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Appellate Division – Third Department Case No. 529350

Court of Appeals

State of New York

THE ROMAN CATHOLIC DIOCESE OF ALBANY; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES OF THE DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBERG; 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; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

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INTRODUCTION

On the State's telling, the United States Supreme Court granted certiorari and remanded in this case for essentially no reason. The State claims that the Abortion Mandate is constitutional under *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), which held that almost any burdens on religious conduct raise no constitutional issue so long as they do not "target" religion, and that nothing in the following seventeen years of Free Exercise jurisprudence undermines that holding. That is wrong. As *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), makes clear, a far more rigorous inquiry is required to show that laws burdening religious conduct comport with the First Amendment. Under the proper standard the U.S. Supreme Court has directed this Court to apply, the Abortion Mandate must fall.

Fulton requires that laws burdening religious conduct treat like parties alike. The State cannot prohibit religious conduct while permitting other conduct "that undermines the government's asserted interests in a similar way." *Id.* at 1877. Nor can it make the availability of an exemption turn on State officials' "individualized" judgments. *Id.*

There is no dispute that the Abortion Mandate burdens the Religious Objectors' religious conduct. And the Mandate fails *Fulton*'s requirements for general applicability in at least two ways. First, it picks religious winners and losers,

extending a religious exemption to some religious groups based on subjective criteria having nothing to do with the State's asserted interest in promoting access to abortion. Second, it requires religious employers to cover the abortions of their employees while failing to guarantee abortion access to other women across the State who do not have ordinary employer-based insurance.

Accordingly, strict scrutiny applies. The Religious Objectors have shown that the Abortion Mandate does not advance "interests of the highest order" and is not "narrowly tailored to achieve those interests," as is required to survive strict scrutiny. *Id.* at 1881. And because the State does not even try to meet its demanding burden of showing otherwise, the Abortion Mandate must fall.

ARGUMENT

I. THE STATE DOES NOT DISPUTE THAT THE ABORTION MANDATE IMPOSES A SUBSTANTIAL BURDEN.

The Abortion Mandate substantially burdens the Religious Objectors' exercise of religion by making them choose between violating their religious beliefs on the sanctity of life and paying an annual fine of $2,880 per employee. Opening Br. at 10–11. The State did not argue to the contrary below, thereby waiving the issue. *People v. Ladd*, 638 N.Y.S.2d 512, 514 n.1 (3d Dep't 1996), *aff'd*, 89 N.Y.2d 893 (1996). It does not contest the issue before this Court either.

II. THE ABORTION MANDATE IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY, THEREFORE TRIGGERING STRICT SCRUTINY

The Abortion Mandate fails to treat burdened religious conduct the same as comparable conduct it does not cover and so triggers strict scrutiny under *Fulton*. To the extent *Serio* held to the contrary, it is no longer good law.

A. Given Its Religious And Secular Exemptions, The Abortion Mandate Is Not Generally Applicable.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . ." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Thus, a law burdening religion "that is not 'neutral' *or* 'generally applicable'" is unconstitutional, unless the State "can satisfy 'strict scrutiny.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (emphasis added).

Under *Fulton*, a law is "generally applicable" only if it treats like conduct alike. If a law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," it triggers strict scrutiny. *Fulton*, 141 S. Ct. at 1877. And since the government has no more leeway to discriminate among religious groups than it does to discriminate against religion generally, *see Larson v. Valente*, 456 U.S. 228, 244–46 (1982), the same principle applies to laws permitting some but not all religious conduct: if the permitted religious conduct undermines the government's asserted interest in the same way as

the prohibited religious conduct, strict scrutiny applies, *see Lukumi*, 508 U.S. at 532–33. In addition, a law fails to treat like conduct alike—and thus triggers strict scrutiny—if it establishes "a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877.

Here, the State's asserted interests are "assuring access to [abortion] and promoting equality in health care between the sexes." Resp. Br. at 42.[1] Because of the Abortion Mandate's existing religious exemption and gaps in coverage, the law does not pursue that interest uniformly and is not generally applicable.

1. The Abortion Mandate's existing religious exemption triggers strict scrutiny.

The Abortion Mandate's existing religious exemption violates *Fulton* in two ways. It permits conduct that is similarly situated to the Religious Objectors' prohibited conduct. And it establishes a mechanism for individualized exemptions.

a. The existing religious exemption triggers strict scrutiny because it undermines the State's asserted interests in a comparable way.

The Abortion Mandate picks religious winners and losers for reasons unrelated to its "asserted interests." *Fulton*, 141 S. Ct. at 1877; *see* Opening Br. at 23–30. If a religious organization's "purpose" is "the inculcation of religious values,"

[1] In briefing to this Court, the State has changed its asserted interest, evidently abandoning its earlier asserted interest in "standardiz[ing] coverage so that consumers can understand and make informed comparisons among policies." Cert. Opp. 15; *see* AD Supp. Br. 24.

its conscience is respected. 11 NYCRR § 52.2(y)(1). If the entity exists to feed the hungry, it is not. If a religious organization sticks to its own kind, it qualifies for an exemption. *Id.* § 52.2(y)(2)–(3). If it helps all people in need or employs individuals from a variety of religious backgrounds, it does not. These distinctions have nothing to do with employees' ability to access abortion. To the contrary, they reflect only the State's judgment as to which religious beliefs and activities are "worthy of solicitude," precisely what *Fulton* forbids. 141 S. Ct. at 1879.

i. The State raises three principal arguments why these disparities created by the Abortion Mandate's existing religious exemption do not trigger strict scrutiny. None is persuasive.

First, the State maintains that "distinctions drawn among religious entities," rather than "between secular and religious conduct," are not discriminatory under *Fulton*. Resp. Br. at 38–41, 49–53. But although *Fulton* specifically dealt with an ordinance that risked privileging secular conduct over religious conduct, there is no principled basis for cabining its discussion of general applicability to that context. As the State recognizes, *Fulton* applied *Lukumi*. *Id.* at 38. And *Lukumi* is explicit that a law is not neutral and generally applicable if it "discriminates against *some* or all religious beliefs." 508 U.S. at 532 (emphasis added); *see id.* at 532–33 (citing cases involving "statute[s] that treated some religious denominations more favorably than others").

Rather than a safe harbor, inter-religious favoritism is an especially pernicious form of discrimination under the First Amendment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Adherence to that "absolute" command is essential for "the continuing vitality of the Free Exercise Clause." *Id.* at 245–46. Where two religious organizations' actions implicate the State's asserted interest in the same way but are treated differently, settled law "demand[s]" that this Court "treat the law as suspect and . . . apply strict scrutiny." *Id.* at 246.

The State claims the existing exemption does not amount to discrimination among religious groups because it makes distinctions based on their "activities, as opposed to their beliefs." Resp. Br. at 50. But that reasoning defies *Fulton*. Under *Fulton*, it is not necessary for a law to single out a religious group's *beliefs* to be unconstitutionally discriminatory. Rather, strict scrutiny is triggered whenever the law at issue "prohibits religious *conduct* while permitting secular"—or, as here religious—"conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877 (emphasis added); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("government regulations . . . trigger strict scrutiny . . . whenever they treat *any* comparable secular activity more favorably than" the challenger's "religious exercise"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (strict scrutiny triggered where "regulations treat[ed] houses of worship much

more harshly than comparable secular facilities"). Because the Abortion Mandate singles out some religious groups for unfavorable treatment for reasons unrelated to the State's asserted interests, it triggers strict scrutiny.

The State also tries to justify its selective exemption by arguing that forbidding discriminatory religious exemptions will undermine religious exercise by discouraging governments from passing religious exemptions in the first place. Resp. Br. at 40–41. Longstanding U.S. Supreme Court precedent says otherwise: "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Larson*, 456 U.S. at 245–46 (quoting *Rwy. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)). Without a strict requirement of equal treatment, the State would be free to transform religious exemptions from a shield against oppression to a tool for accomplishing a "religious gerrymander" by singling out unpopular religious groups for special mistreatment. *See Lukumi*, 508 U.S. at 535–36 (expressing concern that an animal-sacrifice ordinance "exempt[ed] kosher slaughter" but not "Santeria sacrifice[s]").

Second, the State claims the existing exemption is unobjectionable because "[n]umerous" laws benefitting religion limit their reach to "churches" rather than religious organizations generally. Resp. Br. at 53–54. The State cites two vacated

federal circuit decisions for this proposition. *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 272 (D.C. Cir. 2014), *vacated sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016), *vacated sub nom. Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). Those decisions rely exclusively on provisions of the Tax Code. *See* 26 U.S.C. §§ 170(b)(1)(A)(i), 514(b)(3)(E), 6033(a)(3)(A)(i), 7611.

Tax exemptions, however, do not bear on the First Amendment evaluation of the Abortion Mandate. The State identifies no authority addressing the constitutionality of the cited exemptions. But to the extent they are permissible, it is because they do not burden religious exercise in the first place or because they survive strict scrutiny despite triggering it. Neither point helps the State, since it concedes that the Abortion Mandate burdens the Religious Objectors' religious exercise and that it cannot survive strict scrutiny. *See supra* Part I; *infra* Part III.

The tax exemptions arguably do not impose a substantial burden on religious exercise at all—and certainly not to the same extent as the Abortion Mandate. Here, by contrast, it is undisputed that the Abortion Mandate imposes a substantial burden on the Religious Objectors' protected conduct by making them either "facilitat[e] abortions" against their sincerely held religious beliefs or "pay a very heavy price." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014); *supra* Part I.

The tax exemptions may also survive strict scrutiny. The Supreme Court has long recognized that there are uniquely compelling reasons to make our "national system of taxation" as uniform as possible. *Hobby Lobby*, 573 U.S. at 734–35 (recognizing that limiting exemptions in the tax context can survive strict scrutiny because "there simply is no less restrictive alternative to the categorical requirement to pay taxes"); *see United States v. Lee*, 455 U.S. 252, 257, 260 (1982) (finding the "burdens" on religious exercise imposed by a lack of tax exemptions permissible because they are "essential to accomplish an overriding governmental interest"). In particular, if "taxpayers" could routinely "withhold a portion of their tax obligations on religious grounds," "the tax system could not function," and "chaos" would ensue. *Hobby Lobby*, 573 U.S. at 734 (alteration omitted). Accordingly, legislatures may be justified in granting narrower religious exemptions in the tax context than would be permissible elsewhere. In contrast, when it comes to a "mandate" that "individual employers . . . purchase insurance for their own employees," the same unyielding need for uniformity is not present. *Id.*[2]

[2] In any event, the mere existence of tax exemptions limited to "churches" does not establish that the denial of such an exemption to other religious organizations is permissible, and the State cites no cases addressing (rather than assuming) their validity. To the extent those exemptions condition government benefits on the government's notions of the appropriate governing structure and activities of religious organizations rather than the legitimate interests the Tax Code is meant to serve, they may well be constitutionally dubious. *See Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1996 (2022) ("a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits").

Finally, the State claims that the Religious Objectors are not similarly situated to employers eligible for the existing exemption, because employees of a pro-life religious organization that share their employer's religious views are less likely to seek abortions than those of a different religious background. Resp. Br. at 41–42. It is, however, far from clear that that is true. To be sure, people who choose to work for a pro-life religious organization are more likely to share their employer's *pro-life* view, or at least not object to it. But that does not mean that they are more likely to share their employer's *religious* views more generally. It would, for example, be far less surprising to find a pro-life Methodist than a pro-abortion Catholic working for a Catholic *pro-life* organization. At the very least, it is the State's burden to show otherwise, which it has not even attempted to do here.

But even if the State's unproven and counter-intuitive assertion were true, it would not matter. The narrow religious exemption does not turn just on an organization's employees. It also turns on who it serves and whether its primary purpose is the inculcation of religious beliefs. And whether the people an organization *serves* share its religious beliefs on abortion has no bearing on whether the people it *employs* do so. Likewise, whether a pro-life religious organization focuses on teaching its beliefs or putting them into practice through service says nothing about whether its employees adhere to the organization's view on abortion.

The State's argument, therefore, does not even remotely justify the narrow religious exemption it has adopted.

Indeed, this entire line of reasoning is itself inimical to the First Amendment. It requires the State to make a judgment about an employee's probable views on the morality of abortion from her religious affiliation. But "[r]epeatedly and in many different contexts," the Supreme Court has "warned" that governments "must not presume to determine the place of a particular belief in a religion." *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990). After all, "determining whether a person is a 'co-religionist' will not always be easy." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2068–69 (2020) ("Are Orthodox Jews and non-Orthodox Jews coreligionists? . . . Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?"). Does a self-identifying Catholic who is pro-choice have the same "religious tenets" as a Catholic diocese? Does a Baptist or Latter-day Saint who is pro-life? It is impossible for the State (or the courts) to answer these questions, which is precisely why the Supreme Court has forbidden the use of factors such as religious affiliation as a "convenient or rough proxy for another trait that the government believes to be 'characteristic' of [the religious] group." *Roberts v. McDonald*, 143 S. Ct. 2425, 2425 (2023) (statement of Alito, J.); *cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 211 (2023) (the government may not make racial classifications "on the 'belief

that minority students always (or even consistently) express some characteristic minority viewpoint on any issue'").

In short, the State may not dole out benefits and burdens based on its speculation of the moral views of a religious entity's employees and clients, or because it believes that those further their faith through proselytization are more religious than those who do so through acts of service. Such laws are the opposite of "generally applicable" ones.

ii. Church autonomy principles reinforce that the existing exemption triggers strict scrutiny. The First Amendment protects the right of "religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. By conditioning conscience protections on the religious organization adopting a particular employment structure and approach to its mission, the State seeks to coopt those essentially private and ecclesiastical judgments. Opening Br. at 25–26.

The State counters that this point is forfeited because the Religious Objectors supposedly failed to raise it below. Resp. Br. at 54. But in the passage to which the State responds (Opening Br. at 25–26), the Religious Objectors cited religious autonomy principles not to raise "a new claim . . . , but"—at most—"a new argument to support what has been [their] consistent claim:" that the existing religious exemption makes the Abortion mandate not generally applicable. *Lebron v. Nat'l*

R.R. Passenger Corp., 513 U.S. 374, 379 (1995); *see Persky v. Bank of Am. Nat. Ass'n*, 261 N.Y. 212, 218 (1933) ("In our review we are confined to the *questions* raised or argued at the trial but not to the arguments there presented.").[3]

In any event, the Religious Objectors consistently raised church autonomy principles below. *See* A68–73 (religious autonomy allegations in Complaint); Religious Objectors' Third Dep't Br., NYSCEF Doc. No. 8, at 19 (religious autonomy briefing); Religious Objectors' Supp. Third Dep't Br., NYSCEF Doc. No. 40, at 27–28 (same). And even if that were not enough to preserve the point, it still would not be forfeited because it falls within the U.S. Supreme Court's remand order, it raises a pure question of law, and it is based on intervening case law (*Our Lady of Guadalupe*). *See infra* at 17–18.

On the merits, the State argues that the church autonomy doctrine does not apply to the employment relationship outside of the "'ministerial exception' to employment discrimination claims." Resp. Br. at 55–56. *Our Lady of Guadalupe*, however, rules out this narrow understanding of church autonomy in the employment context. Surveying the history of the ministerial exception and religious autonomy, the Court there emphasized that the "foundation" for the ministerial exception was not anything peculiar to ministers or antidiscrimination

[3] Although the Religious Objectors did not raise a freestanding religious autonomy claim *in pages 25–26* of their Opening Brief, they did preserve such a claim for further review elsewhere. *See* Opening Br. at 3 n.1.

law, but rather the "broad principle" of "independence in matters of faith and doctrine and in closely linked matters of internal government." 140 S. Ct. at 2061; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–87 (2012) (making a similar survey).

The existing exemption violates this broad principle. It penalizes certain religious groups based on how they organize themselves (*i.e.*, whom they hire and serve) and how they define their religious mission (*i.e.*, teaching versus acts of charity, and serving their coreligionists versus serving others). By these criteria, the exemption reserves favorable treatment for certain religious groups the State deems more "religious" than others, in direct violation of the church autonomy doctrine. *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality). The exemption thus triggers strict scrutiny.

b. The existing religious exemption independently triggers strict scrutiny because it establishes a system of individualized exemptions.

Even setting aside whether the existing religious exemption permits comparable activity, the exemption makes the Abortion Mandate not generally applicable because it establishes a system of individualized exemptions. Determining what counts as the same "religious tenets" and what counts as "inculcation of religious values" is an inescapably subjective inquiry. This "invites" government adjudicators to scrutinize which religious organizations' conscience

claims are "worthy of solicitude" on a discretionary, case-by-case basis, the very evil *Fulton* forbids. 141 S. Ct. at 1879 (brackets omitted); *see* Opening Br. at 27–30.

The State claims the exemption does not require any intrusive inquiries into church doctrine or practice. Instead, it asserts that the enforcement history of the analogous exemption for the State's contraception mandate—namely, statements from the Department of Financial Services (DFS), which administers the exemption—shows that sincere self-certification by religious employers will generally be sufficient to satisfy the exemption. Resp. Br. at 36–37, 56–57. But in making this argument, the State ignores DFS guidance saying just the opposite.

According to a DFS circular letter issued to insurers, the exemption for the State's contraception mandate, which has the same four eligibility requirements as the Abortion Mandate's, is a "narrow" one. DFS, *Supplement No. 2 to Insurance Circular Letter No. 1* (May 1, 2019), https://perma.cc/M5YE-DU78. Insurers "may *not* rely solely on a self-attestation from an employer," and they must demand proof of religious status, "including articles of incorporation, bylaws, charters, mission statements, brochures, and nonprofit determination letters." *Id.* (emphasis added). The State's position here is thus directly contrary to its own guidance, set forth by DFS.

Nor does the State identify any provision of law that *requires* adjudicators to be deferential. To the extent DFS disregards its existing guidance and *chooses* to be

deferential, it still exercises exactly the kind of discretion *Fulton* forbids. *Fulton*, after all, found the mere "availability of exceptions" in principle to be enough to trigger strict scrutiny, even though city officials "ha[d] never granted one." 141 S. Ct. at 1879. So too here. To the extent DFS has discretion to determine whether a religious employer's purpose is the inculcation of religious values, or whether it primarily employs or serves persons who share its religious tenets, the Abortion Mandate is not generally applicable.

2. The Abortion Mandate's failure to address coverage for many women in New York triggers strict scrutiny.

The Abortion Mandate is also not generally applicable because it does not guarantee access to abortion for women whose employers do not provide insurance, women whose employers provide a self-insured ERISA plan, and women who are not employed and do not otherwise have access to employer-based insurance. Opening Br. at 30–32.

This disparity is far from trivial. As of 2020, 900,000 New Yorkers had no health insurance. U.S. Dep't of Labor, *Health Insurance Coverage Bulletin* 7 (Aug. 26, 2022), https://perma.cc/MWY4-GTZW. And over four million New Yorkers received health insurance through private-sector, self-funded plans. *Id.* at 24. These totals vastly exceed the number of women employed by the Religious Objectors.

a. The State maintains this argument is not preserved because the Religious Objectors did not raise these gaps in coverage until after the U.S. Supreme Court

issued its grant-vacate-remand (GVR) order in this case. Resp. Br. at 43–44. The State is wrong three times over. *First*, the coverage gaps present simply another "argument[]" relevant to the "*question[]*" this Court must decide—whether the Abortion Mandate is neutral and generally applicable. *Persky*, 261 N.Y. at 218; *accord Lebron*, 513 U.S. at 379. The Court cannot properly answer that question, and thus determine whether the Abortion Mandate triggers strict scrutiny, unless it assesses the coverage gaps; a decision that ignores them would be incomplete and likely erroneous.

Second, wholly apart from forfeiture, this Court "may address" a pure issue of law "even though it was not presented below." *Matter of Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 250 (1986). That includes whether a statute has an exception rendering it not generally applicable under *Smith*.

Finally, it would be inconsistent with the U.S. Supreme Court's GVR order to refuse to consider the effect of these coverage gaps on the Abortion Mandate. There is no question that such gaps will be properly before the Supreme Court in an appeal from this Court: "once a federal claim is properly presented, a party can make any argument [to the U.S. Supreme Court] in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) (brackets omitted).

Because the coverage gaps will be properly before the Supreme Court in the future, they are properly before this Court now. The Supreme Court has repeatedly emphasized that it is "a court of review, not of first view." *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). An essential function of a GVR order is to "assist[] th[e] [Supreme] Court by procuring the benefit of the lower court's insight before [the Supreme Court] rule[s] on the merits." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Thus, the GVR order "enabl[es]" this Court "to consider potentially relevant decisions *and arguments* that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197 (1996) (emphasis added). Hearing the Religious Objectors' additional argument on the merits is necessary to fully comply with the GVR order.

b. On the merits, the State maintains that, despite not guaranteeing abortion access for all women in New York, the Abortion Mandate is generally applicable because is covers the full extent of the Superintendent of DFS's authority. Resp. Br. at 44–47. But the federal constitutional question of general applicability cannot turn on the technicalities of how state law divvies up power among bureaucrats. *Fulton* makes clear general applicability turns on the extent to which the challenged law "permit[s] secular conduct that undermines the government's asserted interests in a similar way," not the intent of any particular official. 141 S. Ct. at 1877. Rather,

the State has an obligation to treat like parties alike even if that requires "the 'creation of an entirely new program.'" *Hobby Lobby*, 573 U.S. at 730.

For instance, in *Lukumi*, a municipal ordinance prohibiting religious animal sacrifice was not generally applicable because it "fail[ed] to prohibit nonreligious conduct that endanger[ed]" the city's interest in "preventing cruelty to animals" "in a similar or greater degree than [religious] sacrifice does." 508 U.S. at 543. This was in part because "Florida law," which the city had no power to alter, authorized the killing of animals for secular reasons in a variety of comparable circumstances, such as "euthanasia of 'stray … animals'" and "hunting." *Id.* at 543–44. Even though the city could not on its own remedy the underinclusiveness of its prohibition, the ordinance still triggered and failed strict scrutiny. *Id.* at 544, 547.

In any event, if the State genuinely wanted to ensure across-the-board access to abortion, it could directly "assume the cost of providing [abortions] to any women who are unable to obtain them under their health-insurance policies" either because they do not have access to a New York-regulated insurance plan or because their employer has a religious objection. *Hobby Lobby*, 573 U.S. at 728; *see* Opening Br. at 43–45. The State makes no representation that this would be infeasible. *See* Resp. Br. at 44–47.[4]

[4] The State asserts that federal law prevents it from regulating self-funded ERISA plans. Resp. Br. at 45. But that would not prevent the State from directly

B. *Serio* Must Be Rejected Because Its Reasoning Is Inconsistent With U.S. Supreme Court Precedent.

Following the Third Department, the State rests its entire case on this Court's decision in *Serio*. But after *Fulton*, *Tandon* and other intervening Free Exercise cases, *Serio* is no longer good law. Opening Br. at 32–35.[5]

Serio held that a law burdening religious conduct is neutral and generally applicable so long as it does not consciously "target" religion. 7 N.Y.3d at 522. But *Fulton* and *Tandon* make clear that general applicability requires more—that similarly situated parties be treated similarly. Thus, even if a law does not affirmatively *target* religion, it still triggers strict scrutiny if it permits other "conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. If a law "treat[s] *any* comparable secular" or religious "activity more favorably than religious exercise," it is "not neutral and generally applicable." *Tandon*, 141 S. Ct. at 1296. And the same is true for comparable religious conduct. *Supra* at 5–6.

In response to this clear-cut conflict, the State attempts to rewrite *Serio*. Resp. Br. at 27–28. The State declares—without quoting any relevant analysis from the

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funding or insuring abortions outside of the plans, and the State does not claim otherwise.

[5] The Religious Objectors do not challenge the continued validity of *Serio*'s interpretation of the Article I, § 3 of the New York State Constitution. *See* 7 N.Y.3d at 524–28.

decision—that *Serio* "additionally found the statute to be one 'of general applicability,' because it uniformly required carriers offering policies in the State that covered prescription drugs and devices to provide coverage for contraceptives." *Id.* at 27. But although *Serio* used the phrase "generally applicable," it never justified its holding in way the State suggests, or otherwise indicated that it weighed whether the law was "generally applicable" apart from any issue of religious targeting, despite the law's exemption for certain religious entities and not others. *See* 7 N.Y.3d at 522. Because *Fulton* and *Tandon* require more to establish general applicability, *Serio* cannot control here.

Like the Third Department, the State also argues that *Fulton* could not have displaced *Serio* because the two cases rely on the same earlier precedents—*Smith* and *Lukumi*. Resp. Br. at 28; *Roman Cath. Diocese of Albany v. Vullo*, 206 A.D.3d 1074, 1075 (2022). But, again, by reading them to prohibit only deliberate targeting, *Serio*'s interpretation of those precedents was inconsistent with *Fulton*'s.

In addition, the State pointedly does *not* defend the Third Department's theory that *Serio* remains good law because a law is not generally applicable under *Fulton* only if it creates a system of individualized exemptions. *Diocese of Albany*, 206 A.D.3d at 1075. That theory is plainly inconsistent with the language of *Fulton*, which, after discussing individualized exemptions, stated that a law "*also* lacks general applicability if it prohibits religious conduct while permitting secular

conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877 (emphasis added). But in any event, the Abortion Mandate *does* create a system of individualized exemptions, as discussed. *Supra* at 14–16.

Finally, even if it is technically possible to reconcile *Serio* with *Fulton* and *Tandon*, it should still be overruled. *Stare decisis* is not "an inexorable command." *In re Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 518 (1985). Even absent a direct overruling by the U.S. Supreme Court, this Court is "free … to correct a prior erroneous interpretation of the law" in "a past decision," *id.* at 519, "especially" in a matter of "constitutional interpretation where legislative change is practically impossible," *People v. Bing*, 76 N.Y.2d 331, 338 (1990). At a minimum, *Serio*'s approach to general applicability is inconsistent with the reasoning underlying *Fulton* and *Tandon*. For that reason too, *Serio* must be discarded.

The Third Department's entire analysis rested on *Serio*. But neither it nor the State can square *Serio* with *Fulton* or *Tandon*. The Third Department must be reversed.

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

Because the Abortion Mandate is not generally applicable, it is constitutional only if the State shows that the Mandate "advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881. The State does not even try to meet that demanding burden. It did not attempt to do so

below, thereby waiving the issue. *Ladd*, 638 N.Y.S.2d at 514 n.1. Nor does it attempt to do so in this Court. And given the Mandate's exceptions and the lack of evidence the State has presented justifying how its interests somehow allow exemptions for so many others but not the Religious Objectors here, there is no way the State could have met its burden. Opening Br. at 41–48.

IV. THIS CASE PRESENTS A PROPER PRE-ENFORCEMENT CHALLENGE.

Finally, nearly six years into this litigation, the State suggests for the first time that the Religious Objectors' claims are not suited to a pre-enforcement challenge. Resp. Br. at 58–61. This assertion is baseless.

A claim is well suited to be presented in a "preenforcement challenge" if it presents "a 'purely legal' question" and will result in "hardship" to the challenger absent judicial intervention. *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 519 (1986). Both elements are present here. The case turns entirely on whether the Abortion Mandate is generally applicable, not on the fact-specific circumstances of any of the Religious Objectors. And without judicial relief, at least some—and perhaps all—of the Objectors will have to either violate their religious beliefs or pay an annual fine of $2,880 per employee. *See* Opening Br. at 11; *supra* at 2.

The State claims the record does not establish whether any of the Religious Objectors actually fall outside the existing exemption. Resp. Br. at 58–60. This is false. Given the subjectivity that pervade the exemption criteria, none of the

Objectors can predict whether they will qualify for the narrow exemption. And at least four—the Teresian House Nursing Home Company and Catholic Charities (Albany, Ogdensburg, Brooklyn)—plainly do not, because they serve and employ individuals of a variety of faith backgrounds, and do not primarily provide religious instruction. A48–49, 59–60. Indeed, DFS guidance explicitly states that "religious nursing homes" do *not* qualify for the exemption. *Supplement No. 2*, *supra*.

The State also argues a pre-enforcement challenge may not be appropriate because it is unclear how intrusively DFS will enforce the conditions on the existing religious exemption. Resp. Br. at 60–61. But that provides no comfort to the Teresian House or Catholic Charities. Even under the most deferential enforcement, they still would not be able to affirm in good faith that they meet the criteria, and so face crippling fines regardless. And in any event, the State's professed uncertainty cannot be squared with the aggressive stance DFS has taken to interpret the exemption "narrow[ly]." *Supplement No. 2*, *supra*; *see supra* at 15. Indeed, DFS has vowed to "take action against an issuer for *any* failure to adhere to *all* statutory and regulatory requirements" in applying the exemption. *Supplement No. 2*, *supra* (emphases added).

The Religious Objectors' claims cannot wait. They must obtain relief now if they are to avoid irreparable harm. *See Diocese of Brooklyn*, 141 S. Ct. at 67 ("The

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

CONCLUSION

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

Date: November 8, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)(1), the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Roman Catholic Diocese of Albany, New York; The Roman Catholic Diocese of Ogdensburg; 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, N.Y.; First Bible Baptist Church; Our Savior's Lutheran Church, Albany, N.Y.; Teresian House Nursing Home Company, Inc.; Renee Morgiewicz; and Depaul Housing Corporation are not publicly held corporations. They have no subsidiaries or affiliates that are publicly traded.

Date: November 8, 2023

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AFFIRMATION OF SERVICE

I, Victoria Dorfman, an attorney admitted to practice before the courts of the State of New York, affirm under penalty of perjury as follows: I am over 18 years of age and not a party to this case. On November 8, 2023, I served three copies of the attached Brief for Plaintiffs-Appellants dated November 8, 2023, by enclosing the aforesaid documents in a properly addressed postage paid envelope deposited into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery addressed as follows:

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