APL-2022-0089
Albany Co. Clerk Index Nos. 7536-17/2070-16
Appellate Division – Third Department Case No.529350

Court of Appeals

State of New York

THE ROMAN CATHOLIC DIOCESE OF ALBANY; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES OF THE DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBERG; 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.; RENEE MORGIEWICZ; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION,

Plaintiffs-Appellants,

– against –

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants-Respondents.

NOTICE OF MOTION

EDWARD T. MECHMANN, ESQ.
ALEXIS N. CARRA-TRACEY, ESQ.
Attorneys for Amicus Curiae
New York State Catholic Conference
1011 First Avenue
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COURT OF APPEALS
STATE OF NEW YORK

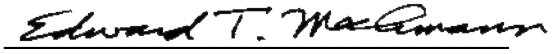
THE ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL., *Plaintiffs-Appellants,* v. ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, *Defendants-Respondents.*	APL-2022-0089 Albany Co. Clerk Index Nos. 7536-17/2070-16 Appellate Division – Third Department Case No.529350 **MOTION TO APPEAR AS *AMICUS CURIAE* AND TO FILE A BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS**

PLEASE TAKE NOTICE , that upon the annexed affirmation of Edward T. Mechmann, dated August 25, 2023, the undersigned will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, 12207, on the 11th day of September 2023, for an order pursuant to Section 500.23(a) of the Court of Appeals Rules of Practice, granting to the New York State Catholic Conference permission to appear as *amicus curiae* and to file a brief in support of Plaintiffs-Appellants in their appeal of the June 2, 2022, Decision and Order of

the Supreme Court of the State of New York, Appellate Division, Third Department, and for such other relief as may be just and proper.

Dated: New York, New York
August 25, 2023

Respectfully submitted,

By: 

Edward T. Mechmann, Esq.
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1011 First Avenue
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To: Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street Albany, New York 12207

Hon. Letitia James
Attorney General of the State of New York
Laura Etlinger
Assistant Solicitor General
The Capitol
Albany, NY 12224
Attorney for Defendants-Respondents

Michael L. Costello
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Albany, New York 12207
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COURT OF APPEALS
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THE ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL., *Plaintiffs-Appellants,* v. ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, *Defendants-Respondents.*	APL-2022-0089 Albany Co. Clerk Index Nos. 7536-17/2070-16 Appellate Division – Third Department Case No.529350 **AFFIRMATION IN SUPPORT OF MOTION TO APPEAR AS *AMICUS CURIAE* AND TO FILE A BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS**

EDWARD T. MECHMANN, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney for the New York State Catholic Conference ("the Catholic Conference"), and I submit this affirmation in support of the motion by the Catholic Conference for leave to appear as *amicus curiae* and to file a brief in support of the Plaintiffs-Appellants in the above-titled action.

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

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

3. This action involves issues of great interest to the Catholic Church. In addition to concerns about the common good and the health of society as a whole, the Church in New York State operates the largest network of non-governmental educational, social service and health care providers. Catholic institutions provide their services in an atmosphere of respect for the value and dignity of all human life, with

special attention to poor, vulnerable, and marginalized persons. The bishops of New York State, who are the constituent members of the Catholic Conference, are ultimately responsible for ensuring that our religious beliefs are adhered to in all Catholic institutions.

4. The freedom of Catholic individuals and institutions to act according to our faith is thus a major concern to the Catholic Conference. The Church has always taught that the killing of an innocent human being is gravely immoral under any and all circumstances, and that nobody may commit such a crime, cooperate in it, or obey a law that permits it. The Abortion Mandate that is the subject of this case requires Catholic institutions to pay for elective abortions through their employee benefit plans. This forces them to violate their religious beliefs by cooperating in a gravely immoral act.

5. This Court's erroneous ruling in *Catholic Charities v. Serio,* 7 N.Y.3d 510 (2006), fundamentally mis-interpreted the Free Exercise Clause of the New York State Constitution and has had a significant negative impact on religious liberty in this state. The issue is thus vitally important to the public in general and to the Catholic Conference.

6. The Catholic Conference therefore seeks to submit an *amicus curia*e brief to argue that this Court should: (1) overrule *Catholic Charities* and (2) apply the appropriate standard of strict scrutiny to find that the Abortion Mandate is unconstitutional under the Free Exercise Clause.

7. The proposed brief will present original research and analysis. This brief will not be duplicative of arguments raised by Petitioners-Appellants and will present analysis that will not have been brought to the court's consideration. This argument is not directly presented by the Plaintiffs-Appellants in their brief to this Court, which focuses entirely on arguments the Free Exercise Clause of the United States Constitution.

8. The Catholic Conference has the consent of Plaintiffs-Appellants for the submission of this *amicus curiae* brief.

9. The Catholic Conference has previously filed two *amicus curiae* briefs in the Appellate Division, Third Department, on this case, in which similar arguments were made. Raising these arguments before this Court is particularly important, however, since only this Court can

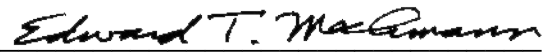
correct *Catholic Charities*.

10. The Catholic Conference will file an *amicus curiae* brief within one week of the Court's granting Petitioner's motion or at such other time as the Court may direct.

11. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that the Court grant this motion for leave to appear as *amicus curiae* and to file a brief in support of the Plaintiffs-Appellants.

Dated: New York, New York
August 25, 2023



Edward T. Mechmann, Esq.
Attorney for New York State Catholic Conference
1011 First Avenue
New York, NY 10022

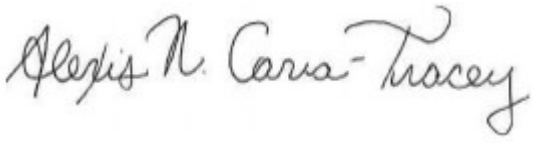
AFFIRMATION OF SERVICE

I, Alexis N. Carra, an attorney admitted to practice before the courts of the State of New York, affirm under penalty of perjury that on August 25, 2023, I served the attached motion and copy of the proposed *Amicus Curiae* Brief, dated August 22, 2023, by enclosing the aforesaid documents in a properly addressed postage paid envelope deposited into the custody of the FedEx overnight delivery service for overnight delivery addressed as follows:

Hon. Letitia James
Attorney General of the State of New York
Laura Etlinger
Assistant Solicitor General
The Capitol
Albany, NY 12224
Attorney for Defendants-Respondents

Michael L. Costello
Tobin and Dempf, LLP
515 Broadway
Albany, New York 12207
Attorney for Plaintiffs-Appellants

Dated: August 25, 2023
New York, NY



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Plaintiffs-Appellants,

– against –

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants-Respondents.

SUPPLEMENTARY AFFIRMATION

EDWARD T. MECHMANN, ESQ.
ALEXIS N. CARRA-TRACEY, ESQ.
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1011 First Avenue
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646-794-2807

COURT OF APPEALS
STATE OF NEW YORK

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I, EDWARD T. MECHMANN, an attorney duly admitted to practice in the State of New York, hereby affirm under penalty of perjury as follows:

1. I am an attorney for the New York State Catholic Conference.

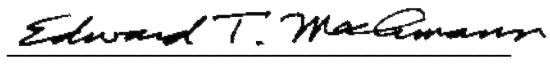
2. On August 25, 2023, I submitted a motion for leave to appear as *amicus curiae* and to file a brief in support of the Plaintiffs-Appellants in the above-titled action.

3. In my affirmation in support of that motion, the statement required by Court of Appeals Rules of Practice § 500.23(a)(4)(iii) was omitted. I hereby submit this supplementary affirmation to correct that omission.

4. I affirm that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief.

Dated: New York, New York
September 5, 2023

Respectfully submitted,

By: 

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Attorney for Defendants-Respondents

Michael L. Costello
Tobin and Dempf, LLP
515 Broadway
Albany, New York 12207
Attorney for Plaintiffs-Appellants

AFFIRMATION OF SERVICE

I, Alexis N. Carra, an attorney admitted to practice before the courts of the State of New York, affirm under penalty of perjury that on September 5, 2023, I served the attached supplementary affirmation, by enclosing the aforesaid documents in a properly addressed postage paid envelope deposited into the custody of the United States Postal Service for overnight delivery, addressed as follows:

Hon. Letitia James
Attorney General of the State of New York
Attn: Laura Etlinger
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Attorney for Defendants-Respondents

Michael L. Costello
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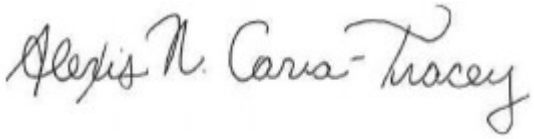
515 Broadway
Albany, New York 12207
Attorney for Plaintiffs-Appellants

Dated: New York, NY
September 5, 2023



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Plaintiffs-Appellants,

– against –

ADRIENNE A. HARRIS, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants-Respondents.

BRIEF FOR AMICUS CURIAE
NEW YORK STATE CATHOLIC CONFERENCE

EDWARD T. MECHMANN, ESQ.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Cases

[1] All citations are cleaned up to enhance readability by removing internal citations, quotation marks, ellipses, etc. and modernizing spelling.

Constitutions, Statutes, Codes and Regulations

Other Cited Authorities

INTEREST OF THE *AMICUS CURIAE*

The New York State Catholic Conference has been organized by the Roman Catholic Bishops of New York State as the institution by which the Bishops speak in the field of public policy and public affairs. When permitted by courts, the Catholic Conference participates as a party and files briefs as *amicus curiae* in litigation of importance to the Catholic Church and the common good of the people of the State of New York.

The freedom of Catholic individuals and institutions to act according to our faith is a major concern to the Catholic Conference. The Church in New York State operates the largest network of non-governmental educational, social service, and health care providers. The bishops of New York State are ultimately responsible for ensuring that our religious beliefs are adhered to in all Catholic institutions.

The Church has always taught that the killing of an innocent human being is gravely immoral under any and all circumstances, and that nobody may commit such a crime, cooperate in it, or obey a law that permits it. The Abortion Mandate being challenged in this case would require Church institutions and employees to violate their faith

by forcing them to pay for abortions.

The Catholic Conference thus has a very significant interest in defending the religious liberty of the Church in this case, and to set a precedent for any further threats to that freedom.

Amicus concurs with all the arguments presented in the Plaintiffs-Appellants' ("Religious Objectors") brief on appeal to this Court and joins their request that the Court find that the Abortion Mandate violates the Free Exercise Clause of the United States Constitution. Because the Religious Objectors' argument is exclusively about federal law, *Amicus* writes separately to ask the Court to find that the Abortion Mandate is also unconstitutional under the Free Exercise Clause of the New York State Constitution.

INTRODUCTION

This important case has returned to this Court after a complex procedural history. That history is set forth in the Brief of the Religious Objectors' and need not be repeated here.

Amicus submits that the decision in *Catholic Charities v. Serio*, 7 N.Y.3d 510 (2006), was fundamentally flawed, failed to reflect the

meaning of the constitutional text, and has now been fatally undermined and effectively overruled by the Supreme Court of the United States in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

This Court should now overrule *Catholic Charities* and hold that under the New York State Constitution's Free Exercise Clause, strict scrutiny analysis applies to any law that burdens the free exercise of religion. Under that test, the Abortion Mandate should be held to be an unconstitutional burden on the Religious Objectors.

ARGUMENT

I. THE STATE CONSTITUTIONAL STANDARD ESTABLISHED IN *CATHOLIC CHARITIES V. SERIO* SHOULD BE OVERRULED.

In *Catholic Charities v. Serio*, this Court established a standard for evaluating a law that burdens the free exercise of religion under the New York State Constitution. But that test was flawed from the beginning and its underlying reasoning is incompatible with the Supreme Court's ruling in *Fulton v. City of Philadelphia,* 141 S. Ct. 1868 (2021) and the constitutional text itself. This Court should now recognize these fatal flaws and overrule *Catholic Charities*.

A. *Catholic Charities v. Serio* Has Been Effectively Overruled by *Fulton v. City of Philadelphia.*

The holding in *Catholic Charities* rested entirely on the foundation of the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). By granting certiorari, vacating, and remanding this Court's earlier ruling for further consideration, the Supreme Court sent an unmistakable message that this Court had fundamentally misconstrued *Smith*. *Roman Cath. Diocese of Albany v. Emami*, 142 S. Ct. 421 (2021).

In *Catholic Charities*, this Court purported to follow *Smith* and focused as a threshold matter on whether the statute in question was neutral and generally applicable. *Catholic Charities*, 7 N.Y.3d at 526. But the Supreme Court made clear in *Fulton* that the existence of exemptions must be considered separately from neutrality or targeting, and is in fact the most important consideration in evaluating a law's constitutionality. In *Fulton*, the Supreme Court did not even mention the need to show targeting of religion in order to negate a law's general applicability.

This Court thus made a fatal error in *Catholic Charities* – instead

of analyzing the elements of neutrality and general applicability independently, it conflated them together. It erroneously considered exceptions to be relevant only to the question of neutrality or targeting. *Id.* at 522. The Court in *Catholic Charities* failed to take the necessary next step and consider whether the existence of exceptions – the existence of which the Court acknowledged – rendered the law not generally applicable.

The *Catholic Charities* analysis is thus utterly incompatible with *Fulton* and other recent federal Free Exercise cases decided by the Supreme Court. *Fulton* repeatedly stressed that "a law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" and "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason". *Id.* at 1877; *also Id.* at 1879 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude

—here, at the Commissioner's 'sole discretion.'").

Fulton and other recent decisions emphasize that when there are discretionary exceptions in a law that lead to disparate treatment of religion, it is not generally applicable and is no longer to be evaluated under a rational basis standard. *See Tandon v. Newsom*, 141 S.Ct. 1868 (2021) *and Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020). The rational basis standard adopted in *Catholic Charities* is thus no longer tenable.

This Court should correct the mistaken ruling in *Catholic Charities* and repudiate its flawed standard. That is the appropriate response when a ruling from the Supreme Court on federal grounds has required an independent re-evaluation of the state constitutional standards. *E.g.*, *People v. P.J. Video*, 68 N.Y.2d 296 (1986).

B. The *Catholic Charities* Standard is Incoherent.

Even aside from having been effectively overruled, the *Catholic Charities* standard is incoherent and contradicts traditional constitutional law and precedent. The first problem is identifying exactly what the standard actually is. It seems to shift even across the relatively brief opinion itself, leaving nothing but doubt and confusion.

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

The Court then invented a brand-new and unprecedented standard: "We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." *Id.* But just three paragraphs later, they reversed course and resurrected the *Smith* rule that they had supposedly just rejected:

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

To further add to the confusion it had thus created, the Court gave

no indication as to how to determine when or if the (previously) rejected and "inflexible" but (later revived) "usual, though not invariable rule" of *Smith* will apply or not. Such confusion is not a reasonable way to define a standard of constitutional review for such an important and fundamental right. "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

The incoherence of *Catholic Charities* is evident in the Court's suggestion that certain restrictions would be unreasonable – confidentiality of the confessional, the use of alcoholic wine at Communion, kosher meat preparation, and the male celibate priesthood. *Catholic Charities,* 7 N.Y.3d at 527. It is not at all obvious why those practices would be so easy for a claimant to prove to be "plainly inconsistent with basic ideas of religious freedom." *Id*. Indeed, in this case, involving the much more significant issue of cooperation in the taking of innocent human life, this Court dismissed the burden on our beliefs without even briefing the case, because "no substantial constitutional question is directly involved". *Roman Cath. Diocese of Albany v. Vullo*, 36 N.Y.3d 927 (2020). How can a ban on communion wine be an easy case, but mandated insurance coverage for abortion is

so easily brushed aside?

Surely, a law that intrudes upon such an important right deserves to be reviewed under a more coherent standard.

C. The Standard Wrongly Shifts the Burden to the Religious Objectors.

On top of the confusion inherent in the *Catholic Charities* rule is an even more fundamental flaw. It imposed the burden of proof on the religious objector to establish that the interference is unreasonable. This was a radical break from all precedent and turned constitutional law on its head – creating a backwards rational basis test.

It is also flatly inconsistent with the legal standard that applies to every other fundamental constitutional right – freedom of speech, assembly, press, association, voting, racial equality, and more. Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 St. Thomas L.J. 650, 667-68 (2018). There is no constitutional principle that would justify shifting the burden of proof from the government to the aggrieved party who wishes to defend their rights.

In fact, the Court in *Catholic Charities* erred in its sole citation to one of its own precedents as authority for the use of a balancing test

with a burden shift. The Court relied on *LaRocca v. Lane*, 37 N.Y.2d 575 (1975), but *LaRocca* actually cited pre-*Smith* federal decisions that applied a strict scrutiny standard, thereby implying that it was using the same standard. Neither *LaRocca* nor any case cited therein imposed a burden on the religious objector to prove that the restriction on their religious beliefs were unreasonable.

In fact, prior to *Catholic Charities*, it was assumed that the State bore the burden of proof. In a concurring opinion in *Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990), which dealt with whether a religious objector could be required to undergo medical treatment against her religious beliefs, one judge of this Court stated that:

> [T]he State requires her to undergo treatment which violates her religious beliefs it interferes with her fundamental constitutional rights. Before doing so, **it [i.e., the State]** must demonstrate under the 'strict scrutiny' test that the treatment pursues an unusually important or compelling goal and that permitting her to avoid the treatment will hinder the fulfillment of that goal. *Id*. at 234 (Simons, J. concurring). (emphasis added)

Lower courts also took for granted that whatever analysis applied, the burden would remain on the State. For example, in *Rourke v. New York State Dep't of Corr. Servs.*, 201 A.D.2d 179 (4th Dept. 1994), the court found the plaintiff had satisfied his obligation to show that his

religious beliefs were burdened, "thus placing the burden **upon respondents [i.e., the State]** to demonstrate that requiring petitioner to comply with the policy furthers a legitimate State interest which outweighs the negative impact upon his religious freedom". *Id*. at 183. (emphasis added)

Because *Catholic Charities* wrongfully shifted the burden of proof, the government is thus "relieved of any requirement to justify the burden placed on religious liberty," claimants are left to wonder what (if any) protection their rights still enjoy, or if their beliefs are merely "a nuisance to be dismissed as not quite so important." Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 St. Thomas L.J. at 689.

D. The Standard is Inconsistent With the Constitutional Text.

Catholic Charities also veered far from the constitutional language itself:

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

It is a guiding principle of constitutional interpretation that the words must be applied according to the "plain import of the language." N.Y. Statutes § 94; *Matter of King v. Cuomo*, 81 NY2d 247, 253 (1993). *Catholic Charities* utterly failed to do so.

The current constitutional provision is substantially identical to the very first New York State Constitution, which was adopted in 1777 during the Revolutionary War. N.Y. Const., Article XXXVIII (1777).

That constitutional language was carefully chosen to grant expansive religious freedom. The Constitutional Convention rejected the colonial regime of an established church, governors with the authority to appoint or dismiss ministers, ministers eligible to hold public office, and an explicit denial of religious tolerance for Catholics (disparagingly referred to as "Papists"). Charles Z. Lincoln, *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905*, vol. 1, p. 541-46 (1906), https://archive.org/details/cu31924032657615/page/540/mode/2up. The delegates rejected repeated efforts to reinstitute some of those restrictions and other efforts to narrow the guarantee of religious liberty. *Id*. The result was that "New York had adopted one of the

strongest constitutional clauses on religious liberty of all the states." William A. Polf, *1777: The Political Revolution and New York's First Constitution* 36 (1977).

The plain meaning of the text, as understood by those who enacted it, thus creates a strong presumption of religious freedom. The only exception is if a person's conduct would constitute "licentiousness" or would endanger "the peace or safety of the state." At the time of the adoption of the Constitution of 1777, the terms "licentiousness" and "peace or safety of the state" were understood to mean behavior that was criminal, libelous, or a serious breach of public order. *E.g.*, William Blackstone, *Commentaries on the Laws of England*, Vol. V, Ch. 11 (https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-411/). Restrictions on religion were thus acceptable only in grave cases of lawless behavior, not in any situation where the government seeks to regulate otherwise lawful behavior.

This was demonstrated when New York ratified the new United States Constitution a decade later in 1787. In their statement of principles accompanying the message of ratification, the Convention of New York affirmed that "the people have an equal, natural, and

unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others." Jonathan Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Elliott's Debates)*, Vol. 1, p. 328, https://www.usconstitution.net/rat_ny.html. The delegates did not see fit to include any qualifications to that guarantee of religious liberty.

The broad protection of the Free Exercise Clause was recognized by the first New York court to consider it. A trial court was confronted with an attempt to force a Catholic priest to breach the seal of the Sacrament of Confession. *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813) (reprinted in William Sampson, *The Catholic Question in America* (1813), https://books.google.com/books?id=elk3AAAAMAAJ&). The court rebuffed that effort, and looked to the specific terms of the Constitution and their plain meaning:

> The language of the constitution is emphatic and striking, it speaks of acts of licentiousness, of practices inconsistent with the tranquility and safety of the state; it has reference to something actually, not negatively injurious. To acts committed, not to acts omitted – offenses of a deep dye, and of an extensively injurious nature… *Id.* at 113.

The court concluded that the safety exception should not be expanded beyond that narrow class of gravely dangerous behavior:

> To assert this as the genuine meaning of the constitution, would be to mock the understanding, and to render the liberty of conscience a mere illusion. It would be to destroy the enacting clause of the proviso – and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense…. But until men under pretense of religion, act counter to the fundamental principles of morality, and endanger the well-being of the state, they are to be protected in the free exercise of their religion. *Id.* at 113-14.

The broad protection for free exercise of religion recognized in our first state constitution has been repeated in virtually identical terms by every subsequent constitutional convention. None has ever suggested further limiting that right, and the people of the state have never consented to any such limitation. *Catholic Charities* thus erred by failing to follow the clear meaning of the constitutional text and by granting the State too much power to intrude on religious exercise.

In sum, *Catholic Charities* was a fatally flawed decision that day it was handed down. It was incoherent and failed to follow the plain meaning of the constitutional text. It has now been effectively overruled by the Supreme Court. This Court should overrule it and start over.

II. THE ABORTION MANDATE IS AN UNCONSTITUTIONAL BURDEN ON THE FREE EXERCISE OF RELIGION.

In the interim between *Smith* and *Catholic Charities*, the Supreme Court, Albany County, when considering the state Free Exercise Clause, said that:

> This Court cannot ignore the New York Court of Appeals' long history and commitment to the protection of individual rights and liberties beyond those afforded by the U.S. Constitution, and federal constitutional law. Given this history and commitment... and the importance of this free exercise right, **it is hard to imagine that New York would not continue to apply a strict scrutiny standard of review**, and a balancing of the state's competing interests and the fundamental rights of the individual. *Rourke v. New York State Dep't of Corr. Servs.*, 159 Misc. 2d 324, 328 (Sup. Ct., Albany Co. 1993), *aff'd*, 201 A.D.2d 179, 615 N.Y.S.2d 470 (4th Dept. 1994) (emphasis added).

Unfortunately, that court's prediction was betrayed by *Catholic Charities*' failure to live up to that "long history and commitment". Now is the time to correct this by returning to the strict scrutiny test. Under that test, the Abortion Mandate should be held unconstitutional.

A. Strict Scrutiny Should Be the Proper Standard of Review Under the State Free Exercise Clause.

This Court once stated that under the New York State Constitution, the free exercise of religion is a "preferred right," even if it is not "absolute." *Brown v. McGinnis*, 10 N.Y.2d 531, 535-536 (1962). A

"preferred right" must be protected by more than a mere rational basis balancing test. This was emphasized in the landmark case of *People v. Barber*, which clarified that the presumption of liberty in the New York State Free Exercise Clause must be taken seriously:

> The Bill of Rights embodied in the Constitutions of the State and Nation is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual – rights which are part of our democratic traditions and which no government may invade. *People v. Barber*, 289 N.Y. 378, 385 (1943).

Indeed, prior to *Catholic Charities*, New York Courts applied strict scrutiny to cases involving free exercise and liberty of conscience – if not in name, then in fact.

For example, this Court once upheld the right of a hospital patient who expressly refused treatment that included blood transfusions on grounds that it violated her religious beliefs as a Jehovah's Witness. *Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990). The Court held that there was "no showing that the State had a superior interest in preventing her from exercising that right." *Id.* at 231. One concurring judge explicitly stated that the State "must demonstrate under the strict scrutiny test that the treatment pursues an unusually important or compelling goal and that permitting her to avoid the treatment will

hinder the fulfillment of that goal." *Id.* at 234 (Simons, J. concurring).

Catholic Charities was also inconsistent with the way that lower courts had previously interpreted the state Free Exercise Clause. Lower courts often explicitly applied the strict scrutiny standard, even if they did not call it by that name. For example, the Appellate Division once stated that:

> The traditional balancing test involves a two-step analysis: (1) whether the party claiming the free exercise right has established a sincerely held religious belief that is burdened by the statutory requirement; and (2) whether the State has demonstrated that the requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal. *In re Miller*, 252 A.D.2d 156, 159 (4th Dept. 1998).

The Second Circuit also understood the standard to be strict scrutiny. *Seabrook v. City of New York*, 210 F.3d 355 (2d Cir. 2000) (discussing "the compelling interest test arguably applicable to the plaintiffs' free exercise claim under the New York State Constitution").

In the absence of contrary rulings from this Court, Appellate Division decisions establish controlling precedent for the trial courts of the entire state. Thus, prior to *Catholic Charities*, trial5 courts were actually required to apply strict scrutiny. It is truly remarkable that *Catholic Charities* did not even mention cases like *In re Miller*, either to

distinguish or explicitly overrule them.

Additionally, even in cases in which the religious claimant did not prevail, the core values of New York's Free Exercise Clause were still shown great respect. For instance, in *People v. Woodruff*, 26 A.D.2d 236 (2nd Dept. 1966), *aff'd* 21 N.Y.2d 848 (1968), the court called for a balancing of interests, in which there must be a "determination whether the presence of a restriction is justified, after a consideration of the social and constitutional values involved." *Id*. at 238. The court did not explicitly apply strict scrutiny analysis, but stressed the very strong state interest in compelling testimony before a grand jury.

Analogously, there are numerous instances where New York courts have conducted strict scrutiny analysis for burdens on fundamental rights under the New York State Constitution. *E.g.*, *Hope v. Perales*, 83 N.Y.2d 563 (1994) (unenumerated substantive due process right to abortion under Article I, § 6), *People v. Scott*, 79 N.Y.2d 474, 497 (1992) (search and seizure under Art. I, § 12); *People v. Harris*, 77 N.Y.2d 434 (1991) (criminal defendant's right to counsel under Art. I, § 6); *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988) (free speech and press under Art. I, § 8); *Rivers v. Katz*, 67 N.Y.2d 485 (1986)

(unenumerated substantive due process right to decline medication under Article I, § 6); *and People v. Isaacson*, 44 N.Y.2d 511 (1978) (unenumerated substantive due process right to be free of police brutality under Art. I, § 6).

As a fundamental right specifically enumerated in the very first New York State Constitution and every subsequent iteration, the free exercise of religion should be treated the same way as the aforementioned rights and thus protected by strict scrutiny.

Furthermore, in "determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York," this Court has often held that it need "not [be] bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States." *People v. Barber*, 289 N.Y. at 384.

Instead, New York may afford such rights even greater protection than that afforded in the United States Constitution. This would also follow the trend in Supreme Court jurisprudence, reflected in *Fulton*, *Tandon*, etc., of greater protection for religious liberty than in *Smith*, and thus in *Catholic Charities*. Surely, the free exercise of religion

should not be treated with less protection under the state constitution.

Consequently, the proper standard to apply to the Abortion Mandate at hand is strict scrutiny, both under the federal Free Exercise Clause and the New York State Free Exercise Clause, and not the backwards rational basis balancing test from *Catholic Charities*.

B. The Abortion Mandate Fails the Strict Scrutiny Test.

The Religious Objectors have already presented extensive arguments demonstrating that the Abortion Mandate fails strict scrutiny analysis for purposes of the federal Free Exercise Clause. We adopt those arguments here and urge this Court to apply them equally to the New York State Free Exercise Clause.

Any test for the constitutionality of the Abortion Mandate, let alone strict scrutiny, must take into account just how gravely it burdens the religious beliefs of *Amicus* and those who share our pro-life beliefs. No interest asserted by the State is sufficient to justify this burden.

One important point must first be emphasized. Throughout the history of this case, the Department has asserted its interest in applying the Abortion Mandate only at very high levels of generality. The State has merely asserted an interest "to provide women with

better health care, ensure access to reproductive care, address the disproportionate impact on women in low-income families from a lack of access to reproductive health care, and foster equality between the sexes." Respondent's Appellate Division Brief at 20-21. The Department later added another vague purported interest, "to standardize coverage so that consumers can understand and make informed comparisons among policies." Respondents' Brief in Opposition to Certiorari at 15.

On remand, the State was equally vague, citing such alleged interests as "the interests of employees in access to essential reproductive health care and the equality in health care between the sexes... women's full access to health care services" and "increasing women's access to the full range of healthcare services". Respondent's Supplementary Brief on Remand at 6 and 33.

The Supreme Court has made clear that a government interest must be defined more precisely when conducting a constitutional analysis. *See Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 430–432 (2006). This court should reject the alleged state interests here, which are discussed at "an artificially high level of generality" and are "interests expanded to some society-wide

level of generality". *Does 1-3 v. Mills*, 142 S.Ct. 17, 20 (2021) (Gorsuch, J., dissenting). Indeed, "rather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S.Ct. at 1881.

The question in this case, then, is not whether the State has a sufficient interest in providing insurance coverage for abortion in a very general sense. Rather, the question is whether the State has a compelling interest in requiring religious employers to violate their deeply-held belief that abortion is a gravely immoral act that can never be tolerated or cooperated.

The Department's asserted interests are so vague and general as to be virtually meaningless, and they could be said to support virtually any legislative or regulatory proposal. They certainly fail to support a scheme that impermissibly benefits some religions, namely the very few religious organizations that qualify for the extremely narrow exception. *See Fulton*, 141 S.Ct. at 1879. This violates the very terms of the Free Exercise Clause of the New York State Constitution, which specifically guarantees freedom of religion without "discrimination or preference".

N.Y. Const. Article I, § 3. This grave intrusion on religious belief cannot be justified by such amorphous interests as the State proposes.

But the mandate's fault lies even deeper than that. *Amicus* would like to emphasize, lest the point be overshadowed by all the secular legal arguments, how profoundly offensive this Abortion Mandate is to Catholics and other religious people who share our belief about the inherent dignity of every human life.

Abortion is a much more serious moral question than contraception, which was at issue in *Catholic Charities*. To falsely equate the two is a fundamental category error. For a court to substitute its judgment about this issue violates the Catholic Church's right to assess moral questions according to her own teachings – an area in which a court has no legitimate role. The Appellate Division has now twice made this mistake, and this Court should not repeat it.

The Abortion Mandate does not just incidentally burden our religious beliefs and freedom – it strikes at their very heart. At the foundation of our faith is the belief that every human being, regardless of their age or state of development or condition, is made in the image and likeness of God and is thereby sacred. Through the Incarnation,

Jesus Christ sanctified human nature to an even higher level and united Himself to every human being. Second Vatican Council, *Gaudium et Spes* (1965), 22. Consequently, "the direct and voluntary killing of an innocent human being is always gravely immoral". John Paul II, *Evangelium Vitae* (1995), 57. Thus, we firmly believe that "whoever attacks human life, in some way attacks God himself". *Id.* at 9.

We hold that abortion is an "infamous crime", the violent and unjust destruction of an innocent human being at a time when she is most vulnerable and thus most deserving of special protection and solicitude. *Gaudium et Spes* at 22. Legalizing this crime is an egregious violation of the basic duty of the government to protect all those who are subject to its jurisdiction. It unjustly denies the guarantee of equal protection of the law to an entire class of human beings. The Abortion Mandate forces religious objectors to violate their solemn duty to obey God's law above all, even when it conflicts with the laws of the state. *Evangelium Vitae* at 68-74 (a section appropriately entitled, "We must obey God rather than men (Acts 5:29): civil law and the moral law").

To require religious believers to cooperate with such grave moral

evil is beyond the proper authority of the government. There can be no legitimate, much less a compelling, interest in forcing believers into a Hobson's choice between faith and law. *See*, *e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments*. For this reason alone, the Abortion Mandate fails the strict scrutiny test and is unconstitutional.

CONCLUSION

The Catholic Church's pro-life religious beliefs are obviously extremely disfavored by the political leaders of our state and by many of its citizens. Public officials often reiterate their commitment to ensuring unlimited access to abortion and have enacted numerous laws to that effect. New York is generally considered to have some of the most expansive abortion laws in the nation.

Hostility to our beliefs is openly expressed by political leaders. The current governor disparaged pro-life New Yorkers as "neanderthals" for daring to believe that unborn children should be entitled to the same legal rights as their mothers or anyone else. *Governor Hochul Signs Nation-leading Legislative Package to Protect Abortion and*

Reproductive Rights for All, https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-signs-nation-leading-legislative-package (last accessed July 21, 2023).

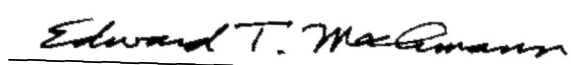
The Abortion Mandate, with its stingy and discriminatory exception for only a few religious organizations, is an expression of this official hostility to our religious beliefs.

The Bill of Rights was a promissory note, assuring unpopular minorities that their constitutional rights will be protected from unfair impositions by a hostile majority. *Catholic Charities* failed to live up to that commitment. This Court should now fulfill it.

This Court should therefore overrule *Catholic Charities v. Serio* and declare that the Abortion Mandate is unconstitutional under the Free Exercise Clause of the New York State Constitution.

Dated: August 22, 2023

Respectfully submitted,



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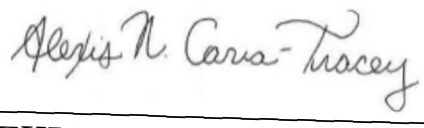

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)(1), the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used:

Typeface: Century Schoolbook

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the table of contents, table of authorities, proof of service, certificate of compliance, corporate disclosure statement, questions presented, and any addendum containing material required by 22 NYCRR § 500.1(h) is 5312.

RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

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AFFIRMATION OF SERVICE

I, Alexis N. Carra-Tracey, an attorney admitted to practice before the courts of the State of New York, affirm under penalty of perjury that on September 14, 2023, I served the attached *Amicus Curiae* Brief, dated August 22, 2023, by enclosing the aforesaid documents in a properly addressed postage paid envelope deposited into the custody of the United States Postal Service overnight delivery service for overnight delivery addressed as follows:

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