North Coast Women's Care Med. Grp.* v. *Superior Ct.*, No. D045438 (Cal. Ct. App. Feb. 25, 2005), 2005 WL 6132616, at *39. But the Court of Appeal did not reach that issue. Rather, the Court held that there was a factual dispute as to whether the refusal to perform the artificial insemination was based on the plaintiff's sexual orientation (protected under the Act) or her unmarried status (not protected under the Act). *North Coast Women's Care Med. Grp.* v. *Superior Ct.*, 40 Cal. Rptr. 3d 636, 646 (Cal. Ct. App. 2006).

The California Supreme Court then also granted review. And again, the doctor argued that the Unruh Civil Rights Act was not neutral and generally applicable. See Answer Brief on the Merits, *North Coast Women's Care Med. Grp.* v. *Superior Ct.*, No. S142892 (Cal. Dec. 21, 2006), 2006 WL 4098607, at *60-*61. Yet the California Supreme Court rejected

this argument without any analysis, stating summarily that "California's Unruh Civil Rights Act, from which defendant physicians seek religious exemption, is 'a valid and neutral law of general applicability.'" *North Coast Women's Care Med. Grp., Inc.* v. *Superior Ct.*, 189 P.3d 959, 966 (Cal. 2008) (quoting *Employment Division* v. *Smith*, 494 U.S. at 879).

3. California courts most recently addressed a Free Exercise defense to the Unruh Civil Rights Act in *Civil Rights Department* v. *Cathy's Creations, Inc.*, 109 Cal. App. 5th 204 (Cal. Ct. App. 2025). There the Civil Rights Department,[4] prosecuted a bakery owner for her practice of referring couples seeking a wedding cake for a same-sex wedding to a competitor business that had agreed to take such referrals. The trial court held that the baker's religiously-motivated referral practice was not arbitrary such that she did not violate the Civil Rights Act. *Dep't of Fair Emp't & Hous.* v. *Cathy's Creations, Inc.*, No. BCV-18-102633, 2022 WL 18232316, at *7 (Cal. Super. Ct. Dec. 27, 2022). The trial court, however, felt compelled to follow the California Supreme Court's prior announcements that the Unruh Civil Rights Act was a neutral and generally applicable statute. *Id.* at *11-*12.

The Court of Appeal agreed that the Unruh Civil Rights Act only prohibits arbitrary discrimination, but

[4] The Civil Rights Department is the successor to the Department of Fair Employment and Housing, which is the successor to the Fair Employment and Housing Commission.

held that the baker's practice was "legally arbitrary and unreasonable." *Civil Rts. Dep't* v. *Cathy's Creations, Inc.*, 109 Cal. App. 5th 204, 242-43 (Cal. Ct. App. 2025). And on the Free Exercise defense, the Court of Appeal held that "Nothing in defendants' arguments persuades us *North Coast*'s conclusions regarding the UCRA's general applicability and neutrality have been fatally undermined by *Fulton[* v. *City of Philadelphia*, 593 U.S. 522 (2021)] or *Tandon[* v. *Newsom*, 593 U.S. 61 (2021)]." *Id*. at 268.

Rather, the Court of Appeal explained, the Civil Rights Act's limit to "arbitrary" discrimination "does not constitute a formalized system of discretionary, individualized exemptions to the UCRA" as understood by *Fulton*, but merely (and circularly) "represents California courts' efforts to define the contours of what constitutes unreasonable, arbitrary or invidious discrimination under the UCRA." *Id*. at 267. And, the Court of Appeal held, the Act's permission for age discrimination in housing (and other permissions) is not "comparable" because the baker sought to discriminate on the basis of sexual orientation, not age. *Id*. at 268.

4. Under this Court's precedents, the results in *Smith* v. *Fair Employment & Housing Commission* and *Civil Rights Department* v. *Cathy's Creations, Inc.* are anomalous. As explicitly understood by California courts for decades, the Unruh Civil Rights Act is a roving anti-discrimination statute aimed at striking down activity which California courts declare arbitrary and which, over the years, has collected

numerous judicially or legislatively created carve outs for "non-arbitrary" discrimination. Yet, in both cases, the lower courts got the result wrong and this Court denied review. See *Smith* v. *Fair Emp't & Hous. Comm'n*, 521 U.S. 1129 (1997); *Miller* v. *Civil Rts. Dep't*, 146 S. Ct. 886 (2025). Because those opinions remain binding on California courts, further and more explicit clarity is needed from this Court on the standards for determining whether a statute is one of general application or not, whether due to individualized or categorical exemptions.

II. California Courts' Tolerance of Pandemic-Era Religious Discrimination Both Before and After This Court's Rulings.

The next major series of cases dealing with the Free Exercise clause litigated in California courts since *Employment Division* v. *Smith* relates to the coronavirus pandemic. In those cases, beginning in July 2020, various counties initiated civil enforcement actions against churches that had reopened for worship services in defiance of pandemic-related closure orders. In three separate prosecutions, those counties all obtained temporary restraining orders and preliminary injunctions, and two obtained contempt orders. See *Cty. of Ventura* v. *Godspeak Calvary Chapel*, No. 56-2020-544086, 2020 WL 6557862 (Cal. Super. Ct. Aug. 7, 2020) (temporary restraining order), 2020 WL 6557860 (Cal. Super. Ct. Sept. 21, 2020) (contempt order), 2020 WL 6557861 (Cal. Super. Ct. Oct. 9, 2020) (preliminary injunction order); *People* v. *Calvary Chapel San Jose*, No.

20CV372285, 2020 WL 7872811 (Cal. Super. Ct. Dec. 4, 2020) (preliminary injunction order); *Cty. of Los Angeles* v. *Grace Community Church of the Valley*, No. 20STCV30695, 2020 WL 5553662 (Cal. Super. Ct. Aug. 14, 2020) (temporary restraining order), 2020 WL 6302630 (Cal. Super. Ct. Sept. 10, 2020) (preliminary injunction order).

In only one of those cases did the court even attempt to restrain the over-zealous prosecutors. In *Grace Community Church*, the trial court imposed a temporary restraining order requiring the Church to enforce masking and social distancing requirements, but denied Los Angeles County's request to close the Church. The next day, however, that was reversed by the California Court of Appeal. *Cty. of Los Angeles* v. *Grace Community Church of the Valley*, No. 20STCV30695, 2020 WL 5553662 (Cal. Super. Ct. Aug. 14, 2020), rev'd, No. B307056, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020). In light of this Court's earlier pandemic-related decisions, these results were perhaps unsurprising. But even after this Court issued *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020), California courts refused to comply.

In January 2021, one California superior court granted a Catholic priest's motion for a preliminary injunction permitting him to open the churches that he oversaw. That order, however, was short-lived and quickly stayed by the California Court of Appeal. *Burfitt* v. *Newsom*, No. BCV-20-102267, 2021 WL 2152961 (Cal. Super. Ct. Jan. 5, 2020), stayed, No.

F082235 (Cal. Ct. App. Jan. 28, 2021). But then the appeal was dismissed and the case settled following this Court's trilogy of decisions in *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021), *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460 (2021), and *Tandon* v. *Newsom*, 593 U.S. 61 (2021).

Unlike the Catholic priest in *Burfitt* v. *Newsom*, Calvary Chapel San Jose found itself continuing to be prosecuted. The Church had been held in contempt of court twice, first on December 17, 2020, and then on February 16, 2021, and sanctioned $222,000. These fines quickly escalated because separate amounts were imposed on the Church and each of its pastors for every day in which the Church was noncompliant with the court's orders. In addition, the County of Santa Clara had levied $4.3 million in administrative fines against Calvary Chapel and was aggressively pursuing collection of those fines. Jeffrey M. Trissell, *Unlocking the Churches: The Legal Victory Against California's Pandemic-Era Religious Discrimination* 213-14 (2025).

This unjust prosecution led to the first published appellate victory in the California courts for any religious objector for over thirty years. But it was not to last long. See *People* v. *Calvary Chapel San Jose*, 298 Cal. Rptr. 3d 262 (Cal. Ct. App. 2022), depublished, No. S276560 (Cal. Nov. 30, 2022). With its discussion of this Court's ruling in *Tandon* v. *Newsom*, the Court of Appeal's decision in *Calvary Chapel San Jose* promised to provide clarity on Free Exercise jurisprudence that had not been updated by

the California Supreme Court for over a decade, since *North Coast*. But with its depublication, *Calvary Chapel San Jose* can now no longer be cited by California courts. See Cal. Ct. R. 8.1115.

Perhaps most alarmingly, *Calvary Chapel San Jose* soon returned to litigation. The County continued to seek fines and penalties for the Church's failure to enforce the County's masking requirements. This time, the California Court of Appeal dutifully did not publish its opinion. *People* v. *Calvary Chapel San Jose*, No. H051860, 2025 WL 1110779 (Cal. Ct. App. Apr. 15, 2025). But the result was alarming. The Court held that the masking mandate was generally applicable even though it did not apply "to construction sites, personal care services, restaurants, youth programs, and athletes." *Id.* at *15-*16. The Court thus affirmed the County's right to collect $1.2 million in fines (reduced from $4.3 million for daring to open at all) allegedly relating solely to masking.

Calvary Chapel San Jose is currently petitioning this Court to grant a writ of certiorari. See Petition for Writ of Certiorari, *Calvary Chapel San Jose* v. *California*, No. 25-703 (U.S., pet. docketed Dec. 17, 2025). But the Church should never have needed to petition this Court. The lower courts should have realized that the "outcome is clearly dictated" by the Court's now five-year-old COVID-19 jurisprudence. *Gateway City Church*, 141 S. Ct. 1460. But, apparently, further bright-line rules are needed.

III. California Courts' Tolerance of Interference With Church Autonomy.

The California Supreme Court's seminal and most frequently cited decision on the First Amendment's Free Exercise clause is *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 85 P.3d 67 (Cal. 2004). There, California passed a statute requiring contraceptives to be included in employer-sponsored health insurance. 1999 Cal. Stats., ch. 532, § 2. That statute included a limited exception for "religious employers," defined as (1) a non-profit entity whose purpose is to inculcate religious values, (2) that primarily employs and serves members of the same faith, and (3) who comes within IRS definitions for a "church." *Id.*[5]

Because this limited exception does not cover Catholic Charities, it brought suit alleging a violation of its Free Exercise rights under both the state and federal constitutions. The trial court denied a preliminary injunction, Catholic Charities appealed, and the Court of Appeal affirmed. *Cath. Charities of Sacramento, Inc.* v. *Superior Ct.*, 109 Cal. Rptr. 2d 176 (Cal. Ct. App. 2001). Catholic Charities raised a host of arguments, each of which was rejected, including that the statute's limited exception for churches but not church-affiliated nonprofits made it lack general

[5] Oddly, that same limited exception still exists in the statute today, Cal. Health & Saf. Code § 1367.25(c); Cal. Ins. Code § 10123.196(e). It has not yet been updated to comply with this Court's decision in *Catholic Charities Bureau, Inc.* v. *Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025).

applicability, *id.* at 185-90, that the statute lacked neutrality because its exclusion of church-affiliated nonprofits appeared aimed at the Catholic Church, *id.* at 190-92, that the statute contained a system of individualized exemptions, *id.* at 192-93, that the church autonomy doctrine applied, *id.* at 193-94, and that the hybrid-rights doctrine applied. *Id.* at 194-95. Most relevantly here, as noted, the Court of Appeal held that the statute was generally applicable: "The 'religious employer' exemption is neutral and generally applicable to all religions. It does not discriminate among religions, but applies to all faiths in the same manner, exempting some but not all parts of all religious organizations." *Id.* at 189.

Catholic Charities then petitioned the California Supreme Court to review the case, which it did. *Cath. Charities of Sacramento, Inc.* v. *Superior Ct.*, 85 P.3d 67 (Cal. 2004). The California Supreme Court first agreed with the Court of Appeal that the church autonomy doctrine did not control. *Id.* at 76-81. As the Court summarized:

> This case does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline.

Id. at 77.

The California Supreme Court then turned to each of Catholic Charities' Free Exercise arguments. As a preamble, the Court held that the statute was generally applicable: "The WCEA's requirements apply neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute's strict requirements for exemption on religious grounds." *Id.* at 82. It then only proceeded to analyze whether the statute was neutral, and found that it was not a religious gerrymander. *Id.* at 83-87. The California Supreme Court ignored Catholic Charities' general applicability arguments even though they were squarely presented. See Petition for Review, *Cath. Charities of Sacramento, Inc.* v. *Superior Ct.*, No. S099822 (Cal. Aug. 10, 2001), 2001 WL 34369289, at *23-*27.

The spiritual successor to Catholic Charities arose in *Minton* v. *Dignity Health*, 39 Cal. App. 5th 1155 (Cal. Ct. App. 2019). There the issue was whether a Catholic hospital violated the Unruh Civil Rights Act by refusing to perform a hysterectomy on a transgender patient. Citing both *North Coast* and *Catholic Charities*, the Court of Appeal held that it was constrained to find that the Catholic hospital had no Free Exercise defense. *Id.* at 1165-66. California courts, of course, are bound to follow this Court's rulings but strictly apply the principle that they will not depart from the rulings of the California Supreme Court "unless the United States Supreme Court has decided the *same* question differently." *Civil Rts. Dep't* v. *Cathy's Creations, Inc.*, 109 Cal. App. 5th 204, 268 (Cal. Ct. App. 2025) (quoting *Correia* v. *NB Baker*

Elec., Inc., 32 Cal. App. 5th 602, 619 (Cal. Ct. App. 2019)).

As applied in *Minton* v. *Dignity Health*, this meant that the Court of Appeal would hold that, even if the Unruh Civil Rights Act were not generally applicable, "any burden the Act places on the exercise of religion is justified by California's compelling interest in ensuring full and equal access to medical treatment for all its residents, and that there are no less restrictive means available for the state to achieve that goal." 39 Cal. App. 5th at 1165. Because *North Coast* also held that the Unruh Act per se satisfies strict scrutiny, the courts in *Minton* v. *Dignity Health* (and *Civil Rights Department* v. *Cathy's Creations*) would not revisit that. But see *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 541 (2021).

Also like many of the above cases, the published opinion does not match the argument. A central plank of Dignity Health's argument focused on the church autonomy problems with forcing a Catholic hospital to perform a procedure directly contrary to its faith. See Respondent's Brief, *Minton* v. *Dignity Health*, No. A153662 (Cal. Ct. App. Feb. 14, 2019), 2019 WL 764071, at *42-*51. Yet this argument warranted not even a sentence in the published opinion, presumably because it too was squarely foreclosed by a binding, but long-outdated, California Supreme Court opinion. See *Minton* v. *Dignity Health*, 39 Cal. App. 5th at 1166 (citing *Cath. Charities of Sacramento, Inc.* v. *Superior Ct.*, 85 P.3d 67 (Cal. 2004)).

Finally, in an all-too-frequent pattern, both Catholic Charities and Dignity Health petitioned this Court for a writ of certiorari, but had their petitions denied. *Cath. Charities of Sacramento, Inc.* v. *California*, 543 U.S. 816 (2004); *Dignity Health* v. *Minton*, 142 S. Ct. 455 (2021).

* * *

The last time that a religious objector succeeded in a published California case (that was not quickly depublished) occurred more than fifty years ago. *Montgomery* v. *Bd. of Ret.*, 33 Cal. App. 3d 447 (Cal. Ct. App. 1973). This result is not due to the absence of conflict between the requirements of California law and religious belief—but because of the absence of religious tolerance. Too often courts in California are adamant in their refusal to follow this Court's precedents. See *South Bay United Pentecostal Church* v. *Newsom*, 508 F. Supp. 3d 756 (S.D. Cal. Dec. 21, 2020) (on remand after *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, holding that church closure order satisfied strict scrutiny). Thus, *Amicus* urges the Court to not cabin its analysis to *Carson v. Makin*, 596 U.S. 767 (2022), but to instead provide further clarity regarding why Colorado's regime is not neutral and generally applicable under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and thereby help ensure that lower courts cannot easily evade this Court's precedents.

CONCLUSION

The Court should reverse the Tenth Circuit.

Respectfully submitted,

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