

No. 25-703

In the Supreme Court of the United States

CALVARY CHAPEL SAN JOSE, ET AL.,
Petitioners,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
California Court of Appeal, Sixth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the neutral, generally applicable face-covering requirement in place in Santa Clara County from 2020–2021 violate the First Amendment?
2. Should this Court adopt a “liturgical exception,” even though Calvary did not raise the issue in the state courts below and no court has even considered doing so?
3. Should this Court overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)?
4. Should this Court overturn the state superior court’s conclusion, based on factual findings about Calvary’s culpability and harm, that the fines imposed were proportional to Calvary’s culpability?

LIST OF PARTIES

Petitioners:

Calvary Chapel San Jose
Mike McClure

Respondents:

The People of the State of California
County of Santa Clara
Sarah H. Cody, M.D., in her Official Capacity as
Health Officer for the County of Santa Clara

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INTRODUCTION

Calvary Chapel San Jose asks this Court to review an unpublished state-court decision about a COVID-era face-covering requirement that was rescinded nearly five years ago—a decision that cannot possibly have any impact on anyone besides the parties. Under California’s rules of court, the decision may not even be cited. Calvary offers no compelling reason why this Court should grant review of an uncitable decision about a municipal public health order that has not been in effect anywhere for years.

First, Calvary argues that the Court should grant review to engage in factbound error correction. According to Calvary, the California Court of Appeal was wrong to hold that the County of Santa Clara’s rule requiring face coverings in indoor spaces did not violate the Free Exercise Clause. But Calvary cannot claim that the court of appeal applied the wrong legal standard. Nor can Calvary claim that its decision conflicts with that of any other court. Every court across the country, including the court of appeal here, applies the same standard. Pet. App. 30a (quoting *Tandon v. Newsom*, 593 U.S. 61, 62 (2021)). Calvary simply argues that based on the facts here, the lower court should have come out the other way. That does not warrant review.

Recognizing that this Court is unlikely to review an unpublished decision simply to engage in factbound error correction, Calvary next suggests that this Court should grant review to consider changing the law. Calvary asks this Court to adopt what it calls a “liturgical exception” to *Employment Division v. Smith*, 494 U.S. 872 (1990)—or alternatively to overrule *Smith* altogether. But

Calvary never presented its “liturgical exception” argument below. And besides saying that it’s an application of the church autonomy doctrine, Calvary says nothing about how it should apply here. Indeed, no court has ever considered adopting a “liturgical exception” in any context. This Court’s certiorari jurisdiction over state-court decisions does not extend to federal-law issues that were not raised before the state court. And even if it did, this Court should not grant certiorari to consider an exception no court has ever even considered and that the petitioner cannot clearly articulate.

Nor should this Court grant certiorari to consider whether to overrule *Smith* entirely. If this Court is going to consider its approach to Free Exercise challenges anew, it should do so in a context where they are likely to occur—not a case involving a long-lapsed municipal public health order adopted during a once-in-a-century pandemic. And if this Court is going to abandon the framework that has governed Free Exercise challenges for nearly forty years, it will need to replace it with something. But Calvary says nothing about what that substitute should be, and the facts of this case present a very poor vehicle to try to come up with one.

Finally, Calvary argues that this Court should grant certiorari to “provide guidance” to lower courts on how to apply the Excessive Fines Clause. But Calvary does not dispute that there is no conflict in the lower courts on that issue: Every court, including the state courts here, applies the standard that this Court set forth in *United States v.ajakajian*, 524 U.S. 321 (1998). Calvary merely disagrees with the superior court’s factual findings in applying that

standard. Disagreement with a state trial court's factual findings is not a basis for this Court's review.

This Court should deny the petition for certiorari.

STATEMENT

1. In the early days of the COVID-19 pandemic, the County of Santa Clara, like states and municipalities around the country, issued a series of public health orders in an effort to control the spread of the highly contagious disease. Pet. App. 50a–53a. The orders' requirements changed as the pandemic—and the tools available to manage it—evolved. Pet. App. 2a–6a. Although the petition mentions several pandemic-era disputes, all that is at issue here is a single public health requirement: that face coverings be worn in indoor public spaces. Pet. App. 2a; Pet. 15–16 n.9 (Calvary conceding as much). The County rescinded this requirement nearly five years ago. Pet. App. 5a–6a.¹

2. Calvary Chapel San Jose is a church in Santa Clara County that refused to comply with the County's public health orders. Its objection focused on County guidance—early in the pandemic—prohibiting indoor gatherings or limiting the number of people who could attend. *See, e.g.*, Opp'n to Mot. for Prelim. Inj. at 7–8, *People of the State of California v. Calvary Chapel San Jose*, No. 20cv372285 (Santa Clara Sup. Ct. Nov. 20, 2020). Initially, the superior court overruled Calvary's objection and enjoined it to

¹ Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

comply with these restrictions as well as the County's other public health orders.

But following this Court's rulings on similar limitations on indoor gatherings, the California Court of Appeal held that the County's indoor capacity restrictions could not be applied to religious gatherings, and vacated any orders against Calvary seeking to enforce those restrictions. Pet. App. 116a (citing *Tandon v. Newsom*, 593 U.S. 61 (2021)); see also, e.g., Pet. App. 113a–114a (citing *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021)); Pet. App. 121a, 126a, 132a. Following that decision, neither the County nor any court attempted to enforce those restrictions against Calvary. And they are not at issue here.

The only restriction at issue is a face-covering requirement. At that time, face coverings were in “routine use” throughout the nation. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718–19 (2021) (Gorsuch, J., concurring). And they were frequently cited by religious organizations as a reasonable alternative to prohibiting indoor gatherings or limiting their capacity.² In fact, when challenging the restrictions on indoor gatherings, Calvary itself argued that face-covering requirements were a “commonsense” alternative. See Mem. of Points & Auth. in Opp'n to Pls.' Request for Contempt

² See, e.g., Emergency Appl. for Writ of Inj. Relief at 11, *S. Bay United Pentecostal Church v. Newsom*, No. 20A136 (U.S. Jan. 25, 2021); Emergency Appl. for an Inj. Pending Appellate Rev. at 28, *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (U.S. July 8, 2020).

and/or Sanctions at 9, *People of the State of California v. Calvary Chapel San Jose*, No. 20cv372285 (Santa Clara Sup. Ct. Dec. 4, 2020).

Nevertheless, Calvary refused to comply with those requirements. Pet. App. 68a. On November 9, 2020, after numerous warnings, the County notified Calvary that it was being fined for failing to comply with the face-coverings rules. Pet. App. 8a. Calvary did not appeal the notice to an administrative hearing officer. Pet. App. 9a. Nor did it appeal to the superior court. *Id.* But it also did not pay the fines.

So the County sought to collect them in court. Pet. App. 12a–13a. In response, Calvary argued that what it had previously called a “commonsense” public health measure now violated the First Amendment’s Free Exercise Clause and the Eighth Amendment’s Excessive Fines Clause.

3. The superior court disagreed. The court first held that the face-covering requirement did not violate the Free Exercise Clause. It explained that the requirement was “facially neutral” and “generally applicable” because it “applied to ‘all individuals, businesses, and other entities in the County.’” Pet. App. 79a (citing 1 CT 77, 80 (July 2, 2020 Order of the County Health Officer); 1 CT 87, 91 (Oct. 5, 2020 Order of the County Health Officer); 1 CT 162, 164 (May 18, 2021 Order of the County Health Officer)). Therefore, the court held, strict scrutiny did not apply. Pet. App. 77a–78a (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532

(1992); *Fulton v. City of Phil.*, 593 U.S. 522, 541 (2021)).³

The superior court recognized that the Free Exercise Clause prohibits even “subtle departures from neutrality,” such as exceptions that are granted for secular activities, but not “comparable” religious activities. Pet. 78a–79a. But, the court held, none of what Calvary called “exceptions” to the County’s face-covering requirement was “comparable” to Calvary’s indoor gatherings of 300–600 people. Pet. App. 81a. Calvary’s argument to the contrary, the court explained, rested on “mischaracterization[s].” Pet. App. 79a, 81a.

As actually written, the exceptions to the face-covering requirement were few and narrow. Consistent with the County’s interest in protecting public health, those with medical conditions that prevented them from safely wearing a face covering and very young children at “risk of suffocation” were not required to wear a face covering. Pet. App. 32a. And while Calvary asserted that the County retained discretion to grant individualized exemptions to the face-covering requirement, the superior court explained that simply was not true. Pet. App. 80a; *see also* Pet. App. 40a–41a.

Calvary also seized on a handful of County directives that governed specific activities, such as restaurant dining. Pet. App. 81a.⁴ For a few activities,

³ CT refers to the Clerk’s Transcript, or record, before the California Court of Appeal.

⁴ To be clear, although Calvary refers to these activities as “secular,” religious organizations undertaking the same

the directives allowed participants to remove their face coverings under limited circumstances, where—due to other multi-layered safety requirements governing those activities—the transmission risk was low and a potential outbreak could be forestalled through contact tracing. But as the superior court explained, Calvary “mischaracteriz[ed]” these activity-specific orders too. *Id.*

For example, the superior court found that Calvary’s assertion that restaurant patrons were permitted to dine “completely unfettered” was “not accurate.” *Id.* In fact, diners could only remove their face coverings when actively eating, while seated with members of the same household, and while maintaining 10 feet of separation from other tables. Pet. App. 52a, 81a; 6 CT 1631–32. In addition, restaurants had to screen customers for COVID-19 before allowing them to dine, and they were required to collect customer contact information for “contact tracing purposes.” 6 CT 1635–36. The numerous restrictions on indoor dining minimized the risk that allowing diners to temporarily remove their face coverings while eating would cause an outbreak.

And contrary to Calvary’s assertion (at 11), the public health orders explicitly allowed face coverings to be removed “for purposes of religious ceremony,”

activities were subject to the same guidance. *See, e.g.*, Pet. 18, 25. So, for example, Calvary’s cafe was subject to the same guidance as any other restaurant. *See* 6 CT 1630–31 (Mandatory Directive for Dining, Bars, Wineries, and Smoking Lounges).

such as Communion. Pet. App. 81a; *see also* 6 CT 1635, 7 CT 1875.⁵

Even if strict scrutiny applied, the superior court continued, it was met: “[R]equiring face coverings” is a “reasonable, unobtrusive means of addressing [the] indisputable compelling government interest” in curbing the spread of COVID-19. Pet. App. 83a. It was “undisputed that the government interest in reducing the spread of COVID-19 is compelling, and requiring face coverings” was a “reasonable, unobtrusive means of addressing that indisputable compelling government interest.” *Id.* In fact, the court noted, members of this Court had “recognized face coverings ... as a basic public health measure consistent with being able to conduct indoor religious worship and a ‘narrower option’ than an outright ban on such gatherings.” *Id.* (quoting *S. Bay*, 141 S. Ct. at 718–19 (Gorsuch, J., concurring)). It also noted that in this Court’s orders regarding “[gathering] bans and capacity restrictions,” the places of worship at issue had not challenged this basic safety measure. *Id.* at

⁵ Similarly, while Calvary emphasized that collegiate and professional athletes were permitted to unmask while “actively engaged in athletic activity,” it neglected to mention that they were also required to test for COVID-19 beforehand and were subject to reporting and quarantine requirements that were not applicable to the general public or Calvary. 6 CT 1689–93. And because collegiate and professional athletic teams are small groups with known members, the County could use contact tracing to limit the risk that any illness within a team would spread to the general public. None of this was true of Calvary. The other activity-specific directives similarly only allowed limited unmasking under circumstances where other requirements—requirements that Calvary did not follow—limited the transmission risk and allowed contact tracing.

82a. Instead, they had “rigorously implemented and adhered to all health protocols,” if not “enforcing stricter safety protocols than the State required.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (cited at Pet. App. 83a).

Finally, the superior court—relying on this Court’s decision in *Bajakajian*—held that the face-covering fines did not violate the Excessive Fines Clause’s “principle of proportionality.” Pet. App. 88a (quoting *Bajakajian*, 524 U.S. at 334). The court concluded that Calvary’s culpability was “plain” because it had long been “on notice” that it was violating a basic safety measure that was “routine in religious services across the country.” Pet. App. 88a, 91a (quoting *S. Bay*, 141 S. Ct. at 718–19 (Gorsuch, J., concurring)). And the “harm” caused by this refusal was “also plain.” Pet. App. 89a. The evidence demonstrated that Calvary knew that its attendees had “contracted COVID-19” and attended its services while symptomatic; there had also been a “major outbreak” at its school. Pet. App. 88a. By refusing to require face coverings, each Calvary gathering potentially exposed hundreds of people to COVID-19 and then sent them out into the county to expose many more. Pet. App. 89a.

And while Calvary complained about the “cumulative” amount of the fines, the fines only accrued because Calvary allowed them to. *Id.* It neither immediately appealed the notice of violation, nor paid the fines, nor complied. Calvary, moreover, conceded that it was able to pay the fines. Pet. App. 90a–91a.

After considering and rejecting Calvary’s constitutional challenges, the court fined Calvary for

its repeated violations of the County’s face-covering rules from the November 9, 2020 notice of violation until June 21, 2021, when those rules were rescinded. Pet. App. 92a–93a.⁶

4. The California Court of Appeal affirmed. The court emphasized that the only question at issue was the constitutionality of the fines imposed on Calvary for violating the County’s face-covering requirement. Pet. App. 2a. Like the superior court, it concluded that the face covering rules were neutral and generally applicable under the First Amendment. Pet. App. 37a. And, like the superior court, it found that the church had “misstated” the guidance that Calvary claimed proved that the County “favor[ed] comparable secular activities.” *Id.*

As to the Eighth Amendment, the court of appeal also agreed that the fines were not “grossly disproportionate to Calvary Chapel’s culpability” because the church had openly violated the face-covering rules, which no court had found to be unconstitutional, even while “aware that some of its congregants had contracted COVID-19 and its school had sustained a serious outbreak.” Pet. App. 47a–48a.

Calvary sought rehearing, which the court denied. Pet. App. 136a. The Supreme Court of California also

⁶ To the extent Calvary suggests (at 30 & n.13) that the court imposed fines for a “course of conduct” beyond violation of the face-covering requirement, it is wrong. The November 9, 2020 notice of violation—the only notice at issue here—imposed fines solely for violating the face-covering requirements. 4 CT 1180. And the superior court allowed the County to collect fines solely for that violation. Pet. App. 91a.

denied Calvary's petition for discretionary review. Pet. App. 137a.

REASONS FOR DENYING THE PETITION

I. This Court should not grant review of an uncitable decision to address the application of undisputed First Amendment principles to a rescinded COVID-era rule.

Review of the California Court of Appeal's routine application of First Amendment principles to a single COVID-era face-covering requirement that was rescinded in 2021 is unwarranted under this Court's traditional criteria. Calvary does not ask this Court to resolve a circuit split. Instead, it requests highly fact-specific error correction of an unpublished and uncitable decision applying undisputed law to extraordinary circumstances that are unlikely to recur. This Court should not grant review to issue a decision that would have no prospective effect beyond the parties.

1. The first question (at i) that Calvary asks this Court to decide is whether "COVID restrictions that contain multiple exceptions, ... permitting comparable risks of viral transmission, trigger strict scrutiny." But this Court need not grant certiorari to answer that question. It already has: "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62.

That's the rule that courts across the country apply. And it's the rule the California Court of Appeal applied here. Pet. App. 30a (quoting *Tandon*, 593 U.S.

at 62). Calvary doesn't argue that there's a circuit split because it can't. Nor can it argue that the court of appeal applied the wrong rule: The rule it applied is precisely the rule this Court articulated.

Instead, Calvary asserts (at 18) that the way in which the lower court applied that rule departs from "this Court's teachings." But the court of appeal applied exactly the "teaching[]" that Calvary says it should: A law is not generally applicable when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Compare* Pet. App. 30a–31a (court of appeal opinion quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022), which in turn quotes *Fulton*, 593 U.S. at 534), *with* Pet. 19 (quoting same language from *Fulton*). Calvary simply disagrees with the court's conclusion. It believes that the court misapprehended the relative risk of, for example, exempting a patient having a mole on their face examined by their masked dermatologist as compared to Calvary's indoor gatherings of hundreds of people from multiple households, who were not all easy to contact if there were a COVID-19 outbreak. Pet. 19.

In other words, Calvary asks this Court to grant certiorari, five years after the pandemic, to make a factual determination about the risk of COVID-19 transmission posed by different activities. But Calvary gives no reason to depart from the usual rule that this Court is "not a court of error correction." *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (Alito, J., concurring in denial of certiorari); *see* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

findings or the misapplication of a properly stated rule of law.”).

2. And, in any event, the decision below does not require correction. Calvary’s argument to the contrary relies on the same “misstate[ments]” and “mischaracterization[s]” of the narrow face-covering exemptions that the courts below rejected. Pet. App. 37a, 81a. It is, of course, state courts’ duty to interpret state and local law. *See Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177–78 (1940). Nevertheless, Calvary seeks review based on the same reading of local law that the state courts rejected. *Compare* Pet. 11, 19, *with* Pet. App. 37a, 79a–81a.

The lower courts did not err in concluding that, properly construed, the limited circumstances where face coverings were not required were not comparable to Calvary’s gatherings of, often, hundreds of people. “Comparability is concerned with the risks various activities pose” to the government’s interest—here, the interest in public health. *Tandon*, 593 U.S. at 62. The courts did not err in concluding that exempting babies who might suffocate from wearing a face covering or allowing collegiate athletes—who were subject to testing, reporting, and quarantine rules and whose teammates could be identified and called if there was an outbreak—to take off their face coverings only when actively playing does not pose a comparable risk of a super spreader event as allowing 300–600 untested and potentially unknown people in close contact indoors to go unmasked.

Even if strict scrutiny applied, the courts below still got it right. Pet. App. 41a; Pet. App. 82a–83a. “[F]ace coverings” were a “narrow[]” and reasonable safety precaution widely adopted by religious

institutions across the country—including other Calvary churches. Pet. App. 83a (quoting *S. Bay*, 141 S. Ct. at 718–19 (Gorsuch, J., concurring)); Pet. App. 82a (describing “religious institutions” that “rigorously implemented and adhered to all health protocols” (citing *Roman Catholic Diocese of Brooklyn*, 592 U.S. at 18); Pet. App. 84a (emphasizing that face coverings were in “routine use in religious services” (quoting *S. Bay*, 141 S. Ct. at 718–19 (Gorsuch, J., concurring)); see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (detailing the “many precautions” that “Calvary Chapel [Dayton Valley] plans to take” to hold indoor worship services, including “requir[ing]” congregants “to wear masks throughout the service or for all but a very brief time”); Emergency Appl. for an Inj. Pending Appellate Rev. at 28, *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (U.S. July 8, 2020) (asking to be permitted to “host religious gatherings on the same terms as comparable secular assemblies ... with social distancing, face coverings, and other neutral and generally-applicable precautions in keeping with the church’s comprehensive health and safety plans”).⁷

⁷ See also, e.g., Emergency Appl. for Writ of Inj. Relief at 11, *S. Bay United Pentecostal Church v. Newsom*, No. 20A136 (U.S. Jan. 25, 2021) (listing the mitigation measures “South Bay is able to integrate ... to inhibit the spread of COVID-19 during services,” including “masks”); Emergency Appl. for Writ of Inj. at 36, *Harvest Rock Church, Inc. v. Newsom*, No. 20A137 (U.S. Jan. 25, 2021) (emphasizing that Harvest Rock “[c]ompl[ies] with [s]afety [p]rotocols,” including by “requir[ing] everyone to wear a mask into the building”); Emergency Appl. for a Writ of Inj. at

Tellingly, before it decided it did not want to pay its fines for failing to require face coverings, even Calvary called face-covering requirements “commonsense restrictions.” Mem. of Points & Auth. in Opp. to Pls.’ Request for Contempt and/or Sanctions at 9, *People of the State of California v. Calvary Chapel San Jose*, No. 20cv372285 (Santa Clara Sup. Ct. Dec. 4, 2020).

3. Not only does Calvary ask this Court to engage in factbound error correction of a decision the court of appeal did not even get wrong, but doing so would have no impact on anyone besides the parties to this case. Because the decision below is unpublished, under California law, it “must not be cited or relied on by a court or a party in any other action.” Cal. R. Ct. 8.1115. And it is highly unlikely that the extraordinary circumstances of this case—fines resulting from a COVID-era face-covering rule rescinded nearly five years ago—will arise again. This Court’s intervention would thus provide particularly little guidance going forward as courts regularly consider the application of the Free Exercise Clause in other, more routine circumstances.

II. This case is a hopelessly flawed vehicle for deciding Calvary’s novel challenges to *Smith*.

To avoid asking only for factbound error correction, Calvary also asks this Court to grant certiorari to articulate a new “liturgical” exception to

21, *Gish v. Newsom*, No. 20A120 (U.S. Jan. 6, 2021) (emphasizing that “Applicant Pastors” were “willing to accept” and had “tried implementing” various “less restrictive rules,” including “mask-wearing requirements”).

the longstanding rule—repeated in this Court’s recent cases—that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.” *Smith*, 494 U.S. at 879; *accord Tandon*, 593 U.S. at 63; *Fulton*, 593 U.S. at 533. Or, Calvary says, this Court should just abandon *Smith* and the “neutral and generally applicable” framework altogether. However, this case is a fundamentally flawed vehicle to consider these questions.

1. Calvary never presented its request for a “liturgical exception” to the state courts below. This Court, therefore, lacks jurisdiction to review it. “It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Proper presentation requires, at minimum, bringing the issue “to the attention of the state court with fair precision and in due time.” *Hemphill v. New York*, 595 U.S. 140, 148 (2022). Calvary did not bring any so-called “liturgical exception” to the state courts’ attention at all.

Calvary claims that it could not have invoked a “liturgical exception” below, but it does not say why. Pet. 20. According to Calvary (at 20–22), the exception is merely an application of the church autonomy doctrine. And lower courts apply and extend existing doctrine all the time.

But even if this Court had jurisdiction to do so, this Court should not grant certiorari to consider an exception that Calvary barely explains and no court—in this case or otherwise—has ever considered. Because Calvary raises its so-called “liturgical

exception” for the first time in its petition, it has never explained its proposed rule for this exception or how it might apply here. Indeed, Calvary does not even define “liturgical.” It says only that the exception “would not be a *carte blanche* for criminal acts contrary to legitimate police power.” Pet. 22. So, it asserts, “[c]hild sacrifice” performed as part of a religious ceremony would still constitute “homicide [as] homicide.” *Id.* But Calvary does not explain why that would be, or why face-covering requirements during a pandemic fall on the other side of its undefined line.

Nor can this Court look to lower courts for guidance: Calvary identifies—and we have found—no court that has ever even considered a “liturgical exception” to *Smith*. This Court should not grant review to create an entirely new exception to well-established precedent out of thin air.

2. Nor is this a good vehicle for the Court to consider overruling *Smith* altogether. As an initial matter, if this Court is going to consider anew what framework should govern Free Exercise challenges, it should do so in a context where they are likely to occur—not a challenge to a municipal public health order that was rescinded five years ago, is not in effect anywhere in the country, and is unlikely to recur.

And if this Court were inclined to replace *Smith*, it would need something to replace it with. Calvary does not suggest what that might be. There would be “a number of issues to work through if *Smith* were overruled.” *Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring). Yet, Calvary is silent on all of them. Indeed, even the United States, which has expressed skepticism of *Smith*, has urged this Court to approach

deciding cases in a manner that would “obviate the need to confront at this juncture whether *Smith* itself retains vitality.” Br. of the United States as Amicus Curiae Supporting Pets. at 5, *St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. Jan. 30, 2025).

Consistent with that caution, this Court has repeatedly declined invitations to overrule *Smith*. It did so in *Fulton*. 593 U.S. at 540–41. It did so during the pandemic. See, e.g., *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), cert. denied, 141 S. Ct. 1753 (2021). And it has repeatedly done so in other contexts, too. See, e.g., *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal. App. 4th 417 (2005), cert. denied., 547 U.S. 1071 (2006); *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023), cert. denied, 144 S. Ct. 2682 (2024). Nothing has changed since those denials. If this Court wishes to revisit *Smith*, there will continue to be future opportunities in more appropriate vehicles—not in a case involving circumstances that are no longer happening and that were extraordinary when they were.⁸

⁸ Indeed, as of filing, there is a pending petition for certiorari that asks this Court to overrule *Smith* in a case involving government funding for preschools. See Pet. for a Writ of Cert., *St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. Nov. 13, 2025).

III. This Court should not grant review of an uncitable decision to address the application of undisputed Eighth Amendment principles to a rescinded COVID-era public health rule.

Calvary’s final question presented—whether the imposition of fines against it violated the Eighth Amendment—also does not warrant this Court’s review.

1. Again, Calvary cannot ask this Court to resolve a circuit split on what standard applies to Excessive Fines challenges. There is none. The law is well settled. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality”: A fine is only “constitutionally excessive ... if it is grossly disproportional to the gravity of a defendant’s offense.” *Bajakajian*, 524 U.S. at 334. To make that determination, every court across the country compares the defendant’s “culpability” with the level of “harm ... caused.” *Id.* at 338–39. That is precisely the standard the California Court of Appeal here applied. Pet. App. 46a (citing *Bajakajian*, 524 U.S. at 337–38).

Calvary does not argue otherwise. Pet. 28 (citing *Bajakajian*, 524 U.S. at 338–39). Instead, it argues that the superior court’s factual findings on culpability and harm—and the court of appeal’s affirmance of those findings—were wrong. Pet. 29–31. And it asks this Court to review them. That kind of factbound error correction is not a basis for this Court’s review. *See Martin*, 571 U.S. at 1045 (Alito, J., concurring in denial of certiorari).

2. In any event, the court below did not err. It found Calvary’s culpability to be “high” because it

“intentionally and repeatedly” violated the County’s face-covering rules from November 9, 2020 until they were rescinded on June 21, 2021. Pet. App. 47a–48a; *see also* Pet. App. 5a, 45a. While Calvary emphasizes that the fines exceed \$1 million, that is because Calvary itself let those fines accrue daily for eight months. It could have immediately challenged the notice of violation but did not. Nor did it seriously challenge the constitutionality of the face-covering rules until nearly a year into the County’s civil action to bring Calvary into compliance. Instead, Calvary called face-covering requirements “commonsense restrictions”—consistent with the general understanding that these were narrow and reasonable mitigation measures in routine use across the country, including by other places of worship. *Supra* 4–5, 14–15.

Calvary’s main argument to the contrary is based on restrictions that are not at issue and for which there are no fines. It asserts that the County’s face-covering rules “overlapped heavily” with and were “part of the same overall regulatory scheme” as the County’s unlawful restrictions on gatherings, and therefore, Calvary argues, fines for the former cannot be separated from fines for the latter. Pet. 29–30. That’s just not true. The requirement that face coverings be worn in indoor public spaces was a discrete requirement. And as Calvary itself acknowledges elsewhere (at 15–16 n.9), the fines imposed here were fines for violating that discrete requirement. *Supra* 4, 10, & n.6. Whatever Calvary might now try to suggest, they had nothing to do with any other public health guidance the County issued during the pandemic. *See id.* As the court of appeal emphasized, the “issues on appeal arise *solely* from

Calvary Chapel’s violation of certain public health orders requiring face coverings.” Pet. App. 2a (emphasis added); *see also* Pet. App. 92a–93a (superior court “[l]ooking only at the face covering fines”).

Nor did the court err in evaluating the harm resulting from Calvary’s ongoing violations. Although Calvary dismisses (at 30–31) any harm it caused as “minimal” and “incalculable,” Calvary admitted that it knew that multiple congregants had contracted COVID-19 and attended services while symptomatic, that there had been a “serious outbreak” at its on-campus school; and that there had been at least one COVID-19 death in its community. Pet. App. 48; *see also* Pet. App. 88a; 4 CT 1026–27.

3. To dress up its request for fact-specific error correction, Calvary argues there is a “need for guidance for lower courts applying the Excessive Fines Clause.” Pet. 26. But it does not explain what guidance lower courts purportedly need, given that it does not identify any conflict in the cases—or even any confusion. And even if there were such need, this case would not be the vehicle to provide it. A decision from this Court exploring the application of the Excessive Fines Clause in the context of a single COVID-era rule regarding face coverings would have little bearing on how that clause should apply in the circumstances in which it usually arises.

CONCLUSION

This petition for a writ of certiorari should be denied.

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Respectfully submitted,

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