Case No. 529350

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**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: THIRD DEPARTMENT**

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THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OFOGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF OGENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OFAMHERST, N.Y; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y., TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

-- against –

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, ET AL.,

Defendants-Respondents.

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**BRIEF FOR *AMICUS CURIAE***
**NEW YORK STATE CATHOLIC CONFERENCE**

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## Preliminary Statement[1]

This case arises from a regulation issued by the New York State Department of Financial Services ("the Department") mandating that all health insurance plans in the State of New York provide coverage for voluntary abortions ("the abortion mandate"). 11 NYCRR 52.1(p). An exemption was offered to only a limited number of religious institutions that can satisfy a stringent four-part test. 11 NYCRR 52.1(y), 52.16(o).

This regulation was challenged by the Roman Catholic Dioceses of Albany, Ogdensburg, and Brooklyn, as well as a number of other Catholic and non-Catholic institutions and individuals ("the Plaintiffs"). They argued, in pertinent part, that a large number of Catholic institutions cannot qualify for this religious exemption, and that the abortion mandate therefore violated the Free Exercise Clause of the New York State Constitution. The Supreme Court granted the State's motion for summary judgment and dismissed the action. The Plaintiffs then filed the instant appeal.

*Amicus Curiae* New York State Catholic Conference ("the Catholic Conference") files this brief to find that the Supreme Court failed to apply a standard that gave appropriate weight to the core values of the Free Exercise

[1] Counsel would like to express his gratitude for the invaluable assistance of Alexis N. Carra (J.D., 2020 anticipated, Fordham Law School; M.A., 2016, Fordham G.S.A.S.) for her substantial contributions to the writing of this brief.

Clause of the New York State Constitution. This failure was due to the inadequacies of the rule established by the Court of Appeals in *Catholic Charities v. Serio*, 7 N.Y.3d 510 (2006). By applying a proper standard, this Court should find that the burdens imposed on the Plaintiffs' religious beliefs by the abortion mandate are unreasonable and constitutionally impermissible. This Court should thus reverse the ruling of the Supreme Court.

## Interest of the *Amicus Curiae*

The Catholic Conference has been organized by the Roman Catholic Bishops of New York State as the institution by which the Bishops speak cooperatively and collegially in the field of public policy and public affairs. The Catholic Conference promotes the common good of society based on the social teaching of the Catholic Church in such areas as education, family life, respect for human life, health care, social welfare, immigration, civil rights, criminal justice, the environment, and the economy.

The Catholic Conference carries out advocacy with legislative and executive officials of the New York State government on public policy matters that relate to these areas of interest. When permitted by court rules and practice, the Catholic Conference participates as a party and files briefs as *amicus curiae* in litigation of

importance to the Catholic Church and the common good of the people of the State of New York.

This action involves issues of great interest to the Catholic Church. The Church has always taught that the killing of an innocent human being is gravely immoral under any and all circumstances, and that nobody may commit such a crime, cooperate in it, or obey a law that permits it. *Catechism of the Catholic Church* (1994), par. 2268-69, 2273. This was reaffirmed by Pope St. John Paul II as an infallible doctrine of the Church. *Evangelium Vitae (The Gospel of Life)* (1995). When the pope "proclaims by a definitive act a doctrine pertaining to faith or morals," Catholics are required to respond with "the obedience of faith." *Catechism of the Catholic Church,* par. 891. The Pope stated that:

> laws which legitimize the direct killing of innocent human beings through abortion or euthanasia are in complete opposition to the inviolable right to life proper to every individual; they thus deny the equality of everyone before the law… Laws which authorize and promote abortion and euthanasia are therefore radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity...Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection…. In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to "take part in a propaganda campaign in favour of such a law, or vote for it". *Evangelium Vitae,* par. 72-73.

In addition to concerns about the common good and the health of society as a whole, this issue is particularly important to the Catholic Church. The Church in New York State operates the largest network of non-governmental educational, social service, and health care providers. Catholic institutions provide their services in an atmosphere of respect for the value and dignity of all human life, with special attention to poor, vulnerable, and marginalized persons. The bishops of New York State, who are the constituent members of the Catholic Conference, are ultimately responsible for ensuring that our religious beliefs are adhered to in all Catholic institutions. The freedom of Catholic individuals and institutions to act according to our faith is also a major concern to the Catholic Conference.

The Catholic Conference concurs with all the arguments presented in the Plaintiffs' brief on appeal to this Court. We write separately, though, to discuss the flawed standard established in *Catholic Charities*, and to propose some considerations on how to apply that standard in a way that fully respects the core principles of the Free Exercise Clause. This argument was referenced by the Plaintiffs in their brief, see Plaintiffs' Brief, Point VII, but the issue is of such importance to the public in general and to the Catholic Conference specifically that it requires a much more in-depth treatment.

## Questions Presented

1. Should the standard established by the Court of Appeals in *Catholic Charities* be clarified and modified so that it is fully in keeping with the core values of the Free Exercise Clause of the New York State Constitution?
2. By applying an appropriate standard, should this Court find that the abortion mandate unreasonably interferes with the Plaintiffs' Free Exercise rights?

## Argument

### I. THE STANDARD ESTABLISHED IN *CATHOLIC CHARITIES V. SERIO* IS DEEPLY FLAWED

Soon after the filing of this litigation, Professor Vincent Bonventre, noted scholar of the New York State Constitution, published an article that stated, "the rule applied in *Catholic Charities*… is a drastic reversal of traditional constitutional principles. It is the opposite of what the rules are for other fundamental rights." Vincent Martin Bonventre, *Religious Liberty vs. Abortion Coverage Mandate (Part 2)*, New York Court Watcher (Saturday, May 21, 2016), http://www.newyorkcourtwatcher.com/2016/05/religious-liberty-vs-abortion-coverage_21.html.

But it is actually even worse. Not only does the *Catholic Charities* standard contradict traditional constitutional law and precedent, it is also incoherent and

unclear. It is internally inconsistent to such an extent that it virtually extinguishes any protection under the Free Exercise Clause of the New York State Constitution and it relegates religious freedom to the status of a second-class right.

**A. The Standard is Incoherent**

The first problem with the *Catholic Charities* standard is identifying exactly what it is, since the standard seems to shift even across the relatively brief opinion itself. The Court of Appeals began by saying, "we have not applied, and we do not now adopt, the inflexible rule of Smith that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." *Catholic Charities*, 7 N.Y.3d at 525. Instead, they stated that it would use a balancing test: "we must consider the interest advanced by the legislation that imposes the burden, and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified." *Id*.

The Court of Appeals then stated its holding: "We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." *Id.* But just three paragraphs later, they reversed course and resurrected the *Smith* rule:

> The principle stated by the United States Supreme Court in Smith – that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets – **should be the usual, though not the invariable, rule**. *Id.* at 526.

To further add to the confusion it had thus created, the Court of Appeals gave no indication as to what standards will be used to determine if the (previously) rejected and "inflexible" but (later revived) "usual, though not invariable rule" of *Smith* will apply or not. Such confusion is not a reasonable way to define a standard of constitutional review for such an important and fundamental right. "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

**B. The Standard Wrongly Shifts the Burden to the Plaintiff**

On top of the confusion inherent in the *Catholic Charities* rule is an even more fundamental flaw: it imposes the burden of proof on the religious objector to establish that the interference is unreasonable. This was a radical break from all precedent – for the first time, "the government that is interfering with religious liberty has no burden of justifying its action." Vincent Martin Bonventre, *Religious Liberty vs. Abortion Coverage Mandate (Part 1)*, New York Court Watcher (Tuesday, May 17, 2016), http://www.newyorkcourtwatcher.com/2016/05/religious-liberty-vs-abortion-coverage.html. This creates the bizarre situation where any government interference with religion is presumptively permissible, unless the injured party can prove otherwise. This turns constitutional law on its head.

It is also flatly inconsistent with the legal standard that applies to every other fundamental constitutional right – freedom of speech, assembly, press, association, voting, racial equality, and more. Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 St. Thomas L.J. 650, 667-68 (2018). There is no constitutional principle that would justify shifting the burden of proof from the government, which is admittedly interfering with a constitutional right, to the aggrieved party who wishes to defend their rights. It is certainly not consonant with the plain meaning of the Free Exercise Clause, as explained below.

Oddly, the Court of Appeals then insisted that "The burden… should not be impossible to overcome," and suggested that that certain restrictions would be unreasonable: confidentiality of the confessional, the use of alcoholic wine at Communion, kosher meat preparation, and the male celibate priesthood. *Catholic Charities,* 7 N.Y.3d at 527. Yet these examples are not self-evident – in fact, there is really nothing that unites them. No reason was offered for why it would be easier for a claimant to demonstrate that interference with those rights would be "plainly inconsistent with basic ideas of religious freedom." Indeed, one can easily imagine a court finding that the claimant failed to satisfy the burden of proof.

By wrongfully shifting the burden, the government is thus "relieved ... of any requirement to justify the burden placed on religious liberty," and claimants are left to wonder what, if any protection, their rights still enjoy, or if they are

merely "a nuisance to be dismissed as not quite so important." Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 St. Thomas L.J. at 689.

In short, the *Catholic Charities* standard is deeply flawed. It is incoherent and internally inconsistent, and it imposes the burden of proof on the wrong party. Surely, a law or regulation that intrudes upon such an important right deserves to be reviewed under a more coherent standard.

## II. THE *CATHOLIC CHARITIES* STANDARD IS INCONSISTENT WITH THE CONSTITUTIONAL TEXT AND THE COURT OF APPEALS' OWN PRECEDENTS

On top of this confusion over the proper standard and the burden of proof, the *Catholic Charities* standard veers far from the Constitutional language itself:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind... but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. N.Y. Const. Art. 1, § 3.

It is a guiding principle of constitutional interpretation that the words must be applied according to the "plain import of the language." N.Y. Statutes § 94; *see also Matter of King v. Cuomo*, 81 NY2d 247, 253 (1993). It is clear from the plain meaning of the text that there is a strong presumption of religious freedom, unless the claimant's conduct would constitute "licentiousness" or would endanger "the

peace or safety of the state." There is nothing in that language that suggests that the burden of proof should be on the religious claimant, or that virtually any government interest will override religious liberty. Instead, it clearly means that the burden will fall on the government and that only the most serious reasons for interference with the right will suffice.

The importance of the plain meaning of the Free Exercise Clause was recognized by the first New York court to consider the provision of the Constitution of 1777, which was substantially identical to the current language. N.Y. Const., Article XXXVIII (1777). A trial court was confronted with an attempt to force a Catholic priest to breach the Seal of the Confessional and be forced to testify in court. *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813) (reprinted in 1 Cath. Law. 199 (1955)). The court rebuffed that effort, and looked to the specific terms of the Constitution and stated:

> The language of the constitution is emphatic and striking, it speaks of acts of licentiousness, of practices inconsistent with the tranquility [sic] and safety of the state; it has reference to something actually, not negatively injurious... To acts committed, not to acts omitted – offences of a deep dye, and of an extensively injurious nature… *Id.*

This specifically rejected a broad reading of the concept of conduct that endangers "the safety of the state," and concluded that an expansive approach to applying the safety exception would be wholly unjustified:

> To assert this as the genuine meaning of the constitution, would be to mock the understanding, and to render the liberty of conscience a mere illusion. It

> would be to destroy the enacting clause of the proviso – and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense. *Id.*

This plain meaning of the constitutional language, which gave broad protection to free exercise rights, has been given great respect by the courts, particularly to the constitutional principle that the government's "powers may not... be asserted to prohibit beliefs and practices which are not in conflict with good order or to compel acts which have no reasonable relation to the peace or safety or even the general welfare of the State or Nation." *People ex rel. Fish v. Sandstrom*, 279 N.Y. 523, 537 (1939).

In *Brown v. McGinness*, 10 N.Y.2d 531 (1962), the Court of Appeals classified the right to free Exercise Clause as a "preferred right." In that case, there was a strong government interest in play – security and safety in prison. In reaching its decision, the Court of Appeals discussed the standard for deciding a free exercise claim and instructed the trial court to assess the permissibility of restricting the prisoners' religious freedom. *Id*. at 535-536. To provide guidance in making this determination, the Court of Appeals specified that under the New York State Constitution, the right to religious freedom is a "preferred right," although it is not "absolute." *Id*. Within this paradigm, the upholding of religious freedom is the default option in the face of a government interest, subject to some limitations.

Additionally, even in cases in which the religious claimant did not prevail, the core values of New York's Free Exercise Clause were still shown great respect. For instance, in *People v. Woodruff*, 26 A.D.2d 236 (2nd Dept. 1966), the court called for a balancing of interests, in which there must be a "determination whether the presence of a restriction is justified, after a consideration of the social and constitutional values involved." *Id*. at 238. This plainly implies that the burden should be on the government to justify the imposition of a burden on religious beliefs – the opposite of what *Catholic Charities* held.

Indeed, the Court of Appeals has never failed to recognize some religious exemptions from laws of general applicability. The key example is the landmark case of *People v. Barber*, 289 N.Y. 378 (1943) – which, remarkably, was not even cited in *Catholic Charities*. In that case, they made clear that the presumption of liberty in the Free Exercise Clause must be taken seriously:

> The Bill of Rights embodied in the Constitutions of the State and Nation is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual — rights which are part of our democratic traditions and which no government may invade. *Id.* at 385.

In *Catholic Charities*, the Court of Appeals not only failed to follow the plain meaning of the constitutional text, but it also failed to follow its own precedents. As it stands the *Catholic Charities* rule potentially extinguishes the

fundamental right to religious liberty that is guaranteed by the New York State Free Exercise Clause "forever … to all humankind".

## III. THE *CATHOLIC CHARITIES* STANDARD CAN BE CLARIFIED TO BETTER REFLECT THE CORE VALUES OF THE FREE EXERCISE CLAUSE

Although we consider the *Catholic Charities* standard to be incorrect, and acknowledge that this Court cannot overrule it, this Court should still clarify how to apply the standard in a way that is more consistent with the core values of the Free Exercise Clause of the New York State Constitution. In particular, it should specify what kind of factors should be considered in evaluating the degree of burden imposed on Free Exercise rights and the strength of the government purpose behind the regulation. Without further clarification, no court can fairly evaluate the seriousness of a religious belief, the competing interests at stake, the degree of interference by the government, and thus the reasonableness of the burden imposed.

### A. The Standard is An Insufficient Guide for Judicial Review

The Court of Appeals' own precedents make clear that courts should give primary weight to the plain language of the Free Exercise Clause and respect the "primary right" of religious liberty, even in the course of applying any kind of balancing test. But *Catholic Charities* failed to do so. It gave little weight --

indeed, barely discussed – the Plaintiffs' religious beliefs, suggesting that it did not take them seriously. This is in bold contrast to the respectful and thoughtful way that the Supreme Court of the United States has treated the religious beliefs of claimants. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. __, 135 S. Ct. 853 (2015), *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014) and *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981). Instead, the Court of Appeals essentially blamed the Plaintiffs for the burden they felt, arguing that they could have just chosen other employment policies – even though they recognized that those other policies would also have violated their religious beliefs. *Catholic Charities,* 7 N.Y.3d at 527. It is certainly not in keeping with the values of the Free Exercise Clause to give such short shrift to a claimant's sincerely held religious beliefs and it suggests to future courts that they need not take religious beliefs seriously.

There was also virtually no substantive scrutiny in *Catholic Charities* to the state interest in imposing the burden on the particular plaintiffs, but instead mere references to very conclusory and generic policy goals in the broadest possible terms. *Id.* There was no analysis of what specific interests the government had in imposing a very specific burden on a particular group of plaintiffs who had very clear faith tenets, a burden that carried very well defined consequences both spiritual and material. This highlights the insufficiency of the *Catholic Charities*

test – if the government can succeed by proposing only the most vague and generic interest, then there is really no test at all.

To merely invoke words like "unreasonable" and "interference" is not sufficient when such an important right is at stake. No other constitutional right is treated in such a dismissive way. There has to be more to the test of constitutionality than pure judicial intuition or *ipse dixit*.

### B. The Post-*Catholic Charities Cases* Reveal the Inadequacies of the Standard

Various post-*Catholic Charities* cases demonstrate that the *Catholic Charities* standard, as it stands, is difficult to apply. For the most part, the courts have been extremely deferential to the legislature, without engaging in any real assessment of the competing interests, even if the courts employ the words "balancing test" in their decisions. For example, in *People v. Storm-Eggnick*, 25 Misc.3d 1218(A), 2009 N.Y. Slip Op. 52175(U) (City Ct. Albany, 2009), the court noted that regardless of whether the defendant had a *bona fide* religious interest in the use of marijuana, the defendant's claim would still fail if the legislature determined that "the religious exemption proffered by the defendant would undermine the regulation, and render impotent the legislature's ability to pursue its substantial interest in the public health and welfare." *Id*. at 3. This gives virtually no weight to the claimant's religious beliefs. It is also an especially odd argument

since the legislature had never considered a religious exemption. This was a "balancing test" without any balancing.

Similarly, in *St. Joseph Hospital of Cheektowaga v. Novello*, 43 A.D.3d 139 (4th Dept. 2007), the court was so deferential to the legislature that it also engaged in no real balancing of interests. Specifically, the court simultaneously noted that the *Catholic Charities* standard must be applied, but that "the Legislation did not target Catholic hospitals for closing, and there is nothing in the Legislation itself that imposes any restrictions on religious freedom." *Id.* at 147. This is a very deferential result, let alone a tautology – it is already presumed that the Catholic hospital is not being specifically targeted if the *Catholic Charities* standard is to be applied. It is also incoherent, since the test is not whether there is anything in the specific legislation that *explicitly* restricts religion, but rather if the law has *the effect* of burdening it.

Even the federal courts have shied away from any vigorous application of the *Catholic Charitie*s standard in cases being decided under New York law. For example, in *Fortress Bible Church v. Feiner,* 694 F.3d 208 (2d Cir. 2012), the Town of Greenburgh had prevented the Fortress Bible Church from building a facility on land owned by the Town. *Id*. at 212. The Second Circuit clearly stated that under New York's Free Exercise Clause, courts must "employ a balancing test to determine if the interference with religious exercise was unreasonable." *Id*. at

221 n.9 (citing *Catholic Charities*). However, the Second Circuit did not elaborate on how the balancing test should be applied, but sided with the religious claimant mainly on the grounds that the Town had acted in bad faith. *Id*.

The history of the *Catholic Charities* standard thus shows that it fails to give courts adequate guidance as to how to decide cases, and gives little weight to the genuine religious beliefs that are burdened by state action. That is not an acceptable way to address such an important right as the free exercise of religion.

**C. The Standard is Best Applied as "Rational Basis With Bite"**

While this Court cannot abandon the *Catholic Charities* standard, it can construe it in a way that affords proper respect to both the constitutional right and the government interests, as well as provides better guidance for the disposition of future cases.

The most fitting application of the *Catholic Charities* standard lies between strict scrutiny review and rational basis review. The Court of Appeals explicitly stated that "[s]trict scrutiny is not the right approach to constitutionally-based claims for religious exemptions." *Catholic Charities*, 7 N.Y.3d at 526. Yet the Court did not even mention the alternative of proceeding under the minimalistic rational basis review.

In fact, in the oral argument on *Catholic Charities*, the Assistant Solicitor General – representing the predecessor agency to DFS – conceded that the correct

standard was some kind of "intermediate scrutiny" that was more demanding than mere rational basis. Transcript of Oral Argument, *Catholic Charities,* 2006 WL 5876549. For example, this exchange took place:

> JUDGE SMITH: Is this about, is it akin to a rational basis approach then, because if we can find any sane or halfway sane reason for what the Legislature did, that ends the matter?
> MS. PURI: It is something slightly more stringent than a rational basis review your Honor in that the court has, you know, it's not a toothless inquiry but it certainly doesn't approach strict scrutiny, it doesn't -- it's not equal to strict scrutiny.
> JUDGE KAYE: Sort of intermediate scrutiny?
> MS. PURI: Something in the middle, your Honor.… if we were looking for analogous quantums, it would be something that was more akin to an intermediate scrutiny than it would be to a strict scrutiny or an entirely toothless rational basis. *Id*. (unpaginated in original).

It is clear, then, that to find the correct level of review, it is important to pay close attention to the terms of the balancing test that the Court ultimately defined: "when the State imposes an incidental burden on the right to free exercise of religion," a court must consider the "interest advanced by the legislation that imposes the burden," and then "the respective interests must be balanced to determine whether the incidental burdening is justified." *Catholic Charities*, 7 N.Y.3d at 525 (citations omitted).

This balancing test cannot be squared with an "entirely toothless rational basis", but instead is best interpreted as what has been called a "rational basis with bite" standard of review, a standard that has been applied in cases where a particularly significant right has been burdened. Raphael Holoszyc-Pimentel,

*Reconciling Rational-Basis Review*, 90 N.Y.U. Law Review 2070 (2015). That standard is particularly appropriate for Free Exercise cases in light of "the importance which our State attaches to the free exercise of religious beliefs." *Rivera v. Smith*, 63 N.Y.2d 501, 511 (1984).

Rational basis with bite is a "more searching form of rational basis review." *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). It is used in contexts where the liberty interest implicated is especially strong, but there is no suspect class or fundamental right to warrant strict scrutiny review. The U.S. Supreme Court has employed rational basis with bite, albeit under different labels, in cases that involve fundamental rights that have at least as much significance as the free exercise of religion. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (persons with developmental disabilities), *Plyer v. Doe*, 457 U.S. 202 (1982) (undocumented alien status), *Zobel v. Williams,* 457 U.S. 55 (1982) (right to interstate travel). This standard bridges the gap between cases that do not call for a heightened standard of review, but nonetheless require a higher standard of review than rational basis, given the significance of the liberty interest at hand.

For example, *Plyer v. Doe* involved a challenge to a state statute that authorized public schools to deny enrollment to children of illegal aliens. The U.S. Supreme Court rejected arguments that illegal aliens were a suspect class or that

public education was a fundamental right, either of which would have triggered strict scrutiny review. *Plyer*, 457 U.S. at 216-18. Yet the Supreme Court did not employ the typical rational basis test in reaching its decision either. Instead, the Court noted that to pass constitutional muster, the statute must further some "substantial interest of the State" in light of the associated human costs. *Id.* at 218.

If this Court seeks to remain faithful to New York's Free Exercise Clause, the balancing test articulated in *Catholic Charities* is thus best interpreted in the same fashion, as a "rational basis with bite" standard. As such, many factors should be considered in weighing the State's interest in providing contraception against the plaintiffs' interest in adhering to their religious beliefs. These factors include the nature and importance of the religious belief or practice, how that belief or conduct presents a danger to "the peace and safety of the state," the significance of the public health and safety goal the State is promoting, the kind of law involved (e.g., legislation, regulation, or agency guidance), the place of the particular law in a larger scheme of public safety regulation, the potential impact on the welfare of third parties, and the availability of reasonable alternative ways of achieving the government's purpose, etc.

Accounting for these factors and others would allow a reviewing court to give genuine respect to the constitutional values at stake, while still recognizing

that religious liberty rights are not absolute and can be burdened in furtherance of some significant government interests.

## IV. BY CONDUCTING AN APPROPRIATE CONSTITUTIONAL REVIEW, THIS COURT SHOULD HOLD THAT THE ABORTION MANDATE VIOLATES THE PLAINTIFFS' FREE EXERCISE RIGHTS

In applying this "rational basis with bite" standard to the present case, this Court should find that the abortion mandate imposes an unreasonable burden on the religious beliefs and practices of these particular plaintiffs, and should thus find that it violates the Plaintiffs' Free Exercise rights.

As set forth above, an authentic judicial review of a Free Exercise Clause challenge should take into account a number of factors. The first and most important is the actual impact of the law in question on the religious beliefs and practices of the plaintiffs.

In this case, there can be no question that the religious objection to providing abortion coverage is intensely strong and the penalty for failing to comply is extremely onerous. For the Catholic plaintiffs in particular, this is a matter of being coerced to cooperate with a very grave sin pursuant to a law that our faith declares is fundamentally unjust and thus not morally binding. The teaching of the Catholic Church could not be any clearer, as it was stated by Pope St. John Paul:

> Laws which authorize and promote abortion and euthanasia are therefore radically opposed not only to the good of the individual but also to the common good… Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law. Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection. *The Gospel of Life (Evangelium Vitae)*, par. 72-73.

For Catholics, it would thus be gravely immoral to cooperate with such laws in any way – our Church teaches that it is against the will of God to cooperate in killing the innocent, and doing so could put our eternal life at risk. Thus the impact of the abortion mandate on the religious beliefs of the Catholic plaintiffs is direct, severe, and profound.

The lower court utterly failed to give due consideration or respect to the gravity of this moral teaching, and the fact that it is much more serious than the contraceptive mandate involved in *Catholic Charities*. Instead, the lower court erroneously equated the two moral teachings and thus fundamentally erred in its constitutional analysis. This Court should give these teachings their proper consideration, and recognize that a it is a profoundly unreasonable burden on the religious freedom of Catholic institutions and individuals to force them to cooperate in any way with such a gravely immoral act as abortion. This burden is intensified by the potentially ruinous fines that Plaintiffs' may face, if they remain faithful to their beliefs. *Brief of Plaintiff* at 29.

The unreasonableness of the burden is made very clear when moving on to the next step of the *Catholic Charities* balancing test, namely evaluating the asserted state interest – or, more accurately in this case, the utter lack of any asserted interest.

Obviously, there is no record that lays out any legislative intent, since the Legislature has consistently refused to pass an abortion mandate for over twenty years. *See e.g.*, A. 3570 (1997). That legislative inaction, in itself, contradicts any claim that there is such a serious state interest that would justify interfering with plaintiffs' religious beliefs. Significantly, in 2019 the Legislature defined "essential health benefits" for all health insurance plans, but it did not specifically include abortion. 2019 N.Y. Sess. Laws Ch. 57, Part T (McKinney) (enacting Insurance Law §§ 3217-i(a), 4306-h(a), effective January 1, 2020). Moreover, also in 2019, the Legislature passed the so-called Reproductive Health Act, which was widely promoted as guaranteeing comprehensive protection for abortion rights. 2019 N.Y. Sess. Laws Ch. 1 (McKinney). Yet even in that bill, the Legislature still failed to impose an abortion mandate on insurance coverage. The comprehensive lack of any explicit statutory authorization should thus be a significant factor in determining that the mandate is an unreasonable burden on the plaintiffs' free exercise rights.

The absence of any significant state interest can also be seen in the relevant regulatory materials themselves. In the Department's first attempt at imposing the stealth mandate under the guise of "Model Language" for health insurance policies, there wasn't even the slightest justification presented in general, much less for imposing it on all but a few religious organizations. When the Department finally decided to issue actual regulations -- clearly in an effort to respond to this litigation -- the notice of Proposed Rule-Making contained no substantive justification beyond mere boilerplate statements. N.Y. Register Vol. XXXIX, Issue 6 (February 8, 2017) (DFS-06-17-00014-P).

The only real rationale ever offered for the mandate was in the form of campaign-style press releases from the Governor's Office. *E.g.*, https://www.governor.ny.gov/news/governor-cuomo-announces-decisive-actions-secure-access-reproductive-health-services-new-york. Surely, the political agenda of elected officials is not a sufficiently strong government interest that would justify interfering with the plaintiffs' Free Exercise of religious faith and practice.

It is important to note that by granting some religious exemptions, the Department itself has acknowledged that this would not interfere with the intended purpose for the regulations. In fact, the original proposed exemption was much broader than the one that was finally promulgated. *Brief of Plaintiff* at 4-5. This

indicates that the Department understood well that they could accomplish their goals without forcing religious organizations to compromise their faith.

In addition, by looking at the broader context of how abortion is treated under current law, the Department's comprehensive mandate and narrow exemption are dramatically inconsistent with a larger pattern of robust protection of religious belief. There are strong conscience protections for any person who does not wish to perform or assist in abortions. Civil Rights Law § 79-i. Blanket protection is given to doctors who do not wish to be involved in procedures that violate their religious beliefs, which obviously includes abortion. Education Law § 6527(4)(c). The expansive protections of the Human Rights Law have also been held by this Court to extend to those with religious or moral objections to abortion. Executive Law § 296(1)(a); *Larsen v. Albany Medical Center*, 252 A.D.2d 936 (3rd Dept. 1998). Regulations also acknowledge the right of religious hospitals to decline to provide abortions. 10 NYCRR § 405.9(a)(10). For none of those exemptions does the religious person or institution have to satisfy such a stringent test as the abortion mandate would require. In each of those exemptions, a determination was obviously made that any state interest in promoting abortion was outweighed by the burden on religious beliefs opposed to it.

It is unreasonable for the state to grant wide exemptions for individuals and institutions that do not wish to perform abortions, yet fail to do so for individuals

and institutions that do not wish to pay for them. The lower court thus clearly erred in this case by giving less protection to religious belief under the Constitution than has already been recognized by all three branches of the government.

In fact, beyond merely asserting broad and vague generalities that could apply to virtually any regulation, it is doubtful that the state can offer a credible case that there is a significant state interest in imposing an abortion mandate. The federal Affordable Care and Patient Protection Act, which was meant to be a systematic reform and regulation of health insurance, does not contain an abortion mandate, and abortion has never been defined as an "essential health benefit" under that law. Alina Salganicoff, Laurie Sobel, and Amrutha Ramaswamy, *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans* (June 24, 2019) https://www.kff.org/interactive/abortion-coverage/. A majority of states impose some limitations on either Medicaid or private insurance coverage of abortion. *Id*. Only four other states require private insurance coverage of abortion. *Id*. Given such a negative consensus, there is little justification for New York to impose the mandate on all but a few religious employers.

It is hardly credible to argue that there is a serious deficiency of access to abortion in New York. There were over 77,000 reported abortions in New York in 2017, and over 82% were already covered by public or private health insurance. New York State Department of Health, *Table 24: Induced Abortions by Financial*

*Coverage and Resident County, New York State 2017*, https://www.health.ny.gov/statistics/vital_statistics/2017/table24.htm. Residents of every county in the state were able to obtain abortions. New York State Department of Health, *Table 21: Induced Abortions By Woman's Age and Resident County, New York State 2017*, https://www.health.ny.gov/statistics/vital_statistics/2017/table21.htm. Under these circumstances, it is difficult to see the case for an abortion mandate on all but a few religious employers. The Department did not even try to make one.

There is also ample reason to question the Department's good faith in imposing the abortion mandate. As set forth in extensive detail in the Plaintiffs' Brief, the Department first attempted to use the vehicle of "Model Language" that it disingenuously claimed was not mandatory. When challenged, the Department then revealed that in their view the mandate had already been in effect, thanks to a previously unknown interpretation of the existing contract language. The failure of the Department to reveal that secret interpretation shows a lack of good faith, since the Department was well aware of the religious objections to any such mandate. Only after this litigation was commenced did the Department finally begin the formal legal process of issuing legitimate regulations – an implicit admission that their prior extra-legal efforts to impose the mandate were flawed. Under all these

circumstances, the lower court erred in giving the same deference to these regulations as they would to legislation that was passed in good faith.

The lower court also failed to give adequate weight to the fact that there are other means readily available for the state to accomplish its purported goals, without infringing on the plaintiffs' religious liberty. The regulations exempt some religious organizations, and the initial Notice of Proposed Rule-Making considered a broader religious exemption, which was later dropped without explanation. *Brief of Plaintiff* at 4-5 (sources in Record cited therein). So even the Department itself recognized that it was not necessary for all religious organizations to provide insurance coverage for abortion. There was thus a manifest failure to explore other avenues of achieving the government purpose without imposing on the Plaintiffs' religious beliefs.

Under all these circumstances, a proper judicial review of the abortion mandate would conclude that it is an unreasonable burden on the religious beliefs of the Plaintiffs.

## Conclusion

The Court of Appeals has rightly said of the Bill of Rights that, "It is a guarantee of those rights which are essential to the preservation of the freedom of

the individual — rights which are part of our democratic traditions and which no government may invade." *Barber*, 289 N.Y. at 385.

We therefore respectfully urge this Court to uphold that noble principle and give real protection to the "preferred right" of free exercise of religion by reversing the erroneous lower court decision.

Dated: New York, New York
November 5, 2019

Respectfully submitted,

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