SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; THE SERVANTS OF RELIEF FOR INCURABLE CANCER; TEMPLE BAPTIST CHURCH; OUR LADY OF CONSOLATION GERIATRIC CARE CENTER; DELTA DEVELOPMENT OF WESTERN NEW YORK, INC.; ST. JOHN BAPTIST CHURCH; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; BISHOP LUDDEN HIGH SCHOOL; FIRST BIBLE BAPTIST CHURCH; CARMELITE SISTERS FOR THE AGED AND INFIRM, INC.,	:	
Appellants,	:	Docket No. 96621
- vs -	:	
GREGORY V. SERIO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF INSURANCE,	:	
Respondent.	:	

Brief for *Amici Curiae* New York Civil Liberties Union and American Civil Liberties Union in Support of Respondent Serio

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INTEREST OF *AMICI CURIAE*

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union (ACLU). The NYCLU, which has approximately 30,000 members, has long been devoted to protecting the fundamental rights and values embodied in the Bill of Rights of the United States Constitution and in their counterpart provisions in the New York Constitution. The ACLU, a nationwide, nonprofit, nonpartisan organization with more than 400,000 members, is dedicated to defending the guarantees of liberty and equality embodied in the state and federal constitutions. The ACLU and the NYCLU have a long history of vigorously defending religious liberty, both through litigation and advocacy, and have been equally vigilant in their efforts to safeguard reproductive rights. This history makes the ACLU and the NYCLU well positioned to assist the Court in its consideration of this case.

INTRODUCTION

Amici urge the Court to affirm the lower court's holding that the Women's Health and Wellness Act [hereinafter WHWA or the Act] does not violate the United States or New York constitutions. *Catholic Charities et al. v. Serio*, No. 8229-02, slip op. at 24 (N.Y. Sup. Ct. Albany Cty. Nov. 25, 2003). The Act is a comprehensive anti-discrimination and public health statute that requires insurance plans to cover women's preventive health needs equitably. Among its other requirements, which include mandating coverage for mammograms, cervical cancer screenings, and osteoporosis tests, WHWA requires insurance plans that include prescription drug benefits to cover contraceptive drugs and devices. N.Y. Ins. Law §§ 3221(l)(16), 4303(cc) (McKinney's

2004). The Legislature enacted the contraceptive coverage mandate to combat discrimination in prescription plans and to promote public health.

The mandate exempts "religious employers." Its terms are carefully crafted to balance religious liberty and the important health and equality interests furthered by the contraceptive equity requirement. To fall within the exemption, an employer must satisfy all of the following four criteria:

> (i) The inculcation of religious values is the purpose of the entity.
> (ii) The entity primarily employs persons who share the religious tenets of the entity.
> (iii) The entity serves primarily persons who share the religious tenets of the entity.
> (iv) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Ins. Law § 3221(l)(16)(A)(1).

In essence, New York has exempted from the Act's requirements pervasively sectarian organizations – churches, temples, and mosques – that fulfill primarily spiritual missions. Employees at these institutions, which are primarily engaged in worship and religious instruction, are most likely to share their employer's religious tenets. In contrast, religiously affiliated entities, be they health care facilities, domestic violence shelters, or economic development corporations, that provide secular services to the general public and employ workers of various faiths are not exempt from the Act. If those entities decide to purchase health plans with prescription drug benefits, they may not impose their religious views on their diverse workforce by denying contraceptive coverage.

New York's contraceptive equity requirement is not unusual, and certainly not unconstitutional, in drawing a line between spiritual and secular aspects of a religious

institution. The California Supreme Court has held constitutional the virtually identical law of that state. *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 125 S. Ct. 53 (2004). Moreover, the courts regularly distinguish core liturgical institutions from religiously affiliated hospitals, schools, charities, and other social services agencies in assessing constitutional claims. This line-drawing reflects the unremarkable constitutional principle that a religious organization's relationship with the government differs depending on whether it provides spiritual care to its congregation or furnishes secular services to the public.

When churches conduct worship or provide religious instruction to their faithful, they have the greatest constitutional autonomy from the state (and, correspondingly, the strongest constitutional barriers against receiving public benefits). In contrast, when religious organizations create agencies that enter the secular world, and offer the public secular services, such as health care, they are increasingly subject to public rules. Even when religious organizations are motivated by their religious beliefs to provide these services, government oversight of religiously affiliated nonprofits, particularly their relationships with their consumers and employees, is familiar and constitutionally permissible.

Plaintiffs-Appellants [hereinafter Appellants] are the paradigm of organizations that are not exempt from state labor policy. They are ten organizations that provide social services to the general public. Slip op. at 2. Notwithstanding the characterization of themselves collectively as "the churches" in their Brief, they include a housing development company, nursing facilities, and other social service organizations. *Id.* Their employees predominantly do not share their faith. Their primary function is the

provision of social, educational, and health care services to people of all faiths – and people who adhere to no faith – in New York's pluralistic population. They are tax-exempt nonprofit organizations, many of which operate in connection with government programs and receive government funds. Appellants plainly do not qualify for an exemption; they concede that they do not satisfy the Act's criteria. Compl. ¶ 50.

Appellants claim that because they oppose contraception on religious grounds the federal and state constitutions protect their right to obstruct their employees' access to contraception. In essence, they argue that their religious affiliation entitles them to a zone of autonomy beyond the reach of any law at odds with their religious tenets. But neither free exercise nor establishment clause principles entitle Appellants to an exemption from the provisions of WHWA. Courts have ordered religiously affiliated nonprofit organizations – notwithstanding contrary church tenets – to grant male and female employees equal benefits,[1] and to comply with boarding house regulations,[2] teacher certification and curricular standards for religious schools,[3] immigration laws,[4] minimum wage laws,[5] and social security laws.[6] Most recently, in a case virtually

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1 *See United States Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff'd sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Tree of Life Christian Sch.*, 751 F. Supp. 700 (S.D. Ohio 1990); *EEOC v. First Baptist Church*, 59 Fair Empl. Prac. Cas. (BNA) 517 (N.D. Ind. 1992).

2 *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183 (3d Cir. 1990).

3 *Sheridan Rd. Baptist Church v. Dep't of Educ.*, 396 N.W.2d 373 (Mich. 1986).

4 *American Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42 (2d Cir. 1990).

5 *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

identical to this one, the California Supreme Court held that Catholic Charities of Sacramento must comply with that state's version of WHWA, the Women's Contraception Equity Act. *Catholic Charities of Sacramento*, 85 P.3d at 73-74. There, as here, Catholic Charities argued that they should not be required to provide contraceptive coverage as part of their employees' prescription benefits plan because doing so violated their sincerely held religious beliefs. At each stage of that litigation, culminating in the California Supreme Court decision, the courts rejected the plaintiff's arguments. As each of these cases makes clear, religious liberty is not the absolute right to disregard the rights of others in a democratic society.

Like the arguments presented to those courts, Appellants' arguments here must fail. First, because WHWA is a neutral and generally applicable law that is in no way directed at prohibiting the exercise of religion, it does not violate the federal Free Exercise Clause. The fact that the Legislature elected to include a limited religious exemption does not alter that conclusion. Second, WHWA does not violate the New York Constitution's Free Exercise Clause even if a higher level of scrutiny is applied. The Act advances compelling state interests that outweigh any alleged burden on Appellants' exercise of their religious beliefs. Third, WHWA readily survives scrutiny under the federal Establishment Clause and analogous Preference Clause of the New York Constitution: The Act's distinction between the secular and the religious is familiar and constitutional. The administration of its exemption does not impermissibly entangle the state with religion. And neither the text nor the legislative history of the Act supports

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[6] *United States v. Lee*, 455 U.S. 252 (1982).

Appellants' contention that it discriminates among religions. Finally, Appellants' remaining free expression, free association, and hybrid rights claims are groundless.

ARGUMENT

I. THE ACT DOES NOT VIOLATE APPELLANTS' FREE EXERCISE RIGHTS UNDER THE FEDERAL CONSTITUTION.

A state acts constitutionally when it promulgates generally applicable laws that are not aimed at regulating religiously motivated conduct, even when those laws incidentally affect such conduct. Under this principle, courts have time and again rejected free exercise challenges to generally applicable laws regulating, for example, conditions of employment, tax obligations, and social security benefits. As the trial court correctly held, WHWA is among these neutral, generally applicable, and constitutional laws. Slip op. at 11; *see also Catholic Charities of Sacramento*, 85 P.3d at 82 (holding California's similar law neutral and generally applicable).

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court held that a neutral law of general applicability does not offend the federal Free Exercise Clause even if its effect is to limit religious conduct. "[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878; *see also Rector, Wardens & Members v. City of New York*, 914 F.2d 348, 354 (2d Cir. 1990) (upholding neutral, generally applicable landmark preservation law against challenge by church seeking to expand its facilities to better carry out its ministerial programs); *New York State Employment Relations Bd. v. Christ the King Regional High Sch.*, 90 N.Y.2d 244 (1997) (upholding neutral, generally applicable labor law that forced religious school to engage in collective bargaining with

lay faculty); *Walsh v. St. Mary's Church*, 248 A.D.2d 792, 793 (3d Dep't 1998) (noting that adverse possession statutes could be applied to church because they "in no way intentionally regulate religious conduct or beliefs") (quotes omitted). The critical question for free exercise purposes is thus whether in purpose and structure a statute is neutral and generally applicable. If a statute satisfies that test, the free exercise inquiry ends.

WHWA readily satisfies the *Smith* test: It is a neutral and generally applicable law that is not directed at prohibiting the exercise of religion, either overtly or covertly.[7] Indeed, WHWA is no different than a host of generally applicable anti-discrimination laws, labor laws, and social security laws that have been unsuccessfully challenged by employers claiming the right to an exemption under the Free Exercise Clause.[8] Like

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[7] As the lower court held, WHWA "is clearly generally applicable, as it applies to all group health insurance policies issued in the State of New York." *Catholic Charities et al. v. Serio*, No. 8229-02, slip op. at 11.

[8] *See, e.g., Lee*, 455 U.S. 252 (social security taxes constitutionally imposed on Amish employers with sincere religious objection); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) (Age Discrimination in Employment Act constitutionally applied to religious employers); *Intercommunity Ctr. for Justice & Peace*, 910 F.2d at 44 (immigration employment verification law constitutionally applied to employers with sincere religious objection); *Catholic High Sch. Ass'n v. Culvert*, 753 F.2d 1161, 1171 (2d Cir. 1985) (New York State Labor Relations Law constitutionally applied to religious schools); *New York State Employment Relations Bd. v. Christ the King Regional High Sch.*, 90 N.Y.2d 244, 248-49 (1997) (same).

Notably, among the range of generally applicable benefits laws, a contraceptive coverage mandate is not a novel obligation. At least nine other states, including the California law recently declared constitutional, have laws mandating contraceptive equity in prescription coverage with either no religious employer exemptions, or exemptions similar in scope to WHWA. *See* Ariz. Rev. Stat. §20-826(Z), §20-826 (AA)(3) (West 2003); Cal. Health & Safety § 1367.25(b) (West Supp. 2001); Ga. Code Ann. § 33-24-59.6 (1999); Iowa Code Ann. § 514C.19 (West 2001); Me. Rev. Stat. Ann. tit. 24-A, § 2756 (West 2001) (one of several like provisions); N.H. Rev. Stat. Ann. § 415:18-I (West 2003) (one of several like provisions); N.C. Gen. Stat. § 58-3-178 (West 2003); Vt. Stat. Ann. tit. 8, § 4099c (1993); Wash. Admin. Code § 284-43-822 (West 2003).

those laws, WHWA requires both secular and religiously affiliated employers operating in the secular market to comply with a general social regulation. Like those laws, it is constitutional.

The rationale behind the *Smith* rule is simple: The "mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Smith*, 494 U.S. at 879 (quotes omitted). As the Court cautioned:

> The rule [Appellants] favor would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military services, to the payment of taxes, to health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Id. at 888-89 (citations omitted). Indeed, because it is generally applicable, WHWA need not include *any* exemption for religiously motivated conduct. *Id.* at 880. The fact that the Legislature has, in its discretion, chosen to provide a limited religious exemption does not render WHWA unconstitutional. *See infra* Part III.

Arguing otherwise, Appellants contend that WHWA is not neutral on its face because its exemption for religious employers uses "religious terms and terminology that lack any secular meaning or purpose." Appellants' Br. at 49. Appellants thus insist that they are constitutionally entitled to a religious exemption *and* that any reference to religion in an exemption makes the law facially unconstitutional. This argument fails. As the court below held, "the purposes of the WHWA as a whole are clearly secular. The

fact that the religious exemption involves religion is inevitable and does not render the WHWA or the exemption invalid." Slip op. at 18.

Indeed, Appellants' argument would make it impossible for legislatures to include religious exemptions in any generally applicable law. The Supreme Court has unequivocally rejected this result. In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), for example, the Court rejected the argument that the inclusion of a religious employer exemption in Title VII violates the Establishment Clause. In so doing, the Court emphasized that "it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Id.* at 338. In the same vein, the Court has held that the government has broad discretion to fashion an accommodation for religion when it chooses to do so. *See Smith*, 494 U.S. at 890; *see also Catholic Charities of Sacramento*, 85 P.3d at 84 ("A rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes.").

Moreover, in arguing their position, Appellants blatantly misconstrue the Supreme Court's decision in *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Court in *Lukumi* concluded that a law is not facially neutral if it "infringe[s] upon or restrict[s] practices" by reference to "religious practice *without a secular meaning discernable from the language or context*." *Id.* at 533 (emphasis added). Thus, the ordinances in *Lukumi* were suspect on their face because they prohibited activities

that were defined primarily by reference to religious practices.[9] In contrast, WHWA regulates health benefits offered to employees, a completely secular practice. It only uses the term "religious" in the context of *relieving* religious institutions of the Act's mandate, *not* in defining the Act's prohibitions. *See Catholic Charities of Sacramento*, 85 P.3d at 83 ("The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice.").

Finally, as the court below firmly concluded, WHWA's legislative history does not even remotely suggest that the New York Legislature enacted WHWA, or its religious exemption, to target particular religious beliefs. *See* slip op. at 19; *see generally* Resp't Br. At most, the legislative record reveals that, unlike the legislation in *Lukumi*, the Act was passed "in spite of," not "because of," any impact it would have on a particular religious practice. *Lukumi*, 508 U.S. at 540 (quotes and citations omitted); *see also Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 31-33 (1st Cir. 2001) (rejecting comparison to *Lukumi* when legislative history shows no evidence of religious discrimination); *Catholic Charities of Sacramento*, 85 P.3d at 86-87 (same). All told, the Act readily survives Appellants' challenge under the Free Exercise Clause.

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[9] Appellants similarly misconstrue the scope of *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992). *First Covenant* involved a landmark preservation ordinance regulating any changes to the church's exterior architecture. It was undisputed that given the "relationship between theological doctrine and architectural design," the exterior of the church building was an expression of its religious belief. *Id.* at 217. Nonetheless, to receive an exemption from the regulation, the ordinance required the church to first explain and consult with the city whenever "changes in liturgy" necessitated architectural redesign and to consider "alternative . . . solutions." *Id.* at 178. Thus, in effect, this reference to "liturgy" served to inject the city into church decisions about theological doctrine, thereby intruding on church autonomy. *See* discussion *infra* Part III.A. WHWA, and its reference to religion, imposes no such intrusion. *Cf. KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999) (use of the term "religiously-neutral settings" did not render regulation unconstitutional).

II. THE ACT DOES NOT VIOLATE APPELLANTS' FREE EXERCISE RIGHTS UNDER THE NEW YORK CONSTITUTION.

The New York Constitution is independent of, and can be more protective than, its federal counterpart. *See, e.g.*, *People v. Barber*, 289 N.Y. 378, 384 (1943). Yet even under the more rigorous scrutiny required by the New York Constitution, WHWA does not violate Appellants' free exercise rights.

The court below recognized, and Appellants agree, that New York courts have traditionally applied a balancing test to free exercise claims brought under Article I, Section 3 of the State Constitution. Slip op. at 11-12; Appellants' Br. at 27-28. In *People v. Woodruff*, 26 A.D.2d 236 (2d Dep't 1966), *aff'd no op.*, 21 N.Y.2d 848 (1968), the Appellate Division, Second Department, assessed a criminal defendant's claim that she could not be compelled to testify before a grand jury in violation of her religious beliefs. The court balanced "the interest of the individual right of religious worship against the interest of the State which is sought to be enforced." 26 A.D.2d at 238. The Court of Appeals affirmed, *Woodruff*, 21 N.Y.2d 848 (1968), and has relied on the *Woodruff* balancing test in later decisions. *See, e.g.*, *LaRocca v. Lane*, 37 N.Y.2d 575 (1975) (holding that State's interest in ensuring a fair trial outweighed attorney's right to wear clerical garb in court); *People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963, 964 (1998) (holding trial court properly balanced individual's right of religious worship against State's interest in zoning ordinance to determine, as a matter of law, that defendant was not entitled to jury instruction on free exercise rights). This Court has applied a similar balancing test to a prison employee's claim that a Department of Corrections directive requiring him to keep his hair short violated his right to free exercise. The Court held that the State needed to demonstrate "a legitimate State interest

which outweighs the negative impact upon his religious freedom." *See Rourke v. New York State Dep't of Correctional Serv.*, 201 A.D.2d 179, 182-83 (3d Dep't 1994) (holding State had failed to demonstrate any such interest).

By its terms, the *Woodruff* test approaches, although it is not identical to, the strict scrutiny test that applied to federal free exercise claims before the United States Supreme Court decision in *Employment Division v. Smith.*[10] *See Woodruff*, 26 A.D.2d at 238 (citing as support for its balancing test *Sherbert v. Verner*, 374 U.S. 398 (1963), a pre-*Smith* federal free exercise case requiring that burdens on free exercise be narrowly tailored to advance a compelling state interest). Both the *Woodruff* test – which the Court of Appeals has applied even after *Smith*, *see, e.g.*, *DeMauro*, 92 N.Y.2d at 963 – and strict scrutiny require "a determination whether a restriction will be . . . imposed on the individual's freedom of worship; and secondly, a determination whether the presence of a restriction is justified, after a consideration of the social and constitutional values involved." *Woodruff*, 26 A.D. 2d at 238 (citing *Sherbert*, 374 U.S. 398). As a result, both New York cases applying the *Woodruff* standard and federal pre-*Smith* cases applying the strict scrutiny standard are useful in assessing claims under the New York Free Exercise Clause.

This Court need not determine the exact contours of the *Woodruff* standard because even assuming it is as exacting as strict scrutiny, the Act is constitutional: It is narrowly tailored to advance the compelling state interests of promoting gender equality and public health. *See* slip op. at 12 (holding "State's compelling secular interests are sufficient to uphold the WHWA's constitutionality" under New York Constitution); *see*

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[10] *See*, *supra* Part I, discussing *Smith* standard.

also Catholic Charities of Sacramento, 85 P.3d at 91-94 (holding California's contraceptive equity statute survived strict scrutiny). Amici adopt herein the arguments on these points advanced by the State and Amici American Jewish Congress et al., in Support of Respondent Serio, and address three additional points. First, the burden WHWA imposes on Appellants' free exercise is insufficient to sustain a successful free exercise claim. Second, Appellants err in arguing that only those state interests meeting the narrowest definition of "peace or safety" can justify a burden on free exercise. Third, the Act legitimately prevents Appellants' exercise of their religious beliefs from burdening third parties.

A. The Act's Burden on Appellants' Free Exercise Rights Is Insufficient To Sustain a Successful Free Exercise Claim.

WHWA's impact on Appellants' religious exercise is insufficient to sustain a successful free exercise claim. Appellants assert that their right to religious exercise is burdened because under their religious teachings, purchasing a generally available prescription drug plan constitutes facilitation of their employees' use of contraception. *See* Appellants' Br. at 15-17. Amici do not contest that the Act has the indirect effect of burdening Appellants' sincerely held religious beliefs. But that burden is insufficient to sustain a successful free exercise claim when balanced against the State's interests. As the court below correctly held, even when applying a strict scrutiny standard of review, Appellants' free exercise claim fails.[11] Indeed, courts applying a strict scrutiny standard of review in comparable contexts have rejected similar challenges.

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[11] Appellants argue that the lower court erred in suggesting the Act does not significantly burden their religious beliefs. Appellants' Br. at 20-22. The lower court, however, did not rest its holding on that determination. To the contrary, the court below specifically held that while it "appears" Appellants had not shown how "WHWA

In a closely related case, for example, the Court of Appeals for the Ninth Circuit held that a public university does not unconstitutionally burden students' exercise of religion by compelling them to pay mandatory fees that subsidize student health services, including abortion, which the objecting students consider to be a grave sin. *See Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996).[12] The court reasoned that the mandatory fees did not substantially burden the students' religious rights because beyond the required payment, the students were "not required to accept, participate in, or advocate in any manner for the provision of abortion services." *Id.* at 1300. Moreover, even assuming that the mandatory fee could be considered a substantial burden, the court held that the University's health system was narrowly tailored to further a compelling government interest. *Id.*

WHWA similarly does not require religious objectors to use contraceptives or to advocate for their use. Rather, it requires insurance companies to include contraceptive coverage in prescription drug plans. Appellants, in turn, purchase these insurance plans to cover a broad range of health care needs for their employees. Finally, an employee, in her private life far removed from the office, may or may not choose to use these health benefits to cover the cost of prescription contraception. Moreover, Appellants remain

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significantly burdens their religions," even assuming it "imposes a substantial burden upon the plaintiffs' religions," the Act is constitutional. Slip op. at 9, 12.

[12] *Goehring* was brought under the Religious Freedom Restoration Act (RFRA), a statute that by its terms requires the application of strict scrutiny to religious exercise claims. Specifically, RFRA provides that the government shall not "substantially burden a person's exercise of religion" except when it furthers a "'compelling governmental interest'" by the "'least restrictive means.'" *Id.* at 1298 (quoting 42 U.S.C. § 2000bb-1). Although the Supreme Court subsequently held RFRA is not constitutionally applicable against the states, *Boerne v. Flores*, 521 U.S. 507 (1997), RFRA's strict scrutiny standard remains applicable against the federal government. *See, e.g., Adams v. Comm'r*, 170 F.3d 173, 174 & n.1 (3d Cir. 1999).

free to oppose birth control, to attempt to persuade their employees not to use contraception, and to convey their moral message to their adherents. The burden here is equivalent to that imposed in *Goehring*. As in that case, such a burden is insufficient to outweigh the State's interest in ensuring New York's women workers have adequate health coverage and do not bear an unequal share of those health costs.

Related cases demonstrate that *Goehring* achieves the right balance. In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Supreme Court held that despite their sincere religious objections to, *inter alia*, the receipt of government benefits, Amish employers could be constitutionally compelled to contribute to the social security tax system. Likewise, in *Adams v. Commissioner*, the Third Circuit rejected a request for exemption from tax obligations despite the plaintiff's sincere religious belief that "participation in war is contrary to God's will, and hence, that the payment of taxes to fund the military is against the will of God." 170 F.3d 173, 174 (3d Cir. 1999). New York courts have similarly rejected requests for exemptions from state tax and benefit schemes despite claims of religious burden. *See Sisters of Saint Joseph v. City of New York*, 49 N.Y.2d 429, 441-42 (1980) (no free exercise exemption from real property tax); *Matter of Faith Bible Church v. Hudacs*, 179 A.D.2d 308, 313 (3d Dep't 1992) (no free exercise exemption from payment of unemployment contributions).

B. Cognizable State Interests Are Not Limited to the Narrowest Definition of "Peace or Safety."

Under the New York Constitution, the right of "free exercise and enjoyment of religious profession and worship" is broad and vigorous, but it may not be construed to "justify practices inconsistent with the peace or safety of this state." N.Y. Const. Art I, § 3. While the "peace or safety" language of the State Constitution is certainly independent

of, and different from, the language of the federal Free Exercise Clause, Appellants plainly err in arguing that only a state interest that corresponds to the narrowest possible definition of "peace or safety" may trump a free exercise burden under the New York Constitution. Both the historical context surrounding the inclusion of those terms in the State Constitution and their interpretation by the courts establish that a broader range of state interests apply. *See* Def.'s Reply Mem. at 16-17 (dated Aug. 21, 2003). Thus, the court below correctly held that under the New York Constitution compelling interests include the State's interest in "the general protection of the community, meeting the medical needs of the community or individuals, and ending discrimination against women." Slip op. at 12 (citations omitted).

Indeed, the earliest reported free exercise case to reach the Court of Appeals squarely rejected a narrow reading of the State's ability to protect the "peace or safety." In *People v. Pierson*, 176 N.Y. 201 (1903), a parent who was convicted of failing to seek medical attention for his child claimed that his conduct was protected by Article I, Section 3, because his religion did not permit medical treatment by a physician. In rejecting his claim, the court interpreted the "peace and safety of the state [to] involve[] the protection of the lives and health of its children as well as the obedience to its laws." *Id.* at 211. Later courts have continued to apply a broader interpretation of the state interests that may outweigh a burden on free exercise. These include, notably, an interest in ensuring the equal protection of the law, *see Williams v. Bright*, 230 A.D.2d 548, 553 (1st Dep't 1997), as well as an interest in maintaining the legal system's integrity, *see id.*; *LaRocca*, 37 N.Y.2d 575; *Woodruff*, 26 A.D.2d at 239.

Courts in other states with comparable state constitutional language have likewise rejected narrow interpretations of "peace or safety." Notably, the California Constitution contains the very same "peace or safety" limitation on its free exercise clause as does the New York Constitution. Assuming, without deciding the question, that this clause requires strict scrutiny analysis, the California Supreme Court held that the Woman's Contraceptive Equity Act furthered a compelling state interest within the meaning of the state constitution's free exercise clause. *See Catholic Charities of Sacramento*, 85 P.3d at 89 n.16, 91-92; *see also* slip op. at 12-13 (finding California appellate court decision "well reasoned and persuasive" in light of similarities between New York and California contraceptive equity laws and constitutional free exercise clauses). Likewise, Minnesota and Washington, which Appellants emphasize because they have constitutions that contain "identical limiting language" and are modeled after the New York Constitution, Appellants' Br. at 28, have also interpreted "peace or safety" more broadly than Appellants suggest.

For example, the Minnesota Supreme Court has refused to exempt a religious school from compliance with state labor laws, notwithstanding the school's religious objections, on the ground that "[o]ne of the state's most compelling interests is to ensure the peace and safety of labor relations." *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 861-68 (Minn. 1992). For their part, the Washington courts have identified numerous state interests as sufficient to justify infringement on religious beliefs, including state interests in "requiring hospital staff to purchase professional liability insurance"; "requiring blood tests for putative fathers"; "requiring an x-ray . . . for tuberculosis"; and "requir[ing] . . . a driver's license [for motorists]." *State v. Balzer*,

954 P.2d 931, 937-38 (Wash. Ct. App. 1998) (holding infringement on religious freedom justified by state interests in, *inter alia*, protecting against adverse health effects of marijuana use); *see also Open Door Baptist Church v. Clark County*, 995 P.2d 33 (Wash. 2000) (upholding against church's free exercise challenge zoning law furthering state interest in protecting physical environment); *cf. Munns v. Martin*, 930 P.2d 318, 322 (Wash. 1997) (citing cases recognizing variety of interests beyond narrow conception of peace and safety as sufficient to outweigh burden on free exercise). Like the binding New York precedent discussed above, the California, Minnesota, and Washington cases establish that Appellants' insistence on a narrow reading of "peace or safety" is without merit.

C. The Act Legitimately Prevents Appellants From Imposing Their Religious Beliefs on Third Parties.

Appellants' religious tenets with regard to contraception are entitled to respect. However, the exemption that Appellants seek would impose their beliefs on their religiously diverse workforce. As the lower court found, Appellants' "businesses employ over 50,000 persons, with health insurance coverage provided to as many as 500,000." Slip op. at 17. Expanding the exemption would leave tens of thousands of these employees and their dependents without adequate prescription coverage, thus reducing the effectiveness of WHWA. *See id.* at 17-18. The Act legitimately operates to prevent that result. Both relevant case law and New York constitutional history support this conclusion.

First, a concern for third parties is evident in New York free exercise case law. In *Williams v. Bright*, for example, the plaintiff had refused surgery after a car accident

because the necessary blood transfusions would violate her religious beliefs as a Jehovah's Witness. It was uncontested that without surgery, she would likely live "a wheelchair-bound life," whereas surgery "offered her the prospect of a good recovery and a near normal life." 230 A.D.2d at 550. She sought reimbursement from the car leasing agent and its insurance company for damages resulting from the accident. The question before the court was whether her sincere religious belief in any way exempted her from state law requiring plaintiffs in tort actions "to use reasonable and proper efforts to make the damage as small as practicable." *Id.* Holding that it did not, the First Department emphasized that "the real issue here is whether the consequences of [a religious] belief must be fully paid for here on earth by someone other than the injured believer." *Id.* at 552. Because of its concern that an exemption would impose burdens on third parties, the court held that the plaintiff was required "to mitigate damages under the same standard required of all other persons similarly situated who do not share similar religious convictions." *Id.* at 551; *see also In re Sampson*, 37 A.D.2d 668 (3d Dep't 1971) (rejecting mother's claim that requiring son to have blood transfusion and surgery for facial disfigurement would violate her free exercise rights).

Likewise, when applying a strict scrutiny analysis, federal courts have often taken care to ensure that third party rights are not detrimentally affected by free exercise exemptions. In *Lee*, for example, the Supreme Court rejected an Amish religious employer's claim for an exemption to the Social Security law based in part on the impact it would have on employees. The Court held that "the limits [employers] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an

exemption . . . to an employer operates to impose the employer's religious faith on the employees." 455 U.S. at 261. Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court expressly limited its holding to avoid a religious accommodation that would burden others' rights. The parents in *Yoder* sought an exemption on religious grounds from a compulsory education requirement. Allowing the exemption, the Court emphasized that the right of the parents to exercise their religious practice of educating their children at home depended on the fact that the record included no evidence showing either that the children wanted to attend high school or that the children would be harmed by being educated at home. *Id.* at 230-32; *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 133, n.31 (N.D.N.Y. 1988) (rejecting free exercise claim in part because "the interests of the children . . . can[not] be ignored in any proper balancing of conflicting interests when the free exercise rights of homeschooling parents are implicated").

As the California Supreme Court noted in holding that Catholic Charities must comply with California's contraceptive equity law, even under a strict scrutiny analysis the state's interest is strongly enhanced by the "circumstance that any exemption from the [legislation] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits." *Catholic Charities of Sacramento*, 85 P.3d at 93.[13] Likewise, here, New York law's "narrow exemption serves to protect the rights and health of large numbers of employees who do not share their employer's religious views." Slip op. at 17. An expanded exemption would deprive these tens of thousands of employees of the Act's protections.

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[13] In this same vein, that court noted, "We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties." 85 P.3d at 94.

Finally, Appellants err in suggesting that the history and text of Article I, Section 3, and in particular its phrase "liberty of conscience," permit their free exercise to trump a resulting burden on third parties. As Judge Michael W. McConnell has noted in his influential study of the origins of free exercise (which is cited by Appellants), in the eighteenth century "liberty of conscience" connoted "*individual judgment*," not "the corporate or institutional aspects of religious belief." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1490 (1990) (emphasis added). It connoted an individual's right to follow his own conscience in matters of religion, to be free from discrimination on the basis of religion, and to be free from civil duties – such as required oaths – that would violate his conscience. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 372, 390-92 (1996) (citing writings of contemporary religious liberty proponents). It afforded no extra protection to the *institutional* exercise of religion, which has far greater potential to burden third parties. Appellants' reliance on the phrase is thus unfounded.

III. THE ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FEDERAL CONSTITUTION OR THE ANALOGOUS PREFERENCE CLAUSE OF THE NEW YORK CONSTITUTION.

WHWA likewise survives Appellants' challenge under the federal Establishment Clause and the analogous Preference Clause of the New York Constitution.[14] Appellants

[14] Appellants have not suggested, below or on appeal, that their claims under the Preference Clause of Article I, Section 3 of the New York Constitution require different analysis from their claims under the federal Establishment Clause. The New York courts have traditionally treated the state and federal constitutions as providing "equivalent protections under the prohibitions against establishment or preference of religion." Slip op. at 14; *see also Germenis v. Coughlin*, 232 A.D.2d 738 (3d Dep't 1996) (applying the

complain that in exempting "religious employers," WHWA impermissibly distinguishes between the religious and the secular; that the oversight necessary to implement the "religious employer" exemption leads to excessive government entanglement; and that the Act amounts to religious gerrymandering aimed at Catholicism. At every turn, Appellants' arguments fail.

A. The Constitution Permits Laws To Distinguish Between the Religious and the Secular.

Appellants claim that, through its definition of "religious employers," WHWA creates distinctions that effectively define the church and thus unconstitutionally intrude on church autonomy. Fundamentally, Appellants argue that by distinguishing between the religious and the secular, WHWA impermissibly intrudes on a church's self-definition. To the contrary, as the lower court explained, "the determination of whether an entity is primarily religious or secular is routinely made and is clearly constitutional." Slip op. at 19. Indeed, legislative accommodations of religious exercise "would be impossible as a practical matter if the government were, as Catholic Charities argues, forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not." *Catholic Charities of Sacramento*, 85 P.3d at 79. Appellants' strained analysis ignores this basic principle.

Moreover, the Constitution not only permits, but often requires the State to make distinctions like those in WHWA. Courts, legislators, and administrators are frequently obligated to distinguish the religious from the secular. The Establishment Clause forbids the advancement of religion, whereas the advancement of secular principles is

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same analysis to address both federal and state establishment of religion claims); *Lewis v. Allen*, 11 A.D.2d 447, 451 (3d Dep't 1960), *aff'd mem.*, 14 N.Y.2d 867 (1964).

permissible. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Thus, the Supreme Court has upheld laws providing direct grants of public funds to religiously affiliated hospitals,[15] universities,[16] and teenage pregnancy prevention programs[17] only after determining that their publicly funded work was, or would be, secular. In the same vein, the Supreme Court has held that direct grants of public funds may not support "specifically religious activit[ies] in an otherwise substantially secular setting." 487 U.S. at 610, 613 (quotes and citation omitted). The Court has likewise held that the Establishment Clause permits public school teachers to teach remedial education at parochial schools only if their courses remain secular. *Agostini v. Felton*, 521 U.S. 203, 232-35 (1997). And the Supreme Court has held that public funds may not flow directly to "pervasively sectarian institutions," meaning institutions in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Bowen*, 487 U.S. at 610, 613.

Likewise, only beliefs rooted in religion are protected by the Free Exercise Clause. Purely secular views do not suffice. *See, e.g., Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989). In some contexts then, the Constitution *requires* a distinction between religious and secular activities, and between pervasively sectarian organizations and religiously affiliated institutions. Courts or other state actors making this constitutionally mandated distinction do not – as Appellants argue – impermissibly define the church and its organizations.

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15 *Bradfield v. Roberts*, 175 U.S. 291 (1899).

16 *Tilton v. Richardson*, 403 U.S. 672 (1971).

17 *Bowen*, 487 U.S. 589.

Notably, the Supreme Court has deemed services secular for Establishment Clause purposes even when religious motivations support the provision of those services. In *Bowen*, for example, the Court recognized that some religiously affiliated organizations sought public dollars for abstinence education because of a religiously based belief in promoting abstinence. 487 U.S. at 597, 607. Notwithstanding the religious motivations of those organizations, the Court held that they have the capacity to conduct abstinence programs in a secular manner for purposes of the Establishment Clause. *Id.* at 612. The Court clarified that the Establishment Clause is violated if the organizations include religious content in the publicly funded programs. *Id.* at 611-612. In recognizing that programs can be secular for Establishment Clause purposes notwithstanding an underlying religious motivation, the Court did not – as Appellants argue – impermissibly intrude on church autonomy.

Here too, by not including Appellants in its exemption for religious employers, the Act does not impermissibly define Appellants' services as secular, in derogation of their religious motivation for their work. Rather, the Act simply exempts church organizations conducting core religious functions but does not exempt all religiously affiliated organizations. This line drawing is neither unfamiliar nor unconstitutional. Appellants benefit from the line drawing when they receive direct funding from the government; they cannot legitimately balk at the same line drawing now.[18]

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[18] Appellants' heavy reliance on *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *summarily aff'd*, 456 U.S. 951 (1982), is misplaced. In *Espinosa*, the court struck down a statute that required secular, but not religious, groups to apply for a permit prior to conducting public solicitations. *Id.* at 479. The constitutional infirmity with the requirement, as applied, was not that the ordinance was "anti-religious" by virtue of distinguishing between the secular and religious, but that it afforded city officials excessive discretion in making a determination as to which activities qualified as

Appellants nonetheless insist that their omission from the exemption violates the Establishment Clause because it amounts to "state intervention into a doctrinal matter within a church or church institution." Appellants' Br. at 31. Appellants misunderstand the law. It is true that the Establishment Clause bars secular authorities from resolving matters of theological doctrine. *See, e.g., Jones v. Wolfe*, 443 U.S. 595 (1979) (courts must defer to church's own definition of its identity and polity); *Watson v. Jones*, 80 U.S. 679 (1872) (court may not decide which faction may retain control of a church). Thus, for example, a court may not adjudicate a tenure dispute involving a professor of canon law at Catholic University, as the litigation would necessarily require a judge to determine the quality of the plaintiff's scholarship in matters of ecclesiastical law. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996).

In this case, however, New York is not entering into, far less adjudicating, a dispute about religious doctrine. It is undisputed that Appellants' religious tenets prohibit the use of contraception. The Act says nothing about church doctrine on this issue; rather, it expresses New York's secular state policy. Applying this labor law to ensure equal health benefits to Appellants' workers does not impermissibly intrude on theological autonomy. As the United States Court of Appeals for the Ninth Circuit has cautioned:

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religious and thus which groups were relieved of the burden of applying for a permit. *Id.* at 481 (citing series of cases addressing discretionary prior restraints on free speech). Thus, *Espinosa* is one in a line of cases holding that the state may not grant administrators unfettered discretion in imposing prior restraints on first amendment activities. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 n.2 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). These cases do not support Plaintiffs' conclusion that the state may never draw distinctions between the secular and the religious. *See Catholic Charities of Sacramento*, 85 P.3d at 79-80 (rejecting same reliance on *Espinosa*, noting it "addressed the different problem of content-based prior restraints on speech").

> [A]pplying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, [but] this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws. Otherwise, churches would be free from all of the secular legal obligations that currently and routinely apply to them.

Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999); *see also Catholic Charities of Sacramento*, 85 P.3d at 77 ("This case does not implicate internal church governance . . . [and although the law] conflicts with Catholic Charities' religious beliefs . . . this does not mean the Legislature has decided a religious question.").

B. The Administration of the Exemption Will Not Impermissibly Entangle the State With Religion.

Appellants insist that the application of the exemption is complex and requires a governmental inquisition, with state officials interrogating workers about their faith. Their claim is specious. Most significantly, the exemption is sufficiently clear that all ten Appellants had no trouble discerning that they did not qualify.

The exemption employs criteria familiar from United States Supreme Court case law. Indeed, the Supreme Court, when deciding whether an institution is pervasively sectarian for Establishment Clause purposes, has frequently relied on the very factors used in the Act. Thus, when assessing whether an institution is pervasively sectarian and therefore unable to receive government aid, the Court has considered whether a substantial purpose of the institution is inculcation of religious values, *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 744 (1973); *Tilton v. Richardson*, 403 U.S. 672, 685, 687 (1971) (plurality opinion), and whether the institution hires and serves people who share its faith, *Roemer*, 426 U.S.

at 757-58 (plurality opinion); *Hunt*, 413 U.S. at 743-44, 746; *Tilton*, 403 U.S. at 686 (plurality opinion). If consideration of these factors – the primary purpose of an institution and the religious affiliation of employees and clients – is relevant to the Supreme Court's review of a law for Establishment Clause purposes, they are plainly permissible here. Thus, the Act appropriately incorporates each of these criteria, which taken as a whole allow the State to identify and exempt "religious employers" engaged in those core religious activities that the courts have granted the greatest constitutional protection.

Moreover, a review of the criteria illustrates the exaggeration inherent in Appellants' claims. One criterion – exemption from federal tax filings – is obviously easily ascertainable. To qualify for that federal tax exemption, an entity must be a church, an integrated auxiliary of a church, a convention or association of churches, or "the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(2)(i), (iii). An entity that qualifies will likely satisfy the Act's other three criteria, which logically flow from the status as a church, integrated auxiliary, or religious order. Those institutions primarily exist to inculcate religious values. Most of their employees and those receiving their services would typically share their religious tenets.

Appellants assert that neither they nor the State can determine whether their workers primarily share their faiths. But this is simply untrue. An entity does not create a workforce comprised primarily of co-religionists by accident. It consciously engages in religious scrutiny in hiring if its employees' responsibilities (such as teaching theology) make their religious background relevant to their work. Even where an entity exercises its prerogative to hire only co-religionists for nonprofit affiliates that engage in secular

work, *see Amos*, 483 U.S. 327, it will certainly *know* that its labor force meets the Act's exemption criteria. Likewise, it will know when it does not. Indeed, Appellants concede that they do not meet the exemption's criteria because "Appellants do not primarily employ persons who share their religious beliefs, but, rather, employ a diverse group of persons of many religious backgrounds." Compl. ¶ 50; slip op. at 19 (noting "all of the plaintiffs have been able to determine that they do not qualify for the exemption"). Also, as the lower court found, there is "no indication that the defendant will not accept an applicant's statements concerning its religious tenets and whether those whom it primarily employs and those whom it primarily serves share such religious tenets." Slip op. at 19. Appellants' continued speculation to the contrary is merely an attempt to generate a factual dispute where none exists.

In short, Appellants plainly do not qualify for an exemption; none of them satisfy the Act's criteria. *See* Compl. ¶ 50. For all the hypothetical confusion they posit, Appellants have not identified any religiously affiliated entity that would raise a close question as to its qualification for the exemption. Neither the entities nor the State would experience any confusion in administering the Act. The Act, therefore, does not impermissibly entangle government officials with religion.

C. The Act Does Not Impermissibly Discriminate Among Religions.

Appellants next claim that the New York Legislature passed the Act to disadvantage the Catholic Church and that the Act is therefore unconstitutional. There is simply no support for this charge, either in the text of the law or its legislative history.

1. The Act does not impermissibly discriminate against religious denominations that oppose contraception.

As Supreme Court precedent makes amply clear, laws frequently conflict with some religious tenets and harmonize with other religious tenets, but that fact does not make the laws discriminatory or the lawmakers guilty of religious persecution. For example, the Supreme Court rejected a claim that the federal Hyde Amendment, which eliminated Medicaid coverage for abortion, violates the Establishment Clause because it incorporates "into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Harris v. McRae*, 448 U.S. 297, 319 (1980). In so holding, the Court emphasized that a statute does not violate the Establishment Clause "because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Id.* at 319-320 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). The Supreme Court and other courts have repeatedly applied this principle to uphold Sunday closing laws,[19] federal grants to religious organizations for teen pregnancy prevention,[20] selective service laws,[21] denial of charitable deduction for payments to religions in expectation of spiritual services,[22] and denial of federal tax exemption to racially discriminatory colleges.[23]

Indeed, the courts have rejected an argument directly mirroring that at issue here, namely, that laws prohibiting gender discrimination violate the Establishment Clause. For example, in *EEOC v. Tree of Life Christian Schools*, 751 F. Supp. 700 (S.D. Ohio 1990), the court rejected a religiously affiliated employer's argument that the Equal Pay

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19 *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

20 *Bowen*, 487 U.S. at 604 n. 8.

21 *Gillette v. United States*, 401 U.S. 437, 452 (1971).

22 *Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987).

23 *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983).

Act violates the Establishment Clause because it has the "effect of favoring those religions whose beliefs do not conflict with majoritarian precepts," and disfavoring those believing that God ordained different roles for men and women. *Id.* at 713. Similarly, the Act does not violate the Establishment Clause simply because it conflicts with Catholic doctrine on birth control. Indeed, the presence of two Baptist-affiliated complainants in this action belies Appellants' claim that WHWA patently targets Catholic organizations.

2. The religious employer exemption does not render the Act discriminatory.

Appellants next attempt to create an image of unconstitutional religious gerrymandering from the scope of the religious employer exemption. Appellants complain that the exemption omits religious institutions devoted more to the provision of social services than to worship. *See, e.g.*, Appellants' Br. at 51-53. The religious employer exemption thus does not go as far as Appellants would like. But the government is under no constitutional obligation to exempt all religiously affiliated organizations from generally applicable laws if it exempts churches. Laws can and do distinguish between the church and related nonprofit organizations. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), for example, the Court of Appeals ruled that a religious school must comply with the Fair Labor Standards Act, although its sponsoring church was exempt. The court expressly rejected the argument that "the government should be required to accept the church's characterization of Roanoke Valley [the school] as an inseverable part of the church." *Id.* at 1396. Appellants' claim that the Legislature cannot exempt the spiritual church without also

exempting all of its affiliated enterprises, hospitals, colleges, and charities, no matter how secular, is a radical and unrecognized constitutional position.

Moreover, the scope of WHWA's religious accommodation is not proof of bias. "That the exemption is not sufficiently broad to cover all organizations affiliated with the [Apellants] does not mean that the exemption discriminates against the [Appellants]." *Catholic Charities of Sacramento*, 85 P.3d at 84-85. Rather, the government has broad discretion as to when and how to fashion an accommodation for religion. *See Smith*, 494 U.S. at 890 ("leaving accommodation to the political process . . . must be preferred"); *see also Adams*, 170 F.3d at 180 (noting religiously-based exemptions from federal tax laws are not required but "a matter of legislative grace").[24] In the Act, the New York Legislature has fashioned a neutral exemption that achieves a sensitive and constitutional balance between the church's need for religious freedom and workers' need for health care.

In addition, Appellants lack the evidence of government bias against religion that infected all cases in which courts have found religious gerrymandering. In *Larson*, the Minnesota legislature crafted the exemption at issue – which narrowed a preexisting exemption for all religions – to distinguish between novel and established religious organizations and indeed to target the "Moonies." *Larson v. Valente*, 456 U.S. 228, 247 n.23, 253-55 (1982). In *Lukumi*, the Hialeah city council passed the ordinances in direct response to, and in an attempt to deter, the Santeria religion's plan to establish a new church. 508 U.S. at 525-26; s*ee also Catholic Charities of Sacramento*, 85 P.3d at 82-86 (distinguishing purpose and effect of laws challenged in *Larson* and *Lukumi* from

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[24] Like *Goehring*, *Adams* was brought under RFRA, and the court therefore applied strict scrutiny. *See supra* note 12.

California's contraceptive equity law). And in *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993), the legislative materials provided "explicit evidence that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation." *Id.* at 1531.

The New York Legislature was not on a similar campaign to persecute the Catholic Church. *See* slip op. at 19 (finding legislative history "does not demonstrate any animus towards [Catholic] Church"). It was, instead, engaged in an effort to address gender discrimination and the failure of an estimated fifty percent of insurance plans to cover prescription contraceptives. *See* Smith Aff. ¶ 11; slip op. at 19 (finding "legislative history overwhelmingly establishes" Act's purpose of "promoting women's health and ending gender discrimination"). Moreover, organizations affiliated with both denominations represented by Appellants fall on *both* sides of the Act's religious employer exemption. Indeed, the exemption benefits the Catholic Church – which lobbied for an exemption – as well as its Baptist counterpart: Because their religious tenets proscribe the use of contraceptives, any of their institutions meeting the four-part religious employer test need not comply with the statute's requirements. Ins. Law §§ 3221(l)(16)(A), 4303(cc)(1); slip op. at 16 (recognizing that the Catholic Church, which is not a party in this case, does qualify for the exemption). Appellants' efforts to cast the Act as impermissible religious discrimination is thus without foundation.[25]

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[25] Likewise, similar exemptions – apparently benefiting a single religion with doctrines that are in conflict with secular laws and not widely shared by other religions – have been unsuccessfully challenged as preferential treatment of religion. *Kong v. Scully*, 341 F.3d 1132 (9th Cir. 2003); *Children's Healthcare is a Legal Duty, Inc. v. De Parle*, 212 F.3d 1084 (8th Cir. 2000), *cert. denied*, 532 U.S. 957 (2001).

IV. THE ACT DOES NOT VIOLATE THE FEDERAL OR STATE CONSTITUTIONAL RIGHTS OF EXPRESSION OR ASSOCIATION.

Appellants have failed to establish a colorable claim that WHWA violates their right to engage freely in expressive conduct or association. Slip. op. at 20-21. Appellants cannot seriously argue that the Act in any way prohibits them from expressing their views on artificial contraception. Appellants remain free to denounce the use of contraceptive drugs and devices and to urge their employees to refrain from using them. Nor does the Act require Appellants to include or exclude members based on their viewpoints regarding contraception. Thus, their expression claims rest solely on the unsupported theory that the conduct required by the Act — the purchase of an insurance plan that includes benefits to which they have religious objections — constitutes compelled expressive conduct and thus their refusal to do so is a form of protected expressive conduct.

A. The Act Does Not Implicate Expressive Conduct.

Under both the federal and state constitutions, a claim that conduct constitutes protected expression triggers a two-part inquiry. In the first instance, the court must "determine whether [a plaintiff's actions] constitute 'expressive conduct' entitled to protection." *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003); *People v. Hollman*, 68 N.Y.2d 202, 205-06 (1986). Only after the plaintiff makes this threshold showing does the court consider whether the law "impermissibly denies [plaintiff] such protection." *Zalewska*, 316 F.3d at 319; *Hollman*, 68 N.Y.2d at 206-07; *see also Texas v. Johnson*, 491 U.S. 397, 403 (1989); *Al-Amin v. City of New York*, 979 F. Supp. 168, 172 (E.D.N.Y. 1997). With respect to the first inquiry, "the fact that something is in some way communicative does not automatically afford it constitutional protection."

Zalewska, 316 F.3d at 319. Thus, to determine whether particular activities constitute "expressive conduct," a court must ask "whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (alteration in original) (quotes and citations omitted).

Appellants fail to meet the initial inquiry. As myriad cases evidence, the conduct required to comply with WHWA could not reasonably be understood to amount to an expression of a viewpoint or message. For instance, in *Glickman v. Wielman Brothers & Elliott*, 521 U.S. 457, 477 (1997), agricultural producers were required to place purchase orders within the framework of a collectively regulated market and were assessed fees to fund the regulatory scheme. The fees funded, among other components of the scheme, generic advertising. Plaintiff, which did not want to support the advertising, claimed that the assessment constituted a violation of its First Amendment free speech rights. The Court rejected this claim. Finding that the *primary* purpose of the assessment was not to subsidize speech, but rather to further a broader scheme of "economic regulation," the Court held the subsidy did not implicate First Amendment concerns. *Id.* at 471-74; *cf. United States v. United Foods*, 533 U.S. 405, 415 (2001) (holding compelled subsidy unconstitutional where "principal object is speech itself").

Likewise, the Second Circuit has held that a rule requiring a city transit employee to wear pants despite her deep cultural belief in wearing skirts did not implicate First Amendment rights. *Zalewska*, 316 F.3d at 320. The court held that because the choice of wearing skirts, as opposed to pants, would not reasonably be understood as a conveying a viewpoint, it did not rise to the level of constitutionally protected expressive conduct. *Id.*

Further, it has been held that requiring a Catholic university to provide facilities to a gay rights student group, which endorsed conduct contrary to Catholic theology, is not forced expression. *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987). The court held that the school's provision of tangible benefits to the student group would amount to neither "an abstract expression of the University's moral philosophy" nor an expression of support for the group or its views. *Id.* at 20-21. Similarly, by requiring Appellants to buy an insurance plan that includes contraceptive benefits, WHWA neither prevents Appellants from expressing their views against contraception nor compels an expression of support for contraceptive use.

Appellants' reliance on a line of cases prohibiting compulsory funding does not change this analysis. *See* Appellants' Br. at 35-36. Here, the Act does "not require that [Appellants] fund any sort of expressive conduct with which they disagree." Slip. op. at 20. In contrast, in the cases invoked by Appellants, the funding was used to subsidize "ideological activities" that had the "expression of political views" as their primary purpose. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (public employer may not compel union members to pay subsidies for political speech to which they object); *Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435 (1984) (employer may not compel union fees to subsidize ideological advocacy unrelated to collective bargaining and settling grievances); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (state bar may not compel fees that subsidize political or ideological causes). *Amici* do not dispute that when a law compels inherently communicative conduct like subsidizing ideological activities,[26] saluting a flag,[27] or visibly displaying a state message,[28] First Amendment

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[26] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

protections come into play. But Appellants fail to demonstrate how compliance with WHWA is remotely analogous to any of these activities.

B. The Act Does Not Implicate Associational Rights.

Appellants' expressive association claim fails to implicate any of the associational concerns protected under the First Amendment or under Article I, Section 9 of the New York Constitution. Unless a law implicates the ability of individuals and groups to associate freely, neither the federal nor the state right of associational expression comes into play.

Both the federal and state constitutions protect the "right to association with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Golden v. Clark*, 76 N.Y.2d 618 (1990) (recognizing parallel rights of association under federal and state constitutions). This right also "presupposes a freedom not to associate" with individuals who "may impair the ability of the group to express those views." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quotes omitted).[29] Yet the Act does not require Appellants to associate with members who will impair Appellants' ability to express their

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[27] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

[28] *Wooley v. Maynard*, 430 U.S. 705 (1977).

[29] To the extent Appellants cite *Boy Scouts* in support of their right of expression, rather than their right of association, their reliance is misplaced. In *Boy Scouts*, the Supreme Court held that the Scouts had a "First Amendment right to send one message but not the other," and had therefore lawfully dismissed Dale upon learning he was homosexual and a gay rights activist. *Boy Scouts*, 530 U.S. at 655-56. The discussion in *Boy Scouts* focused on Dale's position of leadership in the Scouts and thus his ability to influence the content of the Scouts' apparent message to those both within and outside of the organization. *Id.* at 657. The contents of a health plan can hardly be considered to parallel the expressive role of an organization's leadership.

views on artificial contraception. *See* slip op. at 20-21; *Golden*, 76 N.Y.2d at 627-29 (rejecting associational claim under state constitution because law did not limit ability of Appellants' members to associate and express their views). And Appellants do not allege how the Act prevents them from associating with, or disseminating their message through, individuals of their choosing. Thus, despite Appellants' conclusory statements to the contrary, compliance with a health insurance law that happens to advance goals in conflict with Appellants' religious beliefs simply does not fall within the framework of expressive association.

V. APPELLANTS DO NOT MAKE OUT A "HYBRID RIGHTS" CLAIM.

Finally, Appellants' attempt to establish a "hybrid rights" claim entitled to strict scrutiny analysis is equally unavailing. First, assuming *arguendo* that hybrid rights claims are entitled to strict scrutiny, Appellants' argument fails because they have not made out such a claim. A "plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999). In order to state a colorable "hybrid rights" claim, "other discrete constitutional protections . . . [must] also [be] implicated." *Christ the King*, 90 N.Y.2d at 250; *see also* slip op. at 22 ("Plaintiffs may not bootstrap their free exercise claims to some higher standard by alleging other non-meritorious constitutional claims."). For the reasons discussed above, Appellants' claims based on the right of expression and association are without merit, or at most redundant of their free exercise claim.[30] Thus,

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[30] As already discussed by the State, Appellants similarly fail to allege facts or point to law that would support an independent equal protection claim in this context. *See* Def.'s Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. at 38-39 (dated Apr. 14,

Appellants cannot maintain a hybrid rights claim.

Moreover, even if Appellants had raised a valid hybrid rights claim, that claim would not be entitled to any heightened review. The Court of Appeals for the Second Circuit has expressly rejected the contention that hybrid rights claims are entitled to strict scrutiny analysis. In *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), the court stated that it could "think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated," and held that until the Supreme Court directed otherwise it would "not use a stricter legal standard to evaluate hybrid claims." *Id.* at 44 (rejecting claim that strict scrutiny should apply to plaintiff's claims of a violation of free exercise and parental rights) (internal quotations and citations omitted);[31] *accord Kissinger v. Bd. of Trustees of the Ohio State Univ.*, 5 F.3d 177 (6th Cir. 1993). *But cf. Leebaert*, 332 F.3d at 143 (citing several circuit court decisions that have recognized, but not applied, a standard of heightened review for hybrid claims). Any hybrid rights claim that Appellants could allege would fail under the standards discussed above.

2003). Thus, the equal protection argument does not create grounds for alleging a hybrid rights claim.

[31] In insisting that the Second Circuit has not rejected the theory of hybrid rights, Appellants rely on a pre- *Leebaert* case, therefore failing to address the most recent New York federal court decision on this issue. *See* Appellants' Br. at 54.

CONCLUSION

WHWA is a health measure that protects important workers' rights. It promotes the public health and gender equality, and respects religious liberty. No constitutional principle prohibits Appellants' employees from receiving the protection that this law affords thousands upon thousands of workers throughout the state of New York.

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