To be argued by:
Laura Etlinger
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

THE ROMAN CATHOLIC DIOCESES OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARIEIES OF THE DIOCESES OF ALBANY; CATHOLIC CHARITIES OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN 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.; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

- against-

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, ET AL.,

Defendant-Respondent.

No. 529350

BRIEF FOR RESPONDENTS

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THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE 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 ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, NY; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, NY; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

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MISCELLANEOUS

PRELIMINARY STATEMENT

Plaintiffs challenge a regulation of the Superintendent of the Department of Financial Services requiring that health insurance policies in New York provide coverage for medically necessary abortion services. The regulation makes explicit what is already implicit in the Department's regulations and specifically exempts "religious employers," a defined term, from the coverage requirement.

Plaintiffs are multiple churches, religious organizations, and others, some of whom may qualify for that exemption. They challenge the regulation under the religion, free-speech, expressive-association and equal-protection provisions of the federal and state constitutions, as well as certain state statutory provisions and the separation-of-powers doctrine. Supreme Court, Albany County (McNally, J.), granted summary judgment dismissing the complaint in large part on the basis of the decisions of the Court of Appeals and this Court in *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115 (3d Dep't), *aff'd,* 7 N.Y.3d 510 (2006), *rearg. denied,* 8 N.Y.3d 866, *cert. denied,* 552 U.S. 816 (2007).

As we demonstrate below, those decisions in fact dispose of all of plaintiffs' claims other than the separation-of-powers claim, a claim that was not raised in the *Catholic Charities* litigation. And plaintiffs' separation-of-powers claim was properly rejected by Supreme Court because the regulations do not invade the policymaking province of the Legislature. This Court should therefore affirm the judgment rendered below.

QUESTIONS PRESENTED

1. Whether the decisions of the Court of Appeals and this Court in the *Catholic Charities* litigation compel the dismissal of all of plaintiffs' claims but the separation-of-powers claim.

Supreme Court correctly answered that question in the affirmative.

2. Whether plaintiffs' separation-of-powers claim fails because the challenged regulation does not involve policy determinations but rather reflects a valid exercise of legislative authority expressly delegated to the Department of Financial Services to establish minimum standards for health insurance coverage designed to standardize and simplify required coverage to facilitate understanding and comparisons.

Supreme Court correctly answered that question in the affirmative.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Insurance Law § 3217(a) directs the Superintendent of Financial Services to issue regulations establishing "minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies." To that end, the Superintendent has long had a regulation in place—a regulation not challenged here—that prohibits health insurance policies issued in the State, with only certain exceptions, from limiting or excluding coverage based on "type of illness, accident, treatment or medical condition." 11 N.Y.C.R.R. § 52.16(c). None of the specified exceptions to the non-exclusion regulation includes any abortion services.

In addition, the Superintendent's regulations have long required that all basic[1] and major[2] medical health insurance policies issued in the

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[1] "Basic medical insurance is an insurance policy which provides coverage for services rendered by a physician or, in the case of article 43 corporations, a participating physician, to each covered person for sickness or injury for" specified medical services. 11 N.Y.C.R.R. § 52.6.

[2] "Major medical insurance is an insurance policy which provides coverage for each covered person, to a maximum of not less than $100,000; copayment by the covered person not to exceed 25 percent; a deductible stated on a per-person, per-family, per-illness, per-benefit

State include coverage for surgical services. 11 N.Y.C.R.R. §§ 52.6, 52.7. As a general principle, however, an insurer can deny coverage for a service or procedure that is *not* medically necessary, unless the policy expressly provided otherwise. *See* Insurance Law § 4900(a) (defining "adverse determination" as a determination that a service is not "medically necessary"); *id.* § 4904(a) (authorizing an insured to appeal adverse determinations); *id.* § 4904 (defining "utilization review" as a review to determine medical services are "medically necessary"). The regulations thus require health insurance policies to cover surgical procedures that *are* medically necessary. And when read in conjunction with the non-exclusion regulation described above, these regulations, predating the regulation challenged here, require coverage of all medically necessary surgical abortions.

As a corollary, while certain health insurance policies are not required to cover out-of-hospital physician care, nearly all policies do. And when they do, they are subject to the same non-exclusion regulation. Such policies thus cannot exclude coverage for out-of-hospital care that

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period, or per-year basis, or a combination of such bases" for specified services. 11 N.Y.C.R.R. § 52.7.

involves non-surgical abortions that are medically necessary. To do so would impermissibly "limit or exclude coverage by type of illness, accident, treatment or medical condition," in violation of longstanding New York law. *See* 11 N.Y.C.R.R. § 52.16(c). For like reason, where a health insurance policy includes coverage for the administration of medication at a physician's office or clinic, the health insurance policy cannot exclude coverage for the administration of drugs used in providing medically-necessary abortions.

And because a health insurance policy that fails to conform to the requirements of New York law is unenforceable to that extent, *see* Insurance Law § 3103(a), a health insurance policy that purported to exclude coverage for medically necessary abortion services would be enforceable by the insurer as if it contained no such exclusion.

B. Promulgation of the Medically Necessary Abortion Regulation

Regulations implementing the federal Affordable Care Act require each State to identify a "base-benchmark plan" to guide required coverage of "essential health benefits." 45 C.F.R. §§ 156.100(a), (b), 156.110(a). Accordingly, the Department of Financial Services in 2013

developed a standard health insurance policy template, referred to as "Model Language." (R141-160.) A policy issued in accordance with the Model Language covers all "medically necessary abortions," described as "therapeutic abortions including abortions in cases of rape, incest or fetal malformation."[3] (R158.)

In 2017, Insurance Regulation 62[4] was amended to make explicit what the existing regulation already implicitly required, namely that health insurance policies must provide coverage for medically necessary abortion services. The amendment explains:

> Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

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[3] A prior version of the Model Language purported to distinguish between "therapeutic abortions," non-therapeutic abortions in cases rape, incest, or fetal malformation, and "elective abortions." (R147-148.)

[4] Insurance Regulation 62 is codified as Part 52 of title 11 of the N.Y.C.R.R.

11 N.Y.C.R.R. § 52.1(p)(1). To make that requirement explicit, the regulation as amended now states that "[n]o policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary." 11 N.Y.C.R.R. § 52.16(o)(1). The regulation further provides that coverage for in-network medically necessary abortions is not subject to copayments, coinsurance, or annual deductibles, except for high deductible plans. *Id.*

The 2017 regulatory amendment also added an express exemption for religious employers. The exemption is identical to the statutory exemption from the requirement that health insurance policies providing prescription drug coverage include coverage for contraceptive drugs and devices. *See* Insurance Law §§ 3221(*l*)(16)(A)(1), 4303(cc)(5)(A). As in that context, a "religious employer" is an entity that satisfies four criteria: its purpose is to inculcate religious values, it primarily employs persons who share its religious tenets, it primarily serves persons who share those tenets, and it is a nonprofit organization, as described in the Internal

Revenue Code. 11 N.Y.C.R.R. § 52.2(y).[5] A health insurance plan issued to a "religious employer" can exclude coverage for abortion services if the insurer obtains an annual certificate from the religious employer requesting a contract without coverage for abortion services and issues a rider directly to the insured, at no cost to the insured or the employer, that provides coverage for medically necessary abortions. 11 N.Y.C.R.R. § 52.16(o)(2).

C. These Consolidated Proceedings

Plaintiffs are multiple Catholic dioceses, churches and religious-ministry organizations, as well as a single individual employee and a construction company. Together they commenced the underlying action in Supreme Court, Albany County, against the Superintendent of Financial Services[6] and their health insurers to invalidate the Model

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[5] As originally proposed, the exemption for employers was broader and included not only "religious employers" as defined by law but also "qualified religious organization employers" (not-for-profit organizations and closely-held for-profit entities that oppose medically necessary abortions on account of religious belief). (*See* R641-642.) In response to public comments, the Superintendent chose to use the definition of religious employer in existing law. (R651-652.)

[6] The proceeding named as defendant Maria Vullo, who was the Superintendent at the Department of Financial Services at the time. Linda A. Lacewell has since been appointed as the Superintendent, and

Language as violative of their federal and state constitutional and statutory rights. Their 2016 complaint—filed before the 2017 amendment to the Department's regulations—mirrored the complaint filed in 2002 in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), which challenged the requirement that health insurance policies in New York providing prescription drug coverage include coverage for prescription contraceptives. Plaintiffs' complaint asserted all the federal and state claims asserted in that earlier litigation, with nearly identical language,[7] only as applied to the coverage requirement for medically necessary abortions. (*Compare* R28-71 *with* R579-632.)

The Superintendent moved to dismiss the complaint for failure to state a claim. (R74-75.) Plaintiffs opposed, submitted an amended complaint (R79-132), and cross-moved for injunctive relief, supported by numerous affidavits from officials associated with the plaintiff organizations (R135-464). The court notified the parties that it was

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should thus be substituted for Superintendent Vullo pursuant to C.P.L.R. 1019.

[7] In each of these claims, most of the language of the complaint mirrors the complaint in *Catholic Charities*, with only the term "abortion" substituted for the term "contraceptives."

converting defendant's motion to dismiss to one for summary judgment. (R575.)

While the parties' motions were pending, the Superintendent promulgated the 2017 regulation described above making the required coverage for medically necessary abortion services explicit. Plaintiffs thereupon commenced a second action, this time to challenge the 2017 regulation. (R484-532.) Again, the complaint mirrored, in nearly identical language, the original complaint in *Catholic Charities of Diocese of Albany v. Serio*, except that it added an equal-protection claim and a claim that the 2017 regulation ran afoul of separation-of-powers principles.[8]

Supreme Court dismissed the defendant health insurers and consolidated the two actions. (R576-578.) The State defendants in the second action—the Superintendent and the Department of Financial Services—moved to dismiss the new complaint (R566-673), and plaintiffs

[8] In their complaint, plaintiffs did not allege facts demonstrating that they do not meet the regulatory exemption for "religious employers." (R484-533.) And, indeed, it would appear that at least some of the plaintiffs satisfy those criteria, in particular the plaintiff dioceses, churches, and religious order of nuns. Plaintiffs who meet the regulatory exemption would not be subject to the coverage requirement and would thus suffer no injury from the regulation.

cross-moved for summary judgment and a preliminary injunction (R674-816).

D. Supreme Court's Decision

Supreme Court considered the pending motions as seeking summary judgment, granted defendants summary judgment and dismissed the consolidated action. (R17-26.) The court explained that plaintiffs failed to meaningfully distinguish their federal and state religious, speech and association claims from those presented in *Catholic Charities*, claims the Court of Appeals expressly rejected. (R21-23.) The court reasoned that plaintiffs' separation-of-powers claim failed because, as required by the well-settled standard articulated in *Boreali v. Axelrod,* 71 N.Y.2d 1 (1987), the regulations were properly derived from statutory mandates. (R24.) And the Court rejected plaintiffs' remaining contentions—i.e., the state statutory claims—as lacking merit. (R26.)

This appeal followed.

ARGUMENT

POINT I

THE ANALYSIS AND RULINGS IN *CATHOLIC CHARITIES* CONTROL ALL OF PLAINTIFFS' CLAIMS BUT THE SEPARATION-OF-POWERS CLAIM

In the *Catholic Charities* litigation, the Court of Appeals and this Court considered—and rejected—claims analogous to all of plaintiffs' constitutional and statutory claims in this matter, but for their separation-of-powers claim. Thus, with the exception of plaintiffs' separation-of-powers claim, the rulings in the *Catholic Charities* litigation controls.

"[T]his Court is a court of precedent and is bound to follow the holding of the Court of Appeals." *Jiannaras v. Alfant*, 124 A.D.3d 582, 586 (2d Dep't 2015), *aff'd*, 27 N.Y.3d 349 (2016); *see also People v. Turner*, 5 N.Y.3d 476, 482 (2005) (recognizing that Court of Appeals precedent binds "all trial-level courts in the state"); *Porco v. Lifetime Entertainment Servs., LLC*, 147 A.D.3d 1253, 1254 (3d Dep't 2017) (recognizing that Court of Appeals precedent binds this Court). This Court is thus bound to apply the analysis and rulings of the Court of Appeals in *Catholic Charities*. This Court is also bound by its own analyses of the

constitutional and statutory claims that it considered in *Catholic Charities,* to the extent not addressed by the Court of Appeals. The "doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision." *People v. Bing*, 76 N.Y.2d 331, 337-38 (1990).

Plaintiffs seek to distinguish the *Catholic Charities* litigation on factual grounds. As we demonstrate below, however, the factual differences in these cases are immaterial to the relevant legal analyses. Thus, the *Catholic Charities* decisions control plaintiffs' parallel constitutional and statutory claims, and Supreme Court properly dismissed them.

A. The Medically Necessary Abortion Regulation Does Not Violate Plaintiff's Federal or State Free-Exercise Rights.

As the Court of Appeals held in *Catholic Charities,* an insurance coverage requirement designed to make broader health insurance coverage available to women and thereby to improve women's health and to eliminate disparities between men and women in the cost of health care is a valid and neutral law of general application, notwithstanding

an exemption for some religious institutions and not others. In *Catholic Charities*, the Court of Appeals went on to uphold over federal and state free-exercise challenges, the generally applicable requirement that, with the exception of policies issued for certain "religious employers," health insurance policies in New York cover contraceptives. The Court's analyses of those federal and state challenges controls plaintiffs' parallel challenges to the analogous requirement at issue here. Supreme Court thus properly dismissed those challenges as controlled by *Catholic Charities*.

Under the federal constitution, plaintiffs' religious beliefs do not excuse them from complying with a valid and neutral law of general application, even if the law prescribes conduct that their religion proscribes. *Catholic Charities,* 7 N.Y.3d at 521 (citing *Employment Division v. Smith,* 494 U.S. 872, 879 (1990)). A law that is "neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993). "[W]here a prohibition on the exercise of religion 'is not the object . . . but merely the

incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'" *Catholic Charities*, 7 N.Y.3d at 522 (quoting *Smith*, 494 U.S. at 878). Further, a neutral law of general applicability is valid if it rationally serves a legitimate government purpose. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 220 (2d Cir 2012); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (explaining that rational-basis review applies to such neutral laws).

Under New York's constitutional protection for the free exercise of religion, N.Y. Const. art. 1, § 3, the analysis is similar. Where the State does "not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation," the courts "must consider the interest advanced by the legislation that imposes the burden," and "'[t]he respective interests must be balanced to determine whether the incidental burdening is justified.'" *Catholic Charities*, 7 N.Y.3d at 525, 526 (quoting *La Rocca v. Lane*, 37 N.Y.2d 575, 583 (1975)). In performing this balancing test, however, the State need not demonstrate a compelling interest, substantial deference is due the Legislature, and the party challenging the legislation bears the burden

of showing that the legislation, as applied to that party, constitutes an unreasonable interference with religious freedom. *Id*. at 525, 526. Requiring the State to demonstrate a compelling interest would "give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government." *Id*. at 526. Accordingly, the *Smith* test—that free-exercise rights do not excuse compliance with neutral laws of general application—"should be the usual, though not the invariable, rule." *Id*.

Applying these principles to the coverage requirement before it—a requirement that all health insurance policies in New York, except those of "religious employers," provide coverage for contraceptives, the *Catholic Charities* Court upheld the requirement over plaintiffs' federal and state free-exercise challenges.

The requirement was neutral, the Court explained, because there was no evidence it was intended to target religious practice. Rather, the requirement was designed to make broader health insurance coverage available to women and, by so doing, to improve women's health and to eliminate disparities between men and women in the cost of health care. 7 N.Y.3d at 522. The requirement's neutrality was not undermined by

the fact that the requirement exempted only some religious organizations, namely those the met the four criteria necessary to qualify as a "religious employer" under the Insurance Law. *Id.* "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than to promote, freedom of religion." *Id.*

Moreover, the *Catholic Charities* plaintiffs failed to show that the burden placed on them by the contraceptive-coverage requirement, though "serious," outweighed the State's substantial interests in providing women with better health care and fostering equality between the sexes. 7 N.Y.3d at 527-28. The Court explained that the requirement does not "literally *compel*" plaintiffs to purchase the subject coverage, in violation of their religious beliefs, but rather requires only that policies that provide prescription drug coverage include contraceptive coverage. *Id.* at 527. And further weighing against the plaintiffs was the fact that "many"—and thus not all—of plaintiffs' employees did not share plaintiffs' religious beliefs. *Id.* The Court explained that by hiring nonbelievers, an employer must be "prepared to accept neutral

regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit." *Id*. at 528.

The coverage requirement at issue here is similarly a valid and neutral requirement of general applicability. Like the contraceptive coverage requirement at issue in *Catholic Charities*, it requires all health insurance policies issued in the State, except those issued to "religious employers," to provide coverage for "medically necessary" abortion services. The term "religious employer" has the same definition as that applicable to the contraceptive-coverage requirement. Thus, as in *Catholic Charities,* the fact that only certain religious entities are exempted from the requirement does not defeat the requirement's neutrality, and plaintiffs' contrary argument (Br. at 51-53) is mistaken. And as in *Catholic Charities,* plaintiffs here cannot show that the burden placed on them by the subject coverage requirement outweighs the State's substantial interests.

On plaintiffs' side of the scale, and although plaintiffs claim otherwise (Br. at 17, 19, 30), the requirement does not "literally *compel* them to purchase" medically necessary abortion coverage for their employees. *Catholic Charities,* 7 N.Y.3d at 527 (emphasis in original).

Indeed, many plaintiffs likely have two alternatives to purchasing such coverage, and all have at least one alternative.

First, plaintiffs can choose to self-fund health insurance coverage for their respective employees. An employer that does so is not subject to state regulation of health insurance policies. *See* 29 U.S.C. § 1144(a), (b)(2)(B) (ERISA preempts state law and directs that employer providing a self-funded plan is not considered to be an insurer for purposes of state law regulating insurance plans).

Second, many of the plaintiffs likely can forego the provision of health insurance coverage without violating federal law. In that case they could satisfy their stated moral obligation to provide just wages and benefits by choosing instead to compensate their employees for the value of such coverage, as the Court of Appeals said of the plaintiffs in *Catholic Charities*, 7 N.Y.3d at 527.

Plaintiffs claim (Br. at 29, 30, 34, 35, 36, 38) that they would face "draconian penalties" under the federal Affordable Care Act if they failed to provide health insurance for their employees. Even if true, plaintiffs' argument does nothing to undermine the first alternative set forth above.

But plaintiffs' submissions fail in any event to establish that they would face such penalties.

The federal Affordable Care Act requires only "large employers," namely those who employ 50 or more full-time employees, to provide a percentage of their employees with health insurance, and it subjects such employers to penalties for failing to do so. 26 U.S.C. § 4980H(a). Additionally, even for covered "large employers," the first 30 employees do not count toward the no-coverage penalty. *See id.* § 4980H(c)(2)(A), (D)(i)(I). Only three of the thirteen plaintiffs—the Roman Catholic Diocese of Albany, the Catholic Charities of Albany and the Teresian House Nursing Home—allege they have sufficient numbers of employees to potentially trigger the federal coverage requirement.[9] (R463.) None of the other plaintiffs provides any reason to think that federal law would require them to provide coverage. Indeed, some plaintiffs expressly aver

[9] Even that allegation is suspect. By its own count, the Roman Catholic Diocese of Albany and Catholic Charites of Albany satisfy the definition only when considered together, along with all of the parishes, schools, and cemeteries under the jurisdiction of the Albany Diocese. (R463.) And these plaintiffs do not allege that they are treated as a "single employer" under the Internal Revenue Code, and thus for purposes of the Affordable Care Act.

they have fewer than 50 employees, namely Episcopal Diocese of Albany (R411) and Murnane Building contractors (R445).

Further, and again as in *Catholic Charities,* the fact that not all of plaintiffs' employees necessarily share their employers' religious beliefs further weighs against the plaintiffs. Some of the plaintiffs specifically disclose that they hire employees regardless of religious background (R432.) Others provide no information on the subject at all. Indeed, only plaintiffs Roman Catholic Diocese of Albany and Catholic Charities of Albany allege that all of their employees share and support Catholic religious beliefs and teachings regarding abortion.[10] (R803.)

On the State's side of the scale, the interests are the same "substantial" interests that outweighed those of the plaintiffs in *Catholic Charities.* As the regulatory history makes clear, the regulation is intended 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

[10] In making this assertion, it is unclear whether the Roman Catholic Diocese of Albany is including all of the employees of all of the parishes, schools, and cemeteries under the Diocese's jurisdiction, which they included when tallying the number of employees for purposes of the Affordable Care Act insurance requirement.

foster equality between the sexes. (R652.) The medically necessary abortion regulation ensures the availability of coverage for abortion services when such services are *medically necessary*, 11 N.Y.C.R.R. § 52.16(o)(1), and thereby protects women's health generally, while more specifically ensuring access to medically necessary reproductive care, including access by those from low-income communities most affected by a lack of such access. The regulation also fosters equality between the sexes. As the U.S. Supreme Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se Pa. v. Casey,* 505 U.S. 833, 856 (1992); *see also id.* at 928 (access to abortion services promotes "constitutional guarantees of gender equality") (Blackmun, J., concurring in part and dissenting in part); *id.* at 912 (same) (Stevens, J., concurring in part and dissenting in part).

Thus, under the controlling precedent of *Catholic Charities*, the States' interests outweigh those of the plaintiffs and the medically necessary abortion regulation does not violate the plaintiffs' federal or state free-exercise rights.

B. The Medically Necessary Abortion Regulation Does Not Represent an Unconstitutional Establishment of Religion.

The Court of Appeals' decision in *Catholic Charities* similarly disposes of plaintiffs' federal and state claims that the exemption from the abortion-coverage requirement for some but not all religious entities violates the federal and state establishment principles. The subject exemption is precisely the same as the exemption available for certain religious entities from the contraceptives-coverage requirement. In *Catholic Charities,* the Court of Appeals rejected the claim that the exemption violated the Establishment Clause of the federal Constitution. While the Court of Appeals did not consider the parallel claim under the State's Preference Clause,[11] N.Y. Const. art. 1, § 3, such claims are analyzed the same as claims under the federal Establishment Clause, as plaintiffs effectively acknowledge. (*Compare* Br. at 30-34 *with* Br. at 54-55). The *Catholic Charities* decision therefore disposes of plaintiffs' state claim as well.

[11] The *Catholic Charities* plaintiffs abandoned that state claim in the Appellate Division. *See Catholic Charities,* 28 A.D.3d at 131 n.7.

Indeed, the Court of Appeals in *Catholic Charities* made short shrift of plaintiffs' establishment claim. It explained that the exemption for "religious employers" from contraceptives-coverage requirement did not distinguish between denominations. 7 N.Y.3d at 528-29. The Court explained further that reliance on *Larson v. Valente,* 456 U.S. 228 (1982), was misplaced precisely because that case involved "a statute designed to exempt from certain regulatory requirements all religious faiths except a disfavored one, the Unification Church." 7 N.Y.3d at 528. The exemption for "religious employers" from the contraceptives-coverage requirement, in contrast, distinguishes between religious organizations based on the nature of their activities, not on denomination, and thus does not implicate the prohibition on establishment. *Id.* at 529.

As the Court explained, a contrary ruling "would call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all." *Id.* But "legislative accommodation to religious believers is a longstanding practice completely consistent with First Amendment principles. A legislative decision not to extend an

accommodation to all kinds of religious organizations does not violate the Establishment Clause." *Id.*

Plaintiffs nonetheless seek to resurrect the very argument based on *Larson* that the *Catholic Charities* Court roundly rejected. (*See* Br. at 33.) They do so, even though the exemption at issue for "religious employers" is identical to the exemption at issue in *Catholic Charities;* as we explained, in the coverage requirement at issue here, the Department of Financial Services adopted the same exemption for "religious employers" as the one that applies to the contraceptives-coverage requirement. *See supra,* at 7-8. The Court of Appeals' decision in *Catholic Charities* is therefore fatal to plaintiffs' *Larson*-based argument here.

Plaintiffs also seek to resurrect an argument implicitly rejected by the Court of Appeals in *Catholic Charities* and explicitly rejected by this Court's decision in that litigation, namely that the exemption for religious employers fails to satisfy the three-part test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). (*See* Br. at 30-32, 54-55). But this Court's decision in *Catholic Charities* explained that the exemption satisfied that test because it has a secular purpose, its primary effect neither advances nor inhibits religion, and it does not foster excessive

entanglement with religion. 28 A.D.3d 115, 131-33 (3d Dep't 2006) (citing *Lemon,* 403 U.S. at 612-13).

To be sure, in *Catholic Charities,* no plaintiff had claimed, but been denied, the exemption for religious employers. Consequently, and as this Court explained, there was no occasion to consider whether, in an "as applied" context, enforcing the exemption could entail undue entanglement. 28 A.D.3d at 133. The same is true here, however; no plaintiff asserts that it sought, but was denied, the exemption for religious employers.

Further, even though that same exemption has been in effect since 2003 when it was made applicable to the contraceptives-coverage requirement, plaintiffs provide no evidence that, even as applied in that context, the exemption has prompted unduly entangling inquiries into their religious duties and practices. The single report by the Department of Financial Services on which they rely (*see* Br. at 32) provides no such evidence.

The subject report documents enforcement action taken against insurance companies for improperly accepting employer claims to the exemption for purposes of the contraceptives-coverage requirement. *See*

Department of Financial Services, Press Release, *DFS Takes Action Against Health Insurers for Violations of Insurance Law Related to Contraceptive Coverage* (May 3, 2019), *available at* https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1905031. But in the matters documented, it should have been plain to the insurers from the face of the employer claims that the exemptions were not warranted. The subject employers had represented themselves as "a wood floor refinisher, a café, a chimney cleaning service, a gastroenterologist, a tax consultant, and a construction company," respectively, *id.*, entities that clearly could not qualify as religious employers, because, among other things, there was no reason to think they were nonprofit organizations or that their purpose was to inculcate religious values. 11 N.Y.C.R.R. § 52.2(y). Their claims to the exemption thus did not warrant searching inquiries even by the insurers, let alone by the Department of Financial Services, and thus did not raise any entanglement concerns.

For all of these reasons, the limited exemption for religious employers does not violate establishment principles.

C. The Medically Necessary Abortion Regulation Does Not Implicate Plaintiffs' Free-Speech or Expressive-Association Rights.

In *Catholic Charities,* the plaintiffs claimed that, by requiring them to provide coverage, and fund that coverage, for contraceptives in violation of their religious beliefs, the coverage requirement violated their rights to free speech and expressive association. The Court of Appeals found those claims "insubstantial." 7 N.Y.3d at 523. It explained that the requirement does not interfere with an employer's right to communicate or to refrain from communicating any message at all; nor does the requirement compel an employer to associate, or prohibit an employer from associating, with anyone. And this Court expressly rejected the argument that the coverage requirement interfered with expressive conduct. *See* 28 A.D.3d at 131. The requirement therefore did not implicate plaintiffs' rights to free speech and expressive association. *Id.*

That ruling controls plaintiffs' free-speech and expressive-association claims here.[12] Plaintiffs similarly argue here that, by

[12] While plaintiffs assert their free-speech and expressive-association rights under both the federal and state constitutions they recognize that the analysis is similar (Br. at 35 and 55-57).

requiring them to provide coverage for medically necessary abortions, the coverage requirement violates their rights to free speech and expressive association. (*See* Br. at 34-37, 55-57.) *Catholic Charities* defeats that argument.

"[F]reedom of speech prohibits the government from telling people what they must say," not what they must do. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("*FAIR*"). The medically necessary abortion regulation does not tell plaintiffs what they must say or not say. It does not even tell plaintiffs what they must do. It merely addresses what *insurers* must include in health insurance policies issued in the State, and thus the contents of commercial health insurance coverage available to plaintiffs, if they choose to purchase such coverage for their employees. A requirement on insurers to include particular health insurance coverage in a policy does not interfere with plaintiffs' right to communicate (or not communicate) any message they choose. To the contrary, plaintiffs remain free to express their views about abortion and to counsel and advocate against the use of abortion services. *See Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 89 (Calif. 2004) (rejecting free speech claim because the

contraceptive coverage requirement "leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them").

To be sure, plaintiffs that choose to purchase commercial health insurance[13] must pay the premium the insurer has had approved for its policy, and payment of that premium will provide coverage to which they object. That fact did not change the analysis in *Catholic Charities,* however, and it does not change the analysis here. Like plaintiffs here (Br. at 55-56), the *Catholic Charities* plaintiffs sought to rely on cases involving compulsory funding of associational activities or speech. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (expressive-association rights implicated where non-union members forced to subsidize ideological and political activities with which they might disagree); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (same as to lawyers required to join state bar association). While the *Catholic Charities* courts did not expressly address these cases, they do not aid plaintiffs here. Unlike the forced membership dues in those cases, the

[13] As discussed *supra* at 19, plaintiffs have alternatives to purchasing commercial health insurance, including self-funding health insurance coverage.

payment of insurance premiums does not further any associative or expressive activities.

The coverage requirement at issue here also does not interfere with expressive conduct. Expressive conduct has been found where the nature of the conduct itself is intended to convey a message, such as the organization of a parade. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995). As the U.S. Supreme Court has explained, "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). But by analogy to this Court's reasoning in its *Catholic Charities* decision, given plaintiffs' well-known opposition to abortion, it is highly unlikely that their compliance with the regulation would be perceived as endorsing abortion services, rather than simply complying with a regulatory requirement under protest. *See* 28 A.D.3d at 131; *see also Matter of Gifford v. McCarthy*, 137 A.D.3d 30, 42 (3d Dep't 2016) (hosting same-sex wedding is not expressive conduct).

For like reason, the medically necessary abortion regulation does not implicate plaintiffs' expressive-association rights because it does not cause them to associate with any individual or entity contrary to their anti-abortion message.

For all of these reasons, plaintiffs' free-speech and expressive-association rights are not implicated by the medically necessary abortion regulations.

D. The Medically Necessary Abortion Regulation Does Not Violate Plaintiffs' Equal-Protection Rights

Although the plaintiffs in *Catholic Charities* did not assert an equal-protection claim, the analysis and rulings from this Court and the Court of Appeals in that case nonetheless require the rejection of plaintiffs' equal-protection claim.

It is well settled that a regulation will be upheld against an equal-protection challenge if any distinction it draws has a rational basis. *Schneider v. Sobol*, 76 N.Y.2d 309, 314 (1990). The only distinction drawn by the coverage requirement at issue here is the distinction between qualifying "religious employers" and other religious entities for purposes of the exemption to coverage requirement. Notwithstanding plaintiffs'

contrary argument (Br. at 57), the subject distinction is not a denominational classification. Indeed, the Court of Appeals in *Catholic Charities* expressly so stated. *See* 7 N.Y.3d at 528-29. Rather, the distinction turns on the basis of a religious organization's activities. *Id.* at 529. And that distinction has a rational basis.

In utilizing the Insurance Law's definition of "religious employer," the Department of Financial Services decided to exempt only the narrow class of religious entities already defined by the Legislature, so that more employees would obtain health insurance coverage for medically necessary abortion services automatically under their employer's general insurance policy. (R651-652 (explaining decision to narrow exemption in response to public comments).) If a broader exemption were used, more employees would receive coverage for abortion services only if they obtained a rider from the insurance company providing such coverage. Because there are administrative steps involved in obtaining a rider, coverage under a rider is not as seamless as coverage provided under the employer's plan, leading potentially to some confusion as to coverage. In addition, the classification rationally furthers the legitimate purpose of limiting the riders for that coverage that insurers must provide directly

to employees at no cost. To further these interests, the exemption rationally focuses on those religious entities that are formed to inculcate religious values, primarily hire and serve individuals that share its faith, and qualify for tax exempt status, essentially "houses of worship and similar entities" (R651). While exempting a broader pool of religious employers might have been reasonable as well, the government could rationally draw the line as it did.

Plaintiffs nonetheless argue (Br. at 57-58) that the definition of religious employer incidentally burdens those denominations that choose to operate human service agencies. Contrary to plaintiffs' apparent assertion (Br. at 58), however, there is no evidence of an intent to discriminate on the basis of denomination. Indeed, the *Catholic Charities* Court expressly held that a health insurance coverage requirement is neutral and of general application and, thus, does not target religious beliefs.[14] *Catholic Charities*, 7 N.Y.3d at 522. Accordingly, the requirement is subject to rational basis review, which it readily satisfies.

[14] For this reason, there is no merit to plaintiffs' unpreserved claim that the regulation is arbitrary and capricious because it discriminates on the basis of religion. While plaintiffs briefly assert this claim in their brief (Br. at 61), they asserted no such claim in their petition.

E. The Medically Necessary Abortion Regulation Is Not Unconstitutional Under a "Hybrid Rights" Theory

Plaintiffs cannot succeed on the so-called "hybrid rights" theory, among other reasons, because they assert no colorable constitutional claims.

The notion of a "hybrid rights" exception to the rule of *Employment Division v. Smith*—providing that valid and neutral laws of general application do not violate religious rights even if they incidentally burden those rights—derives from the *Smith* decision itself. There the U.S. Supreme Court explained in dictum that a neutral law of general application might be barred by the First Amendment if the regulated action "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." 494 U.S. at 881.

Even assuming the propriety of a hybrid rights exception, however, it would have no application here because, as we have demonstrated above, no constitutional rights are implicated. Plaintiffs' free-speech and expressive association claims are "insubstantial," *Catholic Charities*, 7 N.Y.3d at 523. And plaintiffs' equal-protection claim fails for the reasons

set forth above. The hybrid rights exception thus has no more force here than it had in the *Catholic Charities* litigation, where it was expressly rejected. *See* 7 N.Y. 3d at 523-24.

F. The Medically Necessary Abortion Regulation Does Not Violate Plaintiffs' Statutory Rights

While the Court of Appeals in *Catholic Charities* did not address state statutory claims under the New York Human Rights and Religious Corporation Laws, this Court did, and it rejected them. Its reasoning controls.

In *Catholic Charities,* the plaintiffs argued that the Human Rights Law requires the exemption of all religious entities from the reach of the contraceptives-coverage requirement. The subject law prohibits discrimination in employment, housing, education, and public accommodations, but contains its own exception for religious institutions:

> Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated

> by such organization to promote the religious principles for which it is established or maintained.

Executive Law § 296(11).

Rejecting plaintiffs' argument in that case, this Court explained that the Human Rights Law merely directs that nothing in "this section," i.e., § 296, shall be construed to bar a religious organization from limiting employment or taking action calculated to promote its religious principles. *Catholic Charities*, 28 A.D.3d at 136. The provision thus "merely excuses such employers from compliance with Executive Law § 296," as opposed to separate legal requirements. *Catholic Charities*, 28 A.D.3d at 137.

Plaintiffs nonetheless make the same argument here. (Br. at 59-60.) Under this Court's decision in *Catholic Charities,* plaintiffs' argument necessarily fails. Nothing in Executive Law § 296(11) precludes the State from imposing separate legal requirements on health insurance policies issued to religious organizations.

The *Catholic Charities* plaintiffs also argued that New York Religious Corporation Law §§ 5 and 26 "explicitly subordinated" the contraceptives-coverage requirement to the governance of religious denominations and their ecclesiastical governing bodies. Rejecting that

argument, this Court explained that the subject provisions merely define church governance principles, *id*. § 5, and protect the "times, nature, or order" of worship from interference under the Religious Corporation Law, *id.* § 26. There is, thus, "nothing in these provisions that purports to insulate plaintiffs from a generally applicable law." *Catholic Charities,* 28 A.D.3d at 137.

Once again, plaintiffs make the same argument here. (Br. at 60-61.) And once again, under this Court's decision in *Catholic Charities,* that argument necessarily fails. Indeed, addressing the contraceptives-coverage requirement, the Court of Appeals expressly stated that "church autonomy" was not undermined by the contraceptives-coverage requirement. 7 N.Y.3d at 524.

Accordingly, the medically necessary abortion regulations do not violate plaintiffs' rights under the Human Rights Law or Religious Corporation Law.

POINT II

THE SUPERINTENDENT OF FINANCIAL SERVICES ACTED WELL WITHIN HER STATUTORY AUTHORITY IN PROMULGATING A REGULATION THAT EXPLICITLY REQUIRES COVERAGE FOR MEDICALLY NECESSARY ABORTIONS

The Legislature has delegated to the Superintendent of Financial Services broad authority to promulgate regulations governing health insurance, as well as specific authority to promulgate regulations establishing minimum standards for health insurance policies that serve specified purposes. The Superintendent acted well within that authority in promulgating a regulation in 2017 that makes explicit what was already implicit in existing regulations—that all health insurance policies issued in the State must provide coverage for medically necessary abortion services. The subject regulation thus represents a valid exercise of the Superintendent's properly delegated legislative authority and does not run afoul of the separation-of-powers doctrine.

The separation-of-powers doctrine recognizes that the three branches of government are coordinate and coequal, and that each performs particular functions. *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018); *Matter of N.Y.C. C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 178 (2016).

The doctrine "commands that the legislature make the primary policy decisions but does not require that the agency be given rigid marching orders." *Matter of LeadingAge N.Y.*, 32 N.Y.3d at 260. Rather, "it is commonly the function of the administrative agency to fill in the details and interstices in a policy that may have been broadly articulated by the legislative branch." *Id.* at 263. To this end, "an agency can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes." *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 609 (2018) (quoting *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.,* 2 N.Y.3d 249, 254 (2004)). While agencies cannot resolve complex matters of broad social or public policy reserved to the Legislature, they "have flexibility in determining the best methods for pursuing objectives articulated by the legislature." *Matter of LeadingAge New York*, 32 N.Y.3d at 260.

When, as here, the Legislature has delegated authority to a state agency, "specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body . . . the sheer breadth of delegated

authority precludes a precise demarcation of the line beyond which the agency may not tread." *Matter of Consolidated Edison v. Public Serv. Comm'n*, 47 N.Y.2d 94, 102 (1979), *rev'd on other grounds,* 447 U.S. 530 (1980). Because the boundary between proper administrative rule-making and legislative policy-making is "difficult-to-define," there is no rigid test for determining whether an administrative agency has exceeded its statutory authority. *Boreali v. Axelrod,* 71 N.Y.2d 1, 11 (1987). Courts must engage in "'a realistic appraisal of the . . . situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment.'" *Matter of Niagara Mohawk Power Corp. v. Public Service Com.,* 69 N.Y.2d 365, 372 (1987) (*quoting Consolidated Edison*, 47 N.Y.2d at 102).

To this end, the *Boreali* Court identified four "coalescing circumstances" it found sufficient in that case to find a violation of the separation-of-powers doctrine: the agency (1) carved out exceptions that reflected the weighing of stated goals with competing social concerns; (2) did not merely fill in details of broad legislation, but enacted what amounted to a detailed code on a clean slate; (3) acted in an area in which the Legislature had tried and failed to reach agreement in the face of

public debate and vigorous lobbying; and (4) lacked special expertise or technical competence in the area it purported to regulate. *Boreali,* 71 N.Y.2d at 11-14. As the Court of Appeals has made clear, however, these circumstances are closely-related and overlapping; they thus should not be rigidly applied, but rather viewed together to determine whether they "signal that an agency has exceeded its authority." *Matter of LeadingAge N.Y.,* 32 N.Y.3d at 261.

Applying these principles here, the Superintendent exercised properly delegated authority to set minimum standards for coverage in accordance with legislative policies and guidelines, and a review of the *Boreali* factors does not suggest otherwise.

A. The Challenged Regulation Implements Authority Expressly Delegated to the Superintendent of Financial Services.

The Legislature has delegated broad authority to the Superintendent to promulgate regulations "effectuating any power, given to him under the provisions of this chapter to prescribe forms or otherwise make regulations," and "interpreting the provisions of this chapter." Insurance Law § 301(b), (c). The Legislature has directed the Superintendent to license insurers, *id*. § 1102, and to decide whether to

revoke or suspend an insurer's license under specified circumstances, *id.* § 1104. With respect to health insurance policies in particular, the Legislature has directed the Superintendent to determine whether filed policy forms conform to the law, and to approve policy forms before policies are issued for delivery in the State. *Id.* § 3201.

The Legislature has also delegated specific authority to the Superintendent to promulgate regulations that "establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies." *Id.* § 3217(a). And the Legislature has specified that, in promulgating minimum standards, the Superintendent shall ensure that such standards serve any or all the following purposes:

> (1) reasonable standardization and simplification of coverages to facilitate understanding and comparisons;
>
> (2) elimination of provisions which may be misleading or unreasonably confusing, in connection either with the purchase of such policies or contracts or with the settlement of claims;
>
> (3) elimination of deceptive practices in connection with the sale of such policies or contracts;
>
> (4) elimination of provisions which may be contrary to the health care needs of the public, as certified to the superintendent by the commissioner of health; and

> (5) elimination of coverages which are so limited in scope as to be of no substantial economic value to the holders.

Insurance Law § 3217(b).

Exercising these statutory grants of authority, the Superintendent in 1972 promulgated a general regulation—a regulation not challenged here—prohibiting the exclusion from coverage of any particular type of medically necessary treatment or condition, with specified exceptions, none of which is relevant here. 11 N.Y.C.R.R. § 52.16(c). The 1972 non-exclusion regulation thus established as a minimum standard that, but for the enumerated exceptions, health insurance policies cannot withhold coverage based on the type of medically necessary treatment or condition. By doing so, the regulation ensured "reasonable standardization and simplification of coverages" that facilitated "understanding and comparisons." among policies Insurance Law § 3217(b)(1). Indeed, in adopting that statutory language, the Legislature was concerned, among other things, with variations in exclusion provisions "which prevent the consumer from making an informed purchase." Bill Jacket to L.1971, c. 554, at 4 (Insurance Department memorandum).

In 2017, the Superintendent promulgated the regulation at issue here clarifying that provisions withholding coverage for medically necessary abortions are not permitted. The 2017 regulation thus made explicit what was already implicit in the 1972 regulation:

> Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

11 N.Y.C.R.R. § 52.1(p)(1).

In promulgating this regulation, the Superintendent did not, as plaintiffs claim (Br. 39-48), make a value judgment that insurance policies in the State should cover abortions, as a specific type of treatment. To the contrary, the Superintendent was merely making explicit what was already implicit in the non-exclusion rule. Because all policies issued in the State must provide coverage for medically necessary surgical services, *see* 11 N.Y.C.R.R. §§ 52.6, 52.7, the non-exclusion rule thus already provided that such policies must provide coverage for medical necessary surgical abortion services. Similarly, those health

insurance policies covering out-of-hospital physician care (as most do) are subject to the same non-exclusion regulation. Such policies thus similarly cannot exclude coverage for out-of-hospital abortions that are medically necessary. Under those pre-existing rules, then, an insurer could no more exclude coverage for medically necessary abortion services than it could for any other medically necessary surgery or medical treatment.

The Superintendent was thus not making a policy determination regarding a difficult social problem by choosing to cover a procedure over which personal views differ. She was merely establishing a minimum standard for the form, content and sale of health insurance coverage with a requirement that health insurance policies in the State would cover this procedure like any other medically necessary surgery or medical treatment. *See* Insurance Law § 3217(a). And by doing so, she was ensuring reasonable standardization and simplification of coverage, thereby facilitating an understanding of the coverage provided and simplifying the task of comparing coverages offered. *See* Insurance Law § 3217(b)(1).

Notably, plaintiffs do not challenge the non-exclusion rule, which was promulgated in 1972. Nor could they. A complaint seeking to have

the 1972 rule invalidated would be subject to dismissal as time barred. And plaintiffs would lack a meritorious challenge to the rule in any event.

The non-exclusion rule implements the legislative authority delegated to the Superintendent to promulgate minimum standards for the content of health insurance policies that serve a variety of purposes, including the purpose of providing reasonable standardization and simplification of coverages to facilitate understanding and comparisons. Insurance Law § 3217(b)(1). The rule "fill[s] in the details and interstices" of that broad policy objective. *See Matter of LeadingAge New York*, 32 N.Y.3d at 263. If insurers could pick and choose between any number of surgical or medical procedures for which they extended coverage, understanding and comparing the array of coverages offered would be an exceeding difficult task. The non-exclusion rule spares consumers from that task. Under the non-exclusion rule an insured can count on the fact that, with the exception of treatments and conditions expressly excepted from the rule, the insured's current insurance policy, and any other policy she might consider, will provide coverage for any surgery or medical treatment that may be necessary.

Additionally, the Legislature has taken no action to modify the 1972 non-exclusion rule. While legislative inaction can signal different things, the fact that the Legislature has taken no action to modify the non-exclusion rule since its promulgation in 1972 at the very least suggests it does not disapprove the rule, and may suggest it approves it.

Plaintiffs also do not appear to challenge on separation-of-powers grounds the Superintendent's decision to include in the 2017 regulation an exemption for religious employers. Any such challenge would fare no better, however, because that decision similarly reflects no improper legislative policymaking on the part of the Superintendent. To the contrary, the Legislature had already made the policy determination that "religious employers," as defined, should be exempt from the analogous requirement that those health insurance policies providing prescription drug coverage should cover prescription contraceptives. The Superintendent simply implemented the legislative policy determination reflected in that statutory exemption by adopting the same exemption for "religious employers," defined precisely the same way, for purposes of applying its non-exclusion rule to medically necessary surgical

procedures and medical treatments in the similarly sensitive context of abortion services.

Accordingly, in promulgating the medically necessary abortion regulation, the Superintendent did not engage in legislative policy-making.

B. The Coalescing Circumstances Identified in *Boreali v. Axelrod* Are Not Present Here.

Review of the four coalescing circumstances that proved determinative in *Boreali* supports this conclusion. Indeed, all four affirmatively support the validity of the coverage requirement at issue here.

1. The Superintendent did not carve out exceptions reflecting the weighing of stated goals with competing social concerns.

The Superintendent did not carve out exceptions that reflected the weighing of competing policy goals to resolve a social problem. To the contrary, the Superintendent simply made explicit what was already implicit in the preexisting non-exclusion regulation. As we have explained, that regulation established as a "minimum standard" that health insurance policies cannot withhold coverage based on the type of

medically necessary treatment or condition. *See* Insurance Law § 3217(a). By doing so, the regulation ensured "reasonable standardization and simplification of coverages to facilitate understanding and comparisons." Insurance Law § 3217(b)(1). And as we have further explained, the exemption for religious employers similarly did not involve the weighing of competing policy goals; the Superintendent simply adopted the religious employer exemption that the Legislature had previously promulgated for an analogous coverage requirement.

2. The Superintendent did not write on a "clean slate."

The Superintendent also did not write on a "clean slate." To the contrary, the 2017 coverage requirement at issue here simply makes explicit what was already implicit in the preexisting 1972 regulation prohibiting exclusion from coverage of specific treatments and conditions. And that non-exclusion regulation has been in effect for over thirty years, with no intervening action on the part of the Legislature to change it.

Courts have long recognized that an agency does not write on a clean slate where it has a longstanding history of regulating a particular area with little interference from the Legislature. Thus, in *Greater N.Y.*

Taxi Ass'n v. N.Y.C. Taxi & Limousine Commn., 25 N.Y.3d 600 (2015), the Court of Appeals reasoned the Taxi and Limousine Commission did not write on a "clean slate" in adopting regulations establishing the make and model of official New York City taxis, given its long history of regulating nearly every detail of the taxi industry. 25 N.Y.3d at 611; *see also Natl. Rest. Ass'n v. New York City Dept. of Health & Mental Hygiene*, 148 A.D.3d 169, 177 (1st Dep't 2017) (Health Board did not write on clean slate in enacting sodium warning rule, where it had always regulated restaurants as necessary to promote public health). Where the agency has adopted prior rules on the same subject without specific legislative guidance, the agency cannot be said to be writing on a clean slate. *See Natl. Rest. Assn.*, 148 A.D.3d at 177. Here, the Superintendent was not writing "on a clean slate in the sense that [she] has always regulated" the equal treatment of specific treatments and conditions. *See Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611.

The Superintendent has long prohibited insurance policies issued in the State from excluding specific kinds of medically necessary surgical services or medical treatments. The 2017 regulation did not change that prohibition, but rather make explicit what was already implicit. And

while the 2017 regulation introduced an exemption for religious employers, that exemption appropriately filled in the details of the abortion coverage requirement by following existing legislative guidelines. Here too, the Superintendent was not writing on a clean slate; she was following existing legislative policy.

3. Legislative bills that died in committee are insufficient to suggest that the Superintendent addressed a policy that the Legislature had actively debated but declined to adopt.

Plaintiffs rely heavily on a number of bills introduced over the years that would have specifically excluded or included coverage for abortion services. (*See* Br. at 40, 43, 44, 48-50.[15]) The subject bills provide no evidence that Superintendent regulated an issue as to which the

[15] Plaintiffs include in the record the text and history of seventeen bills. Two of these bills would have prohibited health insurance coverage for abortion services provided with public funds to state and municipal employees. (R684-687.) Fourteen bills would have required coverage of abortion services in either health insurance policies in general, or in publicly-funded insurance programs. (R694-755.) One bill would have required certain diagnostic testing of other conditions and does not appear to be on point. (R688-692.)

Legislature has actively debated but declined to take action, however, because they all died in committee.[16]

As the courts have explained, there is no indication that an issue "was the subject of vigorous debate," where "proposed legislation was sent to a committee, and no further action was taken." *Matter of Natl. Rest. Ass'n*, 148 A.D.3d at 178; *see Matter of LeadingAge New York*, 32 N.Y.3d at 265 (finding third *Boreali* factor supports validity of regulations where most of prior bills "never made it out of committee").

Indeed, the subject bills are even less significant here, because none was introduced after the Superintendent's promulgation of the 2017 regulation at issue here. *See Rent Stabilization Assn. v. Higgins*, 83 N.Y.2d 156, 170 (1993) (rejecting significance of bill introduction where no bills had been introduced after agency promulgated emergency regulations on the matter).

As the courts have explained, the Legislature can have any number of reasons for declining to act in a given area. In this case, the Legislature could have declined to act for the simple reason that the Superintendent's

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[16] The copy of the bills included in the record includes the bill history and demonstrates that each bill was referred to committee, and no further action was taken. (R684-687, 694-755.)

regulation had since 1972 prohibited the exclusion of medically necessary surgeries or medical treatments, the Legislature had no objection to that non-exclusion rule, and the 2017 regulation simply made explicit what was already implicit in that pre-existing regulatory regime. Given that pre-existing regime, the Legislature's repeated failure to enact legislation governing coverage of abortion services at most "evinces a legislative preference to yield to administrative expertise in filling in an interstice in the statutory scheme." *Matter of Med. Society v. Serio*, 100 N.Y.2d 854, 866 (2003).

Indeed, all but two of the sixteen proposed bills would have codified the requirement that medically necessary abortion services may not be excluded from coverage. (*See* R694-755; *cf.* R684-687.) Thus, legislative inaction on those bills may well suggest a recognition of the lack of any need for legislative action. As the Court of Appeals has reasoned, the existence of multiple unsuccessful bills on a subject that is within the agency's authority could indicate a legislative consensus that the law "already delegates to [the agency] the authority to" act on this subject matter. *Matter of N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 184; *see Matter of Natl. Rest. Ass'n*, 141 A.D.3d at 192 (finding that the Legislature's failure to

agree on the subject matter does not reflect "dispute or confusion as to the longstanding authority of the [agency]" to act in this area).

4. The challenged regulation reflects the Superintendent's special expertise and technical competence regarding public understanding of health insurance policies.

In Boreali, the Court of Appeals expressed concern that the agency had engaged in undue policymaking where it acted outside its area of special expertise or technical competence. The Superintendent did not do so here. To the contrary, the Superintendent exercised special expertise and technical competence regarding public understanding of complicated and often lengthy health insurance policies, first, in 1972, with the promulgation of the non-exclusion rule prohibiting, but for the enumerate exceptions, the exclusion from coverage of medically necessary surgeries and treatment. In promulgating that rule, the Superintendent reasonably determined that the rule would promote standardization and simplification of coverages and thereby facilitate understanding and comparisons. *See* Insurance Law § 3217(b)(1). The Superintendent then took the additional step in 2017 to make explicit what was already implicit in the 1972 regulatory regime—that the non-

exclusion rule applied to medically necessary abortion surgeries and treatments. That express regulation could only further public understanding of the pre-existing requirement.

The fourth and final *Boreali* circumstance thus also supports the validity of the coverage requirement at issue here.

* * * *

The medically necessary abortion regulation comports with the doctrine of separation of powers because it does not involve a policy determination. The Superintendent was merely making express an existing requirement for abortion services coverage, consistent with a longstanding and lawful delegation of rulemaking authority by the Legislature.

CONCLUSION

Judgment dismissing the complaint should be affirmed.

Dated: Albany, New York
December 23, 2019

Respectfully submitted,

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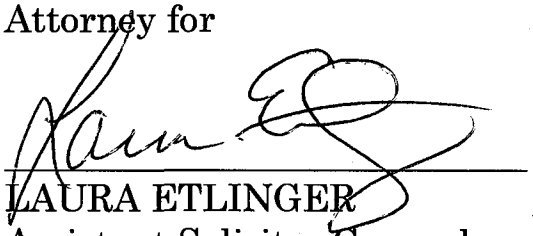
By: 
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