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To be argued by:
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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; DEPAUL MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

-against-

MARIA T. VULLO, Acting Superintendent, New York State Department of Financial Services, et al.,

Defendant-Respondent.

(caption cont.)

No. 529350

SUPPLEMENTAL BRIEF FOR RESPONDENTS ON REMAND FROM THE U.S. SUPREME COURT

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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.; DEPAUL MANAGEMENT CORPORATION; RENEE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

-against-

MARIA T. VULLO, Acting Superintendent, New York State Department of Financial Services; and NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants-Respondents.

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PRELIMINARY STATEMENT

This appeal is back before the Court on remand from the United States Supreme Court for further consideration of plaintiffs' free exercise claim in light of the Supreme Court's recent decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021).

This Court previously—and correctly—affirmed the grant of summary judgment in defendants' favor on the basis of stare decisis, holding that plaintiffs' free exercise claim was controlled by the decision of the Court of Appeals in *Catholic Charities of Diocese of Albany v. Serio (Catholic Charities*), 7 N.Y.3d 510 (2006), *cert. denied*, 552 U.S. 816 (2007). *Catholic Charities* rejected a free exercise claim challenging an insurance coverage law that, like the insurance coverage regulation at issue here, provided an accommodation for religious entities as specifically defined.

The Court should once again affirm. Under principles of stare decisis, the Court remains bound by Court of Appeals precedent unless an intervening U.S. Supreme Court decision either explicitly or implicitly overruled that precedent. *Fulton* did neither. Indeed, there appears no dispute that *Fulton* did not explicitly overrule *Catholic Charities*; *Fulton*

makes no mention of that Court of Appeals precedent. The question, then, is whether *Fulton* implicitly overruled that precedent. *Fulton,* however, neither addressed the free exercise challenge at issue in *Catholic Charities* nor the rationale on which that Court of Appeals' precedent was based. *Catholic Charities* thus remains binding on this Court. Only the Court of Appeals has the power to revisit its own precedent in light of subsequent Supreme Court cases that do not address the same issue as or otherwise conflict with its precedent.

Plaintiffs' supplemental brief to this Court additionally contends that their case implicates certain arguments that were not relevant to, and thus are not controlled by, *Catholic Charities,* but are nonetheless controlled by *Fulton* and recent Supreme Court orders. Because plaintiffs failed to preserve these arguments, the Court should decline to consider them now. In any event, one patently lacks merit, and the other cannot be decided on the existing record. To the extent the Court finds that consideration of that argument is nonetheless appropriate, it should remand to Supreme Court for the development of an appropriate factual record.

QUESTIONS PRESENTED

1. Whether this Court remains bound by the decision of the Court of Appeals in *Catholic Charities*.

2. Whether the Court should decline to reach plaintiffs' free exercise arguments that were never raised in the state court proceedings, and whether the Court's consideration of at least one of those arguments would in any event warrant remand to Supreme Court for factual development.

BACKGROUND

Although respondents' original brief fully sets forth the background facts, a summary is provided here for the Court's convenience.

A. Statutory and Regulatory Background

Health insurance policies issued for delivery in the State are subject to approval of the Superintendent. Insurance Law § 3201. Section 3217(a) of the Insurance Law directs the Superintendent 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 that prohibits health insurance policies issued in the State from limiting or excluding coverage based on "type of illness, accident, treatment or medical condition," except for narrow exclusions expressly permitted. 11 N.Y.C.R.R. § 52.16(c). This nonexclusion regulation serves the important legislative purpose of standardizing and simplifying coverage so that consumers can understand and make informed comparisons among policies. *See* Insurance Law § 3217(b)(1); Bill Jacket to N.Y. Sess. L. 1971, c. 554, at 4, *available at* https://nysl.ptfs.com/data/Library1/pdf/NY200060392_L-1971-CH-0554.pdf (memorandum of the Insurance Department in support).

In 2017, the Superintendent promulgated a regulation to make explicit what was already implicit in the nonexclusion regulation: policies that provide hospital, surgical, or medical expense coverage may not "limit or exclude coverage for abortions that are medically necessary."[1]

[1] An insurer is generally required to cover only treatments that are medically necessary, unless the policy provides otherwise. Medical necessity is not defined by statute or regulation, and is not determined by the Department of Financial Services (the Department). It is a determination "regularly made in the normal course of insurance business by a patient's healthcare provider in consultation with the patient, subject to the utilization review and external appeal procedures" provided for by state law. (R653.)

11 N.Y.C.R.R. § 52.16(o)(1); *see id.* § 52.1(p)(1) (explaining that the nonexclusion rule already prohibited limitation or exclusion of abortion coverage in such policies). The Superintendent determined that an explicit coverage requirement was necessary because inconsistent plan application of such coverage "was leading to improper coverage exclusion and consumer misunderstanding." (R655.)

At the same time, the Superintendent sought to accommodate the concerns of religious employers. The Superintendent did so by authorizing "religious employer[s]," as defined, to obtain group policies that exclude coverage for medically necessary abortions. 11 N.Y.C.R.R. § 52.16(o)(2). The 2017 regulation defines a "religious employer" as an entity for which each of the following is true:

1. Its purpose is to inculcate religious values,

2. It primarily employs persons who share its religious tenets,

3. It primarily serves persons who share those tenets, and

4. It is a nonprofit organization described in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code, which exempts churches, their integrated auxiliaries, and the exclusively religious activities of any religious order from the requirement to file an annual return.

11 N.Y.C.R.R. § 52.2(y). The definition is the same one that the Legislature used in the religious accommodation it incorporated into the contraceptive coverage statute at issue in *Catholic Charities*.

In adopting the same definition as the one used for that statute, the Superintendent embraced the Legislature's policy judgment that a limited accommodation provided an appropriate balance between the interests of religious employers in the State, on one hand, and the interests of employees in access to essential reproductive health care and the equality in health care between the sexes, on the other hand. (R651-654.) The new regulation was "necessary to implement New York's policy and law supporting women's full access to health care services," and the accommodation, while recognizing the interests of religious employers, minimized the harms to employees who may not agree with their employer's religious beliefs. (R652, 655.)

A religious organization invokes the accommodation by certifying to its insurer that it is a "religious employer," as defined. The insurer then issues a policy to the employer that excludes the coverage and a rider to each employee providing coverage for medically necessary

abortion services, at no cost to either the employee or the religious employer. 11 N.Y.C.R.R. § 52.16(o)(2)(i), (ii).

B. State Court Proceedings

1. Plaintiffs Commence this Action.

Plaintiffs include dioceses, churches, a religious order of women, and religiously affiliated service organizations that provide social or community services, all of which object to providing coverage to their employees for medically necessary abortions.[2] (R486-491, 497-499.) They filed this action to challenge the 2017 regulation.[3] In addition to raising other federal and state constitutional claims and state statutory claims, plaintiffs argued that the regulation is neither neutral nor generally applicable because its accommodation for "religious employers" does not

[2] Plaintiffs also include an employee of an organizational plaintiff (R490) and a construction company, Murnane Building Contractors (R491), which has since discontinued its participation in this lawsuit.

[3] Plaintiffs had earlier filed an action challenging the terms of a standard health insurance policy template issued by the Department that, in accordance with the pre-existing nonexclusion regulation, included coverage of medically necessary abortions as part of the coverage of essential benefits. (R79-132; *see* R158.) After the promulgation of the 2017 regulation at issue here, petitioners commenced a second action challenging that regulation, and their two actions were joined. (R484-532, 577-578.)

extend to all religious organizations. (R518.) Asserting that at least some among their ranks do not satisfy the criteria for the accommodation,[4] they claimed that the regulation violates the Free Exercise Clause of the U.S. Constitution because it "target[s] the practices of certain religious employers for discriminatory treatment." (R518.)

2. The State Courts Reject Plaintiffs' Free Exercise Claim on the Basis of the Court of Appeals Decision in *Catholic Charities.*

Supreme Court, Albany County (McNally, J.), granted defendants summary judgment dismissing the action on the basis of *Catholic Charities*. (R15-27.) This Court affirmed. The Court held that principles of stare decisis were "decisive" in resolving the case. *See Roman Catholic Diocese of Albany v. Vullo*, 185 A.D.3d 11, 16 (3d Dep't 2020). The Court noted that in *Catholic Charities*, the Court of Appeals rejected a free

[4] The complaint alleged no facts demonstrating either that any of the named plaintiffs fails to satisfy the requirements for a "religious employer," within the meaning of the 2017 regulation, or that any plaintiff requested and was denied an exempt policy by an insurer. Some plaintiffs—for example the dioceses, the religious order, and the churches—likely satisfy the accommodation for "religious employers." However, other plaintiffs may not satisfy those requirements; for that reason respondents questioned but did not affirmatively challenge plaintiffs' standing.

exercise challenge to an analogous law and thus that plaintiffs' free exercise claim was governed by that decision. *Id.*

Catholic Charities involved a free exercise challenge to an analogous requirement that (a) required health insurance policies issued in the State that include coverage for prescription drugs to include coverage for contraceptive drugs and devices, and (b) provided an accommodation for qualifying "religious employers," defined by the same criteria as the accommodation here. *See Catholic Charities*, 7 N.Y.3d at 518-19.

As here, the "heart" of the free exercise claim in *Catholic Charities*, was the accommodation for "religious employers," which plaintiffs there challenged, as plaintiffs do here, as "unconstitutionally narrow." *Id.* at 519-20. In rejecting that free exercise claim, the Court of Appeals applied the holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that individuals must comply with "'a valid and neutral law of general applicability'" even if the law incidentally burdens the exercise of religion. 7 N.Y.3d at 521 (quoting *Smith*, 494 U.S. at 879). *Catholic Charities* held that the contraceptive coverage requirement at issue was a "neutral law of general

applicability": it was neutral because it did not target religion but rather was intended to make health insurance coverage of contraceptives more broadly available to women, and it was generally applicable because it uniformly required health insurance policies that include coverage for prescription drugs to include coverage for contraceptive drugs and devices. *Catholic Charities*, 7 N.Y.3d at 522 (internal citation omitted). Accordingly, the requirement was not subject to strict scrutiny, and plaintiffs' federal free exercise claim therefore failed.[5] *Id.* at 524.

The Court also held that the accommodation for "religious employers" did not take the statute outside of the *Smith* rule. The Court reasoned that the fact that some religious organizations—"in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith"—may obtain an exempt policy did not defeat the law's neutrality. *Id.* at 522. Indeed, to hold otherwise would be to discourage the enactment of religious accommodations. *Id.* The Court further rejected plaintiffs' Establishment

[5] The Court of Appeals additionally rejected the plaintiffs' argument in the case that the contraceptive coverage requirement violated their free exercise rights under the church autonomy and hybrid rights doctrines. 7 N.Y.3d at 523-24.

Clause claim, holding that the "religious employer" accommodation was not a denominational preference, and reaffirming that it was "generally applicable and neutral between religions." *Id.* at 528-29.

Recognizing that plaintiffs asserted the same constitutional claims here, this Court determined that the Court of Appeals' analysis of neutrality and general applicability in *Catholic Charities* controlled and required the Court to reject plaintiffs' free exercise challenge to the 2017 regulation. *Roman Catholic Diocese*, 185 A.D.3d at 16. In particular, the Court relied on *Catholic Charities'* conclusion that the contraceptive-coverage statute at issue in that case was neutral and uniformly applied, except to those who qualified for the religious accommodation. *Roman Catholic Diocese*, 185 A.D.3d at 17. The Court held that the same analysis applied to the regulation challenged here because it too is "a neutral regulation that treats, in terms of insurance coverage, medically necessary abortions the same as any other medically necessary procedure." *Id.* And citing *Catholic Charities*, the Court held that the regulatory "distinction between qualifying 'religious employers' and other religious entities for purposes of the exemption is not a denominal classification." 185 A.D.3d at 17 n.7.

Concluding that the remaining religious-rights claims were governed by the Appellate Division and Court of Appeals decisions in the *Catholic Charities* litigation and that the separation-of-powers claim lacked merit, this Court affirmed the judgment in defendants' favor. *Id.* at 17 & nn.6-7, 21.

Plaintiffs filed an appeal as of right and sought leave to appeal, arguing that the Court's decision in *Catholic Charities* did not control or, if it did, that the test for religious exercise under the State Constitution should be re-examined. The Court of Appeals denied leave and, on its own motion, dismissed plaintiffs' appeal as of right, finding no substantial constitutional question directly involved. *Roman Catholic Diocese of Albany v. Vullo*, 36 N.Y.3d 927 (2020).

C. U.S. Supreme Court Proceedings

Plaintiffs[6] filed a petition for certiorari, seeking review of their free exercise claim. They sought review of the question whether the Superintendent created a coverage requirement that is not neutral or generally applicable, by including a religious accommodation that does

[6] Plaintiff Murnane Building Contractors did not join the petition.

not extend to all organizations asserting a religious objection.[7] Pet. i, 15-27.[8] Plaintiffs also sought review of a claim they had not pursued in the state courts, namely whether the regulation violated the Free Exercise or Establishment Clauses under the church-autonomy doctrine. Pet. i, 28-31, *supra* n.8. Following the submission of a memorandum in opposition to plaintiffs' petition for certiorari, Resp. Brief in Opp.,[9] the U.S. Supreme Court granted the petition, vacated this Court's judgment, and remanded to the Court for further consideration in light of its recent decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868. *See Roman Catholic Diocese of Albany v. Emami*, 142 S. Ct. 421 (2021). In *Fulton,* the Court discussed two circumstances that render a governmental policy not generally applicable for purposes of *Smith*, and held that the government

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[7] Plaintiffs also asked the Supreme Court to revisit *Smith* if the regulation satisfied free exercise principles under the *Smith* test. Plaintiffs recognize that *Smith* binds this Court and thus do not reiterate that request here. (Supp. Br. 17 n.3.)

[8] *Roman Catholic Diocese v. Emami*, No. 20-1501 (filed April 23, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/176496/20210423144447105_Roman%20Catholic%20Diocese%20of%20Albany%20v.%20Lacewell%20-%20Cert%20Petition.pdf.

[9] *Roman Catholic Diocese v. Emami*, No. 20-1501 (filed Aug. 23, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/188345/20210823171934058_20-1501%20Brief%20in%20Opposition.pdf.

policy at issue was not generally applicable under one such circumstance—the policy incorporated a system of individualized exemptions. *Fulton*, 141 S. Ct. at 1877-81.

This Court thereafter ordered supplemental briefing to address the parties' arguments in light of the decision in *Fulton*.[10]

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[10] While plaintiffs purport to recognize that the Court authorized supplemental briefing only to address the extent to which, if any, *Fulton* modifies the arguments they previously made (*see* Supp. Br. 27 n.4), they assert that they are not "abandoning" their argument that the challenged regulation violates separate principles of religious autonomy and, indeed, include argument in support of that claim in their supplemental brief (Supp. Br. 27 & n.4, 28). Plaintiffs, however, did not properly raise any religious-autonomy claim in the prior state court proceedings—not by generally referencing an Establishment Clause claim or hybrid-rights claims in their complaint as they claim here (Supp. Br. 27 n.4) nor by making fleeting references to "institutional autonomy" and to "principles of autonomy" in their opening brief to this Court (App. Opening Br. 19, 61). *See, e.g.*, *Dunn v. Northgate Ford, Inc.*, 16 A.D.3d 875, 878 (3d Dep't 2005). Rather, plaintiffs raised this religious-autonomy claim for the first time in their petition for certiorari. *See* Pet. 29-30, *supra* n. 8. Accordingly, neither the original briefing nor plaintiffs' supplemental brief provides a basis for the Court to consider that claim. Likewise, most of the arguments of amicus New York State Catholic Conference address a claim under the state constitutional free exercise provision, which is not a proper subject of this supplemental briefing and which, in any event, remains controlled by *Catholic Charities* for the reasons set forth *supra* at 15-28.

ARGUMENT

POINT I

FULTON DOES NOT CONFLICT WITH THE COURT OF APPEALS DECISION IN *CATHOLIC CHARITIES*, WHICH THUS REMAINS BINDING ON THIS COURT

This Court previously held that the Court of Appeals decision in *Catholic Charities* controls plaintiffs' federal free exercise claim challenging the abortion coverage requirement on the ground the religious accommodation extends to some, but not all, organizations asserting a religious objection. That claim asserts that the challenged regulation is subject to strict scrutiny because the accommodation renders the medically necessary abortion coverage requirement not neutral or generally applicable, as contemplated by *Smith*. The U.S. Supreme Court has now vacated the Court's judgment and remanded the case for further consideration in light of *Fulton*. Under principles of stare decisis, the rationale of the Court of Appeals decision in *Catholic Charities* remains binding on this Court unless it has been explicitly or implicitly overruled by the Supreme Court. As we explain below, it has not. This Court therefore remains bound by *Catholic Charities*. To the extent *Fulton* portends future developments in the law

that may be relevant to the Court of Appeals' analysis in *Catholic Charities*, it is for the Court of Appeals to determine whether *Fulton* warrants reconsideration of its precedent at this time. Accordingly, this Court should once again affirm judgment in favor of defendants.[11]

As this Court explained in its original decision in this case, it is crucial for an intermediate appellate court to apply the neutral principle of stare decisis. *Roman Catholic Diocese*, 185 A.D.3d at 16. For this reason, this Court held that the Court of Appeals decision in *Catholic Charities* controlled to the extent this case presented the same constitutional claims addressed by the Court of Appeals there, including claims involving issues of federal constitutional law. *Id.* at 16-17.

It is true, as plaintiffs note, that "'[s]tate courts are bound by the decisions of the Supreme Court when reviewing Federal statutes or applying the Federal Constitution.'" (Supp. Br. 21 (quoting *People v. P. J. Video, Inc.*, 68 N.Y.2d 296, 301-02 (1986))). Thus, where a decision of the

[11] Because *Fulton* addresses only a federal free exercise claim, it does not require this Court to revisit the remaining claims in this case. *See Duffy v. Wetzler*, 207 A.D.2d 375, 377-78 (2d Dep't), *lv. denied*, 84 N.Y.2d 838 (1994), *cert. denied*, 513 U.S. 1103 (1995). Thus, the Court should affirm as to the remaining claims for the reasons set forth in its original decision.

Court of Appeals that would otherwise control is “in direct opposition” to a decision of the Supreme Court of the United States on a question of federal law, this Court is bound to follow the Supreme Court’s decision. *Grant v. Cananea Consol. Copper Co.*, 117 A.D. 576, 581 (1st Dep’t), *rev’d on other grounds*, 189 N.Y. 241 (1907); *see also Pereira v. Pereira*, 272 A.D. 281, 286 (1st Dep’t 1947) (applying this principle).

But Court of Appeals precedent on a question of federal law—one that addresses the same legal problem on analogous facts—remains binding on the intermediate appellate court unless it is explicitly or implicitly overruled by a subsequent Supreme Court decision. *See Torres v. City of N.Y.*, 177 A.D.2d 97, 99 (2d Dep’t), *lv. denied*, 80 N.Y.2d 759 (1992), *cert. denied*, 507 U.S. 986 (1993). There has been no explicit overruling here, which occurs when a court expressly states that it is overruling precedent. *See, e.g., People v. Ponder*, 54 N.Y.2d 160, 164-65 (1981). *Catholic Charities* was not reviewed by the Supreme Court and thus could not have been expressly overruled. The Supreme Court also has not overruled any of its prior decisions on which *Catholic Charities* relied.

The issue therefore is whether *Catholic Charities* has been implicitly overruled by *Fulton*, as plaintiffs contend (Supp. Br. 21-23). Implicit overruling occurs when there is an irreconcilable conflict between a Court of Appeals precedent and a subsequent Supreme Court decision, such as when the Supreme Court addresses the very issue decided by the Court of Appeals and rules the other way or the Supreme Court rules in a way that is "directly inconsistent" with the rationale on which the Court of Appeals precedent is based. *Torres v. City of N.Y.*, 177 A.D.2d at 104-05; *see also People v. Costello,* 101 A.D.2d 244, 247 (3d Dep't 1984). Under this rule, the Supreme Court decision is not inconsistent if it reaches the opposite result on analogous, but potentially distinguishable facts. *See Torres,* 177 A.D.2d at 108.

Furthermore, the requirement that there be an irreconcilable conflict for the Appellate Division to ignore otherwise-binding Court of Appeals precedent applies even after the U.S. Supreme Court has, as here, vacated a judgment and remanded for further consideration in light of a subsequent decision. *Cf. People v. Costello*, 101 A.D.2d at 247 (applying this rule where Supreme Court remanded and vacated decision from another court involving same ruling). Neither potential implications

of a subsequent Supreme Court opinion nor even the fact that the Supreme Court, in vacating and remanding, has indicated it "may not agree" with Court of Appeals analysis, is sufficient to eliminate the controlling effect of Court of Appeals precedent. *Id.* at 247.

This Court remains bound by *Catholic Charities* because there is no irreconcilable conflict between that Court of Appeals precedent and the Supreme Court's decision in *Fulton*.

In *Fulton*, a foster care agency that contracted with the City of Philadelphia to provide foster care services refused, on the basis of religious belief, to certify unmarried couples or same-sex married couples for foster care placements. 141 S. Ct. at 1875. The City stopped contracting with the agency for foster care services because the agency's refusal violated a nondiscrimination provision of the contract as well as various nondiscrimination laws. *See id.* at 1875-76. When the agency and certain foster parents challenged that determination as a violation of the Free Exercise Clause, the lower federal courts rejected the claim on the basis of the Supreme Court's decision in *Smith*, holding that the City was acting on the basis of a neutral and generally applicable policy prohibiting discrimination on the basis of marital status or sexual

orientation. *See Fulton*, 141 S. Ct. at 1876. The Supreme Court reversed. It held that the City's nondiscrimination policy burdened the agency's religious exercise and fell outside the rule established in *Smith*, i.e., that government policies "incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." 141 S. Ct. at 1876-77.

In applying the *Smith* test*, Fulton* reaffirmed the well-settled standard for neutrality—that the "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature," but found that plaintiffs' free exercise claim could be more easily resolved on the ground that the nondiscrimination policy lacked generally applicability. 141 S. Ct. at 1877.

Noting that the Court had applied strict scrutiny in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), to a government scheme that allowed exemptions to individuals if they demonstrated "good cause"—a scheme that the *Smith* Court had characterized as "a system of individual exemptions," *Smith*, 494 U. S. at 884—*Fulton* held that "[a] law is not generally applicable if it invites the government to consider the

particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (internal quotation and alteration omitted).

Fulton found this rule applied to the facts before it. It focused on a provision of the contract requiring that services be provided to prospective foster parents regardless of their sexual orientation "'unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.'" *Id.* at 1878 (quoting record). *Fulton* held that the nondiscrimination policy thereby incorporated an entirely discretionary "mechanism for individual exemptions," which invited "the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id*. at 1877, 1879 (internal quotations omitted).

Having thus decided that the City's system of fully discretionary, individualized exemptions rendered the policy not generally applicable, *Fulton* reasoned that the City's policy could be upheld only if it satisfied strict scrutiny. *Id.* at 1877, 1881. *Fulton* then went on to hold that the policy did not satisfy that scrutiny because the City failed to identify a compelling reason for denying an exception to the plaintiff agency while

making individualized exceptions available to others in its discretion. *Id.* at 1881-82.

Fulton also restated the principle that a government policy is not generally applicable in a second circumstance, namely when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *id.* at 1877, though it had no occasion to apply that principle in the case. Although *Fulton* cited its earlier decision in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 544-46 (1993), as support for that principle, *see Fulton*, 141 S. Ct. at 1877, the Supreme Court had recently applied the principle in granting applications for interim relief in cases seeking to challenge various COVID-19 assembly restrictions under the Free Exercise Clause. For example, in its per curiam order in *Tandon*, which preliminarily enjoined such a restriction pending appeal, the Court explained that a government regulation is "not neutral and generally applicable" if it treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis omitted); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.

Ct. 63, 66-67 (2020) (per curiam) (applying same principle in similarly granting injunctive relief pending appeal).

Contrary to plaintiffs' argument (*e.g.*, Supp. Br. 21-23), neither *Fulton* nor these recent per curiam orders implicitly overrule *Catholic Charities* because they do not conflict with that Court of Appeals precedent. *Fulton*, like *Catholic Charities*, applied *Smith*'s holding that neutral and generally applicable laws that incidentally burden religion are not subject to strict scrutiny. *Compare Fulton*, 141 S. Ct. at 1876, *with Catholic Charities*, 7 N.Y.3d at 521. And *Fulton* reaffirmed, as *Catholic Charities* had held, that a government policy is neutral when it does not target religion or restrict practices because of their religious nature. *Compare* 141 S. Ct. at 1877 *with* 7 N.Y.3d at 522.

Nor does *Catholic Charities* conflict with *Fulton* on the issue of general applicability, as plaintiffs contend. Preliminarily, *Fulton* did not hold, as plaintiffs argue, that a government policy can escape strict scrutiny under *Smith* "only if the policy contains no exemptions that undermine its stated purpose"—including an exemption that accommodates religion. (*See* Supp. Br. 20-21 (emphasis omitted), 23, 24-26). Rather, *Fulton* recognized that the general applicability of a

governmental policy may be defeated in two circumstances: (1) when the policy provides a mechanism for individualized exemptions granted on a discretionary basis and thereby allows the government to consider the particular reasons for the person's conduct, and (2) when the policy prohibits religious conduct while permitting comparable secular conduct, *i.e.,* secular conduct that undermines the government's interests in the policy at issue.[12] *Fulton*, 141 S. Ct. at 1877. *Fulton* did not implicate, let alone address, exemptions that *accommodate* religion. And because neither of the two circumstances defeating general applicability that

[12] The federal circuit courts of appeals have consistently described *Fulton* as addressing, and have applied its reasoning to, only these two circumstances. *See, e.g., Doe v. San Diego Unified Sch. Dist.*, No. 21-56259, 2021 U.S. App. LEXIS 35760, at *6-7, 11 (9th Cir. Dec. 4, 2021) (applying both circumstances), *cert. denied*, No. 21A217. 2022 U.S. LEXIS 766 (Feb. 18, 2022); *Kane v. De Blasio*, Nos. 21-2678, 21-2711, 2021 U.S. App. LEXIS 35102, at *18-19 (2d Cir. Nov. 28, 2021) (citing *Fulton* for proposition that policies "may not be generally applicable under *Smith* for either of two reasons"); *Doe v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021) (describing *Fulton as* applying the first and confirming the existence of the second circumstance), *injunction denied*, 142 S. Ct. 17 (2021); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1184, 1188 (10th Cir. 2021) (same), *cert. granted on other grounds*, No. 21-476, 2022 U.S. LEXIS 840 (Feb. 22, 2022); *Dahl v. Board of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733-34 (6th Cir. 2021) (describing how *Fulton* applied to circumstance of individualized exemptions); *see also Doe v. Mills,* 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (citing to *Fulton* in applying both circumstances).

Fulton did address were implicated in *Catholic Charities*, *Fulton* does not conflict with *Catholic Charities*.

Catholic Charities did not involve a system of discretionary individualized exemptions like the one incorporated in the nondiscrimination policy analyzed by *Fulton*. The contraceptive insurance requirement at issue in *Catholic Charities* applied uniformly to all insurance policies providing prescription drug coverage, except those available under the religious accommodation. There was no mechanism for the Superintendent to grant an exemption allowing contraceptives to be excluded on an individualized, discretionary basis. Exemptions were not available for "good cause" or under any other individualized standard and the Superintendent had no authority to grant an exception in her sole discretion.

Amicus New York State Catholic Conference mistakenly argues (Br. 7-8) that the "religious employer" accommodation renders the challenged regulation not generally applicable because the accommodation itself provides for individualized or discretionary exemptions. The accommodation uses four established criteria, not an entirely individualized and discretionary standard like "good cause" or

"sole discretion." In any event, *Catholic Charities* expressly held that a religious accommodation using the same criteria did not defeat the general applicability of an analogous coverage requirement. Inasmuch as *Fulton* addressed a standardless system of individualized exemptions, it does not conflict with that holding.

Nor did the law at issue in *Catholic Charities* allow policies providing prescription coverage to exclude coverage of contraceptive drugs and devices for secular reasons but not religious reasons. No secular exemptions were at issue *Catholic Charities*. Instead, the only "exception" at issue in *Catholic Charities* was the accommodation for "religious employers," and no religious accommodation was at issue in, or discussed by, the Supreme Court in *Fulton*. Thus, nothing in that decision conflicts with the Court of Appeals' determination that a law remains neutral and generally applicable even when it accommodates certain religious entities.

Further, the rationale of *Catholic Charities* is not directly inconsistent with anything in *Fulton.* The Court of Appeals ruled that a religious accommodation does not defeat neutrality or general applicability even when it is not "all inclusive" because holding otherwise

"would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion," *Catholic Charities*, 7 N.Y.3d at 522. *Fulton* had no occasion to address that rationale.

Finally, the Court should reject plaintiffs' attempt to establish a conflict by mischaracterizing the decision in *Catholic Charities*. *Catholic Charities* did not hold, as plaintiffs contend (Supp. Br. 22), that, regardless of its general applicability, a law does not trigger strict scrutiny as long as it is neutral toward religion. As we explained, *supra* at 9-11, the Court in *Catholic Charities* considered both whether the law before it was neutral and also whether it was generally applicable, and the Court found the law to be one "of general applicability" because it uniformly required health insurance policies covering prescription drugs to cover contraceptives. 7 N.Y.3d at 522. In arguing to the contrary, plaintiffs selectively quote language from the *Catholic Charities* decision out of context. (*See* Supp. Br. 22 (quoting 7 N.Y.3d at 522).) The quoted language merely restated the standard for neutrality and, applying that standard, rejected the neutrality argument pressed by the *Catholic Charities* plaintiffs—that the neutrality of the contraceptive coverage requirement at issue was altered by the fact that the religious

accommodation exempted some religious institutions and not others. *Catholic Charities*, 7 N.Y.3d at 522. And *Catholic Charities* also confirmed that the coverage requirement was both "generally applicable and neutral between religions" notwithstanding the narrow religious accommodation. *Id.* at 528; *see id.* at 522.

Thus, there is no irreconcilable conflict between *Catholic Charities* and *Fulton*, *Fulton* did not effectively overrule *Catholic Charities,* and that Court of Appeals precedent remains binding on this Court. *Torres v. City of N.Y.*, 177 A.D.2d at 104-05; *People v. Costello*, 101 A.D.2d at 247.

To the extent plaintiffs are understood as arguing that *Fulton* and the Court's recent per curiam orders portend a broader rule about the effect of a religious accommodation on a policy's general applicability, it is for the Court of Appeals to determine whether these rulings warrant reconsideration of its precedent. The Court of Appeals may consider whether its earlier decision "was proper when rendered and is unaltered by the spirit, if not the language of" the recent Supreme Court rulings. *See People v. Overton*, 24 N.Y.2d 522, 524 (1969) (adhering to its decision following a remand from Supreme Court for further consideration in light of recent decision). If there is to be any shift in Court of Appeals

precedent, however, "the change in the law is for the Court of Appeals to pronounce." *See People v. Polite*, 164 A.D.3d 1372, 1374 (2d Dep't), *lv. denied*, 32 N.Y.3d 1127 (2018) & *lv. denied sub nom. People v. Bogle (Mark)*, 32 N.Y.3d 1124 (2018). Accordingly, the Court should again reject plaintiffs' free exercise claim on the basis of *Catholic Charities*.

POINT II

PLAINTIFFS' REMAINING ARGUMENTS CONCERNING GENERAL APPLICABILITY ARE UNPRESERVED

Plaintiffs seek to assert two new grounds to support their contention that the challenged regulation is not generally applicable and thus should be subject to strict scrutiny. They argue that (1) the challenged regulation is underinclusive because it does not assure all women coverage for medically necessary abortion services, and (2) the underlying nonexclusion rule on which the challenged regulation is based contains comparable secular exemptions. While the Court of Appeals in *Catholic Charities* did not address any arguments analogous to these new arguments, and thus that precedent does not control their resolution, plaintiffs made no such arguments at any stage of the state court proceedings in this matter and thus failed to preserve them for this

Court's review. Plaintiffs' underinclusivity argument lacks merit in any event. And plaintiffs' secular-exemptions argument cannot be decided on the existing record. Thus, to the extent the Court reads the decision of the U.S. Supreme Court to vacate this Court's decision and remand it for reconsideration in light of *Fulton* as a suggestion to consider that unpreserved argument, it should remand the matter to the trial court for development of an appropriate factual record.

More specifically, plaintiffs now argue (Supp. Br. 28-30) that the regulation they challenge is not generally applicable because, as a requirement imposed on insurers who issue policies in the State, it assures medically-necessary abortion coverage only for employees whose employers purchase insurance policies, as opposed to those employees whose employers self-insure or provide no employee health insurance at all. Plaintiffs argue as well that the regulation does not address the coverage needs of those who are not employed. These supposed "holes" in coverage, plaintiffs argue (Supp. 29-30), undermine the purpose of the challenged regulation to increase women's access to full healthcare services and thereby defeat the regulation's general applicability.

Plaintiffs make this underinclusivity argument for the first time in this litigation in their supplemental brief to this Court. It is well settled, however, that arguments and legal theories that were not raised before the state Supreme Court are unpreserved for this Court's review. *See, e.g., Liere v. State of N.Y.*, 123 A.D.3d 1323, 1323-24 (3d Dep't 2014) (additional arguments concerning venue unpreserved where not raised below). As this Court has explained, the "doctrine of preservation mandates that an issue is preserved for appellate review, and thus available as a basis for reversal or modification of an order or judgment, only if it was first raised in the *nisi prius* court." *Sam v. Town of Rotterdam*, 248 A.D.2d 850, 851-52 (3d Dep't) (internal quotation omitted), *lv. denied*, 92 N.Y.2d 804 (1998). The Court thus should not consider plaintiffs' new-found underinclusivity argument now.

The argument lacks merit in any event. The Superintendent did not create "holes" in coverage, but rather regulated to the full extent of her authority to approve policies issued in New York. The challenged regulation does not require employers who self-insure or provide no health insurance coverage to provide coverage for medically-necessary abortion services because it does not regulate employers. Nor could the

Superintendent do so. The content of health insurance policies is subject to the Superintendent's approval, and thus subject to her regulation, only when health insurance policies are "delivered or issued for delivery" in the State. Insurance Law § 3201(b). If employers do not purchase policies subject to the Superintendent's approval, they are not subject to such regulatory authority. Likewise, when employers choose to self-insure, the health coverage they provide to employees, commonly known as an ERISA plan, is authorized by federal law, *see* 29 U.S.C. §§ 1001–1461, and is not subject to state regulation, *see* 29 U.S.C. § 1144(a), (b)(2)(B). Thus, and as defendants explained in their original brief to this Court (Defs. Br. 19-21), these situations are outside the scope of the Superintendent's regulatory authority.

We note, however, that the *employees* of employers who do not purchase regulated policies would nonetheless obtain coverage of medically-necessary abortion services if those employees are otherwise covered by a policy delivered, or issued for delivery in, New York. And unless specifically exempt, such employees would be subject to the *federal* requirement that individuals obtain health insurance coverage. *See* 26 U.S.C. § 5000A(a). The State's interest in increasing women's access

to the full range of healthcare services can therefore be served even when women do not receive coverage for medically-necessary abortions through policies obtained by their employers.

Likewise, women who do not work for an employer can still benefit from the challenged coverage requirement. They may have insurance coverage under a policy issued in New York through means other than such employment if, for example, they are covered as a dependent on such a policy or they purchase an individual policy. But the Superintendent lacks authority to assure coverage for those without health insurance, whether they are employed or not. Thus, to the extent women without health insurance coverage do not benefit from the regulation, it is not because the Superintendent could have exercised her regulatory authority, but failed to do so.

Plaintiffs' second unpreserved argument asserts (Supp. Br. 30-31) that the challenged regulation is not generally applicable because the nonexclusion regulation on which it is based, 11 N.Y.C.R.R. § 52.16(c), includes purportedly comparable secular exemptions. As we have explained, the longstanding nonexclusion regulation prohibits health insurance policies issued in the State from limiting or excluding coverage

based on "type of illness, accident, treatment or medical condition," but permits certain specified exclusions. *Id.* The abortion coverage requirement thus made explicit what was already implicit in the nonexclusion regulation: health insurance policies issued in the State that cover medically necessary hospital, surgical, or medical expenses, cannot exclude coverage for medically-necessary abortion services. Although some of the prior permitted exclusions have been superseded by statutory provisions and to that extent are no longer in effect,[13] some exclusions remain. These include routine vision and dental services, and cosmetic surgery. 11 N.Y.C.R.R. § 52.16(c)(5), (9), (10).

Plaintiffs never referenced, let alone relied upon, the permitted exclusions in 11 N.Y.C.R.R. § 52.16(c) at any time in the state court proceedings in this matter. To support their claim that the regulation at issue was not generally applicable, plaintiffs relied solely on the accommodation made for qualifying religious employers. Plaintiffs

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[13] The permitted exclusions listed in the regulation that have now been superseded by statute in full or to a significant degree include maternity care, Insurance Law §§ 3216(i)(10), 3221(k)(5), 4303(c)(1), chiropractic care, *id.* §§ 3216(i)(21)(c), 3221(k)(11), 4303(y), and mental health services, *id.* § 3216(i)(30), (31), (35); *id.* § 3221(l)(5), (6), (7); *id.* § 4303(g), (k), (*l*).

suggested this unpreserved argument for the first time in their petition for certiorari and, even then, they only alluded to it. *See* Pet. 6, 24, *supra* n.8. Indeed, when defendants explained in response that no arguments concerning the permitted exclusions had been pressed or passed on below, Resp. Brief in Opp., 14-15, *supra* n.9, plaintiffs in effect conceded the point by seeking to justify the lack of preservation, asserting with a citation to *Catholic Charities* that the state courts "did not believe that exemptions mattered," Pet. Brief in Reply 5 & n.2.[14] That statement mischaracterized *Catholic Charities, see supra* at 27-28, which did not address any claim about purportedly comparable secular exemptions. Thus, nothing in *Catholic Charities* justifies plaintiffs' failure to preserve the argument.

Plaintiffs' failure to preserve this secular-exemptions argument is especially problematic because a proper resolution of the argument would require the development of a factual record, and there has been no such record development in this case. As this Court has explained, "[n]ew fact questions or legal theories will not be considered on appeal if proof might

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[14] *Roman Catholic Diocese v. Emami*, No. 20-1501 (filed Sept. 3, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-1501/191355/20210903124649781_20-1501%20cert%20rb.pdf.

have been offered to obviate or refute them had they been presented in the court below." *Sam v. Town of Rotterdam*, 248 A.D.2d at 852 (internal quotation omitted); *see also Arthur Brundage Inc. v. Morris*, 174 A.D.3d 1088, 1089 (3d Dep't 2019) (stating this "well-settled rule").

The U.S. Supreme Court has explained that strict scrutiny applies only when a policy treats "*comparable* secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (per curiam) (emphasis added). Because plaintiffs did not properly preserve an argument based on purportedly comparable secular exceptions, defendants had no opportunity to develop a record refuting that argument with evidence establishing that the permitted exclusions are not in fact comparable.

As plaintiffs note (Supp. Br. 31), defendants in their brief in opposition to the petition for certiorari offered ways in which they could seek to demonstrate, if given the opportunity to do so, that the subject exclusions are not comparable (Brief in Opp. 15-17, *supra* n. 9). Defendants discussed generally some of the purposes that the permitted exclusions seemed to serve in ensuring stability in the insurance market, purposes that are not implicated by the expanded religious

accommodation that plaintiffs seek. (Brief in Opp. 16, *supra* n. 9.) These statements were akin to offers of proof. To properly refute the comparability of the permitted exclusions, defendants would have submitted appropriate evidence, including affidavits from Department staff and technical experts, and comprehensive actuarial analyses, establishing that the subject exclusions are not exceptions to standard health insurance at all, but rather, for a variety of reasons, have historically not been included in standard health insurance coverage in the first place. The permitted exclusions thus create no consumer confusion, the concern of the nonexclusion regulation. Nor do they undermine the State's interest in the more explicit abortion-coverage regulation, which is facilitating women's access to reproductive healthcare. *See Fulton*, 141 S. Ct. at 1877 (a law lacks general applicability when it permits secular conduct that "undermines the government's asserted interests in a similar way").

We recognize that the decision of the U.S. Supreme Court to vacate this Court's decision and remand it for reconsideration in light of *Fulton* can be read as a suggestion to consider the relevance of these permitted exclusions. Should this Court read the decision in that way, it should

remit the matter to the trial court for development of an appropriate factual record.

Finally, to the extent plaintiffs seek to expand the nature of the relief they seek—suggesting that even an expansion of the existing religious accommodation could be insufficient (Supp. Br. 42 & n.8)—they cannot do so at this late stage of the litigation.

CONCLUSION

Judgment dismissing the action should be affirmed.

Dated: Albany, New York
February 25, 2022

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