

No. 26-286

In the Supreme Court of the United States

OLYMPUS SPA; MYOON WOON LEE; SUN LEE; JANE
DOE, PATRON; JANE DOES, EMPLOYEES 1-3,
Petitioners,
v.

ANDRETA ARMSTRONG, EXECUTIVE DIRECTOR OF THE
WASHINGTON STATE HUMAN RIGHTS COMMISSION,
MADISON IMIOLA,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF THE MANHATTAN INSTITUTE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether applying Washington’s law to force a Christian, all-female *jjimjilbang* to admit males violates the Free Exercise Clause under *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), and *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238 (2025), or associational freedom under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

2. Whether a policy that differentiates based on anatomy discriminates “based on gender identity or transgender status.” *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2378 (2026) (citing *United States v. Skrmetti*, 605 U.S. 495, 517 (2025)).

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INTEREST OF *AMICUS CURIAE*¹

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has a strong interest in ensuring that courts safeguard the freedoms that enable individuals and organizations to live out their convictions without undue government interference. This case interests MI because the robust protection of religious liberty and the freedom of association is essential to a free and vibrant society.

SUMMARY OF ARGUMENT

This Court has made clear laws are not generally applicable when they “treat any comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). And whether secular and religious conduct are comparable “must be judged against the asserted government interest that justifies the regulation at issue.” *Id.* That command follows directly from *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Government may not burden religious conduct but not secular conduct when both undermine its asserted interests in a similar way.

The Ninth Circuit did not conduct the same inquiry below as this Court did in *Tandon*. Olympus Spa is a women-only Korean spa whose patrons are nude in communal bathhouse and treatment areas. Pet. at 2.

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel; no person or entity other than *amicus* funded its preparation or submission.

Its owners maintain the admission policy in part because of their religious beliefs concerning modesty between men and women. After a discrimination complaint, a state investigator informed Olympus Spa that its admission policy violated Washington Law Against Discrimination (WLAD) and urged the spa to enter a pre-finding settlement.

But the WLAD exempts “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private.” Wash. Rev. Code § 49.60.040(2). Olympus Spa argued secular conduct permitted by that exemption must be compared with the religiously motivated conduct Washington regulates. The Ninth Circuit instead emphasized that the private-club exemption “appl[ies] equally to secular and non-secular aggregations.” *Olympus Spa v. Armstrong*, 169 F.4th 817, 833 (9th Cir. 2026). Because a religious private club could claim the exemption on the same terms as a secular one, the court treated the exemption as consistent with general applicability.

In *Tandon*, the state likewise treated religious and secular gatherings alike within the category of private gatherings. Yet this Court looked outside that category to hair salons, retail stores, restaurants, and other secular activities California treated more favorably, asking whether they posed comparable risks under the state’s asserted public-health interest. *Tandon*, 593 U.S. at 62–64. The Court’s inquiry thus does not end with the categorical nature of a given exemption. As *Fulton* recognized, a law may fail general applicability because it contains discretionary exemptions or because the secular conduct it permits undermines the government’s interests in a similar way. *Fulton*, 593 U.S. at 533–36. Courts applying *Tandon* have likewise

examined what categorical exemptions actually permit and whether the exempted conduct affects the government’s interests in the same way as the burdened religious conduct. *See, e.g., Spivack v. City of Philadelphia*, 109 F.4th 158, 173–77 (3d Cir. 2024); *Lowe v. Mills*, 68 F.4th 706, 714–15 (1st Cir. 2023).

The Ninth Circuit’s mistaken logic is already appearing elsewhere. In *General Conference of Seventh-Day Adventists v. Horton*, 787 F. Supp. 3d 99 (D. Md. 2025), the district court rejected reliance on Maryland’s private-membership-club exemption in part because that exemption “applies regardless of whether the organization is religious or secular.” *Id.* at 120. *Doe v. Catholic Relief Services*, ironically from the same district, shows the more proper course. 779 F. Supp. 3d 545 (D. Md. 2025). Although the *Doe* court also noted Maryland’s small-employer exemption was available to religious and secular employers alike, it separately considered whether an employer with fewer than fifteen employees was actually comparable to Catholic Relief Services under *Tandon* and concluded that CRS had not established such a comparison. *Id.* at 564–65.

This Court should take this opportunity to clarify that an exemption does not escape *Tandon* merely because religious and secular actors may qualify for it on equal terms. Courts must still ask whether secular conduct receiving favorable treatment is comparable to the burdened religious conduct in light of the government’s asserted interest. While such a clarification would not decide whether Olympus Spa and private clubs are ultimately comparable—much less whether Washington can satisfy strict scrutiny—it would still require courts to perform the comparison required by *Tandon* before treating a law as generally applicable.

ARGUMENT

I. *TANDON* REQUIRES COURTS TO COMPARE FAVORED SECULAR CONDUCT WITH BURDENED RELIGIOUS CONDUCT IN LIGHT OF THE GOVERNMENT'S ASSERTED INTEREST

This Court's general-applicability cases do not allow governments to circumvent the Free Exercise Clause. Precedents up to and including *Tandon* establish that rule, and lower courts have often properly applied the rule. Yet the Ninth Circuit diverged from the rule here. Thus, as Judge VanDyke wrote in dissent from denial of en banc review, "a secular, traditional Korean, nude spa organized as a private institute, club, or accommodation would be permitted to enforce a women-only policy" while an "identical for-profit spa seeking to enforce the same policy based on the owners' sincere religious convictions would be prohibited from doing so." App. 69a.

This Court established the general-applicability rule over time. In *Lukumi*, Hialeah enacted ordinances restricting animal sacrifice after a Santeria church announced plans to open. 508 U.S. at 524–28. The city defended the ordinances as necessary to protect public health and prevent cruelty to animals. *Id.* at 543–44. Yet Hialeah allowed numerous secular killings implicating those same interests, such as fishing, pest extermination, and the euthanasia of animals for medical research. And the ordinances did not address comparable health hazards arising from hunters' disposal of animal carcasses or restaurants' disposal of garbage. *Id.* at 543–45. The ordinances were "underinclusive" because they did not touch nonreligious conduct

endangering the city’s asserted interests “in a similar or greater degree” than *Santeria*. *Id.* at 543–46.

Fulton v. City of Philadelphia carried the *Lukumi* rule forward. Philadelphia stopped referring children to Catholic Social Services after learning CSS would not certify same-sex couples as foster parents. *Fulton*, 593 U.S. at 526–28. The Court identified two ways a law may lack general applicability. A law is not generally applicable when it “invite[s]” the government to consider the reasons for a person’s conduct through “a mechanism for individualized exemptions.” *Id.* at 533. The Court then separately explained a law “also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* at 534. To explain the second rule, *Fulton* returned to *Lukumi* and the secular conduct Hialeah had left unregulated despite the comparable threat it posed to the city’s claimed interests. *Id.*.

Tandon v. Newsom made the rule even more explicit. California limited at-home religious gatherings to three households while permitting hair salons, retail stores, personal-care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more people. 593 U.S. at 62–63. This Court held government regulations are not generally applicable “whenever they treat any comparable secular activity more favorably than religious exercise.” *Id.* at 62. And “whether two activities are comparable” must be judged “against the asserted government interest that justifies the regulation at issue.” *Id.* In the public-health setting there, “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather.” *Id.*

In its decision in *Tandon*, the Ninth Circuit rejected California’s proposed secular comparators because this Court’s cases at that time involved public buildings rather than gatherings in private homes. *Tandon*, 593 U.S. at 63–64. But this Court held that was error. California had favored secular activities, and the Ninth Circuit had not found that those activities posed a lesser risk of transmission than the religious gatherings California restricted. *Id.* at 63–64. The state could not avoid the comparison by pointing to a categorical difference between the locations in which the activities occurred. Nor was it enough that California treated other secular activities as poorly as religious exercise: “It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.” *Id.* at 62.

Nothing in *Tandon* makes that rule turn on whether the secular exemption is discretionary or categorical. In fact, *Fulton* separately recognized that a law may lack general applicability when it provides “a mechanism for individualized exemptions.” 593 U.S. at 533. But *Fulton* separately requires comparison when the law “permit[s] secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 593 U.S. at 534. An exemption’s lack of official discretion does not shield the permitted conduct from comparative analysis.

The Third Circuit followed this approach in *Spi-vack*. The Philadelphia district attorney’s office required employees to receive a COVID-19 vaccine. Under one version of the policy, the office retained a medical exemption with objective criteria while eliminating religious exemptions. *Id.* at 172–74. The court

distinguished medical exemptions from the individualized exemption addressed in *Fulton*: the medical exemption was “a separate and objectively defined category,” and the district attorney lacked discretion to entertain religious requests under the later policy. *Id.* at 173. But *Spivack* did not end its general-applicability analysis there; it separately asked whether the conduct permitted by the medical exemption affected the government’s interests in the same way as a religious exemption would. *Id.* at 174–77. The “critical question” was whether the favored secular behavior “affect[s] the regulation’s purpose in the same way as the prohibited religious behavior.” *Id.* at 175.

In other words, courts must examine the specific conduct permitted by an exemption to be able to make a comparison. The district attorney asserted interests in preventing the spread of COVID, maintaining adequate staffing, and protecting employees. *Id.* at 175–76, 176 n.13. Those are the interests that must be examined for whether they are “undermine[d] . . . in a similar way” by secular and religious exemptions. *Fulton*, 593 U.S. at 534. The medical exemption covered employees “whose health the vaccine would endanger” and therefore “further[ed]—not undercut—the [DAO’s] interest in employee health and safety.” *Id.* at 177. *Spivack* contrasted *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), where a police department required officers to remain clean shaven—including two Muslim officers who challenged the policy—but exempted officers who could not shave for medical reasons. *Id.* at 360–61, 366. The medical exemption “undoubtedly undermine[d]” the department’s asserted interest in uniform appearance in the same way a religious

exemption would. *Spivack*, 109 F.4th at 177 n.14 (quoting *Fraternal Ord. of Police*, 170 F.3d at 366).

In *Lowe v. Mills*, the First Circuit likewise refused to resolve comparability from the face of the exemption alone. Healthcare workers challenged a vaccination requirement permitting medical but not religious exemptions. At the pleading stage, the court concluded the allegations plausibly showed medical exemptions could undermine Maine’s public-health interests similar to religious exemptions by allowing unvaccinated workers to remain in healthcare facilities. 68 F.4th at 714–15. Yet the court recognized factual development could show otherwise. Medical exemptions might prove “rarer, more time limited, or more geographically diffuse” than religious exemptions, differences that could alter their respective effects on the state’s interests. *Id.* at 715.

These cases do not make every statutory exemption fatal to general applicability. Some exempted secular conduct will differ from burdened religious conduct in ways that bear directly on the government’s asserted interests. *Spivack* itself reached that conclusion. But *Lukumi*, *Fulton*, and *Tandon* require courts to make that comparison. A legislature’s decision to define an exemption categorically—and to make religious and secular actors equally eligible for it—cannot itself establish the secular conduct permitted by the exemption is incomparable to the religious conduct the law burdens. That is the question here: whether conduct permitted by WLAD’s private-club exemption is comparable, in light of Washington’s asserted antidiscrimination interest, to the religiously motivated conduct for which Olympus Spa is regulated.

II. THE NINTH CIRCUIT REPLACED *TANDON*'S REQUIRED COMPARISON WITH A DIFFERENT INQUIRY

Here, the Ninth Circuit began from the right precedents, but it did not find the right result. The panel recognized that WLAD's private-club carveout is categorical and mandatory, not a discretionary system of individualized exemptions. *Olympus Spa*, 169 F.4th at 833. But because the public-accommodations requirement and the private-club exemption "apply equally to secular and non-secular aggregations," the court concluded that "this is not a situation where a 'comparable secular activity [is treated] more favorably than religious exercise.'" *Id.* (quoting *Tandon*, 593 U.S. at 62).

But *Fulton* treated those as separate grounds for finding a law not generally applicable. A discretionary system fails general applicability when the government maintains individual exemptions but refuses to extend them to cases of "religious hardship." 593 U.S. at 533–34. A law "also lacks general applicability," however, when it permits secular conduct that undermines the asserted governmental interests in a similar way to prohibited religious conduct. *Id.* at 534. The second rule does not depend on official discretion. Nor did *Fulton* suggest that categorical exemptions disappear from the analysis whenever eligibility for them is itself religion-neutral.

Similarly, in *Tandon*, California's rule did not single out religious gatherings on its face. The Ninth Circuit emphasized its restrictions "apply equally to private religious and private secular gatherings." *Tandon v. Newsom*, 992 F.3d 916, 922 (9th Cir. 2021). This Court nonetheless held that the lower court "erroneously rejected these comparators simply because this

Court’s previous decisions involved public buildings as opposed to private buildings.” 593 U.S. at 64. And it made clear that “[i]t is no answer” that the state treats some comparable secular activity as poorly as religious exercise. *Id.* at 62.

The WLAD contains an express exemption for “any institute, bona fide club, or place of accommodation, which is by its nature distinctly private.” Wash. Rev. Code § 49.60.040(2). The Ninth Circuit answered the spa’s reliance on that exemption by emphasizing that it “appl[ies] equally to secular and non-secular aggregations.” *Olympus Spa*, 169 F.4th at 833. But equal treatment among entities that qualify for the exemption does not answer *Tandon*’s question about conduct outside it. WLAD does not subject a qualifying private club to the public-accommodations requirement that governs Olympus Spa. Whether the conduct of those two entities is comparable depends on Washington’s asserted interest and how the two activities bear upon it—not on whether a religious private club could also invoke the exemption.

In a statement respecting the denial of rehearing en banc, Judge McKeown offered a different reason for rejecting the proposed comparison. Relying on *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (explaining that discrimination in the distribution of “publicly available goods, services, and other advantages” causes “unique evils” government has a compelling interest to prevent), she reasoned that Washington has a distinct interest in preventing denials of equal access to public establishments and thus lacks a comparable interest in regulating private clubs. App. 53a. (McKeown, J., respecting denial of reh’g en banc). That argument at least addresses the

inquiry *Tandon* requires: whether the proposed secular and religious conduct are comparable in light of the interest asserted to justify the regulation. But it is not the same as saying the exemption poses no general-applicability problem because it is available to religious and secular clubs alike. Allowing the state to define its asserted interest by reference to the very statutory boundary under review would make the exemption itself determine the comparator analysis, rather than requiring the comparison *Tandon* directs.

This Court need not decide whether Olympus and a private club are ultimately comparable. Under *Tandon*, that question turns on the asserted governmental interest that justifies the regulation. 593 U.S. at 62. Washington therefore remains free to argue that conduct permitted within the private-club exemption affects its asserted antidiscrimination interests differently from Olympus's conduct. *Spivack* likewise explained that when a religious exemption would affect the government's interests "in a different way or to a greater extent than another type of exemption," the secular exemption does not undermine general applicability. 109 F.4th at 177. What those decisions do not permit is dispensing with the comparison because the statutory category containing the secular exemption is itself drawn without reference to religion.

The reasoning below is especially hard to reconcile with *Tandon* because this Court has already rejected substantially the same approach. The WLAD's private-club exemption calls for the same inquiry. If the exempted secular conduct is *not* comparable to Olympus's religious exercise, Washington may prevail. But *Tandon* requires the comparison before the state receives the benefit of intermediate scrutiny.

III. THE NINTH CIRCUIT'S APPROACH IS ALREADY APPEARING IN OTHER COURTS

The problem is not confined to this case. A recent decision from the District of Maryland applied essentially the same reasoning to that state's employment law. In *General Conference of Seventh-Day Adventists v. Horton*, 787 F. Supp. 3d 99 (D. Md. 2025), religious organizations challenged the Maryland Fair Employment Practices Act's (MFEPA) limits on their ability to employ only members of their faith. They argued that the law was not generally applicable because, among other things, it exempted employers with fewer than 15 employees or bona fide seniority systems or benefit plans, plus certain private membership clubs. *Id.* at 119–20. The court recognized *Tandon's* instruction: comparability must be assessed against the government's asserted interest—in that case, preventing religious discrimination in employment. *Id.* at 118–19.

But when the court reached the exemptions themselves, it changed course. The small-employer and seniority-system exemptions, it reasoned, were neutral because they “exempt employers—religious and non-religious—in the same way without favoring comparable secular activities.” *Id.* at 119. The court treated the private-club exemption the same way. After explaining that qualifying clubs could have either religious or secular purposes, the court concluded the exemption presented no general-applicability problem because it “applies regardless of whether the organization is religious or secular.” *Id.* at 119–20.

Horton then identified “the comparable secular activity” for a large religious group as “that of a large secular organization without a seniority policy that does not constitute a private membership club.” *Id.* at

120. Because both remained regulated, the court held MFEPA generally applicable. It distinguished *Tandon* on the ground that California had exempted “certain specific secular activities involving comparable numbers of people and with comparable impact.” *Id.*

But *Tandon* did not ask whether California treated religious and secular actors identically within each regulatory category. California did; the private-gathering restriction applied to religious and secular gatherings alike. Yet this Court compared the burdened religious gathering to favored secular activity outside that category because both implicated California’s asserted interest in reducing transmission. 593 U.S. at 62–64. In *Horton*, by contrast, the court effectively defined the comparator by the boundaries of the statutory exemptions themselves. It identified “the comparable secular activity” as that of “a large secular organization without a seniority policy that does not constitute a private membership club,” because such an organization, like the religious plaintiff, remained subject to MFEPA. 787 F. Supp. 3d at 120.

That approach would substantially narrow *Tandon*. Statutory exemptions are ordinarily defined by some characteristic other than the claimant’s religious motivation: number of employees, organizational form, location, activity, or some other criterion. If equal treatment inside each category were enough, a government could insulate an exemption from free exercise review merely by making religious actors eligible for it on the same terms. But *Tandon* asks whether secular conduct receiving favorable treatment is comparable to the burdened religious conduct in light of the interest that allegedly requires the burden. 593 U.S. at 62.

Doe illustrates the point more subtly. There, Catholic Relief Services (CRS) argued that MFEPA was not generally applicable because it exempted employers with fewer than 15 employees and employment of certain aliens. 779 F. Supp. 3d at 564–65. The district court did not rely solely on the formal breadth of those exemptions. It addressed comparability under *Tandon* and concluded that CRS “has pointed to secular institutions not covered by Title VII, but it has not pointed to reasonably comparable institutions.” *Id.* at 565. The court contrasted this proposed comparison with *Tandon*, where religious and secular gatherings shared the feature pertinent to California’s asserted public-health interest: people from multiple households occupying indoor spaces during the pandemic.

That analysis is materially different from saying that a categorical exemption cannot matter because it is available to religious and secular actors alike. *Doe* asked whether the exempted secular entity was actually comparable to the burdened religious entity. Only after concluding CRS had not established such comparability did the court add that “a religious employer of fewer than 15 employees . . . would be exempt from MFEPA in the same manner as would be a secular employer with fewer than 15 employees.” *Id.* at 565.

But *Horton* both cited the latter observation and carried it further. It treated the exemption’s availability to all entities as a reason that the exemption itself did not favor secular activity. 787 F. Supp. 3d at 119–20. And it did so while addressing the same kind of private-club exemption at issue here. The Ninth Circuit likewise concluded that WLAD’s exemption did not implicate *Tandon* because it “appl[ies] equally to secular and non-secular aggregations.” *Olympus Spa*,

169 F.4th at 833. The recurrence of that reasoning matters because it changes the general-applicability inquiry before comparability has been resolved.

This Court need not decide whether the proposed comparators in *Horton*, *Doe*, or this case ultimately satisfy *Tandon*. Nor would every categorical exemption trigger strict scrutiny. *Doe* itself demonstrates why no such rule is needed: a court may examine the exempted secular conduct and conclude that it is not comparable to the burdened religious conduct in light of the government's interest. What courts should not do is avoid that inquiry because the exemption happens to contain religious as well as secular actors.

The decision below offers the Court an opportunity to make that point clear. A categorical exemption may cover religious and secular entities alike and still protect comparable secular conduct, under the state's asserted interest, to religious conduct left subject to the law. Whether the WLAD does so here is a question that should be answered through the comparison *Tandon* requires—not by treating the exemption's facial evenhandedness as the answer to such a comparison.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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