To be Argued by:
HOWARD S. KRONBERG
(Time Requested: 30 Minutes)

APL 2021-00108
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Appellate Division–Third Department Docket No. 530047

Court of Appeals

of the

State of New York

In the Matter of the Application of

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC. *et al.*,

Petitioners-Respondents,

– and –

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., *et al.*,

Petitioners,

– against –

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, *et al.*,

Respondents-Appellants.

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

BRIEF FOR PETITIONERS-RESPONDENTS

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COURT OF APPEALS
STATE OF NEW YORK
---X

In the Matter of the Application of APL 2021-00108

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., et al.,

Petitioners-Respondents;

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, et al.

Respondents-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules
---X

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Petitioners-Respondents Independent Insurance Agents and Brokers of New York, Inc. certifies that the following are its corporate parents, subsidiaries, or affiliates:

IAAC, Inc.

Dated: White Plains, New York
April 15, 2022

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK
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In the Matter of the Application of APL 2021-00108

INDEPENDENT INSURANCE AGENTS AND BROKERS OF NEW YORK, INC., et al.,

Petitioners-Respondents;

PROFESSIONAL INSURANCE AGENTS OF NEW YORK STATE, INC., et al.,

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Petitioners-Respondents Testa Brothers, Ltd. certifies that it has no corporate parents, subsidiaries, or affiliates.

Dated: White Plains, New York
April 15, 2022

Respectfully submitted,

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PRELIMINARY STATEMENT

A. Generally

By this appeal the New York State Department of Financial Services ("DFS" or "Appellant"), is challenging a Decision and Order of the Appellate Division, Third Department, entered April 29, 2021 that found that the "First Amendment to 11 N.Y.C.R.R. §224 (Insurance Regulation 187) Suitability and Best Interests in Life Insurance and Annuity Transactions" ("Regulation"), is unconstitutionally vague.

Respondents, Independent Insurance Agents and Brokers of New York, Inc. ("Big I NY") and Testa Brothers, Ltd. are, respectively, a New York Not-for-Profit organization representing the interests of over 1,750-member insurance agencies and brokerages and their 13,000 employees in this state, and one individual member agency. They are a proxy for all New York insurance agents and brokers whose interests will be severely harmed if this Regulation is allowed to stand.

B. The Core Issue of This Appeal - The Forest From the Trees

In the Article 78 proceeding before the Albany County Supreme Court and the appeal to the Third Department, Respondents made several arguments, any one of which would have supported annulment of the Regulation. Nevertheless, the Third Department found that the Regulation was unconstitutionally vague without ever having to address those other arguments.[1] They correctly, and simply, held that the Regulation was unworkable on a concrete, day-to-day, basis. That is, after all, what this is about.

As we should have, all the parties to this litigation made dozens of sophisticated, nuanced and near-metaphysical arguments about legal standards, public policy, compliance with SAPA, etc., all worthy of a Law Review Note. But Respondents also argued, and the Third Department agreed, that stripped of its Constitutional finery, at issue was something that was going to affect producers in a concrete way; every day of their working lives. Like any/every other statute, regulation or rule, this Regulation was intended to have people, in their everyday lives, comport their actions to an identifiable standard or be penalized by the enforcement authorities if they did not follow the designated requirements.

A good regulation, one that is well crafted and specific, (i.e. Constitutional), can be a helpful tool for everyone. Compliance should be easy or at least manageable when a regulation is clear and unambiguous. It is an "Either/Or" proposition. You are either in compliance or you are not <u>and you know it</u>. The last is key. Because ease and clarity of compliance also allows the regulators who enforce regulations to do so with fairness, objectivity, and consistency.

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1 As the Court of Appeals can search the record "de novo" we reiterate those arguments that were made to the courts below as alternate grounds for voiding the Regulation.

But the converse is also true. A poorly worded and ambiguous regulation becomes a nightmare for all involved. Those who are subject to it do not know what to do or how to act. Those who enforce it have no objective standard to apply, allowing wild variations in what conduct is punished. The Regulation at issue relies on wording so unclear and lacking guidance and/or specificity, that no one would know what to do to comply with it or how to enforce it.

Consider the following. By correspondence dated June 10, 2021, this Court sent a letter to Appellant, copied to the undersigned, setting out the specifics for submission of the jurisdictional/disclosure statements, and the digital filing requirements. At page 2, ¶3, L. 4 it even provides the specific digital name Appellant's submission "shall have" when filing. The letter instructed the parties exactly what to do and how to do it. Dovetailing with that, this appeal is governed by 22 N.Y.C.R.R. Part 500, (a rule, which is on constitutional par with the Regulation). It has 27 parts and subparts with concrete, specific requirements. Rule 500.1 (i) for example says this:

> "(i) Paper quality, size and binding. Paper shall be opaque, unglazed, white and 11 by 8½ inches. Briefs, appendices, records and motion papers shall be bound on the left side in a manner that keeps all pages securely together, without plastic covers or any metal fasteners or similar hard material that protrudes or presents a bulky surface or sharp edge."

Like countless other statutes, rules and regulations, New York Vehicle and Traffic Law § 1202 sets out the specific distances that one can park near a crosswalk, (20 feet - "(a)2b") or a fire hydrant, (15 feet - "(b)1").

Now suppose rather than the above this Court's rule simply had a "best interest" standard that allowed lawyers to determine what color, font style, font size, spacing and word limits to use when submitting appellate documents. We all know that they would be submitted in every way, shape, form and color, without any uniformity.

Similarly, what if the Vehicle and Traffic Law, ("VTL"), said that you should use your "best judgment", (based on the need for the Fire Department to access a hydrant in case of fire), to determine how close to park. How close would be legal? How close would be a violation? How would the police be able to determine when to ticket someone parked too close and would the distance for which Ms. A was ticketed match Mr. B in a county over? Of course not.

This is exactly what is before this Court. A producer goes to work in the morning, opens the door, turns the lights on, sits down, boots up the computer and goes to work. Any Regulation on them that attaches the second they start working, (as this does), must be concrete, clear and defined. Like everything else in their workday...they must know, without guesswork or crossed fingers, what to do and what not to do. This Regulation fails to provide specific clear guidance that is required for any insurance producer to know what to do and what not to do. Nor does it allow DFS to enforce it for the same reasons.

When it wants, the State of New York can be very specific in creating laws governing the conduct of insurance brokers. New York Insurance Law § 2118 sets forth the minutia required before a producer can seek a policy in the non-admitted market. It states that a producer must get three (3) declinations by an admitted carrier, and execute an approved affidavit thereon, before being able to seek coverage in the non-admitted market. (N.Y.I.L. § 2118 (b)(4)). Whether or not a producer agrees with that number of declinations is irrelevant. They know what it is and compliance is clear, objective and uniform in the industry.

One final comment. We view the Appellant's Brief itself as an admission that the Third Department was correct and its decision must be affirmed. The entirety of Appellant's 56 page, 10,000+ word brief is dedicated to why the Regulation's language is clear and precise. Simply, if it was, they would not have needed over 10,000 words to explain it. All DFS would have needed was to quote the language of the Regulation, show the concrete specifics contained therein and say "See!" Like we did with the statutes and regulations above. DFS did not do that because the Regulation plainly lacks such clarity, and thus, DFS must rely upon unnecessarily complicated comparisons to dissimilar laws and regulations.

C. The Negation of Murphy v. Kuhn, Its Progeny & The Future

Staying with the practicality of what is before the Court, the nightmare that will ensue from this Regulation will be dropped on the Court's doorstep, first and foremost. Built into the Appellant's Brief is the suggestion that any ambiguity will be clarified as we go. Again, that is an admission that the Regulation is defective, since it should not need clarification. But, in reality, the Supreme and Appellate courts of this state will be inundated with cases, large and small, to judicially define what the Regulation's undefined terms mean. As with everything, there will be a wide diversity of holdings until you finally rule on the issue. Inextricably related is that the courts will be flooded with cases in which it will have to reconcile this Court's decision in Murphy v. Kuhn, 90 N.Y.2d 266 (1977) with the Regulation, as they are anathema to each other.

Your seminal decision in Murphy set the common law standard for procurement conduct for producers in the state. In pertinent point, you said that

> "Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status." "Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers,..." and "Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation. Notably, in a different context, but with resonant relevance, it has been observed that "[u]nlike a recipient of the services of a doctor, attorney or architect * * * the recipient of the services of an insurance broker is not at a substantial

> disadvantage to question the actions of the provider of services".
>
> Id. at 273. (Underline added)

Regulation 187 effectively makes that holding a nullity.

First, whether or not the Regulation permits a private cause of action is irrelevant. Even if it does not, it will be argued to provide the standard of care for life and annuity transactions. Rivera v. Nelson Realty, LLC, 7 N.Y.3d 530, 535 (2006); Restatement [Second] of Torts §286.

Second, the Regulation is designed to shift responsibility away from the ultimate decision maker, the insurance purchaser, and make the producer a guarantor of every possible outcome for decades to come. It will be a sea change in the common law. Respondents can show it and prove how unworkable the "best interest" standard is right now.

By decision dated February 18, 2021, this Court refused to entertain an appeal of the widow-beneficiary of a life insurance policy who sued the producer when the life insurer denied death benefits at the passing of her husband. The Lower Court granted summary judgment and the Third Department upheld the ruling. Vestal v. Pontillo, 183 A.D.2d 1146 (3rd Dept. 2020) lv. denied 36 N.Y.3d 907 (2021). The producer relied primarily on Murphy and its progeny and the decisions were similarly grounded. There, the widow's core argument was that the producer had a duty to act based on a "best interest" standard. The husband, a lawyer, sought to purchase a term life insurance policy without any input or involvement of his wife. Due to prior health issues the policy that he wanted would not have been in his "best interest" as he had to make material misrepresentations in the application to qualify for it. He thought that he could beat the 2-year contestability period and avoid any material misrepresentation-based denial after his death. Sadly he was wrong.

He decided what his needs were. He decided what premium he wanted to pay and what he could afford. He filled out the application and he was bound by the duty to read as to his submissions and the policy once issued. He was in "a better position to know [his] personal assets and abilities to protect [himself and his family] more so than general insurance agents or brokers...". Id. The Vestal holdings followed your admonition in Murphy that "[i]nsurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status" which is exactly what was argued in that case by the widow and what the Regulation now codifies.

Like with this Regulation, a threshold issue was whose "best interest" was being litigated? The husband who procured the policy, or the beneficiary? Their interests were not aligned or the same. The courts correctly ruled, under Murphy, that it was his. Under the Regulation that might not have been the case. Also, the husband got exactly what he wanted. Thus, the producer could not be found liable. Not so under the Regulation. A producer obtaining the exact coverage that the applicant wants does not prevent liability under the Regulation. With the amorphous nature of the Regulation, the outcome, (procuring the coverage requested), is no longer the standard. Instead, the standard is how the producer goes about obtaining that outcome. Thus, liability against life insurance brokers and agents is almost guaranteed, no matter the facts. Consider how that will affect life insurers willing to offer products in the state, the exponential increase in E&O premiums and tightening of underwriting requirements with a "guarantor" regulation in effect.

D. DFS Seeks to Usurp the Power of This Court as to the Common Law

Dovetailing with the above is this. The Regulation seeks to change the common law as to the duty an insurance producer owes to its client. It does not have that power as this Court is the last and authoritative word on what the common law is in this state.

In Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 39 (1978) you reiterated that "it is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law." Where the "Legislature has not spoken in the unmuted strains necessary to displace the common law" the common law stands. Id. at 39. That case has been cited on the subject dozens and dozens of times. The takeaway holding is that absent crystal-clear intent, the Legislature in enacting a statute cannot override your pronouncement of common law. Note that this applies to a statute. By logical extension it would mean that a regulation by an agency cannot change the common law espoused by this Court...even if the intent of the regulation were clear.

The Regulation at issue drastically changes the common law Murphy duty on an insurance producer to that of a fiduciary...which in this state is reserved for professionals like doctors and lawyers. Murphy supra; Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20 (2001). Since Murphy no case has ever held that an insurance producer owed a fiduciary duty to its client. This Regulation changes that.

On point is a recent Massachusetts case. In Robinhood Financial, LLC v. Galvin, et al., (Superior Court, Civ #: 2184CV00884, dated March 30, 2022), the court struck down a securities regulation that created a fiduciary duty. Galvin, the Secretary of the Commonwealth, brought an administrative enforcement proceeding against Robinhood alleging that Robinhood violated a regulation by "breaching a fiduciary duty that it allegedly owed to its customers when providing investment recommendations or advice. The fiduciary duty allegation in the Administrative Action is grounded upon a regulation adopted by the Secretary on March 6, 2020...". It had similar "suitability" language in the regulation.

Among other arguments, Robinhood contended that the fiduciary duty rule, like here, unlawfully overrode Massachusetts common law which did not impose a fiduciary duty on such broker-dealers. The court ruled that the regulation was invalid on the grounds that the Secretary did not have the authority to override the common law as stated by the Massachusetts Supreme Court in Patsos v. First Albany Corp., 433 Mass. 323 (2001)(Their version of Murphy for broker-dealers) ("The Fiduciary Duty Rule thus changes the common law as defined by the Supreme Judicial Court in Patsos...". Id.). The court noted that as to the ability to change common law, like your holding in Hechter "[n]othing in the statute expressly confers such a delegation; indeed, the statutory provisions on which the Secretary relies are the same ones that existed at the time Patsos was decided, evidencing that no specific delegation was made. The Secretary's argument that such a delegation can be implied from the statute is unconvincing. Generally, courts presume that the Legislature does not intend to displace the common law." Id. Finally the court noted that the regulation "does not reflect a clear Legislative intent to override Patsos directly, much less to empower the Secretary to do so indirectly through delegated rulemaking."

The logic in Robinhood is unassailable and mirrors the ratio decidendi in Hechter. The regulation here is invalid as it drastically changes the common law as espoused by you without the proper authority.

QUESTIONS PRESENTED

Q. Does a regulation that lacks clarity to provide notice of permitted/prohibited conduct to those governed by it violate the constitutional doctrine of vagueness?

Answer: Yes. The Third Department did not err.

Q. Does a regulation that lacks clarity to provide notice of permitted/prohibited conduct to those who are charged with enforcing it violate the constitutional doctrine of vagueness?

Answer: Yes. The Third Department did not err.

Q. Where there are alternative grounds to affirm the determination of the Appellate Division, Third Department should the Court of Appeals so find if needed?

Answer: Yes.

COUNTERSTATEMENT OF THE CASE

In its original form, prior to adoption of the DFS amendment, Regulation 187 applied solely to annuities, and created a suitability standard for insurance producers similar to laws in other states. (Appendix, A. 377-388.) (hereinafter "A.[page number]").

In April 2016, the United States Department of Labor ("DOL") introduced its "Fiduciary Rule" which expanded the federal definition of investment advice and required financial advisors to adhere to enhanced standards of conduct using a "best interest" standard. Respondents' Appendix, RA-20-52. (hereinafter "RA.[page number]").

DFS followed suit in December 2017 with Regulation 187 and its "best interest" standard. A.278-281. Notwithstanding that the DOL Fiduciary Rule was overturned by the U.S. Fifth Circuit Court of Appeals in March 2018, RA.20-48, in May 2018 the DFS republished the Amended Regulation. A.388; A.296-300; A.341-346.

The Regulation requires "producers" to perform a complex analysis of an applicant's financial life and then make recommendations regarding what is "suitable" for the applicant's needs, with the producer acting as a fiduciary in the "best interest" of the applicant. This standard of conduct applies to "recommending" a "sales transaction," or an "in-force transaction." 11 N.Y.C.R.R. §§ 224.4, 224.5.

While the Regulation provides "examples" of what prohibited conduct might be, it does not provide a standard as to what a producer should or should not do to comply. Examples are not a standard.

THE DECISION OF THE THIRD DEPARTMENT

The Third Department cited the accepted standard and test to be applied to determine if the Regulation was unconstitutionally vague.

First "whether the regulation is 'sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of [regulatory] terms' and have fair notice of the conduct that is prohibited." Second whether the regulation provides "clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis." Matter of Indep. Ins. Agents & Brokers of N.Y. v. New York State Dep't of Fin. Servs., 195 A.D.3d 83, 87 (3rd Dept. 2021).

Then, based on the plain language of the Regulation, it concluded that "the amendment fails to provide sufficient concrete, practical guidance for producers to know whether their conduct, on a day-to-day basis, comports with the amendment's corresponding requirements for making recommendations and compiling and evaluating the relevant suitability information of the consumer." Id.

The court noted, again based on the actual language of the Regulation, that "examples" are not a defined and workable standard of conduct. Id. at 87-88. It found the whole "suitability" concept not only unworkable in real life, but reliant on "subjective terms that lack long-recognized and accepted meanings and provide insufficient guidance with respect to how producers must conduct themselves in order to comply with the amendment." Id. at 88.

Most importantly, these fatal flaws applied not only to the producers governed by the Regulation, but also to DFS, who has to figure out how to enforce it.

RESPONSIVE ARGUMENT I
THE AMENDMENT IS UNCONSTITUTIONALLY VAGUE

A. Appellant's Argument Summarized

DFS's arguments are mainly tautological mantras repeating that the Regulation is not vague because DFS says it is not vague. The only substantive arguments are citations to cases that upheld a reasonableness standard in completely unrelated cases. A similar line of attack is made to the "suitability" point. Neither are persuasive.

Finally, DFS tries to argue that the wrong standard was applied.

B. Our Response

1. Generally

First, Appellant dodges addressing how the Regulation will apply in the real world to concrete situations as a whole; the fatal flaw the Third Department noted.

Second, arguing that the words in the Regulation have plain and understandable meanings is no cure for a defective regulation when those words are being used in a manner contrary to the accepted meaning and in contravention to common law legal concepts. In violation of Murphy, the Regulation creates a duty to advise...that is exactly what a "recommendation" is, and one based on a regulatorily imposed fiduciary duty and not a special relationship; the required prima facie element for such a duty.

Third, the Regulation lacks clearly defined and specific terms, most apparent when DFS argues for "suitability." Simply look at the Regulation. "Suitability information" is defined as "information that is" "suitable." 14 N.Y.C.R.R. §§ 224.3(g)(1), (2). Worse the Regulation contains more undefined nebulous terms to try to define inherently subjective criteria. The Regulation says, "to determine the suitability of a recommendation commensurate with the materiality of the transaction to a consumer's financial situation at the time of the recommendation and the complexity of the transaction recommended." "[S]uitability," "recommendation," "materiality," "consumer," "financial situation," and "complexity" are all terms can mean myriad different things at any given moment and in any given context. We defy DFS to explain in specific and concrete terms how it will uniformly enforce and regulate the conduct of producers under the framework of this language.

2. "Recommendation"

The Third Department correctly found that the Regulation failed both prongs of the vagueness standard articulated in Turner v. Municipal Code Violations Bur., 122 A.D.3d 1376, 1378 (4th Dept. 2014). We add the following.

First, "recommendation" is a legally loaded term. It is *not* neutral. It does not mean the mere forwarding of information for the applicant to choose. It means a value judgment as to "the best course of action, especially one put forward by an authoritative body." Lexico (Oxford University Press, 2022, at http://www.lexico.com/en/definition/recommendation). This term equates a producer with professionals like doctors and lawyers, in contravention to your holding in Chase Scientific Research v. NIA Group, Inc., 96 N.Y.2d (2001); and the First Department's holding in Busker on the Roof Ltd. Partnership Co. v. Warrington, 283 A.D.2d 376 (1st Dept. 2001). Basically, the Regulation creates a statutory negligent misrepresentation cause of action without the prima facie elements of a special relationship or justifiable reliance. It creates "absolute liability."

Second, the Regulation contains words and phrases such as "may be interpreted by a consumer," which is a codification of an improperly subjective standard rejected by New York courts. Courts throughout this state have correctly and uniformly rejected finding the creation of a duty, (tort or contract), based on amorphous and generalized terms like procured the "best coverage" or that the insured needs to be "fully covered." (Iterations of a "best interest" standard.) See Erwig v. Cook Agency, 173 A.D.2d 439 (2nd Dept. 1991); see also Chaim v. Benedict, 216 A.D.2d 347 (2nd Dept. 1995) (plaintiff's request for a "top of the line" policy and to be "*fully covered*" insufficient to create a duty); L.C.E.L. Collectibles, Inc. v. The American Ins. Co., 228 A.D.2d 196 (1st Dept. 1996) ("[p]laintiff's request for 'the best and most comprehensive coverage' did not trigger [a] duty");

see e.g., Obomsawin v. Bailey, Haskell & Lalonde Agency, Inc., 85 A.D.3d 1566, 1567 (4th Dept. 2011) (granting summary judgment to defendant where plaintiff claimed defendant failed to provide "appropriate advice with respect to their insurance needs"); Catalanotto v. Commercial Mut. Ins. Co., 285 A.D.2d 788, 790 (3rd Dept. 2001) (reversing denial of directed verdict where plaintiffs merely requested defendant "cover [them] on everything").

Third, no individual of ordinary intelligence would be able to determine whether the specific pieces of information supplied to the customer are a "recommendation" as defined by the Regulation. If a producer were to present proposals for quotes for different coverage options to a customer, they all would be considered a "recommendation." Any effort to secure a renewal of any existing policy or provide information about it may constitute a "recommendation."

Finally, the Regulation improperly provides the Superintendent with unfettered discretion to determine what constitutes a "recommendation' within the meaning of the Regulation without meaningful guidance and standards for the determination of the application of the Regulation, thereby subjecting the producer to administrative action. 11 N.Y.C.R.R. § 224.8.; see Matter of Nicholas v. Kahn, 47 N.Y.2d 24 (1979).

3. "Best Interest" / "Suitability"

These are related concepts. So first, ...whose best interest? The person applying for the insurance or the policy owner or the beneficiary? Their interests, as per the Vestal case, are not always one and the same. Suppose a high-net-worth person only wants $1M in life insurance and that is objectively not enough to provide for the family after death. If that is what the applicant wants, then it is in their best interest as determined by them. If viewed from the perspective of the family...it is not. Like in Vestal, after the death, the beneficiary would sue the producer based on this Regulation claiming that it was not in the beneficiary's best interest. Nothing in the wording of the Regulation makes it clear whose best interest is at issue. DFS will say it is the applicant. But the very nature of annuities and life insurance are for the benefit of others, so that will ring hollow.

Further, if the applicant's best interest is at issue, then the Regulation is just a codification of Murphy. The insured knows its needs best and as long as the producer obtains the coverage the customer wants, it satisfied its common law duty. Murphy v. Kuhn, 90 N.Y.2d 266, 273 (1977) If this is the case, there is no need for the Regulation.

However, the Regulation's vague terms and imprecise language make it a flawed and practically untenable version of Murphy. It is unclear what information is required to determine "suitability" and what type of in-depth analysis of the applicant's finances is required, as opposed to the customer telling the producer what it wants based on their own intimate knowledge of their finances.

11 N.Y.C.R.R. § 224.3(g) lists "some or all" information that may be relevant to the consumer. With respect to term life insurance, there are nine pieces of information listed with varying levels of specificity. 11 N.Y.C.R.R. § 224.3(g)(1). With respect to all other policies, there are 14 different pieces of information listed. 11 N.Y.C.R.R. §224.3(g)(2). While there is some specific factual information listed, like age and annual income, the Regulation also lists various amorphous and subjective factors as well, such as "financial situation and needs," "financial time horizon, including the duration of existing liabilities and obligations" and "financial objective," to just name a few. Since these terms are not defined, do not have concrete common or ordinary meanings, and are variable and subjective from person-to-person over time, it is impossible for the producer to know whether she compiled the necessary information to comply with the Regulation. Further, since DFS claims it is taking a "principles-based approach" to the Regulation, enforcement will inevitably be ad hoc.

DFS suggests it uses sufficiently definite language by relying upon an objective standard of reasonableness that can be consistently applied without confusion. However, that could not be farther from the truth. Many of those challenging the Regulation, including the drafters of the two letters specifically cited by DFS on page 50 of its Appellant's Brief (A.282, A.289), objected to the Regulation because New York adopted a standard that may prove inconsistent with federal rules related to sales of federal regulated annuities. As such, the Regulation does not rely upon commonly applied legal standards, which do not exist, but instead creates new duties and obligations that will inevitably confuse the regulated parties. The mere use of the term "reasonable" does not somehow transform an impermissibly vague statute or regulation into a provision that may be reasonably enforced.

For example, in Suter v. Artist M., 503 U.S. 347, 559-60 (1992), the U.S. Supreme Court rejected the premise that there was a private right of action for individuals to enforce the Adoption Assistance and Child Welfare Act of 1980 against states, and stated:

> "No further statutory guidance is found as to how 'reasonable efforts' are to be measured. . . . [I]t is a directive whose meaning will obviously vary with the circumstances of each individual case. How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State."

Thus, far from suggesting that "reasonable efforts" provides an objective standard, the Supreme Court concluded it provided discretion to states on how to enforce it.

Further, DFS has not cited to a single statute or regulation that defines a recommendation in the fashion adopted by it for application to New York insurance producers. Instead, DFS makes several flawed attempts to analogize its Regulation with the National Association of Insurance Commissioners ("NAIC") model rule and 19 other state regulations or statutes. So what! That is not before the Court, nor are any of the other state regulations being examined under New York Law.

Regardless, the NAIC Model Rule clearly shows that the Regulation *sub judice* in no way comports with (and actually runs afoul) of the NAIC Model Rule in several different material respects including purpose, scope and definitions. First the NAIC model explicitly does not subject a producer to potential civil liability under the best interest standard while the Regulation does. Second, as to the scope, the NAIC model applies only to annuities while the Regulation applies to annuities and life insurance. Certainly, since many annuities are regulated under federal law as securities, there is some value in having consistent standards for those products among the states. However, DFS created a Regulation that applies to not only annuities, but also life insurance, which is far different from any other regulation by any state or federal jurisdiction. Third, the NAIC Model Rule definition of recommendation makes clear that it applies only to actual advice provided with an intent by the producer to result in a purchase, exchange or replacement, while the Regulation defines recommendation to include statements or acts that, based on the customer's subjective interpretation, result in a customer entering into or refraining from a transaction, including in-force transactions. Finally, the NAIC Model relies on clearly defined conduct and consumer criteria while the Regulation relies on a vague and ambiguous best interest standard.

Unfortunately, DFS does not make clear how producers who do not actually provide advice avoid the Regulation. In its February 12, 2020 Industry Guidance at http://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq, DFS claims in response to Question # 13, that "[a] producer cannot avoid the requirements of Regulation 187 by simply providing the consumer with multiple quotes when the producer's statements or actions otherwise meet the definition of a recommendation." Thereafter, DFS cites to its vague recommendation definition, suggesting that "there may be situations where the provision of a quote would not be considered a recommendation" and provides two examples. This is tantamount to no answer at all. Ultimately, DFS leaves itself unfettered discretion to conclude when "one or more statements or acts by a producer . . . to a consumer that: (1) [are] reasonably interpreted by a consumer to be advice. . . ." 11 N.Y.C.R.R. § 224.3(e).

As with "best interest," another nebulous but common term "good character" was challenged in 164th Bronx Parking, LLC v. City of New York, 20 Misc. 3d 796, 803 (N. Y. Sup. Ct. 2008), leading the Court to observe:

> The words "good" and "character" both are widely used, but, consequently, are susceptible of multiple and varied meanings. The absence of interpretative statutory or regulatory provisions relegates the enforcers and their objects, license applicants, to the two words of the statue itself. While these two common words may set a

> comprehensible normative standard, they are so imprecise that it is as if no standard of conduct is specified at all. (*Internal citations omitted*.)

Troubled by this ambiguity, and lack of meaningful guidance, the court found the licensing requirements for a parking garage in question unacceptably vague in violation of due process. Id. at 804. Indeed, the court noted that two different decision makers could make differing determinations on a license based upon "subjective sensibilities or notions of good versus mediocre character or the idiosyncrasies of the official or the applicant." Id. at 803. While this is a trial level decision, it provides an excellent correlation to the power of DFS here using this Regulation, and the problems that are created by the language of the Regulation.

There is no surefire way to determine how much life insurance is in a person's "best interest." The requirement that producers disclose "all relevant suitability considerations and product information, both favorable and unfavorable" is an impossibility. How can one ever capture in writing all unfavorable considerations in any transaction? The requirement that insurers – especially those selling through independent agents representing multiple companies and products – must ensure agents are not influenced by compensation is impossible without insurers committing antitrust violations to control independent agent decisions and behaviors spanning across multiple carriers and their products and compensation.

DFS has created a mystery of what exactly is expected from an agent or broker seeking to comply with this Regulation and how it will be enforced, leaving thousands of agents and brokers uncertain on what is required to comply and at great risk for failure to do so. For the insurance industry, the stakes could not be higher, given this Regulation allows DFS to impose steep fines and force firms to give restitution to policyholders.

In defending the "recommendation" definition, DFS claims the term "reasonable" is ubiquitous in the law, but fails to appreciate that its use of the term therein does not create an objective standard. Certainly, advice is a term someone of reasonable intelligence can understand has an objective meaning. However, DFS created a Regulation that applies not only to actual advice, but forces producers to guess what DFS will believe a consumer would "reasonably" consider advice. This "standard" is materially different from the provisions addressed in Appellant's Brief and is impermissibly vague.

DFS's position on vagueness is absurd, presumably because it is impossible to locate any authority to justify what DFS hopes to do here. Having failed to explain a reasonable objective standard, DFS takes scienter requirements in criminal statutes or specific intent related to engaging in proscribed conduct, and then contends that the regulated parties here would have to engage in an intentional act before it would be subject to the Regulation. See e.g., Gonzales v. Carhart, 500 U.S. 124, 149, 150

(2007) (emphasizing intent related to partial birth abortion); Screws v. United States, 325 U.S. 91, 102 (1945) (willful violation of civil rights by police officer beating prisoner to death); People v. Smith, 44 N.Y.2d 613, 619-21 (1978) (prohibiting loitering for the specific purpose of prostitution). Of course, 11 N.Y.C.R.R. § 224.3(e)(1) reflects that the intent of the producer with respect to the statements or acts is irrelevant, only the alleged "reasonable interpretation of the consumer" of whether the statement is advice. Further, the specific intent here, even if one did exist, is not to deceive or engage in some objectionable conduct, but to sell a product approved for sale in New York by DFS.

At another point, DFS revealed that it apparently does not understand the consequences of the language of its own Regulation. Specifically, DFS claimed on page 40 of its Appellant's Brief: "if a producer does intend to make a sale, he 'cannot be said to suffer from a lack of warning or knowledge that his conduct is regulated by the Amendment.'" However, as explained above, a "recommendation" can even occur with respect to an "in-force transaction" without any intent to make a sale by a "statement or act by a producer . . . to a consumer that . . . is intended by the producer . . . to result in a consumer . . . refraining from entering into a transaction." 11 N.Y.C.R.R. § 224.3(e).

Thus, unlike those scienter cases or specific intent cases, a producer, who may intend to make a sale, which is a normal, expected noncriminal action of any licensed business, could be subject to the Regulation and the consequences of the same, regardless of existing New York law that the producer should not be compelled to provide advice. Similarly, under the Regulation, a producer who already sold a policy without any advice may become subject to the Regulation via a customer who asks questions, even if the producer advised the customer against making a transaction that would result in additional commissions to the producer.

Finally, DFS argues, without any substantive analysis (or preservation of the issue below) in prior briefing, that economic regulations are subject to a less strict vagueness test because the regulated business can seek to clarify the Regulation and resort to an administrative process, and cites Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99 (1982). Of course, if the Industry Guidance cited above is an example, it provides no clarity at all. In Hoffman Estates, the Supreme Court considered a licensing ordinance related to drug paraphernalia, and the challenging business violated the clear wording of the ordinance by prominently displaying a magazine entitled "The Pleasures of Cocaine" near pipes and admittedly selling "roach clips." Id. at 502.

This case is materially different in several ways. First, the Court held that the ordinance provided fair notice of what is proscribed. Id. at 503. Here, a unanimous Third Department disagreed. Second, the ordinance, like many of those set forth above, contained a scienter component with an intent to market the products for use with illegal drugs. Id. at 502. Third, the Court specifically stated "the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Id. at 499.

Here, there is no practical ability for every producer to receive administrative guidance on whether each document or statement made to a customer is a recommendation. Further, the Regulation's "suitability analysis" may compel those who do not want to provide any recommendations or opinion on policies to do so prophylactically for fear of running afoul of the Regulation. Thus, the Regulation not only denies Due Process, it further denies the producers' First Amendment rights by compelling the producer to speak, to provide advice when the "producer" merely prefers to sell a policy. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (holding the general rule, that a speaker has the right to tailor his speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid).

With respect to commercial speech, compelled disclosures are limited to purely factual, and uncontroversial information. See National Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018). Here, rather than sell a product, or merely provide factual information, DFS is requiring producers to engage in the impossible, recommending the single ideal policy for each customer out of potentially thousands of available options based upon a vague "best interest" standard.

Due to the plethora of ambiguities discussed herein, the Regulation is void for vagueness and simply does not pass muster under constitutional due process.

RESPONSIVE ARGUMENT II
ALTERNATIVE GROUNDS FOR AFFIRMANCE
ULTRA VIRES - DFS EXCEEDED ITS AUTHORITY

A. The Standard to Search the Record

In the unlikely event the Court of Appeals disagrees with the holding of the Appellate Division, it may consider alternative grounds for affirmance. See Long v. State of New York, 7 N.Y.3d 269, 275 (2006).

B. The Law - Generally

An agency cannot override governing common law by regulatory fiat. See People ex rel. Cuomo v. First Am. Corp., 18 N.Y.3d 173, 179 (2011) (holding that power to preempt relevant common law lies with the legislature). Here, the actions of DFS in promulgating the Regulation are not only contrary to existing law, but are purely legislative in that DFS, without legislative guidance, engaged in the very kind of policymaking, entailing fundamental choices among broad social and public policy goals, that resides exclusively with the legislature.

C. The Law - The Boreali Test

The test to determine whether an administrative agency usurped legislative functions include four factors. Boreali v. Axelrod, 71 N.Y.2d 1 (1987).

> "whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate . . .; (3) the legislature has unsuccessfully tried to reach agreement on the issue . . .; and (4) the agency used special expertise or competence in the field to develop the challenged regulation."

Matter of LeadingAge N.Y., Inc. v. Shah, 32 N.Y.3d 249, 261-62 (2018).

Boreali provides "overlapping, closely related factors that, viewed together, may signal that an agency has exceeded its authority" (internal quotes omitted). Id. at 261. "Any Boreali analysis should center on the theme that it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends. The focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner." New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene, 23 N.Y.3d 681, 697 (2014).

D. Application Here

1. DFS Made Value Judgments

DFS made value judgments. First, it ignored the consequences of regulatory action by choosing to increase the transaction costs of products through its Regulation at the expense of increasing the volume of those covered, such as the middle class, who may now be unable to afford life insurance and annuities products. The affidavits of insurance producers Gary Slavin and Stephen Testa speak to these consequences in meaningful ways. See RA.5-19.

This Court has distinguished between policymaking and rulemaking by considering the personal autonomy of those impacted, and whether the value judgments concerning the underlying ends are widely shared. See Hispanic Chambers of Commerce, 23 N.Y.3d at 699. Here, DFS inappropriately crossed the line between policymaking and rulemaking by taking it upon itself to make inherently difficult and complex societal choices with no direct proof that the changing legal standards will produce better financial outcomes.

DFS downplayed the impact by suggesting it parallels or piggybacks on the DOL Fiduciary Rule, which was abandoned. A.279-280, A.297-298. While DFS portrays the cost of the Regulation as nominal, a comparable regulatory proposal like the DOL Fiduciary Rule was subject to rigorous cost-benefit analysis more realistically admitting to significant impact and cost. With an honest assessment of the costs, it is clear that the Regulation, especially without the federal Fiduciary Rule, constitutes a value judgment more suitable to resolution and consideration/evaluation as part of public policymaking reserved to the legislature.

2. DFS Acted As The Legislature Writing On A Clean Slate

The second Boreali factor considers whether the agency promulgated the rule on a clean slate. Here, the Regulation is an extreme outlier well beyond the bounds of New York's insurance code. DFS clearly "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" rather than "merely fill[ing] in the details of broad legislation describing the over-all policies to be implemented." Boreali, 71 N.Y.2d at 13.

DFS set its own standard for the insurance industry, rather than exercising authority "by promulgating rules within the boundaries of its legislative delegation." Matter of Nicholas v. Kahn, 47 N.Y.2d 24, 28 (1979). There is no question the Regulation operates contrary to existing statutes and goes far beyond even the broad regulatory authority given to DFS. The statutory language and structure of the New York Insurance Law do not authorize DFS to impose a best interest or fiduciary standard upon insurance producers under the guise to "implement" the intent of the legislature. See Jewish Home & Infirmary v. Commr. of N.Y. State Dep't of Health, 84 N.Y.2d 252, 262–63 (1994). No statutory authority contemplates the application of a "best interest" standard to sales and brokerage in the life insurance industry, especially without a comparable federal counterpart. The provisions cited by DFS only authorize the Superintendent to prescribe regulations generally, see N.Y. Fin. Servs. L. § 302, N.Y. Ins. L. ("NYIL") § 301. The Superintendent can make inquiry of insurance producers and suspend their licenses for infractions, see NYIL §§ 308, 2110; and prohibit insurance producers from making misstatements, competing unfairly or deceptively, and discriminating, see id. §§ 2123, 2401-2409 (art. 24), 4224, 4226. If this Regulation is permitted to stand under these circumstances, there will essentially be no limitation on the ability of DFS to adopt regulations beyond those specifically authorized by the legislature.

Rather, as should be the case within the proper framework of the law, the statutory scheme acts to preclude implementing a broadly applied "best interest" standard through regulation. Courts in this state have not hesitated to strike down regulations promulgated by DFS or its predecessor, the New York Insurance Department, for similar reasons. See Mazgulski v. Lewis, 118 Misc.2d 600, 606–07 (Sup. Ct. N.Y. Co. 1982) (addressing *expressio unius* argument and annulling regulation because "the Superintendent has forged a new policy not reasonably to be implied from the statutes and in contradistinction to the history of these statutes"), aff'd., 96 A.D.2d 1154 (1st Dept. 1983), aff'd., 63 N.Y.2d 992 (1984).

Other sections of the New York Insurance Law further underscore that the Regulation is impermissibly inconsistent with the governing statutory scheme. The

New York Insurance law prescribes the standard of care for various discrete situations, such as investments made by life insurers, see N.Y. Ins. Law § 1405(c), or the fiduciary duty owed to policy owners by life settlement brokers, see Id. § 7813(l), but it does not provide for a best interest standard of care by producers who sell life insurance. See Jewish Home, 84 N.Y.2d at 262–63; cf. Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another. . . it is presumed that Congress acts intentionally and purposely. . ."). The New York Insurance Law devotes an entire section to "Unfair Methods of Competition and Unfair and Deceptive Acts and Practices," consistent with a statutory scheme designed around fair and honest conduct, but nowhere is there any mention or granting of authority to create a "best interest" or fiduciary standard. See N.Y. Insurance Law §§ 2401-2409 (Article 24).

There is simply no evidence the legislature ever intended for DFS to implement a best interest standard of care regulating the sale of life insurance and annuities. Nor did it create any framework allowing DFS to "fill in the details" with a best interest standard of care. All existing statutes governing New York producers impose consistent standards of fairness and honesty upon insurance industry intermediaries within boundaries that fall well short of best interest, and thus DFS operates here on a clean slate. DFS impermissibly created its own "comprehensive set of rules" without any legislative guidance.

3. The Legislature Tried To Reach Agreement On The Issue

The third Boreali factor concerns whether the legislature tried unsuccessfully to address the issue, evidencing "the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide [health] problem." Boreali, 71 N.Y.2d at 13. Agency rulemaking is improper where there is "legislative indecisiveness on the policy issue." Health Ins. Ass'n v. Corcoran, 551 N.Y.S. 2d 615, 622 (3rd Dept. 1990).

Respondents submit this policy issue has already been the subject matter of such "indecisive" legislative attention – which is very likely to increase in the future – thereby foreclosing agency action in the absence of legislative agreement. See N.Y. Legis. Assemb. A2464A Reg. Sess. 2017-2018 (2017); N.Y. Legis. Assemb. A6933 Reg. Sess. 2015-2016 (2015) and companion Senate Bill S2872A. Indeed, the legislature engaged in a robust debate over these bills, and during this time it has passed committees, but never gained traction for passage by the entire legislature.

Here, the legislature has yet to reach agreement on goals and methods that should govern financial professionals; yet DFS overreached with its own regulatory solution. See Boreali, 71 N.Y.2d at 13. DFS should not be allowed to bypass the legislature by imposing a best interest standard, which is not only unauthorized by the legislature, but which goes beyond what the legislature even considered. Since the legislature could not even pass a law seeking disclosure, it is outrageous that DFS believes producers can become fiduciaries through regulatory fiat.

4. DFS Did Not Use Special Expertise To Develop The Regulation

Turning to the fourth and final Boreali factor, DFS used no special expertise or technical competence to adopt a best interest standard. Here the Court must look to whether DFS actually used its technical competence to "flesh out details of the broadly stated legislative policies embodied in" the state's insurance laws. Boreali, 71 N.Y.2d at 14. There is nothing within the Regulation itself, nor the Regulatory Impact Statement, to evidence DFS used any such expertise. There is simply no discussion of any specialized knowledge used or possessed by DFS in a technical analysis of what best interest means, what are its elements, how it relates to fiduciary duty, whether there are differing levels of such duties, etc. It is worth noting that DFS does not regulate ERISA plans nor does it regulate securities brokers to the extent of the United States Securities and Exchange Commission ("SEC"). Thus, it lacks the depth of knowledge possessed by other agencies that have contended with issues of this nature over many years within their natural regulatory spheres. DFS took an improper and misguided shortcut by attempting to mimic the rejected and abandoned DOL Fiduciary Rule.

DFS decided that it could institute a fundamental change to how life insurance is sold without legislative guidance, without analysis of the costs, and effectively overturned years of case law precedent. While DFS may have broad domain as the insurance regulator in New York, DFS does not have a blank check to act in a legislative capacity. DFS exceeded its authority in promulgating the Regulation and the Appellate Division decision must be affirmed.

RESPONSIVE ARGUMENT III
ALTERNATIVE GROUNDS FOR AFFIRMANCE
THE REGULATION VIOLATES "SAPA"

The record shows that the DFS failed to comply with the State Administrative Procedure Act ("SAPA") rendering the Regulation invalid. SAPA § 202-a (3) requires that the Regulatory Impact Statement contain the following information:

> A statement detailing the projected costs of the rule, which shall indicate:
>
> > (i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;
> >
> > (ii) the costs of implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and
> >
> > (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or
> >
> > (iv) *where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided.* (Emphasis added.)

DFS failed to state the costs of compliance with the Regulation or, alternatively, failed to make any estimate of those costs. The statutory mandate, at a minimum, requires a statement setting forth a best estimate, the information and methodology upon which such estimate is based, and the reason or reasons why a complete cost statement cannot be provided. NY SAPA § 202-a (3)(c)(iv). DFS did not even do this.

The Regulatory Impact Statement lacks the statutorily required cost information demanded by SAPA. Instead, DFS offers only unsubstantiated one-dimensional conclusions that any costs will be minimal and any impact insubstantial. The analysis contains a hodgepodge of information that is contradictory on its face, fails to address costs beyond glossing over administrative compliance, and is fatally defective in its lack of numerical estimates to gauge the ultimate cost impact of this Regulation on affected parties.

The superficiality of the DFS Regulatory Impact Statement is plainly visible throughout its various iterations which are replete with comments such as:

> "The amendment takes a principle-based approach to compliance . . . which is expected to greatly minimize costs . . . "
>
> "Many insurers were already preparing to implement the DOL Rule . . ."
>
> "[M]ost insurers need only incur minimal additional costs to comply with the requirements of this rule."

A.297, A.311, A.373.

These statements are wholly undocumented, and unsupported by any facts or figures. Instead, hedge words like “many,” “most”, and “greatly” are unacceptably imprecise under SAPA. No sources or methodologies for a cost analysis are cited, just amorphous statements that lead to a predetermined conclusion.

Regardless of the fate of the DOL Fiduciary Rule, DFS said that the Regulation was “necessary for the protection of [New York] consumers,” and claimed the then-proposed SEC regulation was not “desirable” because it “relies primarily on disclosure of conflicted advice.” A.304-305. Of course, the DOL acknowledged that substantial costs were incurred by insurers to comply with the DOL Fiduciary Rule. Despite this, DFS again attempted to piggyback around its SAPA duty claiming “many insurers were already preparing to implement the DOL Rule . . . by making changes to processes, procedures, and technology,” adding that “firms that already comply with the [DOL] Rule have minimal additional costs to comply with the [proposed] amendment.” A.297, A.373. Seemingly unaware of its inconsistency and SAPA violation, DFS still somehow insists the insurance industry would incur virtually no cost to comply with its Regulation.

This position does not make sense since the insurance industry obviously had been incurring substantial cost trying to come into compliance with its federal counterpart, the DOL Fiduciary Rule, and those costs have been expressly acknowledged by DFS. When the DOL Fiduciary Rule was proposed, the DOL estimated that "compliance costs imposed on the regulated parties might amount to $31.5 billion over ten years with a 'primary estimate' of $16.1 billion." RA.25.[2] Certainly, with the DOL Fiduciary Rule overturned, it is hollow and self-serving for DFS to claim that all of the expected costs associated with its implementation magically evaporated, especially since the costs associated with adding this standard for life insurance did not previously exist.

Other faulty assumptions are strewn throughout the DFS analysis. It says "producers will already have in place standards and procedures that can be leveraged to comply with this amendment" – but best interest is a whole new paradigm different from suitability that requires insurers and intermediaries to establish systems and procedures to address the influence of compensation on sales. A.298, A.372-373. DFS says it anticipates "future costs may decrease over time by establishing one consistent best interest standard." This statement is pure speculation as there are currently no other federal or state standards equivalent to the Regulation. Id. At every turn, DFS wishes away tangible costs associated with the Regulation,

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[2] In contrast to a dearth of pages addressing cost in the DFS Regulatory Impact Statement (RA.1422-1428), the Regulatory Impact Statement of the DOL Fiduciary Rule was a 382-page analysis of costs and benefits, (*Dept. of Labor, Regulating Advice Markets (April 2016)*, available at *http://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf*).

and replaces them with imprecise vague qualifiers and hedge words without any citation to sources or attempt at quantification.

The DFS analysis also ignores the various effects of this Regulation beyond pure compliance costs. As stated previously, the record is replete with examples of broader, far-reaching costs extending beyond administrative recordkeeping, which remain unaddressed and overlooked. RA.5-19, RA.745, RA.783, RA.599-716. These too are costs, no doubt difficult to assess, but which DFS cannot simply ignore.

Paramount to the above defects in the Regulatory Impact Statement, is the complete lack of any dollar figures. SAPA does not allow this, and the easiest way to satisfy the SAPA requirements is through a "best estimate." However, the history of SAPA § 202-a(3)(c) shows the legislature purposely tightened the cost estimate requirements to avoid the lack of analysis provided by DFS here. RA.333-552. In 1990, the legislature added the requirement of a "best estimate," as well as disclosure of information and methodology upon which the estimate is based. RA.321-327. The Executive Chamber Memorandum accompanying the 1990 legislation explained the purpose to strengthen the cost analysis component of the Regulatory Impact Statement with a best estimate of the costs of a new rule to regulated parties and the information and methodology upon which the estimate is based. See RA.345-346. No best estimate – not even a range, or description of a projection formula - is provided by DFS. Therefore, DFS failed to meet its obligations under SAPA. By statute, the burden is on DFS to supply an estimate of cost which it failed to do, and any claim of substantial compliance is meritless. Without an actual statement of the real costs, or a reasonable estimate of those costs within a range of dollar amounts, DFS failed to comply with SAPA.

In addition, SAPA § 202-a(3)(h) requires DFS to provide a statement identifying whether the rule exceeds minimum federal standards, and if so, explain why the rule exceeds such standards. DFS failed to do this. The only explanation we could uncover was its general belief that it is an important consumer protection. A.314-315, A.366. This is no real explanation for implementing a radical, drastic change in standards for insurance producers once there was no federal counterpart.

Subsequent to the underlying petition, in June 2019 the SEC adopted Regulation Best Interest, or "Reg BI", taking effect in June 2020. 17 C.F.R. 240.15l-1 (2019). It established a standard of conduct for securities firms and brokers "to act in the best interest of the retail customer at the time a recommendation is made without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer." The SEC rule does not apply to insurance-only transactions or to most insurance producers (unless dually licensed as security agents).

While ostensible similarities may exist between the SEC Reg BI and DFS Regulation 187, it is the differences that stand out and expose the overreach of Regulation 187. Reg BI was expressly authorized by Congress in the Dodd-Frank Act. Regulation 187 came from improper policymaking by DFS. Reg BI contains specific "obligations" that give meaning and boundaries to a best interest standard. Regulation 187 is open-ended allowing for the most far-reaching meaning to attach to its best interest standard. In its February 12, 2020 Industry Guidance, at http://www.dfs.ny.gov/apps_and_licensing/life_insurers/reg187_first_amendment_faq, in response to Question # 10, DFS admits that satisfactory compliance with FINRA rules, the SEC's Regulation Best Interest regulation and the NAIC model suitability regulation would not comply with the Regulation.

Thus, the Regulation exceeds federal standards, fails to provide reasons for doing so and fails to address their resulting impact in violation of SAPA.

Finally, SAPA § 202-b requires DFS to "consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses." Once again, the Regulatory Impact Statement consists of conclusory statements which disregard valid concerns raised by and on behalf of agencies and brokerages severely impacted by these new requirements. While DFS has discretion to weigh the information it receives from interested parties, it cannot dismiss input and information from small businesses without offering its own estimate of cost and impact. DFS resolutely refused to address bona fide concerns about this Regulation voiced by small businesses, clinging to an unrealistic view that the Regulation's only effect will be to require extra administrative paperwork. As explained elsewhere herein, the Regulation will have far deeper effects on insurance producers and others in the marketplace.

For all the foregoing reasons, the Regulatory Impact Statement in support of the Regulation is deficient under SAPA, and the Appellate Division decision must be upheld and the Regulation annulled.

RESPONSIVE ARGUMENT IV
ALTERNATIVE GROUNDS FOR AFFIRMANCE
THE REGULATION IS ARBITRARY AND CAPRICIOUS

A. The Issue

Even if DFS had the authority to promulgate a regulation, it is unconstitutional because it is arbitrary and capricious.

B. The Law - The Test

A regulation can only be upheld if it has a rational basis and is not unreasonable, arbitrary, or capricious. Grossman v. Baumgartner, 17 N.Y.2d 345, 349 (1966); Levine v. Whalen, 39 N.Y.2d 510 (1976). Regulations are "not judicially reviewed pro forma in a vacuum but scrutinized for genuine reasonableness and rationality in the specific context." New York State Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 166 (1992) (internal citations omitted).

To stand, the regulation must have "adequate record support or correlation to the reasons" for promulgation. Id. at 167. This requires "a rational, documented, empirical determination," and not merely unsubstantiated "theory and assumption" arrived at without "empirical documentation, assessment and evaluation." Id. at 167-68. Absent an "adequate predicate" in the administrative record, the Regulation must be annulled. Matter of Jewish Memorial Hosp. v. Whalen, 47 N.Y.2d 331, 336 (1979).

The Court of Appeals has explained "the promulgation of regulations necessarily involves an analysis of societal costs and benefits. Indeed, cost-benefit analysis is the essence of reasonable regulation; if an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally." Hispanic Chambers of Commerce, 23 N.Y.3d at 697.

C. Application

Here, without the benefit of legislative guidance on how to undertake its task, as discussed supra, DFS veered far from its regulatory purpose/mission, implementing the Regulation in an arbitrary and irrational manner. When compared to the in-depth cost-benefit analysis done by the Department of Labor together with voluminous explanations, DFS did next to nothing. Rather, DFS offered only conclusory findings on benefits and costs, the kind found objectionable by the Court of Appeals in New York State Ass'n of Counties, 78 N.Y.2d at 168, and the First

Department in Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs., 169 A.D.3d 18 (1st Dept. 2019).

The "analysis" lacked any disciplined review of advantages and disadvantages, pros and cons, benefits and costs, or alternatives of the Regulation. It is difficult to think of any actual justification for DFS's claim that it was being asked "to measure the immeasurable" and declaration that "preventing consumer harm far outweighs any administrative costs imposed by the Regulation." A.372. (Emphasis added.) Even if both were true, which Respondents dispute, DFS still has an obligation to understand the impact of its rulemaking and seek in earnest to weigh benefits against costs, addressing basic questions on its impact.

Not only are costs of the Regulation unexplored, but any benefits are equally questionable. Without any specifics, DFS contends that purchase of annuities and life insurance has become a more complex financial transaction, resulting in a greater reliance on financial advice. A.303, A.365. It adds – without any details or identification of actual marketplace problems – that a number of "investigations, examinations, and observations" since 2013 "demonstrated the need" that regulation is necessary "to prevent insurers and producers from recommending a transaction that is properly disclosed and determined to be suitable for a consumer, but that is otherwise not in the best interest of that consumer and is designed to maximize compensation to the sellers." A.303, A.365. This is quite an indictment of the insurance industry, yet there is not a shred of real evidence in the record to support it. Typical throughout, DFS's justifications are entirely built on inferences and lack any specificity whatsoever.

To be clear, DFS fails to explain how existing regulations are insufficient, and how adoption of a best interest standard would benefit consumers (beyond giving DFS a weapon to wield at will against whomever it chooses). The "proliferation of life products and annuities" referenced by DFS mainly refers to products that entered the marketplace between the 1950s to early 2000s. The use of annuities and insurance as investments goes back decades; as do producer compensation practices including front-end commissions, which remain essentially unchanged. Likewise, life insurance lapse rates are not novel.

As with costs, the record is barren of concrete facts to support purported benefits, relying on "theory and assumption" without "empirical documentation, assessment and evaluation" as demanded of rational rulemaking. New York State Ass'n of Counties, 78 N.Y.2d at 167–168. DFS claims that there will be vast benefits from the Regulation, but it is pure conjecture, lacking even a modicum of analysis, documentation, evaluation, or explanation. As to annuities, DFS fails to demonstrate why prior suitability rules are deficient in addressing its repurposed concerns, or how application of a standard in New York that differs from everywhere else makes practical sense. In fact, as to life insurance, DFS fails to demonstrate that extension of prior suitability rules to life insurance products would be inadequate to address issues with respect to those products. Instead, DFS jumps straight to its desired conclusion that the panacea is a unique "best interest" standard applicable only to New York products. Put simply, "its predicates are entirely conclusory," which is why adoption of the Regulation is arbitrary and capricious. New York State Ass'n of Counties, 78 N.Y.2d at 168.

As explained above, the Regulation itself is also irreconcilable with governing law and irrational on its face with respect to insurance sales. The Regulation mandates "only the interests of the consumer shall be considered." A.381. Notwithstanding any efforts by DFS to relax this extreme requirement through after-the-fact interpretation (to save it from its own literal words), on its face, the Regulation presents an impossible standard to meet and invites DFS's unfettered discretion. Thus, even if a producer offers high quality products that satisfy consumer needs, and she tries her best to get the "right" policy, the producer faces an impossible task based on the nature of the transaction itself, which will either paralyze the sales process or render the producer perpetually vulnerable to legal action by customers seeking to rewrite their policies based upon changed circumstances. Liability exposure of insurance agents and brokers would be at the whim of their customers and DFS.

In fact, the same best interest standard here is applied to all producers without recognition that an agent, unlike a broker, under New York statutes is "an agent of an insurer" and not of the customer. See N.Y. Ins. L. § 2101(a), (b) & (c). As such, the agent owes its principal, "a duty of loyalty and an obligation to act in the best interests of the principal," Dubbs v. Stribling & Assocs., 96 N.Y.2d 337 (2001), as well as an "implied good faith obligation [to] use his best efforts to promote the principal's product." Griffin & Evans Cosmetic Mktg. v. Madeleine Mono, Ltd., 73 A.D.2d 957 (2nd Dept. 1980). An agent's "duty is single, and he cannot serve two masters with antagonistic interests." Rabinowitz v. Kaiser-Frazer Corp., 111 N.Y.S.2d 539 (Sup.Ct., Kings Cty. 1952).

Below, DFS failed to address this issue at all, ignoring relevant and instructive lessons on the dichotomy between arms-length salespeople and fiduciary advisers pertaining to the securities industry. In its dubious attempt to harmonize standards across the financial services industry, DFS sought to hold insurance agents and brokers to the same standard of care historically applied to investment advisers. However, in doing so, DFS exhibits no awareness of well-recognized obstacles in pursuing that objective let alone how to address them. The Fifth Circuit struck down the DOL Fiduciary Rule largely because the agency blurred the distinction between advisers as fiduciaries and brokers as transaction-based intermediaries without proper authority or attention to these differences. See Chamber of Commerce v. U.S.

Dep't of Labor, 885 F.3d 360, 376 (5th Cir. 2018) ("that DOL contradicts its owns longstanding, contemporary interpretation of an 'investment advice fiduciary' and cannot point to a single contemporary source that interprets the term to include stockbrokers and insurance agents indicates that the Rule is far afield from its enabling legislation"). Similarly, DFS ignores these lessons and offers no insight on how its extreme rule can be reconciled with practical realities of insurance sales and existing statutes and case law.

"The general rule [is] that the relationship between the parties to a contract of insurance is strictly contractual in nature" and "no special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer" because "the relationship is legal rather than equitable." Batas v. Prudential Ins. Co. of Am., 281 A.D.2d 260, 264 (1st Dept. 2001).

As explained above, this Court has made clear that "[i]nsurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status id.). . . . [P]ermitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation." See Murphy, 90 N.Y.2d at 273. If DFS did not understand and appreciate this possibility, it did not act rationally in promulgating the Regulation.

Thus, even if DFS had the authority to adopt a best interest standard, the Regulation itself and the process by which it was promulgated deviate radically and recklessly from existing insurance law, and ordinary common sense without adequate explanation. Thus, the Regulation lacks the rational and thoughtful underpinnings demanded of an administrative agency and is arbitrary and capricious, which warrants its annulment by upholding the Appellate Division decision.

RESPONSIVE ARGUMENT V
NEGATION OF APPELLANT'S COMMENTS ON PROCUREMENT

In its Statement of Facts, DFS attempts to create confusion with unnecessary and unrelated information on life insurance and annuities hoping that inundating the Court will cause it to defer to DFS's improper administrative action. Appellant's Brief p. 10-12, 15-17. Certainly, when the superfluous information is stripped away, there can be no doubt of DFS's improper overreach.

DFS cannot credibly claim that the Regulation ameliorates the alleged complexity of life insurance or the volume of choices with 44,624 different policy forms, presumably overwhelming for even the most knowledgeable insurance producers and regulators. Appellant's Brief p. 15.

Thus, DFS seeks to allow one segment of the market to offer limitless products while shifting responsibility for understanding these products away from the person actually purchasing them onto a different segment of the market. Regardless of the time and effort placed in attempting to understand a consumer's preferences, a producer can never practically understand all of the issues most important in the selection that are in the customer's subjective "best interest." DFS claims it needed to act due to the increased marketing of life insurance and annuities as investment products, and because the compensation structures for producers created incentives to act other than in the best interest of their customers. Appellant's Brief p. 14-15. However, this argument is disingenuous. Life insurance and annuities have always been treated as an investment. Additionally, insurance agents and brokers have been paid on a commission basis for decades, if not centuries, and the incentives DFS laments are capped as recognized by statute, (Insurance Law § 4228(d)) and mandated to be disclosed at the consumer's request through Insurance Regulation 194, 11 N.Y.C.R.R. § 30.

Ultimately, DFS created a tag-along regulation designed to work in conjunction with the U.S. DOL's adoption of a fiduciary rule related to certain annuities, which was ultimately struck down. Part of the justification for the Regulation was consistency of requirements among annuity and life insurance products. A.279. When the federal regulation was struck down, the rationale for the Regulation was substantially undercut.

DFS attempts to justify the Regulation by listing several attributes of producer compensation, such as the lack of compensation without a sale, and commissions proportional to the amount of the premium, which they purport can potentially interfere with the objectivity of the producer. Appellant's Brief p. 18-21. Nevertheless, none of this information would be surprising to an ordinary prudent person. No rational consumer expects a producer to be paid more for selling less, or that commissions will be higher for a cheaper product. Furthermore, producers are required to disclose their compensation at the request of the customer. 11 N.Y.C.R.R. § 30.

In its Appellant's Brief p. 20-21, DFS suggests that it regularly observed instances of producers: (1) selling unaffordable policies to low-wealth consumers; (2) selling policies with terms contrary to the consumer's stated preferences as recorded by the producer, or incompatible with the purpose for which the consumer is buying the policy; and (3) encouraging consumers to cancel their existing contracts and purchase new products that provide inferior benefits, apparently in an effort to generate new commissions. We are unaware of any and have located no specific examples to analyze the merit of these claims. However, taken individually, none of these generic and overbroad examples reflect instances where the Regulation would have necessarily aided the consumer.

The first example is the prototypical consumer who cannot afford a luxury car but buys it anyway. There is no regulation possible that can prevent a consumer from buying something that he cannot afford. Certainly, there is no way for any regulatory agency to rationally prevent a producer from selling a product that will pay the purchaser's beneficiaries greater benefits. While there is the possibility that the expensive policy will lapse, there is also the possibility that the insured will die soon after the purchase. Thus, it is impossible for a producer to truly know what product is in the "best interest" of the customer without clairvoyance.

Second, those producers who sell an insurance or annuity contrary to a specific request of the customer would not comply with the appropriate request for coverage according to New York's common law rules and expose the producer to potential liability. See Murphy v. Kuhn, 90 N.Y.2d 266, 270 (1997).

Third, in those instances where a producer encourages the cancellation of an existing contract for the purchase of a policy with inferior benefits, we raise two points. Initially, DFS claims that producers have engaged in instances where they have sold insurance that is too expensive for the consumer. If that is the case, it would seem based upon DFS's own reasoning that a subsequent producer should seek to secure a different policy that the customer can afford, which may have inferior benefits. Second, if the alleged benefits are inferior through an objective standard, and the producer made efforts to replace the existing policy via fraudulent means, DFS would already have the power to punish such producer. Thus, these examples of alleged producer conduct provide no justification for the Regulation.

DFS cites to a lengthy administrative record related to its alleged consideration of the issues, but DFS completely ignored the complaints of interested parties affected by the Regulation who warned against the fundamental flaws in a "best interest" standard of conduct. Indeed, in its zeal to support the Regulation, on page 30 of its Appellant's Brief, DFS misleads the Court regarding the alleged "recognition" by the Fifth Circuit decision in Chamber of Commerce v. U.S. Dept. of Labor, 885 F.3d 360, 379 (5th Cir. 2018) that the increased complexity of financial markets required DFS to act. In reality, the Fifth Circuit was extremely critical of the federal version of the "fiduciary rule" and the "best interest" standard. Otherwise, it would have served no purpose for the Court to note, at length, the costs and market consequences. Id. at 366, 368.

Yet, despite the decision striking down the federal fiduciary rule, and the fact that the Regulation was explicitly based on the federal rule, DFS decided to proceed with the Regulation and suggests that the Chamber of Commerce decision supports its administrative action. Far from supporting Congressional or regulatory action, the Fifth Circuit stated:

> Moreover, DOL's principal policy concern about the lack of fiduciary safeguards in Title II was present when the statute was enacted, but Congress chose not to require advisers to individual retirement plans to bear the duties of loyalty and prudence required of Title I ERISA plan fiduciaries. That times have changed, the financial market has become more complex, and IRA accounts have assumed enormous importance are arguments for Congress to make adjustments in the law, or for other appropriate federal or state regulators to act within their authority. A perceived "need" does not empower DOL to craft de facto statutory amendments or to act beyond its expressly defined authority.

Id. at 378-79. In other words, the extreme action undertaken by the federal DOL was erroneous and its argument of "perceived 'need'" was improperly pursued regardless of any alleged changed circumstances. Further at page 30 of its brief, DFS uses ellipses to gloss over the reference to legislative action and the deference paid by the Fifth Circuit to the legislative body on such issues prior to the Court's discussion of any potential administrative action. DFS intentionally overlooks such deference as a shortcut to validate their "need" to act.

The evidence submitted below by insurance producers Gary Slavin and Stephen Testa is uncontradicted and explains many of the same concerns that are apparent through DFS's action, including confusion related to interpretation of its requirements, increased costs to customers, and a decrease in the availability of such products to lower and middle-income families. RA.5-19.

Stephen Testa, Chartered Property Casualty Underwriter and Associate in Risk Management, a producer with approximately 30 years of insurance experience, stated:

> The Regulation leaves unanswered what is the "best interest" of the customer and how it is judged. It is unclear whether I can sell products without any advice to the customer. Yet, if I do endeavor to provide advice and a recommendation, I am not sure whether I am expected to recommend a policy that saves a customer money in the short term, or whether I should recommend a policy that considers the consequences to beneficiaries of minimal coverage. There is no "right" answer from an insurance agent or broker, and it will be impossible for insurance agents and brokers to comply with the Regulation.

RA.17.

Similarly, Gary Slavin, Certified Insurance Counselor and Life Underwriter Training Council Fellow, also with three decades of insurance experience, stated:

> In my experience, no insurance agent or broker can evaluate every possible coverage available to the customer to determine what product is ultimately in the customer's best interest, even for someone with the level of knowledge of products from multiple states like me. There are literally thousands of options in the marketplace. Nevertheless, under the best interest standard, we would have to engage in the impossible task of trying to determine what coverage is best for that customer, and it is unclear whether the key factor will be cost, term, type, benefit, flexibility of conversion among other factors.

RA.7.

DFS did not reserve ambiguity to the language of the Regulation itself. The substantive costs, including the indirect costs of lost business, and increased litigation surrounding the Regulation, would have also been a substantial basis to annul the Regulation, but DFS chose to gloss over the costs and failed to provide any reasonable estimate. While DFS tried to portray the costs and consequences of Regulation 187 as nominal, the factual record suggests otherwise. During rulemaking, the American Council of Life Insurers and the Life Insurance Council of New York conducted a survey covering 63% of New York licensed companies showing an initial estimated aggregate cost of implementation to be $208M and continuing estimated annual cost of $66.6M. RA.764. That could be conservative. When the DOL Fiduciary Rule was proposed, the DOL estimated that "compliance costs imposed on the regulated parties might amount to $31.5 billion over ten years with a 'primary estimate' of $16.1 billion." RA.25.

In fact, as late as August 2018, DFS continued to be dismissive of others' cost estimates while failing to provide its own. A.307-313. For example, in its Assessment of Public Comments, DFS stated: "To address the comment that the Costs section of the RIS [Regulatory Impact Statement] should include studies that directly address the cost of the proposal, the commenter has asked the Department to measure the immeasurable." A.372 (emphasis added). Without any actual estimate of the costs, DFS definitively claimed "the Department strongly believes that preventing consumer harm far outweighs any administrative costs imposed by this regulation." A.372 (emphasis added).

The record is replete with examples of broader, far-reaching costs extending beyond administrative recordkeeping, which remain unaddressed and overlooked. See RA.5-19 (Affidavits of Gary Slavin and Steven Testa); RA.745 (Association for Advanced Life Underwriting ("AALU") letter stating: "added procedural hurdles will serve no consumer protection purpose, but will increase costs and compliance complexity, ultimately paid for by consumers."); RA.783 (U.S. Chamber of Commerce warning proposal will significantly increase the cost and complexity of purchasing life insurance for consumers); RA.599-716 (series of emails reflecting increase in costs). There is no evidence that DFS measured the costs to New York consumers due to the significant market changes, less product availability and reduced access to trusted advice. A.278-281; A.296-315; A.341-346.

DFS also failed to provide an estimate nor any explicit discussion of costs for those who only sell life insurance and not annuities. As one company warned: "The extension of best interest standard [sic] to life insurance is a sea change in insurance regulation and the current Proposed Amendment is virtually certain to increase costs, decrease life insurance protection obtained by consumers, and limit consumer access to advice and information… [i]t would be incorrect to presume that existing infrastructure, operations, and supervision and controls applicable to annuities easily and inexpensively can be modified for life insurance. To the contrary, it will be difficult and costly." RA.731 (USAA Life Insurance Company of New York letter). DFS has ignored these warnings, clinging to the view that any costs associated with this regulation are "minimal," and focusing only on those who sell both federally regulated annuities and life insurance. See A.279-280, A.297-298, A.342.

CONCLUSION

The Regulation dramatically alters the fundamental relationship between insurance producers and their customers yet was adopted with virtually no cost analysis of its wider impact on industry and consumers here in New York. It usurps powers of the legislature, contradicts existing law, and contains unworkable and unacceptably vague language and subjective standards, all in violation of proper regulatory rulemaking. For these reasons, the Appellate Division decision should be upheld, and the Regulation invalidated.

Dated: White Plains, New York
April 15, 2022

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: White Plains, New York
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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On April 15, 2022

deponent served the within: **Brief for Petitioners-Respondent**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on April 15, 2022

Mariana Braylovskiy

T. Heath

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