To be Argued by: Victoria Dorfman
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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 ALBANY; 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.

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INTRODUCTION

This First Amendment challenge to New York's requirement that employers fund abortions through their employee healthcare plans (the "Abortion Mandate"), is back before this Court on remand from the United States Supreme Court. In the initial run through the New York courts, both the trial court and this Court applied the Court of Appeals' earlier decision in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), to conclude that the mandate was "neutral" and "generally applicable" and thus not subject to strict scrutiny under the First Amendment's Free Exercise Clause. After the Court of Appeals declined review, the United States Supreme Court granted the petition for certiorari filed by Plaintiffs-Appellants (the "Religious Objectors"), vacated this Court's judgment, and remanded "for further consideration in light of *Fulton v. Philadelphia*, 593 U.S. ____ (2021)," with three Justices indicating that they would have granted plenary review. *Roman Catholic Diocese of Albany v. Emami*, No. 20-1501, 2021 WL 5043558, at *1 (Nov. 1, 2021).

The Abortion Mandate is irreconcilable with *Fulton* and the other recent Supreme Court decisions in this area. Those cases make clear that a law burdening the free exercise of religion is not "neutral" and "generally applicable" if it contains exemptions that undermine its stated purposes. As the *Fulton* Court explained, when a statute "creat[es] [] a formal mechanism for granting

exceptions," the policy cannot be considered "generally applicable" because it "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S. Ct. 1868, 1879 (2021). Likewise, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). In short, whenever a law permits such exceptions, it must be set aside unless it can satisfy strict scrutiny—the most demanding standard under the Constitution.

The New York regulatory command that employers fund abortions has multiple religious and secular exemptions, including for religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists. But if religious organizations embrace a broader religious mission, such as service to the poor, or if they employ or serve people regardless of their faith, their religious beliefs are no longer protected. As a result, this regulation imposes enormous burdens on the Religious Objectors and countless religious entities opposed to abortion as a matter of longstanding and deep-seated religious conviction. This Court's reasoning in its initial decision in this case cannot be reconciled with *Fulton*, *Tandon*, and the Supreme Court's other recent religious liberty decisions. In particular, the mandate's numerous exceptions mean that it is

not generally applicable. It thus can be applied to burden religious exercise only if the State satisfies strict scrutiny. The mandate plainly burdens the Religious Objectors' religious exercise, as it requires them to provide coverage for abortions—an act they consider a grave sin. The State imposes this heavy burden on religious organizations without any adequate justification, as the myriad existing exemptions to the mandate demonstrate. The result under recent United States Supreme Court precedent is clear: the Abortion Mandate cannot stand.

QUESTION PRESENTED

Whether New York's mandate, which burdens a subset of religious organizations by forcing them to cover abortions while allowing numerous exemptions for other religious and secular purposes, can be upheld as "neutral" and "generally applicable" under *Fulton v. Philadelphia*.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

New York regulates the content of employer health insurance plans both by statute and through regulations. New York statutory law includes various substantive requirements of group insurance plans and insurance providers. *See, e.g.,* N.Y. Ins. Law § 3221; *id*. § 4303. And Respondent, the Superintendent of the New York State Department of Financial Services, also regulates the content of group health insurance plans. *See* N.Y. Ins. Law § 3217 ("The superintendent shall issue such regulations he deems necessary or desirable to establish minimum

standards . . . for the form, content and sale of accident and health insurance policies.").

As a general matter, the Superintendent's regulations require that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition," but at the same time create a number of specified "except[ions]." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c). Care for many foot, vision, and dental conditions, for example, can be excluded from coverage. *Id*. § 52.16(c)(6), (9), (10). Other regulatory exceptions are more complicated, allowing a variety of conditions and treatments to be excluded to varying degrees, such as, for example, "mental [and] emotional disorders," "pregnancy, except to the extent coverage is required pursuant to" other provisions of New York law, and certain "cosmetic surgery." *Id*. § 52.16(c)(2), (3), (5).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule that would require group health insurance plans to cover "medically necessary abortions." R535. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibited "health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition," and "[n]one of the exceptions apply to medically necessary abortions." *Id*. The new regulation would "make[] explicit that group and blanket

insurance policies that provide hospital, surgical, or medical expense coverage . . . shall not exclude coverage for medically necessary abortions." *Id*.

Accordingly, the Superintendent proposed a new regulatory subsection, § 52.16(o), which would provide 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." R536.

The proposed regulation and the eventual published version do not define "medically necessary abortions." But in "model language" for health insurance contracts, the Superintendent stated that "medically necessary abortions" include at least "abortions in cases of rape, incest or fetal malformation." R19-20. And in responses to comments on the proposed rule, the Superintendent explained that "[m]edical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient." R653. The mandate thus appears to cover abortions of babies with Down Syndrome and other abnormalities.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent initially proposed to include a broad religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s] may exclude coverage for medically necessary abortions" if they followed certain procedures. R565. And "[q]ualified religious organization[s]"

would include any organization that "opposes medically necessary abortions on account of a firmly-held religious belief" and was either (i) a nonprofit that "holds itself out as a religious organization" or (ii) a closely held for-profit that "adopted a resolution . . . establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs." R563-64. That definition largely tracked the scope of federal religious liberty exemptions created after the United States Supreme Court's rulings in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014), and upheld by the Supreme Court in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). *See* 80 Fed. Reg. 41343–41347 (July 14, 2015); *see also* R650 (Superintendent "decided to use the current definition because it is more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new regulation ("Abortion Mandate"). R535. Between the time of proposal and the time of promulgation, however, the religious exemption was eviscerated. The Superintendent otherwise promulgated the Abortion Mandate as proposed but removed the exemption for all objecting religious organizations. R535-36. Instead, a narrower religious exemption was introduced that applies only to "[r]eligious employer[s]" "for which each of the following is true":

(1) The inculcation of religious values is the purpose of the entity.

> (2) The entity primarily employs persons who share the religious tenets of the entity.
> (3) The entity serves primarily persons who share the religious tenets of the entity.
> (4) The entity is a [tax-exempt] nonprofit organization [falling within certain narrow federal tax categories].

R535; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This is the same short-lived exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraception mandate litigation. *Compare* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original exemption), *with* 78 Fed. Reg. 39,870 (July 2, 2013) (later exemption).

The Superintendent abandoned the broader exemption after "request[s]" by "hundreds" of commenters. R651-52. In the Superintendent's view, "[n]either State nor Federal law require[d]" any exemption. R651. And the exemption she chose was "analogous to existing state law." R669. The Superintendent stated that she rejected the initially proposed religious exemption because "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of business corporations to assert religious beliefs." R652.

C. The Religious Objectors and Their Objections to the Mandate

The Religious Objectors are religious organizations with employee health plans, and one individual, all of which object to the Abortion Mandate on religious grounds. They include religious orders, churches, and service organizations. They employ from dozens to hundreds of people, often of varied religious backgrounds, both for propagating their faith and for charitable service in their communities.

For instance, the Teresian Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. R427-28. The "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being." R427. The Teresian House employs over 400 people, and it provides healthcare coverage to over 200 full-time employees because of its "moral" and "religious" obligations to "pay just wages." *Id*.

The other Religious Objectors are of a piece. The First Bible Baptist Church employs over "sixty people," has a congregation with "individuals of varied religious backgrounds," and engages in "human services outreach," including "youth ministry, adult ministry, death ministry, education ministry, athletic activities, daycare and pre-school and mission ministry." R432. The Sisterhood of St. Mary is an "Anglican/Episcopal Order" of religious sisters, who "live a traditional, contemplative expression of monastic life through a disciplined life of

prayer set within a simple agrarian lifestyle and active ministries in their local communities." R487. Other Religious Objectors, including two Catholic Dioceses (Albany and Ogdensburg), an Episcopal Diocese (Albany), and Our Savior's Lutheran Church, also engage in ministries and missions within New York or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. R486-90.

Some of the Religious Objectors are service organizations. For instance, three subdivisions of Catholic Charities (Albany, Ogdensburg, and Brooklyn) provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life," as part of the "charitable and social justice ministry" of the Catholic Church. R489. And DePaul Management Corporation is a non-profit organization, associated with the Catholic Diocese of Albany, that manages senior living facilities. R491.

All of these organizations are religiously opposed to abortion; no one has questioned the sincerity of those beliefs. The Catholic Church, for instance, teaches that abortion is an "unspeakable crime," because it ends the life of a "new human being." R497-98. The Church has taught and believes that "modern genetic science offers clear confirmation" that from the moment of conception a new living person exists. R597. The other Religious Objectors share similar beliefs. *See, e.g.,* R412 ("The Episcopal Diocese of Albany resolutely affirms the

sanctity of human life as a gift from God from conception until natural death"); R433 (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Religious Objectors "cannot religiously or morally accept or sanction." R499.

The Religious Objectors also share the belief that providing "fair, adequate and just employment benefits" is a "moral obligation." *Id*. And, in the absence of providing health insurance to their employees, they face the prospect of severe financial penalties. *See, e.g*., R200 (Roman Catholic Diocese of Albany); R428 (Teresian House); R433-34 (First Bible Baptist Church). Indeed, for just the calendar year 2021, the federal fines for failing to provide health insurance would be $2,700 per employee.[1] Just as one example, for the Teresian House, which provides health coverage to over 200 employees, R427, those fines would reach over half a million dollars per year.

Accordingly, with no other options, the Religious Objectors sued the Superintendent and New York State Department of Financial Services, seeking to enjoin the Abortion Mandate.

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[1] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (July 21, 2021), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

D. Procedural History

In their consolidated suit,[2] the Religious Objectors challenged the Abortion Mandate as a violation of numerous federal and state laws. As relevant here, they argued that the Abortion Mandate violates the Free Exercise Clause because it substantially burdens and discriminates among and against certain religious entities without justification. The Abortion Mandate was "promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption." R499. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." R521. The Religious Objectors also challenged the Abortion Mandate as interfering with religious autonomy under both Religion Clauses. R515; R523-26.

The trial court granted summary judgment in favor of Defendants-Respondents. R17-27. The trial court believed itself to be bound by a decision of the New York Court of Appeals that upheld a similar law respecting contraception

[2] The Religious Objectors filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of a "[m]odel [l]anguage" insurance policy, which covered "medically necessary abortions." Decision and Order, NYSCEF Doc. No. 36, at *2-3 (3d Dept. July 2, 2020). In 2017, after the Superintendent promulgated the Abortion Mandate, the Religious Objectors filed a second complaint that challenged that regulation directly. *Id*. The trial court consolidated the suits. *Id*. at *3-4. None of the courts to have considered this case have distinguished in relevant part between the two First Amendment challenges.

coverage, *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). In *Serio*, a group of religious entities had challenged a New York statute mandating that health insurance plans must include contraceptives. That statute contained a religious exemption materially identical to the exemption in the Abortion Mandate here. *Id*. at 519. The *Serio* court rejected both Free Exercise and Establishment Clause claims. With respect to the Free Exercise Clause, the court held that the mandate was "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not specifically "target religious beliefs as such." *Id*. at 522, 525 (alteration omitted). And it rejected an Establishment Clause claim based on church autonomy because the mandate "merely regulates one aspect of the relationship between plaintiffs and their employees." *Id*. at 524. In the trial court's view, *Serio* involved the "same" claims, and so it barred the Religious Objectors' challenges to the Abortion Mandate. R22-23.

This Court likewise believed itself to be bound by *Serio*. "The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases." Decision and Order, NYSCEF Doc. No. 36, at *6 (3d Dept. July 2, 2020). Accordingly, it affirmed the judgment in favor of the Defendants-Respondents. *Id*. at *11.

The New York Court of Appeals dismissed the appeal "upon the ground that

no substantial constitutional question is directly involved" and denied leave to appeal on November 25, 2020, with Judge Fahey dissenting. 36 N.Y.3d 927, 927 (2020).

The Religious Objectors filed a petition for certiorari to the United States Supreme Court on April 23, 2021. The Religious Objectors sought plenary review, but because the Supreme Court had already granted certiorari in *Fulton* to address similar issues regarding the application of the Free Exercise Clause, the Religious Objectors also asked in the alternative that the Court grant certiorari, vacate the judgment, and remand the case in light of the eventual *Fulton* decision. On November 1, 2021, the Court did just that, vacating the judgment and remanding for further consideration in light of *Fulton*. *See Roman Catholic Diocese of Albany v. Emami*, 595 U.S. ___, No. 20-1501, 2021 WL 5043558 (Nov. 1, 2021).

Pursuant to that remand order and this Court's November 4, 2021, scheduling order, the Religious Objectors submit this brief to address the effect of *Fulton* on this case.

SUMMARY OF ARGUMENT

When this case was previously before this Court, this Court rejected the Religious Objectors' challenge to the Abortion Mandate based on the conclusion that *Serio*, 7 N.Y.3d 510, had rejected a materially identical religious liberty claim. But *Serio*'s analysis and approach to the First Amendment has since been rejected

by the United States Supreme Court's decisions in *Fulton, Tandon,* and numerous other recent decisions by the United States Supreme Court. *See, e.g.*, *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). While *Serio* largely disclaimed the relevance of exceptions to a law in the First Amendment analysis, the United States Supreme Court has made clear that such exceptions are at the center of the inquiry. Indeed, under the Court's recent precedents, a law that contains *any* exemptions that undermine its stated purposes may be upheld only if the State carries its burden under strict scrutiny.

Here, under this new case law, the State must satisfy strict scrutiny if it wishes to apply the Abortion Mandate to religious entities like the Religious Objectors. While the State refuses to grant exemptions to the Religious Objectors despite their sincere religious objections to providing abortion coverage, the Abortion Mandate contains several major exemptions, each of which alone is sufficient to trigger strict-scrutiny review of the law. First, the Abortion Mandate contains a narrow religious exemption that covers certain religious organizations but not others—a form of religious discrimination and interference with religious autonomy that is in the heartland of the First Amendment's concern. Second, the State does not apply its Abortion Mandate to all employers—there are numerous

employers who are not required to pay for or otherwise cover the cost of abortions for any of their employees—undermining the State's purported interest in ensuring all women have the coverage at issue. Finally, the State's general medical coverage mandate contains exemptions for many types of medical services—belying the State's purported interest in standardizing coverage to aid consumers' understanding of their plans.

Each of these exceptions triggers strict scrutiny, pursuant to which the State bears the burden of proving that the Abortion Mandate is the least restrictive means of furthering a compelling governmental interest. The Abortion Mandate cannot survive such close review. The State's purported interests cannot justify the Abortion Mandate, which is not narrowly tailored to advance any compelling government interest. Indeed, the United States Supreme Court's decision in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), which held that a materially identical government mandate could not survive strict scrutiny, is directly controlling here. As *Hobby Lobby* makes clear and the existing religious exemption to the Abortion Mandate shows, the State has other options to pursue its stated interests without burdening religious exercise. Although the State may view the Religious Objectors' religious objections as unworthy of accommodation, the First Amendment nonetheless bars the State from burdening their religious

exercise without adequate justification. The Abortion Mandate thus cannot be applied to religious entities like the Religious Objectors.

ARGUMENT

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. In *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the United States Supreme Court explained that the starting point for analyzing religious liberty claims under the First Amendment is to determine whether a law is "neutral and generally applicable." If so, according to these precedents, the law "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi Babalu Aye*, 508 U.S. at 531. But if the law is not both neutral and generally applicable, it faces far more rigorous review: it can be applied to burden religious exercise only if the State can justify the regulation under strict scrutiny. *Id*. That strict standard requires that the State demonstrate that it has chosen "the least restrictive means of achieving some compelling state interest." *Thomas v. Rev. Bd. Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).

In the decades since *Smith* and *Lukumi Babalu Aye*, courts have remained divided about how to approach the threshold inquiry of whether a law burdening

religion is neutral and generally applicable. But the Supreme Court's recent precedents, including *Fulton*, *Tandon, Harvest Rock Church*, *South Bay Pentecostal*, *Gish*, and *Gateway City Church,* have resolved that a law cannot qualify as "neutral" and "generally applicable" if it permits exemptions that undermine its stated purpose while refusing to accommodate sincere religious objections. In light of that clarification, the Abortion Mandate is plainly not a neutral law of general applicability, and it therefore must be evaluated under strict scrutiny. And because the mandate cannot survive strict-scrutiny review, the law cannot be enforced against religious organizations like the Religious Objectors over their sincere religious objections.[3]

I. UNDER *FULTON*, THE ABORTION MANDATE IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY.

A. *Fulton* and other recent Supreme Court precedents make clear that a law is not "generally applicable" if it contains exceptions that undermine its purported goals.

In *Fulton v. City of Philadelphia*, the United States Supreme Court granted certiorari in part to determine whether to revisit the holding of *Employment Division v. Smith* that the government need not satisfy strict scrutiny if a neutral

[3] Before the United States Supreme Court, the Religious Objectors also argued that if the Abortion Mandate is neutral and generally applicable under *Smith*, the Court should overrule *Smith*. Recognizing that this Court lacks authority to reconsider *Smith*, the Religious Objectors do not make that argument here, but preserve it for review.

and generally applicable law incidentally burdens religion. *Fulton*, 141 S. Ct. at 1881. But the Court ultimately found it unnecessary to reach that question. As the Court explained, the challenged government action in *Fulton* would be "examined under the strictest scrutiny regardless of *Smith*," so the Court had "no occasion to reconsider that decision." *Id*. Instead, the Court reconfirmed the narrow scope of *Smith* as recently clarified in *Tandon*, *Harvest Rock Church*, *South Bay Pentecostal*, *Gish*, and *Gateway City Church*, emphasizing that *Smith* exempted far fewer laws from strict scrutiny than certain lower courts believed.

The challenged government action in *Fulton* was a City of Philadelphia policy regarding foster care placement. Catholic Social Services ("CSS"), a foster care agency in Philadelphia, pursues its religious mission by serving needy children. *Id*. at 1875. Private foster agencies like CSS work with the Philadelphia Department of Human Services to review, certify, train, and supervise prospective foster families. *Id*. Because CSS believes in the Catholic Church's traditional teachings regarding marriage and considers certifying foster families to be an endorsement of their relationships, CSS refused to certify unmarried couples or same-sex married couples. *Id*. More than 20 other private foster care agencies in the City, however, willingly certify these couples. *Id*. Nonetheless, in 2018, the City adopted a policy requiring CSS to begin certifying all couples. *Id*. When CSS refused, the City declined to renew its contract with CSS, and informed CSS

it would no longer refer children to the agency. *Id*. CSS challenged the City's policy on religious liberty grounds, but the district court and Third Circuit each upheld the City's policy, concluding that it was "a neutral and generally applicable policy under *Smith*." *Id*.

The Supreme Court reversed, holding both that the law was not "generally applicable" under *Smith* and that the law could not survive strict scrutiny. The Court's conclusion on general applicability was based wholly on the possibility that certain organizations could be granted exceptions to the policy requiring certification of couples who approached the agency. *Id*. at 1877-78. While not purporting to articulate an exhaustive list of evidence that would undermine "general applicability," the Court explained that the policy was not generally applicable for at least two reasons: First, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id*. at 1877. Second, "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. Either way, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide

which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1879.

Several of the cases the Court has recently considered in light of the COVID-19 pandemic have similarly confirmed the centrality of exceptions to the general applicability analysis. As articulated in one of these cases, *Tandon v. Newsom*, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. Moreover, "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." *Id*. That is, "[c]omparability is concerned with the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Id*. The Court has repeatedly confirmed these principles in addressing the Free Exercise Clause's interaction with COVID-19-related regulations, and has repeatedly reversed where lower courts failed to give the Free Exercise Clause its full due. *See, e.g.*, *Harvest Rock Church*, 141 S. Ct. at 889; *South Bay Pentecostal Church*, 141 S. Ct. at 716; *Gish*, 141 S. Ct. at 1290; *Gateway City Church*, 141 S. Ct. at 1460.

As *Fulton*, *Tandon*, and the Court's other recent Free Exercise jurisprudence make clear, then, *Smith* applies to a government policy—and such a policy can

escape strict scrutiny—only if the policy contains *no* exceptions that undermine its stated purpose. Once the State introduces exceptions, it necessarily begins "to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879. If the State decides that religious objections are not among the reasons "worthy of solicitude," it must justify that stance under strict scrutiny.

B. Because *Serio* cannot be reconciled with *Fulton*, it is no longer controlling.

Both the trial court and this Court granted summary judgment to the Defendants-Respondents on the basis that *Serio*, 7 N.Y.3d 522, foreclosed the Religious Objectors' claims. However, this Court can no longer rely on *Serio* to resolve this case. "State courts are bound by the decisions of the Supreme Court when reviewing Federal statutes or applying the Federal Constitution." *People v. P.J. Video, Inc*., 68 N.Y.2d 296, 301–02 (1986) (recognizing, after reversal and remand by United State Supreme Court, that prior New York Court of Appeals statement of federal law was overruled); *see also People ex rel Arcara v. Cloud Books, Inc*., 68 N.Y.2d 553, 557 (1986) (recognizing, after reversal and remand by the United States Supreme Court, that state courts "of course[] are bound by Supreme Court decisions defining and limiting Federal constitutional rights"). In this federal constitutional challenge, then, this Court is bound to follow *Fulton* and the United States Supreme Court's other recent decisions, not *Serio*, to the extent

the decisions are in conflict.

And the conflict here is manifest. In particular, the *Serio* Court concluded that a law was neutral and generally applicable under *Smith* as long as it did 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 therefore concluded that exemptions to a law are irrelevant to the free exercise analysis as long as the "neutral purpose of the challenged portions of the [law] . . . is not altered" by the law's exemptions. *Id*. In other words, so long as the law's exemptions did not reflect an improper purpose in enacting the law, the *Serio* Court concluded that the law could escape strict scrutiny.

That rationale, however, is irreconcilable with *Fulton*, *Tandon*, and the United States Supreme Court's other recent precedents, which make clear that the presence of exemptions alone triggers strict scrutiny regardless of the State's subjective purpose. To be sure, as that Court explained in *Fulton*, a law will trigger strict scrutiny if the "[g]overnment fails to act neutrally" because "it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-32 (2018)). And indeed, the religious challenger in *Fulton* was prepared to "point[] to evidence in the record that it believe[d] demonstrates that the City ha[d] transgressed this

neutrality standard." *Id*. But the Court declined to even consider that evidence, because it was unnecessary in that case. Rather, as the Court explained, it would be "more straightforward" to resolve the case "under the rubric of general applicability." *Id*. And under that rubric, the Court held, exemptions subject a law to strict scrutiny even if the law's purpose has nothing to do with religion. *Id*.

Serio cannot be reconciled with this aspect of *Fulton*'s holding. Following *Fulton*, regardless of whether the State subjectively intends to "target" religion, there is simply no basis for holding that the law is "generally applicable" where, as here, the presence of exemptions make clear that the law is not, in fact, "generally applicable." Rather, the Supreme Court's precedents make clear that such exemptions, standing alone, trigger strict scrutiny. Because *Serio* rejected precisely the analysis that was later embraced by the Supreme Court, *Serio* has been overruled, and no longer constitutes binding precedent. This Court must therefore analyze the Abortion Mandate according to the general applicability analysis articulated by *Fulton*.

C. Under the analysis prescribed by *Fulton*, the Abortion Mandate is not neutral and generally applicable.

As described above, any exemption that undermines the stated purposes of a law renders the law subject to strict scrutiny under *Fulton*. According to the State, the Abortion Mandate 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 foster equality between the sexes." Govt Third Dept. Br., NYSCEF Doc. No. 21, at *21-22 (citing R652). In its briefing in opposition to certiorari before the United States Supreme Court, the State added that the Abortion Mandate is also intended "to standardize coverage so that consumers can understand and make informed comparisons among policies." Cert. Opp. at 15. The Abortion Mandate, however, contains at least three categories of exemptions, all of which undermine these stated purposes of the law. The mandate therefore is not "generally applicable" under *Smith* and so is subject to strict-scrutiny review.

1. The Abortion Mandate discriminates between religious organizations.

First, and most obviously, the Abortion Mandate is not "generally applicable" because it contains an express exemption for some religious organizations but not others. That exemption applies only to organizations for which "the purpose of the entity" is "inculcation of religious values," and even then, only if the entity also "primarily employs" and "primarily serves persons who share the religious tenets of the entity." R535; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This exemption bears no relationship to any of the State's purported interests in the Abortion Mandate—and the State has never argued otherwise. Indeed, a religious entity's "purpose" or whom the entity "serves" bears no apparent link to its employees' need for abortion services, ability to

access such services without employer-sponsored coverage, or likely ability to compare healthcare plans that offer different scopes of coverage. To the contrary, the exemption reflects only the State's decision that the religious beliefs of certain entities are more "worthy of solicitude" than the religious beliefs of other entities. *Fulton*, 141 S. Ct. at 1879.

Rather than offering any justification for the limited religious exemptions based on the Abortion Mandate's stated purposes, the State has previously argued that religious accommodations are simply not the type of "exception" that is relevant to the general applicability inquiry. Cert. Opp. at 13-14 (arguing that religious "accommodation does not implicate a law's 'general applicability' because it does not disfavor religion"). But that analysis cannot be squared with *Fulton* or *Tandon*. As those cases make clear, the "general applicability" inquiry is distinct from the "neutrality" inquiry—and a law may therefore not be generally applicable even if it does not target or disfavor religion. *See Fulton*, 141 S. Ct. at 1877 (declining to consider evidence of religious targeting); *Tandon*, 141 S. Ct. at 1296 (State cannot escape strict scrutiny by "treat[ing] some comparable secular business or other activities as poorly as or even less favorably than the religious exercise at issue"). Moreover, as the Supreme Court has made explicit, because "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"—"[c]omparability is concerned with the risks various activities pose" to the government's stated interest, "not the reasons why people" engage in those activities. *Tandon*, 141 S. Ct. at 1296. A narrow religious exemption, therefore, is plainly an appropriate comparator for First Amendment purposes. That, presumably, is why the Supreme Court GVR'd this case for application of *Fulton.*

Indeed, favored treatment for *some* religious conduct is a particularly pernicious form of discrimination under the First Amendment: "[t]h[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson v. Valente*, 456 U.S. 228, 245–47 (1982). The Religion Clauses demand "the equal treatment of all religious faiths without discrimination or preference." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). The State therefore cannot privilege certain visions of religion over others. *See Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828, 834-35 (D.C. Cir. 2020) (rejecting the NLRB's attempts to define its jurisdiction over religious schools by "making determinations about . . . whether certain faculty members contribute to [the religious] mission," because the Board's proposed test "impermissibly sided with a particular view of religious functions"). By permitting certain entities that exercise their religion in the manner the State prefers—that is, those entities that generally restrict their

activities to interactions with others who already share their religion—the Abortion Mandate does exactly what the Religion Clauses most clearly forbid.

Moreover, in effect, the State will allow the religious to exercise their beliefs with respect to abortion only if they alter other aspects of their governance and doctrine. Such direct interference ignores the foundational holding that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The State therefore cannot intrude upon questions of "church doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969). Instead, religious organizations must enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060.[4]

[4] As these precedents make clear, and as the Religious Objectors have previously argued, *see* R515, R523-26, the Abortion Mandate fails based on religious autonomy principles (which are drawn from both the Free Exercise Clause and the Establishment Clause) as well as under Free Exercise principles. In light of the United States Supreme Court's remand order and the Third Department's scheduling order regarding briefing on remand, this brief focuses on the impact of *Fulton* on this case. That focus should not be construed as abandoning any arguments based on religious autonomy principles, which provide yet another reason for striking down the mandate.

These clear precedents belie the State's position that laws are "neutral" and "generally applicable" and remain outside the reach of strict scrutiny under *Smith* and *Fulton*, even where they contain not only religious exemptions as such, but ones requiring the State to engage in the "offensive" business of discriminating among religions based on their perceived level of religiosity. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). Indeed, the State asserts that its law is neutral and generally applicable even though the Abortion Mandate coerces religious entities to define their spiritual mission in a particular manner and to limit their interactions with people of diverse religious views. Such targeted religious exemptions for some religions and religious beliefs, but not others, plainly trigger strict scrutiny under *Fulton*.

2. The Abortion Mandate is significantly underinclusive, as it does not address coverage for many women in New York.

Although the targeted religious exemption contained in the Abortion Mandate is sufficient to trigger strict scrutiny on its own, the Abortion Mandate's underinclusiveness does not end there. Rather, by its terms, the Abortion Mandate ensures access to abortion coverage only for women whose employers choose to provide health insurance. But many other employers, both secular and religious, provide no medical insurance at all—and thus no coverage for the service identified in the Abortion Mandate. Likewise, the Abortion Mandate does not apply to employers who use a self-insured plan for their employees, as authorized

by 29 U.S.C. §§ 1001-1461 ("ERISA"). Finally, the Abortion Mandate likewise does nothing to ensure that women who are not employed at all receive access to abortion coverage.

These holes in the State's plan for providing abortion coverage cannot be reconciled with the State's purported interests in the Abortion Mandate. The State's purported interest here is in "ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families." R652. But the State cannot explain why its interests are less acute with respect to women whose employers opt not to offer any health insurance at all, whose employers self-insure, or who lack employers altogether. Nor does the State clarify why employees of self-insured organizations are less burdened by needing to "examine the fine print of potentially voluminous policy documentation to determine what is or is not covered," such that the State need not ensure that abortion coverage is somehow provided for such employees. Cert. Opp. at 15.

Similar holes in government plans to address the COVID-19 pandemic triggered strict scrutiny where those plans burdened religious exercise. Thus, for example, a New York order was not neutral or generally applicable where it capped attendance at religious services to ten persons while allowing hundreds of

persons to shop at nearby stores deemed "essential." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Similarly, a California rule disallowing more than three households from gathering together in a private home triggered strict scrutiny when applied over religious objections because California allowed individuals from far more households to gather in businesses. *Tandon*, 141 S. Ct. at 1297. In each case, the law's underinclusiveness meant it was not neutral and generally applicable.

In short, because the State leaves many women outside the coverage of the mandate, and because these holes in coverage plainly undermine the stated purposes of the law, the Abortion Mandate is not neutral and generally applicable. It is therefore subject to strict scrutiny for this reason as well.

3. The State allows employers to decline to provide coverage for a variety of other medical services.

Finally, the Abortion Mandate cannot be considered generally applicable under *Fulton* when the State permits employers to refuse coverage for a variety of other medical conditions. The underlying basis for the Abortion Mandate is the regulation requiring that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c). According to the Superintendent, the Abortion Mandate merely "ma[de] explicit" that this regulation requires coverage for medically necessary abortions. R535. But the broader regulation contains numerous exemptions:

many foot, vision, and dental conditions, for example, can be excluded from coverage. *Id*. § 52.16(c)(6), (9), (10). Although the State has offered a variety of justifications for these exemptions from mandated health coverage, none of these justifications align with the State's articulated interests in the Abortion Mandate itself. The State's purported interest in "standardiz[ing] coverage so that consumers can understand and make informed comparisons among policies," Cert. Opp. at 15, runs directly counter to all such exceptions, many of which themselves contain exceptions to the exceptions. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(c). Such justifications, then, reflect only the State's own decisions regarding "which reasons" for declining to provide coverage "are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879. These numerous comparable, secular exemptions from mandated health coverage require the State to satisfy strict scrutiny if it wishes to deny religious exemptions.

II. THE ABORTION MANDATE CANNOT WITHSTAND STRICT SCRUTINY

Because the Abortion Mandate is not neutral and generally applicable, and because it undisputedly burdens the Religious Objectors' religious exercise, the State bears the burden of proving that it satisfies strict scrutiny. *See Tandon*, 141 S. Ct. at 1296. As the United States Supreme Court has recently emphasized, this requires the State to prove that its law "further[s] 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Id.* at 1298 (quoting

Lukumi Babalu Aye, 508 U.S. at 546). "That standard 'is not watered down'; it 'really means what it says.'" *Id*. (quoting *Lukumi Babalu Aye*, 508 U.S. at 546). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 813 (2000). In short, it is the State that must prove that the Abortion Mandate is the least restrictive means of furthering a compelling governmental interest. The State cannot satisfy that exacting standard here.

A. The Abortion Mandate cannot be justified by the State's asserted interests.

In support of the Abortion Mandate, the State has asserted an interest in "provid[ing] women with better health care, ensur[ing] access to reproductive care, address[ing] the disproportionate impact on women in low-income families from a lack of access to reproductive health care, and foster[ing] equality between the sexes," Govt Third Dept. Br., NYSCEF Doc. No. 21, at *21-22 (citing R652), as well as "standardiz[ing] coverage so that consumers can understand and make informed comparisons among policies," Cert. Opp. at 15. But for two reasons, the State cannot satisfy the compelling interest prong of the strict scrutiny standard.

First, regardless of whether the State's asserted interests could be deemed "compelling" in a vacuum, the Supreme Court has made clear that, under the Free Exercise Clause, the inquiry is far more focused—the State must prove a compelling interest not in the Abortion Mandate generally, but in denying an

exemption to the Religious Objectors in this case. As the Supreme Court has explained, interests "couched in very broad terms, such as promoting 'public health' and 'gender equality,'" will generally be inadequate to justify a law under strict scrutiny. *Burwell*, 573 U.S. at 726. Instead, the requisite inquiry is "more focused," requiring courts "to look to the marginal interest in enforcing" the challenged law against the particular challengers. *Id*. at 726-27. As the Court explained in *Fulton*, "[t]he question, then, is not whether the [State] has a compelling interest in enforcing its [Abortion Mandate] generally, but whether it has such an interest in denying an exception" to the Religious Objectors. *Fulton*, 141 S. Ct. at 1881; *see also Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 431 (2006) (explaining that courts applying strict scrutiny must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants").

Here, the various exceptions to the Abortion Mandate belie any compelling interest in denying an exemption to the Religious Objectors. The government itself has apparently concluded that its interests are not sufficiently compelling to ensure free or low-cost access to abortion services for employees of self-insured organizations, employees of organizations that do not provide health care coverage to their employees, and unemployed women. Consequently, it is the State's burden

to show that it has a compelling interest in denying a similar exemption to the thirteen religious organizations at issue in this case. *See Hobby Lobby*, 573 U.S. at 726; *Fulton*, 141 S. Ct. at 1882 (noting that the City's policy failed strict scrutiny in part because the City "offer[ed] no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others").

The State, however, has put forward no evidence justifying how its interests somehow allow exemptions to so many others but not one for the Religious Objectors. Indeed, the justifications for distinguishing between religious entities covered by the religious exemption and those falling outside its scope are not matters of legitimate State concern at all, much less compelling State interests. *See supra* at Part I.C.1. Nor has the State put forth any other evidence in support of its interest in denying the Religious Objectors an exemption that it accords to so many others. Such underinclusiveness "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular [group] or viewpoint." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 802 (2011). Accordingly, the State has not established the type of "compelling interest" that the United States Supreme Court's case law in this area demands.

Second, and relatedly, once the State has articulated its interest in denying an exception, the State must also show that enforcing the law at issue will materially advance that interest. *See, e.g., Eu v. San Francisco Cty. Democratic Cent.*

Comm., 489 U.S. 214, 228-29 (1989) (law could not withstand strict scrutiny because it was unclear to what extent it would advance purported interest). It is not enough, therefore, for the State to show that its law will close a small gap in abortion coverage. To the contrary, the Supreme Court has explained that "[f]illing the remaining modest gap" does *not* rise to "a compelling state interest," *Brown*, 564 U.S. at 803 (2011), because "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced," *id.* at 803 n.9. Accordingly, the State must put forth actual *evidence* of how the law will advance the interest. *Id*. (explaining that under strict scrutiny, the State cannot rely on a "predictive judgment" about the law's potential effects); *see also Playboy*, 529 U.S. at 822 ("the Government must present more than anecdote and supposition" to establish a compelling interest). And because the State "bears the risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice" to satisfy its burden. *Brown*, 564 U.S. at 799-800.

Here, however, the State has never provided any evidence that the Abortion Mandate will materially advance its asserted interests, and there is good reason to doubt that such evidence exists. The Religious Objectors have well-known beliefs about abortion, and their employees are more likely than the employees of other organizations to share those beliefs. Moreover, many of the Religious Objectors' employees are likely to have access to abortion coverage in other ways, such as

through insurance provided by their spouses' employers or through Medicaid. In addition, women who do not have access to abortion coverage through insurance may have sufficient funds to pay for such services themselves, or may have access to other sources of abortion funding, as, for example, a New York City government website enumerates in detail.[5] The State has thus not demonstrated that enforcing the Abortion Mandate against the Religious Objectors would *materially* advance its interests (or indeed, advance them at all).

B. As the United States Supreme Court's controlling decision in *Burwell v. Hobby Lobby Stores* makes clear, the Abortion Mandate is not narrowly tailored.

Regardless of whether the State's interests are compelling here, the Abortion Mandate still fails, because the State likewise bears the burden of proving that the mandate is the least restrictive means of furthering those interests. *See, e.g., Tandon*, 141 S. Ct. at 1296 (noting that "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID"). As explained below, the Abortion Mandate cannot survive this latter test.

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[5] *See* https://www1.nyc.gov/site/doh/health/health-topics/abortion.page (listing funding sources for abortion). *See also, e.g.*, https://www.ny.gov/pregnancy-know-your-options-get-facts/think-you-might-be-pregnant (explaining abortion services).

Under the narrow tailoring prong of strict scrutiny, a law cannot survive if the State's purported interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (quoting *Lukumi Babalu Aye*, 508 U.S. at 546). The State must justify its chosen approach with a high degree of precision—down to the difference between a ½-inch beard and a ¼-inch beard permitted by prison regulations in *Holt*. *Id*. at 367-68. Satisfying strict scrutiny requires the State to show at least a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex*., 570 U.S. 297, 312 (2013). Based on that good-faith consideration, the State must then "prove" that forcing religious objectors to violate their beliefs "is the least restrictive means of furthering a compelling governmental interest." *Holt*, 574 U.S. at 364. "[M]ere[] . . . expla[nations]" and assertions without evidence do not suffice. *Id*.; *see also Playboy*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."). The Abortion Mandate cannot withstand such fine-grained review, as far less restrictive means could be used to achieve the State's goals.

Indeed, the Supreme Court's decision in *Burwell*, 573 U.S. 682, is directly on point and makes clear that the Abortion Mandate cannot stand.[6] There, the Court struck down a regulation that required employers to provide insurance coverage for certain forms of contraception that the employers regarded as abortifacients. 573 U.S. at 696-97. In *Hobby Lobby*, as here, the challengers were employers who objected to providing the required medical coverage on religious grounds. *Id*. at 700-704. In *Hobby Lobby*, as here, the mandate provided exemptions for certain religious employers, but the exemptions were not broad enough to cover the organizations who challenged the law. *Id*. at 698-700. In *Hobby Lobby*, as here, the mandate also contained exceptions for certain secular employers. *Id*. at 699-700. And in *Hobby Lobby*, as here, the government's asserted interests included "public health," "gender equality," and "ensuring that all women have access" to the medical services at issue. *Id*. at 726-27.

Although *Hobby Lobby* seriously questioned whether the government had asserted a compelling governmental interest in view of the regulation's

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[6] *Hobby Lobby* was decided under the Religious Freedom Restoration Act (RFRA), rather than under the First Amendment itself, but that is a distinction without a difference here. RFRA was written expressly to adopt for federal laws the "strict scrutiny" test that applies to religious exercise when *Smith* does not. *See, e.g., O Centro Espirita Beneficente* , 546 U.S. at 430. Where, as here, *Smith* does not apply to a State law because it is not a neutral law of general applicability, the resulting strict scrutiny test is the same as the test under RFRA.

exemptions, it assumed *arguendo* that it had and, instead, invalidated the law under the narrow tailoring prong because it was not the least restrictive means to achieve the government's interests. *Id*. at 728. As that Court explained, the law was not sufficiently tailored to withstand strict scrutiny because "[t]here are other ways in which [the government] could equally ensure that every woman has cost-free access to the particular [medical services] at issue here." *Id*. at 692.

First, as the *Hobby Lobby* Court recognized, "the Government [could] assume the cost of providing the [abortion services] at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." 573 U.S. at 728. This plainly contemplates that the Government could provide the objectionable coverage independently of the health plans offered by religious objectors. Notably, the State's Attorney General has recently called for the State to establish "a fund that will cover the costs for women living in [states that restrict abortion] to travel to New York, as well as cover accommodations and costs of an abortion."[7] And yet the State has not engaged in any "good faith consideration" of such an alternative for women who live in the State, much less carried its burden to "prove" that it would be unworkable. *Holt*,

[7] *See* https://ag.ny.gov/press-release/2021/attorney-general-james-calls-state-funding-provide-abortion-access-women.

574 U.S. at 364-65. And such direct State payment for the coverage at issue is only one of several less restrictive alternatives that exist.

Another solution would be for the State to offer women enrolled in the Religious Objectors' health plans the opportunity to sign up for separate, abortion-only health plans. This option would involve nothing but a de minimis administrative burden for women—taking a few minutes to sign up for a separate insurance card—that would avoid the crushing burden of forcing religious employers to act in violation of their conscience. It would not be burdensome for the beneficiaries of this program to keep two insurance cards in their wallets instead of one. Indeed, it is commonplace for people to use separate insurance cards to pay for prescription drugs, doctor's visits, dental care, and vision care. And signing up and using an abortion-only health policy would be no more burdensome than the ordinary administrative tasks associated with obtaining and using health insurance. The State has never suggested any reason, much less provided any evidence, that such an option would not be workable and affordable. Given the State's position that "providing all women with . . . access to [abortion] is a Government interest of the highest order, it is hard to understand [the] argument that it cannot be required" to pay the relatively minor cost of providing such access. *Hobby Lobby*, 573 U.S. at 729.

Another way for the State to provide the objectionable coverage independently would be to treat employees whose employers refuse to provide abortion coverage for religious reasons the same as it does employees whose employers provide no medical coverage at all. Such employees can sign up for health plans independently of their employer, and can thus obtain health insurance containing the State-mandated abortion coverage. Indeed, the State has already argued in effect that its interests would be equally well served if the Religious Objectors and other religious employers simply stopped providing medical coverage altogether. *See* Cert. Opp. at 4 (arguing that the Abortion Mandate "places no requirements on employers" because objecting employers need not provide health insurance at all).

Additionally, the State could "give tax incentives to [abortion] suppliers to provide these . . . services at no cost to consumers" or "give tax incentives to consumers" so they would not have to bear the cost of abortion. *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). The simplest version of this approach would be to grant refundable tax credits for the cost of abortion services purchased by people enrolled in religious objectors' health plans. Or, alternatively, the State could grant credits to a network of large insurance companies to incentivize them to provide an independent program with easy online enrollment for people enrolled in religious health plans.

Finally, as in *Hobby Lobby*, the government has "already devised and implemented a system that seeks to respect the religious liberty of [some] religious [employers] while ensuring that the employees of those entities have precisely the same access [to the coverage at issue] as employees of companies whose owners have no religious objections to providing such coverage." *Id.*; *see also* N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o)(2)(i), (ii) (providing a scheme to ensure abortion coverage for employees of religious employers who qualify for the existing exemption). The State has never offered any satisfactory explanation for why this option, which is adequate to serve its interests as to select religious employers, is inadequate when extended to employers like the Religious Objectors. Extending that same option to religious entities like the Religious Objectors here thus appears to pose no threat to public health, access to healthcare, health disparities, or consumer understanding of their options for healthcare. Although the terms of the current scheme would still severely burden the religious exercise of the Religious Objectors, and would fail to qualify as the least restrictive alternative given the several alternatives listed above, the exemption still demonstrates that the State has plainly not chosen the least restrictive means to achieve its goals.[8]

[8] It is unnecessary for the Court to decide whether this alternative would itself violate the Free Exercise Clause for those employers who objected to this approach on religious grounds. "At a minimum," it would be a less restrictive

Indeed, rather than seriously considering any of these less restrictive means, the State has opted for a sharply limited religious exemption that requires an intrusive inquiry into the religious mission and organization and that otherwise threatens religious autonomy in the manner described above. Such an approach cannot be considered "narrowly tailored" under any of the U.S. Supreme Court's precedents, and must be rejected in light of the clearly available alternatives.

* * *

Fulton, Tandon, and the United States Supreme Court's other recent Free Exercise cases compel the conclusion that the Abortion Mandate is subject to strict scrutiny. *Hobby Lobby* and the Court's other strict scrutiny precedents compel the conclusion that the Abortion Mandate cannot survive review under that standard. In its current form, then, the Abortion Mandate violates the First Amendment, and cannot stand.

CONCLUSION

For all of the reasons set forth herein, judgment should be entered declaring the Abortion Mandate unconstitutional under the United States Constitution.

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alternative and "it serves [the State's] interests equally well." *Hobby Lobby*, 573 U.S. at 731. The mere existence of such an alternative establishes that the current regulation cannot survive strict scrutiny, even if additional accommodations might be required for religious objectors. *See id*.

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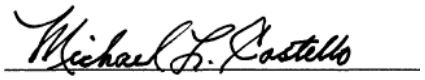
Respectfully submitted,



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