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 the 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
Civil Case No. 1:20-cv-0112 (TJM/DJS) (Hon. Thomas J. McAvoy)

BRIEF OF AMERICAN ATHEISTS AS AMICUS CURIAE IN SUPPORT OF APPELLEE FOR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate procedure, American Atheists certifies that it is a non-profit corporation, has been granted 501(c)(3) status by the IRS, has no parent company, and has issued no stock.

American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

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STATEMENT REGARDING CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(c), amicus certifies that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a)(2) with the consent of all parties.

INTEREST OF AMICUS CURIAE

Amicus advocates on behalf of the separation of religion and government and offers a unique viewpoint concerning the scope and propriety of religious exemptions. Amicus' mission includes addressing and preventing discrimination against atheists, humanists, and all non-theists, including discrimination in the form of substantive burdens impermissibly imposed on them by the government as a result of religious accommodation.

Amicus addresses the Court to emphasize the applicability of the Establishment Clause to the remedy sought by the Appellant. When the government places a substantive burden on third parties in order to exempt an entity's religiously motivated behavior from legal obligations, it violates the Establishment Clause by privileging the religious exercise while disadvantaging those who do not share the belief.

SUMMARY OF THE ARGUMENT

The United States Constitution guarantees the free exercise of religion but this guarantee is not absolute. Like the proverbial right to swing one's fist, one's right to freely exercise their religion must end at the tip of another's nose. Likewise, the government's obligation to protect one person's religious exercise must end when the government would need to infringe on the rights of others in order to do so. The Appellants, Christopher Slattery and The Evergreen Association (collectively, Evergreen), wish to dictate the most private decisions of their employees and, perhaps more troubling, their employees' dependents—children and young adults with no control over their parents' choice of employer. Evergreen claims the right to intrude into sensitive and personal matters—a person's private, reproductive health care decisions—based on the theory that its religious views take precedence over an employee's own beliefs not only in the employee's performance of their duties but also in private health care decisions.

While the government may accommodate an individual's religious practice, the government cannot countenance any religious conduct, no matter how sincerely held the motivating belief, when that conduct inflicts substantive harm on another. Evergreen demands that this Court place the substantive burden of accommodating its religious beliefs on not only its employees, but its employees' dependents, forcing New Yorkers who have no direct relationship with Evergreen to nonetheless conform their behavior to its religious edicts, lest their family members lose their job.

ARGUMENT

The First Amendment's protection of the free exercise of religion may be broad but it is not boundless. In fact, the First Amendment *affirmatively prohibits* the government from accommodating one person's religious exercise by imposing a substantive burden on another. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). Evergreen seeks a power that neither the courts nor any other branch of government is allowed to grant: the authority to impose its religious beliefs on third parties.

Evergreen demands from the judiciary a rule exempting religious nonprofit entities from Section 203-E, a provision intended to protect workers and their families from intrusion by employers into private family matters. N.Y. Lab. Law § 203-E; S.B. 660 Sponsor Memo, 2019-20 Leg., Reg. Sess. (N.Y. 2019). Such an exemption would impose substantive burdens on both the employees and potential employees of these organizations. Moreover, this exemption would, in practice, give these organizations the authority to dictate the private health care decisions of not just its employees but its employees' *dependents*—potentially including employees' spouses, minor and adult children, and other family members; individuals wholly separate from the employer-employee relationship. In particular, an employee's children have little, if any, influence over where their parents choose to work and often have very different beliefs than their parents. If Evergreen prevails, however, the children and other dependents of religious entities' employees will find themselves pressured to conform

their behavior to the strictures of a religious entity with which they have no direct connection.

The Constitution prohibits the government from imposing these substantive material and dignitary harms on one to accommodate the religious practices of another.

I. Accommodating Evergreen's demand violates the Establishment Clause by privileging the religious beliefs of some through the imposition of substantive burdens on others.

Granting Evergreen, and entities like it, the exemption it demands will force a significant number of people—those employed in community service on behalf of religious nonprofits, as well as their dependents—to conform their private behavior to the demands of their employer's religious beliefs. But as this Court has said:

> [The First Amendment] gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Otten v. Baltimore & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (majority opinion of Judge Learned Hand); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)). Section 203-E does not require Evergreen to alter its beliefs, its mission, or its work. It only requires that Evergreen, like every other employer, not attempt to impose its will on the deeply personal health care decisions of its employees and their dependents.

Exempting religious entities from legal obligations in a manner that directly and substantively harms others "contravenes a fundamental principle of the Religion Clauses." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). A religious exemption that gives "preference [to] some at the expense of others" does not accommodate religion, but rather amounts to an unconstitutional establishment of religion. *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 28 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 617-18 (1987); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987); *Thornton*, 472 U.S. at 710; *Wis. v. Yoder*, 406 U.S. 205, 220-21 (1972). Such preferential treatment bends the "play in the joints" between the religion clauses beyond the breaking point. *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970); *see also Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 144-45, 145 n.11 (1987); *Presiding Bishop*, 483 U.S. at 334-35 ("At some point, accommodation may devolve into an unlawful fostering of religion." (internal quotation marks omitted)). It is a perversion of religious liberty and turns the intent of the Framers on its head.

The Supreme Court regularly strikes down purported accommodations of religious exercise that place substantive burdens on the shoulders of those not benefiting from the exemption and thus violate the government's obligation of neutrality between religious denominations and between religion and nonreligion,

Thornton, 472 U.S. at 710 (statute's "unyielding weighting in favor of Sabbath observers over all other interests" was invalid); *see also Texas Monthly*, 489 U.S. at 15 (accommodation not necessitated by Free Exercise Clause that burdened non-beneficiaries conveyed message of religious endorsement), while exemptions that have a *de minimus* impact on the interests of third parties have been deemed permissible accommodations, *Hobby Lobby*, 573 U.S. at 732; *Hobbie*, 480 U.S. at 145 n.11; *Yoder*, 406 U.S. at 234; *Walz*, 397 U.S. at 673; *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). *Compare Illinois* ex rel. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) *with Zorach v. Clauson*, 343 U.S. 306 (1952).

Section 203-E is intended to "ensure that employees' decisions about pregnancy, contraception, and reproductive health" do not leave them open to employment discrimination and it does so by closing a number of "loopholes" in federal and state anti-discrimination statutes. N.Y. S.B. 660 Sponsor Memo. Evergreen contends that hiring or continuing to employ someone who (or whose dependent) made a health care decision it disagrees with violates its religious beliefs and that it must therefore be exempted from Section 203-E or its exercise of its religious beliefs will be burdened. The *only way* to accommodate Evergreen's exercise of this belief is to allow it to make adverse employment decisions against employees based on that employee's private health care decisions or on the private health care decisions of people with whom Evergreen has no relationship whatsoever. The government *cannot* accommodate Evergreen's exercise of its beliefs without placing

substantive, concrete burdens on those not benefiting from the exemption. To do so would contravene the Establishment Clause.

II. Exempting Appellants from New York's labor law will unavoidably inflict material and dignitary harms on third parties in favor of sectarian agencies' religious beliefs.

The U.S. Constitution protects each of us against government intrusion into numerous domains of private life. The rights protected by the Due Process Clause of the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy, ..." *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). These choices include "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Unwarranted government intrusion into this area of life inflicts a substantive harm on the person. This harm is all the more acute when inflicted in order to privilege the rights of another. Acceding to Evergreen's demand for special treatment for religious entities would inflict just such a harm on both the employees and prospective employees of these organizations as well as their dependents.

a. Employees will be harmed if sectarian businesses are exempted from government non-discrimination requirements.

Exempting religious employers from this statute would inflict substantive harms on the employees and prospective employees of these organizations. For example, atheists and other nonreligious people often face discrimination in the workplace and, as a result, frequently conceal this aspect of their identities.

Consequently, many religious organizations employ nonreligious people to conduct social services and community-based work without knowing about their nonreligious beliefs, and without their lack of religion impacting their work.

Concealment, the decision not to reveal one's membership in an invisible minority, is prevalent in the nonreligious community. Nearly half (44.3%) of the approximately 34,000 participants in the recent U.S. Secular Survey reported "mostly" or "always" concealing their nonreligious identity at work. S. Frazer, A. El-Shafei, & Alison Gill, *Reality Check: Being Nonreligious in America*, 19 (2020). "More than one in five (21.7%) employed or recently employed survey participants reported negative experiences in employment because of their nonreligious identity." *Id.* at 23. Those who suffered negative experiences in employment as a result of their nonreligious identity were 37.2% more likely to suffer from depression. *Id.* at 30.

The dignitary harm that would be imposed by the exemption Evergreen seeks, and the real consequences that follow from that harm, are illustrated by a number of responses provided by participants in the U.S. Secular Survey. There are, for example, atheists who oppose abortion for entirely nonreligious reasons and, therefore, would substantially support Evergreen's objectives. Several participants in the U.S. Secular Survey opposed abortion while supporting the use of contraceptives as a means to reduce demand. Survey responses, 2019 U.S. Secular Survey (Nov. 2, 2019) (on file with author) ("Survey Responses"). Evergreen, or a similar entity, might be the only realistic opportunity these individuals have to earn a living by advocating for their

moral beliefs, yet they would face the prospect of dismissal if they, or one of their dependents, failed to conform to Evergreen's religious strictures in every detail.

Of course, the exemption Evergreen demands would extend beyond the narrow facts of this case. In parts of New York, as in other regions of the country, someone looking to earn a living doing community assistance work may have no choice but to seek employment at a religious entity. This is also true when it comes to health care professions. Secular medical facilities are increasingly being incorporated into religious health care networks, *see generally* Kate Hafner, *When the Religious Objections Comes From Your Local Hospital*, N.Y. Times, August 11, 2018, at A1; Casey Ross, *Catholic hospitals are multiplying, and so is their impact on reproductive health care*, STAT (Sep. 14, 2017), https://www.statnews.com/2017/09/14/catholic-hospitals-reproductive-health-care/. leaving those wishing to provide medical services to their local communities with little choice but to submit to religious directives affecting their professional lives. If Evergreen gets its way, these strictures will extend to their personal lives, including avoiding medical treatment to which the employee has absolutely no objection.

Moreover, many affected employees will be people who neither sought nor desired employment at a religious entity, yet nonetheless find themselves subjected to religious requirements as a result of events entirely outside their control. This could be the result of something as mundane as a corporate merger.

One respondent to the U.S. Secular Survey reported that the secular health care organization where he had worked for years merged with a religious health care organization and that this led to issues with his employment that he "never anticipated." *See* Survey Responses. Following the merger, religion became pervasive in his workplace. *Id.* "[W]e were told that the expectation now is to start every meeting with a prayer. . . . [O]ur pharmacies not [sic] longer sell condoms or other contraception." *Id.* At 56 years old, the survey respondent suddenly faced the difficult prospect of looking for a new job, either because he found his new obligations untenable or because his new employer fired him for failing to conform to their religious expectations. *Id.*

Granting Evergreen the exemption it demands will increase the already-heightened pressure these individuals face to conceal their nonreligious identities and thereby exacerbate the physical, social, and psychological ills that come with that concealment.

b. Employees' dependents will be substantively impaired if sectarian businesses are exempted from government non-discrimination requirements.

The "accommodation" demanded by Evergreen is particularly insidious in light of the protection the law affords to employees' dependents.[1] Children have little

[1] "Dependents" is not defined in Section 203-E and amicus is unaware of any definition for the term in the New York Labor Law, Civil Rights Law, or Public

control over the decisions of their parents, particularly when it comes to their parents' chosen professions. Likewise, parents have little, if any, control over the health care decisions of their adult children, who may still be their dependents. Moreover, it is increasingly common for children not to share the religious beliefs of their parents. Catherine Segars, *Christian Kids Are Leaving the Faith. What Can We Do About It?*, Crosswalk (Mar. 24, 2021), https://www.crosswalk.com/family/parenting/christian-kids-leaving-the-faith-what-can-we-do.html; Daniel Cox & Amelia Thomson-DeVeaux, *Millennials Are Leaving Religion And Not Coming Back*, FiveThirtyEight (Dec. 12, 2019, 6:00 AM), https://fivethirtyeight.com/features/millennials-are-leaving-religion-and-not-coming-back/. Granting religious employers a judicial license to discriminate against employees based on the actions of their dependents inflicts a substantive dignitary harm on those dependents and will exacerbate an already-troubling problem in our society: the stigmatization and ostracization of nonreligious youth in our communities and the long-lasting physical, social, and psychological

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Health Law. However, the New York Tax Law expressly looks to the U.S. Internal Revenue Code for definitions, N.Y. Tax Law § 607, and there "dependent" is defined to include, with limitations, an employee's child under age 19 and child under age 24 who is also a student, as well as the employee's sibling, step-sibling, parent, step-parent, grandchild, first cousin, aunt, uncle, and any parents, siblings, or children by marriage. 26 U.S.C. § 152(c), (d) (2021).

harms that result. *See* S. Frazer, A. El-Shafei, & Alison Gill, *The Tipping Point Generation: America's Nonreligious Youth*, 9-14 (2020)

Approximately five of every six of the more than 3,400 nonreligious respondents to the U.S. Secular Survey between the ages of 18 and 24 reported being raised in a religious household. *Id.* at 7. One in three (37.5%) reported that their families were either somewhat or very unsupportive of their nonreligious identity. *Id.* at 8.

> Youth participants with very unsupportive parents were 45.4% more likely to screen positive for depression than those with very supportive parents, and they scored 9.7% higher on loneliness. Those who reported negative experiences with their families due to their nonreligious beliefs were about two thirds more likely (65.5%) to screen positive for depression than those who did not or were not sure that they experienced a negative family event.

Id. As a result, many young nonreligious individuals conceal their identities from family members. Two in five (40.0%) youth participants surveyed mostly or always concealed their nonreligious beliefs from their families of origin, and such participants were 2.5 times as likely to say they mostly or always concealed their secular identities compared to adults age 25 and older. *Id.* at 12. "[Y]outh participants who were raised with strict religious expectations were 42.3% more likely to screen positive for depression compared to all other youth." *Id.* at 14. This family rejection, stigma, concealment, and resulting negative outcomes are not likely to be improved by the prospect that a parent could lose their job as the result of a child's reproductive health

care decisions motivated (or perceived to be motivated) by their nonreligious identity. Quite the contrary.

The Establishment Clause was intended to prevent the machinery of government from being used to force any person to abide by the requirements of powerful religious denominations. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225-26 (1963); *see also Lee*, 505 U.S. at 629-30; A significant and growing number of young Americans are nonreligious and extensive research indicates that this community strongly supports individual reproductive freedom. Frazer, El-Shafei, & Gill, *Tipping Point*, *supra*, at 3, 19. If the Court were to grant Evergreen the exemption it seeks, it would be directly impairing employees' dependents' ability to make private decisions based on their own sincerely held beliefs and for which they should be accountable to none but their own conscience.

No contractual relationship exists between an employer and an employee's dependents. Yet Evergreen seeks an exemption permitting religious employers to extort their employees' dependents' compliance with its religious strictures by holding the employee's job hostage, and it demands that this Court provide the gun. The Constitution prohibits this Court from acceding to Evergreen's demand.

CONCLUSION

For these reasons, the amici respectfully request that this Court affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Local Rule 25.1(c), this brief is being filed electronically via the Court's CM/ECF system on this day, August 25, 2021, and six paper copies will be delivered to the Court within three days. Counsel for the Parties are being served with electronic copies via the Court's CM/ECF system and email.

/s/ Geoffrey T. Blackwell
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