To be Argued by: Victoria Dorfman
Time Requested: 30 minutes
Appellate Division – Third Department Case No. 529350

New York Supreme Court
Appellate Division—Third Department

ROMAN CATHOLIC DIOCESE OF ALBANY; ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBERG; ST. GREGORY THE GREAT CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION; RENEE MORGIEWICZ,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ERIC BAXTER
MARK RIENZI
DANIEL BLOMBERG
LORI WINDHAM
DANIEL D. BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.

MICHAEL L. COSTELLO
Counsel of Record
TOBIN AND DEMPF, LLP
515 BROADWAY
ALBANY, NY 12207

KELLY C. HOLT
JONES DAY
250 VESEY STREET
NEW YORK, NY 10281

NOEL J. FRANCISCO
VICTORIA DORFMAN
JONES DAY
51 LOUISIANA AVE., NW
WASHINGTON, D.C.

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

INTRODUCTION

In its Supplemental Response Brief (NYSCEF Doc. No. 49, "Supp. Resp."), the State largely ignores the history of this case and acts as if *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), simply confirmed pre-existing law and could not possibly alter the outcome or even the analysis here. That blinkered view is wrong. The United States Supreme Court's decision to grant the petition for certiorari filed by Plaintiffs-Appellants (the "Religious Objectors"), vacate this Court's judgment, and remand for this Court to reconsider its decision in light of *Fulton* is a straightforward recognition that the Free Exercise landscape has changed since this Court issued its first decision in this case.

In particular, *Fulton* and the United States Supreme Court's other recent Free Exercise decisions establish beyond any doubt that a law must satisfy strict scrutiny if it is not "generally applicable," regardless of whether the law is otherwise "neutral" toward religion. That rule cannot be reconciled with the New York Court of Appeals' earlier decision in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), which is therefore no longer controlling. And *Fulton*'s rule triggers strict scrutiny here, because the Abortion Mandate is riddled with exemptions that undermine its general applicability. First and dispositively, the Abortion Mandate's narrow religious exemption itself requires application of strict scrutiny. The State cannot avoid this result by asserting that the Abortion

Mandate "favors" religion. Not only is this the wrong question under *Fulton*, but even earlier United States Supreme Court rulings make clear that laws favoring some religious groups over others demand strict scrutiny. There is no safe harbor for governments picking religious winners and losers. *See Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny."). And although the existing religious exemption is alone sufficient to trigger strict scrutiny, the Abortion Mandate's numerous secular exemptions also independently trigger strict scrutiny because they render the law not generally applicable.

For all of these reasons, the Abortion Mandate must be evaluated under strict scrutiny. The State cannot clear that high bar, and in fact does not even attempt the leap. Thus, the Abortion Mandate violates the First Amendment.

ARGUMENT

I. *SERIO* CANNOT BE RECONCILED WITH *FULTON* AND IS NO LONGER CONTROLLING.

Prior to the remand, this Court held that this case was controlled by the Court of Appeals' holding in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). Although the State concedes that this Court is bound to follow decisions of the United States Supreme Court over irreconcilable decisions of the Court of Appeals, Supp. Resp. at 16–17, the State devotes much of its

response to contending that *Serio* still controls despite the intervening clarification of Free Exercise doctrine provided by *Fulton*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), and other recent decisions.[1] That argument rests on a fundamental misreading of *Serio*.

To begin, the State acknowledges that "[i]mplicit overruling occurs when there is an irreconcilable conflict between a Court of Appeals precedent and a subsequent Supreme Court decision, such as when . . . the Supreme Court rules in a way that is 'directly inconsistent' with the rationale on which the Court of Appeals precedent is based." Supp. Resp. at 18. To justify *Serio*'s continued vitality, then, the State must show that the Court of Appeals assessed whether to apply strict scrutiny using the same test later articulated by the United States Supreme Court, or at least using a rule consistent with the United States Supreme Court's test. It can do neither.

In particular, and as the Religious Objectors explained in their supplemental brief on remand (NYSCEF Doc. No. 40, "Obj. Supp."), *Serio* failed to analyze "general applicability" as an independent basis for applying strict scrutiny apart from "neutrality." Obj. Supp. at 21–23. The *Serio* Court contended that a "neutral

[1] *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *South Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021): *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021).

law of general applicability" may incidentally burden religion without triggering strict scrutiny, explaining that a law is "neutral" if it does not "'target [] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.'" *Serio*, 7 N.Y.3d at 522. It then held the law permissible as a neutral law of general applicability because "[r]eligious beliefs were not the 'target' of the [law at issue], and it was plainly not the law's 'object' to interfere with plaintiffs' or anyone's exercise of religion." *Id*. The law's admitted exemptions were deemed irrelevant under this analysis, as the Court concluded they did "*not* . . . demonstrate that [the Contraception Mandate] provisions are not 'neutral'" in the sense of "target[ing] religious beliefs as such." *Id*. (emphasis added). In short, *Serio* considered "neutral and generally applicable" as a single standard, satisfied whenever a law is not intended to target religion.

By contrast, *Fulton* and the United States Supreme Court's other recent precedents treat neutrality and general applicability as distinct standards that require separate analysis. *See, e.g.*, *Fulton*, 141 S. Ct. at 1877 (evaluating law under general applicability while declining to consider neutrality). Even where the law is "neutral," then, exemptions remain central to the analysis because they undermine general applicability. *See id*.

The State responds to this irreconcilable conflict between *Serio* and *Fulton* by attempting to rewrite *Serio*. The State declares—without quoting any relevant analysis from *Serio*—that "the Court found the law to be one 'of general applicability' because it uniformly required health insurance policies covering prescription drugs to cover contraceptives." Supp. Resp. at 27. But as the State's own case makes clear, to determine whether *Serio* and *Fulton* can be reconciled, it is "important to examine closely the reasoning of the [*Serio*] Court, *as expressed in its decision*." *Torres v. City of New York*, 581 N.Y.S.2d 194, 198 (2d Dep't 1992) (emphasis added) (cited in Supp. Resp. at 17, 18, & 28), *abrogated on other grounds by Eriksen v. Long Island Lighting Co*. 653 N.Y.S.2d 670 (2d Dep't 1997). The *Serio* Court itself never justified its holding in way the State suggests, or otherwise indicated that it weighed whether the law was "generally applicable" apart from any issue of religious targeting, despite the law's exemption for certain religious entities and not others. *See infra* Part II.B. Because *Fulton* requires an analysis of any exemptions' effect on general applicability, not just neutrality, the two cases cannot be reconciled.

The cases cited by the State do not require a different result. In each of those cases, the "reasoning of the [Court of Appeals], as expressed in its decision," 581 N.Y.S.2d at 198, was entirely consistent with the analysis required by the United States Supreme Court precedent at issue. In *People v. Costello*, 101 A.D.2d 244

(3d Dep't 1984) (cited at Supp. Resp. at 18–19, 28), the appellant argued that the otherwise-controlling Court of Appeals decision in *People v. Mealer*, 57 N.Y.2d 214 (1982), was contrary to the United States Supreme Court's decision in *United States v. Henry*, 447 U.S. 264 (1980). But *Mealer* was decided two years after *Henry*, and actually cited *Henry* in its analysis of the relevant issue. *See Mealer*, 57 N.Y.2d at 218. Thus, there was no doubt that the Court of Appeals itself considered *Mealer* to be consistent with *Henry*, and the Third Department lacked the authority to second-guess that judgment.

In *Torres*, the Second Department analyzed *Butler*, a prior Court of Appeals decision holding that activity on a "graven" dock was subject to maritime jurisdiction. 581 N.Y.S.2d at 198–201 (cited at Supp. Resp. at 17–18, 28). Later United States Supreme Court cases held that piers were extensions of the land, such that activity on piers was not subject to maritime jurisdiction. *Id*. at 199–200. As the *Torres* court explained, however, "[t]he rule of maritime law pursuant to which piers and docks were to be considered as extensions of the land did not . . . take shape only after" *Butler*, but instead "had been established for many years" *Id*. at 200. Thus, "the *Butler* court's holding" had to "be viewed as a deliberate decision to create an exception to that general rule," and its reasoning for adopting that exception was entirely consistent with the reasoning of the later decisions

from the United States Supreme Court. *Id*. There was thus no conflict between the cases.

The same cannot be said here, where the Court of Appeals treated general applicability as coextensive with neutrality, only analyzed the law's "object" or "target," and never even considered that a law could lack general applicability based on exemptions if it was otherwise neutral. That approach to neutrality and general applicability is plainly inconsistent with *Fulton*, *Tandon*, and the Court's other recent cases, and no longer remains valid.

In short, to the extent *Serio* analyzed general applicability at all, it considered it to be the same as neutrality, an approach that is irreconcilable with the analysis required by *Fulton*. The only plausible alternative reading of *Serio* is that the Court simply considered general applicability undisputed and thus failed to analyze it—in which case *Serio* is still not binding precedent on the question of general applicability. *See, e.g.*, *Redding v. Gulf Oil Corp*., 330 N.Y.S.2d 158, 161 (2d Dep't 1972) (prior decision is not binding on issue that was "not raised or litigated" in the case). Either way, then, this Court's general applicability analysis is controlled by *Fulton*, not by *Serio*.

II. THE STATE RELIES ON AN UNDULY CONSTRAINED READING OF *FULTON* TO AVOID STRICT SCRUTINY BASED ON THE EXISTING RELIGIOUS EXEMPTION.

The State's attempt to render *Fulton* inconsequential does not end with its approach to *Serio*, as the State argues throughout its brief that *Fulton* worked no change in First Amendment law at all. *See, e.g.*, Supp. Resp. at 20 ("*Fulton* reaffirmed the well-settled standard . . .); *id*. at 22 ("*Fulton* also restated the principle . . ."). But if *Fulton* did no more than reiterate long-established precedent, as the State argues, there would have been no basis for a GVR. After all, GVR's are appropriate only "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). The United States Supreme Court's choice to GVR this case thus confirms, at a minimum, that the decision in *Fulton* sufficiently altered the Free Exercise landscape to create a "reasonable probability" that this case should be resolved differently. The State's minimization of *Fulton* therefore cannot be maintained—and the United States Supreme Court's unanimous holding in *Fulton* requires application of strict scrutiny here.

A. The existing religious exemption to the Abortion Mandate is "individualized" within the meaning of *Fulton*.

As *Fulton* explained, a law is not "generally applicable" if it contains "a mechanism for individualized exemptions," which are those that "'invite[]' the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877. Under this standard, the existing religious exemption plainly provides a mechanism for individualized exemptions: there is no dispute that the existing religious exemption involves consideration of the particular reasons for an individual organization's conduct.

Despite this, the State and its amicus argue that the existing scheme for religious exemptions is not "individualized" because it contains objective criteria rather than a "discretionary standard." Supp. Resp. at 25–26; Brief of *Amici Curiae* New York Civil Liberties Union and American Civil Liberties Union, NYSCEF Doc. No. 52 ("ACLU Br."), at 11. This argument starts from a false premise, since even a cursory review of the religious exemption's qualifying criteria reveals that they are far from objective. Consider, for example, the requirement that the organization "serves primarily persons who share the religious tenets of the entity." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). That standard embeds numerous discretionary judgments. An adjudicator must determine which individuals the organization "primarily" serves, which is far from objective where an organization routinely interacts with different individuals in

different capacities. Moreover, the adjudicator must discern which individuals sufficiently "share the religious tenets of the entity"—requiring the adjudicator to identify both a required level of belief and a required quantum of common beliefs. As the Supreme Court has noted, "determining whether a person is a 'co-religionist' will not always be easy." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2068 (2020). "Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Id*. at 2068–69. Or to put this question in concrete terms for this case: How many elderly residents must the Carmelite Sisters evict from their nursing homes to qualify for the exemption? All non-Christians? All non-Catholics?

Similar questions—and similar opportunities for discretion—are inextricably bound with the other criteria. After all, difficulties in identifying who qualifies as a co-religionist apply equally when determining whether the employer "primarily employs persons who share the religious tenets of the entity." And attempting to discern whether "inculcation of religious values is the purpose of the entity" raises its own set of discretionary judgment calls. What does it mean for a religious organization to have a "purpose" of inculcating "religious values"? Does "caring for orphans and widows" count? James 1:27.

None of these questions have "objective" answers—resolving them requires an individualized determination that leaves substantial room for discretion, not to mention an impermissible intrusion on matters of religious doctrine. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (government inquiry into internal religious doctrine is "not only unnecessary but also offensive"); *NLRB v. Cath. Bishop of Chi*., 440 U.S. 490, 502 (1979) (the "very process of inquiry" into religious questions can "impinge on rights guaranteed by the Religion Clauses"); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) ("It is well established . . . that courts should refrain from trolling through a person's or institution's religious beliefs."); *see also, e.g.*, R65–66 (religious autonomy allegations in Complaint); Religious Objectors' Third Dept. Br., NYSCEF Doc. No. 8, at 19 (religious autonomy briefing). The State's argument thus fails from the start.

But even if the religious exemption were somehow deemed "objective," the State and its amicus further err by conflating the concepts of "individualized" and "discretionary" exemptions. These two terms are not interchangeable, and by its plain terms, *Fulton* never required that a scheme of exemptions be "entirely discretionary" to trigger strict scrutiny. Instead, *Fulton* treated the discretionary aspect of the system at issue as an aggravating factor rather than a requirement for strict scrutiny: "The creation of a formal mechanism for granting exceptions

renders a policy not generally applicable . . . because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioner's 'sole discretion.'" *Fulton*, 141 S. Ct. 1879. Even seemingly "objective" exemptions can therefore be individualized exemptions that trigger strict scrutiny. *See Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (explaining that "individualized exemptions are available" where "employees can avoid the vaccine mandate if they produce a 'written statement' from a doctor or other care provider indicating that immunization 'may be' medically inadvisable"). The key question, then, is not whether exemptions are wholly discretionary, but whether they account for the *reasons* for the conduct—as the existing religious objection plainly does.

To justify their narrower reading of "individualized," the State and its amicus make precisely the same mistake as did the *Serio* court: conflating the issues of neutrality and general applicability. On the State's view, individualized exemptions matter only because they reflect a lack of neutrality in the law's application. But *Fulton* makes clear that a system of exemptions undermines general applicability regardless of whether the State or any state official targets or disfavors religion. Indeed, the *Fulton* Court not only declined to analyze the neutrality of the law at issue, but also rejected the government's argument that "the

availability of exceptions . . . is irrelevant because the Commissioner has never granted one." *Fulton*, 141 S. Ct. at 1879. As the Court explained, any exemptions that turn on "which reasons for not complying with the policy are worthy of solicitude" undermine general applicability, regardless of the law's neutrality. *Id*. The State's similar argument should be rejected here for the same reason.

B. The Abortion Mandate's lack of general applicability triggers strict scrutiny even if the regulation does not disfavor all religious conduct.

In a second attempt to introduce a distinction that cannot be squared with United States Supreme Court precedents, the State next seizes on a single sentence in *Fulton* using the word "secular" to argue that "exemptions that *accommodate* religion" cannot trigger strict scrutiny. While that might be true if the exemption were broad enough to extend to *all* religious groups, it cannot be correct where the exemption is provided selectively to some religious groups but not others. As the United States Supreme Court has made clear, distinctions *among* religious groups are a particularly pernicious form of Free Exercise violation, because "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). Indeed, "[t]h[e] constitutional

prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245.

Fulton and these cases make clear that the existing religious exemption requires application of strict scrutiny here. *Fulton* and *Tandon* establish that exemptions which undermine the State's asserted interest trigger strict scrutiny. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296 (requiring strict scrutiny where "comparable" activities are treated more favorably than religious activities, and explaining "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue"). *Larson* then makes clear that distinctions among religions are at least as suspect under the Free Exercise Clause as distinctions between religious and secular conduct. After *Fulton,* then, these cases together establish that a system of exemptions that favors some religious groups over others is at least as suspect as a system that favors secular conduct over religious conduct—and thus necessarily must be evaluated under strict scrutiny.

None of the post-*Fulton* cases cited by the State undermine this analysis. Two found that religious accommodations *did* trigger strict scrutiny, because the accommodations were not neutral or generally applicable. *Kane v. De Blasio*, 19 F.4th 152, 167–69 (2d Cir. 2021) (per curiam); *Dahl v. Tr. of W. Mich. Univ.*, 15 F.4th 728, 733–34 (6th Cir. 2021) (per curiam). Two, like *Fulton*, simply had no

occasion to address religious exemptions, as they involved only medical exemptions.[2] And the sole post-*Fulton* case cited by the State holding that a religious exemption did not trigger strict scrutiny involved a far broader religious exemption than the one at issue here. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) (noting that law exempted all places "principally used for religious purposes" from definition of public accommodations), *cert. granted in part*, No. 21-476, 2022 WL 515867 (U.S. Feb. 22, 2022). It is not at all clear *303 Creative* is correctly decided, as evidenced by the fact that the Supreme Court recently granted *certiorari* in it. But regardless, that exemption did not, like the Abortion Mandate's religious exemption, purport to define what purposes would qualify as "religious" or otherwise discriminate among religious denominations based on organization structure or service priorities. It therefore does not support the State's position here.

The State's amicus contends that the rationale of *Larson* is inapplicable because the exemption does not qualify as a "denominational preference[]." ACLU Br. at 18. According to the amicus, that is so because the exemption "applies to all religious employers, regardless of the religion or denomination," that satisfy the enumerated regulations. *Id*. But the United States Supreme Court

[2] *See, e.g., Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177–78 (9th Cir. 2021), *cert. denied*, No. 21A217, 2022 WL 498812 (Feb. 18, 2022); *Doe v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021), *injunction denied*, 142 S. Ct. 17 (2021).

rejected the same argument in *Larson*, where the government claimed the law at issue did not discriminate among religions but instead was "based upon secular criteria which may not identically affect all religious organizations." *Larson*, 456 U.S. at 246 n.23. The statute in that case distinguished between religious organizations that obtained at least 50 percent of their funding from their own membership versus those that solicited the majority of their funds from nonmembers. *Id*. at 231. That distinction was "the sort consistently and firmly deprecated" in precedent because it "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand." *Id*. at 246 & n.23.

Just the same is true here. Through its exemption criteria, New York has necessarily preferred certain types of religious entities: religious entities that do not, as part of their religious missions, employ and serve individuals of other faiths or of no faith, and whose missions extend far beyond the inculcation of religious beliefs. *Cf. Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 710 (2014) (recognizing that organizational decisions or any other "practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within

[the] definition" of the exercise of religion). The regulation thus plainly privileges religious entities of a certain type—those involving more formal worship and less service—in exactly the same way the law in *Larson* favored religious entities that were mostly member-funded. Indeed, just as in *Larson*, the criteria for qualifying for an exemption favor certain "well-established churches"—all else equal, a well-established denomination will find it far less difficult to primarily employ and serve individuals who share its beliefs than a denomination with very few members, just as a well-established religion will find it easier to solicit funding from its own membership. The religious exemption thus establishes precisely the same type of "denominational preference" declared suspect in *Larson*. The State cannot escape strict scrutiny under *Fulton* on the basis of such an inherently suspect exemption.

III. THE ABORTION MANDATE'S OTHER EXEMPTIONS INDEPENDENTLY REQUIRE APPLICATION OF STRICT SCRUTINY.

Because the existing religious exemption renders the Abortion Mandate not generally applicable, this Court need not consider any of the regulation's other exemptions before applying strict scrutiny. Contrary to the State's position, however, all of these exemptions are properly before this Court, and each requires the application of strict scrutiny. That is because the Abortion Mandate itself is substantially underinclusive, and the broader regulation of which the Abortion

Mandate is a part allows employers to exclude coverage for various procedures and conditions for a variety of secular reasons. These secular exemptions provide an independent basis for finding that the Abortion Mandate is not generally applicable.

A. All of the Abortion Mandate's exemptions are properly before this Court.

The State argues that this Court should consider only the existing religious exemption, rather than any secular exemptions, because the secular exemptions are not properly before this Court. *See* Supp. Resp. at 31. That is wrong. First, even the State "recognize[s]" that the GVR "can be read as a suggestion to consider the relevance of these [secular] exclusions." *Id*. at 37. Given that guidance from the United States Supreme Court, there is no basis for this Court to decline to consider all of the relevant exclusions. This is particularly clear given that all of the exclusions were properly raised to the United States Supreme Court prior to the GVR, and would be properly before that Court again if the case returns—"once a federal claim is properly presented, a party can make any argument [to the United States Supreme Court] in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010). The "federal claim" in this case remains a First Amendment claim based on the law's exemptions. Since this case was previously before this Court, the United States Supreme Court has made it crystal clear that

"government regulations . . . 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. The United States Supreme Court's GVR thus necessitates considering *all* of the exemptions.

In any event, even for questions of purely New York law, it is clearly established that an issue is "reviewable on appeal," even if not raised previously, so long as it is "'an issue of law which appeared upon the face of the record and could not have been avoided by [the opposing party] if brought to [its] attention at the proper time.'" *Highbridge Dev. BR, LLC v. Diamond Dev., LLC*, 888 N.Y.S.2d 654, 656 n.2 (3d Dep't 2009) (quoting *Matter of Vanderminden v. Tarantino*, 871 N.Y.S.2d 760 (3d Dep't 2009)). Parties can also appropriately adjust their arguments in light of any changes in the law during the pendency of the appeal. *See, e.g.*, *Matter of OnBank & Trust Co*., 90 N.Y.2d 725, 729–30 (1997) (addressing argument based on statutory revisions made during the pendency of the appeal).

The State's cited cases are not to the contrary. In both cases the appellate court declined to address an issue due to an inadequate record, not any bright-line rule regarding preservation. And neither case involved a circumstance—like the one here—where the law had changed since the issues were framed before the trial court. In *Sam v. Town of Rotterdam*, the court held that the plaintiffs could not

challenge the form of a submission for the first time on appeal because, "had plaintiffs timely challenged the form of LaMalfa's submission, there can be no question that a proper evidentiary showing could have been made by simply having LaMalfa renew his oath before a notary public." 248 A.D.2d 850, 852 (3d Dep't 1998). And in *Liere v. New York*, the plaintiff argued in the trial court only for discretionary transfer of venue, and was thus prohibited from arguing on appeal that venue was legally improper under two different entirely different statutes that would have required different evidence. 123 A.D.3d 1323, 1323–24 (3d Dep't 2014).

Accordingly, this Court can properly consider all of the exemptions to the Abortion Mandate, both because the Religious Objectors' arguments rest on a change in the law and because the State could not have avoided strict scrutiny based on the Abortion Mandate's exemptions regardless of when they were raised. The State does not even suggest that it could or would have presented any evidence to overcome the underinclusiveness of the Abortion Mandate in the trial court. And for the reasons explained below, the State's purported "offer of proof" with respect to the remaining secular exemptions only confirms that these exemptions trigger strict scrutiny as a matter of law. The issue is thus ripe for resolution before this Court.

B. The general underinclusiveness of the Abortion Mandate triggers strict scrutiny.

There can be no dispute that the Abortion Mandate is significantly underinclusive, as it fails to provide abortion coverage for many women in New York. Indeed, the State does not seriously dispute this point. While it notes that some women may obtain abortion coverage through other means, it ultimately argues that "to the extent women without health insurance coverage do not benefit from the regulation" it is because "the Superintendent lacks authority to assure coverage for those without health insurance." Supp. Resp. at 33. In effect, the State argues that underinclusiveness is irrelevant here because it is a result of the Superintendent's limited authority. But that position suggests a state can insulate its laws from review by providing different state officials with discrete spheres of authority, such that the overall coverage can be riddled with exceptions without any one official being responsible.

The State cites no authority for this proposition, which has no basis in law or logic, and would allow governments to circumvent the First Amendment through technicalities of bureaucratic organization. To the extent this argument has any coherent connection to First Amendment doctrine, it appears to rest—yet again—on a conflation of neutrality with general applicability. The fact that the Superintendent lacks authority to unilaterally resolve the gaps in the Abortion Mandate could conceivably support the Superintendent's "neutrality," insofar as

the Department could claim that it did not target religion by failing to address the Abortion Mandate's underinclusiveness. But as *Fulton* made clear, the exemptions are central to the general applicability analysis even if they are irrelevant to the neutrality analysis. *See also Tandon*, 141 S. Ct. at 1296 ("government regulations . . . trigger strict scrutiny under the Free Exercise Clause[] whenever they treat *any* comparable secular activity more favorably than religious exercise"). The Abortion Mandate lacks general applicability even if no official targeted religion at any time—and the relevant question is therefore how the State as a whole regulates in this area, not how any particular state official has behaved.

When examined through that lens, the State does not contend that the State, as a whole, lacks the authority or the ability to ensure that all women within the State have abortion coverage.[3] Nor does the State dispute that its failure to address abortion coverage for women who lack insurance or who obtain insurance from self-insured employers undermines its asserted interests in the Abortion Mandate. These substantial holes in the State's coverage thus require application of strict scrutiny. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63,

[3] The State invokes federal preemption to explain its exemption for self-insured plans, Supp. Resp. at 32, but does not contend that federal law would prevent the State from arranging for abortion coverage outside of the self-insured health coverage.

67 (2020) (per curiam) (applying strict scrutiny due to underinclusiveness in State's COVID-19 restrictions); *Tandon*, 141 S. Ct. at 1297 (same).

C. The Abortion Mandate's other secular exemptions also trigger strict scrutiny.

In addition to the underinclusiveness reflected by the Abortion Mandate's failure to actually ensure abortion coverage for many women in the State, the State's insurance coverage requirements also fail the general applicability test because they permit secular employers to exclude coverage for a variety of conditions and procedures based on secular justifications. *See* Obj. Supp. at 30–31. The State's amicus argues that these exemptions are "irrelevant" because they do not "allow[] employers to get out of covering abortions" or "excuse compliance with the Medically Necessary Abortion Regulation." ACLU Br. at 22–23. But the State itself has emphasized that the Abortion Mandate is not a standalone regulation, but is instead "implicit in the nonexclusion regulation" that generally "prohibits health insurance policies issued in the State from limiting or excluding coverage based on 'type of illness, accident, treatment or medical condition.'" Supp. Resp. at 33–34. Any exemptions to this nonexclusion regulation that undermine the State's interest in that regulation, then, necessarily require the State to justify its refusal to offer a comparable exclusion to the Religious Objectors. And in any event, contrary to the amicus's argument, the exemptions at issue need not involve precisely the same conduct as the requested religious exemption to

trigger strict scrutiny—the exemption need only be "comparable." *Tandon*, 141 S. Ct. at 1296.

Rather than adopting the same argument as its amicus, the State chooses not to address the secular exemptions on their merits at all. Instead, the State argues that consideration of these exemptions would require remand for further factual development. Supp. Resp. at 36–38. No remand is necessary, however. The State's own "offer of proof" confirms, rather than refutes, that the secular exemptions at issue are comparable, for purposes of *Fulton* and *Tandon*, to the exemptions the Religious Objectors seek. Indeed, the State has justified distinguishing the secular exemptions from the requested religious exemptions on three grounds, none of which require further evidentiary development. No evidence the State could present on any of these explanations would allow it to escape strict scrutiny here.

First, the State argues that "consumer understanding is not implicated by any of the permitted exclusions provided in 11 N.Y.C.R.R. § 52.16(c) because the regulation itself notifies consumers of the conditions or treatments that may be excluded from coverage." Cert. Opp. at 15–17. This position is self-defeating. Indeed, this argument appears to be an admission that the State could accommodate the Religious Objectors' concerns without any harm to the State's purported interest in consumer understanding by simply writing a new exclusion

into the regulation. The State has not suggested (and could not plausibly argue) that it could present evidence showing that such notice is effective for the secular exemptions but would be ineffective for an exemption addressing abortion. This argument thus weighs strongly in favor of the Religious Objectors, and cannot justify a remand for further evidence.

Second, the State contends that the secular exemptions do not cause confusion because they have historically been excluded from some health insurance plans. *See* Supp. Resp. at 37. But this is also defeated by the State's own briefing. While the State may well be able to provide evidence that the types of coverage involved in the secular exemptions have historically been excluded from some insurance policies, *the same is concededly true for abortion coverage in policies provided by religious employers*. Indeed, the entire justification for creating an explicit rule addressing abortion coverage, when the State contends the general nonexclusion rule already mandates this coverage, was to address the reality that religious employers were in fact excluding abortion coverage from their plans. *See, e.g.*, Supp. Resp. at 4–5 (citing R655). Evidence of the historical exclusion of the procedures and conditions addressed by the secular exemptions is thus irrelevant; if a precedent of non-coverage is adequate to alleviate consumer confusion for the secular exemptions, the same is true for the religious exemptions.

Third, the State contends that even if the secular exemptions would cause consumer confusion (and thus undermine the purpose of the nonexclusion regulation), the secular exemptions affect the State's *other* interests differently than the requested religious exemption would. In particular, the State argues that the secular exemptions serve "purposes" unrelated to consumer confusion that would not be served by the religious exemptions, while the religious exemption would reduce access to reproductive healthcare in a manner the secular exemptions do not. *See* Supp. Resp. at 37; Cert. Opp. at 15–17. To begin, it is unclear what evidence the State believes is necessary on these points—many of these differences are undisputed and apparent from the face of the regulations themselves. But in any event, while differences in this regard might be relevant to whether a State can *satisfy* strict scrutiny, they cannot allow a State to *avoid* strict scrutiny. As *Tandon* explained, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that *justifies the regulation at issue*." 141 S. Ct. at 1296 (emphasis added).

Regardless of the interests served by the *exemptions* at issue, the government's asserted interest in the *regulation* at issue is alleviating consumer confusion. *See, e.g.*, Supp. Resp. at 37 ("the concern of the nonexclusion regulation" is "consumer confusion"). Evidence that the secular exemptions are justified by the fact that "[s]ome treatments and conditions may be . . . cost

prohibitive" or "would not be readily amenable to cost-calculation" reflects only the government's choice to prioritize certain secular reasons for excluding coverage over religious reasons for excluding coverage. Cert. Opp. at 16. Such differences are no more grounds for avoiding strict scrutiny than were the differences between "retail stores" and religious exercise in *Tandon*. 141 S. Ct. at 1297.

Because the evidence the State seeks to provide is irrelevant to the general applicability inquiry as a matter of law, there is no basis for a remand. Instead, it is clear from the face of the record that the secular exemptions to the nonexclusion regulation require that it be evaluated under strict scrutiny.

IV. THE STATE DOES NOT DISPUTE THAT THE ABORTION MANDATE CANNOT SURVIVE STRICT SCRUTINY.

Although the State argues extensively that the Abortion Mandate should not be subject to strict scrutiny, its brief does not contain even a single sentence suggesting that the Abortion Mandate could *survive* strict scrutiny review. By failing to offer any briefing on the point, the State has waived any argument that the Abortion Mandate satisfies strict scrutiny. *See, e.g.*, *People v. Ladd*, 638 N.Y.S.2d 512, 514 n.1 (3d Dep't 1996) ("[T]he People failed to brief this issue on appeal, and, hence, it has been waived."), *aff'd*, 89 N.Y.2d 893 (1996); *Suarez v. State*, 876 N.Y.S.2d 195, 196 n.1 (3d Dep't 2009) (where a party "has failed to brief" an issue, "we deem any argument in that regard to be waived"). The State

thus effectively concedes that if the Abortion Mandate is not neutral and generally applicable, it violates the First Amendment, and is thus unenforceable.[4]

This apparent concession is not surprising. As the Religious Objectors have established, the bar for satisfying strict scrutiny is high and cannot be satisfied here, as the State cannot establish that the Abortion Mandate "further[s] 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" Obj. Supp. at 31–43 (quoting *Tandon*, 141 S. Ct. at 1298). "That standard 'is not watered down'; it 'really means what it says.'" *Tandon*, 141 S. Ct. at 1298 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Indeed, the United States Supreme Court has already held in materially identical circumstances that a regulation requiring employers to provide insurance coverage for certain forms of contraception that the employers regarded as abortifacients did not withstand scrutiny. *See Hobby Lobby*, 573 U.S. at 696–97, 728.

[4] The State offers a single sentence contending that the Religious Objectors "seek to expand the nature of the relief they seek" by "suggesting that even an expansion of the existing religious accommodation could be sufficient." Supp. Resp. at 38. The State offers no record citation for its claim that this would "expand the nature of the relief" at issue in this case. In fact, the Complaint sought a declaration that the Abortion Mandate is "inoperative and unenforceable as a matter of law" and that the State be enjoined from "instituting any administrative or judicial actions seeking enforcement of the subject NYSDFS Regulatory Abortion Mandates." R68-71 (Verified Complaint for Declaratory and Injunctive Relief); *see also* R128-132 (Amended Verified Complaint for Declaratory and Injunctive Relief) (requesting the same relief).

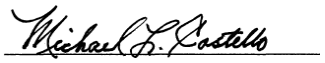
Moreover, the State's own briefing confirms that any possible interest in requiring the Religious Objectors to provide their employees with abortion coverage is marginal at best, as the employees have other options for obtaining abortion coverage. Supp. Resp. at 32–33. Those same alternatives confirm that the regulation is not narrowly tailored, as they highlight the countless ways in which the State could satisfy its interests while imposing far less of a burden on religious liberty. The availability of such alternatives, of course, is conclusive on the question of narrow tailoring. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296–97 ("[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest.").

CONCLUSION

For the reasons set forth herein and in the Religious Objectors' prior briefing, judgment should be entered declaring the Abortion Mandate unconstitutional under the United States Constitution.

Date: March 17, 2022

Respectfully submitted,



MICHAEL L. COSTELLO
Counsel of Record
TOBIN AND DEMPF, LLP
515 BROADWAY
ALBANY, NY 12207

NOEL J. FRANCISCO
VICTORIA DORFMAN
JONES DAY
51 LOUISIANA AVE., NW
WASHINGTON, D.C.
(202) 879-3939
NJFRANCISCO@JONESDAY.COM

ERIC BAXTER
MARK RIENZI
DANIEL BLOMBERG
LORI WINDHAM
DANIEL D. BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 PENNSYLVANIA AVE., NW
WASHINGTON, D.C.

KELLY C. HOLT
JONES DAY
250 VESEY STREET
NEW YORK, NY 10281

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 (on a word processor). A proportionally spaced, Times New Roman typeface was used, as follows:

Typeface: Times New Roman
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 6,757.