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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.

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INTRODUCTION

New York regulation mandates that employers fund abortions through their employee healthcare plans (the "Abortion Mandate"). 11 NYCRR § 52.16(o). The Abortion Mandate exempts religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists, as well as a variety of secular groups. In contrast, religious organizations with a broader religious mission (such as service to the poor) or that employ or serve people regardless of their faith must cover abortions.

Needless to say, this regulation imposes enormous burdens on countless religious entities opposed to abortion as a matter of longstanding and deep-seated religious conviction. Plaintiffs-Appellants (the "Religious Objectors") thus filed this First Amendment challenge seeking to enjoin the Abortion Mandate, arguing among other things that the mandate runs afoul of the Free Exercise Clause.

Both the trial court and the Appellate Division, Third Department, upheld the regulation, concluding the mandate is "neutral and generally applicable" under *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Thus, the lower courts declined to subject the mandate to strict scrutiny and rejected the Religious Objectors' challenge. After this Court declined review, the U.S. Supreme Court granted the Religious Objectors' petition for certiorari, vacated the Appellate

Division's judgment, and remanded for further consideration in light of the U.S. Supreme Court's recent religious liberty precedent, with three justices indicating they would have granted plenary review. A15.

The U.S. Supreme Court's recent cases make clear that a law burdening the free exercise of religion is not "neutral" and "generally applicable" if it contains exemptions that undermine its stated purposes. Thus, whenever a law permits such exceptions, it must be set aside unless it can satisfy strict scrutiny—the most demanding standard under the Constitution. Despite these developments in the U.S. Supreme Court's religious liberty doctrine, on remand, the Third Department affirmed its original judgment "for the reasons stated in [their] original opinion and order." A13.

That was wrong. The Appellate Division's decision is irreconcilable with the U.S. Supreme Court's recent rulings, because the Abortion Mandate's religious and secular exemptions mean that it is not generally applicable. It thus can be applied to burden religious exercise only if the State satisfies strict scrutiny. The mandate plainly burdens the Religious Objectors' religious exercise, as it requires them to provide coverage for abortions—an act they consider a grave sin. And the State imposes this heavy burden on religious organizations without any adequate justification, making it impossible for the State to satisfy strict scrutiny. The result

under applicable U.S. Supreme Court precedent is thus clear: the Abortion Mandate cannot stand, and the decision below should be reversed.

QUESTION PRESENTED

Whether New York's mandate, which burdens a subset of religious organizations by forcing them to cover abortions while allowing numerous exemptions for other religious and secular groups, can be upheld as "neutral" and "generally applicable" or must be evaluated—and invalidated—under strict scrutiny.[1] The Appellate Division upheld the mandate as neutral and generally applicable.

JURISDICTIONAL STATEMENT

This action originated in the Supreme Court, Albany County. The Appellate Division's Decision and Order is a final determination that completely disposed of the matter below. This case directly raises the substantial constitutional question whether the Abortion Mandate violates the First Amendment to the United States Constitution. Accordingly, this Court has jurisdiction over this appeal under CPLR

[1] As the Religious Objectors have previously argued, *see* A66, A70-73, the Abortion Mandate also fails based on religious autonomy principles (which are drawn from both the Free Exercise Clause and the Establishment Clause). Given the U.S. Supreme Court's remand order, the Religious Objectors have focused here on their Free Exercise claims. The Religious Objectors, however, fully preserve all of their arguments based on religious autonomy principles, which provide yet another reason for striking down the mandate. Cert. Pet. at 28-31; Reply Cert. Pet. at 10-11.

§ 5601(b)(1), which provides that "[a]n appeal may be taken to the court of appeals as of right . . . from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution . . . of the United States."

NO RELATED LITIGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), the Religious Objectors state that they are unaware of any litigation related to this appeal.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

New York regulates the content of employer health insurance plans both by statute and through regulations. New York statutory law includes various substantive requirements of group insurance plans and insurance providers. *See, e.g.*, N.Y. Ins. Law § 3221; *id*. § 4303. And Respondent, the Superintendent of the New York State Department of Financial Services, also regulates the content of group health insurance plans. *See* N.Y. Ins. Law § 3217(a) ("The superintendent shall issue such regulations he deems necessary or desirable to establish minimum standards . . . for the form, content and sale of accident and health insurance policies."). As a general matter, the Superintendent's regulations require that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition." But at the same time, the regulations also create a number of

specified "except[ions]," such as for many foot, vision, and dental conditions. 11 NYCRR § 52.16(c).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule that would require group health insurance plans to cover "medically necessary abortions." A75. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibit "health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition," and "[n]one of the exceptions apply to medically necessary abortions." *Id*. The proposed regulation would "make[] explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage . . . shall not exclude coverage for medically necessary abortions." *Id*.

Accordingly, the Superintendent proposed a new regulatory subsection, § 52.16(o), which would provide that "[n]o policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary." A76.

The proposed regulation and the eventual published version do not define "medically necessary abortions." But in "model language" for health insurance contracts, the Superintendent stated that "medically necessary abortions" include at least "abortions in cases of rape, incest or fetal malformation." A33-34. The

mandate thus appears to cover abortions of babies with Down Syndrome and other nonfatal abnormalities. Moreover, in responses to comments on the proposed rule, the Superintendent explained that "[m]edical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient." A91. In other words, "medical necessity" is left largely to the discretion of individual doctors and patients.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent's initial proposal included a broad religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s]" would have been permitted to "exclude coverage for medically necessary abortions" if they followed certain procedures. A80. A "[q]ualified religious organization" would have included any organization that "opposes medically necessary abortions on account of a firmly-held religious belief" and was either (i) a nonprofit that "holds itself out as a religious organization" or (ii) a closely held for-profit that "adopted a resolution . . . establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs." A78-79. That definition largely tracked the scope of federal religious liberty exemptions created after the U.S. Supreme Court's rulings in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), and upheld in *Little Sisters of the Poor Saints*

Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020). *See* 80 Fed. Reg. 41343–41347 (July 14, 2015); *see also* A88 (Superintendent "decided to use the current definition because it is more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new Abortion Mandate regulation. A75. Between the time of proposal and the time of promulgation, however, the religious exemption was eviscerated. The Superintendent otherwise promulgated the Abortion Mandate as proposed but removed the exemption for all objecting religious organizations. A75-76. Instead, a narrower religious exemption was introduced that applies only to "[r]eligious employer[s]" "for which each of the following is true":

> (1) The inculcation of religious values is the purpose of the entity.
> (2) The entity primarily employs persons who share the religious tenets of the entity.
> (3) The entity serves primarily persons who share the religious tenets of the entity.
> (4) The entity is a [tax-exempt] nonprofit organization [falling within certain narrow federal tax categories].

A75; 11 NYCRR § 52.2(y). This is the same short-lived exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraception mandate litigation. *Compare* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original exemption), *with* 78 Fed. Reg. 39,870 (July 2, 2013) (later exemption).

The Superintendent abandoned the broader exemption after concluding that "[n]either State nor Federal law require[d]" any exemption. A89. And the exemption she chose was "analogous to existing state law." A95. The Superintendent stated that she rejected the initially proposed religious exemption because "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of business corporations to assert religious beliefs." A90.

C. The Religious Objectors and Their Objections to the Mandate

The Religious Objectors are religious organizations with employee health plans, and one individual, all of which object to the Abortion Mandate on religious grounds. They include religious orders, churches, and service organizations. They employ from dozens to hundreds of people, often of varied religious backgrounds, for propagating their faith, including through charitable service in their communities.

For instance, the Teresian Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. A48-49. The "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being." A48. The Teresian

House employs over 400 people, and it provides healthcare coverage to over 200 full-time employees because of its "moral" and "religious" obligations to "pay just wages." A49.

The other Religious Objectors are of a piece. The First Bible Baptist Church employs over "sixty people," has a congregation with "individuals of varied religious backgrounds," and engages in "human services outreach," including "youth ministry, adult ministry, death ministry, education ministry, athletic activities, daycare and pre-school and mission ministry." A51. The Sisterhood of St. Mary is an "Anglican/Episcopal Order" of religious sisters, who "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." A58. Other Religious Objectors, including two Catholic Dioceses (Albany and Ogdensburg) and Our Savior's Lutheran Church, also engage in ministries and missions within New York or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. A57-61.

Some of the Religious Objectors are service organizations. For instance, three subdivisions of Catholic Charities (Albany, Ogdensburg, and Brooklyn) provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life," as part of the

"charitable and social justice ministry" of the Catholic Church. A60. And DePaul Management Corporation is a non-profit organization, associated with the Catholic Diocese of Albany, that manages senior living facilities. A62.

All of these organizations are religiously opposed to abortion; no one has questioned the sincerity of those beliefs. The Catholic Church, for instance, teaches that abortion is an "unspeakable crime," because it ends the life of a "new human being." A63-64. The Church has taught and believes that "modern genetic science offers clear confirmation" that from the moment of conception a new living person exists. A83. The other Religious Objectors share similar beliefs. *See, e.g.*, A52 (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"); A64 ("Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures."). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Religious Objectors "cannot religiously or morally accept or sanction." A65.

The Religious Objectors also share the belief that providing "fair, adequate and just employment benefits" is a "moral obligation." *Id*. And, in the absence of providing health insurance to their employees, they face the prospect of severe financial penalties. *See, e.g.*, A45 (Roman Catholic Diocese of Albany); A49

(Teresian House); A52-53 (First Bible Baptist Church). Indeed, for just the calendar year 2023, the federal fines for failing to provide health insurance would be $2,880 per employee.[2] Just as one example, for the Teresian House, which provides health coverage to over 200 employees, A46, those fines would reach over half a million dollars per year.

Accordingly, with no other options, the Religious Objectors sued the Superintendent and New York State Department of Financial Services, seeking to enjoin the Abortion Mandate.

D. Procedural History

In their consolidated suit,[3] the Religious Objectors challenged the Abortion Mandate as a violation of numerous federal and state laws. As relevant here, they argued that the Abortion Mandate violates the Free Exercise Clause because it

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[2] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (Aug. 16, 2022), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

[3] The Religious Objectors filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of a "[m]odel [l]anguage" insurance policy, which covered "medically necessary abortions." A21. In 2017, after the Superintendent promulgated the Abortion Mandate, the Religious Objectors filed a second complaint that challenged that regulation directly. *Id.* The trial court consolidated the suits. A22. None of the courts to have considered this case have distinguished in relevant part between the two First Amendment challenges.

substantially burdens and discriminates among and against certain religious entities without justification. The Abortion Mandate was "promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption." A65. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." A68. The Religious Objectors also challenged the Abortion Mandate as interfering with religious autonomy under both Religion Clauses. A66; A70-73.

The trial court granted summary judgment in favor of Defendants-Respondents. A31-41. The trial court believed itself bound by a decision of the New York Court of Appeals that upheld a similar law respecting contraception coverage: *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). In *Serio*, a group of religious entities challenged a New York statute mandating that health insurance plans include contraceptives. That statute contained a religious exemption materially identical to the exemption in the Abortion Mandate here. *Id*. at 519. The *Serio* court rejected both Free Exercise and Establishment Clause claims. With respect to the Free Exercise Clause, the court held that the mandate was "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not "target religious beliefs as such." *Id*. at 522, 525 (alteration omitted). And it rejected an Establishment Clause claim based on church autonomy because the mandate

"merely regulates one aspect of the relationship between plaintiffs and their employees." *Id*. at 524. In the trial court's view, *Serio* involved the "same" claims, and so it barred the Religious Objectors' challenges to the Abortion Mandate. R22-23.

The Appellate Division likewise believed itself bound by *Serio*. "The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases." A24. Accordingly, it affirmed the judgment in favor of the Defendants-Respondents. A29.

This Court dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" and denied leave to appeal, with Judge Fahey dissenting. A17.

The Religious Objectors then filed a petition for certiorari to the U.S. Supreme Court. The Religious Objectors sought plenary review, but because that Court had already granted certiorari in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), to address similar issues regarding the application of the Free Exercise Clause, they also asked alternatively that the Court grant certiorari, vacate the judgment, and remand the case in light of the eventual *Fulton* decision. On November 1, 2021, the Court did just that, vacating the judgment and remanding for further consideration in light of *Fulton*. A15.

On remand, the Third Department affirmed its original judgment "for the

reasons stated in [their] original opinion and order." A13. In a short decision issued on June 2, 2022, it reasoned that *Serio* remained controlling because *Fulton* neither "explicitly overrule[d]" *Serio* nor "revisit[ed] or overturn[ed] the existing rule" that neutral, generally applicable laws are "'ordinarily not subject to strict scrutiny.'" A11 (quoting 141 S. Ct. at 1876).

On June 30, 2022, the Religious Objectors filed both a Motion for Leave to Appeal and a Notice of Appeal as of right under CPLR § 5601(b)(1) because the Third Department's Decision and Order directly involves the construction of the United States Constitution. A4-6. In response, this Court invited the parties to provide comments on the issue of subject-matter jurisdiction, and the parties filed responsive letters on August 8, 2022, addressing this issue. This Court then issued two orders on February 8, 2023, the first denying the Religious Objectors' Motion for Leave to Appeal as unnecessary, citing CPLR § 5601(b)(1), A8, and the other directing briefing in the Religious Objectors' appeal as of right.

E. Codification of the Abortion Mandate

On April 4, 2022, while this case was pending before the Appellate Division on remand, a statute was enacted codifying the Abortion Mandate, including its narrow religious exemption. *See* N.Y. Ins. Law §§ 3221(k)(22), 4303(ss) (mandate); N.Y. Ins. Law §§ 3221(l)(16)(E)(1), 4303(cc)(5)(A) (religious exemption). The State notified the Appellate Division of this legislation by letter

shortly before oral argument, explaining that the law "codifie[d] in statute the abortion health insurance coverage regulatory requirement and religious employer accommodation at issue in this case" and that the "challenged regulation remains in effect." NYSCEF Doc. No. 55. The statute became effective in January 2023. The challenged regulatory Abortion Mandate, including its religious exemption, remains in force in parallel with the new statute. *See* 11 NYCRR §§ 52.16(o), 52.2(y).

As the statute simply "codifies" the challenged regulation, it is subject to the same constitutional analysis as the regulation itself. Because the statute was enacted long after the complaints in this case were filed, the Religious Objectors have not, in this matter, directly challenged the statute. Neither the State nor the Third Department has suggested that the statutory codification should alter the outcome of this case. The ruling in this matter concerning the regulation, however, would effectively determine the fate of the statute as well.

SUMMARY OF ARGUMENT

Recent U.S. Supreme Court precedent has made clear that exceptions to a law are at the center of the First Amendment analysis: under the Court's recent precedents, a law that contains exemptions that undermine its stated purposes is not "neutral and generally applicable" under *Smith* and thus may be upheld only if the State carries its burden under strict scrutiny. *See, e.g.*, *Fulton*, 141 S. Ct. at 1868;

Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Kennedy v. Bremerton School Dist*., 142 S. Ct. 2407 (2022).

Under these precedents, the Abortion Mandate is not a neutral law of general applicability because it contains exemptions that undermine its asserted purposes. First, the Abortion Mandate contains a narrow religious exemption that covers certain religious organizations but not others—a form of religious discrimination and interference with religious autonomy that is in the heartland of the First Amendment's concern. Second, the Abortion Mandate exempts numerous employers—many are not required to pay for or otherwise cover the cost of abortions for any of their employees—and fails to ensure abortion coverage for unemployed women in the State, reflecting secular exemptions that likewise defeat the law's general applicability.

Each of these exceptions triggers strict scrutiny, pursuant to which the State bears the burden of proving that the Abortion Mandate is the least restrictive means of furthering a compelling governmental interest. The Abortion Mandate cannot survive such close review. The State's purported interests cannot justify the Abortion Mandate, which is not narrowly tailored to advance any compelling

government interest. Indeed, the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), which held that a materially identical government mandate could not survive strict scrutiny, is directly controlling here. As *Hobby Lobby* makes clear, the State has other options to pursue its stated interests without burdening religious exercise. The Abortion Mandate thus cannot be applied to religious entities like the Religious Objectors.

ARGUMENT

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. Laws that burden religious exercise run afoul of this fundamental provision unless they satisfy certain weighty requirements. To start, the U.S. Supreme Court has held that such laws may be permissible if they are "neutral [laws] of general applicability" with only "the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. But a "law failing to satisfy these requirements" must instead satisfy strict scrutiny, *id.*, meaning the government must prove that the law "is the least restrictive means of achieving some compelling state interest." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). Because the Abortion Mandate fails each of these tests, it violates the First Amendment, and cannot stand.

I. THE ABORTION MANDATE UNDISPUTEDLY IMPOSES A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

Each of the Religious Objectors has asserted that its sincere religious beliefs are in conflict with the Abortion Mandate, and that the Abortion Mandate thus imposes a substantial burden on its exercise of religion. *See* A65 (complaint alleging that the Abortion Mandate "constitute[s] a direct . . . interference with the exercise of religion by Plaintiffs"). The sincerity of those assertions has never been questioned. It is of course "not within the judicial function and judicial competence to inquire whether [a plaintiff] correctly perceive[s] the command of [its] faith." *Thomas*, 450 U.S. at 716. Indeed, while the religious beliefs involved in this case are long-standing and well-known, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id*. at 714.

In light of those well-established beliefs, the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*. shows that the Abortion Mandate "substantially burdens the exercise of religion." 573 U.S. at 691. In *Hobby Lobby*, as here, "[t]he owners of the [employers] have religious objections to abortion," and "[i]f the owners comply with the [challenged] mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price." *Id*. As the U.S. Supreme Court explained, "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id*.

II. THE ABORTION MANDATE IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY, AND THUS CANNOT ESCAPE STRICT SCRUTINY UNDER *SMITH*.[4]

In *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Lukumi*, 508 U.S. 520, the U.S. Supreme Court explained that the starting point for analyzing religious liberty claims under the First Amendment is to determine whether a law is "neutral and generally applicable." If so, according to these precedents, the law "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. But if the law is not both neutral and generally applicable, it faces far more rigorous review: it can be applied to burden religious exercise only if the State can justify the regulation under strict scrutiny. *Id*.

[4] If there is any chance that *Smith* allows New York to compel religious organizations to fund what, in their view, is a grave moral evil, *Smith* itself should be reconsidered and replaced with a standard that reflects the text, history, and tradition of the Free Exercise Clause. None of the traditional stare decisis factors—including "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision," *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)—support preserving *Smith*. Indeed, *Smith*'s core concern that greater protection for religious liberty would lead to anarchy has proven false after decades of experience with the federal Religious Freedom Restoration Act and numerous comparable state laws.

Nonetheless, the Religious Objectors recognize that this Court lacks authority to reconsider *Smith*, and preserve this argument for further review in the U.S. Supreme Court.

As these and other more recent cases establish, because the Abortion Mandate is not a neutral law of general applicability, it must be evaluated under strict scrutiny.

A. A Law Is Not "Generally Applicable" If It Contains Exceptions That Undermine Its Purported Goals.

In the decades since *Smith* and *Lukumi*, courts were divided about how to approach the threshold inquiry of whether a law burdening religion is neutral and generally applicable. But the U.S. Supreme Court's recent precedents, including *Fulton*, *Tandon, Harvest Rock Church*, *South Bay Pentecostal*, *Gish*, *Gateway City Church*, and *Kennedy*, have clarified that a law cannot qualify as "neutral" and "generally applicable" if it permits exemptions that undermine its stated purpose while refusing to accommodate sincere religious objections.

Much of this clarification arose from a string of cases addressing various restrictions imposed in light of the Covid-19 pandemic. As articulated in one such case, *Tandon v. Newsom*, those "decisions have made the following points clear." 141 S. Ct. at 1296. "First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. It is thus irrelevant if the state "treats some . . . other activities as poorly as or even less favorably than the religious exercise at issue." *Id*. "Second, whether two activities are comparable for purposes of the Free Exercise Clause

must be judged against the asserted government interest that justifies the regulation at issue." *Id*. That is, "[c]omparability is concerned with the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Id*. Any "comparable" activity that falls outside a law's scope, then—as measured by the government's asserted interest in the law—is an exception that triggers strict scrutiny.

The Court confirmed and expanded on these principles in *Fulton v. City of Philadelphia*, where the challenged government action was a City of Philadelphia policy regarding foster care placement that the lower courts had concluded was "a neutral and generally applicable policy under *Smith*." 141 S. Ct. at 1876. The Supreme Court reversed, holding both that the law was not "generally applicable" under *Smith* and that the law could not survive strict scrutiny.

The Court's conclusion on general applicability was based wholly on the possibility that certain organizations could be granted exceptions to the policy at issue. *Id*. at 1877-78. While not purporting to articulate an exhaustive list of evidence that would undermine "general applicability," the Court explained that the policy was not generally applicable for at least two reasons: First, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id*. at 1877. Second, "[a] law . . . lacks general applicability if it

prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. Either way, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1879. Just last term, the Supreme Court again reiterated these principles in *Kennedy v. Bermerton School District*, 142 S. Ct. 2407, 2423 (2022).

As these cases make clear, then, *Smith* applies to a government policy—and such a policy can escape strict scrutiny—only if the policy contains no exceptions that undermine its stated purpose. *Any* mechanism for granting exceptions that affect the State's asserted interests in the same way as the religious conduct at issue necessarily requires the State to make decisions about "which reasons for not complying with the policy are worthy of solicitude." *Id*. And if the State decides that religious objections are not "worthy of solicitude," it must justify that stance under strict scrutiny.

B. Given Its Religious And Secular Exemptions, The Abortion Mandate Is Not Generally Applicable.

According to the State, the Abortion Mandate is intended "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." Govt. App. Div. Br., NYSCEF Doc. No. 21, at *21-22 (citing A90). In its brief in opposition to certiorari before the U.S. Supreme Court, the State added that the Abortion Mandate is also intended "to standardize coverage so that consumers can understand and make informed comparisons among policies." Cert. Opp. at 15. The Abortion Mandate, however, contains at least two categories of exemptions that undermine these stated purposes of the law. The mandate therefore is not "generally applicable" and so is subject to strict-scrutiny review.

1. The Abortion Mandate's existing religious exemption triggers strict scrutiny.

First, and most obviously, the Abortion Mandate is not "generally applicable" because it contains an express exemption for some religious organizations but not others. That exemption applies only to organizations for which "the purpose of the entity" is "inculcation of religious values," and even then, only if the entity also "primarily employs" and "primarily serves persons who share the religious tenets of the entity." A75; 11 NYCRR § 52.2(y). This exemption bears no relationship to any of the State's purported interests in the Abortion Mandate—and the State has never argued otherwise. Indeed, a religious entity's "purpose" or whom the entity "serves" bears no apparent link to its employees' need for abortion services, ability to access such services without employer-sponsored coverage, or ability to compare healthcare plans that offer

different scopes of coverage. To the contrary, the exemption reflects only the State's decision that the religious beliefs of certain entities are more "worthy of solicitude" than the religious beliefs of other entities. *Fulton*, 141 S. Ct. at 1879.

Rather than offering any justification for the limited religious exemption based on the Abortion Mandate's stated purposes, the State has previously argued that religious accommodations are not relevant to whether the law is generally applicable because these accommodations do not "disfavor religion." Cert. Opp. at 13-14. But under *Fulton* and *Tandon*, the general applicability inquiry is not about favoritism or hostility to religion. As those cases make clear, for purposes of general applicability, the question is whether the exception involves activity that is "comparable" to the religious activity at issue, with "[c]omparability" measured by "the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Tandon*, 141 S. Ct. at 1296. Religious conduct by exempt entities that poses the same risk to the government's asserted interests as the Religious Objectors' proposed conduct is thus plainly "comparable" for purposes of assessing general applicability. A narrow religious exemption for certain favored religious organizations, then, undermines general applicability at least as much as a similar secular exemption would.

Indeed, singling out *some* religious conduct for favored treatment is a particularly pernicious form of discrimination under the First Amendment: "[t]h[e]

constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson v. Valente*, 456 U.S. 228, 245–47 (1982). After all, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). The Religion Clauses thus demand "the equal treatment of all religious faiths without discrimination or preference," *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008), and the State cannot privilege certain visions of religion over others. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828, 834-35 (D.C. Cir. 2020). By privileging certain entities that exercise their religion in the manner the State prefers—that is, by interacting only with others who already share their religion—the Abortion Mandate does exactly what the Religion Clauses most clearly forbid.

Moreover, in effect, the State is allowing the religious to exercise their beliefs with respect to abortion only if they alter other aspects of their governance and doctrine. Such coercion ignores the foundational holding that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct.

2049, 2055 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The State therefore cannot intrude upon questions of "church doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). Instead, a religious organization must enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. These precedents belie the State's position that laws remain outside the reach of strict scrutiny under *Smith* even where they contain not only religious exemptions as such, but ones requiring the State to engage in the "offensive" business of discriminating among religions based on their perceived level of religiosity. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).

Before the Appellate Division, the State offered one final defense for its view that the existing religious exemption is irrelevant: on the State's reading, religious exemptions can be problematic under *Fulton* only to the extent they are "individualized," and the existing scheme for religious exemptions is not "individualized" because it contains objective criteria rather than a discretionary standard. Govt. Supp. App. Div. Br., NYSCEF Doc. No. 59, at *25-26. That presumes that *Fulton*'s second category of laws triggering strict scrutiny—those "permitting secular conduct that undermines the government's asserted interests in a similar way" to the prohibited religious conduct, 141 S. Ct. at 1877—cannot

include laws with religious exemptions. On the State's view that is because this category applies only to exemptions for "secular conduct." That reading of *Fulton* is wrong, for the reasons explained above. But even accepting the State's reading of *Fulton*, its argument regarding "individualized" exemptions cannot succeed, as it rests on at least two fundamental errors.

First, even a cursory review of the religious exemption's qualifying criteria reveals they are far from objective. Consider, for example, the requirement that the organization "serves primarily persons who share the religious tenets of the entity." 11 NYCRR § 52.2(y). That standard embeds numerous discretionary judgments. An adjudicator must determine which individuals the organization "primarily" serves, which is far from objective where an organization routinely interacts with different individuals in different capacities. Moreover, the adjudicator must discern which individuals sufficiently "share the religious tenets of the entity"—requiring the adjudicator to identify both a required level of belief and a required quantum of common beliefs. As the U.S. Supreme Court has noted, "determining whether a person is a 'co-religionist' will not always be easy." *Our Lady of Guadalupe*, 140 S. Ct. at 2068. "Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Id.* at 2068–69. Or to put this question in concrete terms for this case: How many elderly residents must the Carmelite

Sisters evict from their nursing homes to qualify for the exemption? All non-Christians? All non-Catholics?

Similar questions—and similar opportunities for discretion—are inextricably bound with the other criteria. After all, difficulties in identifying who qualifies as a co-religionist apply equally when determining whether the employer "primarily employs persons who share the religious tenets of the entity." And attempting to discern whether "inculcation of religious values is the purpose of the entity" raises its own set of discretionary judgment calls. What does it mean for a religious organization to have a "purpose" of inculcating "religious values"? Does "caring for orphans and widows" count? James 1:27.

None of these questions have "objective" answers—resolving them requires an individualized determination that leaves substantial room for discretion, not to mention an impermissible intrusion on matters of religious doctrine. *See, e.g.*, *New York v. Cathedral Acad*., 434 U.S. 125, 133 (1977) ("[The] prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (government inquiry into internal religious doctrine is "not only unnecessary but also offensive"); *NLRB v. Cath. Bishop of Chi*., 440 U.S. 490, 502 (1979) (the "very process of inquiry" into religious questions can "impinge on rights guaranteed by the Religion Clauses");

Colo. Christian Univ., 534 F.3d at 1261 ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs."). The State's argument thus fails from the start.

Second, even if the religious exemption were somehow deemed "objective," the State further errs by conflating the concepts of "individualized" and "discretionary" exemptions. These two terms are not interchangeable, and by its plain terms, *Fulton* never required that a scheme of exemptions be "entirely discretionary" to trigger strict scrutiny. Instead, *Fulton* treated the discretionary aspect of the system at issue as an aggravating factor, not a requirement : "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioner's 'sole discretion.'" *Fulton*, 141 S. Ct. at 1879. Even seemingly "objective" exemptions can therefore be individualized exemptions that trigger strict scrutiny. *See Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (explaining that "individualized exemptions are available" where "employees can avoid the vaccine mandate if they produce a 'written statement' from a doctor or other care provider indicating that immunization 'may be' medically inadvisable"). The key question, then, is not whether exemptions are wholly discretionary, but whether they require

evaluating the *reasons* for the conduct—as the existing religious exemption plainly does.

2. The Abortion Mandate permits secular exemptions by failing to address coverage for many women in New York.

Although the narrow religious exemption contained in the Abortion Mandate is sufficient to trigger strict scrutiny on its own, the Abortion Mandate's underinclusiveness does not end there. Rather, by its terms, the Abortion Mandate applies only to employers who choose to provide health insurance to their employees. But many other employers, both secular and religious, provide no medical insurance at all—and thus the Abortion Mandate does not require them to provide their employees with any coverage for the services identified in the Abortion Mandate. Likewise, the Abortion Mandate does not apply to employers who use a self-insured ERISA plan for their employees, as authorized by 29 U.S.C. §§ 1001-1461. Finally, the Abortion Mandate does nothing to ensure that women who are not employed at all receive access to abortion coverage. In total, then, the Abortion Mandate (as set forth in both the regulation and the later statute) contains exceptions for broad swaths of both New York employers and women in New York.

These holes in the Abortion Mandate cannot be reconciled with the State's asserted interests in the regulation—meaning the law cannot be considered generally applicable. The State's purported interest here is in "ensuring access to

reproductive care, fostering equality between the sexes, providing women with better health care," and in reducing "the disproportionate impact of a lack of access to reproductive health services on women in low income families." A90. But the State cannot explain why its interests are less acute with respect to women whose employers opt not to offer any health insurance at all, whose employers self-insure, or who lack employers altogether. Nor does the State clarify why employees of self-insured organizations are less burdened by needing to "examine the fine print of potentially voluminous policy documentation to determine what is or is not covered," such that the State need not ensure that abortion coverage is somehow provided for such employees. Cert. Opp. at 15.

Similar holes in government plans to address the COVID-19 pandemic were deemed exceptions that triggered strict scrutiny where those plans burdened religious exercise. For example, a New York order was not neutral or generally applicable where it capped attendance at religious services to ten persons while allowing hundreds of persons to shop at nearby stores deemed "essential." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Similarly, a California rule disallowing more than three households from gathering together in a private home triggered strict scrutiny when applied over religious objections because California allowed individuals from far more households to gather in businesses. *Tandon*, 141 S. Ct. at 1297. There, as here, the underinclusiveness of

the laws at issue—*i.e.*, "treat[ing] *any* comparable secular activity more favorable than religious exercise," with comparability "judged against the asserted government interest"—triggered strict scrutiny review. *Id*. at 1296.

In short, because the State leaves many women outside the coverage of the mandate, and because these holes in coverage plainly undermine the stated purposes of the law, the Abortion Mandate is not neutral and generally applicable.

C. The Appellate Division Concluded Otherwise Based On *Serio*, But *Serio* Cannot Be Reconciled With *Fulton* And Must Be Rejected.

The Third Department's recent decision in this case—just like its original decision—rests entirely on its view that *Serio*, 7 N.Y.3d 522, forecloses the Religious Objectors' claims. But *Serio* can no longer be relied on to resolve this case. "State courts are bound by the decisions of the Supreme Court when reviewing Federal statutes or applying the Federal Constitution." *People v. P.J. Video, Inc*., 68 N.Y.2d 296, 301–02 (1986) (recognizing, after reversal and remand by U.S. Supreme Court, that prior New York Court of Appeals statement of federal law was overruled); *see also People ex rel. Arcara v. Cloud Books, Inc*., 68 N.Y.2d 553, 557 (1986) (recognizing, after reversal and remand by the U.S. Supreme Court, that state courts "of course[] are bound by Supreme Court decisions defining and limiting Federal constitutional rights"). In this federal constitutional challenge, then, the New York Courts are bound to follow *Fulton* and the U.S. Supreme Court's other recent decisions, not *Serio*, to the extent the decisions are in

conflict.

And the conflict here is evident. The *Serio* Court contended that a "neutral law of general applicability" may incidentally burden religion without triggering strict scrutiny, explaining that a law is "neutral" if it does not "'target [] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.'" *Serio*, 7 N.Y.3d at 522. It then held the law permissible as a neutral law of general applicability because "[r]eligious beliefs were not the 'target' of the [law at issue], and it was plainly not the law's 'object' to interfere with plaintiffs' or anyone's exercise of religion." *Id*. Under this analysis, any exemptions were irrelevant as long as they did not "alter[]" the "neutral purpose" of the law. *Id.* For the law at issue in *Serio*, then, admitted exemptions were deemed irrelevant because the Court concluded they did "*not* . . . demonstrate that [the Contraception Mandate] provisions are not 'neutral'" in the sense of "target[ing] religious beliefs as such." *Id*. (emphasis added). In short, *Serio* considered "neutral and generally applicable" as a single standard, satisfied whenever a law is not intended to "target" religion.

That rationale, however, is irreconcilable with *Fulton*, *Tandon*, and the U.S. Supreme Court's other recent precedents, which make clear that neutrality and general applicability are distinct standards that require separate analysis. *See, e.g.*, *Fulton*, 141 S. Ct. at 1877 (evaluating law under general applicability while

declining to consider neutrality). Subjective intent, the key to the *Serio* analysis, is at most relevant to the neutrality prong. Indeed, the religious challenger in *Fulton* was prepared to "point[] to evidence in the record that it believe[d] demonstrates that the City ha[d] transgressed this neutrality standard." *Id*. But the Court declined to even consider that evidence, because it was unnecessary in that case. *Id.*

Rather, as the Court explained, it would be "more straightforward" to resolve the case "under the rubric of general applicability." *Id*. And under that rubric, the Court held, exemptions subject a law to strict scrutiny even if the law's purpose has nothing to do with religion. *Id*. Even where the law is "neutral," then, exemptions remain central to the analysis because they affect general applicability—the presence of exemptions that undermine the State's asserted interest triggers strict scrutiny regardless of the State's subjective purpose. Further, that is true even if the exemptions contemplated by the scheme have never actually been granted, as in *Fulton* itself. *Id*. at 1879.

Serio thus cannot be reconciled with this aspect of *Fulton*'s holding. Following *Fulton*, regardless of whether the State subjectively intends to "target" religion, there is simply no basis for holding that the law is "generally applicable" where, as here, the presence of exemptions make clear that the law is not, in fact, "generally applicable." Rather, *Fulton* and the U.S. Supreme Court's other

precedents establish that such exemptions, standing alone, trigger strict scrutiny. The Appellate Division thus erred in relying on *Serio* to avoid strict scrutiny.

III. THE STATE CANNOT CARRY ITS BURDEN TO OVERCOME STRICT SCRUTINY.

Because the lower courts held that the Abortion Mandate is neutral and generally applicable, they did not reach the question whether the State could satisfy strict scrutiny. But the answer is straightforward: it cannot.

As the U.S. Supreme Court has recently emphasized, meeting strict scrutiny requires the State to prove that its law "further[s] 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Id.* at 1298 (quoting *Lukumi*, 508 U.S. at 546). "That standard 'is not watered down'; it 'really means what it says.'" *Id*. (quoting *Lukumi*, 508 U.S. at 546). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 813 (2000). In short, the State must prove that the Abortion Mandate is the least restrictive means of furthering a compelling governmental interest. The State cannot satisfy that exacting standard here.

A. The State Has Waived Any Argument That The Abortion Mandate Can Survive Strict Scrutiny.

Before the Appellate Division, the State offered not a single sentence of briefing suggesting that the Abortion Mandate could *survive* strict scrutiny. By

failing to address the issue before the Appellate Division, the State waived any argument that the Abortion Mandate satisfies strict scrutiny. *See, e.g.*, *Utica Mut. Ins. Co. v. Prudential Prop. & Cas. Ins. Co*., 64 N.Y.2d 1049, 1050 (1985); *People v. Ladd*, 638 N.Y.S.2d 512, 514 n.1 (3d Dep't 1996) ("[T]he People failed to brief this issue on appeal, and, hence, it has been waived."), *aff'd*, 89 N.Y.2d 893 (1996). The State has thus effectively conceded that if the Abortion Mandate is not neutral and generally applicable, it violates the First Amendment.

This concession is not surprising. Although this Court need not address the issue on the merits given the State's waiver, as described below, the State cannot possibly pass the high bar of strict scrutiny.

B. The Abortion Mandate Cannot Be Justified By The State's Asserted Interests.

In support of the Abortion Mandate, the State has asserted an interest in "provid[ing] women with better health care, ensur[ing] access to reproductive care, address[ing] the disproportionate impact on women in low-income families from a lack of access to reproductive health care, and foster[ing] equality between the sexes," Govt. App. Div. Br., NYSCEF Doc. No. 21, at *21-22 (citing A90), as well as "standardiz[ing] coverage so that consumers can understand and make informed comparisons among policies," Cert. Opp. at 15. But for two reasons, the State cannot satisfy the compelling interest prong of the strict scrutiny standard.

First, regardless of whether the State's asserted interests could be deemed "compelling" in a vacuum, the U.S. Supreme Court has made clear that, under the Free Exercise Clause, the inquiry is far more focused—the State must prove a compelling interest not in the Abortion Mandate generally, but in denying an exemption to the Religious Objectors in this case. As the U.S. Supreme Court has explained, interests "couched in very broad terms, such as promoting 'public health' and 'gender equality,'" will generally be inadequate to justify a law under strict scrutiny. *Burwell*, 573 U.S. at 726. Instead, the requisite inquiry is "more focused," requiring courts "to look to the marginal interest in enforcing" the challenged law against the particular challengers. *Id*. at 726-27. As the Court explained in *Fulton*, "[t]he question, then, is not whether the [State] has a compelling interest in enforcing its [Abortion Mandate] generally, but whether it has such an interest in denying an exception" to the Religious Objectors. *Fulton*, 141 S. Ct. at 1881; *see also Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 431 (2006) (explaining that courts applying strict scrutiny must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants").

Here, the various exceptions to the Abortion Mandate belie any compelling interest in denying an exemption to the Religious Objectors. The government itself

has apparently concluded that its interests are not sufficiently compelling to ensure free or low-cost access to abortion services for women employed by self-insured organizations, women employed by organizations that do not provide health care coverage to their employees, or women who are unemployed. Nor has the State found its interests compelling enough to deny exemptions to those employers the State deems sufficiently religious under its narrow religious exemption. Consequently, it is the State's burden to show that it nonetheless does have a compelling interest in denying an exemption to the thirteen religious organizations at issue in this case. *See Hobby Lobby*, 573 U.S. at 726; *Fulton*, 141 S. Ct. at 1882 (noting that the City's policy failed strict scrutiny in part because the City "offer[ed] no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others").

The State, however, has put forward no evidence justifying how its interests somehow allow exemptions for so many others but not the Religious Objectors here. Indeed, the justifications for distinguishing between religious entities covered by the religious exemption and those falling outside its scope are not matters of legitimate State concern at all, much less compelling State interests. *See supra* at Part I.C.1. Nor has the State put forth any other evidence in support of its interest in denying the Religious Objectors an exemption despite providing one to others. Such underinclusiveness "raises serious doubts about whether the

government is in fact pursuing the interest it invokes, rather than disfavoring a particular [group] or viewpoint." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 802 (2011). Accordingly, the State has not established the type of "compelling interest" that the U.S. Supreme Court's case law in this area demands.

Second, and relatedly, once the State has articulated its interest in denying an exception, the State must also show that enforcing the law at issue will materially advance that interest. *See, e.g.*, *Eu v. San Francisco Cnty. Democratic Cent. Comm*., 489 U.S. 214, 228-29 (1989) (law could not withstand strict scrutiny because it was unclear to what extent it would advance purported interest). It is not enough, therefore, for the State to show that its law will close a small gap in abortion coverage. To the contrary, the U.S. Supreme Court has explained that "[f]illing the remaining modest gap" does *not* rise to "a compelling state interest," *Brown*, 564 U.S. at 803, because "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced," *id.* at 803 n.9. Accordingly, the State must put forth actual *evidence* of how the law will materially advance its interests. *Id*. (explaining that under strict scrutiny, the State cannot rely on a "predictive judgment" about the law's potential effects); *see also Playboy*, 529 U.S. at 822 ("the Government must present more than anecdote and supposition" to establish a compelling interest). And because the State "bears the

risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice" to satisfy its burden. *Brown*, 564 U.S. at 799-800.

Here, however, the State has never provided *any* evidence that the Abortion Mandate will materially advance its asserted interests, and there is good reason to doubt that such evidence exists. The Religious Objectors have well-known beliefs about abortion. As a result, most if not all of their employees undoubtedly accepted their jobs with full knowledge that their religious employers would not provide insurance coverage for abortions. Moreover, many of the Religious Objectors' employees are likely to have access to abortion coverage in other ways, such as through insurance provided by their spouses' employers or through Medicaid. In addition, women who do not have access to abortion coverage through insurance may have sufficient funds to pay for such services themselves, or may have access to other sources of abortion funding, as, for example, a New York City government website enumerates in detail.[5] The State has thus not demonstrated that enforcing the Abortion Mandate against the Religious Objectors would *materially* advance its interests (or indeed, advance them at all).

[5] *See* https://www1.nyc.gov/site/doh/health/health-topics/abortion.page (providing resources including information about funding sources for abortion). *See also, e.g.*, https://www.ny.gov/pregnancy-know-your-options-get-facts/think-you-might-be-pregnant (explaining abortion services).

C. The U.S. Supreme Court's Controlling Decision In *Burwell v. Hobby Lobby Stores* Establishes That The Abortion Mandate Is Not Narrowly Tailored.

Regardless of whether the State's interests are compelling here, the Abortion Mandate still fails, because the State likewise bears the burden of proving that the mandate is the least restrictive means of furthering those interests. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296-97 (noting that "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID"). As explained below, the Abortion Mandate cannot survive this latter test.

Under the narrow tailoring prong of strict scrutiny, a law cannot survive if the State's purported interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (quoting *Lukumi*, 508 U.S. at 546). Satisfying strict scrutiny requires the State to show at least a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013). Based on that good-faith consideration, the State must then "prove" that forcing religious objectors to violate their beliefs "is the least restrictive means of furthering a compelling governmental interest." *Holt*, 574 U.S. at 364. "[M]ere[] . . . expla[nations]" and assertions without evidence do not suffice. *Id.*; *see also Playboy*, 529 U.S. at 824 ("It is no response that [an alternative] requires a consumer to take action, or may

be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective."). The Abortion Mandate cannot withstand such fine-grained review, as far less restrictive means could be used to achieve the State's goals.

Indeed, the U.S. Supreme Court's decision in *Hobby Lobby* is directly on point and makes clear that the Abortion Mandate cannot stand.[6] There, the Court struck down a regulation that required employers to provide insurance coverage for certain forms of contraception that the employers regarded as abortifacients. 573 U.S. at 696-97. In *Hobby Lobby*, as here, the challengers were employers who objected to providing the required medical coverage on religious grounds. *Id*. at 700-704. In *Hobby Lobby*, as here, the mandate provided exemptions for certain religious employers, but the exemptions were not broad enough to cover the organizations who challenged the law. *Id*. at 698-700. In *Hobby Lobby*, as here, the mandate also contained exceptions for certain secular employers. *Id*. at 699-700. And in *Hobby Lobby*, as here, the government's asserted interests included

[6] *Hobby Lobby* was decided under the Religious Freedom Restoration Act (RFRA), rather than under the First Amendment itself, but that is a distinction without a difference here. RFRA was written expressly to adopt for federal laws the "strict scrutiny" test that applies to religious exercise when *Smith* does not. *See, e.g.*, *O Centro Espirita Beneficente*, 546 U.S. at 430. Where, as here, *Smith* does not apply to a State law because it is not a neutral law of general applicability, the resulting strict scrutiny test is the same as the test under RFRA.

"public health," "gender equality," and "ensuring that all women have access" to the medical services at issue. *Id*. at 726-27.

Although the *Hobby Lobby* Court seriously questioned whether the government had asserted a compelling governmental interest in view of the regulation's exemptions, it assumed *arguendo* that it had and, instead, invalidated the law under the narrow tailoring prong because it was not the least restrictive means to achieve the government's interests. *Id*. at 728. As that Court explained, the law was not sufficiently tailored to withstand strict scrutiny because "[t]here are other ways in which [the government] could equally ensure that every woman has cost-free access to the particular [medical services] at issue here." *Id*. at 692.

First, as the *Hobby Lobby* Court recognized, "the Government [could] assume the cost of providing the [abortion services] at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 573 U.S. at 728. This plainly contemplates that the Government could directly reimburse providers for the cost of the procedures at issue, which could address the State's concerns for all women in New York. Notably, the State's Attorney General recently called for the State to establish "a fund that will cover the costs for women living in [states that restrict abortion] to

travel to New York, as well as cover accommodations and costs of an abortion."[7] And yet the State has not engaged in any "good faith consideration" of such an alternative for women who live in the State, much less carried its burden to "prove" that it would be unworkable. *Holt*, 574 U.S. at 364-65. And such direct State payment for the procedures at issue is only one of several less restrictive alternatives that exist.

Another solution would be for the State to offer women enrolled in the Religious Objectors' health plans the opportunity to sign up for freestanding abortion-only health plans, subsidized by the State, separate and apart from the Religious Objectors' plans. This option would involve nothing but a simple administrative step for women—taking a few minutes to sign up for a separate insurance card—that would avoid the crushing burden of forcing religious employers to act in violation of their conscience. It would not be burdensome for the beneficiaries of this program to keep two insurance cards in their wallets instead of one. Indeed, it is commonplace for people to use separate insurance cards to pay for prescription drugs, doctor's visits, dental care, and vision care. New York law recognizes as much by expressly allowing health insurance to exclude dental and vision coverage. *See* 11 NYCRR § 52.16(c). And signing up

[7] *See* https://ag.ny.gov/press-release/2021/attorney-general-james-calls-state-funding-provide-abortion-access-women.

and using an abortion-only health policy would be no more burdensome than the ordinary administrative tasks associated with obtaining and using health insurance. The State has never suggested any reason, much less provided any evidence, that such an option would not be workable and affordable. Given the State's position that "providing all women with . . . access to [abortion] is a Government interest of the highest order, it is hard to understand [the] argument that it cannot be required" to pay the relatively minor cost of providing such access. *Hobby Lobby*, 573 U.S. at 729.

Another way for the State to provide the objectionable coverage independently would be to treat employees whose employers refuse to provide abortion coverage for religious reasons the same as it does employees whose employers provide no medical coverage at all. Such employees can sign up for health plans independently of their employer, and can thus obtain health insurance containing the State-mandated abortion coverage. Indeed, the State has already argued in effect that its interests would be equally well served if the Religious Objectors and other religious employers simply stopped providing medical coverage altogether. *See* Cert. Opp. at 4 (arguing that the Abortion Mandate "places no requirements on employers" because objecting employers need not provide health insurance at all).

Additionally, the State could "give tax incentives to [abortion] suppliers to provide these . . . services at no cost to consumers" or "give tax incentives to consumers" so they would not have to bear the cost of abortion. *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). The simplest version of this approach would be to grant refundable tax credits for the cost of abortion services purchased by people enrolled in religious objectors' health plans. Or, alternatively, the State could grant credits to a network of large insurance companies to incentivize them to provide an independent program with easy online enrollment for people enrolled in religious health plans. Indeed, a rule recently proposed by the federal government would create a similar system for contraception, allowing women to obtain no-cost contraceptive coverage without any involvement of their employer. *See* 88 Fed. Reg. 7236 (Feb. 2, 2023).

Finally, as in *Hobby Lobby*, the government has "already devised and implemented a system that seeks to respect the religious liberty of [some] religious [employers] while ensuring that the employees of those entities have precisely the same access [to the coverage at issue] as employees of companies whose owners have no religious objections to providing such coverage." 573 U.S. at 692; *see also* 11 NYCRR § 52.16(o)(2)(i), (ii) (providing a scheme to ensure abortion coverage for employees of religious employers who qualify for the existing exemption). The State has never offered any satisfactory explanation for why this

option, which is adequate to serve its interests as to select religious employers, is inadequate when extended to employers like the Religious Objectors. Extending that same option to religious entities like the Religious Objectors here thus appears to pose no threat to public health, access to healthcare, health disparities, or consumer understanding of their options for healthcare. Although the terms of the current scheme would still severely burden the religious exercise of the Religious Objectors, and would fail to qualify as the least restrictive alternative given the several alternatives listed above, the exemption still demonstrates that the State has at a minimum not chosen the least restrictive means to achieve its goals.[8]

Indeed, rather than seriously considering any of these less restrictive means, the State has opted for a sharply limited religious exemption that requires an intrusive inquiry into the religious mission and organization and that otherwise threatens religious autonomy as described above. Such an approach cannot be considered "narrowly tailored" under any of the U.S. Supreme Court's precedents, and must be rejected in light of the readily available alternatives.

* * *

[8] It is unnecessary for the Court to decide whether this alternative would itself violate the Free Exercise Clause for those employers who objected to this approach on religious grounds. "At a minimum," it would be a less restrictive alternative and "it serves [the State's] interests equally well." *Hobby Lobby*, 573 U.S. at 731. The mere existence of such an alternative establishes that the current regulation cannot survive strict scrutiny, even if additional accommodations might be required for religious objectors. *See id*.

Fulton, Tandon, and the U.S. Supreme Court's other recent Free Exercise cases compel the conclusion that the Abortion Mandate is subject to strict scrutiny. *Hobby Lobby* and the Court's other strict scrutiny precedents compel the conclusion that the Abortion Mandate cannot survive review under that standard. As a result, the Abortion Mandate violates the First Amendment, and cannot stand.

CONCLUSION

For all of the reasons set forth herein, judgment should be entered declaring the Abortion Mandate unconstitutional under the United States Constitution.

Date: April 10, 2023

Respectfully submitted,

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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, as follows:

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RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Roman Catholic Diocese of Albany, New York; The Roman Catholic Diocese of Ogdensburg; 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.; Renee Morgiewicz; and Depaul Housing Corporation are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

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AFFIRMATION OF SERVICE

I, Kelly C. Holt, an attorney admitted to practice before the courts of the State of New York, affirm under penalty of perjury as follows: I am over 18 years of age and not a party to this case. On April 10, 2022, I served three copies of the attached Brief for Plaintiffs-Appellants dated April 10, 2023, by enclosing the aforesaid documents in a properly addressed postage paid envelope deposited into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery addressed as follows:

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