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New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

Case No. 529350

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

Action No. 1

Plaintiffs-Appellants,

--against--

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; et al.,

Defendants-Respondents.

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.,

Action No. 2

Plaintiffs-Appellants,

--against--

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; AND NEW YORK STATE DEPARTMENT FINANCIAL SERVICES,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

This is a case of extraordinary importance. At issue is an abortion mandate, unprecedented in New York, that requires Plaintiffs to fund, out of their own treasuries and in their own workforces, private conduct that they believe and teach to be sinful. The abortion mandate gives the Plaintiffs a Hobson's choice – either provide their employees with insurance coverage for abortion or else drop insurance coverage altogether. The religious teaching is clear, undisputed and confirmed by a long historical record. Based on their religious duty to provide just wages, the Plaintiffs believe themselves religiously and morally obliged to provide their employees with health insurance coverage. On the other hand, the Plaintiffs believe they have a religious and moral duty not to provide insurance coverage for abortions because such coverage violates their express religious teaching with respect to the protection of human life.

The Plaintiffs that appeal here have a variety of structures, missions, and practices. But the one element that makes them all susceptible to the abortion mandate is that they all serve the public, not just their members, in their religious and religiously-affiliated activities. Human history is full of examples of the dangers of preaching the Gospel to all. In blatant disregard of its own constitutional tradition, New York has now added its own unique penalty to missionary action in service of the common good.

To justify the conceded burden that the abortion mandate places on the sincerely held religious beliefs of the Plaintiffs, the State invokes its interests in promoting gender equity and protecting the health of women. Whether such interests outweigh the constitutionally protected rights of the Plaintiffs, in the event of an irreconcilable conflict, is a novel and important question. But the question presented in this case is a much easier one, for there is no irreconcilable conflict between the State's asserted interests and the religious freedom of these Plaintiffs—not as the mandate is written. By exempting certain "religious employers" from the abortion mandate the State recognizes that free exercise rights can and do outweigh its asserted interests. As explained below, however, by narrowly defining a "religious employer"—to exclude, for example, religious social and human service organizations based on the percentage of non-Church members they employ or serve—the mandate not only ignores the rights of a broad range of religiously-affiliated entities; ironically, it actually undermines the very objectives that the mandate was intended to advance.

In this and in other respects, explained more fully below, the abortion mandate fails even the most deferential scrutiny that could arguably be applicable in such a case. Even more clearly, it cannot survive the exacting scrutiny that is warranted in the case of a law that infringes in such a direct and unprecedented way upon the most fundamental rights of institutional religious freedom.

QUESTIONS PRESENTED

1. Whether the State of New York may compel religiously affiliated entities, contrary to their religious teachings, to include abortion coverage in health plans they provide to their employees, and thereby to finance conduct that their religion teaches is sinful.

2. Whether the State, having chosen to exempt certain "religious employers" from its abortion mandate, may deny that exemption to religiously affiliated entities that (a) employ too many non-members, (b) provide social services to too many non-members, (c) do not have as their purpose the "inculcation" of religious values, or (d) are required to file certain information returns with the Internal Revenue Service.

3. Whether the State, in promulgating its abortion mandate, violated the constitutional limits of administrative rulemaking.

STATEMENT OF THE CASE

I. The Abortion Mandate

In June of 2015 and again in April of 2016, the New York State Department of Financial Services ("DFS") approved and posted an abortion mandate in the form of "Model Language" regarding individual and small group employers offering health insurance benefits to include in renewal contracts coverage of non-therapeutic and therapeutic abortions. (R. 38, 143-153). Prior to June of 2015,

DFS separately mandated abortion coverage in employer health benefit plans under the service category of "medically necessary" surgery. (R. 39-40). This undisclosed abortion mandate was encrypted in health insurance contracts under the generic rubric of "medically necessary" surgery by DFS and health insurance providers. (R. 40).

The undisclosed abortion mandate was never communicated to Plaintiffs and other employers, including those who have conscience, moral or religious objection to abortion. (R. 40). Plaintiffs were caught unawares of this coverage up to the 2015/2016 renewal/enrollment period when the Model Language abortion mandate was for the first time put into effect by DFS and required in renewal health benefits contracts by providers. (R. 37-40). Plaintiffs, on moral, ethical, conscience and religious grounds, protested to DFS the inclusion of coverage and funding of all abortions and demanded complete exemption for all abortion coverage in their health insurance contracts. (R. 40, 199, 206-207, 386, 392, 427, 430, 445-446, 448, 450).

In August of 2017, the DFS finalized, by regulations, the abortion mandate requiring employers offering health insurance benefits to affirmatively include in plan contracts coverage for "medically necessary abortions," "abortion services" and "elective abortions." (R. 483-494, 535-537). The regulatory abortion mandate included "an optional limited exemption for religious employers." (R. 535). The

penultimate version of the DFS regulatory abortion mandate included two additional exemptions for "qualified religious organization employers" and "closely held for profit entities." (R. 496, 563-565). These exemptions were abandoned by the DFS in the final regulatory abortion mandate.

As ultimately promulgated however, the religious exemption was confined to a narrow category of "religious employers" that excludes the vast majority of Church-related employers in the State. It narrowly defines a "religious employer" as "an entity for which each of the following is true":

(i) The inculcation of religious values is the purpose of the entity.

(ii) The entity primarily employs persons who share the religious tenets of the entity.

(iii) The entity serves primarily persons who share the religious tenets of the entity.

(iv) 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. (R, 535).

DFS was well aware that this narrowly drawn exemption would not cover numerous Catholic Church entities and numerous other Church organizations.

II. The Plaintiffs

The Plaintiffs are fifteen Roman Catholic Churches and Dioceses, Baptist and Lutheran Churches, Episcopal Diocese, Anglican Sisters, a construction entity, a consumer and entities that are integral parts of the Roman Catholic Church which provide a variety of educational and social services, including health care, food, clothing, skilled nursing care, independent living housing, affordable housing, drug prevention and treatment programs, domestic violence shelters and immigration settlement programs. With one exception, the construction entity, they minister to people in need of their services, regardless of their religious beliefs, and therefore cannot say that they serve "primarily" those who share their religious tenets. Some cannot verify 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. And some do not qualify under the designated provision of the Internal Revenue Code although they are charitable organizations exempt from taxation.

A. The Roman Catholic Diocese of Albany

The Roman Catholic Diocese of Albany, New York ("Diocese of Albany") a special act corporation incorporated under the Laws of the State of New York, is and at all times has been a constituent part of the Roman Catholic Church and is subject to the Catechism, Canon Law and precepts of the Roman Catholic Church.

Pursuant to same, the Diocese of Albany exercises ecclesiastical authority over its religious, charitable and educational ministries, institutions and parishes within fourteen counties of upstate New York. The Diocese of Albany maintains its principal administrative office in the City and County of Albany. The Diocese of Albany is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 196-204).

B. The Roman Catholic Diocese of Ogdensburg

The Roman Catholic Diocese of Ogdensburg ("Diocese of Ogdensburg") a special act corporation incorporated under the Laws of the State of New York, is and at all times has been a constituent part of the Roman Catholic Church and is subject to the Catechism, Canon Law, doctrines, teachings and precepts of the Roman Catholic Church. Pursuant to the same, the Diocese of Ogdensburg exercises ecclesial authority over the religious, charitable and educational ministries, institutions and parishes within eight counties in northern New York State. The Diocese of Ogdensburg maintains its principal administrative office in Ogdensburg, New York. The Diocese of Ogdensburg is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 383-390).

C. Trustees of the Diocese of Albany ("Episcopal Diocese")

Trustees of The Diocese of Albany ("Episcopal Diocese"), a special act corporation incorporated under the laws of the State of New York, is and at all

times has been a constituent part of the Protestant Episcopal Church in the United States ("Episcopal Church"), and is subject to and accedes to the Constitution, Canons and General Convention of the Episcopal Church. Pursuant to same and its own Constitution and Canons, the Episcopal Diocese exercises ecclesial authority over missions, aided parishes and parishes. The Episcopal Diocese maintains its principal offices within the Counties of Albany and Washington. The Episcopal Diocese is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 410-412).

D. The Sisterhood of St. Mary

The Sisterhood of St. Mary ("Sisters of St. Mary") an Anglican/Episcopal Order of women religious established in 1865 as a New York not-for-profit religious corporation, is and at times has been a constituent part of the Protestant Episcopal Church in the United States and is subject to and accedes to the Constitution, Canons and General Convention of the Episcopal Church. Pursuant to same, its members live a traditional, contemplative expression of monastic life through a disciplined life of prayer set within a simple agrarian lifestyle and active ministries in their local communities. The Sisters of St. Mary maintain their principal convent in Washington County. The Sisters of St. Mary is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 31).

E. Catholic Charities, Diocese of Brooklyn

Catholic Charities, Diocese of Brooklyn ("Charities Brooklyn") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Brooklyn is operated in connection with the Roman Catholic Diocese of Brooklyn and is a vital and integral part of the human services ministry of the Roman Catholic Church. Charities Brooklyn, one of the largest multi-service agencies in the nation, provides human services programs covering the whole span of an individual's life including early childhood and family services as part of the charitable and social justice ministry of the Roman Catholic Church in Brooklyn and Queens Counties. It maintains its principal administrative office in Brooklyn. Charities Brooklyn's health insurance benefits for its employees are regulated by the DFS. (R. 32).

F. Catholic Charities of the Diocese of Albany

Catholic Charities of the Diocese of Albany ("Charities Albany") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Albany is operated in connection with The Roman Catholic Diocese of Albany, New York and represents the human services ministry of the Roman Catholic Church. Among its various human service programs and agencies it operates is Community Maternity Services, which offers a continuum of care for pregnant adolescents and young parents including case management, goal-directed

counseling, childbirth education, parent education, support and advocacy. Charities Albany facilitates the charitable and social justice missions of the Roman Catholic Church in fourteen counties in central and upstate New York. The work of Plaintiff Charities Albany is a vital and integral part of the human services ministry of the Roman Catholic Church. Catholic Charities of Albany maintains its principal administrative office in the City and County of Albany, State of New York. Charities Albany's health insurance benefits for its employees are regulated by the DFS. (R. 196-204).

G. Catholic Charities of the Diocese of Ogdensburg

Catholic Charities of the Diocese of Ogdensburg ("Charities Ogdensburg") is a not-for-profit corporation established by special act of the New York State Legislature. Charities Ogdensburg is operated in connection with the Roman Catholic Diocese of Ogdensburg and is a vital and integral part of the human services ministry of the Roman Catholic Church. Charities Ogdensburg provides multiple human service programs including adoptions, maternity services and Project Rachel which provides services to individuals and families who have been involved in abortion. Charities Ogdensburg facilitates the charitable and social justice missions of the Roman Catholic Church in eight counties in northern New York State. Charities Ogdensburg maintains its principal administrative office in

the Town of Oswegatchie, County of St. Lawrence. Charities Ogdensburg's health insurance benefits for its employees are regulated by the DFS. (R. 383-390).

H. St. Gregory the Great Roman Catholic Church

St. Gregory the Great Roman Catholic Church Society of Amherst, N.Y. ("St. Gregory") is a religious corporation duly organized and existing under the New York Religious Corporations Law. It serves as a parish of the Roman Catholic Diocese of Buffalo, maintains its principal place of worship in Williamsville, Town of Amherst, County of Erie and operates St. Gregory's School and several ministries. St. Gregory is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 33).

I. First Bible Baptist Church

First Bible Baptist Church ("First Bible") is a religious corporation duly organized and existing under the laws of the State of New York. First Bible is an independent Evangelical congregation affiliated with the Baptist Bible Fellowship International. First Bible engages in human services outreach with multiple ministries including youth ministry, adult ministry, deaf ministry, education ministry, athletic activities, day care and pre-school and mission ministry. First Bible maintains its principal place of worship in the City of Rochester, County of Monroe. First Bible is a religious employer whose health insurance benefits for its employees are regulated by the DFS. (R. 33-34).

J. Our Savior's Lutheran Church

Our Savior's Lutheran Church, Albany, N.Y. ("Our Savior's Lutheran Church") is a religious corporation duly organized and existing under the New York Religious Corporations Law. It sponsors several ministries and missions and maintains its principal place of worship in the Town of Colonie, County of Albany. Our Savior's Lutheran Church is an employer whose health insurance benefits for its employees are regulated by the DFS. (R. 34).

K. Teresian House Nursing Home

Teresian House Nursing Home Company, Inc. ("Teresian House") is a not-for-profit corporation organized and existing under the laws of the State of New York. Teresian House provides the elderly with a continuum of services to enhance their physical, spiritual and emotional well-being. Teresian House is sponsored by and affiliated with the Roman Catholic Diocese of Albany and operated by the religious order known as the Carmelite Sisters for the Aged and Infirm. Teresian House maintains its principal service center in the City and County of Albany. Teresian House is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the DFS. (R. 426-428).

L. Renée Morgiewicz

Renée Morgiewicz is a resident of Saratoga County. She is an employee of a religious employer, The Roman Catholic Diocese of Albany, which provides her

with health insurance benefits that are regulated by the DFS and holds the similar beliefs of the Plaintiffs. (R. 435-437).

M. Teresian House Housing

Teresian House Housing Corporation is a not-for-profit corporation organized and existing under the laws of the State of New York and operates the retirement community known as Avila ("Avila"). Avila is sponsored by and affiliated with the Roman Catholic Diocese of Albany. Avila maintains its principal office in the City and County of Albany. Avila is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the DFS. (R. 490-491).

N. DePaul Housing Management

DePaul Housing Management Corporation is a not-for-profit corporation organized and existing under the laws of the State of New York ("DePaul"). DePaul manages multiple senior living apartment communities. DePaul is sponsored by and affiliated with The Roman Catholic Diocese of Albany. DePaul maintains its principal office in the City of Albany and operates in Albany, Delaware, Rensselaer, Saratoga and Schenectady Counties. DePaul is a religiously-affiliated employer whose health insurance benefits for its employees are regulated by the DFS. (R. 491).

O. Murnane Building Contractors

Murnane Building Contractors, Inc. ("Murnane Contractors") is a business corporation organized and existing under the laws of the State of New York. Murnane Contractors provides general construction, construction management and design/build services on public and nonpublic projects throughout New York State. Murnane Contractors maintains its principal business office in Plattsburgh, New York. Murnane is an employer whose health insurance benefits for its employees are regulated by the DFS. The owner of Murnane Contractors holds fundamental religious and conscience beliefs similar to those of the co-Plaintiffs. (R. 444-446).

III. Proceedings Below

The first action for declaratory and injunctive relief was commenced in May 2016 in direct response to the revelation of the DFS so-called Model Language abortion mandate and the recently discovered longstanding DFS undisclosed abortion mandate. The complaint set forth causes of action under the New York State Constitution (free exercise and enjoyment of religion and liberty of conscience, establishment clause, preference clause, free speech and associational liberty); the United States Constitution (free exercise of religion, establishment clause, free speech, associational liberty, equal protection and hybrid rights); and New York statutes (Human Rights Law and Religious Corporations Law). (R. 28-73).

The Attorney General, on behalf of the Respondents, moved to dismiss the complaint on September 30, 2016 pursuant to CPLR 320(a) and 3211(a)(7). (R. 74-75). An amended complaint for declaratory and injunctive relief dated October 21, 2016, asserting fourteen causes of action, was served. (R. 79-134). Plaintiffs by cross-motion dated December 25, 2016, sought a preliminary injunction pursuant to CPLR 6311. (R. 135-136). Oral arguments were heard before the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.) on May 23, 2017. The Court reserved decision on the motion and cross-motion.

On November 21, 2017, during the pendency of the undecided first action Plaintiffs commenced a second action challenging the regulatory abortion mandate promulgated by DFS. In addition to the causes of action under the New York Constitution, the United States Constitution and New York statutes, Plaintiffs asserted a cause of action that the DFS regulatory abortion mandate violated the separation of powers doctrine and rulemaking provision of Articles III, § 1 IV, § 8 of the New York Constitution. (R. 484-567).

On January 23, 2018, following Plaintiffs' motion, the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.) issued a decision and order consolidating both actions. (R. 576-578).

The Attorney General moved to dismiss the complaint in the second action pursuant to CPLR 320(a), 3211(a)(1) and 3211(a)(7). (R. 566-567). Plaintiffs by

cross-motion, dated May 17, 2018, sought an order pursuant to CPLR 3212 and 6311 granting summary judgment and a preliminary injunction. (R. 674-675). The Court thereafter converted the pending motion by the Attorney General to a summary judgment motion.

On August 30, 2018, oral arguments were heard by the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.) on December 28, 2018, the Supreme Court issued its decision and order dismissing the consolidated action. (R. 15-27).

Supreme Court dismissed plaintiff's claims under the New York Constitution and the United States Constitution stating that it was "obligated to follow the determinations of the Court of Appeals" in *Catholic Charities of the Diocese of Albany v Serio,* 7 N.Y.3d 510 [2006] because it found that "the constitutional claims challenged in the case to be the same as those raised in Catholic Charities." The Supreme Court "[l]iterally speaking" acknowledged the difference between "contraceptives" and "abortion" as "obviously different" but concluded that "[l]egally… petitioners' claims challenging medical coverage for both contraceptives and abortions are identical." The Supreme Court did not conduct any balancing or analysis of interests and burdens are required by *Catholic Charities v. Serio*. The Supreme Court having concluded that abortion and contraceptives were "[l]egally" indistinguishable next proceeded to dismiss

Plaintiffs' claim that the DFS "abortion mandate" violated the constitutional limits of administrative rulemaking. The Supreme Court held that the regulatory "abortion mandate" was not "an improper delegation of legislative authority to DFS" after its consideration of the coalescing factors referenced in *Boreali v. Axelrod,* 71 N.Y.2d 1 [1987]. (R. 15-27).

The Plaintiffs filed a timely notice of appeal on January 28, 2019. (R. 2-27).

SUMMARY OF ARGUMENT

The DFS abortion mandate coerces church entities and related organizations and consumers to subsidize private conduct the churches teach is a "grave evil." (R. 422-425). Until the undisclosed, belatedly disclosed and then promulgated regulatory abortion mandate of the DFS, there were no administrative efforts to require abortion insurance coverage to be provided and funded by employers in employee health benefit plans from church organizations. (R. 37, 89, 493). Government in our country has historically respected the right of organized religions to "practice what they preach" and to refrain from financing private conduct that they condemn. By departing from the historical practice, the DFS abortion mandate has placed the State of New York in opposition to that most fundamental value that include both state and federal constitutional guarantees of freedom of religion, freedom of speech and freedom of association.

Article 1, Section 3 of the New York Constitution has long protected the "free exercise and enjoyment of religious profession and worship," subject only to limitations dictated by the need to preserve "the peace or safety of this state." Those concepts—"peace and safety"—have meaning, and it distorts those concepts beyond recognition to suggest that they are threatened by a Church entity's decision not fund abortion coverage for its employees. (R. 47-50, 100-101, 504-505). The Court of Appeals has emphasized that the New York Constitution makes "[f]reedom of exercise of religion ... a preferred right." *LaRocca v. Lane,* 37 N.Y.2d 575, 583 [1975].

Even assuming, however, that the interests intended to be served by the DFS abortion mandate—gender equity and women's access to contraceptives—are sufficiently weighty in the abstract to warrant interference with free exercise rights, they are entitled to little weight in this case, for at least two reasons. First, the State itself has not claimed that its interests in abortion should outweigh religious rights. It has exempted what it regards as "religious employers," thereby recognizing that religious rights are entitled to superior status. And second, the State does not advance, but undermines, its asserted interests by excluding religious objectors like the Plaintiffs from the category of "religious employer." It undermines those interests in at least two respects: (1) by encouraging such

entities to deny health coverage altogether, and (2) by subjecting such entities to draconian fines to practice their religion.

For these same reasons, the DFS abortion mandate runs afoul of the free exercise clause of the First Amendment.

1. The DFS abortion mandate is not generally applicable. It identifies no benefit so important that everyone is required to provide it.

2. The DFS abortion mandate is not religiously neutral. It exempts some religious entities, but not others.

3. The DFS abortion mandate infringes not only upon individual rights to free exercise, but also upon the institutional autonomy of Church organizations.

4. The DFS abortion mandate also interferes with freedom of speech and association. By coercing Church entities to pay for abortion, the DFS abortion mandate undermines the Church entity's ability to communicate an unambiguous message that abortion is a "grave evil." Thus, it not only prevents these Church entities from practicing what they preach, it undermines the effectiveness of their preaching.

For all of these reasons, the DFS abortion mandate must be subjected to the rigorous "compelling state interest" test, which it cannot meet.

Finally, the DFS abortion mandate violates the "central Establishment Clause value of official religious neutrality," *McCreary County v. American Civil*

Liberties Union of Kentucky, 545 U.S. 844 [2005], and the "clearest command of the Establishment Clause"—"that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 [1982]. The DFS abortion mandate discriminates among religious entities by imposing certain burdens upon some religious organizations and not on others. In effect, the DFS abortion mandate "establishes" an officially recognized notion of what it means to be a "religious" organization. And it does so in a way that invites intrusive questioning into the way in which Churches organize themselves, define their mission and conduct their operations. In all of these respects, the DFS abortion mandate offends the establishment and free exercise clauses.

Finally, governance in New York is based on the fundamental principle of separation of powers where power is distributed among the three branches of government with a system of checks and balances that prevents excessive concentration of power of one branch. *Rapp v. Carey,* 44 N.Y.2d 157, 162-63, 167 [1978]. The authority to make laws and establish the policy of the State is the exclusive province of the Legislature. N.Y. Const. art. III, § 1. The Executive Branch however is charged with administering and enforcing the laws created by the Legislature. *Id.* at art. IV; *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995].

In certain cases, the Legislature can designate administrative agencies "with the power to fill in the interstices in the legislative product by prescribing rules and

regulations consisting with the enabling legislation." *Nicholas v. Kahn,* 47 N.Y.2d 24, 31 [1979].

In *Boreali v. Axelrod,* 71 N.Y.2d 1 [1987], the Court of Appeals articulated four "coalescing circumstances" that indicate whether an administrative agency has gone beyond its proper sphere of interstitial rulemaking. These factors are to be "interpreted as indicators of the usurpation of the legislature, rather than a talismanic rule of four required elements that must all be present in every case." *N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene,* 110 A.D.3d 1, 9 [1st Dep't 2013], affirmed 23 N.Y.3d 681 [2014]. No statute clearly authorizes the DFS to promulgate abortion mandate regulations. All the *Boreali* factors, considered together, clearly establish that the DFS exceeded the scope of existing legislative policy in violation of the constitutional separation of powers by stretching the principle of interstitial rule-making beyond the breaking point.

In sum, the so-called DFS abortion mandate is "well beyond the bounds of constitutional acceptability." *Catholic Charities of the Diocese of Albany v. Serio,* 7 N.Y.3d 510, 527 [2006].

ARGUMENT

I. THE ABORTION MANDATE VIOLATES THE NEW YORK CONSTITUTION

A. The Religious Beliefs at Issue

1. Teaching/Beliefs against the "grave evil of abortion."

The DFS abortion mandate imposes a substantial burden on the Plaintiff's freedom of religion and freedom of religious expression resulting in severe state infringement upon the rights of the Plaintiffs to practice, and conduct their ministries in accordance with their beliefs. (*Scharfenberger Aff.* R. 196-204; *LaValley Aff.* R. 383-390; *Love Aff.* R. 410-412; *Caccavale Aff.* R. 422-425; *Mullen Aff.* R. 426-428; *Pestke Aff.* R. 431-434; *Morgiewicz Aff.* R. 435-437; *Nolte Aff.* R. 438-443; *Murnane Aff.* R. 444-446). For example, the Catholic Plaintiffs, as a result of the abortion mandate, are substantially burdened in teaching of three specific Catholic religious beliefs: (1) Catholic teaching of abortion as a "moral evil,"[1]; (2) Catholic religious teaching and fundamental instruction on tenets involving the dignity and respect for each and every human life, whether in utero, or not, i.e. through all stages of development and regardless of age, condition or stage of development; this is crucial to the life affirming message of the Catholic Church, namely that "[h]uman life must be respected and protected absolutely

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[1] *The Catechism of the Catholic Church*, copyright 1997, # 2271; *Humanae Vitae*, July 25, 1968 by Pope Paul VI; and *Familiaris Consortio*, November 22, 1981 by Pope John Paul II.

from the moment conception," that abortion is "gravely contrary to moral law"[2] and an "unspeakable crime,"[3] and (3) Catholic religious teaching against being morally complicit with the facilitation or conduct of sinful or immoral conduct. (*Caccavale Aff.* R. 422-425).

With respect to the other Plaintiffs, the Episcopal Church teaches and affirms this case involves the infringement of their rights to practice,[4] and the Baptist and Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures.[5] (See *Love, Pestke Affs.* R. 410-412, 431-434, *Verified Complaint* R. 498-499).

However, central to all of the Plaintiffs, whether Catholic, Episcopal, Baptist, Lutheran or Evangelical, abortion is in direct conflict with their religious teachings and beliefs. That means that for some deliberately cooperating (i.e. facilitating or otherwise participating in some meaningful way) in the provision of direct abortion constitutes a grave moral offense under Catholic teaching. (*See Scharfenberger, LaValley and Caccavale Affs.* R. 196-204; 383-390; 422-425). In a word, no faithful Catholic person can, without violating a fundamental tenet of

[2] The *Catechism of the Catholic Church,* copyright 1997, # 2270, 2271.
[3] *Pastoral Constitution on the Church in the Modern World Gaudium et Spes, 51: "Abortus necnon infanticidium nefanda sunt crimina."*
[4] *Episcopal Diocese 2007 Annual Convention Resolution 4.* "Resolved, that the 2007 Convention of the Diocese of Albany affirms the sanctity of human life as a gift of God from conception to natural death."
[5] *Jeremiah* 1:4; *Luke* 1:39.

the Catholic religion, ever participate in, facilitate, or otherwise cooperate with the intentional killing of an unborn child. To do so, Catholics believe, violates God's creative plan for humanity and is contrary to the inherent dignity and sanctity of every human life. Therefore the Church formally teaches that it is always objectively evil to engage in the direct and intentional killing of unborn human life or any other innocent human life. Direct abortion is clearly and unequivocally immoral and unacceptable in every circumstance. (*Caccavale Aff.* R. 442-425). Plaintiffs cannot accept or facilitate it in any way.

Plaintiffs and other religions also teach that an employer has a moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family. (*Verified Complaint*, R. 499). The scope and range of these benefits, however, must also be consistent with religious and moral teaching on the dignity and sanctity of each member of the human family. (*See Scharfenberger and LaValley Affs.* R. 196-204, 383-390). Religious employers, especially, in regard to the religious teachings view the offering of fair, adequate and just employment benefits as a moral obligation rooted in the Gospel of Jesus Christ. (*Verified Complaint* R. 499). Consistent with this teaching, the Catholic Bishops in the United States agreed upon and called for universal access to health care in

the past.[6] Now, such obligation in providing health insurance is no longer a moral or religious duty, but a legal one as well under the Affordable Care Act ("ACA") (providing for universal access to health coverage, but severely penalizing those who go without, in particular businesses with numerous employees, (*See Fontanella Aff.* R. 453-455; *Scharfenberger Aff.* R. 200).

The Catholic Church teaches that it, as an institution, may never morally place itself in the position of being complicit in the commission of sinful or evil conduct., *viz.*, abortion.[7] The Catholic Church teaches that the religious truths that underlie the Church, as a matter of its own religious belief, may not facilitate or promote, directly or indirectly, the practice of abortion. To do so would constitute, in the view of Catholic religious belief, moral complicity in the practice of contraception, which Catholic teaching regards as "moral[ly] evil."[8] (*See Caccavale Aff.* R. 422-425). Pope Francis reaffirmed that abortion represents a "horrendous crime" and a "very grave sin." (R. 203, 379-381).

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[6] *See Ethical and Religious Directives for Catholic Health Care Service* (*See Scharfenberger Aff.* Ex. "C" R. 322-362).

[7] The United States Catholic Bishops reaffirmed this, in their pastoral letter *Living the Gospel of Life*.
(Pastoral Letter of the National Conference of Catholic Bishops, *Living the Gospel of Life,* (November 1998), ¶¶ 7, 25.) See *Scharfenberger Aff.* Ex. "D" R. 366-377.

[8] *The Catechism of the Catholic Church*, copyright 1997, # 2271; *Humanae Vitae*, July 25, 1968 by Pope Paul VI (*Scharfenberger Aff. Ex . "B"* R. 209-320); and *Familiaris Consortio*, November 22, 1981 by Pope John Paul II.

The Plaintiffs submitted nine affidavits, none of which was contradicted, explaining how the abortion mandate forces them into a position of noncompliance with their religious beliefs.

B. Free Exercise

Article I, §3, of the New York Constitution is not dependent on the meaning of any provision of the Federal Constitution. The textual differences between Article 1, § 3 and the Free Exercise Clause are significant. The language of the New York provision's first clause is more expansive, protecting the free exercise of "religious profession and worship, without discrimination or preference," whereas the Federal Constitution simply protects "religion." Unlike the Free Exercise Clause, the New York provision is not facially limited to protection against government action. These critical textual differences strongly indicate that the New York Constitution's free exercise provision be interpreted differently than the Supreme Court has interpreted the federal clause.

Because of its broader scope, New York courts have interpreted the state constitutional guarantee of "free exercise and enjoyment of religion" providing a broad protection to religious freedom. In recognition of its historical provenance and context of religious toleration, the Court of Appeals has affirmed that Article I, § 3 "manifest[s] the importance which our State attaches to the free exercise of religious beliefs" (*Rivera v. Smith*, 63 N.Y.2d 501, 511, [1984]).

The Court of Appeals differs with the Supreme Court when it interprets state constitutional provisions that parallel those in the Federal Constitution. The Court stated that it is "bound to exercise its independent judgment" when it considers constitutional law issues (*People v. Barber*, 289 N.Y. 378, 384, [1943]; see *People v. Alvarez*, 70 N.Y.2d 375, 378, [1987]; *People Ex Rel Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553 [1986]). The Court expressly "decline[d] to adopt any rigid method of analysis which would, except in unusual circumstances, require [it] to interpret provisions of the State Constitution in 'lockstep' with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution" (*People v. Scott*, 79 N.Y.2d, 474, 490 [1992]).

In *Catholic Charities v. Serio*, 7 N.Y.3d 510 [2006] the Court of Appeals affirmed the 3-2 decision by the Third Department, Appellate Division, rejecting Plaintiffs' challenge to legislation known as the Women's Health and Wellness Act, ("WHWA"), as applied to them, regarding free exercise of religion.

In *Catholic Charities*, the Court concluded that the WHWA was a validly enacted piece of legislation which required that employers provide contraceptive as part of any prescription plans offered which "shall include coverage for the cost of contraceptive[s]." *Catholic Charities*, 7 N.Y.3d at 518. The legislation was challenged on the grounds that the law unconstitutionally burdened their freedom of religious expression and conscience rights. *Id.* Despite the contentions within

the WHWA's robust legislative history the Court held that because there was no coercion, (Plaintiffs could choose to not provide prescriptive drug coverage to employees because there existed a carve-out or exemption clause within the WHWA statute), it determined that a significant enough public interest was involved, (women's health and gender equality) and that the burden on the Plaintiffs, while substantial, was insufficient to overcome validly enacted legislation which was deemed a "neutral law." The Court held that under a balancing test and analysis the WHWA was validly enacted and not an unreasonable interference with free exercise. *Id.* at 522-523.

The Supreme Court below, and the Attorney General, relied heavily on *Catholic Charities,* notwithstanding the key differences with this case:

- First, the subject abortion mandate challenged here is not legislation.

- Second, because of the ACA and its mandatory coverage requirement, Plaintiffs are confronted with the regulatory abortion mandate where they must give up their federal and state constitutional religious freedom and liberty and conscience rights by paying for and supporting abortions, which is a violation of their deeply held core religious beliefs.

- Third, there is no coverage carve-out provided by the DFS in its abortion mandate as there was in the WHWA.

- Fourth, most importantly, abortion is not contraception.

The Plaintiffs, who represent a broad variety of different religions and related organizations, now, due to the DFS overreaching and misapplication of the ACA requirements have created a desperate and impossible situation. By putting Plaintiffs into a situation where on the one hand, they continue with the type of insurance they have, and thus violate their core-religious beliefs, to treat all human life with dignity and respect from conception to natural death, or on the other hand, refuse the payments and be forced to pay draconian penalties. (*See Fontanella Aff.* R. 453-455; demonstrating how just one of the Plaintiffs, should they be forced to pay the penalty would be subject to a fine of over $2,000,000 a year, and a family of four, looking at the individual mandate can expect a nearly $3,000 fine plus an additional $707.00).

By mandating that Plaintiffs and objecting employers provide their employees with abortion coverage in violation of their sincerely held, core religious beliefs amounts to an act of coercion by the State creating a substantial burden and unreasonable interference with their religious and conscience rights. The Catholic Church – of which many Plaintiffs represent vital and integral parts – explicitly teaches that abortion is "intrinsically evil," "gravely sinful," and "an act of murder against the innocent." (*See Caccavale Aff.* R. 453-455). The Episcopal Church places the same value on life from conception to natural death. Setting aside any moral duty, Plaintiffs now have a legal duty to provide such coverage

and that through such coverage they are forced to subsidize and promote the anathema that is abortion. The reality is that the Plaintiffs, the churches in particular, will face massive fines and penalties. Legally coercing Plaintiffs into making such a choice directly violates the "free exercise and enjoyment of religion" and "liberty of conscience" guarantees of Article I, § 3. The so-called abortion mandate regulations should be subject to "strict scrutiny" by this Court.

Finally, because the abortion mandate regulations have no legislative history, no compelling state interest can be said to be found.

C. Establishment Clause

In applying the Establishment Clause of Article 1, Section 3, the analysis must be interpreted at least as broadly as its federal counterpart and it is apparent that the deliberate distinctions drawn between denominations by the exemption provisions are constitutionally impermissible. *Grumet v. New York State Educ. Dept.*, 187 A.D.2d 16 [3d Dept. 1992], leave to cross appeal denied 81 N.Y.2d 705 modified on other grounds, 81 N.Y.2d 518, stay granted 114 S.Ct. 10, 509 U.S. 938, certiorari granted 114 S.Ct. 544, 510 U.S. 989, affirmed 114 S.Ct. 2481, 512 U.S. 687 [1994]; *College of New Rochelle v. Nyquist,* 37 A.D.2d 461 [3d Dept. 1971]; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42–43, 44 [2004] (O'Connor, J., concurring in the judgment); *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811, 1843–44 [2014]). By not allowing exemptions for

individuals, churches, businesses, organizations or entities, the so-called abortion mandate regulations expressly violated the core rule of the First Amendment. *See Grumet v. New York State Educ. Dept., supra.* Providing an accommodation to one religion, while denying the same to others or granting a benefit to one religion, particularly when that benefit is a right and not anything less, violates the New York and the Federal Constitution. *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1845 [2014].

In the context of the New York Constitution's Establishment Clause, New York courts have traditionally applied an analysis that follows the lead of the United States Supreme Court, *viz.,* most commonly, some derivative of the *Lemon* Test. *See Lemon v. Kurtsman*, 403 U.S. 602, 612–13 [1971].

1. *The So-Called Abortion Mandate Regulations Fail to Meet the Primary Secular Purpose.*

On the very basis that the so-called abortion mandate regulations are not legislation, and thus lack any history, combined with the shifting modifications of their language and exemptions particularly immediately after commencement of the Plaintiffs' first action, one can only infer its intended purpose through its effect. There is no history nor other proof provided by the DFS, that would lead one to believe the primary purpose of said agency mandate is secular, and the modified exemption history only serves to confirm that purpose.

2. *The So-Called Abortion Mandate Regulations Fail To Show that the Primary Effect Neither Inhibits, nor Advances Religion.*

Based on the allowances of certain exemptions, the primary effect of the so-called abortion mandate regulations has been, at the very least, to inhibit certain religions, by refusing to confer upon them a benefit that was conferred upon those similarly situated. This, with the years of undisclosed payments and coverage for abortions demonstrate no neutrality, but rather the accommodation of some religions at the disadvantage of others.

3. *The So-Called Abortion Mandate Regulations Demonstrate Excessive Entanglement Between the State and Religion.*

If allowed to continue forward, the so-called abortion mandate regulations will inextricably violate the excessive entanglement prong from *Lemon*. Specifically, it will require a pervasive monitoring by the government, not merely just a one-time interaction. This type of state watch over religion is clearly a violation of the Establishment Clause. Such pervasive monitoring is illustrated by the recent DFS enforcement action involving the 'religious employer' exemption under the WHWA. See *DFS Takes Action Against Health Insurers for Violations of Insurance Law related to Contraceptive Coverage* (available at https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1905031). (last visited July 12, 2019).

(a) Denominational Preference Under *Larson*

Larson v. Valente, 456 U.S. 228, 102 S.Ct. 1673 [1982], should be considered by the Court to be a useful guide in applying the Establishment Clause of Article 1, Section 3 of the New York Constitution to the instant case. While true, the Court of Appeals in *Serio*, 7 N.Y.3d at 527, 528 [2006], noted that the *Larson* case had been misinterpreted. This might hold true if one were reading Larson on its own, which would strongly suggest that it was the actions of keeping only one sect out that violated the Establishment Clause. However, even in cases predating *Larson,* there is strong support that *Larson's* holding is broader. See *Clay v. United States*, 403 U.S. 698, 700-701 [1971]; *County of Allegheny v. ACLU*, 492 U.S. 573, 605 [1989]; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42–43, 44 [2004] (O'Connor, J., concurring in the judgment); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1843–44 (2014).

Because the inclusions of shifting exemption provisions and the lack of any state interest, the so-called abortion mandate regulations violate the Establishment Clause of Article 1, Section 3 of the New York Constitution.

D. Preference Clause

The case *sub judice* is similar to *Larson*, but not indistinguishable. Larsen's holding, according to the Court of Appeals was actually quite limited. However a look at a series of cases, before and after, it becomes clear just how much broader

the Preference prohibition was designed to be. *Town of Greece v. Galloway*, 134 S. Ct 1811 [2014] (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 605 [1989]. While it was true that *Larson* stood for a different type of preference, that is exactly what is going on here, as opposed to in *Catholic Charities*, 7 N.Y.2d at 528. The purpose of the State's action in enforcing the so-called abortion mandate regulations is unknown, and the early exemptions provided to similarly situated individuals, businesses, churches, entities or organization, and then their swift removal demonstrates a clear situation where the DFS so-called abortion mandate regulations have drawn explicit and deliberate distinctions between different religiously affiliated organizations.

Second, the benefit at issue, and the right being given up is not *de minimus*, but fundamental, *viz.*, the right to religious freedom and conscience rights. By forcing Plaintiffs to choose between paying for health coverage that makes them complicit in the facilitation of a "grave moral" sin, or face a draconian penalty, the Preference Clause is violated.

E. Right to Free Speech

In the Christian tradition, a religious faith not expressed in conduct is inauthentic (James 2:14-26; John 2:3-6). Plaintiffs cannot say one thing and, at the State's bidding, do another without severing the vital link between words and

conduct, especially under the coercion of violating and giving up a fundamental right as freedom of religious exercise or face a draconian penalty.

Such analysis of Free Speech under the New York Constitution is similar to that under the United States Constitution. *Pico v. Board of Education*, 638 F.2d 404 [2d Cir. N.Y. 1980]. Under a traditional forum analysis, content-based discrimination typically requires strict scrutiny; moreover, if viewpoint-based, as is prevalent here, the standard is even higher. At this point it is not up to the Plaintiffs to show that their speech or expressive conduct could be regulated under a more narrow construction, especially when First Amendment rights are at stake. See *Calderon v. Buffalo*, 61 A.D.2d 323 [4th Dep't 1978], *app. denied*, 44 N.Y.2d 648 [1978]. Such impermissive action by the State, when it comes to free speech may be the coercion of Plaintiffs taking part in speech, despite their right not to, including symbolic speech, and freedom of association, where the forced joining of a group that holds ideals that go against core religious beliefs of those forced to join. See *Boy Scouts of America v. Dale*, 530 U.S. 640 [2000].

Here, compulsion of speech is most evident by the so-called abortion mandate regulations. *Walsh v. City of Auburn,* 942 F. Supp. 788 15335 [N.D.N.Y. 1996]. The abortion mandate regulations compel Plaintiffs and all other affected religious and religiously-affiliated employers, individuals and employers to foster concepts contrary to their profoundly important and sincerely held religious beliefs

and moral convictions. No exceptions apply. It is an all or nothing situation, viz., violate core religious beliefs by providing coverage that includes abortion or face overwhelming draconian penalties.

The burden on speech is exacerbated. By offering access to abortion as a "benefit" of employment, Plaintiffs are compelled to choose between the moral requirement for providing fair and just employment benefits, through health care insurance and the moral impermissibility of facilitating access to abortion. The symbolic and actual impact of a religious and religiously-affiliated employer offering and funding such abortion insurance coverage to its employees is a substantial burden and profoundly prejudicial to Plaintiffs' rights. Under such circumstances, the Court must apply strict scrutiny.

Plaintiffs enjoy a guaranteed right under Article I, Section 8, to promote their missional goals and purposes. Plaintiffs, through implementation of operational policies consistent with religious teaching on abortion, have made a powerful statement, both symbolically and literally, through the publication of their employee policy and procedure manuals, regarding the relevance and importance of their religious teachings and traditions in conducting their activities and in the daily lives of their employees. *(Verified Complaint* R. 508-510). The implementation of employee policies and procedures are based upon their religious teachings and traditions and constitute an important component of Plaintiffs'

efforts to actualize their religious beliefs by demonstrating a serious and earnest commitment to the values of the Gospel and religious teachings in the conduct of Plaintiffs' missional affairs and activities.

Plaintiffs possess a concomitant right under Article I, Section 8 of the New York Constitution to decline to foster concepts inimical to their beliefs. Article I, Section 8 protects not only the spoken and written word, but also expressive conduct (See *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496 [1985]; *Highway Tavern Corp. v. McLaughlin*, 105 A.D.2d 122 [2d Dept. 1984]). The DFS abortion mandate regulations force Plaintiffs to become an instrument for fostering public adherence to a public policy promoting the practice of abortion which Plaintiffs find morally, religiously and profoundly unacceptable.

F. Associational Liberty

The so-called Model Language the subsequent abortion mandate regulations infringe Plaintiffs' expressive association rights under Article I, Section 9. By requiring Plaintiffs to fund and cover abortion and consequently provide information to their employees regarding such insurance coverage, the abortion mandates coerce Plaintiffs to, both symbolically and literally, make a public statement and engage in expressive conduct regarding abortion which is profoundly contrary to their sincerely held religious, moral and conscience beliefs.

The only option is to pay draconian penalties and subject their own employees to similar draconian penalties.

II. THE ABORTION MANDATE VIOLATES THE CONSTITUTIONAL LIMITS OF ADMINISTRATIVE RULEMAKING

In New York governance is based on the fundamental principle of separation of powers where power is distributed among the three branches of government with a system of checks and balances that prevents excessive concentration of power of one branch. *Rapp v. Carey,* 44 N.Y.2d 157, 162-63, 167 [1978]. The authority to make laws and establish the policy of the state is the exclusive province of the Legislature. N.Y. Const. art. III, § 1. The Executive Branch however is charged with administering and enforcing the laws created by the Legislature. *Id.* at art. IV; *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995].

In certain cases, the Legislature can designate administrative agencies "with the power to fill in the interstices in the legislative product by prescribing rules and regulations consisting with the enabling legislation." *Nicholas v. Kahn,* 47 N.Y.2d 24, 31 [1979].

In *Boreali v. Axelrod,* 71 N.Y.2d 1 [1987], the Court of Appeals articulated four "coalescing circumstances" that indicate whether an administrative agency has gone beyond its proper sphere of interstitial rulemaking. These factors are "interpreted as indicators of the usurpation of the legislature, rather than a talismanic rule of four required elements that must all be present in every case."

N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene, 110 A.D.3d 1, 9 [1st Dep't 2013], affirmed 23 N.Y.3d 681 [2014].

No statute authorizes the DFS to promulgate abortion mandate regulations. All four factors, considered together, establish that the DFS exceeded the scope of existing legislative policy in violation of the constitutional separation of powers by stretching the principle of interstitial rule-making beyond the breaking point.

A. The Abortion Mandate Regulations Reflect the Executive Branch's Own Value Judgment About the Appropriate Choices Involving Broad Political, Social and Economic Concerns

The first factor articulated in *Boreali* is whether the agency "did more than balance costs and benefits according to pre-existing guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Matter of NYC C.L.A.S.H. Inc. v. New York State Off. of Parks Recreation & Historic Preserv.,* 27 N.Y.3d 174, 179-180 [2016], *quoting Greater N.Y. Taxi Assn. For Greater Taxi Assn.,* 25 N.Y.3d 600, 610 [2015]. The challenged abortion mandate regulations fall directly within the concerns expressed by the Court.

The DFS has ventured beyond legislative directives relating to health benefit insurance oversight and into the realm of broader public policy concerns. The so-called abortion mandate regulation embodies a "value judgment" and "public

policy" determination. The DFS determination in choosing between the competency values involved in the abortion debate is a "value judgment." *See Bryn v. New York City Health and Hospitals Corp.,* 31 N.Y.2d 194 [1972].

This is precisely the type of prohibited social policymaking. See *Campana v. Shaffer,* 73 N.Y.2d 237 [1989]; *Matter of Owner Occupied House., Inc. v. Abrams,* 72 N.Y.2d 553 [1988]; *Under 21, Catholic Home Bur. for Dependent Children v. City of New York,* 65 N.Y.2d 344 [1985]. A broad grant of authority does not serve as a justification for an administrative agency to resolve - under the guise of regulation - matters of social or public policy reserved to the Legislature. See *Matter of LeadingAge, N.Y., Inc. v. Shah*, 32 N.Y.3d 249 [2018].

The abortion mandate regulations were promulgated as a result of the articulated policies of the Executive Branch. In a series of published articles, the Executive Branch articulated its objectives, motivations and policy expectations regarding abortion protections and coverages. (*See Costello Aff.* Exs. "T" to "Y," R. 758-776). The real motivation for the abortion mandate regulations is apparent when one recognizes that they represent the culmination of an exhaustive, repetitive and unsuccessful effort by legislative action to accomplish same. (*See Costello Aff.* Exs. "B" to "R," R. 680-755). Contrast this with the several insurance coverage expansions which were proposed and/or passed by the Legislature under the Insurance Law. (See *Costello Aff.* Ex. "S," R. 756-757). The

challenged abortion mandate regulations do not constitute the kind of mundane, highly technical subject matter for which there is little social or political interest. Instead, they represent the Executive Branch's attempt to unilaterally address politically contentious social issues and balance competing concerns that should be within the exclusive purview of the Legislature.

Remarkably, the DFS through its own documents has conceded that it was acting upon and advancing its own ideas of public policy. The DFS assessment of public comments for the Forty-Eighth Amendment to 11 NYCRR 52 (Insurance Regulation) represents a direct admission of engineering "public policy" when the DFS in response to the "majority of commenters" scaled back the religion-based exemptions in the amendment from three (Religious Employer, Qualified Religious Organization, Employer and Closely Held for Profit Entity) to one (Religious Employer). (See *Kerwin Aff.* Exs. "H" and "L," R. 641-644, 651-657; *Costello Aff.* Exs. "AA" and "CC," R. 778-782, 783-788).

First and foremost, the Attorney General and the lower Court were focused on three general, unrelated to abortion, regulatory sections: 11 NYCRR §§ 52.6(a), 52.7(c), 52.16(c). Neither of these regulations nor any past modifications made to the Insurance Law demonstrate a pre-existing legislative foothold/supporting foundation upon which the DFS has stacked its conclusory arguments, let alone even mention abortion.

The decision made by the DFS through its abortion regulations represents the very essence of a violation of separation of powers. It was based on competing and conflicting views on abortion, which include social, political, religious and financial policy issues. It stripped autonomy from New Yorkers, especially with no supporting legislation or record and only demonstrated the numerous attempts and failures by the Legislature to agree on any kind of abortion mandate. This action by non-elected, appointed agency officials was policymaking of the kind strictly and constitutionally given to the Legislature. The regulatory amendments 47, 48, and 49 should be deemed unconstitutional.

Second, the reliance on and invocation of *Catholic Charities v. Serio*, 7 N.Y.3d 510 [2006] is flawed, not only because the lower Court, had no authority to modify, subtract from or add to the holding of the Court of Appeals, but also because the background here and that in *Catholic Charities* are fundamentally different, viz., the nature of the burden on religious liberty; the difference in subject matter and the fact that in *Catholic Charities* there was legislation replete with a voluminous legislative history. Here there is no legislation, at most there are unsupported agency regulations, the nature and scope of which are constitutionally suspect.

Third, the issue before the Court right now is abortion, not contraception. The Defendants' multiple attempts to treat abortion and contraception as the same

is as much a legal flaw as is their argument that any similarity in the causes of action for this case and those from the initial complaint in the *Catholic Charities* decision should automatically treat them without merit. If such logic on pleadings similarity would create such a heightened scrutiny, it would preclude any future complaints for any cause of action which may have been similarly dismissed in another and entirely unrelated action, based entirely on the words in the complaint and not the facts.

B. DFS Wrote on a Clean Slate, Without the Benefit of Legislative Guidance.

An administrative agency exceeds the scope of its authority when it writes on a clean slate, articulating its own vision of what public policy ought to be, rather than filling in the details of broad legislation describing the overall policies to be implemented. *Boreali, supra* at 13. As noted above, the abortion mandate regulations reflect a nearly verbatim implementation of prior proposed legislation as well as pronouncements from the Executive Branch. (See *Costello Aff.* Exs. "B" to "R" and "T" to "Y," R. 680-755, 756-776). The Executive Branch does not have the authority to enact broad policy for the State or to grant the DFS the authority to fill in the details of that policy. Authority for abortion mandate regulations must come from the Legislature. *Boreali, supra* at 6.

Defendants have asserted that the actions taken by the DFS, as an agency, are entitled to "judicial deference." *See Matter of Spencer v. Shah*, 136 A.D.3d

1242, 1246 [3d Dep't 2016]. However, what Defendants fail to note is that deference is reserved for an agency acting within its rulemaking authority, as an executive agency, and not when the actions of such an agency violate the separation of powers, *viz.*, engage in policymaking/legislation type of behavior. *Id.* Moreover, Defendants assert that the implementation of the abortion mandate is administrative rule-making within their purview, yet fail to provide a valid basis for such broad discretion, especially when the Legislature itself has been unable to pass laws mandating abortion coverage.[9] *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 178 [2016]; *see* NY CONST, ART III, § 1; ART IV, § 1). "The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 144 A.D.3d 59, 67, 38 N.Y.S.3d 880, 884 [1st Dep't

[9] In such instances, failure by the Legislature, those elected to represent the interests of the people, to create policies based on competing interests, as noted in *Boreali v. Axelrod*, 71 N.Y.2d 1, 11, 12, 13, 14 (N.Y. 1987) (specifying that lack of legislative foundation, where agency regulations act as gap-fillers and where the agency, not the Legislature, makes such cost-benefit analyses and decisions on competing/conflicting interests that affects society at large, including their autonomy and when involving complex issues, are strong indicators there has been a separation of powers violation). (See *Costello Aff.* Exs. "B" to "R" and "T" to "Y," R. 680-755, 756-776).

2016] (*quoting Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 865 [2003]; *Matter of Nicholas v. Kahn*, 47 N.Y.2.d 24, 31, [1979]).

As stated by this Court in *Matter of LeadingAge N.Y., Inc. v. Shah*, 153 A.D.3d 10, 16 [3d Dep't 2017] aff'd 32 N.Y.3d 249 [2018] "[t]he separation of powers doctrine 'requires that the [L]egislature make the critical policy decisions, while the [E]xecutive Branch's responsibility is to implement those policies.'" (citation omitted).

Thus, even in the broadest of instances, where an agency has been given regulatory authority, even with wide discretion, when it comes to making cost-benefit analyses and/or financial decisions otherwise, it may represent an abuse of the regulatory authority. (*See Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene,* 23 N.Y.3d 681, 698, [2014]; *Matter of New York City Comm. for Taxi Safety v. New York City Taxi & Limousine Commn.*, 256 A.D.2d 136, 137, [1st Dept. 1998].

The same background and support cannot be said of the cited section, Insurance Law § 3217, a generic statute which does not confer the DFS superintendent with carte blanche authority to promulgate regulations. It does not imbue the DFS with the full power of the Legislature. Both the New York State and United States Constitutions prohibit such delegation. Nondelegation is a cornerstone of the separation of powers doctrine.

The Defendants argue that what was "accomplished" by the DFS's abortion mandate regulations was "not legislative action" but amounted to merely a "flexibility to fill in details" and "subsidiary policy choices consistent with the enabling legislation." Yet the platform proffered as the pre-existing legislative foundation for the so-called abortion mandate regulations are three NYCRR sections: 11 NYCRR § 52.6(a); 52.7(c); 52.16(c), all insurance regulations sections which are generic, never discuss abortion or abortion rights, and provide no foundation for the implementation of any type of abortion mandated coverage. Rather, an analysis of 11 NYCRR §§ 52.1(p), 52.1(q), 52.2(y), 23.2(y), 52.2(aa), 52.16(o), 52.17(a)(36), 52.18(a)(11), 52.18(12), 52.71, 52.72, demonstrates a departure from the scope of authority given to the agency.

Taken in the broadest perspective, the enactment of Insurance Law § 3217, which grants the ability to the superintendent to promulgate regulations to establish the minimum standards for the form, content and sale of health insurance policies, provides no support whatsoever to the superintendent or the DFS to do what the legislation itself has not, namely mandating coverage for abortion. This limitation of agency authority was confirmed by the enactment of the Women's Health and Wellness Act by the Legislature addressing and affirmatively legislating contraception coverage in health benefit insurance plans. There was no

independent authority or action exercised by the DFS, which deferred to the Legislature for that insurance coverage issue.

The decision to include or not include abortion coverage as a key healthcare aspect was decided when the Affordable Care Act ("Act") first came into effect. Specifically, the ACA left the issue of abortion coverage to be a matter for each state. While there have been attempts, (See *Costello Aff.* Exs. "B" to "R" R. 680-755) no such legislation exists in New York. In addition, mandating coverage for abortion, which is a polemical social, political, fiscal and religious issue, affects the autonomy of citizens of New York with immense conflicting and competing interests. Under *Boreali* and its progeny, mandating abortion coverage through insurance regulations is in every way policymaking and is in every way not within administrative purview.

Before the abortion mandate regulations came out from the DFS, there were several legislative attempts, all failures, at incorporating an abortion coverage into statutorily mandated benefits. Included in the record exhibits is a list of all changes made to the Insurance Law for coverages. (*See Costello Aff.* Ex. "S," R. 756-757). Never before has there been such a great discrepancy. In between 1993 and 2017, there were multiple introduced bills concerning abortion coverage. (*See Costello Aff.* Exs. "B" to "R," R. 680-755).

Legislative insurance mandates continue to be advanced. *See Governor Cuomo Announces 2019 Women's Justice Agenda Proposal to Improve Access to IVF and Fertility Preservation* (available at https://www.governor.ny.gov//news/governor-cuomo-announces-2019-womens-justice-agenda-proposal-improve-access-ivf-and-fertility). (last visited July 15, 2019). The record demonstrates that abortion coverage is clearly polemical and that New York State has been unable to come to compromises within the members of the Legislature let alone the pertinent executive agency. As an agency, the DFS was not merely "filing in the gaps."

Here, the first three *Boreali* circumstances are relevant and applicable, demonstrating that the DFS violated the separation of powers doctrine in its independent policymaking of the abortion mandate regulations. The only issue is whether the promulgation of the abortion mandate regulations was undertaken under proper agency authority. With at least three out of four of the *Boreali* coalescing circumstances/factors, indicating that the regulations promulgated by the DFS were in violation of the separation of powers doctrine.

C. The Abortion Mandate Regulations Were Promulgated Following the Legislature's Failure to Enact the Executive's Policy Through Statute and Touch on Difficult Social Issues Over Which There is a Long History of Legislative Wrangling

The Court of Appeals noted in *Boreali* that where the Legislature has repeatedly tried and failed to reach agreement on the goals and methods of

addressing a societal problem, the Executive Branch cannot "take it upon itself to fill the vacuum and impose a solution of its own." *Boreali, supra* at 13. Such Legislative wrangling is indicative of a difficult public policy issue for the Legislative Branch to resolve.

As noted, there is an extensive history of failed proposed legislation in the area of abortion coverage. (*See Costello Aff.* Exs. "B" to "R," R. 680-755). The Legislature has a long history of wrangling with this policy issue and decision making. The history of the Legislature's consideration and ultimate rejection of several bills regarding abortion coverage establishes that this is an issue for the Legislature, not an executive agency. The Court of Appeals has confirmed that "failed Legislative action" concerning the specific subject matter demonstrates that an agency's attempt to take it upon itself to fill the vacuum and impose a solution of its own is improper. *Statewide Coalition, supra* at 110 A.D.3d 1.

In the past, regulations passed by the DFS have always been based on a legislative foothold, however, here, no such foundation, let alone even a reference to abortions (medically necessary or otherwise) exists for the subject abortion mandate regulations. *See Matter of Nicholas v. Kahn*, 47 N.Y.2d at 31. Put simply, administrative regulations come from legislative action, not born by and of an executive agency's own interest, policymaking choices and decisions. Administrative regulations are not meant to represented the will of the people, but

to implement the legislation and polices of those elected by the people. *See Boreali*.

In acting as policymakers, the DFS created its own entire platform for abortion mandates, making more than just the basic cost/benefit analysis. Rather, the DFS took it upon itself to create an entire scheme centered on the forced implementation of a policy issue that is incredibly polemical, social, political, philosophical, financial and moral. The main reason being the multiple bills introduced in the New York State Legislature that never passed. By creating and enforcing the abortion mandate, the DFS not only substantially burdened and unreasonably interfered with the religious expressions of all New Yorkers, but took away the autonomy of the Legislature and its elected officials. For a point of comparison, *Greater N.Y. Taxi Assn v. New York City Taxi Limousine Commn*, 25 N.Y.3d 600, 612–13 [2015] is instructive on resolving "social problems concerning matter of personal autonomy."

D. The Abortion Mandate Regulations Do Not Require the DFS's Special Expertise or Technical Competence

The final factor that the Court of Appeals looked at in *Boreali* was whether the issue at hand was the type of highly technical issue appropriate for interstitial rulemaking. When an agency addresses an issue that is not particular technical and could have been addressed directly by the Legislature, the agency has likely exceeded its authority and usurped the Legislature's role. *Boreali, supra* at 14.

What the DFS identifies as its special expertise must be viewed and assessed through the prism of prior legislation which effected insurance coverages, most especially the Women's Health and Wellness Act. The Legislature has consistently amended the Insurance Law to provide expansions and additions to insurance coverages. (*See Costello Aff.* Ex. "S," R. 756-757). No expertise was required by the DFS in the so-called abortion mandate regulations.

III. THE ABORTION MANDATE VIOLATES THE UNITED STATES CONSTITUTION

The United States Constitution provides separate and distinct protections to Plaintiffs' religious liberty rights. The textual differences and case law precedent emphasize the safeguards to religious liberty provided by the United States Constitution.

A. Free Exercise Clause

The so-called abortion mandate regulations violate the Federal Free Exercise Clause. Failing to meet even legislative standards the DFS abortion mandate regulations, which are not grounded in statute or regulation, are not "generally applicable" or "neutral" because through their design, interpretation and enforcement, they target the practices of certain religious employers for discriminatory treatment.

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." (*Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 2225 [1993]; quoting *Cantwell v. Connecticut,* 310 U.S. at 303). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *(Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 877, 110 S.Ct. 1595, 1599 [1990]). Indeed, the First Amendment excludes all "governmental regulation of religious beliefs as such." *(Id.;* quoting *Sherbert v. Verner*, 374 U.S. 398 at 402, [1963]. The State may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.' *(Id.;* citing *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680 [1961]; *United States v. Ballard,* 322 U.S. 78,86-88,64 S.Ct. 882, 886-87 [1944]; *Larson v. Valente,* supra, 456 U.S. at 245, 102 S.Ct. at 1683-84 [1982]; *Serbian Eastern Orthodox Diocese v. Milivojevich* [1976] 426 U.S. 696, 708-725, 96 S.Ct. 2372, 2380-2388 [1976]).

The Supreme Court has articulated the proposition that a law that is not neutral or is not of general applicability must be justified by a compelling governmental interest if the law has the incidental effect of burdening a particular religious practice. (See *Lukumi Babalu Aye,* supra, 508 U.S. at 531, 113 S.Ct. at

2226; *citing Employment Div., Dept. of Human Resources of Oregon v. Smith,* supra, 494 U.S. at 879, 110 S.Ct. at 1600).

A law failing to satisfy the critical requirements of "neutrality" and "general applicability" is subject to strict scrutiny and must be justified by a "compelling governmental interest" and be narrowly tailored to advance that interest. Because the abortion mandate regulations dealing with abortion coverage are not "neutral" or "generally applicable," those provisions are subject to "strict scrutiny" and, for the reasons discussed above, do not survive the application of such a standard of review.

The DFS's decision to exclude certain religious organizations but not others from the abortion mandate regulations demonstrates intentional targeting of the religious beliefs of certain religiously-affiliated organizations. The DFS's refusal to extend the exemption to all religious organizations, as a whole, is the product of discriminatory intent on the part of the DFS against churches and their constituent religious organizations including, but not limited to, the Plaintiffs.

B. Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *(Larson v. Valente,* 456 U.S. 228, 244, 102 S.Ct. 1673, 1683 [1982]). Since *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, [1947], the U.S. Supreme Court has adhered

to the principle, "clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid one religion' or that 'prefer one religion over another."' *(Larson,* supra, 456 U.S. at 246, 102 S.Ct. at 1684; quoting *Everson,* supra, 330 U.S. at *15.)* "The fullest realization of true religious liberty requires that government effect no favoritism among sects ... and that it work deterrence of no religious belief" *(Larson,* supra, 456 U.S. at 246, 102 S.Ct. at 1684; quoting *Abington School District v. Schempp,* supra, 374 U.S. at 305, 83 S.Ct. at 1615). When "presented with a state law granting a denominational preference, [the decisions of the U.S. Supreme Court] demand that [a court] treat the law as suspect and that [it] apply strict scrutiny in adjudging its constitutionality."' *(Larson,* supra, 456 U.S. at 246, 107 S.Ct. at 1684; *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* 483 U.S. 327, 339, 102 S.Ct. 2862, 2870 [1987] ("[L]aws discriminating among religions are subject to strict scrutiny").

As discussed above, in the New York State Constitution section, the so-called abortion mandate regulations demonstrate a clear violation of all three of the prongs of the *Lemon* Test. Most obvious though is the violation of the second prong, because by not allowing certain similarly situated churches, individuals, groups, and entities exemptions the so-called abortion mandate regulations have demonstrated an overt preference for certain denominations by granting the

exemption to them, and then removing it from the so-called abortion mandate regulations after the commencement of this action. In this way, the primary effect is a benefit to some religions and denied it to others; failed to stay neutral where required. Thus, in failing to neither inhibit nor advance religion, the so-called abortion mandate regulations violate the Establishment Clause and strict scrutiny would apply.

C. Free Speech and Associational Rights

The Free Speech Clause protects not only the spoken, or refusal to speak, and written word, but also expressive conduct (see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065 [1984]). The U.S. Supreme Court recognized that "implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends (*Boy Scouts of America v. Dale,* 520 U.S. 640 120 S.Ct. 2446, 2451 [2000] quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252 [1984].

Compulsory funding violates the constitutional guarantees of free speech and association (see *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 235, 97 S. Ct. 1782, 1793, 1799-80 [1977]; *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 455-57, 104 S. Ct. 1883, 1896-97 [1984]; *Keller*

v. State Bar of California, 496 U.S. 1 [1990], 110 S.Ct. 2228). *Boy Scouts of America v. Dale* recognizes that for purposes of association, just as *Clark v. Community for Creative Non-Violence* recognizes for purposes of speech, that what one says and what one does are inextricably linked. The challenged abortion mandate forces the Plaintiffs to "affirm in one breath that which [it] den[ies] in the next," (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 576, 115 S. Ct. 2338, 2348 [1995], quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16, 106 S.Ct. 903, 912 [1986] (see *Wooley v. Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435 [1977]). Clearly important, is that the DFS action here has a significant impact affecting rights of communication. *See Serio* 7 N.Y.3d 523–24.

With freedom of expression, one must be dealing with an actual right, which here is religious freedom, along with the rights to communicate, both of which are fundamental rights. The abortion mandate is inconsistent with religious teachings such as the Ethical and Religious Directives for Catholic Health Care Services (R. 322-364). Plaintiffs have made a powerful statement and implementation of expressive conduct, both symbolically and literally, through publication of their employee policy and procedure manual materials regarding the relevance and importance of religious teachings in conducting their business and in the daily lives of their employees. (*Verified Complaint* R. 508-510).

Plaintiffs, as church institutions, employers and individuals enjoy a First Amendment right to evangelize and to promote their mission. Plaintiffs' implementation of employee policies and procedures, which reflect and are based upon religious teachings, ethics and conscience, constitute a critical component of Plaintiffs' constitutionally protected right to promote their missions and operations by demonstrating their serious and earnest commitment to living the values of the Gospel and church teachings on morals and ethics.

D. Equal Protection Clause

Because the so-called abortion mandate regulations focus on an improper classification, *viz.*, religion, and because the DFS abortion mandate regulations make an impermissible classification among employers based upon the exercise of fundamental religious rights, specifically the constitutionally protected right to free exercise of religion and to be free of denominational preferences, they violate the Equal Protection Clause contained in the Fourteenth Amendment to the United States Constitution.

The basis for the distinctions drawn by the DFS abortion mandate regulations is religious not secular. It inherently treats similarly situated individuals and organizations differently based solely on religious viewpoint. The classifications are intentionally drawn to specifically burden certain religious employers insofar as their denominations are the only religious denomination that

operate and human service agencies in New York on a statewide scale and have a religious proscription against the practice of abortion. The distinctions were drawn to impact specific religious denominations with strong, well-publicized religious teachings against the use of abortion, *viz*., the Roman Catholic Church, Episcopal Church, Baptist Church and Lutheran Church. DFS "gerrymandered" certain denominations by way of separating them into distinct segments through the use of an unconstitutional classification scheme and thereby imposing a severe burden upon Plaintiffs' religious freedom rights. *Lown v. Salvation Army, Inc.,* 393 F. Supp. 2d 223, 236 [S.D.N.Y. 2005].

E. "Hybrid Claims"

The so-called abortion mandate regulations imposed substantial burdens on Plaintiffs regarding their First Amendment religious freedom rights (*See Catholic Charities,* 7 N.Y.3d at 524–525) and infringe their First Amendment-hybrid rights under the United States Constitution (*Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 100 S. Ct. 1595 [1990]), calling for the exceptional use of strict scrutiny in "hybrid situations."

The so-called abortion mandate regulations burden Plaintiffs' hybrid rights under the Constitution of the United States in the following combinations:[10] (1) Free Exercise Clause – Free Speech; (2) Free Exercise Clause – Expressive

[10] Because each claim in one of the *Smith* claims has been discussed in full, Plaintiffs respectfully submit they did not want to be duplicative.

Association and Associational Rights; (3) Free Exercise Clause – Equal Protection Clause; (4) Free Exercise Clause – Establishment Clause; (5) Free Speech – Expressive Association and Associational Rights; (6) Free Speech – Equal Protection Clause; (7) Free Speech – Establishment Clause; (8) Expressive Association and Associational Rights - Equal Protection Clause; (9) Expressive Association and Associational Rights - Establishment Clause; and (10) Equal Protection Clause - Establishment Clause.

IV. THE ABORTION MANDATE VIOLATES STATUTORY FREE EXERCISE PROTECTION

A. Human Rights Law

The enactment of the Human Rights Law was "deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights" (N.Y. Exec. Law §290(2) (McKinney 2001)). The provision by a New York employer of a group or blanket health policy providing hospital, surgical or medical coverage to employees constitutes a benefit which affects the terms, conditions or privileges of employment (N.Y. Exec. Law §296(1)(a) (McKinney 2001); *American Bank Note Co. v. State Division of Human Rights*, 71 A.D.2d 583 [1st Dept. 1979], affirmed 49 N.Y.2d 852 [1980]. The Legislature, by enacting the Human Rights Law, has pre-empted the area of the employer-employee relationship by previously exempting religious employers

from taking any action which would violate their sincerely-held religious beliefs within the employer-employee relationship dealing with the terms, conditions and privileges thereof: (N.Y. Exec. Law § 296(11) (McKinney 2001)).

There is a clear preference permitted to effectuate the religious missions of organizations. *Scheiber v. St. John's Univ.*, 84 N.Y.2d 120, 123 [1994].

B. Religious Corporations Law

New York's Religious Corporation Law § 26 and § 5 demonstrate that internal church matters should be uninhibited by government involvement and should be left to internal church administration and governance. *See* NY Religious Corporation Law § 5. Under § 26, the state statutes outline that Courts are to remain out of internal church decisions.

Here, the abortion mandate regulations imposed by DFS impermissibly define religion and contravene the sphere of legal regulation of religious organizations, by drawing distinctions between those who received exemptions and those who did not, violating § 5. In addition the DFS abortion mandate regulations abrogate the statutory protections safeguarded to religious organizations under the law in New York and violate Plaintiffs' sincerely held religious beliefs and their rights to religious freedom and liberty of conscience, violating § 26. Violations are evident regarding the decisions for employees, i.e. dealing with benefits and exemptions. *Morris v. Scribner*, 69 N.Y.2d 418 [1987]; *Saint Nicholas Cathedral*

of Russian Orthodox Church in North America v. Kedroff, 302 N.Y. 1 [1950], reversed on other grounds 73 S.Ct. 143, 344 U.S. 94, *remittitur amended* 306 N.Y. 38). By invading the sphere of religious and ecclesiastical freedom and Church autonomy, the so-called abortion mandate regulations violate the Religious Corporations Law and the principles of autonomy.

V. THE ABORTION MANDATE IS ARBITRARY AND CAPRICIOUS

An administrative regulation should be annulled if it does not have a rational basis or is unreasonable, arbitrary and capricious. *Matter of N.Y.S. Assn. of Counties v. Axelrod,* 78 N.Y.2d 158, 166 [1991]; see also *Matter of Consolation Nursing Home, Inc. v. Commissioner of New York State Department of Health,* 85 N.Y.2d 326, 331-332 [1995]. "Administrative Rules are not judicially reviewed *pro forma* in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *Matter of N.Y.S. Assn. of Counties v. Axelrod, supra* at 166. Regulations that are based on speculation and erroneous assumptions, and that lack in evidentiary basis are arbitrary and capricious and should be annulled. See, *Jewish Men'l Hosp. v. Whalen,* 47 N.Y.2d 331, 343 [1979].

The abortion mandate regulations are arbitrary and capricious because they unfairly discriminate and disadvantage employers who are religiously affiliated and/or have moral objections to the mandates.

VI. THE CONSTITUTIONAL INJURY SUSTAINED SUPPORTS INJUNCTIVE RELIEF

"When an alleged deprivation of a constitutional rights is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 [2d Cir. 1984]; *see McCall v. State*, 215 A.D.2d 1, 5 [3d Dep't 1995]; *Wright and Miller,* Federal Practice and Procedure Section 2948, p. 440 [1973]; *See*, *Paulsen v. County of Nassau*, 925 F.2d 65 [2d Cir. 1991]. Here, the constitutional burdens imposed on religious freedom under both the Federal and New York State Constitutions are immense, immediate, ever existing and impossible to avoid. The Supreme Court has held that "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 [1976]. Here, there is no choice; there is only coercion.

VII. *CATHOLIC CHARITIES v. SERIO* WARRANTS REVERSAL OR AT A MINIMUM REFINEMENT FOR THE PROTECTION OF RELIGIOUS LIBERTY UNDER THE NEW YORK STATE CONSTITUTION[11]

The Court of Appeals in *Catholic Charities v. Serio,* 7 N.Y. 3d [2006] adopted a minimalist level of protection for the religious freedom guarantee and its analysis under the New York State Constitution. The Court determined as a matter of law that the constitutional right of religious freedom is infringed only when

[11] This issue was raised and briefed before the Supreme Court and is preserved on this appeal.

religious objectors can demonstrate that the "interference with religious practice is unreasonable, and therefore requires an exemption."

This represents an extraordinary repudiation of traditional constitutional principles and analysis. When infringement claims are advanced involving fundamental constitutional rights, such as free speech, free press or equal protection, constitutional law, doctrine and principles place the burden on the government to demonstrate the burden is justified. The Court of Appeals, however, in *Catholic Charities* held that the justification for interfering with religious freedom need only be reasonable and that the religious objection bears the burden to demonstrate otherwise.

The *Catholic Charities* religious freedom rule and analysis inverts traditional constitutional analysis and eviscerates the most fundamental of rights under the New York Constitution.

The *Catholic Charities* religious freedom analysis is amorphous and vulnerable to inconsistent application. How does a court evaluate the degree of seriousness of a religious tenet or practice, the competing interests at stake, the degree of interference, or the degree of unreasonableness?

Affirming the protection of religious liberty under the new York State Constitution warrants reversal of *Catholic Charities* or significant refinement and clarification.

CONCLUSION

For the foregoing reasons, the judgement of the Supreme Court should be reversed. A judgement should be entered declaring the DFS abortion mandate as unconstitutional, under the New York and United States Constitutions, as applied to these Plaintiffs.

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