No. 06-1550

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY, *et al.*,
Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT, NEW YORK STATE INSURANCE DEPARTMENT,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners' Rule 29.6 Statement was set forth at pages ii–iv of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATE CASES

TABLE OF AUTHORITIES—Continued

Blank Page

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INTRODUCTION

This is an extraordinary case. There is no other context in which any court has held that the state may coerce a church entity to finance private conduct that the church teaches is morally wrong. Such coercion strikes at the heart of a church's ability effectively to transmit its values and implicates several First Amendment precedents—including decisions respecting freedom from coerced subsidization, associational freedom, and the institutional autonomy of churches.

The Brief In Opposition ("Brief") quibbles with these precedents and portrays this case as a "straightforward" application of *Employment Division v. Smith*, 494 U.S. 872 (1990). In so doing, the Brief, as it must, adopts the most

restrictive reading possible of decisions in which this Court has defended institutional and associational freedom against government encroachment, and propounds the most expansive reading possible of otherwise distinguishable holdings found in decisions that involve government speech and vital Congressional powers, such as *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006) ("*FAIR*"). Then, having created a shoebox framed by its interpretation of *Smith* and *FAIR*, the Brief crams this case into the confines of its box and argues that there is nothing for this Court to clarify.

If this Court's prior decisions can be read as Respondent urges, that only underscores the need for guidance from this Court, lest its prior decisions continue to be read—or *mis*read—to undermine one of the most basic liberties protected by the Constitution. For the reasons stated below, Petitioners submit that these decisions should not be so read, and that the unique characteristics of this case, rather than providing fodder for distinguishing prior cases protecting First Amendment values, instead serve to illustrate the importance of bringing clarity to an issue of burgeoning national importance.

ARGUMENT

I. THERE IS A NEED FOR CLARIFICATION OF THIS COURT'S DECISIONS.

A. *Smith* Does Not Control This Case.

The central principle of *Smith* has little to do with this case. *Smith* stands for the proposition that when the state enacts a law prohibiting "socially harmful conduct," *Smith*, 494 U.S. at 885—for example, a law against polygamy—the state has an obvious interest in uniform application of that law. And when the state enacts a law requiring conduct deemed important to the community—such as the payment of taxes—

the state has an equally obvious interest in the uniform application of that law. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982). In these cases, the government's interest in uniform application of such laws—"neutral laws of general applicability"—is such that the government is not required to grant exemptions to individuals who articulate a religious objection. *Id.* at 263.

In this case, the State of New York has identified no conduct so harmful that no employer should be permitted to engage in it, and no benefit so important that all employers should be required to provide it. It has not enacted any "generally applicable" requirement of prescription drug coverage: employers are free to withhold such coverage altogether. What the State has done is to define the requirements of a prescription drug plan in such a way as to prohibit organizations like Petitioners from drawing the religiously-motivated distinctions they wish to draw. And in prohibiting such distinctions, the State has actually placed employees in jeopardy of losing the access to prescription drug coverage that they currently enjoy.

This is thus not the kind of neutral, generally applicable law that was at issue in *Smith*. Whether *Smith* applies at all to such a case is an open question that itself warrants review. What *Smith* means in this context, if applicable, is another question that warrants review, for the reasons explained below and in the Petition.

B. *FAIR* Does Not Control This Case.

FAIR cannot be read to reject a claim by a church entity that its coerced subsidization of contraception interferes with its religious message. Such a reading ignores the distinction between government and private speech and trivializes each Petitioner's rights as an expressive association—one now compelled by New York to subsidize private conduct that it undisputedly teaches is sinful.

As we noted in our Petition, this Court stated in *FAIR* that "[c]itizens may challenge compelled support of *private* speech," 126 S. Ct. at 1307 n.4 (emphasis added) (quotations omitted), and numerous decisions have struck down coerced subsidization of private speech. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). Nothing in *FAIR* suggests that the endorsement inherent in *subsidization*, which was not at issue in *FAIR*, is beyond First Amendment scrutiny, particularly when a church is coerced to subsidize conduct that it teaches is sinful. The application of the First Amendment to such coerced subsidization is a fundamental issue worthy of this Court's attention.

Moreover, *FAIR* reaffirmed this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which held that even generally applicable laws governing conduct, such as anti-discrimination laws, may run afoul of the First Amendment if applied to expressive associations. *Dale* held that the state could not prohibit the Boy Scouts from discriminating against homosexuals in its hiring, because that would interfere with the Boy Scouts' message about homosexual conduct. In contrast, *FAIR* held that requiring law schools to provide equal treatment to military recruiters did not affect the law schools' associational rights, because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." 126 S. Ct. at 1312. This distinction, deemed "critical" in *FAIR*, *id.*, goes far in supporting Petitioners' claim that the Women's Health and Wellness Act (WHWA) overreaches when it mandates that churches violate their own teachings in their relationships with their own employees. At the very least, nothing in *FAIR* dictates the constitutionality of laws governing *internal* relationships between church entities and those employed to carry out the church's mission.

FAIR also reaffirmed *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), which prevented the application of another generally applicable anti-discrimination statute to organizers of a parade. A parade, the Court held, is more than just persons marching from one point to the next; it is a group marching to make a collective point. *Id.* at 568. The protection afforded to the parade-marchers' expression in *Hurley* was not relevant in *FAIR*, however, because "schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive." *FAIR*, 126 S.Ct. at 1309-10.

The State argues that like law schools' hosting of recruiters, the provision of health benefits by churches is not inherently expressive conduct, and thus that *FAIR* precludes redress. This analysis misses a key point of *Hurley*: one cannot determine if an act is inherently expressive by focusing on conduct (such as walking from one point to another) in isolation from the association performing the conduct (a parade). Just as a parade is more than a group of people marching from one point to the next, a church is more than an employer. And just as a parade is a group of people making a collective point, a church is a group of people embodying a collective vision of right and wrong. Thus, when a church teaches that contraception violates the commands of God, its decision to withhold coverage for contraception both reflects and promotes the church's message and collective values.

In sum, nothing in *FAIR* remotely suggests that the State may insert itself into the internal affairs of a church entity and compel it to subsidize employee conduct that it condemns. If *FAIR* can be read, as the Court of Appeals read it, to permit such coerced subsidization, then *FAIR* requires clarification.

C. The Church-Autonomy Cases Support Petitioners.

Respondent states blithely that this Court has routinely applied principles of employment law to religious institutions without reference to the doctrine of church autonomy. Yet in support, Respondent cites only *one* case involving a religious employer-employee relationship, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985)—a case that did not even reach the constitutional question of church autonomy, because the Court found that the challenged law placed no actual burden on the petitioners' religious practices. The only other case cited by Respondent for this point, *United States v. Lee*, 455 U.S. 252, 259-61 (1982), dealt not with an employer's relationship with its employees, but rather with an employer's relationship with the *government* and the *tax system*.

In light of this absence of support, it is worth noting that *Smith* explicitly reaffirmed the continuing validity of decisions protecting a church's right to institutional autonomy—*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); and *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *See Smith*, 494 U.S. at 877. Those decisions recognize that the protections of the First Amendment extend not only to matters of faith, as the State recognizes in its opposition, but also to "church administration," *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, "internal organization," *id.* at 713, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107. Implicit in these decisions is the principle that churches retain a sphere of decisional integrity, not unlike the expressive integrity shared by the secular associations discussed in *Hurley* and *Dale*, that is necessary to allow the church to craft its own message and exhibit its own values to the world. This principle is supported by decisions in lower courts, which

have held uniformly that the First Amendment protects the right of a church to make decisions about the employment of those who implement the church's religious mission.[1]

It is possible, perhaps, factually to distinguish this Court's church-autonomy cases on the basis that they did not involve decisions related to employment benefits. But it is not possible to distinguish on that ground the numerous lower court cases recognizing a ministerial exception to employment laws. Nor would that factual distinction explain this Court's concern over the "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" presented by governmental oversight of church employment. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-04, 507 (1979) (raising concerns as to the NLRB's exercise of jurisdiction over lay faculty members at Catholic high schools, but resolving the case by construing a statute so as to avoid constitutional questions).

The church-autonomy cases explicitly affirmed by *Smith* suggest that a church entity has a First Amendment right to structure its relationship with its employees in conformity with church teachings—a right that, subject to strict scrutiny, trumps even neutral, generally applicable employment laws. At the very least, this is a matter worthy of clarification and guidance by the Court.

D. At a Minimum, Rational Basis Review Is Required.

Respondent incorrectly asserts that the test employed by the New York Court of Appeals under state law conforms to this Court's requirement that laws affecting liberty interests be rationally related to legitimate government interests. The Court of Appeals weighed the infringement of Petitioners' religious freedom against the interests asserted by the State in

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[1] See cases cited in the Petition at 21 n.13.

the abstract, in order to determine whether the WHWA was an unreasonable infringement. But balancing interests in the abstract does not answer the question whether the statute at issue actually advances the interests asserted by the State, or whether it fails to do so due to an irrational design. Whether such an inquiry is necessary for neutral laws of general applicability is another issue in need of clarification by this Court.

II. THE CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

At bottom, this case presents the Court with an opportunity to clarify the meaning and scope of several different lines of cases in the context of a confrontation that is important to religious organizations across the country. This case is unlike any other case the Court has addressed—it involves compelled *subsidization* by *church* entities of *private* conduct that violates the *church's teachings*. The justification for this interference with religious freedom is *not* a vital public need neutrally and uniformly enforced—for no one is compelled to provide prescription drug coverage at all and, as demonstrated in the Petition, the effect of the law may well be to undermine the goal of increasing access to prescription coverage. Rather, the ultimate justification for this statute is an *ideological* one—that inclusion of contraceptive coverage in any prescription drug plan is a matter of gender equity.

Thus, in the final analysis, this case is less a conflict between religious freedom and the public welfare than it is, in the words of one jurist, "a clash of ideas"—the State's view of gender equity versus the church's view of moral truth. *Catholic Charities of Sacramento, Inc., v. Super. Court*, 85 P.3d 67, 104 n.4 (Cal.) (J. Brown, dissenting), *cert. denied*, 543 U.S. 816 (2004). Significantly, it is a clash that takes place not in the community at large, but within a church institution—in the context of a church's relationship with

those who have voluntarily joined in a religious mission of the church. In such a clash, the First Amendment dictates that the State recede, for that is the only way in which both the State and the Church can continue to promote their messages.[2]

In this case, the clash between the State and the Church involves contraception. But if the State can compel church entities to subsidize contraceptives in violation of their religious beliefs, it can compel them to subsidize abortions as well. And if it can compel church entities to subsidize abortions, it can require hospitals owned by churches to provide them.

It was not that long ago that contraceptives and abortions were illegal in many parts of this country. This Court, of course, has held that even if a majority of the population opposes those practices, it may not impose its view on those who disagree—because to do so violates rights that are *implicit* in the Constitution. It would be the height of irony if the law were to shift so far as to allow a majority of the population to impose its view of the desirability of such practices on church entities that disagree—overriding rights that are *explicit* in the Constitution. This case presents an opportunity for the Court to clarify whether its prior decisions require that result.

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[2] Professor Laurence Tribe made the same point in commenting upon the Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), noting that the case involved "a direct clash of competing images of 'the good life,'" and observing that "in such a clash, the teaching of the First Amendment has long been that the state loses." Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 651–52 (2001).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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