No. 25-703

In the Supreme Court of the United States

CALVARY CHAPEL SAN JOSE, AND MIKE MCCLURE,
Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, AND SARA H. CODY, M.D., IN HER OFFICIAL CAPACITY AS HEALTH OFFICER FOR THE COUNTY OF SANTA CLARA,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

This case asks whether the Constitution allows the government to micromanage a church's worship services and impose crushing fines for noncompliance with that micromanagement. As explained in the petition for certiorari, the decision below endorses government overreach at the expense of religious freedom in the core area of worship. The heavy-handed punishment of petitioner church and its pastor, for not *requiring*[1] congregants and staff to wear masks, offends both the Free Exercise and Excessive Fines Clauses and merits this court's review.

Regarding the Free Exercise Clause, the ruling below (1) sustains restrictions on religious worship despite the existence of multiple exemptions, i.e., a lack of general applicability which should trigger strict scrutiny under the test of *Employment Division v. Smith*, 494 U.S. 872 (1990); (2) violates the church autonomy doctrine, which should shield not just the selection of ministerial personnel but also a religious body's rituals; and, (3) poses the recurring question whether this Court should overrule *Smith*.

Relatedly, this case also (4) presents the question whether the Eighth Amendment bars, as unconstitutionally excessive, the imposition of million-dollar fines for not submitting to government control of the intimate details of religious services.

Respondents supply no convincing argument for leaving in place a $1.2 million fine against a church,

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1 Congregants and employees were free to wear masks if they chose, Pet. at 22 n.10, but requiring masking would offend the church's beliefs, *id*. at 6 n.4.

with even steeper liability impending for attorney fees.

That the decision below is unpublished is no obstacle. *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the [lower court's] order . . . is unpublished carries no weight in our decision to review the case.").

Ironically, the lead argument of government respondents is that this case is not of any real concern, mainly because the COVID pandemic is over and the restrictions on religious services have been lifted. But there is no mootness here. Petitioners still face massive fines and attorney fees, absent this Court's intervention. Respondents have not lifted *that* sanction. The constitutional impact thus stands, and the constitutional violations call for this Court's review.

There are three routes to reversal under the Free Exercise Clause, and one under the Eighth Amendment, all involving important and recurring issues of constitutional law.

I. THE CHALLENGED RESTRICTIONS CONTAINED MULTIPLE EXCEPTIONS POSING EQUAL OR GREATER RISK OF VIRAL TRANSMISSION, TRIGGERING STRICT SCRUTINY UNDER *SMITH*.

The first route to reversal is failure of the restrictions under *Smith*'s "general applicability" requirement. "[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 v.*

Newsom, 593 U.S. 61, 62 (2021) (*per curiam*) (emphasis in original). In this case, the government respondents imposed restrictions on Calvary Chapel while allowing multiple exceptions for a variety of secular [2] activities. Pet. at 7-11. Under *Smith*, a restriction containing exceptions for activities which pose comparable risks of the asserted harm triggers strict scrutiny. Respondents concede as much. Opp. at 11. Yet the California Court of Appeal refused to apply strict scrutiny. Pet. App. 41a. That decision is no mere factual error, but a legal holding irreconcilable with this Court's Free Exercise jurisprudence.

Respondents offer two counterarguments.

First, they say that since the law is settled, this Court need not review a purported misapplication of that law. But this Court expressly and *repeatedly* chastised lower courts for upholding California's COVID restrictions on churches, despite there being no intervening change in the law. *Tandon*, 593 U.S. at 64 ("fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise"). Defiance of this Court's constitutional precedents does not earn immunity from review by mere force of repetition.

Second, respondents object that the masking exceptions the state allowed in this case are minimal and not comparable. This is not true. The comparability of activities turns on "the risks various

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2 Respondents quibble with the term "secular" because the exceptions would also apply to religious people and entities engaging in the same activities. Opp. at 6 n.4. But that goes as well for the "hair salons, retail stores, personal care services, movie theaters," etc. in *Tandon*, 593 U.S. at 63, for example; hence, this semantic point is of no help to respondents.

activities pose," not the nature of the activities. *Tandon*, 593 U.S. at 62. "A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). Here, for purposes of *viral transmission*,

> [t]he COVID virus does not care whether the mask is off (1) for *medical* or *religious* reasons; (2) for *intense sports* or for *intense prayer*; (3) to *communicate* or to *worship*; (4) pursuant to government *discretion* or not; (5) to engage in *facial services* or *religious services*; (6) for a *meal* or a *religious ritual*; (7) for outdoor *work or recreation* or outdoor *religious services*; (8) in a *prison*, or in a *church*. For that matter, the virus does not care if the breathing person is age two or under. *But cf. supra* pp. 7, 10 (exempting those age two or younger from masking requirement).

Pet. at 19. Respondents point to COVID testing, screening, and contact tracing measures as supposedly distinguishing some of the exceptions. *E.g.,* Opp. at 7, 8 n.5. But those measures all address situations *after the virus has already been transmitted to someone*. The COVID virus did not care at the time of transmission if the host it sought to infect would later be traced or not, quarantined or not, tested or not. If differences in remedial approach sufficed to defeat a claim of comparability under *Smith*, then the "generally applicable" test would lose much of its bite.

The California Court of Appeal, while purporting to follow *Smith*, likewise resorted to

irrelevant nitpicking. For example, it noted that athletes may remove masks "'only while they are actively engaged in athletic activity.'" Pet. App. 38a (quoting restriction). *Only* when huffing and puffing inches from each other's faces? Plainly, the government had decided that sporting events are preferred to religious worship. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Barrett, J., joined by Kavanaugh, J., concurring) (question is whether government "favors certain sectors (and thus triggers more searching review)").

The lower court severely distorted the test for "general applicability," to the detriment of freedom of worship. This Court should grant review.

II. THIS COURT SHOULD RECOGNIZE A LITURGICAL EXCEPTION TO *SMITH* AS PART OF THE CHURCH AUTONOMY DOCTRINE.

The second route to reversal is recognizing a liturgical exception to *Smith*. Pet. § II. That is, the First Amendment Religion Clauses are best read to include a right not to have the government referee religious services and throw penalty flags over the time, place, and manner of those services. Such an exception would be analogous to the ministerial exception this Court recognized in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012). If anything, the case for a *liturgical* exception to *Smith* is even stronger than the case for a *ministerial* exception. Pet. at 20-21. Just as courts should not second-guess a church's selection of

ministers, courts should not second-guess a church's liturgical rubrics.

Respondents protest that Calvary Chapel did not press the lower courts to recognize a liturgical exception as such. But that would have been pointless. The lower courts were not free to recognize such an exception to *Smith*. Only this Court can modify its own precedents. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).[3] Calvary Chapel most certainly *did* argue that the masking requirement violated the Free Exercise Clause. Whether that violation be categorized as a violation under *Smith* or under a church autonomy/liturgical exception is a matter of nomenclature and doctrinal ordering for this Court to decide.

III. IF *SMITH* AUTHORIZES GOVERNMENT BODIES TO REFEREE RELIGIOUS SERVICES, THIS COURT SHOULD OVERRULE *SMITH*.

The third route to reversal would be to overrule *Smith*. If *Smith* lets government, in the name of "health," command the details of religious services, then S*mith* is fundamentally incompatible with religious freedom and should be overruled.

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3 *Hosanna-Tabor* ratified an exception which predated *Smith* and with which the lower courts thus had "extensive experience," 565 U.S. at 188. *E.g., EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000) (cited in *Hosanna-Tabor*) (noting that the circuits uniformly concluded that the ministerial exception survived *Smith*). Here, there is no comparable pre-*Smith* history of a liturgical exception, presumably because it would have been considered unthinkable for government officials to dictate the number of congregants at a church, whether they could sing, and how they had to attire themselves.

The call for this Court to overrule *Smith* has been extensive and enduring. Pet. at 24-25. Amici here add to that call. *See, e.g.,* Amicus Br. of National Religious Broadcasters §I (NRB Amicus); Amicus of Robertson Center; Amici Br. of West Virginia et al. §IV (W.Va. Amici Br.); Amici Br. of AAF et al. §III.

Respondents counter that other cases present that question, and so the Court need not grant review here. Opp. at 18 & n.8. But the fact that multiple problems with *Smith* continue to fester and prompt repeated calls for its overruling simply flags an ongoing problem which only this Court can finally resolve.

Respondents raise two further objections.

First, they assert that the context of COVID restrictions limiting church services is unlikely to recur. Opp. at 17. But respondents have no record support for their shortsighted prognostication. And if one is to look outside the record, indications point precisely in the opposite direction. *E.g.,* Maryam Shafaati et al., *"The Next Pandemic Catastrophe: Can We Avert the Inevitable?"* 52 NEW MICROBES, NEW INFECT. 1 (Mar. 10, 2023); Karen Feldscher, *"The Next Pandemic: Not If, But When,"* HARVARD SCHOOL OF PUBLIC HEALTH (Sept. 12, 2024), *available at* https://hsph.harvard.edu/news/next-pandemic-not-if-but-when/; Morgan Coulson, *"Defining Disease X,"* JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (Feb. 15, 2024) (Q. "Do we have any idea . . . when Disease X could arise?" A: "It could be arising right now."). And the government mechanisms for imposing the next wave of restrictions remain in place.

This case presents the opportunity to address the key constitutional issues without the pressure-

cooker environment of an ongoing emergency. Confronting the key issues "now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation." *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 27 (2020) (Gorsuch, J., concurring).

Second, respondents contend that this Court should not consider overruling *Smith* without a proposal to replace it. Opp. at 17-18. But proposals to replace *Smith* are plainly on the table.

Most obvious would be a return to text, history, and tradition as the model for construing the Free Exercise Clause, a test this Court uses for a variety of constitutional provisions.[4] Notably, this Court has embraced this test for *other clauses of the First Amendment*. *E.g., Vidal v. Elster*, 602 U.S. 286, 301 (2024) (**Free Speech**); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388, 394-97 (2011) (**Petition**

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4 *E.g., TransUnion LLC v. Ramirez*, 594 U.S. 413, 449 (2021) (**Article III**); *Reid v. Covert*, 354 U.S. 1, 17 (1957) (**Supremacy Clause**); *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (**Second Amendment**); *Timbs v. Indiana*, 586 U.S. 146, 149-50, 154 (2019) (**Eighth Amendment: Excessive Fines**); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (**Eighth Amendment: Cruel and Unusual Punishments**); *Dep't of State v. Muñoz*, 602 U.S. 899, 903, 910-11 (2024) (**Due Process Clause: marriage and immigration**); *Richardson v. United States*, 526 U.S. 813 (1999) (**Due Process Clause: jury unanimity**); *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231, 235, 237-40, 250, 260-61, 298 (2022) (**Due Process Clause: abortion**); *Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (**Eleventh Amendment**).

Clause); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022) (**Establishment Clause**). *See also* W.Va. Amici Br. §IV(B); NRB Amicus §II(A).[5]

There is no reason the Free Exercise Clause should be treated differently.

Another approach, of course, would be to return to pre-*Smith* strict scrutiny, W.Va. Amici Br. §IV(B); NRB Amicus §II(B), an option Congress adopted with the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. Many states likewise embrace the strict scrutiny standard for protection of religious exercise. Pet. at 25. None of these sensible measures have caused the sky to fall.

The COVID pandemic demonstrated that *Smith* leaves churches and religious practices uniquely vulnerable during times of crisis. The *Smith* decision has caused trouble enough. It is time for this Court to modify or discard it.

IV. FINING A HOUSE OF WORSHIP $1.2 MILLION FOR FOLLOWING ITS FAITH VIOLATES THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE.

The fourth route to reversal is to overturn the lower court's bizarre ruling that the Excessive Fines

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5 *See also* William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 Harv. J.L. & Pub. Pol'y 419 (2023). "On this approach, the Free Exercise Clause would presumptively protect a given religious exercise unless the opposing party can show a long, unbroken tradition of restriction that is analogous to the burden at issue." *Id.* at 421. *Accord* NRB Amicus §II(A).

Clause permits imposition of a massive fine[6] for not requiring church congregants and employees to wear masks. Petitioners say "bizarre" for at least two reasons. *First,* respondents themselves urge that the dispute here is no big deal, as the pandemic has passed and the restrictions are (for now) long gone. Yet it is apparently still very, very important for the government respondents to punish the church severely for daring not to follow the governments' prescriptions. *Second,* as noted, Pet. at 7-11, the respondents themselves treated the risk of COVID transmission as perfectly tolerable *so long as it fell into one of the multitudinous exemptions*. As amici states aptly noted:

> NFL teams dress 48 players each week. . . . And seven officials referee each game. . . . Those 103 individuals come together for hours each Sunday during the season. They huddle up, call plays, crash into each other, call fouls, and hand or throw a ball to one another. State and county guidance permits all that without a mask. But if those same 103 individuals entered a church, sat in pews, heard a minister preach, sang worship songs, and prayed together, then they violate that same guidance. And could be on the hook for substantial fines.

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6 Respondents say the fines grew so large "because Calvary allowed them to." Opp. at 9. Nonsense. Calvary Chapel was actively fighting the restrictions that underlay the fines, in both state and federal court. *E.g., Calvary Chapel San Jose v. Cody*, 2021 U.S. Dist. LEXIS 223450 (N.D. Cal. Nov. 12, 2021), at *5 (referencing "challenges to the Face Covering Guidance").

W.Va. Amici at 16 (citations omitted).

Respondents suggest that review is unwarranted because everyone agrees the governing standard is set forth in *United States v. Bajakajian*, 524 U.S. 321 (1998). But the fact that the lower court could reach the result here *despite Bajakajian* illustrates precisely the need for greater fleshing out of the standard.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality," *Bajakajian*, 524 U.S. at 334. "If the amount of the [penalty] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 337.

The response of the government bodies here was truly "grossly disproportional," both with respect to culpability and to harm to the government's interests. *Id.* at 338-39.[7]

As to culpability, the church here merely stood firm on its asserted religious liberty rights. If there was any culpability, it was on the part of government agents insisting on draconian sanctions for any disobedience to their overbearing rules. *See also* Br. of Alliance Defending Freedom (California was hostile to religious practice during the pandemic); Br. of Amicus Pacific Justice Institute (similar); *id.* at 11 ("houses of worship always appeared on the list of the dangerous, the unessential, and the unwanted").

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7 An amicus points out that the fine was also disproportionate in comparison with fines for other offenses, Br. of Liberty Justice Center as Amicus §II(C), including *all* misdemeanors (over five times as high). Respondents even treated Calvary Chapel's refusal to require masks as worse than improper storage of hazardous materials and poison gas. *Id.* at 13.

And as for harm to the government's interests, government officials had no problem allowing ample risk of viral transmission in favored secular contexts, like sports, just not in disfavored contexts like worship services.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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