# 21-911

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

CHRISTOPHER T. SLATTERY, a New York resident, and THE EVERGREEN ASSOCIATION, INC., a New York nonprofit corporation, doing business as Expectant Mother Care and EMC FrontLine Pregnancy Centers,
*Plaintiffs-Appellants*,

v.

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York; ROBERTA REARDON, in her official capacity as the Commissioner of the Labor Department of the State of New York; and LETITIA JAMES, in her official capacity as the Attorney General of the State of New York,
*Defendants-Appellees*.

On Appeal from the United States District Court for the Northern District of New York, Case No. 1:20-cv-112, Hon. Thomas J. McAvoy

**Brief in Support of Appellees and Affirmance of *Amici Curiae* Americans United for Separation of Church and State; Catholics for Choice; Central Conference of American Rabbis; Covenant Network of Presbyterians; Disciples Center for Public Witness; Disciples for Choice; Disciples Justice Action Network; Equal Partners in Faith; Hadassah, the Women's Zionist Organization of America; Hindu American Foundation; Men of Reform Judaism; Methodist Federation for Social Action; Muslim Advocates; Muslim Public Affairs Council; National Council of Jewish Women; Reconstructionist Rabbinical Association; Union for Reform Judaism; Unitarian Universalist Association; and Women of Reform Judaism**

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## RULE 26.1 DISCLOSURE STATEMENT

All the *amici* are nonprofit organizations. None have parent corporations and none are owned, in whole or in part, by any publicly held corporation.

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## INTERESTS OF THE *AMICI CURIAE*[1]

*Amici* are religious, civil-rights, and women's philanthropic organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They recognize that the right to exercise religion freely is precious, but they believe that it was never intended to give religious organizations an unfettered privilege to ignore antidiscrimination laws. They therefore oppose Appellants' attempt to misuse the freedom of religion to gain a blanket exemption from New York's prohibition against employment discrimination that is based on reproductive-health decisions.

The *amici* are:

- Americans United for Separation of Church and State.
- Catholics for Choice.
- Central Conference of American Rabbis.
- Covenant Network of Presbyterians.
- Disciples Center for Public Witness.
- Disciples for Choice.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

- Disciples Justice Action Network.
- Equal Partners in Faith.
- Hadassah, the Women's Zionist Organization of America.
- Hindu American Foundation.
- Men of Reform Judaism.
- Methodist Federation for Social Action.
- Muslim Advocates.
- Muslim Public Affairs Council.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Unitarian Universalist Association.
- Women of Reform Judaism.

## SUMMARY OF ARGUMENT

New York Labor Law Section 203-e, which prohibits employment discrimination based on employees' reproductive-health decisions, does not violate the First Amendment's Free Exercise Clause. As the State's brief explains (at 50–56), laws that are neutral with respect to religion and generally applicable do not violate the Clause, and Section 203-e satisfies that standard because it applies equally both with respect to secular and religious employees and with respect to secularly and religiously motivated discrimination. *Amici* write to offer three supporting reasons why that is so:

First, Appellant Evergreen Association is wrong to suggest that Section 203-e will affect only religious employers and that it therefore targets religion. Religious groups hold a diversity of views on reproductive-health issues. So do nonreligious employers. Both types of employers have engaged in conduct that Section 203-e prohibits. And Section 203-e applies the same way to them all.

Second, Evergreen is equally incorrect in arguing that provisions of different New York laws intended to ensure equal opportunity in employment and contracting for women and minorities undermine the governmental interests served by Section 203-e and thereby trigger strict scrutiny. Far from undermining antidiscrimination interests, those

provisions advance them. But even if the provisions could properly be viewed as exemptions from antidiscrimination prohibitions, which they can't, when assessing whether strict scrutiny should apply under the Free Exercise Clause it is improper as a matter of law to rely on exemptions from a statute that is not the one being challenged.

Third, likely recognizing that its free-exercise claim fails under well-established doctrine, Evergreen essentially contends that, as an organization that identifies as religious, it has an unfettered privilege to ignore any antidiscrimination laws that conflict with its beliefs. But the Supreme Court has made clear that the First Amendment exempts religious organizations from antidiscrimination laws with respect to only those employees who hold ministerial roles; otherwise, neutral employment-nondiscrimination laws apply to them as written. While it might turn out that some of Evergreen's employees fall within the scope of the ministerial exception, that does not render Section 203-e categorically unenforceable against Evergreen.

The district court's decision should be affirmed.

## ARGUMENT

### I. Section 203-e is neutral and generally applicable.

Religious freedom is a value of the highest order. But as the Supreme Court recently reaffirmed, the Free Exercise Clause "does not

mean that religious institutions enjoy a general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). As Justice Scalia wrote for the Court in *Employment Division v. Smith*, a contrary rule would render "professed doctrines of religious belief superior to the law of the land," which would "in effect . . . permit every citizen to become a law unto himself." 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)).

Thus, the Supreme Court held in *Smith* that laws that burden religious conduct do not trigger heightened scrutiny when they are neutral toward religion and generally applicable. *See id.* at 879. These types of laws are subject only to rational-basis review. *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014). It follows that "a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." *Id.* at 196.

*Smith*'s neutrality requirement means that a law must not "infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). General applicability is the closely related concept that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 531, 543. The

touchstone in both inquiries is whether government has discriminated against religious conduct. *See id.* at 533–34, 542–43.

Section 203-e does not do so. It applies to all employers, whether they are religious or secular. And it governs all discrimination that is based on reproductive-health decisions, regardless of whether the discrimination is religiously motivated.

Section 203-e is therefore subject to rational-basis review. And it survives that review easily, because it is rationally related to the state's legitimate—indeed, compelling—interest in ensuring that employees and their dependents are free to make reproductive-health choices for themselves without fearing reprisals from their employers. (*See* J.A. 98–99, 101–02.)

### A. Section 203-e does not target religion.

Evergreen attempts to avoid rational-basis scrutiny by arguing that Section 203-e "targets religious conduct for distinctive treatment." (Appellants' Br. 47 (quoting *Lukumi*, 508 U.S. at 534).) Specifically, Evergreen points to a statement by one of the law's sponsors concerning lawsuits—some of which were filed by religious organizations—that challenged federal regulations that required health-insurance plans to cover contraceptives. (*Id.* at 49 (citing Senate Tr. at 433–34, https://bit.ly/2XL503j).) But Section 203-e's sponsors made clear that the

law was intended to prevent discrimination motivated by *any* "personal [or] political beliefs." *See* Senate Tr. at 433:17–18; *accord* Assembly Tr. at 132, https://bit.ly/3yXaEwU; J.A. 99, 102. Indeed, far from intending to disfavor religious organizations, one of the law's sponsors recognized that the ministerial exception to antidiscrimination laws would prevent enforcement of Section 203-e with respect to ministerial employees of religious organizations. *See* Assembly Tr. at 124–25, 127; *see also infra* Part II.

Evergreen further suggests that Section 203-e must be understood as targeting religion because, in Evergreen's view, it will affect only religious organizations. (*See* Appellants' Br. 50.) But it is far from true that only religious organizations, and not secular employers, attempt to interfere with employees' reproductive-health decisions.

To begin with, religious groups have widely diverging views on reproductive-health issues, including abortion and contraception. Unlike Evergreen, numerous religious traditions either outright accept abortion and contraception or view them as moral decisions to be made by individuals. For example, the Episcopal Church believes that "everyone [should] have the right to make decisions about their bodies and those

decisions should be between themselves and their provider"[2] and "approve[s] [of] contraception for purposes of family planning."[3] The United Church of Christ has long supported access to abortion services and contraception.[4] And the General Assembly of the Presbyterian Church (U.S.A.) has affirmed that "[h]umans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy."[5]

Even within a particular denomination or religious tradition, individual believers may hold a wide array of positions concerning reproductive-health matters. A majority of Catholics, for instance, disagree with church teachings and support policies that favor access to the full range of reproductive-health options, including contraception and

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[2] *Resolution 2018-D032, Advocate for Gender Equity, Including Reproductive Rights, in Healthcare*, ARCHIVES EPISCOPAL CHURCH, https://bit.ly/3xYYh1Z (last visited Aug. 25, 2021).

[3] *Resolution 1994-D009, Reaffirm Family Planning and Control of Global Population Growth*, ARCHIVES EPISCOPAL CHURCH, https://bit.ly/3sH2vKN (last visited Aug. 25, 2021).

[4] *See* Chris Davies, *Let's Talk about Abortion*, UNITED CHURCH OF CHRIST: WITNESS FOR JUSTICE (Feb. 18, 2021), https://bit.ly/37SyNZs; *Reproductive Justice*, UNITED CHURCH OF CHRIST, https://bit.ly/3swceU8 (last visited Aug. 25, 2021).

[5] *Abortion/Reproductive Choice Issues*, PRESBYTERIAN CHURCH (U.S.A.) PRESBYTERIAN MISSION, https://bit.ly/3kj3JId (last visited Aug. 25, 2021).

abortion.[6] Within Judaism, the Reform, Reconstructionist, and Conservative rabbinical bodies have all affirmed the rights to choose to have abortions and use contraceptives, while some Orthodox authorities hold more restrictive views.[7] And there is a diversity of views on these issues within Islam as well.[8]

Moreover, some ideological opposition to abortion, contraception, and other reproductive-health decisions is based on nonreligious grounds. For instance, some atheists oppose abortion. *See, e.g.*, Kelsey Hazzard, *The atheist's case against abortion: respect for human rights*, AMERICA: JESUIT REV. (Oct. 19, 2017), https://bit.ly/3ATWmO1. Also, some of the lawsuits challenging the federal contraceptive-coverage mandate were brought by *non*religious groups that opposed abortion and some or all forms of

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[6] *See* BELDEN RUSSONELLO STRATEGISTS LLC, 2016 SURVEY OF CATHOLIC LIKELY VOTERS CONDUCTED FOR CATHOLICS FOR CHOICE 5–6 (2016), https://bit.ly/2WezHgT.

[7] *See, e.g.*, *Resolution on State Restrictions on Access to Reproductive Health Services*, CENT. CONF. AM. RABBIS (Apr. 2008), https://bit.ly/3j0dDiE; *Resolution: Right to Reproductive Choice*, RECONSTRUCTIONIST RABBINICAL ASS'N, https://bit.ly/3gfEup0 (last visited Aug. 25, 2021); *Resolution on Reproductive Freedom in the United States*, RABBINICAL ASSEMBLY (May 21, 2012), https://bit.ly/3mfM1I4; Rabbi Lori Koffman, *Jewish Perspectives on Reproductive Realities*, NAT'L COUNCIL OF JEWISH WOMEN, https://bit.ly/3kpdS5Y (last visited Aug. 25, 2021).

[8] *See, e.g.*, Khaleel Mohammed, *Islam and Reproductive Choice*, REL. COAL. FOR REPROD. CHOICE, https://bit.ly/3xXvCKM (last visited Aug. 25, 2021).

contraception. *See Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 345 (3d Cir. 2017); *March for Life v. Burwell*, 128 F. Supp. 3d 116, 122 (D.D.C. 2015), *appeal dismissed*, No. 15-5301, 2018 WL 4871092 (D.C. Cir. Sept. 17, 2018).

In addition, discrimination based on reproductive-health decisions is often not rooted in any religious or philosophical disapproval of the decision. Employers have long discriminated against pregnant women based on biases about commitment and dependability. *See, e.g.*, Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), https://nyti.ms/2UAtGKw. Employers have pressured employees to obtain abortions as a result of those biases or in conjunction with supervisors' sexual harassment or assault of employees. *See, e.g.*, *id.*; *Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193, 196 (2d Cir. 2005). Employees have been fired for taking time off from work to undergo in vitro fertilization. *See, e.g.*, *Hall v. Nalco Co.*, 534 F.3d 644, 645–46 (7th Cir. 2008). And employees may be coerced by their employers to use egg-freezing procedures to delay having children. *See, e.g.*, Nicole M. Mattson, *On Ice: The Slippery Slope of Employer-Paid Egg Freezing*, 32 ABA J. LAB. & EMP. L. 255, 265–66 (2017).

Nor is Evergreen correct (*cf.* Appellants' Br. 39, 50) that previously existing laws already prohibited the kinds of reproductive-choice discrimination that nonreligious employers typically commit. The federal Pregnancy Discrimination Act applies only to employers with fifteen or more employees. *See* 42 U.S.C. § 2000e(b). Similarly, the pregnancy-related antidiscrimination prohibitions in the New York State Human Rights Law did not apply to small employers at the time that the New York legislature enacted Section 203-e. *See* Assembly Bill No. A8421, https://bit.ly/3DdhFfh; *New Workplace Discrimination and Harassment Protections*, N.Y. DIV. HUM. RTS., https://on.ny.gov/3zhUONB (last visited Aug. 25, 2021). And the scope of those federal and state laws' protections—for example, whether they cover an employee's decision to use assisted reproductive technology—remains unsettled. *See, e.g.*, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 & n.4 (2d Cir. 2003); *Govori v. Goat Fifty, L.L.C.*, 519 F. App'x 732, 733, 736 (2d Cir. 2013) (summary order).

**B. Section 203-e has no nonreligious exemptions.**

To be sure, strict scrutiny is triggered under the Free Exercise Clause when a law regulates religious conduct but exempts "secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *accord*

*Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Cent. Rabbinical Cong.*, 763 F.3d at 197. But Section 203-e has no exemptions.

Because of that, Evergreen is left to point to provisions in *other* laws—located in a different chapter of the New York code—that aim to ensure equal employment opportunities by promoting the employment of disproportionately unemployed minority groups and by supporting minority- and women-owned businesses in state contracting. (Appellants' Br. 46 (citing N.Y. Exec. Law §§ 296(12), 310–18).) These laws do not create any exemption from Section 203-e's prohibitions, however, so they are irrelevant. Strict scrutiny is not triggered under the Free Exercise Clause by exemptions from different prohibitions, in different laws, for they do not result in different treatment based on religion under the law being challenged.

Thus, for example, the Supreme Court held in *Hernandez v. Commissioner*, 490 U.S. 680, 700 (1989), that the Free Exercise Clause did not entitle a religious group's members to an exemption from taxation of income paid for spiritual-training sessions. The Court explained that the tax code contains a general prohibition against deducting from income money paid to nonprofits—secular or religious—in exchange for services. *See id.* at 687–88, 699–700. It made no difference to the Court that other provisions of the tax code allow taxpayers to deduct charitable

contributions to nonprofits when the taxpayer receives nothing in return. *See id.* at 687–88.

Likewise, in *Smith*, 494 U.S. at 874, 890, the Supreme Court held that Oregon's general criminal prohibition against use of the mind-altering drug peyote could be constitutionally applied to people who use peyote as a religious sacrament. The Court concluded that the Oregon law was neutral and generally applicable, as it prohibited both religious and nonreligious uses of peyote. *See id.* at 874, 879–80. It did not matter to the Court that Oregon state law as a whole did not prohibit the use of another mind-altering substance—alcohol.

But even if it were proper to consider the laws cited by Evergreen, they do not undermine any state antidiscrimination interest, much less New York's interest in stopping discrimination based on reproductive-health decisions. Instead, these laws *further* the state's interests in fostering equal employment opportunities for all, by removing barriers that might negatively affect disadvantaged populations, and by increasing outreach to those populations. Moreover, Evergreen does not allege—much less cite any evidence—that these laws benefit nonreligious organizations or individuals more than religious organizations or individuals. In other words, there is no different treatment, much less targeted disfavor of religion.

## II. Religious organizations do not have an unfettered privilege to ignore antidiscrimination laws.

Likely recognizing that *Smith* precludes its free-exercise claims, Evergreen argues that *Smith* should not apply to its employment decisions. (Appellants' Br. 42–44.) Its argument boils down to the contention that, as a religious organization, it has a free-exercise right to simply ignore any employment-discrimination law that collides with its religious beliefs. (*See id.*) But Evergreen failed to raise this argument below (*see* J.A. 104–34), so it is waived. *See, e.g.*, *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 252–53 (2d Cir. 2017).

Even if it were proper for the Court to consider the argument, it is wholly without merit. Evergreen relies on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012), which recognized that the "ministerial exception" relieves religious organizations from complying with antidiscrimination laws in certain circumstances. That exception does not, however, cover all employees of religious organizations.

Far from it: The exception applies solely to "claims concerning the employment relationship between a religious institution and its ministers." *Id.* It deprives the state of "the power to determine which individuals will minister to the faithful" (*id.* at 189), thus allowing

religious groups to ensure that "a wayward minister's preaching, teaching, and counseling" do not "contradict the church's tenets and lead the congregation away from the faith" (*Morrissey-Berru*, 140 S. Ct. at 2060).

The Supreme Court has adopted a fact-sensitive legal test for deciding who qualifies as a "minister" for purposes of the ministerial exception. In *Hosanna-Tabor*, the Court listed four relevant but nonexclusive considerations in determining that the ministerial exception applied to a Lutheran "called" teacher: (1) the school held her out as a minister, with the formal title "Minister of Religion, Commissioned"; (2) she was required to have considerable religious training and to undergo a formal commissioning process; (3) she held herself out as a minister, including by claiming tax benefits available exclusively to ministers; and (4) she performed substantial religious functions, including teaching religion four times a week and leading students in prayer throughout the school day. *See* 565 U.S. at 191–92. The Court reaffirmed this legal test last year in *Morrissey-Berru*, 140 S. Ct. at 2063–64, emphasizing that the most important consideration is what the employee actually does. It would have made no sense for the Court to engage in the factbound analysis that it did if, as Evergreen contends, the Free Exercise Clause gives religious organizations a blank check to discriminate against *all* their employees, ministerial and otherwise.

Indeed, in both *Hosanna-Tabor* and *Morrissey-Berru*, the Court declined to adopt a rule that would have greatly expanded the scope of the ministerial exception's coverage: In both cases, Justice Thomas (joined by Justice Gorsuch in the later case) argued that courts should have to "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring); *accord Morrissey-Berru*, 140 S. Ct. at 2069–70 (Thomas, J., concurring). But the majority in both cases declined to accept that approach and instead scrutinized the facts to determine whether and to what extent the employees at issue actually performed ministerial roles. *See Morrissey-Berru*, 140 S. Ct. at 2063–66; *Hosanna-Tabor*, 565 U.S. at 190–92.

Evergreen also attempts (Appellants' Br. 43–44) to root an unfettered privilege to discriminate in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), based on the Supreme Court's statement there that, "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." But the Court emphasized in *Masterpiece* that this "exception" must be "confined" to avoid a result "inconsistent with the history and dynamics of civil rights laws." *Id.* Thus *Morrissey-Berru*—which was decided after

*Masterpiece*—reaffirmed the limited scope of the ministerial exception. *See* 140 S. Ct. at 2063–66.

Evergreen's position, if it were the law, would allow religious organizations to broadly engage in discrimination against employees who do not perform core religious practices such as officiating at weddings or "shap[ing] . . . faith and mission" (*cf. Hosanna-Tabor*, 565 U.S. at 188). For example, a religious group with anti-LGBTQ beliefs would be allowed to terminate a mail-room clerk upon learning that he is in a relationship with someone of the same gender. A religious organization opposed to interracial marriage would be permitted to fire a Latina secretary for having a white spouse. And a religious group holding white-supremacist views could flatly refuse to hire Blacks for any position.

To be sure, it may turn out on the facts that some of Evergreen's employees would be subject to the ministerial exception and that Section 203-e would be inapplicable to those employees. But whether or not that might be so for any given employee, the question cannot be decided in the abstract in a facial challenge like the one here, given the fact-sensitive analysis required to determine whether an employee is ministerial. *See Morrissey-Berru*, 140 S. Ct. at 2063–66; *Hosanna-Tabor*, 565 U.S. at 190–92. The problem is especially obvious here, moreover, because Evergreen did not provide in its complaint any information about what titles or

positions its employees hold, what qualifications and training they are required to have, or what duties they perform. (*See* J.A. 44–67.) So there is simply nothing—not even bare allegations—to which the required legal test might be applied.

Finally, it is of no moment that Section 203-e does not expressly incorporate the ministerial exception. (*Cf.* Appellants' Br. 44.) Most nondiscrimination laws don't do that or even vaguely allude to it. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34; Title VII, 42 U.S.C. §§ 2000e–e-17; Americans with Disabilities Act, 42 U.S.C. §§ 12101–213. That has never been a basis for a pre-enforcement challenge. And no explicit reference to the ministerial exception is necessary for it to apply. *See, e.g.*, *Morrissey-Berru*, 140 S. Ct. at 2058–59, 2062 (applying the ministerial exception in the context of the ADEA and ADA). Rather, "the exception operates as an affirmative defense," rooted in the First Amendment's Religion Clauses, "to an otherwise cognizable claim." *See Hosanna-Tabor*, 565 U.S. at 188–89, 195 n.4.

## CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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Date: August 25, 2021

## CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 3,564 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font measuring no less than 14 points.

s/ *Alex J. Luchenitser*