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

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OFOGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF OGENSBURG; ST. GREGORY THE
GREAT ROMAN CATHOLIC CHURCH SOCIETY OFAMHERST, N.Y; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y., TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

-- against –

ADRIENNE A. HARRIS, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, ET AL.,

Defendants-Respondents.

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* NEW YORK STATE CATHOLIC CONFERENCE

EDWARD T. MECHMANN, ESQ.
Counsel of Record
ALEXIS N. CARRA-TRACEY, ESQ.
Attorneys for Amicus Curiae New York State Catholic Conference
1011 First Avenue
New York, NY 10022
646-794-2807
emechmann@archny.org

Table of Contents

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, Codes and Regulations

Other Cited Authorities

INTRODUCTION

On November 1, 2021, the Supreme Court of the United States granted the Plaintiffs' petition for a writ of certiorari, vacated this court's judgment, and remanded the case for further consideration in light of *Fulton v. Philadelphia*, 141 S.Ct. 1868 (2021). The Supreme Court's directive necessarily involves a reassessment of the application of the guarantee of the free exercise of religion in Article I, Section 3 of the New York State Constitution.

Amicus Curiae New York State Catholic Conference submits this supplemental brief to specifically address the issue of the New York State Constitution's guarantee of free exercise of religion, which is crucial for religious individuals and organizations across the state. *Amicus* fully concurs with and incorporates by reference the arguments submitted by the Plaintiffs in their Supplemental Brief.

Specifically, Amicus proposes that the Court of Appeals' decision in *Catholic Charities v. Serio*, 7 N.Y.3d 510 (2006) has been effectively overruled by *Fulton*, and therefore does not apply to a law that burdens religion but is not neutral and generally applicable. As a result, the court's initial ruling in this case was erroneous.

In light of *Fulton*, the proper standard of review for the Free Exercise Clause of the New York State Constitution is strict scrutiny. Under that more stringent test, the Abortion Mandate should now be considered an unreasonable burden on the free exercise of religion.

ARGUMENT

I. *CATHOLIC CHARITIES v. SERIO* HAS BEEN EFFECTIVELY OVERRULED BY *FULTON v. CITY OF PHILADELPHIA*

The Court of Appeals' holding in *Catholic Charities* about the standard for free exercise rights under the New York State Constitution rested entirely on the Court's assessment of the federal constitutional standard, as defined by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

It is now clear that the reasoning and thus the holding in *Catholic Chari*ties has been effectively overruled by the Supreme Court in *Fulton*. Since this court cannot formally overrule *Catholic Charities*, it should treat that case as distinguishable and hence not applicable to this case.

The holding of *Catholic Charities* firmly rests on the Court of

Appeals' assessment of whether the statute in question was neutral and generally applicable. *See*, *e.g.*, *Catholic Charities*, 7 N.Y.3d at 526.

Indeed, the term "neutral" can be found sixteen times in the *Catholic Charities* opinion, and the term "generally applicable" (or its variants) can be found twelve times. *See*, *e.g.*, *Id.* at 522 ("The burden on plaintiffs' religious exercise is the incidental result of a "neutral law of general applicability," one requiring health insurance policies that include coverage for prescription drugs to include coverage for contraception."), *Id.* at 526 ("Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation…"), and *Id.* ("the principle stated by the United States Supreme Court in *Smith* – that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets – should be the usual, though not the invariable, rule.").

In evaluating the neutrality of the law in question, the Court of Appeals focused primarily on whether it improperly targeted religion. It gave little weight to the existence of exemptions. The Court seemed to treat the principles of general applicability and neutrality as if they

were interrelated, rather than distinct constitutional requirements. "The fact that some religious organizations – in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith – are exempt from the WHWA's provisions on contraception does not, as plaintiffs claim, demonstrate that these provisions are not neutral." *Id.* at 522.

But it is now clear that this was incorrect. In *Fulton* and its other recent Free Exercise Clause decisions, the Supreme Court has made clear that the existence of exemptions is the most important consideration in evaluating a law's constitutionality.

In fact, in *Fulton*, the Supreme Court did not even mention the need to show targeting of religion in order to negate a law's neutrality or general applicability. The issue of targeting was only addressed in Justice Alito's concurring opinion – and he criticized it extensively. *Fulton*, 141 S.Ct. at 1918-1921.

The Supreme Court instead repeatedly stressed that "a law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions". *Id.* at 1877. *See also Id.* ("Where the State

has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"), and *Id.* at 1879 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude —here, at the Commissioner's 'sole discretion.'").

The Supreme Court thus emphasized in *Fulton* and in its other recent federal free exercise cases that when there are discretionary exceptions in a law that lead to disparate treatment of religion, it is not generally applicable and is no longer to be evaluated under the *Smith* standard. *See*, *e.g.*, *Tandon v. Newsom*, 141 S.Ct. 1868 (2021) *and Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020).

This directly contradicts the Court of Appeals' reasoning in *Catholic Charities*. But it is completely consonant with the plain language and meaning of the Free Exercise Clause of the New York State Constitution, which makes clear that there can be no discrimination against religion or between religions: "The free exercise

and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind…" N.Y. Const. Art. I, § 3.

Catholic Charities has thus been effectively overruled by *Fulton* and does not control this case. This court should now re-evaluate the appropriate state constitutional standard. This has been done by our state courts before, where a ruling from the Supreme Court on federal grounds has led to an independent evaluation of the state constitutional standards. *See*, *e.g.*, *People v. P.J. Video*, 68 N.Y.2d 296 (1986).

This court should follow the approach of *Fulton* to give the Free Exercise Clause of the New York State Constitution its full effect.

II. THE ABORTION MANDATE IS NOT GENERALLY APPLICABLE

In light of *Fulton*, the initial inquiry is to determine if the Abortion Mandate is generally applicable. Plaintiffs' Supplemental Brief amply establishes that the Abortion Mandate fails this test. Their brief shows that the broad exceptions in the Abortion Mandate actively discriminate against religious employers who do not qualify for the narrow exemption.

We incorporate and fully support that argument, and would like to add a few points.

The Insurance Law in general gives the commissioner very broad discretion to set minimum standards for policies, and to approve modifications from the provisions that are required by statute to be included in policies. *See, e.g.,* Insurance Law §§ 3217(b)(4) and 3221(d)(1). In addition to the general discretion of the commissioner, the Abortion Mandate itself gives considerable discretion to evaluate whether a particular employer qualifies for the exemption. The criteria to be applied are subjective and require an individualized evaluation, for example, of an organization's "primary purpose". 11 NYCRR § 52.2(y). This in itself shows that the Abortion Mandate cannot be generally applicable.

But the lack of general applicability is made even more apparent because the regulation explicitly delegates to private parties – an employer's insurance carrier – full authority to decide whether to grant an exemption. 11 NYCRR § 52.16(o)(2). Neither the Insurance Law, nor the regulations, nor the guidance promulgated by the Department give any standards for the insurance carriers to use in deciding whether to

grant or deny exemptions. *See*, *e.g.*, New York State Department of Financial Services, Health Bureau, *Supplement No. 1 to Insurance Circular Letter No. 1* (January 21, 2017) (https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2017_s1_cl2003_01).

A law can hardly be generally applicable if the constitutional rights of religious employers are at the mercy of private parties who can act with virtually unlimited discretion.

In fact, the Abortion Mandate runs afoul of *Fulton*'s definition of general applicability in yet another way. The Supreme Court stated that "a law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton,* 141 S.Ct. at 1877. *See also Tandon*, 141 S.Ct. at 1296. As noted in the Plaintiff's Supplemental Brief, the state has exempted secular conduct, for example providing self-insured coverage that excludes abortion. At the same time, the Abortion Mandate simultaneously prohibits identical religious conduct, namely religious employers declining to provide coverage for elective abortions based on their faith.

The Abortion Mandate on its own terms only applies to employer-

provided commercial health insurance policies. There is no comparable mandate for employers who self-fund their health plans. But official government statistics show that 59.1% of private-sector employees in New York State who have coverage from their employer are not covered by commercial policies, but instead are enrolled in self-insured plans. United States Department of Labor, Agency for Healthcare Research and Quality, Medical Expenditure Panel Survey Insurance Component, Table II.B.2.b.(1) (2020) https://datatools.ahrq.gov/meps-ic (choose Table Series I, then choose "2020").

As such, the Abortion Mandate reaches far fewer than half of private sector employees. Indeed, the state has already conceded the limited scope of the Abortion Mandate, by arguing in their initial brief that the mandate could be easily avoided simply by offering employees self-insured coverage. Respondent's Brief at 19.

By allowing such a large population to be exempt, the Abortion Mandate improperly discriminates against religious employers who obtain health coverage through commercial policies. It is thus not generally applicable, and should be subject to strict scrutiny analysis.

III. THIS COURT SHOULD EVALUATE THE ABORTION MANDATE WITH STRICT SCRUTINY

The proper standard to apply to a law that is not neutral or generally applicable and that burdens religious belief, is not the extremely deferential test of *Catholic Charities*. In *Fulton*, the Supreme Court stressed that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Fulton*, 141 S.Ct. at 1878. Similarly, in *Tandon*, the Supreme Court applied the same underlying principle in which "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296.

In light of *Fulton*, then, the proper standard of review for the Abortion Mandate under the New York Constitution is strict scrutiny, especially given "the importance which our State attaches to the free exercise of religious beliefs." *Rivera v. Smith*, 63 N.Y.2d 501, 511 (1984). This is clear because the New York Free Exercise Clause is phrased in far more expansive language than the Federal Constitution.

The Court of Appeals has even gone so far as to specify that under the New York State Constitution, the free exercise of religion is a "preferred right," even if it is not "absolute." *Brown v. McGinnis*, 10 N.Y.2d 531, 535-536 (1962). In fact, New York courts have previously applied strict scrutiny to cases involving free exercise and liberty of conscience. For example, the Court of Appeals upheld the right of a hospital patient who expressly refused treatment that included blood transfusions on grounds that it violated her religious beliefs as a Jehovah's Witness. *Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990). The Court held that there was "no showing that the State had a superior interest in preventing her from exercising that right." *Id.* at 23. Likewise, the Court noted that when:

> the State requires her to undergo treatment which violates her religious beliefs it interferes with her fundamental constitutional rights. Before doing so, it must demonstrate under the 'strict scrutiny' test that the treatment pursues an unusually important or compelling goal and that permitting her to avoid the treatment will hinder the fulfillment of that goal. *Id.* at 234 (Simons, J. concurring).

Additionally, in *Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114 (1989), members of a religious group sought a religious exemption, so that their children would not be required to attend AIDS classes in

public school. The Court of Appeals explicitly stated that when deciding whether a claimant is entitled to a religious exemption, a two-step analysis based on strict scrutiny must be followed. The Court articulated that "First, a claimant must show a sincerely held religious belief that is burdened by a State requirement…[and] Second, the State must demonstrate that the requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal." *Id.* at 124. The Court even added that "while the spread of AIDS heightens and intensifies the public interest in education, it does not overrun other cherished values that may not require sacrifice." *Id.* at 130.

It is also important to emphasize the landmark case of *People v. Barber*, which clarified that the presumption of liberty in the Free Exercise Clause must be taken seriously:

> The Bill of Rights embodied in the Constitutions of the State and Nation is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual – rights which are part of our democratic traditions and which no government may invade. *People v. Barber*, 289 N.Y. 378, 385 (1943).

It is clear that the right to free exercise of religion is one of these

essential rights which no government may invade without exceptional justification. Furthermore, in "determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York," the New York State Court of Appeals need "not [be] bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States." *Id.* at 384. Instead, New York may afford such rights even greater protection than that afforded in the United States Constitution. This would also follow the trend in Supreme Court jurisprudence, reflected in *Fulton*, *Tandon*, etc., of greater protection for religious liberty than in *Smith*, and thus in *Catholic Charities*.

Furthermore, there are numerous instances where our courts have conducted strict scrutiny analysis for burdens on fundamental and enumerated rights under the New York Constitution. *See*, *e.g.*, *People v. Scott*, 79 N.Y.2d 474, 497 (1992) (search and seizure under Art. I, § 12); *People v. Harris*, 77 N.Y.2d 434 (1991) (criminal defendant's right to counsel under Art. I, § 6); *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521 (1988) (free speech and press under Art. I, § 8); *Rivers v. Katz*, 67 N.Y.2d 485 (1986) (substantive due process right to decline

medication under Article I, § 6); *and People v. Isaacson*, 44 N.Y.2d 511 (1978) (substantive due process right to be free of police brutality under Art. I, § 6). As a fundamental right specifically enumerated in the State Constitution, the free exercise of religion should be treated the same way as those rights listed above.

Consequently, the proper standard to apply to the Abortion Mandate, which burdens the free exercise of religion and is not a neutral or generally applicable law, is strict scrutiny, the highest standard of review.

IV. THE ABORTION MANDATE FAILS STRICT SCRUTINY ANALYSIS AND IS AN UNCONSTITUTIONAL BURDEN ON THE FREE EXERCISE OF RELIGION

The Abortion Mandate cannot satisfy a strict scrutiny standard, as thoroughly demonstrated in the Plaintiffs' Supplemental Brief. *Amicus* would like to add a few points to stress the importance of this issue to religious organizations that oppose abortion. Any test for the constitutionality of the Abortion Mandate must take into account just how grave this issue is to *Amicus* and those who share our pro-life beliefs.

One important point must first be emphasized. In this case, the Department has asserted its interest in applying the Abortion Mandate only at very high levels of generality. The state has merely asserted an interest "to provide women with better health care, ensure access to reproductive care, address the disproportionate impact on women in low-income families from a lack of access to reproductive health care, and foster equality between the sexes." Respondent's Brief at 20-21. The Department later added another purported interest, "to standardize coverage so that consumers can understand and make informed comparisons among policies." Certiorari Opposition at 15.

The Supreme Court has made clear that a more precise definition of the government interest is required when conducting a constitutional analysis. *See Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 430–432 (2006). This court should thus avoid relying on alleged state interests that are discussed at "an artificially high level of generality" or "interests expanded to some society-wide level of generality". *Does 1-3 v. Mills*, 142 S.Ct. 17, 20 (2021) (Gorsuch, dissenting). Indeed, "rather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific

exemptions to particular religious claimants." *Fulton*, 141 S.Ct. at 1881.

The question in this case, then, is not whether the state has a sufficient interest in providing insurance coverage for abortion in a very general sense. Rather, the question is whether the state has any legitimate interest in requiring religious employers to violate their deeply-held belief that abortion is a gravely immoral act that can never be tolerated or cooperated with.

The Department's asserted interests are so vague and general as to be virtually meaningless, and they could be said to support virtually any legislative or regulatory proposal. They certainly fail to support a scheme that impermissibly benefits some religions while discriminating against others. *See Fulton*, 141 S.Ct. at 1879. This violates the very terms of the Free Exercise Clause of the State Constitution, which specifically guarantees freedom of religion without "discrimination or preference". N.Y. Const. Article I, § 3. This grave intrusion on religious belief cannot be justified by such amorphous interests as the state proposes.

But its fault lies even deeper than that. *Amicus* would like to

reiterate, lest the point be overshadowed by all the secular legal arguments, how profoundly offensive this Abortion Mandate is to Catholics and other religious people who share our belief about the inherent dignity of every human life. The Mandate does not just incidentally burden our religious beliefs – it strikes to their very heart.

At the foundation of our faith is the belief that every human being, regardless of their age or state of development or condition, is made in the image and likeness of God and is thereby sacred. Through the Incarnation, Jesus Christ sanctified human nature to an even higher level and united Himself to every human being. Second Vatican Council, *Gaudium et Spes* (1965), 22.

Consequently, "the direct and voluntary killing of an innocent human being is always gravely immoral". John Paul II, *Evangelium Vitae* (1995), 57. Indeed, we firmly believe that "whoever attacks human life, in some way attacks God himself". *Id.* at 9.

As a result, we hold that abortion is an "infamous crime", the violent and unjust destruction of an innocent human being at a time when she is most vulnerable and thus most deserving of special protection and solicitude. *Gaudium et Spes* at 22. Legalizing this crime

is an egregious violation of the basic duty of the government to protect all those who are subject to its jurisdiction. It unjustly denies to an entire class the guarantee equal protection of the law. Forcing religious objectors to cooperate with this crime forces them to violate their solemn duty to obey God's law above all, even when it conflicts with the laws of the state. *Evangelium Vitae* at 68-74 (a section appropriately entitled, "We must obey God rather than men" (Acts 5:29): civil law and the moral law").

At the time the first Free Exercise Clause in the New York State Constitution was enacted, it was clearly understood that government could not intrude upon religious conscience in this way. As the principal drafter of the Federal Constitution wrote, "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785).

To force religious believers to cooperate with such grave moral evil is beyond the proper authority of the government. There can be no legitimate, much less a compelling, interest in doing so.

CONCLUSION

For the reasons set forth above, the court's initial ruling in this case was erroneous. In light of the Supreme Court's ruling in *Fulton*, the Court of Appeals' decision in *Catholic Charities* is not controlling. Instead, the proper standard for cases involving the Free Exercise Clause of the New York State Constitution should be strict scrutiny. The Abortion Mandate should therefore be found to be an unreasonable burden on the free exercise of religion.

Dated: New York, New York
December 20, 2021

Respectfully submitted,

By: Edward T. MacMann

Edward T. Mechmann, Esq.
Counsel of Record
Alexis N. Carra-Tracey, Esq.
Attorneys for Amicus Curiae
New York State Catholic Conference
1011 First Avenue
New York, NY 10022
646-794-2807
emechmann@archny.org

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division, 22 NYCRR § 1250.8(j), the foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3534.

Respectfully submitted,

By: Edward T. MacMann

Edward T. Mechmann, Esq.
Counsel of Record
Alexis N. Carra-Tracey, Esq.
Attorneys for Amicus Curiae New York State Catholic Conference
1011 First Avenue
New York, NY 10022
646-794-2807