FSU | FIRST AMENDMENT CLINIC

February 20, 2026

<u>Via Email and Certified Mail</u>

Tad Atkinson,
Assistant Director State Farmers Markets & Agricultural Centers
2 West Edenton St.
Raleigh, North Carolina 27601

Re: *Unconstitutional Treatment of Religious Vendors by the North Carolina Department of Agriculture and Consumer Services and the Charlotte Regional Farmers Market*

Dear Mr. Atkinson,

We write on behalf of De La Vega Tortillas, LLC ("De La Vega Tortillas"), seeking reversal of the unconstitutional application of the 2026 Building "C" Vendor Operational Guidelines ("Guidelines"). De La Vega Tortillas is a long-standing and popular vendor at the Charlotte Regional Farmers Market ("Market"), and is owned and operated by Cherai and Ruben Gomez ("Gomezes"). The Gomezes' family-owned business has operated in compliance with Market rules while adhering to sincerely held religious beliefs that require Sabbath observance on Sundays. For the Gomezes, Sunday is a day reserved for worship and rest, and they do not (or do they force their employees to) engage in commercial activity on that day. *Exodus* 20:8-11 (King James Version).

The North Carolina Department of Agriculture and Consumer Services ("NCDA&CS") and the Market are violating the First Amendment to the United States Constitution by imposing a burden on religious practices and exhibiting bias against religious beliefs in the application of policy. Specifically, the Guidelines require vendors to operate their booths on Saturdays and Sundays, burdening religious observance of the Sabbath.

As a state-sponsored and state-operated market, the vendor policies and enforcement decisions constitute state action and must comply with the constitutional limitations on government action that burden religious exercise. The Market's failure to perform an individualized assessment of our client's good-faith effort to adhere to the rules—despite the policy's express authorization of such discretion—is a violation of the Free Exercise Clause. Moreover, refusing to grant the religious accommodation request in light of the policy's existing exception for produce farmers is a display of religious animus.

To ensure compliance with fundamental constitutional rights, we respectfully request that the Market allow De La Vega Tortillas to operate its own booth space in Building "C" on Saturdays. De La Vega Tortillas is prepared to continue paying the full weekend rental fee, to allow the Market to use its booth on Sundays when De La Vega Tortillas is not there, and to comply with all other applicable Market rules and requirements.

Alternatively, at a minimum, the Market should immediately reinstate De La Vega Tortillas' previous 2025 Building "C" accommodation agreement. Under that arrangement, the Market would allow De La Vega Tortillas to resume operating a shared booth space in Building "C" on Saturdays while refraining from operation on Sundays. De La Vega Tortillas would continue to pay the full rental fee for both Saturdays and Sundays, and the approved partner vendor would continue to operate on Sundays, ensuring that the booth is never empty.

As De La Vega Tortillas seeks to maintain a respectful relationship with the Market, we would be happy to discuss this matter with you if there are alternative accommodations that may better suit your interests while ensuring adherence to the Constitution. If no response is received by Friday, February 27th, we will have no choice but to pursue legal action.

Factual Background

Despite the Market adopting a policy in 2025 requiring vendors to operate on both Saturday and Sunday, De La Vega Tortillas was permitted to operate out of Building "C" on Saturdays while refraining from Sunday operations. The Market had implemented a booth-splitting arrangement for vendors; under this accommodation, De La Vega Tortillas shared its assigned booth space with an approved partner vendor who operated the booth on Sundays. De La Vega Tortillas and its partner vendor each paid the full booth rental fee for both Saturdays and Sundays, and the booth remained continuously occupied and operational throughout the weekend. This arrangement fully satisfied the Market's operational interests, ensured no booth was left empty on Sundays, provided the Market with an economic windfall, and allowed De La Vega Tortillas to permanently operate within Building "C" without the Gomezes compromising their faith.

For 2026, the Market adopted Guidelines, requiring vendors to operate their booths on both Saturdays and Sundays. The Guidelines provide that "[a]ll vendors will be required to sell both Saturdays and Sundays year round," while also expressly stating that "[e]xceptions will be made for produce farmers." In addition, the Guidelines reserve broad discretion to the Market Manager to determine eligibility and enforcement, including authority to consider a vendor's history of cooperation and good-faith efforts to comply with Market rules.

Despite this discretionary framework, and despite De La Vega Tortillas' successful compliance under the prior year's accommodation, the Market refused to renew De La Vega Tortillas' existing accommodation for the 2026 market year.

When the new Guidelines were sent out, De La Vega Tortillas' owners emailed Ms. Newsome, the Market Manager, to request a continuation of the 2025 booth-sharing accommodation. In your response on November 7, 2025, you acknowledged that policy must be applied "consistently across all vendors to ensure fairness and operational integrity." De La Vega Tortillas' owners replied, clarifying that the business was seeking a continuation of the successful accommodation provided the prior year and requesting an individualized assessment to ensure a good-faith accommodation was provided. In your response on November 20, you declined their requested exemption once again, citing "fairness and operational integrity." At no point did market management conduct an individualized assessment of De La Vega Tortillas' circumstances, consider De La Vega Tortillas' history of compliance and cooperation, or explain why the prior accommodation could no longer satisfy the Market's interests.

Instead, the Market offered De La Vega Tortillas the option to operate in "The Greenery," an outdoor section of the Market where vendors do not receive permanent booth assignments and are subject to first-come, first-served placement that does not guarantee a selling space on any given day. The Greenery is located more than 300 yards away from Building "C," separated from the primary grocery section of the Market. This section primarily attracts patrons who drive specifically to purchase and pick up plants, and does not receive the regular foot traffic of patrons shopping for food vendors. Moreover, customers must detour to reach The Greenery and are often deterred by bad weather, like heavy precipitation or extreme temperatures. The Greenery does not offer a climate-controlled space, and leaves De La Vega Tortillas exposed to heat, cold, and other weather conditions. Inventory and equipment are also exposed to the elements, and electrical access is not guaranteed despite the need to refrigerate products in the summer and maintain appropriate sample temperatures. This alternative materially differs from the benefits of operating in Building "C," where vendors are assigned fixed indoor booths, can store equipment securely, and are easily located by patrons.

As it stands, since January 1, De La Vega Tortillas has been forced to operate in the Greenery section of the Market because relocation was the only way to continue participating after being removed from Building "C" for declining to operate a booth on Sundays. In addition to the operational harm, the forced move has caused reputational damage. Customers and fellow vendors have asked what De La Vega Tortillas "did wrong" to be removed from Building "C," creating the appearance of misconduct or impropriety where none exists. This relocation places De La Vega Tortillas in a significantly worse position solely because of the Gomezes' religious observance.

The Market asserted that the purpose of the revised policy is to promote fairness and operational integrity, as well as consistent vendor presence. But market patrons have expressed displeasure with De La Vega Tortillas' relocation outdoors, precisely because of its inconsistent placement, which makes the booth harder to find. Plenty of patrons have conveyed their strong support for De La Vega Tortillas, noting that it is a primary draw for their visits to the Market and that some come specifically—and at times exclusively—to purchase their products. The Market has also suggested informally that the policy is intended to avoid empty booths and increase Sunday foot traffic. Yet the Market continues to permit produce farmers to operate under different attendance requirements and previously allowed De La Vega Tortillas' shared-booth arrangement to achieve those same objectives. The Market has offered no explanation for why secular exceptions remain permissible, while De La Vega Tortillas' request for a religious accommodation, one that previously worked without burdening the Market's interests, has been denied.

As a result of the Market's refusal to reinstate the prior accommodation or to consider adequate alternatives, the Gomezes are forced to choose between adherence to their religious beliefs and continued access to the benefits of operating in Building "C." This burden arises not from neutral and evenhanded application of Market rules, but from the selective denial of religious accommodation within a policy that expressly allows secular exceptions and discretion to account for individual circumstances.

Legal Analysis

When a government policy burdens the free exercise of religion, the applicable constitutional analysis turns on whether the relevant policy is neutral and generally applicable or instead allows discretionary exemptions. *Employment Div. v. Smith*, 494 U.S. 872 (1990). A neutral and generally applicable policy must be applied evenly to avoid heightened scrutiny for incidental burdens on religious beliefs or practices. *Id.* By contrast, a policy which permits discretionary individualized assessments or secular exemptions cannot be enforced to burden religious exercise unless it survives strict scrutiny. *Id.* at 873, 884 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). A policy will fail strict scrutiny if it is not narrowly tailored to achieve a compelling interest by the least restrictive means. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021).

The Market's policy requiring vendors in Building "C" to work on Sundays burdens religious exercise for the Gomezes, who own and operate De La Vega Tortillas, and any other vendors who observe Sunday as the Sabbath. Since the Market's policy burdens the Gomezes' free exercise of religion, it must be neutral and generally applicable—and it is not.

The policy is not generally applicable because it awards the Market Manager discretion to decide eligibility for participation and "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). Further, the policy's secular exemption for produce farmers independently invalidates the claim that it is neutral and generally applicable. When the government permits secular exceptions but refuses to extend the same flexibility to religious exercise, the policy cannot be regarded as neutral. *Fulton*, 593 U.S. at 534-35.

As such, and explained in further detail below, the Market's application of the policy to De La Vega Tortillas is subject to strict scrutiny under the Free Exercise Clause. *Id.* at 541. Because the Market has provided no compelling interest in denying the Gomezes' specific request for a religious accommodation while making exceptions available to others, enforcement of the policy against De La Vega Tortillas fails strict scrutiny and violates the Free Exercise Clause.

Religious Hardship. There is no question that the policy requiring all Building "C" vendors to work on Sundays burdens religious exercise for the Gomezes and all other vendors who observe Sunday as the Sabbath. The decision "forces [them] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion" to receive the benefit of operating out of Building "C," on the other hand. *Sherbert v. Verner*, 374 U.S. 398 (1963). The fact that selling in the Market is not a "'right' but merely a 'privilege[,]'" does not insulate the Market from liability for burdening religion. *Id.* at 404. It is well established "that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.*

Further, that De La Vega Tortillas may operate a vendor stand out of "The Greenery" section of the Market is not an adequate alternative to accommodate losing access to the benefits of Building "C." Vendors in Building "C" are assigned to permanent indoor booths where they may lock and store supplies throughout the week, and patrons can easily navigate to the designated spot. But at The Greenery, vendors are outdoors, and their assigned locations change each day they are at the Market on a first-come, first-served basis, subject to the discretion of Market staff. This not only makes it more difficult for patrons to locate De La Vega Tortillas but also eliminates De La Vega Tortillas' ability to keep its business supplies stored onsite and secured throughout the week. Worst of all, the first-come-first-served nature of booth assignment means that vendors in The Greenery are not guaranteed a spot to sell each day they arrive at the Market. This leaves De La Vega Tortillas in a significantly worse position than it was when operating out of Building "C"—all because of adherence to religious beliefs and practice that have never caused an issue in the Market. This is not an adequate alternative.

Individualized Assessment. Because the vendor policy incorporates a "system of individual exemptions," *id.* at 535, made available at the Market Manager's "ultimate discretion," it cannot be generally applicable. The Guidelines explicitly state, "[i]n utilizing his or her discretion to suspend, revoke, or otherwise terminate a seller's privilege to sell on the market, the Market Manager may consider a seller's history of cooperation with the Market Manager and the seller's *good faith effort* to obey the guidelines and rules of the market. . . . The *ultimate discretion* for eligibility determinations belongs to the Market Manager. . . ." (emphasis added).[1]

Despite the assertion in emails to the Gomezes on November 7 and November 20, 2025, that the Market must apply its policies "consistently across all vendors to ensure fairness and operational integrity," the written policy indicates the Market Manager may use discretion to grant exceptions based on a person's particular circumstances and "good faith effort" to comply with the rules. That a government actor does not presently intend to use its discretion is not sufficient to erase the discretionary nature of the policy.[2] *See Fulton*, 593 at 535. Because this policy gives the Market Manager discretion to grant exceptions based on a person's particular circumstances and good faith effort to comply with the rules, the Market may not "refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Id.* (citing *Smith*, 494 U.S. at 872, 873, 884).

Existing Secular Exemptions. Facially, the Guidelines are not neutral because, for reasons unknown to our client, produce farmers are excused from following the policy, but De La Vega Tortillas' religious reasons for seeking the same flexibility are categorically rejected. This intentional carve-out reflects the Market's explicit determination that its interests may still be satisfied when

[1] *See Smith*, 494 U.S. at 873, 884 (citing *Sherbert*, 374 U.S. at 401). The law in *Sherbert* provided that an individual would be ineligible for unemployment benefits if "[s]he has failed, *without good cause*, to accept available suitable work when offered. . . ." *Sherbert*, 374 U.S. at 401 (emphasis added). The *Sherbert* Court reasoned that the substantial burden imposed on religious exercise by the policy warranted strict scrutiny. *See id.* at 407. But the *Smith* Court reframed the issue, explaining that strict scrutiny was applicable because the "good cause" exception created a discretionary, individualized process for assessing whether the reason for refusing work was justified. *Smith*, 494 U.S. at 873, 884.

[2] In *Fulton*, the City ceased further referrals to a Catholic foster agency after the agency refused to comply with a non-discrimination provision of their contract based on religious objections. *Fulton*, 593 U.S. at 532. The provision stated, "[p]rovider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." *Id.* at 535. The Court—acknowledging that the City "made clear that the Commissioner 'ha[d] no intention of granting an exception'"—explained that the policy created a system of individual exemptions made available at the "sole discretion" of the Commissioner, and as such, was subject to strict scrutiny. *Id.* In other words, even the Guidelines' contemplation of discretionary exemptions is enough to require exemptions for religious exercise.

allowing exceptions for vendors with comparable secular reasons for noncompliance. *Tandon v. Newsom*, 593 U.S. 61, 63-64 (2021).[3]

Once the government has determined that its interests can tolerate exceptions for secular reasons, it must explain why religious exercise is treated differently. *Fulton*, 593 U.S. at 542. The presence of a produce-farmer exemption undermines the government's contention that it has a compelling interest in enforcing the policy uniformly, because the exception demonstrates that uniformity is not, in fact, essential. *Id*. With this exception, the Market reveals that it is *not* applying a neutral administrative policy; rather, it is making value judgments pertaining to which reasons for noncompliance are acceptable. While value judgments are a function of the Market Manager's discretion, such judgments become impermissible when they unconstitutionally "devalue[] religious reasons" for non-compliance by "judging them to be of lesser import than nonreligious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–38 (1993). The Free Exercise Clause forbids the government from privileging secular motivations while disfavoring religious ones without compelling reasons. *Id.* at 543, 546-47.

Nor can the Market plausibly argue that produce farmers are not "comparable" for the purposes of constitutional analysis. The relevant inquiry is not whether vendors are identical, but whether they are similarly situated with respect to the government's asserted interests. *Tandon*, 593 U.S. at 62. If the Market's interests are ensuring fairness and operational integrity, consistent vendor presence, and Sunday foot traffic; then all vendors in Building "C" are similarly situated to pose risks to achieving those interests, and as such, are comparable for purposes of constitutional analysis.

Moreover, the Supreme Court has stressed that even "subtle departures from neutrality" violate the Free Exercise Clause, and thus "upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n*, 584 U.S. 617, 638-39 (2018) (quoting *Lukumi*, 508 U.S. at 534, 547).

Strict Scrutiny. Enforcement of the policy against De La Vega Tortillas receives strict scrutiny analysis because it burdens their religious exercise and is neither neutral nor generally applicable, as it permits individualized assessments

[3] In *Tandon*, the Supreme Court clarified that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." 593 U.S. at 62 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020)) (per curiam). Comparability is concerned with the risks the activities pose to the asserted government interest, not with perfectly analogous reasons for non-compliance. *Id.* (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66).

and secular exemptions. The Market's refusal to grant a religious exemption to De La Vega Tortillas fails strict scrutiny and violates the Free Exercise Clause of the First Amendment. Where the government creates a system of individual exemptions, the policy will fail strict scrutiny if it unnecessarily burdens religious practice, meaning that the policy is not narrowly tailored to the least restrictive means necessary to achieve a compelling interest. *Fulton*, 593 U.S. at 541; *Church of Lukumi Babalu Aye*, 508 U.S. at 546. Stated differently, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. As such, the question is not whether the Market has a compelling reason for its policy generally, but whether it has a compelling reason for denying De La Vega Tortillas' particular religious exemption request. *Id.*

Our understanding is that the 2026 change in the Market's policies resulted from a desire to maintain operational integrity, seemingly by ensuring that no booths in Building "C" are empty on Sundays, in hopes of increasing foot traffic at the Market on those days. And the stated reason for denying De La Vega Tortillas' religious exemption request was an interest in applying the Market's policies "consistently across all vendors to ensure fairness and operational integrity." But this interest cannot survive strict scrutiny, because the very policy the Market seeks to apply "consistently across all vendors" enacts a system of individualized exceptions through managerial discretion, which undermines the contention that its interests will be thwarted by less restrictive application of the policy against De La Vega Tortillas. *Fulton*, 593 U.S. at 542.[4]

The produce-farmer exemption further undermines the claim that denying De La Vega Tortillas' religious exemption is necessary to advance the Market's interests by creating a problem of both over- and under-inclusiveness. *Church of Lukumi Babalu Aye*, 508 U.S. at 547. Under strict scrutiny, "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* (internal quotations omitted). By enshrining an exception for produce farmers in the policy, the Market is underinclusive of vendors and conduct that potentially threatens its interests. The Market may not refuse to extend the same flexibility granted to produce farmers to De La Vega Tortillas' religious hardship, absent a compelling

[4] In *Fulton*, the City asserted that it would not permit a religious exception from its non-discrimination policy because of its interests in "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children." *Id.* In assessing these interests the Court explained that, while important, "[t]he creation of a system of exceptions . . . undermines the City's contention that its [policies] can brook no departures." *Id.* at 542. Explaining that the City "offered no compelling reason why it had a particular interest in denying a religious exception while making them available to others," the court held that the City's denial violated the Free Exercise Clause. *Id.* at 542-43.

reason. *Fulton*, 593 U.S. at 542. And the Market has failed to offer any compelling reason for its particular interest in denying De La Vega Tortillas a religious accommodation while making comparable secular exceptions.

In addition, overbroad application of a policy will fail strict scrutiny where "interests could be achieved by narrower [policies] that burdened religion to a far lesser degree." *Id.* at 522. By providing produce farmers with the outright exception from working on Sundays, the Market not only shows that its interests could be accomplished by less restrictive means but also permits an exception that is far more threatening to its interests than the religious accommodation that De La Vega Tortillas requested.

De La Vega Tortillas made a simple request to continue the previous arrangement in which they shared a booth space with another vendor, so the space would never be empty on Sundays. This arrangement proved acceptable to the Market in the past; it is more restrictive than the blanket exception given to produce farmers, and the Market has offered no compelling reason that it can no longer permit this accommodation for religious practices.

Ultimately, the underinclusive and overbroad application of the policy confirms that the policy is not generally applicable, that its interests can be pursued through less restrictive means, and that religious exercise is being singled out for unfavorable treatment based on impermissible value judgments. *Lukimi*, 508 U.S. 337-38; *Fulton*, 593 U.S. at 542.

Conclusion

For these reasons, the Market's denial of a religious exemption to De La Vega Tortillas from the Building "C" policy—requiring vendors to operate booths on Sundays—is unconstitutional and must be remedied immediately. Nor is it an acceptable solution to request that De La Vega Tortillas secure other workers to operate their booth on Sundays. It is their sincerely held religious belief that the Sabbath is a day for worship and rest, and asking another to labor on this day for their convenience or profit would equally violate these beliefs.

We are requesting the Market please provide a written response by close of business on Friday, February 27th, confirming that

1) De La Vega Tortillas' religious accommodation request to continue operating as a vendor out of Building "C" with their own booth has been approved;

2) De La Vega Tortillas' prior accommodation is reinstated to allow them to operate as a vendor out of Building "C"; or

3) The Market would like to discuss alternative accommodations that would better serve the Market's interests while permitting De La Vega Tortillas to enjoy all the benefits of operating out of Building "C" on Saturdays and uphold the integrity of their religious beliefs and practices on Sundays.

De La Vega Tortillas appreciates the hard work you put into ensuring the smooth operation of the Market and remains happy to work with you to craft a solution that promotes the Market's interests while ensuring the Gomezes' freedom to operate in accordance with their faith, as guaranteed by both the federal and state constitutions.

You may reach us via the contact information listed below.

Sincerely,

Denise M. Harle

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Attachments **via email**: 2026 Building "C" Vendor Operational Guidelines