

APL-2022-0089
Albany County Clerk's Index Nos. 7536-17 and 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
OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH
SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR
SAVIOR'S LUTERHAN 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.

**BRIEF OF *AMICUS CURIAE* NOTRE DAME LAW SCHOOL RELIGIOUS
LIBERTY CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Date: February 19, 2024

John A. Meiser
Francesca Matozzo
Notre Dame Law School
Religious Liberty Clinic
1338 Biolchini Hall
Notre Dame, IN 46556
Tel.: (574) 631-1306
Fax: (574) 634-1431

Counsel for Amicus Curiae

TABLE OF CONTENTS

RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. New York State’s abortion mandate impermissibly invites the State to inquire into religious questions.....	3
II. The government cannot single out a particular set of favored religious traditions for favorable treatment.	12
III. The misguided exemption will not serve the state’s interests and will lead to perverse consequences.....	15
CONCLUSION	20
CERTIFICATE OF COMPLIANCE.....	22
AFFIRMATION OF SERVICE	22

RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

Amicus certifies that it is not a publicly held corporation. It has no parent corporation, subsidiaries, or affiliates.

Date: March 4, 2024

/s/ *Francesca Matozzo*
Francesca Matozzo

TABLE OF AUTHORITIES

Cases

<i>Church of Lukumi v. Hialeah</i> , 508 U.S. 520 (1993)	8
<i>Congregation Yetev Lev D’satmar, Inc. v. Kahana</i> , 9 N.Y.3d 282 (2007)	5, 6, 10
<i>Emad v. Dodge Cnty.</i> , No. 19-cv-0598, 2022 WL 1408044 (E.D. Wis. May 3, 2022)	8
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	2, 8
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	14
<i>Espinoza v. Mont. Dep’t of Revenue</i> , 140 S. Ct. 2246 (2020)	13
<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021)	2, 13, 15, 20
<i>Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006)	8
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	8
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 565 U.S. 171 (2012)	4, 13
<i>Jones v. Wolf</i> , 443 U.S. 595 (1979)	4
<i>Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.</i> , 344 U.S. 94 (1952)	4, 6, 10

<i>Landor v. La. Dep’t of Corr. & Pub. Safety</i> , No. 21-733, 2022 WL 4593085 (M.D. La. Sept. 29, 2022)	8
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	14
<i>Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania</i> , 140 S. Ct. 2367 (2020)	16
<i>NLRB v. Catholic Bishop of Chi.</i> , 440 U.S. 490 (1979).....	4
<i>Our Lady of Guadalupe v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020)	4, 5, 6, 11, 12, 15
<i>Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevic</i> , 426 U.S. 696 (1976)	4, 7
<i>Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981)	7, 8, 13
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2017)	13
<i>Walker v. Baldwin</i> , No. 19-cv-50233, 2022 WL 2356430 (N.D. Ill. June 30, 2022)	8
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871)	4, 5, 7
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	14
Statutes & Regulations	
11 NYCRR § 52.2	8, 10, 11

Other Authorities

Byron Johnson et al., <i>Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities</i> , Baylor Inst. for the Study of Relig. (2017)	17
Chris Schoon, <i>Living Like Jesus: Service as a Faith Practice</i> , Christian Reformed Church: Faith Practices Project (last visited Feb. 16, 2024)	14
David Masci, <i>Where Major Religious Groups Stand on Abortion</i> , Pew Rsch. Ctr. (June 21, 2016)	19
Emilie Kao, <i>Religious Discrimination Makes Children Pay the Price</i> , Heritage Found. (Nov. 16, 2020).....	17, 18
<i>Faith Based Ministries and Service Resource Directory</i> , New York State Dep't of Health (April 18, 2019).	18
Gregory A. Smith, <i>Just One-Third of U.S. Catholics Agree with their Church that Eucharist is Body, Blood of Christ</i> , Pew Rsch. Ctr. (Aug. 5, 2019)	11
Jessica Eby et al., <i>The Faith Community's Role in Refugee Resettlement in the United States</i> , 24 J. Refugee Stud. 586 (2011)	17
<i>Less God, Less Giving? Religion and Generosity Feed Each Other in Fascinating Ways</i> , Philanthropy Roundtable (Winter 2019).....	18
Liam Stack, <i>A Look Inside New York's Swirling Kaleidoscope of Faiths</i> , N.Y. Times (Dec. 19, 2022).....	9, 10, 20
Luke W. Goodrich & Rachel N. Busick, <i>Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases</i> , 48 Seton Hall L. Rev. 353 (2018)	8
Moshe Borowski, <i>Chayim Aruchim: When Six Weeks Becomes a Lifetime</i> , 5 Towns Jewish Times (May 30, 2014).....	9
Natalie D. Riediger et al., <i>A Descriptive Analysis of Food Pantries in Twelve American States</i> , 22 BMC Pub. Health 525 (2022)	17

Natalie Goodnow, <i>The Role of Faith-Based Agencies in Child Welfare</i> , Heritage Found. (May 22, 2018)	17
Nat’l All. to End Homelessness, Faith-Based Organizations: Fundamental Partners in Ending Homelessness (May 2017)	17
<i>New York Religious Organizations</i> , Cause IQ (last visited Feb. 16, 2024).....	19
<i>Religious Landscape Study: Religious Composition of Adults in New York</i> , Pew Rsch. Ctr. (2014).....	19
<i>Religious Organizations in the US</i> , IBIS World (Sept. 2023).....	19
Riyadh Mohammed, <i>Hot Trend in 2017: Rise of Islamic Banks on Main St. USA</i> , CNBC (Dec. 2, 2016, 9:16 AM).....	9
Stephanie H. Barclay, <i>An Economic Approach to Religious Exemptions</i> , 72 Fla. L. Rev. 1211 (2020)	15, 16
Southern Baptist Convention, <i>On Abolishing Abortion</i> (June 21, 2021)	16

INTEREST OF THE *AMICUS CURIAE*

The Notre Dame Law School Religious Liberty Clinic promotes and defends religious freedom for all people. It advocates for the right of all people to exercise, express, and live according to their beliefs. And it defends individuals and organizations of all faith traditions against interference with these fundamental liberties. It has represented groups from an array of faith traditions to defend the right to religious exercise, to preserve sacred lands from destruction, to promote the freedom to select religious ministers and shape religious doctrine, and to prevent discrimination against religious institutions and believers. The Clinic has participated in proceedings at all levels of federal and state courts, in administrative agencies, and before foreign courts and other governmental bodies around the world.

The Notre Dame Law School Religious Liberty Clinic has an interest in this case because it seeks to ensure that government officials do not compel religious institutions to act in a manner that violates their deeply held beliefs in contravention of the guarantees of the First Amendment. That is the case here where New York State has not acted neutrally towards religions but instead has given special treatment to only some preferred religious groups, forcing other disfavored religions to choose between their missions of service and their deeply held convictions on the sanctity of the life of the unborn.

SUMMARY OF THE ARGUMENT

New York State's abortion mandate requires many faith-based organizations to violate their deeply held religious beliefs on the sanctity of life. As Appellants have demonstrated, this mandate violates the First Amendment under *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), because it is not generally applicable and New York State does not pursue its interest with equal vigor across all groups. And the statute's narrow exemption for *some* religious organizations does not remedy that First Amendment violation. Instead, the exemption compounds the law's First Amendment breach.

First, New York State's law improperly invites the government to inquire into religious questions of faith and doctrine. The law offers an exemption only to those organizations that inculcate religious tenets and that primarily employ and serve only those individuals who share such tenets. This necessarily invites government actors to inquire into the nature of an organization's religious beliefs and evaluate whether those beliefs are sufficiently shared among the people with whom the organization interacts. Both the United States Supreme Court and this Court have made clear that the government lacks the authority to even *investigate* those questions, let alone make pronouncements on them.

Second, New York State's law inappropriately offers protections only to organizations with certain favored characteristics. It picks and chooses between

religious organizations, privileging some over others. Those faiths that require outward service to the community are disfavored, while more inwardly focused ministries are given greater priority. The First Amendment bars exactly this kind of discrimination.

Finally, New York’s law threatens perverse outcomes—namely, a loss of critical social services for those in need—that especially harm minority believers and the people of New York.

The dramatic infringement on religious exercise wrought by New York’s abortion mandate is not remedied by its idiosyncratic, unduly narrow, and ultimately discriminatory religious exemption. This Court must rule that New York’s law violates the First Amendment and uphold the fundamental right of all religious organizations to their free exercise of religion, regardless of faith tradition.

ARGUMENT

I. New York State’s abortion mandate impermissibly invites the State to inquire into religious questions.

The abortion mandate’s exemption improperly invites government actors to inquire into a host of questions about a religious organization’s beliefs, membership, and outreach. The First Amendment bars those inquiries.

“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned.”

Serbian E. Orthodox Diocese for U.S. of Am. and Can. v. Milivojevich, 426 U.S. 696, 711 (1976) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1871)); see Plaintiffs-Appellants’ Op. Br. 16, 25-26. “The First Amendment protects the right of religious institutions to ‘decide for themselves, free from state interference’” matters of church government, faith, and doctrine. *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952)).

Governments lack authority to even “inquire” into “the doctrinal theology, the usages and customs, the written laws, and fundamental organization” of religious organizations. *Watson*, 80 U.S. at 733; see *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (State decisions must “involve[] no consideration of doctrinal matters” including “the tenets of faith”). When the government does so, the “very process of inquiry leading to findings and conclusions” threatens the “rights guaranteed by the Religion Clauses” of the First Amendment. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). This doctrine—like the First Amendment itself—is not limited to “churches” as such but rather applies generally to organizations of religious character. See, e.g., *Our Lady of Guadalupe*, 140 S. Ct. 2049 (recognizing autonomy of “churches and other religious institutions” and applying rule to Catholic elementary school); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (applying rule to Lutheran elementary school).

This principle not only springs from religious organizations' free-exercise rights. It is also a core mandate of the Establishment Clause. The "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson*, 80 U.S. at 728-29. The state is barred from favoring "groups espousing particular doctrines or beliefs." *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 282 (2007). And to fulfill this demand, governments must avoid entanglement in matters of faith and doctrine. *See, e.g., Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Congregation Yetev Lev D'Satmar*, 9 N.Y.3d at 282. If the State were to "interfer[e] in or determin[e]" matters relating to faith, there would be a "substantial danger that the state will become entangled in essentially religious controversies" that lie beyond the purview of civil government. *Congregation Yetev Lev D'Satmar*, 9 N.Y.3d at 286. The government lacks power "to dictate *or even to influence*" matters of faith. *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2069; *see also id.*(entanglement in matters of faith "constitute[s] one of the central attributes of an [unconstitutional] establishment of religion").

Working together, the Religion Clauses thus bar the government from wading into religious matters, such as who counts as a "member" of a religious community. Indeed, "[i]t is well settled that membership issues . . . are an ecclesiastical matter." *Congregation Yetev Lev D'Satmar*, 9 N.Y.3d at 287; *see also Our Lady of Guadalupe*, 140 S. Ct. at 2068-69; *Kedroff v. St. Nicholas*

Cathedral, 344 U.S. 94, 106-10 (1952). In *Kedroff v. Saint Nicholas Cathedral*, for example, the U.S. Supreme Court forbade New York State from opining on the “strictly . . . ecclesiastical” question of who leads a church. 344 U.S. at 115. The First Amendment, the Court explained, reserves for religious organizations “an independence from secular control or manipulation” that promises them sole authority over that determination. *Id.* at 116. So, too, this Court declined to look into any questions of membership in a Jewish congregation “beyond any membership criteria found in the Congregation’s bylaws.” *Congregation Yetev Lev D’Satmar*, 9 N.Y.3d at 288. Because a Jewish congregation’s bylaws defined membership as requiring a congregant to follow the “ways of the Torah”—a fundamentally religious question—this Court held that it could not adjudicate a membership dispute, which rested on a “constitutionally protected ecclesiastical matter.” *Id.* at 288. And in *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court rejected the argument that a school could invoke the ministerial exception only for those employees who were “practicing” members of the school’s religion. Indeed, inviting a court to “determin[e] whether a person is a ‘co-religionist’ . . . would risk . . . [impermissible] entanglement in religious issues.” *Our Lady of Guadalupe*, 140 S. Ct. at 2068-69.

Civil governments not only lack the *authority* to consider religious questions like institutional membership and doctrine. They also lack the

competence to do so. The government cannot “be as competent in the ecclesiastical law and religious faith . . . as the ablest men in each are in reference to their own.” *Watson*, 80 U.S. at 729; *see Serbian E. Orthodox Diocese*, 426 U.S. at 714 n.8 (same). This is especially so given the complexity and diversity of faiths in this country. Religious leaders and believers have a deep knowledge of the contours of their own faith and teaching. State officials do not. Government officials cannot be expected to determine what any particular faith requires, let alone to interpret the beliefs of *all* faiths. Indeed, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Even *within* a faith community, there can be vast differences in self-understanding and members may disagree about core beliefs or requirements for full membership. It would be impossible for a government actor to evaluate fraught and contested religious questions on any neutral or acceptable terms. And this problem is particularly acute when governments deal with minority religions, which officials may be even more likely to misunderstand because of their limited awareness of or interactions with them.¹

¹ *See, e.g.,* Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353 (2018); *Walker v. Baldwin*, No. 19-cv-50233, 2022 WL 2356430, at *1 (N.D. Ill. June 30, 2022); *Landor v. La. Dep’t of Corr. & Pub. Safety*, No. 21-

The narrow religious-organization exemption to New York’s abortion mandate runs afoul of these bedrock principles by inviting the State to entangle itself in religious matters in two ways: by examining a religious organization’s core “purpose” and by inquiring into whether those people who are primarily employed or served by a religious organization sufficiently share the same religious tenets. 11 NYCRR § 52.2(y)(1).

First, to qualify for the exemption, an organization’s purpose must be “[t]he inculcation of religious values.” § 52.2(y)(1). Absent simple deference to a religious organization on this question, the government cannot determine whether the organization promotes “religious values” without making impermissible judgments as to what counts as a “religious value” in the first place. Nor could the State provide a neutral, administrable metric for determining what an organization must do to sufficiently “inculcate” those values as opposed, perhaps, to simply

733, 2022 WL 4593085 (M.D. La. Sept. 29, 2022); *Emad v. Dodge Cnty.*, No. 19-cv-0598, 2022 WL 1408044 (E.D. Wis. May 3, 2022). Or, worse still, these discrete communities may be more likely to face outright hostility. Indeed, many of the U.S. Supreme Court’s religious freedom cases involve minority religions although such communities are, by their nature, unrepresentative of the population. *See, e.g., Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (Christian spiritualist sect); *Holt v. Hobbs*, 574 U.S. 352 (2015) (Muslim prisoner); *Church of Lukumi v. Hialeah*, 508 U.S. 520 (1993) (Santeria practitioners); *Smith*, 594 U.S. 872 (Native American faith practitioners); *Thomas*, 450 U.S. 707 (Jehovah’s Witness).

fulfill them. It is anyone's guess whether a State regulator would determine a wide variety of religious conduct to satisfy these narrow categories.

Consider several examples from New York itself beyond the Plaintiffs themselves. *See* Plaintiffs-Appellants' Op. Br. 8-11. What, for instance, of an Islamic financial institution, which exists specifically to provide financing needs for the Muslim community in accordance with religious law?² Or an Orthodox Jewish medical organization that works to ensure that Orthodox Jews are given religiously appropriate end-of-life care.³ Or a Catholic Church whose pastor "spends more than half his time each week" as a religious "psychologis[t] for . . . immigrants."⁴ Or a vocational and professional training program run by an Antioch Baptist pastor who preaches that "God don't want you to be poor another day in your life."⁵ Do these activities "inculcate" "religious values"? And where would a regulator draw that line? Must a group explicitly "teach" religious beliefs as it lives

² *See, e.g.,* Riyadh Mohammed, *Hot Trend in 2017: Rise of Islamic Banks on Main St. USA*, CNBC (Dec. 2, 2016, 9:16 AM), <https://www.cnbc.com/2016/12/02/under-the-radar-islamic-banks-rise-in-th.html>.

³ *See, e.g.,* Moshe Borowski, *Chayim Aruchim: When Six Weeks Becomes a Lifetime*, 5 Towns Jewish Times (May 30, 2014), <https://www.5tjt.com/chayim-aruchim-when-six-weeks-becomes-a-lifetime/>.

⁴ Liam Stack, *A Look Inside New York's Swirling Kaleidoscope of Faiths*, N.Y. Times (Dec. 19, 2022), <https://www.nytimes.com/2022/12/15/nyregion/world-religions-new-york-city.html>.

⁵ *Id.*

them out? What if it is its belief that charitable work itself furthers religious teaching? And what evidence would a religious organization need to satisfy this requirement? Inquiries like these present exactly the sort of governmental entanglement in religious affairs that is barred by the First Amendment. They strike at the heart of religious organizations’ “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff*, 344 U.S. at 94.

Second, the mandate’s exemption applies only to organizations that “primarily emplo[y]” and “serve” “persons who share the religious tenets of the entity.” § 52.2(y)(2). That requirement invites government officials to make two further impermissible determinations: first, to investigate and pronounce what “religious tenets” a faith community believes and, second, to assess whether those beliefs are sufficiently shared among the organization’s employees and the people it serves. “It is well-settled that membership issues . . . are an ecclesiastical matter” barred from government inquiry—and it is even more obvious that a more searching review of a community’s shared religious tenets is also off-limits. *Congregation Yetev Lev D’Satmar*, 9 N.Y.3d at 287. Religious adherents hold their own views of what their faith requires, beliefs that are a matter of theology, of conscience, and of faith—not subjects of legitimate inquiry for civil government. Indeed, it is not clear what a government official would even be expected to

consult to determine a faith's "tenets." Many faiths do not have formally or comprehensively codified doctrine. And for those that do, like the Catholic organizations in this case, there can be wide disagreement on a number of official tenets even if the religion itself might have defined certain orthodox beliefs.⁶

And of course, there remains the second question of what counts as "sharing faith tenets," especially given the inherent diversity in individual beliefs. In the words of the U.S. Supreme Court, "Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Our Lady of Guadalupe*, 140 S. Ct. at 2069. The government has no authority (and indeed no ability) to render such judgments. *Id.* It is no easier (and no more appropriate) for a government official to determine what it means for an organization to "primarily serve" people who share the same religious tenets. § 52.2(y)(3). For example, how can the government determine the primary population "served" by a church that has a large congregation in Sunday services and also runs transitional housing for people newly released from incarceration? Or a house of worship that also provides meals to underprivileged families in the neighborhood? Or offers drug and alcohol addiction programs?

⁶ See, e.g., Gregory A. Smith, *Just One-Third of U.S. Catholics Agree with their Church that Eucharist is Body, Blood of Christ*, Pew Rsch. Ctr. (Aug. 5, 2019), <https://www.pewresearch.org/short-reads/2019/08/05/transubstantiation-eucharist-u-s-catholics>.

Which religious exercise is “primary”? And what is the relevant population of people if it might not be consistent? The people who visit a religious soup kitchen may vary daily, and the organization may not know or inquire into the faith of these changing patrons. Does such a group count?

There are no easy answers to these questions—nor any inquiry into them that would be appropriate for civil authorities. Indeed, to even inquire into these questions, the government would deeply and unavoidably entangle itself in religious matters. But governments are precluded from “delv[ing]” into such “sensitive question[s].” *Our Lady of Guadalupe*, 140 S. Ct. at 2069.

II. The government cannot single out a particular set of favored religious traditions for favorable treatment.

Appellants have demonstrated that the mandate, which contains an “exemption for some religious organizations but not others,” is not generally applicable and must be subject to strict scrutiny. Plaintiffs-Appellants’ Op. Br. 23; *see id.* at 19-32. Indeed, the State’s narrow exemption not only fails to remedy the constitutional violation of its abortion mandate for many religious organizations, but worse still, that exemption doubles down on the State’s First Amendment breach by discriminating against groups based on their beliefs.

The First Amendment’s protections are not limited to religious ministries that serve only their own faith communities. Indeed, “the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.”

Thomas, 450 U.S. at 715-16. The U.S. Supreme Court has repeatedly held that the First Amendment protects a wide variety of religious organizations whose charitable ministries extend far beyond their own members. For example, in *Trinity Lutheran*, the Court held that the First Amendment demanded equal access to playground-improvement grants for a church that operated a preschool open to “students of any religion.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 454 (2017). The Court also recently recognized the free-exercise rights of a Catholic foster care agency that “served the needy children of Philadelphia for over two centuries” regardless of the children’s religious background. *Fulton*, 141 S. Ct. at 1874. And in *Hosanna-Tabor*, the Court applied the Religion Clauses’ protections to a small Lutheran school that hired teachers who were “not required to be trained by the Synod or even to be Lutheran.” 565 U.S. at 177, 181; *see also Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (applying Free Exercise protections to “both religious schools and adherents” without reference to who the schools employed or served).

More fundamentally, the government may not pick and choose between religions based on how broadly their beliefs lead them to minister and to serve. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). No government official may “prescribe[] what shall be

orthodox in . . . religion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In fact, the government “must be neutral,” not only “in matters of religious theory [and] doctrine,” but also regarding “religious . . . practice.” *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

Yet the circumscribed criteria of the abortion mandate’s religious exemption create just this kind of discrimination. New York is a “home for many different world religions,” all of which “express their faith . . . in a multitude of ways.” Stack, *supra* note 5. Often that includes service or ministry to those outside of their own particular faith community—as is the case with the Plaintiffs here.⁷ Plaintiffs-Appellants’ Op. Br. 8-11. Nor, as described above, is such outwardly focused religious exercise rare. Yet, New York State would appear to deny such groups any religious exemption and offer protection instead only to a narrow class of preferred religious organizations, impermissibly excluding a great many other religions or denominations based on differences in their mission or ministries. The exemption favors more inward-focused religious groups over those whose religious beliefs

⁷ See, e.g., Chris Schoon, *Living Like Jesus: Service as a Faith Practice*, Christian Reformed Church: Faith Practices Project, <https://www.crcna.org/FaithPracticesProject/service/living-jesus-service-faith-practice> (last visited Feb. 16, 2024) (“Service is a response to God’s love for us in Jesus Christ that teaches us to live like Jesus through specific, tangible actions that contribute to the dignity and well-being of the people we serve.”).

lead—or require—they to more broadly serve those outside their membership. The First Amendment demands more.

III. The misguided exemption will lead to perverse consequences.

The mandate threatens grave consequences for a great many religious organizations that serve the public but which fundamentally oppose abortion. By ordering them to partake in conduct that violates their deeply held beliefs, New York State demands that such religious organizations choose between adhering to their deeply held beliefs about the sanctity of human life or violating those beliefs in order to continue their ministries of service. This is often no choice at all. For many faith-based organizations, their religious convictions “are the very reason for [their] existence.” *Our Lady of Guadalupe*, 140 S. Ct. at 2055. Such organizations simply *cannot* divorce their religious beliefs from the ways in which they serve. *See id.*; *see also, e.g., Fulton*, 141 S. Ct. at 1884-85 (Alito, J., concurring).

If religious organizations like these are stripped of the core reason for their work, many might cease to perform it. Our history and laws protecting religious liberty have been shaped by religious believers who are willing to suffer dramatic consequences to avoid compromising their faith. *See* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 Fla. L. Rev. 1211, 1231-38 (2020). Often, “religious individuals do not comply with government pressure or coercion.” *Id.* at 1226. This phenomenon has a long history. For example, at the

time of the founding, Quakers refused to join the military and “did not respond to government penalties trying to induce them to do so.” *Id.* In more modern times, Catholic Charities closed its foster care program in many states in response to coercion related to the organization’s beliefs about marriage. *Id.* Pressuring religious organizations in New York to similarly close or curtail services not only infringes their religious freedom but indeed would do little or nothing to promote the State’s supposed interest in expanded abortion coverage. And there is reason to believe that is exactly that effect New York’s law threatens.⁸

Moreover, the perverse incentives created by New York’s narrow exemption threaten to harm not only religious believers but indeed the broader communities they serve. In order to receive the protections of the exemption, religious organizations are encouraged to *limit* their good work to their own fellow believers. Every day, vulnerable communities rely on faith-based organizations to provide a wide range of services addressing critical needs. For example, religious organizations “serve as the backbone of the emergency shelter system in this

⁸ Indeed, many Christian organizations’ objections to abortion are well-known and longstanding. See *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); Southern Baptist Convention, On Abolishing Abortion (June 21, 2021), <https://www.sbc.net/resource-library/resolutions/on-abolishing-abortion/>.

country,” and are estimated to operate between 30 and 60% of emergency shelter beds in the United States.⁹ In some cities, religious shelters account for as high as 70 to 90% of beds.¹⁰ Likewise, a recent study found that faith-based organizations operate nearly two-thirds of the food pantries in the twelve states it studied.¹¹ The same goes for aid to migrants. According to one report, faith-based organizations have been instrumental in resettling 70% of all refugees arriving in the United States.¹² So too with foster care: by one count there are more than 8,000 faith-based foster care and adoption agencies in the United States, which in some states are responsible for facilitating more than 25% of foster care adoptions.¹³ The list

⁹ Nat’l All. to End Homelessness, *Faith-Based Organizations: Fundamental Partners in Ending Homelessness* 1 (2017); see *id.* (estimating 30%); Byron Johnson et al., *Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities*, Baylor Inst. for Study of Relig. 20 (2017) (estimating nearly 60%).

¹⁰ Johnson, *supra* note 9, at 20-21; Nat’l All. To End Homelessness, *supra* note 9, at 1.

¹¹ Natalie D. Riediger et al., *A Descriptive Analysis of Food Pantries in Twelve American States*, 22 BMC Pub. Health 525, at 6-10 (2022).

¹² See Jessica Eby et al., *The Faith Community’s Role in Refugee Resettlement in the United States*, 24 J. Refugee Stud. 586 (2011).

¹³ Emilie Kao, *Religious Discrimination Makes Children Pay the Price*, Heritage Found. (Nov. 16, 2020), <https://www.heritage.org/religious-liberty/commentary/religious-discrimination-makes-children-pay-the-price>; Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, Heritage Found. (May 22, 2018), <https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare>.

goes on. Studies have shown that religious organizations “care for one out of every five U.S. hospital patients,” “provide 130,000 alcohol recovery programs,” offer 120,000 employment-related services, and support those living with HIV/AIDS at a rate of “one ministry for every 46 people infected with the virus.”¹⁴

New York reflects the same reality and is home to hundreds of faith-based charities, including over one-hundred HIV and AIDs programs, over one hundred prison ministries, and more than fifty domestic violence programs.¹⁵

Many of these organizations do not require the people they serve to share their religious beliefs. Indeed, for many, the idea of turning away someone in need because of her personal religious beliefs is anathema. Yet, for the many such organizations whose religious beliefs oppose abortion,¹⁶ New York’s cabined exemption now incentivizes them to reduce the populations they serve in order to escape the abortion mandate. This will both drastically limit the good work they

¹⁴ *Less God, Less Giving? Religion and Generosity Feed Each Other in Fascinating Ways*, Philanthropy Roundtable (Winter 2019), <https://www.philanthropyroundtable.org/magazine/less-god-less-giving/>.

¹⁵ *Faith Based Ministries and Service Resource Directory*, N.Y.S. Dep’t of Health (April 18, 2019), https://www.health.ny.gov/diseases/aids/consumers/faith_communities/docs/resource_directory.pdf.

¹⁶ See David Masci, *Where Major Religious Groups Stand on Abortion*, Pew Rsch. Ctr. (June 21, 2016), <https://www.pewresearch.org/short-reads/2016/06/21/where-major-religious-groups-stand-on-abortion/>.

may perform and, for many, undermine the very reason for their existence. The most vulnerable in the community stand to suffer worst from these losses.¹⁷

These problems are exacerbated by the exemption's demand that religious organizations primarily *employ* coreligionists as well. Religious organizations employ thousands of people in New York and roughly one million nationwide.¹⁸ Limiting those positions to individuals who sufficiently share an organization's religious beliefs would harm religious organizations, those who depend on them for their livelihoods, and indeed those who rely on their charitable work. The problem is most acute for smaller religious groups who may be less able to fill necessary positions with only coreligionists. In 2014, Pew Research Center found that many minority religions—including Jehovah's Witnesses, Muslims, Buddhists, Hindus, and members of the Church of Jesus Christ of Latter-day Saints—each represented two percent or less of the total population.¹⁹ In any given

¹⁷ See, e.g., Kao, *supra* note 13 (highlighting religious discrimination against religious foster care agencies in some states that forced them to shut down and displace 2,000-3,000 children in one state alone).

¹⁸ See *New York Religious Organizations*, Cause IQ, https://www.causeiq.com/directory/religious-organizations-list/new-york-state/#employment_section (last visited Feb. 16, 2024); *Religious Organizations in the US*, IBIS World (Sept. 2023), <https://www.ibisworld.com/united-states/market-research-reports/religious-organizations-industry/#IndustryStatisticsAndTrends>.

¹⁹ *Religious Landscape Study: Religious Composition of Adults in New York*, Pew Rsch. Ctr. (2014), <https://www.pewresearch.org/religion/religious-landscape-study/state/new-york/>.

area, or for many other faiths, that number might be much smaller.²⁰ Even larger religious groups may find it difficult to recruit coreligionists to fill necessary roles at an organization; for smaller groups it may simply not be possible. The natural consequence, again, would be to force such organizations to reduce their work or even possibly close.

In recent years, the Supreme Court has gone to great lengths to ensure that governments do not force religious believers to either “give up [their] sincerely held religious beliefs or give up serving” the broader community. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring). But now New York does just that. Religious organizations will be faced with two options: comply with the mandate and violate their beliefs or drastically scale back their missions to receive the exemption (which for many, may lead to closing their doors). Forcing such a choice will harm both religious organizations and the people of New York. It also violates the First Amendment.

CONCLUSION

The mandate cannot be squared with protections afforded by the First Amendment. Its narrow attempt to accommodate favored religious groups is

²⁰ Consider just New York City, where, in addition to many larger religious groups, “[t]here are Buddhist and Jain temples, Sikh soup kitchens, Orthodox grade schools that teach in Greek, and communities that follow Bon.” Stack, *supra* note 5.

woefully insufficient and encourages the State to impermissibly entangle itself in religious matters. The mandate will not achieve its stated goals, but will rather harm those employed and served by religious organizations. This Court should hold that the abortion mandate violates the First Amendment.

Date: February 19, 2024

Respectfully submitted,

/s/ Francesca Matozzo

Francesca Matozzo

John A. Meiser

Notre Dame Law School Religious Liberty Clinic

1338 Biolchini Hall of Law

Notre Dame, IN 46656

(574) 631-3106

fgenova@nd.edu

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:

Typeface: Times New Roman

Point size: 14

Line Spacing: Double

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 4,077.

Date: February 19, 2024

/s/ Francesca Matozzo

Francesca Matozzo

Counsel of Record

Notre Dame Law School Religious Liberty Clinic
1338 Biolchini Hall of Law
Notre Dame, IN 46656

AFFIRMATION OF SERVICE

I, Francesca Matozzo, 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 party to this case. On February 19, 2024, I served three copies of the attached Brief of Amicus Curiae dated March 4, 2024, by enclosing the 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:

Hon. Leticia James
Attorney General
of the State of New York
Laura Ettinger
Assistant Solicitor General
The Capitol
Albany, NY 12224

Attorney for Defendants-Respondents

Michael L. Costello
Tobin and Dempf, LLP
515 Broadway
Albany, NY 12207

Daniel Blomberg
The Becket Fund for
Religious Liberty
1919 Pennsylvania Ave. NW
Washington, D.C. 20006

Victoria Dorfman
Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001

Attorneys for Plaintiffs-Appellants

Date: February 19, 2024

/s/ Francesca Matozzo

Francesca Matozzo

Notre Dame Law School Religious Liberty Clinic
1338 Biolchini Hall of Law
Notre Dame, IN 46656

Attorney for Amicus Curiae