No. 20-1501

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY ET AL.,
Petitioners,

v.

LINDA A. LACEWELL, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York, Appellate Division, Third Department

BRIEF FOR *AMICI CURIAE* THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; THE GENERAL CONFERENCE OF THE SEVENTH-DAY ADVENTISTS; THE JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY OF THE ANGLICAN CHURCH IN NORTH AMERICA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

This case involves a New York regulation requiring employee healthcare plans to cover abortion. A narrow exemption shields some churches but not other religious organizations. *Amici* are churches and other religious organizations with a substantial interest in the Constitution's guarantee that religious institutions are free to govern their own ecclesiastical affairs. Several *amici* have participated in previous cases before this Court involving related issues under the First Amendment. See, *e.g.*, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 565 U.S. 171 (2012) (unanimous). We submit this brief because the New York Appellate Division's decision holds exceptional importance. Unless reviewed, it will undermine the crucial principle of religious autonomy.

INTRODUCTION

New York law dictates that employer-sponsored healthcare plans cannot "limit or exclude coverage for abortions that are medically necessary." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o). *Medically necessary* is undefined in the regulation. Official guidance documents suggest that the State intends for the term to include not only "abortions in cases of rape, incest or fetal malformation," Pet. App. 19a, but also

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici's* intent to file this brief and consented to the filing.

"abortions of babies afflicted with Down Syndrome and other maladies." Pet. 7.

Few religious employers are exempt. To qualify, an employer must show that (1) its purpose is "[t]he inculcation of religious values"; (2) it "primarily employs persons who share [its] religious tenets"; (3) it "serves primarily persons who share [its] religious tenets"; and (4) it "is a nonprofit organization as described in section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). These citations to the Code refer to "churches, their integrated auxiliaries, and conventions or associations of churches" as well as "the exclusively religious activities of any religious order." 26 U.S.C. 6033(a)(3)(A)(i) & (iii).

The exemption is temporary. An insurer must obtain "an annual certification" from each employer asserting the exemption. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(2)(i). That certification must state that "the policyholder or contract holder is a religious employer and that the religious employer requests a contract without coverage for medically necessary abortions …." *Ibid.* Also, the insurer must issue a no-cost rider to each employee of a religious employer providing "coverage for medically necessary abortions" along with a notice of the rider. *Id.* § 52.16(o)(2)(ii). Both policy and rider must be approved by Respondent New York Superintendent of Financial Services. *Id.* § 52.16(o)(2)(iii).

Petitioners seek review on three grounds. *First*, they contend that the Appellate Division's decision deepens an entrenched lower-court split over when a law is neutral or generally applicable under *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). See Pet. 2–3. *Second*,

they argue that if *Smith* precludes relief from the abortion mandate, it should be overruled. See *id*. at 4. *Third*, they assert that the abortion mandate encroaches on their religious autonomy. See *id*. at 3–4. Although we endorse all three reasons to grant review, this brief exclusively addresses the question of religious autonomy.

SUMMARY OF ARGUMENT

So it's come to this. Having forced religious charities to include contraception in their employee health plans, New York has taken the long next step. It now compels an objecting religious employer to cover "medically necessary" abortion procedures unless the employer fits within a severely restricted class of religious organizations. Petitioners are correct that the mandate and its exemption are void under the First Amendment because they trespass into petitioners' religious autonomy.

Abortion has been at the center of a religious, moral, political, and judicial firestorm for decades. It has deeply divided our Nation. Centuries-old faith traditions and tens of millions of their adherents consider terminating the life of an unborn child to be a grave evil. Until recently, supporters and opponents of abortion rights acknowledged that coercing religious organizations to support abortion triggers profound questions of religious freedom. Dragooning religious organizations into becoming complicit in abortion is no mere health-and-safety regulation: it is an intolerable invasion of religious autonomy.

For 150 years, this Court has affirmed and reaffirmed that the government may not intervene in

religious matters. Religious doctrine, polity, administration, and finance belong (within broad limits nowhere approached here) to a religious body alone.

The abortion mandate offends the doctrine of religious autonomy in this uniquely sensitive area in two ways. It uses the State's control of insurance plans to force religious employers to subsidize abortion for their employees despite their profound religious objections. And it blocks religious employers from modeling and expressing their beliefs authentically.

The only available exemption is drastically underinclusive. A religious employer must show that its purpose is to inculcate religion, its employees come from its faith community, it serves only fellow members of that community, and its nonprofit status fits within the narrowest categories of religious activity. These criteria invade religious autonomy at multiple points. And the exemption requires excessive entanglement with religious matters, contrary to the First Amendment.

New York cannot justify its incursions into religious autonomy as necessary to comply with this Court's abortion precedents. Those decisions leave States free to adopt a policy favoring childbirth over abortion and to implement that policy by withholding subsidies for abortion. New York could have extended the same freedom of choice to petitioners. Forcing them to subsidize abortion reflects State policy—not obedience to binding precedent.

The question of religious autonomy presented here holds exceptional importance for *amici*. Faith communities rely on the doctrine of religious autonomy to carry out their vital work. Without this Court's intervention, religious institutions in New York will

have to subsidize and facilitate conduct that they believe to be grave sin. Other States may follow. That will fuel a dangerous trend where States exert regulatory power to override the autonomy guaranteed to religious institutions by the First Amendment.

ARGUMENT

I. REVIEW IS WARRANTED TO PREVENT NEW YORK'S REGULATORY SCHEME FROM VIOLATING PETITIONERS' RELIGIOUS AUTONOMY.

A. The First Amendment Guarantees the Autonomy of Religious Organizations.

For 150 years, this Court has held that the government holds no authority to act in any matter that is "ecclesiastical in its character." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 697, 733 (1871). The First Amendment guarantees religious organizations the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Decisions since *Kedroff* consistently deny the government authority to intervene in ecclesiastical matters. See, *e.g.*, *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 116 (1960) (per curiam); *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 447 (1969); *Serbian E. Orthodox Diocese for U.S. of Am. & Can.* v. *Milivojevich*, 426 U.S. 696, 721–22 (1976); *Hosanna-Tabor*, 565 U.S. at 186–87; *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61.

The First Amendment secures the freedom of religious institutions to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of Presiding*

Bishop of The Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327, 341 (1986) (Brennan, J., concurring) (quotation omitted). This doctrine of religious autonomy reflects the "special solicitude" that both Religion Clauses accord religious institutions. *Hosanna-Tabor*, 565 U.S. at 189.

The religious autonomy doctrine operates as a kind of immunity, not as a balancing standard. *Hosanna-Tabor* illustrates the point. Once the Court found that Cheryl Perich was a minister in the constitutional sense, "the First Amendment *require[d]* dismissal of [her] employment discrimination suit against her religious employer." *Hosanna-Tabor*, 565 U.S. at 194 (emphasis added). No judicial balancing is permitted because "the First Amendment has struck the balance for us." *Id.* at 196. Intrusion into any matter covered by the religious autonomy doctrine dooms a law. New York's abortion mandate and religious exemption cross that forbidden line at several points. Any one of them renders its regulatory scheme void.

B. New York's Abortion Mandate Violates Petitioners' Religious Autonomy.

1. The abortion mandate infringes on petitioners' religious autonomy by using their employee health-care plans to compel support for conduct they believe to be immoral. Under the regulation, any employee health-insurance plan must include coverage for abortions that the State deems "medically necessary." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(1). Requiring petitioners to purchase employee health insurance that covers abortion compels them to subsidize and facilitate an act they understand as offensive to God. See Pet. 29. That is undisputed. See *id*. at 10–11.

This conflict between petitioners' faith and the demands of State law calls for an accommodation under the Free Exercise Clause. See Pet. 27–28. But the failure to exempt petitioners is not the regulation's only defect. Petitioners' autonomy as religious institutions is also at stake. Like the hotly disputed contraceptive mandate imposed by the U.S. Department of Health & Human Services, New York's abortion mandate "impos[es] secular morality *inside* religious institutions." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 867 (emphasis added) (footnote omitted). Specifically, it forces religious organizations like petitioners to use their sacred funds and institutional structures to sponsor and facilitate abortion. By overriding petitioners' management of their religious institutions on a matter of profound doctrinal and ecclesiastical importance, the abortion mandate violates the doctrine of religious autonomy.

In case after case, this Court has affirmed that the First Amendment safeguards religious institutions' "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. Deciding whether to cover abortion as part of an employee healthcare plan is among the "internal management decisions that are essential to the … central mission" of petitioners—as well as many other religious institutions. *Id.* at 2060. Control of their property and finances for religious purposes is inseparable from "the ecclesiastical functions" of a religious institution. *People* v. *Worldwide Church of God*, 178 Cal. Rptr. 913, 915 (Cal. Ct. App. 1981). The Eleventh Circuit saw this connection in *Church of Scientology Flag Service Organization, Inc.* v. *City of Clearwater*,

2 F.3d 1514 (11th Cir. 1993). There, a municipal ordinance required a religious organization to disclose its financial information to the public and to church members. Mandatory disclosure of the church's finances offended "the principle that civil authorities must abstain from interposing themselves in matters of church organization and governance." *Id.* at 1537. New York's abortion mandate violates the same principle.

Forcing religious employers to subsidize and facilitate abortion for their own employees is a shocking invasion of religious autonomy and a stark departure from the "the best our traditions," which have long "respect[ed] the religious nature of our people." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Abortion is uniquely controversial. Strong-arming religious organizations into becoming complicit in abortion is an intolerable incursion into religious autonomy.

The State's utter disregard for the religious significance of abortion is at odds with an established tradition of legislative respect for religious institutions. Congress signaled that regard when enacting Title VII of the Civil Rights Act of 1964. Even as it enacted that historic guarantee of workplace equality, Congress carved out exemptions for religious organizations and religious schools. See 42 U.S.C. 2000e-1(a), 2000e-2(e)(2).

New York law contains a comparable safeguard. Its ban on employment discrimination does not extend to "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization." N.Y. Exec. Law § 296(11) (2000). More

than that, any of these religious organizations may "tak[e] such action as is calculated by such organization to promote the religious principles for which it is established or maintained." *Ibid.* So if New York had prescribed the abortion mandate as a matter of sex discrimination in employee health plans, petitioners would be altogether exempt.

Working in the same tradition, lawmakers have long shown appropriate respect for religious belief and practice when addressing abortion and contraception. Congress has repeatedly expressed a particular concern for religious objections to abortion. See, *e.g.*, Church Amendment, 42 U.S.C. 300a-7 (for any program funded by HHS, a person or entity need not perform or assist in the performance of an abortion or sterilization procedure contrary to religious beliefs or moral convictions); Danforth Amendment, 20 U.S.C. 1688 (requiring neutrality toward abortion in federally funded education programs); Coates-Snow Amendment, 42 U.S.C. 238n (no government receiving federal aid may discriminate against a health care entity because it refuses to participate in training to perform abortions).

The Weldon Amendment deserves special mention. That provision withholds HHS funding from a government program that discriminates against a "health care entity" (including a health insurance plan) that "does not provide, pay for, provide coverage of, or refer for abortions." Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, at sec. 507(d)(1) (2020). Noncompliance can lead to dire financial consequences. Only last December, HHS withheld $200 million in Medicaid funds from California after concluding that a State law requiring employers to cover abortion in their health insurance plans violates the Weldon Amendment. See Press Release, U.S. Dep't

Health & Human Servs., HHS to Disallow $200M in California Medicaid Funds Due to Unlawful Abortion Insurance Mandate (Dec. 16, 2020) ("California has refused to come into compliance with the Weldon Amendment, despite demands from OCR to do so and offers of OCR technical assistance.").

The abortion mandate here closely resembles California's.[2] Serious questions about New York's compliance with the Weldon Amendment demonstrate how far the abortion mandate intrudes into a matter long recognized by State and federal governments as raising significant religious autonomy concerns.[3] By commandeering a religious employer's financial and organizational resources to implement religiously objectionable ends, New York has patently breached petitioners' religious autonomy.

Of course, religious institutions have no "general immunity" from state regulation. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. A church or religious charity must comply with religiously uncontroversial health and safety regulations no less than any other institution. See, *e.g.*, *Jimmy Swaggart Ministries* v. *Bd. of Equalization of Cal.*, 493 U.S. 378, 391 (1990);

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[2] Similarities between New York's abortion mandate and California's ought to inform petitioners' challenge under the Free Exercise Clause. New York can hardly say that its regulatory scheme serves a legitimate interest, much less a compelling one, when the abortion mandate appears to contradict federal law.

[3] An exception to the federal government's customary respect for religious institutions is the HHS contraceptive mandate. See 29 C.F.R. 2590.715-2713. Its departure from the long-standing pattern of governmental sensitivity toward religious institutions ignited nationwide litigation by religious employers—including multiple cases before this Court. See *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2376–77 (2020).

Tony and Susan Alamo Found. v. *Sec'y of Labor*, 471 U.S. 290, 304–05 (1985). But the First Amendment "does protect [petitioners'] 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. A religiously sensitive "internal management decision[]" that a religious organization must make is whether an employee health insurance plan should cover abortion. *Id.* When a religious organization's religious doctrines condemn abortion as immoral, excluding coverage for it is "essential to the institution's central mission." *Id.* Overriding that decision to achieve the State's contrary goals undeniably invades religious autonomy.

2. The abortion mandate also infringes on religious autonomy by undermining petitioners' ability to communicate their religious identity authentically. A key aspect of religious autonomy means that "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). So too here. New York's abortion mandate compels an employer religiously opposed to abortion to fund and facilitate it anyway. Complying with that mandate defeats petitioners' ability to practice what they preach. The State's compulsion "severs the vital link between religious teaching and the living out of that teaching in church outreach." Mark E. Chopko & Michael F. Moses, *Freedom to Be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 Geo. J.L. & Pub. Pol'y 387, 449 (2005). Without that link, a religious institution's identity will be eroded or distorted. "[L]egal rules that require the [religious] group to assist prohibited conduct and relationships interfere with the ability of the group to

model and express the group's beliefs." Kathleen A. Brady, *The Disappearance of Religion from Debates About Religious Accommodation*, 20 Lewis & Clark L. Rev. 1093, 1110 (2017).

C. New York's Religious Exemption Also Invades Petitioners' Religious Autonomy.

1. New York law contains an exemption to the abortion mandate that also trespasses into matters protected by the religious autonomy doctrine. Consider, for instance, the effects of asking whether an employer's purpose is "[t]he inculcation of religious values." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y).

New York's approach resembles the city ordinance struck down in *Espinosa* v. *Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd sub nom. Rusk* v. *Espinosa*, 456 U.S. 951 (1982). There, the Tenth Circuit overturned an Albuquerque rule exempting religious organizations from licensing and registration requirements only when they sought contributions for "evangelical, missionary or religious but not secular purposes." *Id.* at 479. By the city's reckoning, secular purposes included gathering donations to "provid[e] food, clothing, and counseling." *Id.* Albuquerque thus regulated religious entities as they sought contributions for "the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor." *Id.* The city's reliance on this cramped "conception of religion" rendered the ordinance void. *Id.* Like any summary affirmance on appeal, *Espinosa* is a decision on the merits. See *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

New York's exemption from the abortion mandate resembles the ordinance in *Espinosa* because it

wrongly assumes that the State has the "competence" and "legitimacy" to determine what values count as religious. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1265 (10th Cir. 2008) (McConnell, J.). By reserving the exemption for employers whose purpose is "the inculcation of religious values," N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y), New York requires State officials and insurers to go illicitly "trolling through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (citation omitted). The contours of the exemption subject a religious employer to devastating legal consequences unless it confines itself to "hard-nosed proselytizing." *Univ. of Great Falls* v. *NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). Excluding religious charities like petitioners draws a false distinction between religious inculcation and charitable activity. Churches themselves "often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster." *Amos*, 483 U.S. at 344 (Brennan, J., concurring). New York's inquiry into religious inculcation thus "boils down" to whether an employer asserting the exemption is "sufficiently religious" *as the State defines religion*—an enterprise that the First Amendment flatly prohibits. *Univ. of Great Falls*, 278 F.3d. at 1343 (punctuation altered).

Because of the unique and extreme religious sensitivity associated with abortion, denying the exemption to religious organizations that fail the State's preferred religiosity test will pressure them to modify their religious missions. (Pressure is augmented because the State demands an annual certification attesting to a religious organization's eligibility for the exemption. See N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(2)(i)). This form of coercion offends both Religion Clauses of the First Amendment. "[T]he Free

Exercise Clause … protects a religious group's right to shape its own faith and mission" and authorizing the State to decide when a religious mission is acceptable "also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89. No wonder courts are sensitive to laws that threaten an institution's religious mission. See *Amos*, 483 U.S. at 336 ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."); *Univ. of Great Falls*, 278 F.3d at 1345 (adopting a bright-line rule to avoid "coercing an educational institution into altering its religious mission to meet regulatory demands"). New York's religious exemption takes the opposite course by placing official pressure on a religious organization's identity-forming choice of religious mission.

No one denies that New York can generally differentiate between those who are subject to the law and those who are exempt. But "if the State wishes to choose among otherwise eligible institutions" when conferring an exemption, "it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." *Colo. Christian Univ.*, 534 F.3d at 1266.

Even this usual leeway is unavailable here. Abortion is simply different. No secular principle, however neutrally or objectively framed, can be applied to force an objecting religious organization to subsidize abortion through its health insurance plan. That exercise of State power constitutes an incursion into religious autonomy on an issue of extreme religious sensitivity. New York's abortion mandate effectively compels petitioners and other objecting religious organizations to become complicit in an act they

sincerely believe to be tantamount to murder. While the State can pursue its aim of making abortion more widely available through other means—paying for expanded insurance coverage itself, for instance—the Constitution precludes New York from meddling with petitioners' religious autonomy where the resulting interference with a religious doctrine, practice, and identity is unmistakable.

2. The exemption's other criteria are equally objectionable. Requiring a religious organization to show that it "primarily employs persons who share [its] religious tenets" and "serves primarily persons who share [its] religious tenets" is an incursion into religious autonomy. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Deciding whom to employ and serve is inextricably connected with an organization's religious doctrine and religious mission. For many faiths, the notion of refusing to serve people with other beliefs—or no beliefs at all—is anathema. Religious organizations shape their institutions through these choices. See *Hosanna-Tabor*, 565 U.S. at 188–89; *Kedroff*, 363 U.S. at 116. Because of the intensely offensive nature of abortion to numerous religious organizations—and their related need to avoid complicity with it in any form—the State interferes with those institution-building decisions when it confines the exemption to religious organizations that employ and serve only their own people.

Still less is it in New York's legitimate interest to force religious employers to "probe the beliefs of those they hire and those they serve." 2 W. Cole Durham et al., *Religious Organizations and the Law* § 14:41 (2020). That too violates "the autonomy of religious organizations that the First Amendment was designed to protect." *Id.*

D. The Abortion Mandate and Religious Exemption Excessively Entangle New York in Religious Matters.

New York's religious exemption also invites "excessive entanglement" by regulators and courts in religious affairs contrary to the Establishment Clause. *Walz* v. *Tax Comm'n of City of N.Y.*, 397 U.S. 664, 670 (1970). This familiar doctrine "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices … as a basis for regulation …." *Colo. Christian Univ.*, 534 F.3d at 1261.

Concerns with entanglement have prevented the NLRB from exercising jurisdiction over a labor dispute against Catholic high schools. *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979). Denying jurisdiction was necessary to sidestep the "serious First Amendment questions that would [otherwise] follow." *Id.* at 504. The charge of unfair labor practices would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. The Court reasoned that probing the internal management of a religious institution is doubly offensive. "It is not only the conclusions that may be reached … which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* Lower courts have followed *Catholic Bishop* by denying NLRB jurisdiction to resolve disputes against religious schools. See *Duquesne Univ. of the Holy Spirit* v. *NLRB*, 947 F.3d 824, 835–36 (D.C. Cir. 2020); *Univ. of Great Falls*, 278 F.3d at 1342.

The Tenth Circuit applied *Catholic Bishop* in a different setting when invalidating a Colorado law

that excluded "pervasively sectarian" colleges and universities from a State scholarship program. *Colo. Christian Univ.*, 534 F.3d at 1250. An institution could not receive scholarship funds if its faculty and students belonged to "one religious persuasion," if it prescribed "courses in religion or theology that tend to indoctrinate or proselytize," or if its governing board consisted of "persons of any particular religion." *Id.* at 1251 (quoting Colo. Rev. Stat. §§ 23–3.5–105, 23–3.3–103(d), 23–3.7–04). The court found these criteria "fraught with entanglement problems." *Id.* at 1261. Determining whether an institution's faculty and students come from a single religion "requires government officials to decide which groups of believers count as 'a particular religion' or 'one religious persuasion,' and which groups do not." *Id.* at 1264. That approach required the government "to decide how religious beliefs are derived and to discern the boundary between religious faith and academic theological beliefs." *Id.* at 1262.

Like the Colorado law, New York's religious exemption obligates a State regulator or a court to wade into religious matters safeguarded by the First Amendment. Entanglement is evident with the exemption's very first criterion—whether an employer's purpose is "[t]he inculcation of religious values." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Which values count as *religious*? What does it mean for an institution's purpose to consist of *inculcating* those values? Determining whether an employer is *primarily* engaged in hiring and serving members of its own faith raises further religious questions. Cf. *Colo. Christian Univ.*, 534 F.3d at 1264 (deciding whether a school gets its funding "primarily" from "a particular religion" involves the "entanglement problem" of obligating "government officials to decide which groups of

believers count as 'a particular religion' … and which groups do not"). Entanglement greets the State at every turn. Resolving religious questions to decide legal rights is a breach of religious autonomy. "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." *N.Y.* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977).

Entanglement becomes ongoing because of New York's annual certification requirement. Each year a religious employer must satisfy its insurer of its continuing eligibility. See N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(2)(i) (requiring "an annual certification … that the policyholder ... is a religious employer and that the religious employer requests a contract without coverage for medically necessary abortions"). And the State must then agree. Excessive entanglement is a feature, not a bug in New York's regulatory scheme. State officials and insurers must evaluate forbidden religious matters every year that a religious employer asserts the exemption.

In sum, New York correctly recognized the need to shield at least some religious organizations from the abortion mandate. But the conditions of any exemption must also comply with the First Amendment, and the State's religious exemption here contradicts this Court's established standards. No law—even one evidently aimed at protecting religious organizations—may violate the ban on excessive entanglement. Since New York's religious exemption *requires* such entanglement, it is void.

II. NEW YORK'S DENIAL OF PETITIONERS' RELIGIOUS AUTONOMY IS NOT JUSTIFIED BY THIS COURT'S ABORTION DECISIONS.

A casual observer might think that New York has invaded petitioners' religious autonomy out of necessity, to comply with the Court's abortion precedents. Not so.

This Court's decisions recognizing the right of woman to terminate a pregnancy do not obligate a State to endorse or subsidize that right. "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales* v. *Carhart*, 550 U.S. 124, 128 (2007). Under this Court's decisions, a State law is not invalid merely because it has "the incidental effect of making it more difficult or more expensive to procure an abortion." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 874 (1992) (joint op.).

States may adopt policies preferring childbirth to abortion. The Court's leading decision on abortion says so. See *id.* at 883. That authority is broad. A State may communicate an official position praising childbirth or condemning abortion. See *Gonzales*, 550 U.S. at 128 (allowing a State to "use its voice … to show its profound respect" for an unborn child).

A State may also put its money where its mouth is by denying a subsidy for abortion that it makes available for childbirth. That is the teaching of *Maher* v. *Roe*, 432 U.S. 464 (1977). It upheld a Connecticut regulation denying State Medicaid benefits for any abortion procedure not deemed "medically necessary." *Id.* at 466. The Court stressed that the abortion right does not entail financial support for its exercise. The right "protects the woman from unduly burdensome

interference with her freedom to decide whether to terminate her pregnancy." *Id.* But that right "implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 473–74.

A consistent line of decisions holds that the government at every level may deny public funding for abortion without violating the Constitution—regardless of whether the government deems an abortion medically necessary. See *Beal* v. *Doe*, 432 U.S. 438 (1977) (State has no duty to fund elective abortions); *Poelker* v. *Doe*, 432 U.S. 519, 521 (1977) (city may withhold public funding for elective abortions); *Rust* v. *Sullivan*, 500 U.S. 173, 178 (1991) (HHS may prohibit States from using federal funds for abortion counseling, referral, and advocacy); *Harris* v. *McRae*, 448 U.S. 297 (1980) (Hyde Amendment does not violate the Constitution by denying subsidies for certain medically necessary abortions); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980) (State may withhold funding for medically necessary abortion when federal reimbursement is unavailable).

These decisions establish that New York has no constitutional duty to subsidize abortion. The State is free to pursue policies supporting or opposing abortion and "to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474. Its abortion mandate is purely a reflection of State policy. New York cannot defend its decision to impose an abortion mandate on religious institutions as necessary to comply with this Court's abortion decisions. In fact, New York's regulatory scheme denies petitioners the freedom of choice that the State enjoys.

III. THE QUESTION OF RELIGIOUS AUTONOMY HOLDS EXCEPTIONAL IMPORTANCE FOR *AMICI*.

This friend-of-the-court brief attests to the importance of the questions presented—especially the question of religious autonomy. *Amici* support petitioners out of a surpassing concern with the far-reaching implications of New York's incursion into religious autonomy. Not only that. Petitioners' plight may too readily become our own.

Religious institutions like *amici* rely on the doctrine of religious autonomy to govern their religious affairs while complying with State and federal law. The barrier recognized in *Watson* and constitutionalized in *Kedroff* safeguards the generative freedom of self-government for religious institutions of all kinds. Under the Constitution's aegis, a homeless shelter operated by a religious charity may place a cross over the entrance and offer prayer before every meal. An assisted living center for the elderly may be overseen by an order of nuns dressed in full habit. An elementary school may be sponsored by a local synagogue and staffed by Orthodox Jews who commit to live by shared religious standards in and out of the workplace. Countless decisions about how to form and maintain religious institutions depend on the freedom to adopt policies and practices dictated by the institution's faith. Allowing the State to control those policies for secular purposes would undercut the capacity of religious institutions to thrive.

Review is made more urgent by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). There, the Court concluded that the Religious Freedom Restoration Act is unavailable as a defense to State law. *Id.* at 536. New York has no statute modeled after RFRA. See 1 W. Cole Durham et al., *Religious Organizations and*

the Law § 3:27 (2020) (chart showing that New York has no state RFRA). Petitioners and other religious organizations must therefore rely on statute- and regulation-specific exemptions or on their constitutional rights. Since New York does not exempt petitioners, their only recourse is to invoke their rights under the First Amendment. Reliance on *Smith* is unsure because it "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J.). Besides, the confusion among lower courts as to *Smith*'s application, which the petition ably describes, makes constitutional protection an accident of jurisdiction. Here, the Second Circuit probably would have adopted a more religion-friendly reading of *Smith* than the New York courts did. See Pet. 16.

Allowing New York's regulatory scheme to go unreviewed will encourage other States to follow suit. Already, five other States require employee health plans to cover abortion. See Cal. Health & Safety Code § 1367(i); Cal. Code Regs. tit. 28, § 1300.67; 215 Ill. Ins. Code ch. 215, § 5/356z.4a(a); Me. Rev. Stat. Ann. tit. 24, § 4320-M(1); Or. Rev. Stat. § 743A.067(2)(g); Wash. Admin. Code § 284-43-7220. Of these, Oregon and Maine exempt religious employers. See Or. Rev. Stat. § 743A.067(9); Me. Rev. Stat. Ann. tit. 24, § 4320-M(4). Oregon limits its exemption to the same narrow class of religious employers eligible for protection in New York. See Or. Rev. Stat. § 743A.067(e). Maine's religious exemption is slightly broader. Me. Rev. Stat. Ann. tit. 24, § 4320-M(4) (*religious employer* includes "a church, a convention or association of churches" or a K-12 school controlled or "principally supported" by them but not religious charities and other religious organizations). This pattern of State-law incursions

into religious autonomy should be stopped—not encouraged.

* * *

Abortion remains one of the most deeply divisive topics in American law and society. It is a matter of enormous religious and moral significance to millions of Americans and their faith communities. New York's abortion mandate commandeers a religious employer's healthcare plan to subsidize and facilitate abortion for its own employees. By doing so, the mandate interjects State power into the internal management of a religious organization precisely where religious beliefs are at their most intense. Few religious beliefs carry greater force than the divine mandate "[t]hou shalt not kill." Exodus 20:13 (King James). Because the decision below disregards petitioners' religious autonomy, it richly deserves review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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