No. ___ 061550 MAY 18 2007

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

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. COSTELLO

TOBIN & DEMPF LLP
33 Elk Street
Albany, NY 12207
(518) 463-1177

KEVIN T. BAINE *
STEPHEN J. FUZESI
CHRISTOPHER R. HART
MATTHEW J. PEED

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

Whether the State may compel a church or church entity, contrary to its religious teachings, to include contraceptives in the prescription drug plan that it provides to its employees, and thereby to finance conduct that the church teaches is sinful.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceedings in the New York Court of Appeals were:

> Catholic Charities of the Diocese of Albany; Servants of Relief for Incurable Cancer; Temple Baptist Church; Our Lady of Consolation Geriatric Care Center; Delta Development of Western New York, Inc.; St. John the Baptist Church; Catholic Charities of the Diocese of Ogdensburg; Bishop Ludden High School; First Bible Baptist Church; Carmelite Sisters for the Aged and Infirm, Inc., plaintiffs;
>
> Gregory V. Serio, Superintendent, New York State Insurance Department, defendant.[1]

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

- Catholic Charities of the Diocese of Albany is a nonprofit corporation incorporated pursuant to the provisions of a special act of the New York State Legislature. Catholic Charities of the Diocese of Albany has no parent corporations and is neither publicly held nor affiliated with any entity that is so held. Catholic Charities of the Diocese of Albany has as an individual corporate member the Bishop of the Roman Catholic Diocese of Albany.

- Temple Baptist Church is a religious corporation organized pursuant to the New York Religious Corporations Law. Temple Baptist Church has no parent corpo-

---

[1] Gregory V. Serio, the named defendant in the decision under review, is no longer the Superintendent of the New York State Insurance Department. Eric R. Dinallo was confirmed by the New York State Senate as Superintendent on April 18, 2007.

rations and is neither publicly held nor affiliated with any entity that is so held.

• Our Lady of Consolation Geriatric Care Center is a New York nonprofit corporation. Our Lady of Consolation Geriatric Care Center has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Delta Development of Western New York, Inc. is a New York nonprofit corporation. Delta Development of Western New York, Inc. has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• The Roman Catholic Church of St. John the Baptist (St. John the Baptist Church) is a religious corporation organized pursuant to the New York Religious Corporations Law. St. John the Baptist Church has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Catholic Charities of the Diocese of Ogdensburg is a New York nonprofit corporation incorporated pursuant to the provisions of a special act of the New York State Legislature. Catholic Charities of the Diocese of Ogdensburg has no parent corporations and is neither publicly held nor affiliated with any entity that is so held. Catholic Charities of the Diocese of Ogdensburg has as an individual corporate member the Bishop of the Roman Catholic Diocese of Ogdensburg.

• Bishop Ludden High School is a diocesan high school chartered by the New York Department of Education. Bishop Ludden High School has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• First Bible Baptist Church is a religious corporation organized pursuant to the New York Religious Corporations Law. First Bible Baptist Church has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

• Carmelite Sisters for the Aged and Infirm, Inc. is a New York nonprofit corporation. Carmelite Sisters for the Aged and Infirm, Inc. has no parent corporations and is neither publicly held nor affiliated with any entity that is so held.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. ___

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

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Catholic Charities of the Diocese of Albany, *et al.* respectfully petition for a writ of certiorari to review the decision and judgment entered on October 19, 2006, by the New York Court of Appeals.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals is reported at 7 N.Y.3d 510, 859 N.E.2d 459 (2006) and is reproduced in the Appendix ("App.") at 1a. The order of the Court of Appeals denying petitioners' motion for reargument is reported at 8 N.Y.3d 866, 863 N.E.2d 1019 (2007) and is reproduced in the Appendix at 95a. The opinion of the Appellate Division is reported at 808 N.Y.S.2d 447, 28 A.D.3d 115 (App. Div. 2006) and is reproduced in the

Appendix at 18a. The opinion of the trial court, the Supreme Court, is unreported and is reproduced in the Appendix at 67a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 19, 2006. A timely motion for reargument was denied on February 20, 2007. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant portions of New York's Women's Health and Wellness Act ("WHWA"), N.Y. Ins. Law § 3221 (*l*)(16) (McKinney 2006 & Supp. 2007) and N.Y. Ins. Law § 4303(cc) (McKinney 2007), are reproduced in the Appendix at 97a and 99a.

STATEMENT OF THE CASE

The New York Court of Appeals has upheld a law that requires church entities, including those of the Catholic and Baptist Churches, to include contraceptives in the prescription drug plans that they provide to their employees—or to deprive their employees of prescription drug coverage altogether. This is now the second case in which a state's highest court has upheld a law that coerces religious institutions to

subsidize non-governmental conduct that conflicts with their own religious beliefs.[1]

Under the approach taken by the Court of Appeals, which purported to apply this Court's precedents, neither the Free Exercise Clause nor the Free Speech Clause provides *any* protection against such laws, as long as they apply neutrally to non-religious entities as well as religious ones. Whether the Court of Appeals misconstrued those precedents is an important question that warrants this Court's consideration.

A. Religious Beliefs at Issue

This case implicates at least two important religious principles of the Catholic Church.

First, the Catholic Church teaches that contraception is "intrinsically evil." *See, e.g.*, 2 Court of Appeals Record on Appeal ("N.Y. App.") 782, 785. This is a clear historic and theologically grounded teaching of the Catholic faith.[2] In keeping with this teaching, church entities cannot facilitate or promote, directly or indirectly, the practice of contraception. *See, e.g.*, 2 N.Y. App. 781, 793, 870. Accordingly, church entities are prohibited from paying for or otherwise providing contraceptives. *Id.* The same is true with respect to several other procedures, including abortion, voluntary sterilization, and *in vitro* fertilization. *Id.*

Second, the Catholic Church teaches that employers are obligated to provide just wages and benefits to their employees. Thus, as explained in an affidavit from an expert, "Roman Catholic institutional employers, consistent with Roman Catholic religious and moral teaching in this area,

---

[1] The Supreme Court of California has upheld a similar statute. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004).

[2] *See* John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1965).

must provide their full time employees with health care benefits that include access to prescription medications." 2 N.Y. App. 793.

The Baptist Church shares similar beliefs. The Baptist Church teaches that abortifacient contraception "violates religious beliefs rooted in the Scriptures" and is "morally . . . illicit and unacceptable." 2 N.Y. App. 505, 510-11. Like the Catholic petitioners, the Baptist petitioners offer their employees health coverage that includes access to prescription medications, based on their religious commitment to "live according to the values of the Scriptures." *Id.*

B. New York's Women's Health and Wellness Act

The WHWA, enacted in 2002, requires that all group insurance policies that include coverage for prescription drugs must provide coverage for the cost of prescribed contraceptive drugs or devices. App. 97a, 99a.

The legislative history reveals that the state legislature was well aware that this requirement would conflict with the religious beliefs of a number of churches and affiliated organizations. Indeed, as originally introduced and passed by the State Senate, the law would have contained a religious exemption for which all petitioners would have qualified. 1 N.Y. App. 131, 149-50. As ultimately enacted, however, the religious exemption was confined to a narrow category of "religious employer[s]" that excludes the vast majority of church-related employers in New York. App. 97a, 99a. The law defines a "religious employer" as "an entity for which each of the following is true:"

> (a) The inculcation of religious values is the purpose of the entity.
>
> (b) The entity primarily employs persons who share the religious tenets of the entity.

> (c) The entity serves primarily persons who share the religious tenets of the entity.
>
> (d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

App. 97a, 99a. The legislature knew that restricting the exemption in this way would subject many Catholic Church entities to the contraceptive mandate. A number of legislators found the Act's application to such arms of the church to be offensive and unconstitutional, but their views did not prevail. *See, e.g.*, 1 N.Y. App. 330-31, 358-59, 437-38.

Under the law, an entity meeting the restrictive criteria for a "religious employer" is not required to provide contraceptive coverage if doing so would be "contrary to the religious employer's religious tenets." App. 97a, 99a. But those who work for exempt "religious employer[s]" are not left without coverage. Those employees are eligible for contraceptive coverage through a state-mandated rider. App. 98a, 100a. They have the right to purchase the coverage rider directly from their employer's insurance provider "at the prevailing small group community rate for such a rider," App. 98a, 100a, which the Supreme Court estimated to be "on the order of $1.00 to $2.00 per month." App. 52a, 71a. There is no comparable rider provision for the employees of employers who opt not to provide prescription coverage at all.

C. Petitioners

Petitioners are nine Catholic churches, Baptist churches, or entities that are juridically part of the Catholic Church. They provide a broad range of educational and social services—including health care, food, clothing, affordable housing, drug prevention and treatment, domestic violence shelters, and immigration settlement programs. Those services, while

addressing the physical needs of the recipients, are vital and integral parts of the churches' ministry.[3]

None of petitioners qualifies for the "religious employer" exemption contained in the New York law, for one or more reasons. All petitioners provide their services to people in need, regardless of their religious beliefs, and thus cannot say that they serve "primarily" those who share their religious tenets. In addition, some cannot certify that they "primarily" employ persons who share their religious tenets. Some do not have "the inculcation of religious values" as their "purpose," although all transmit religious values through their religiously motivated work. Finally, some do not qualify under the designated Internal Revenue Code provision, although all petitioners are charitable organizations exempt from federal taxation.

As a result, the WHWA's contraceptive mandate has thrust petitioners into a religiously untenable position. They must choose between (i) obeying their church's doctrine on contraception or (ii) remaining faithful to their church's teaching on providing just wages and benefits to employees, including prescription drug coverage. Pending the outcome of this case, petitioners are currently providing prescription drug coverage and complying with the contraceptive mandate under protest.

Brief descriptions of each petitioner are as follows:

- Catholic Charities of the Diocese of Albany is operated in connection with the Roman Catholic Diocese

---

[3] *See, e.g.*, Benedict XVI, Encyclical Letter *Deus Caritas Est* ¶ 25(a) (2005) ("The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God . . . , celebrating the sacraments . . . , and exercising the ministry of charity . . . . These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.").

of Albany, New York, and is an ecclesiastical part of the Catholic Church. It provides a wide variety of human service programs. 2 N.Y. App. 526-32, 867.

• Temple Baptist Church is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. The Church engages in a range of scripturally based human service outreach programs. It is a "religious corporation" under New York law.[4] 2 N.Y. App. 503-07.

• Our Lady of Consolation Geriatric Care Center operates a nursing and rehabilitative care center in connection with the Roman Catholic Diocese of Rockville Centre, New York. 2 N.Y. App. 651-55.

• Delta Development of Western New York, Inc. offers housing services and assistance. It is operated in connection with the Roman Catholic Diocese of Buffalo, New York. 2 N.Y. App. 632-37.

• St. John the Baptist Church is a Roman Catholic Church that is part of the Roman Catholic Diocese of Brooklyn. A "religious corporation" under New York law, it operates St. John the Baptist School, an elementary school serving the Bedford-Stuyvesant community in Brooklyn, New York. 2 N.Y. App. 673-78.

• Catholic Charities of the Diocese of Ogdensburg is operated in connection with the Roman Catholic Diocese of Ogdensburg, New York. It provides a variety of religiously motivated human service programs. 2 N.Y. App. 583-88.

---

[4] New York's Religious Corporations Law applies to certain corporations "created for religious purposes." *See* N.Y. Relig. Corp. Law § 2 (McKinney 1990 & Supp. 2007) (defining a "Religious Corporations Law corporation," otherwise known as a "religious corporation").

• Bishop Ludden High School serves the community of Syracuse, New York, and is operated in connection with the Roman Catholic Diocese of Syracuse. 1 N.Y. App. 476-81.

• First Bible Baptist Church is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. The Church engages in various human service outreach programs in the Rochester area of New York and operates a K-12 school, the Northstar Christian Academy. It is a religious corporation under New York law. 2 N.Y. App. 508-12.

• The Carmelite Sisters for the Aged and Infirm is a Roman Catholic congregation of Pontifical Rite that staffs long-term care facilities at multiple locations throughout New York. 2 N.Y. App. 608-13.[5]

D. Decisions Below

Petitioners filed suit in the New York Supreme Court for Albany County on December 30, 2002, seeking declaratory and injunctive relief against application of the WHWA's contraceptive mandate. Petitioners sought this relief under the First Amendment's Free Exercise and Establishment Clauses, as well as the First Amendment's protections for free speech and association. Petitioners also sought relief under provisions of the New York Constitution. In a decision and order dated November 25, 2003, the Supreme Court granted respondent's motion for summary judgment and dismissed petitioners' complaint. App. 91a.

---

[5] A tenth plaintiff below, the Servants of Relief for Incurable Cancer, which operates two nursing facilities in connection with the Roman Catholic Archdiocese of New York, was granted an exemption from the contraceptive mandate while this case was pending and has issued a group policy without contraceptive coverage. 2 N.Y. App. 513-16; 3 *id.* at 1482-90.

Petitioners appealed the ruling to the intermediate appellate court, the Appellate Division, on the basis of both federal and state constitutional guarantees. The Appellate Division affirmed the Supreme Court's dismissal of petitioner's complaint by a 3-2 vote. App. 18a. The dissenting judges explained that the contraceptive mandate undermines petitioners' religious message, pointing out that "[i]t is not enough for religious employers to say that they are morally opposed to contraception if they are simultaneously paying for employees to obtain it; the condemnation of the act is inauthentic if religious employers are paying for what they believe to be immoral." App. 60a (quoting a commentator).

Again invoking both federal and state constitutional protections, including the Free Exercise and Free Speech Clauses, petitioners appealed to the New York Court of Appeals. On October 19, 2006, the Court of Appeals affirmed, based on its view that this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), had adopted an "*inflexible rule* . . . that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." App. 9a (emphasis added). The court noted that the "sincerity of [petitioners'] beliefs, and the centrality of those beliefs to their faiths, are not in dispute." App. 4a. Moreover, the court acknowledged that New York's law presented a "serious" burden to petitioners' religious practices. App. 13a. Nonetheless, the court held that *Smith* represented "an insuperable obstacle to plaintiffs' federal free exercise claim." App. 9a.

In *Smith*, this Court had observed that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 494 U.S. at 881. "Assuming that [this] language

does create an exception to the general rule of *Smith*," the Court of Appeals held the exception inapplicable because, in its view, petitioners' free speech and free association claims were "insubstantial." App. 7a-8a. The contraceptive mandate, the court held, "does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like." App. 8a. The sole support cited for that conclusion was this Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006). App. 8a.

The court further held that "church autonomy is not at issue in this case," App. 8a, notwithstanding the fact that the WHWA dictates how churches deal with their employees on matters directly related to their religious beliefs.

Based on its view that *Smith* had adopted an "inflexible rule" presenting an "insuperable obstacle" to petitioners' claim, the Court of Appeals did not even address petitioners' argument that the challenged provisions of the Act were not rationally related to its stated purposes. Petitioners had argued that denying the "religious employer" exemption to employers like them actually undermined the objective of expanding contraceptive coverage. That is so because the Act encourages religious objectors who are ineligible for the "religious employer" exception to deny the prescription drug coverage that they would otherwise be prepared to provide. If those employers were exempt, they could continue to provide general prescription drug coverage, and their employees would be eligible for contraceptive coverage under the state-mandated rider. The court neither acknowledged these peculiar features of the Act nor considered their impact on its constitutionality. Instead, the court construed *Smith* as a barrier to *any* review of the law, evidently reading *Smith* to mean that not even rational basis review is required under the Free Exercise Clause once it is determined that a law is neutral and generally applicable. App. 9a.

Petitioners filed a timely motion for reargument before the Court of Appeals, which was denied on February 20, 2007. App. 95a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify the meaning and scope of its rulings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 126 S. Ct. 1297 (2006), and to resolve First Amendment questions of national importance. There are at least twenty-three states that have adopted laws mandating contraceptive coverage—only seven of which contain comprehensive exemptions for religious employers.[6] The issues in this case, therefore—as

---

[6] Five states provide no exemption for religious employers. *See* Ga. Code Ann. § 33-24-59.6 (2005); Iowa Code Ann. § 514C.19 (West Supp. 2007); N.H. Rev. Stat. Ann. §§ 415:18-i, 420-A:17-c, 420-B:8-gg (2004); Vt. Stat. Ann. tit. 8 § 4099c (2006); Wash. Admin. Code § 284-43-822 (2005).

Eleven states, including New York, have exemptions that fail to cover all religiously affiliated employers. *See* Ariz. Rev. Stat. §§ 20-826, 20-1057.08, 20-1402, 20-1404, 20-2329 (Supp. 2006); Ark. Code Ann. §§ 23-79-1101 to 23-79-1104 (LexisNexis Supp. 2005); Cal. Health & Safety Code § 1367.25 (West Supp. 2007), Cal. Ins. Code § 10123.196 (West 2005); Haw. Rev. Stat. Ann. §§ 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (Michie 2004); Me. Rev. Stat. Ann. tits. 24, § 2332-J; 24-A, §§ 2756, 2847-G, 4247 (West 2000 & Supp. 2006); Mass. Gen. Laws chs. 175, § 47W; 176A, § 8W; 176B, § 4W; 176G, § 4O (West Supp. 2007); N.J. Stat. Ann. §§ 17:48-6ee, 17:48A-7bb, 17:48E-35.29, 17:48F-13.2, 17B:26-2.1y, 17B:27-46.1ee, 17B:27A-7.12, 17B:27A-19.15, 26:2J-4.30 (West 2006, 2007 & Supp. 2007); Nev. Rev. Stat. Ann. §§ 689A.0415, 689A.0417, 689B.0376, 689B.0377, 695B.1916, 695B.1918, 695C.1694, 695C.1695 (Michie 2003 & Supp. 2005); N.C. Gen. Stat. §§ 58-3-178, 58-50-155 (LexisNexis 2005); R.I. Gen. Laws §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (LexisNexis 2002).

Seven states provide broader exemptions. *See* Conn. Gen. Stat. Ann. §§ 38a-503e, 38a-530e (West Supp. 2007); Del. Code Ann. tit. 18, § 3559 (Supp. 2006); Md. Code Ann., Ins. § 15-826 (LexisNexis 2006); Mo.

well as the broader principles at stake—affect religious institutions throughout the country.

There is, to our knowledge, no other context in which courts have upheld coerced financing by a church institution of private, non-government conduct that the church teaches is morally wrong. This Court should grant the writ to clarify that its prior decisions do not mandate this result, and to offer guidance on the principles that should govern such cases in the future.

Churches in this country often espouse views at odds with those of the majority—and often on pressing social and cultural issues of national prominence. Contraception is but one example of a range of issues for which this is true. Abortion is perhaps the most prominent example. This petition asks the Court to consider just how far the First Amendment permits the state to go in imposing its own view on such controversial issues on churches that sincerely hold contrary views.

The Court of Appeals thought that *Smith* and *FAIR* foreclosed any protection for church entities that believe the conduct they are being asked to subsidize is sinful, so long as non-church entities, which have no institutional position on the subject, are also subject to the law's requirements. In other words, the Constitution places no obligation on the legislature to respect a church entity's views on the subject at all. That conclusion, however, rests upon a misinterpretation of this Court's decisions in *Smith* and *FAIR* and conflicts

---

Ann. Stat. § 376.1199 (West 2002); N.M. Stat. Ann. §§ 59A-22-42, 59A-23-4, 59A-46-44 (LexisNexis Supp. 2006); Tex. Ins. Code Ann. §§ 1369.104 to 1369.108 (Vernon 2006); W. Va. Code Ann. §§ 33-16E-1 to 33-16E-7 (LexisNexis 2006). Illinois has no such exemption in its contraceptive coverage statute, 215 Ill. Comp. Stat. Ann. § 5/356z.4 (West Supp. 2006), but it does have a comprehensive Health Care Right of Conscience Act, 745 Ill. Comp. Stat. Ann. 70/1-70/14 (West 2002).

with the holdings of this Court and other courts in several important respects.

As explained below, this case provides the Court with an opportunity (a) to answer a question that was not decided in *FAIR*—whether coerced subsidization of private conduct can amount to coerced endorsement of that conduct in violation of free-speech principles; (b) to resolve a conflict among the circuits as to whether there is an exception from the holding of *Smith* for "hybrid" claims that free speech, as well as free exercise, rights have been violated; (c) to address unresolved questions as to the applicability of *Smith* to claims of institutional church autonomy; and (d) to resolve the conflict created by the Court of Appeals' opinion on whether even rational basis review is applicable to a neutral law of general applicability.

I. THE COURT SHOULD CLARIFY THE MEANING OF *EMPLOYMENT DIVISION V. SMITH* AND *RUMSFELD V. FAIR.*

A. The Court in *FAIR* Left Unresolved the Important Question Whether Coerced Subsidization of Private Activity Implicates the Right of Free Speech.

In *Smith*, the Court noted that even neutral, generally applicable laws are vulnerable to attack based on the Free Exercise Clause "in conjunction with other constitutional protections." 494 U.S. at 881. Among those "other constitutional protections," the Court noted, were "freedom of speech" and "freedom of association." *Id.* at 881-82. Petitioners have argued that this case presents precisely the "hybrid situation" that warrants strict scrutiny under *Smith*. *Id.* at 882.

In addition to claiming a violation of their right to free exercise of religion, petitioners have argued that New York's contraceptive mandate interferes with their right of free

speech. It does so by coercing them to subsidize—and thereby endorse—conduct that they seek to condemn as wrong. At the very least, petitioners have argued, subsidizing such conduct would undermine the strength and effectiveness of the church's message condemning the conduct as immoral.[7]

The Court of Appeals read this Court's ruling in *FAIR* as foreclosing this argument. But *FAIR* did not address any claim of compelled *subsidization* by a *church* entity of *private* behavior that undercuts its religious message. This case would be the first such case that the Court has addressed, and it presents an opportunity to clarify the meaning and implications of *FAIR* in this context.

In *FAIR*, this Court explicitly reaffirmed "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 126 S. Ct. at 1309 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995)). That principle was inapplicable in *FAIR*, the Court held, because the requirement to accommodate military recruiters on campus "does not sufficiently interfere with any message of the school." *Id.* at 1310. Moreover, the law in *FAIR* did not raise any issue of coerced subsidization of any message, because the required accommodations were "not of a monetary nature." *Id.* at 1307 n.4. In addition, the Court noted, its "compelled-subsidy cases involved subsidizing private speech," not government speech. *Id.*

This case is obviously different. It involves accommodations "of a monetary nature." The subsidized activity is not that of the government, but that of *private* individuals. And the churches affected by this law, unlike the law schools in *FAIR*, were formed for expressive purposes, including the

---

[7] Petitioners have also claimed that the contraceptive mandate interferes with the right of their members to associate with others to promote a set of beliefs of their own choosing.

very purpose of imparting views about morality. Indeed, "a church's message . . . is of singular importance." *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003). And the law at issue here interferes dramatically with the religious message that the petitioner church entities seek to convey.[8]

FAIR cannot reasonably be read, as the Court of Appeals evidently read it, to foreclose the claim of coerced subsidization and endorsement that these petitioners raise, and prior decisions of this Court offer substantial support for such a claim. *FAIR* itself confirmed that "[c]itizens may challenge compelled support of private speech." 126 S. Ct. at 1307 n.4 (alteration in original) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005)). Indeed, this Court has held that an individual cannot be required to subsidize expressive activities that he opposes in a variety of settings.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977), the Court held that it violated the First Amendment rights of state employees to require them to provide financial support for ideological union activities unrelated to collective bargaining.[9] And in *Keller v. State Bar*

---

[8] As the chief executive officer of Catholic Charities of the Diocese of Albany explained in an affidavit, the contraceptive mandate, with which petitioners are currently complying under protest, has not only "placed Catholic Charities in direct conflict . . . with the doctrines, beliefs and disciplines of the Roman Catholic Church"; it "has generated pervasive confusion among its employees with respect to its mission, philosophy and values." 3 N.Y. App. 1378-79.

[9] Although the Court reaffirmed its previous rulings that the state had an overriding interest that justified compelling employees to subsidize the collective bargaining activities of the union, it recognized that even that form of compelled subsidization might interfere with an employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 222 (1977). In an observation that is pertinent to this case, the Court noted that an employee's "moral or religious views about the desirability of abortion

of California, 496 U.S. 1, 16 (1990), the Court held that state bar members could not be compelled to finance political and ideological activities with which they disagreed. In both cases, the Court recognized that compelled subsidization amounted to a compelled message of approval or support in violation of the First Amendment.

Of course, this case does not involve compelled support of private *speech*, but rather compelled subsidization of private *conduct*. But the claim here is that coerced subsidization of that private conduct places petitioners in the position of appearing to endorse that conduct—or, at the very least, that it undermines their message of disapproval.[10] This Court has not previously addressed such a claim—because, as we have noted, laws like this one are the first of their kind. There is, therefore, a substantial unresolved question whether coercing a church entity to subsidize private conduct that it condemns undermines the message it wishes to convey on the subject, in violation of the First Amendment.[11]

---

may not square with the union's policy in negotiating a medical benefits plan." *Id.*

[10] This claim is unlike the claim by the law schools in *FAIR* that treating military and nonmilitary recruiters alike could be viewed as sending the message that they approve of a particular military policy. *See* 126 S. Ct. at 1310. Here petitioners are being coerced to subsidize the particular behavior that they wish to condemn as immoral.

[11] Our argument is limited to the coerced subsidization of *non-governmental* conduct. A citizen may be compelled to pay taxes to support the general activities of government even when he objects to particular activities on religious grounds. *See, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982). That is principally because "[t]he tax system could not function" if individuals and organizations could pick and choose the policies that they could in conscience support. *Id.* at 260. But it also reflects the reality that compliance with such a fundamental duty of citizenship can hardly be understood as an expression of support for all of the government's policies. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), this Court held that citizens "have no First Amendment

There is no question that financial support is a form of sponsorship or endorsement. When an organization pays for an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. That is at least in part why direct government funding of religious activity gives rise to Establishment Clause concerns. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846-47 (1995) (O'Connor, J., concurring). More generally, this Court has emphasized that the government's own spending can be used to express encouragement for certain types of conduct over others—that is, legislatures can "make a value judgment" and "implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Indeed, the government chooses to fund certain activities and not others precisely to *"encourage*[] . . . activity deemed in the public interest." *Harris v. McRae*, 448 U.S. 297, 315 (1980) (emphasis added). In *Harris* and *Maher*, the Court upheld legislative decisions to encourage "childbirth over abortion by means of subsidization of one and not the other." *Harris*, 448 U.S. at 315. What is true of government spending is also true of private spending.

When a religious institution subsidizes particular private conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur. In particular, petitioners cannot persuasively communicate their church's teaching that contraceptive use is immoral if they simultaneously pay for contraceptives for their employees. At the least, petitioners are entitled to reach that judgment. As the Court emphasized in *Boy Scouts of America v. Dale*, "we must . . . give deference to an association's view of what would impair its expression." 530 U.S. 640, 653 (2000).

---

right not to fund government speech," but specifically noted that "[c]itizens may challenge compelled support of private speech." *Id.* at 562.

In the *Boy Scouts* case, this Court held that the Boy Scouts' "freedom of expressive association" prevented the state from enforcing its public accommodations law to require the inclusion of a gay assistant scoutmaster. 530 U.S. at 648. Just like the contraceptive mandate at issue in the instant case, the Court held that the state law would "force the organization to send a message, both to the youth members and the world, that the [organization] accepts [the] conduct as a legitimate form of behavior." *Id.* at 653.

Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574. The parade organizers had that right even though they had no particular message on the subject that they wished to convey—only a preference "not to propound a particular point of view." *Id.* at 575. Again, the "principle of speaker's autonomy" prevailed. *Id.* at 580.

Petitioners and their supporters have an even stronger right than parade organizers and the Boy Scouts to join together in an organization that stands for something. They have the additional protection of the Free Exercise Clause. And if non-religious organizations have a constitutional right to exclude individuals whose mere presence might send a message on the subject of homosexuality that they did not like, then how much more clear it must be that a church organization has a right not to subsidize private conduct that contradicts its teachings.

The compelled subsidization in this case strikes at the heart of the Church's ability to communicate its unambiguous commitment to basic moral teachings and to form associations, like petitioners, that maintain their adherence to those moral teachings. Indeed, one can scarcely think of a more direct

and substantial interference with the religious mission of a church. If the State can coerce the Catholic Church and its social welfare arms to pay for contraceptives, it can force them to pay for abortions or for other private conduct that contradicts their teachings. But the First Amendment protects the right of these church entities "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Court should grant the writ to preserve that bedrock principle.

B. There Is a Conflict Among the Circuits on the Application of *Smith*'s Hybrid Rights Doctrine.

There is a split among the circuits on how to interpret this Court's observation in *Smith* that strict scrutiny has been applied in "hybrid situation[s]" involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881-82.

Two circuits have specifically endorsed the hybrid rights approach. They have held that in order to obtain strict scrutiny for a free exercise claim, a plaintiff need only assert a "colorable" companion constitutional claim—that is, a claim with a "fair probability or a likelihood, but not a certitude, of success on the merits." *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (quotations omitted); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

In contrast, at least two circuits have expressly rejected the hybrid rights approach. *See Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (calling *Smith*'s hybrid rights discussion "dicta and not binding on this court" (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir.

1993) (refusing to "use a stricter legal standard" to evaluate hybrid claims absent further explanation from this Court).[12]

The New York Court of Appeals did not take sides in the conflict among the circuits on this issue. It "[a]ssum[ed] that the [hybrid rights] language [in *Smith*] does create an exception to the general rule of *Smith*," but found the exception inapplicable because it concluded that petitioners' free-speech and association claims were "insubstantial." App. 7a-8a. But the split in authority is nevertheless an additional reason to grant the petition. The free speech and association claims in this case are not insubstantial, for the reasons stated. The case, therefore, affords an opportunity to clarify once and for all what kinds of "hybrid" claims, if any, give rise to strict scrutiny.

C. There Are Unresolved Questions Concerning the Scope of a Church's Institutional Autonomy Rights After *Smith*.

Smith involved only "individual" rights. 494 U.S. at 876, 878-79. This case involves the *institutional* rights of a church. Specifically, it involves the church's freedom to conduct its relations with its employees—those whom it

---

[12] In addition to this clear split between the Ninth and Tenth Circuits, on the one hand, and the Second and Sixth Circuits, on the other, three other circuits have indicated that a companion constitutional claim must meet at least some threshold of merit before strict scrutiny will be applied. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 764-65 (7th Cir. 2003) (finding speech, assembly, and equal protection claims each independently lacking merit, and thus concluding that no hybrid claim exists); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting hybrid claims where the plaintiff's companion free speech claim was "untenable"); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (holding that no hybrid claim existed where the plaintiffs' allegations failed to implicate "an independently protected constitutional protection").

employs to carry out its religious mission—in accordance with its religious beliefs.

In *Smith*, the Court noted the continuing validity of prior 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, 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.

This case presents an important, unresolved question concerning the reach of a church's institutional freedom. Applying the precedents reaffirmed in *Smith*, lower courts 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.[13]

---

[13] *See, e.g., Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (resident in hospital's clinical pastoral program); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (university chaplain), *cert. denied*, 2007 U.S. Lexis 4357 (Apr. 23, 2007); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (communications manager); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (director of music ministry and part-time music teacher); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (minister); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (minister); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (professor of canon law); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002) (church autonomy doctrine bars youth minister's claim of sexual harassment based on statements regarding homosexuality); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332 (4th Cir. 1997) (refusing to "interpose the judiciary" into decisions "relating to how and by whom [churches] spread their message and specifically their

Congress, of course, recognized that important principle when it adopted an exception from Title VII to permit religious groups and schools to restrict hiring to members of their faith. *See* 42 U.S.C. 2000e-2(e)(2) (2000); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption against Establishment Clause challenge). But these lower court decisions have held that Congress's exemption did not go far enough—that the First Amendment protects the right not only to restrict hiring to members of the church, but more generally to decide who is fit to carry out the church's religious mission.

Just as a church entity has a First Amendment right to decide who should carry out its religious mission, so too must it have the right to structure its relationship with its employees in conformity with church teachings.[14] If it chose to, a church entity could require its employees to promise to conform their conduct in all respects to church teachings. Surely the church can take the more "hands-off" approach of not funding conduct by its employees that violates those teachings. That is all that petitioners aim to do here.

Petitioners' employees have voluntarily elected to associate themselves with church entities, and petitioners have hired

---

decision to select their outreach ministry through the granting or withholding of funds").

[14] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408-09 (1981); *cf. 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 "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses").

them to advance the church's ministry.[15] There may be limits upon a church entity's right to conform its employee relations to church teachings. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982) (private employer cannot avoid social security taxes based on religious objections). But neither *Smith* nor any other decision of this Court suggests that a church institution may be compelled to structure its employment relationship with its employees so as to sponsor private employee conduct that violates church teachings.

II. THE COURT OF APPEALS DECISION CREATES A CONFLICT OVER WHETHER LAWS THAT BURDEN RELIGIOUS FREEDOM MUST AT LEAST MEET RATIONAL BASIS SCRUTINY.

In general, "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Accordingly, all laws implicating a liberty interest are subject to at least rational basis review. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 722, 728 (1997).

Smith did not contradict this principle. Rather, *Smith* merely rejected the application of the strict "compelling state interest" test to neutral laws of general applicability, stating: "we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." 494 U.S. at 887-88 (emphasis omitted). Nothing in *Smith* implies that such laws should be free from rational basis review, which imposes no presumption of invalidity.

---

[15] *See, e.g.*, Benedict XVI, Encyclical Letter *Deus Caritas Est* ¶ 33 (2005) ("The personnel of every Catholic charitable organization want to work with the Church and therefore with the Bishop, so that the love of God can spread throughout the world.")

The New York Court of Appeals, however, held that a law burdening religious freedom escapes all judicial scrutiny under the Free Exercise Clause, so long as the law is neutral and generally applicable. In its view, *Smith* created an "inflexible rule . . . that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." App. 9a. Having found the WHWA to be such a law,[16] the Court upheld it with no further review.

The Court of Appeals' interpretation of *Smith* on this point conflicts with every federal and state court of appeals decision on the question, all of which have held that even neutral laws of general applicability must meet rational basis review.[17] This conflict is of fundamental constitutional importance and is deserving of this Court's attention.

Unless rational basis review is required, petitioners face the deprivation of rights that have long been recognized as

---

[16] That determination is itself questionable, given that the law contains a religious exemption and applies only to employers who choose to provide prescription drug coverage. *See infra* note 20.

[17] *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) ("[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("[I]f the zoning law only incidentally burdens the free exercise of religion, with the law being both neutral and generally applicable, it passes constitutional muster unless the law is not rationally related to a legitimate governmental interest."); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) ("Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement . . . ."); *Utah v. Green*, 99 P.3d 820, 829 (Utah 2004) ("Because Utah's bigamy statute is neutral and of general applicability, the State is not required to show that the interests it serves are compelling or that the statute is narrowly tailored in pursuit of those interests. Instead, the State need show only that the statute is rationally related to a legitimate government end.") (citations omitted).

fundamental, *see, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 307 (1940), without even the minimum level of constitutional protection that is extended to claimants asserting liberty interests that are unspecified in the Constitution and not deemed to be fundamental. The Court should clarify that *Smith* was not intended to countenance such a result.[18]

The law at issue here operates in a decidedly irrational manner. It was designed to advance women's health by expanding the provision of contraceptive coverage. But three features of the law, taken together, undermine that objective:

- The Act does not require any employer to provide prescription drug coverage at all.[19]

- Employees of exempt "religious employer[s]" who do not provide contraceptive coverage have access to contraceptive coverage through a low-cost state-mandated rider. *See supra* p. 5.

- Employees of non-exempt employers who do not provide prescription coverage are not eligible for the state-mandated contraceptive rider.

---

[18] The rational basis standard is not without teeth. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment that precluded any legislative, executive, or judicial action to protect persons based on their homosexual orientation as having no rational relationship to any legitimate purpose); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (finding that requiring a special use permit for a group home for persons with mental retardation was not rationally related to any legitimate state interest).

[19] In this respect, the WHWA is fundamentally different from the laws that were described in *Smith* as "generally applicable." 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. New York asserts no interest in mandating the uniform provision of prescription drug coverage or the uniform provision of contraceptive coverage.

In other words, far from requiring these petitioners (and other like-minded Church entities) to provide contraceptive coverage, the legislature has actually created an incentive for them to deny the prescription drug coverage that they would otherwise provide—for that is the only way that they can implement their religious belief that subsidizing contraceptive coverage is wrong. And far from guaranteeing contraceptive coverage of any kind to the employees of such entities, the legislature has denied those employees the contraceptive coverage guarantee that they would enjoy if petitioners were exempt.

In short, denying these employers an exemption from the contraceptive mandate undercuts the objective of the law. Exempting such entities, on the other hand, would advance the state's objective of "ensuring that the maximum number of women receive the best possible health care," App. 56a (Cardona, P.J., dissenting), because it would eliminate the incentive these entities have to withdraw prescription coverage altogether, while at the same time guaranteeing that their employees remain eligible for contraceptive coverage through the state-mandated rider.

Strict scrutiny is not required to see that the WHWA, as structured, unnecessarily infringes petitioners' free exercise rights. But something more than the Court of Appeals' total deference to legislative judgment is required.[20] This Court

[20] In reviewing the statute under the New York Constitution, the Court granted "deference" to the legislature's presumed judgment that "to grant the broad religious exemption that plaintiffs seek would leave too many women outside the statute." App. 14a. But that deference overlooks the fact that *no one* would be left "outside" the statute's provisions for contraceptive coverage if the exemption were broadened: employees of exempt employers have access to contraceptive coverage through the contraceptive rider. On the other hand, denying these employers the exemption threatens to leave their employees without both the prescription coverage that they previously enjoyed and the state's desired contraceptive coverage. This is not a rationally conceived scheme.

should grant review to clarify that, at the very least, a law that places a "serious" burden on an institutional church's exercise of its religious freedom, App. 13a, must be rationally designed to promote its legitimate objective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL L. COSTELLO

TOBIN & DEMPF LLP
33 Elk Street
Albany, NY 12207
(518) 463-1177

KEVIN T. BAINE *
STEPHEN J. FUZESI
CHRISTOPHER R. HART
MATTHEW J. PEED

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

* Counsel of Record

Attorneys for Petitioners

Blank Page