No. APL-2022-00089

To be argued by:
LAURA ETLINGER
15 minutes requested

State of New York
Court of Appeals

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

Plaintiffs-Appellants,

-against-

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

Defendant-Respondent.

(Caption continued inside front cover.)

BRIEF FOR RESPONDENTS

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Supreme Court, Albany County, Index Nos. 02070-16, 07536-17
Third Department No. 529350B

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

Plaintiffs-Appellants,

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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 requires the Court to decide whether its decision in *Catholic Charities of Diocese of Albany v. Serio (Catholic Charities*), 7 N.Y.3d 510 (2006), *cert. denied*, 552 U.S. 816 (2007), remains good law.

Plaintiffs challenge under the Free Exercise Clause a regulation of the Superintendent of Financial Services (Superintendent) prohibiting health insurance policies issued or delivered in the State from excluding coverage for medically necessary abortions if they provide coverage for hospital, surgical, or medical expenses. The regulation accommodates religious entities that satisfy the criteria for "religious employers" by providing that such employers may obtain group policies excluding coverage for medically necessary abortion services. Plaintiffs suggest, however, albeit without expressly conceding, that they do not satisfy the definition and thus remain subject to the coverage requirement. In *Catholic Charities*, the Court rejected a free-exercise challenge to an analogous coverage requirement for contraceptives that included an accommodation for religious

employers defined by the same terms, because the coverage requirement was both neutral and generally applicable. *Id.* at 522. In prior state court proceedings in this case, the Third Department concluded that *Catholic Charities* controlled and affirmed the dismissal of the underlying complaint. This Court dismissed the appeal from that judgment for want of a substantial constitutional question, and also denied leave to appeal. The case is now back before the Court again, after the Supreme Court vacated the judgment and remanded to the Third Department for reconsideration in light of the Supreme Court's recent decision in *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021).

The Court should find, as the Third Department did on remand, that *Catholic Charities* remains good law and affirm. Neither *Fulton* nor the recent Supreme Court per curiam orders on which plaintiffs rely conflict with the holding or rationale of *Catholic Charities*. While plaintiffs additionally challenge as too limited the definition of "religious employers" entitled to the religious accommodation, their challenge is outside the scope of the remand order and the Court need not address it. In any event,

plaintiffs' challenge in effect asks the Court to re-examine its conclusion in *Catholic Charities* that confining the accommodation to the "religious employers," as defined, does not violate free-exercise principles. No such re-examination is warranted, and this case provides a poor vehicle for any such re-examination in any event.

QUESTIONS PRESENTED

1. Whether *Catholic Charities* rejects the same free-exercise challenge presented here and thus the Third Department properly treated it as controlling precedent.

2. Whether *Catholic Charities* remains good law, notwithstanding the Supreme Court's recent decision in *Fulton,* because *Fulton* does not overrule *Catholic Charities*, either directly or by implication.

3. Whether the Court should decline to re-examine *Catholic Charities*' conclusion that the scope of the religious-employer accommodation does not violate free-exercise principles, because that issue is outside the scope of the remand order, the

Court's analysis was correct, and this pre-enforcement challenge presents a poor vehicle for such re-examination in any event.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Health insurance policies issued for delivery in the State are subject to approval by the Superintendent. Insurance Law § 3201. Under the Superintendent's broad authority to promulgate regulations establishing minimum standards for the form, content and sale of health insurance policies, Insurance Law § 3217(a), 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).[1] In 2017, the Superintendent

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[1] An insurer is generally required to cover only treatments that are medically necessary, unless the insurance policy provides otherwise. Medical necessity is not defined by statute or regulation, and is not determined by the Department of Financial Services. Determinations of medical necessity are "regularly made in the normal course of insurance business by a patient's healthcare provider in consultation with the patient, subject to the utilization

(*continued on the next page*)

promulgated a regulation to make explicit what was already implicit in this more general nonexclusion regulation: all policies that provide hospital, surgical, or medical expense coverage may not "limit or exclude coverage for abortions that are medically necessary." 11 N.Y.C.R.R. § 52.16(o)(1); *see also id.* § 52.1(p)(1) (explaining that the nonexclusion regulation already required coverage for medically necessary abortions). The Superintendent determined that an explicit coverage requirement was necessary because inconsistent implementation of the nonexclusion regulation "was leading to improper coverage exclusion and consumer misunderstanding." (Defendants' Supplemental Appendix (SA) 111.)

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 regulation defines a "religious

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review and external appeal procedures" provided for by state law. (SA109.)

employer" as an entity that satisfies four criteria: its purpose is to inculcate religious values; it primarily employs persons who share its religious tenets; it primarily serves persons who share those tenets; and it is a nonprofit organization, as described in sections of the Internal Revenue Code that exempt from the requirement to file an annual return churches, their integrated auxiliaries, and the exclusively religious activities of any religious order. 11 N.Y.C.R.R. § 52.2(y). The Legislature had used the same definition in the religious accommodation it incorporated into the contraceptive coverage statute at issue in *Catholic Charities*. *See* Insurance Law §§ 3221(*l*)(16)(E), 4303(cc)(5)(A).

In adopting that accommodation, instead of a broader one that was originally proposed, the Superintendent embraced the Legislature's policy judgment that the more limited accommodation provided the appropriate balance between, on one hand, the interests of religious employers in the State, and on the other hand, the interests of employees in access to essential reproductive health care and equality in health care between the sexes. (SA107-111.) 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. (SA108, 111.)

When a religious employer invokes the accommodation by certifying to its insurer that it is a "religious employer," as defined, the insurer 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).

B. State Court Proceedings

1. Plaintiffs Commence this Action.

Plaintiffs include dioceses, churches, a religious order of women, and religiously affiliated service organizations that object on religious grounds to providing insurance coverage for medically necessary abortion services.[2] (R486-491, 497-499.) They assert that

[2] Plaintiffs also include an employee of an organizational plaintiff (SA7) and a construction company, Murnane Building

(*continued on the next page*)

the challenged regulation requires them to provide health insurance for the designated abortion services, and thereby to fund those services. (Plaintiffs' Brief (Br.) 1, 19 n.4; *see also* Plaintiffs' Appendix (A) 54, 56.)

Though plaintiffs describe the regulation as an "abortion mandate" (Br. *passim*), the regulation does not compel them to provide coverage for those services. The regulation affects plaintiffs indirectly and, even then, only if they choose to provide health insurance to their employees by purchasing group health insurance policies. New York does not require employers in the State to provide employee health insurance.[3] While the federal Affordable

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Contractors (SA8), that has discontinued its participation in this lawsuit.

[3] Further, the record contains no evidence that by purchasing policies that include the subject coverage, a purchaser funds, even indirectly, medically necessary abortion services. Indeed, the Department of Financial Services advises that covering abortion services as part of a health plan that provides hospital, surgical, or medical expense coverage is cost-neutral because of the low cost of covering such services, *see* M. Schaler-Haynes, et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 Univ. of Pa. J.L. and Social Change 323, 384-85 (2012), and the cost savings attributable to such coverage.

Care Act imposes penalties on "large employers," as defined, that fail to provide employee health insurance, *see* 26 U.S.C. § 4980H(a), other employers face no penalties. And those plaintiffs who feel compelled to provide health insurance by what they see as a "moral obligation" (Br. 10) or by the specter of federal penalties can avoid New York's coverage requirements by choosing to create a self-insured plan for their employees, as authorized by 29 U.S.C. §§ 1001–1461, commonly known as ERISA. Such plans are not subject to state regulation. *See* 29 U.S.C. § 1144(a), (b)(2)(B).

Plaintiffs' brought this suit to challenge 11 N.Y.C.R.R. § 52.16(o)(1)'s abortion coverage requirement.[4] They did so without first seeking to invoke the religious accommodation or expressly

[4] Plaintiffs had earlier filed an action challenging the terms of a standard health insurance policy template issued by the Department of Financial Services that, in accordance with the pre-existing general nonexclusion regulation, included coverage of medically necessary abortions as part of the coverage of essential benefits. After the promulgation of the regulation at issue here, petitioners commenced a second action challenging that regulation, and the two actions were joined. *See Roman Catholic Diocese of Albany v. Vullo* (*Roman Catholic Diocese I*), 185 A.D.3d 11, 14-15 (3d Dep't 2020).

conceding in their complaint that it did not apply to them.[5] They asserted, among other claims, the same federal free-exercise claim that was asserted in *Catholic Charities*.[6] (*Compare* SA34-35 (underlying complaint), *with* SA89-92 (*Catholic Charities* complaint).) Plaintiffs claimed that the regulation violates their right

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[5] While a few of the plaintiffs' declarations refer to requests for policies that did not cover abortion services, those requests were made before the Superintendent by regulation recognized a religious-employer accommodation. (*See, e.g.,* A48 (referring to exhibit at R430).)

[6] Plaintiffs also asserted the same state free-exercise claim, as well as the same federal Establishment Clause, free-speech, expressive-association, and state statutory claims that were asserted in the *Catholic Charities* litigation. In addition, they asserted a separation-of-powers claim. All of these claims were rejected by the Third Department. Because plaintiffs did not pursue any of these additional federal claims in their petition for certiorari, those claims are outside the scope of the remand order to the Third Department and, appropriately, are not pressed by plaintiffs here. Plaintiffs likewise press no state-constitutional claim here. This appeal thus provides no basis to re-examine the state free-exercise analysis applied by the Court in *Catholic Charities*, as the brief of amicus New York State Catholic Conference asks this Court to do. Plaintiffs did, however, seek reexamination of the Court's state-constitutional analysis in their appeal as of right to this Court from the Third Department's original judgment. In dismissing that appeal for want of a substantial constitutional question, the Court implicitly found no basis to do so.

to free exercise because it "target[s] the practices of certain religious employers for discriminatory treatment." (SA34-35.)

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

On defendants' motion to dismiss and plaintiffs' cross-motion for summary judgment, Supreme Court, Albany County, dismissed the complaints on the basis of *Catholic Charities*. (A31-41.) The Third Department affirmed. The court held that principles of stare decisis resolved the case. *See Roman Catholic Diocese of Albany v. Vullo* (*Roman Catholic Diocese I*), 185 A.D.3d 11, 16 (3d Dep't 2020). The Third Department explained that *Catholic Charities* rejected a free-exercise challenge to an analogous law requiring contraceptives coverage while accommodating "religious employers," defined by the same criteria that the Superintendent used in the regulation at issue here.

In rejecting that free-exercise claim, *Catholic Charities* relied on 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 was a "neutral law of general applicability" because it did not target religion and 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).

Catholic Charities specifically concluded that the accommodation for "religious employers" did not take the statute outside of the *Smith* rule. The Court explained that the law's neutrality was not defeated by the fact that only some religious entities—namely, religious employers, as defined—may obtain an exempt policy, because to hold otherwise would discourage the enactment of religious accommodations in the first place. *Id.* at 522. The Court also rejected plaintiffs' Establishment Clause claim, concluding that the "religious employer" accommodation was not a

denominational preference and reaffirming that the law was "generally applicable and neutral between religions." *Id.* at 528-29.[7]

Recognizing that plaintiffs here asserted the same constitutional claims, the Third Department determined that *Catholic Charities*' analysis of neutrality and general applicability controlled and required the court to reject plaintiffs' free-exercise challenge. *Roman Catholic Diocese I*, 185 A.D.3d at 16. In particular, the Third Department relied on *Catholic Charities'* conclusion that the contraceptive-coverage statute at issue in that case was neutral and uniformly applied, notwithstanding the exception available for those who qualified for the religious accommodation. *Id.* at 17. The Third Department held that the same analysis governed the regulation at issue 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.* The court explained further that the

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[7] *Catholic Charities* additionally rejected the argument that the contraceptive coverage requirement violated plaintiffs' free-exercise rights under the church-autonomy and hybrid-rights doctrines. 7 N.Y.3d at 523-24.

difference between contraceptives and abortion was "immaterial" to the legal analysis, as was the fact that the matter at hand involved a regulation, while *Catholic Charities* involved a statute. *Id.* And as *Catholic Charities* had expressly held, 7 N.Y.3d at 528-29, the accommodation for "religious employers," as defined, did not create a denominational classification that ran afoul of free-exercise principles because it was based on the religious entity's activities, and not its beliefs. *Roman Catholic Diocese I*, 185 A.D.3d at 17 n.7.

Concluding that the remaining claims were governed by the Third Department and Court of Appeals decisions in the *Catholic Charities* litigation and otherwise lacked merit, the Third Department affirmed the judgment in defendants' favor. *Id.* at 17 & nn.6-7, 21.

Plaintiffs filed an appeal as of right and also sought leave to appeal, arguing that this 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. 36 N.Y.3d 927.

C. U.S. Supreme Court Proceedings

Plaintiffs filed a petition for certiorari, seeking review of their federal free-exercise claim. More specifically, they sought review of the question whether the Superintendent's coverage requirement is neither neutral nor generally applicable because its religious accommodation does not extend to all entities asserting a religious objection.[8] Pet. i, 15-28.[9] 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.9.

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[8] Plaintiffs also asked the Supreme Court to revisit *Smith* if the regulation satisfied free exercise principles under the *Smith* test. While plaintiffs recognize that *Smith* binds this Court, they purport to preserve this argument for further review in the U.S. Supreme Court. (Br. 19 n.4.)

[9] *Roman Catholic Diocese v. Emami*, No. 20-1501 (filed April 23, 2021) (petition for certiorari) (internet). (For internet sources, URLs are provided in the Table of Authorities. All URLs were last visited on September 26, 2023.)

Following the Superintendent's submission of a memorandum in opposition and plaintiffs' submission of a reply, the U.S. Supreme Court granted the petition, vacated the Third Department's judgment, and remanded to that 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).

Fulton involved a free-exercise challenge to Philadelphia's decision to cease contracting with the plaintiff foster-care agency based on the agency's refusal to certify unmarried couples or same-sex married couples for foster-care placements, in violation of a nondiscrimination provision of the contract and multiple nondiscrimination laws. 141 S. Ct. at 1875-76. The Court held that Philadelphia's nondiscrimination policy burdened the agency's religious exercise and fell outside the rule established in *Smith*, because the subject policy was not generally applicable. *Id.* at 1876-77. For that purpose, *Fulton* recognized two circumstances that render a governmental policy not generally applicable for purposes of *Smith*: (1) when the policy "invites the government to consider the particular reasons for a person's conduct by providing a

mechanism for individualized exemptions" and (2) when the policy "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. *Fulton* held that the government policy before it was not generally applicable because it involved the first of those circumstances. *Id.* at 1877-81.

D. The Third Department Decision Upon Remand

Following supplemental briefing, the Third Department again affirmed, holding that *Catholic Charities* remained valid and controlling precedent. *Roman Catholic Diocese of Albany v. Vullo* (*Roman Catholic Diocese II*), 206 A.D.3d 1074 (3d Dep't 2022). The court noted that *Fulton* did not explicitly overrule *Catholic Charities*. *Roman Catholic Diocese II,* 206 A.D.3d at 1074-75. The court held further that nothing in *Fulton* conflicted with *Catholic Charities*. As for the two circumstances *Fulton* identified that render a governmental policy not generally applicable, the court noted that *Fulton* cited precedent for those propositions that pre-dated *Catholic Charities*, precedent that *Catholic Charities* had cited. *See Roman Catholic Diocese II*, 206 A.D.3d at 1075. The Third

Department also rejected plaintiffs' argument that, under *Fulton*, a governmental policy cannot be generally applicable if it contains *any* exemption, including an exemption to accommodate religion. *Id.* Neither the language of *Fulton* nor the federal courts of appeals cases interpreting it supported that view. *Id.*

Accordingly, the Third Department held that *Fulton* did not conflict with the rationale of *Catholic Charities* or its holding that a law's neutrality and general applicability is not defeated by the law's inclusion of a religious accommodation. *Id.* at 1075-76. Rejecting plaintiffs' remaining arguments to the extent they fell within the scope of the remand order and were preserved, the Third Department held that *Catholic Charities* remained binding precedent. *Id.* at 1076. The court therefore affirmed for the reasons stated in its original decision. *Id.*

This appeal followed.

E. Subsequent Legislative Developments

While the Supreme Court's remand was pending before the Third Department, the Legislature enacted a bill as part of the 2022-2023 New York State budget that codifies the regulation at

issue here. *See* Ch. 57, pt. R, 2022 N.Y. Laws (LRS), (amending Insurance Law §§ 3216(i)(36), 3221(k)(22), and 4303(ss)). The legislation was made effective January 1, 2023, and applies to policies issued or renewed on or after that date. *See* Ch. 57, pt. R, § 5, 2022 N.Y. Laws (LRS). The challenged regulation has not been repealed, however, and thus remains in effect. And because the legislation is co-extensive with the regulation,[10] the legislation is subject to challenge on the basis of the same "alleged infirmities," and thus does not appear to moot this appeal. *See Matter of Dry Harbor Nursing Home v. Zucker*, 175 A.D.3d 770, 772 (3d Dep't 2019) (quotation marks omitted).

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[10] While the language of the regulation differs from that of the statutory provisions, when those provisions are considered together, they are co-extensive as to both the scope of the coverage requirement and the religious accommodation. *See* Insurance Law §§ 3216(i)(10)(A), (*l*)(36)(A) (applying coverage requirement to individual policies that provide hospital, surgical, or medical expenses coverage), 3221(k)(5)(A)(1), (k)(22)(A),(C), (*l*)(16)(E) (applying coverage requirement and accommodation to such group and blanket policies), and 4303(c)(1)(A), (cc)(5)(A),(C), (ss)(1) (same; policies issued by article 43 corporations and HMOs). While the statutory provisions, unlike the regulation, do not specifically refer to coverage of "medically necessary" abortions, they effectively provide the same coverage because the requirement that care be "medically necessary" applies to all covered services. *See infra* n.1.

For ease of reference, we refer to the government policy at issue as the "regulation."

ARGUMENT

POINT I

CATHOLIC CHARITIES REJECTS THE SAME FREE-EXERCISE CLAIM ASSERTED HERE

As the Third Department correctly held in its original judgment, *Roman Catholic Diocese I*, 185 A.D.3d at 16-17, and reaffirmed on remand, *Roman Catholic Diocese II*, 206 A.D.3d at 1075-76, the Court's decision in *Catholic Charities* rejects the same free-exercise challenge that plaintiffs raise here. This Court recognized as much when it dismissed plaintiffs' original appeal for lack of a substantial constitutional question. 36 N.Y.3d 927. *Catholic Charities* thus controls here, unless subsequent Supreme Court caselaw requires the Court to overrule that precedent. For the reasons set forth in Points II and III, *infra,* it does not.

Catholic Charities upheld as a valid and neutral law of general application a statute requiring policies delivered in the State to include coverage for contraceptive drugs and devices if the

policies covered prescription drugs and devices more generally,[11] notwithstanding that the statute accommodated some religious entities—those that qualified as "religious employers"—and not others. 7 N.Y.3d at 522. The Court's reasoning, and its conclusion that the statute easily survived a challenge under the federal Free Exercise Clause, *see id.* at 524-25, applies equally to the regulation challenged here. Like the statute at issue in *Catholic Charities,* the regulation at issue here requires coverage of medically necessary abortion services if medically necessary hospital, surgical, or medical expenses are covered. And the regulation similarly accommodates "religious employers," defined precisely as the statute at issue in *Catholic Charities* did.

Thus, the conclusion of *Catholic Charities* that such a statute is neutral and generally applicable, notwithstanding the accommodation for religious employers, as defined, controls the like coverage

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[11] Pursuant to more recent amendments, the Insurance Law now requires that all New York-regulated policies cover designated contraceptives if they cover hospital, surgical, or medical expenses. *See* Insurance Law §§ 3216(i)(17)(E)(v), 3221(*l*)(16)(A)(1), 4303(cc)(1)(A).

requirement here, as does the Court's rationale that to hold otherwise would be to discourage, rather than promote, religious exercise. *See Catholic Charities*, 7 N.Y.3d at 522, 528. Also controlling here is the conclusion in *Catholic Charities* that the accommodation does not create a denominational preference, but rather is "neutral between religions." *Id.* at 528. And as the Third Department correctly recognized, the factual distinctions between the statute at issue in *Catholic Charities* and the regulation at issue here are legally immaterial and do not change *Catholic Charities*' controlling effect. *Roman Catholic Diocese I*, 185 A.D.3d at 17. Indeed, just as plaintiffs assert that abortion is a "grave moral offense" that violates their core religious teachings (A63-65; *see* Br. 10), the *Catholic Charities* plaintiffs similarly asserted that contraception was "sinful" and that the challenged statute required them to violate their religious tenets by compelling them to finance "conduct that they condemn."[12] *Catholic Charities*, 7 N.Y.3d at 520-

[12] As the complaint in *Catholic Charities* makes clear, plaintiffs in that case opposed the contraceptive coverage mandate in part because it required coverage of contraceptive methods that they believed had "abortifacient" properties. (*See* SA70.)

21. Indeed, the Court there noted the centrality of plaintiffs' beliefs to their faiths. *Id.*

For all of these reasons, the Court's decision in *Catholic Charities* controls, unless subsequent Supreme Court caselaw requires the Court to overrule that precedent. As we explain below, subsequent Supreme Court caselaw imposes no such requirement.

POINT II

FULTON DOES NOT OVERRULE *CATHOLIC CHARITIES* OR OTHERWISE REQUIRE A DIFFERENT RESULT

As the Third Department correctly held, *Fulton* did not expressly or implicitly overrule *Catholic Charities*. It is undisputed that *Fulton* did not expressly overrule *Catholic Charities*, because it did not review that decision and the U.S. Supreme Court also has not overruled any of its prior decisions on which *Catholic Charities* relied, including *Employment Division v. Smith*, 494 U.S. 872. *See Roman Catholic Charities II*, 206 A.D.3d at 1074-75. Nor, contrary to plaintiffs' argument (Br. 32-35), does *Fulton* or the Supreme Court's recent per curiam orders addressing COVID-19 gatherings

restrictions[13] conflict with *Catholic Charities* and thereby implicitly overrule it.

Implicit overruling occurs when there is an irreconcilable conflict between a precedent of this Court and a subsequent U.S. Supreme Court decision, as happens when the U.S. Supreme Court addresses the very issue decided by the Court of Appeals and rules the other way, *see People v. Brown*, 40 N.Y.2d 381, 383 (1976), or rules in a way that is directly inconsistent with the rationale on which the Court of Appeals precedent is based, *see Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 631-632 (1993), *cert. denied*, 510 U.S. 993 (1993). An intervening Supreme Court decision is not inconsistent with, and therefore does not overrule the Court's precedent, if this Court has reached a different result on distinguishable facts. *See People v. Overton*, 24 N.Y.2d 522, 524, 526 (1969).

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[13] *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) and discussion *infra* at 39-40.

The rule that implicit overruling requires an irreconcilable conflict 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. *See*, *e.g.*, *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (finding earlier factual conclusion remained dispositive following remand in light of intervening Supreme Court decision), *cert. denied*, 500 U.S. 954 (1991); *People v. Moll*, 26 N.Y.2d 1, 4-5 (finding facts distinguishable from those in intervening Supreme Court decision), *cert. denied sub nom. Stanbridge v. New York*, 398 U.S. 911 (1970); *Overton*, 24 N.Y.2d at 524, 526 (same).

Fulton and the recent Supreme Court per curiam orders on which plaintiffs rely involving COVID gathering restrictions address the two circumstances in which a government policy lacks general applicability and thus triggers strict scrutiny under the Free Exercise Clause. Neither circumstance is implicated here. Accordingly, there is no irreconcilable conflict between this recent Supreme Court precedent and this Court's decision in *Catholic Charities,* which thus remains controlling precedent. While

plaintiffs also raise an unpreserved argument concerning general applicability that is not controlled by *Catholic Charities*, that argument should not be considered and would not provide a basis for reversal in any event.

A. Plaintiffs' Asserted Conflict Between *Fulton* and *Catholic Charities* Rests on a Mischaracterization of that State Court Precedent.

Preliminarily, plaintiffs argue that *Catholic Charities* conflicts with *Fulton* by failing to consider the general applicability of the statute before it. (Br. 32-35.) Plaintiffs' argument mischaracterizes this Court's decision.

As explained *supra* 16-17, *Fulton* applied the principle that a government policy is not generally applicable if it provides a mechanism, as Philadelphia's policy did, for individualized exemptions granted on a discretionary basis that allows the government to consider the reasons for the person's conduct. 141 S. Ct. at 1877-79. And *Fulton* explained that Philadelphia's policy fell outside the rule of *Smith* on that basis, without regard to whether the policy was neutral toward religion, 141 S. Ct. at 1877. Thus,

Philadelphia's policy could be upheld only if it satisfied strict scrutiny, which it did not. *Id.* at 1877, 1881-82.

Selectively quoting from the decision, plaintiffs argue that *Catholic Charities* found the statute before it "neutral and generally applicable," and thus not subject to strict scrutiny, *solely* because it did not target religion. (Br. 33.) Plaintiffs thus contend that *Catholic Charities* failed to separately consider whether the statute before it was also generally applicable, as *Fulton* expressly requires. And plaintiffs contend the statute is not.

To be sure, *Catholic Charities* restated the standard for neutrality and, applying that standard, found that religion was neither the object nor the target of the statute at issue. 7 N.Y.3d at 522. However, *Catholic Charities* 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, and because its religious accommodation did not create a denominational preference. *Id.* While *Catholic Charities* specifically rejected the plaintiffs' argument there that the religious-

employer accommodation rendered the statute "non-neutral," *id.*, it also confirmed that, notwithstanding the accommodation, the statute was *both* "generally applicable and neutral between religions," *id.* at 528. Indeed, and as the Third Department noted, *Roman Catholic Diocese II*, 206 A.D.3d at 1075, the very cases on which *Fulton* relied for the principles of neutrality and general applicability—*Smith* and *Church of Lukumi Babalu Aye*—were likewise relied upon by *Catholic Charities*. *See Fulton*, 141 S. Ct. at 1876; *Catholic Charities*, 7 N.Y.3d at 521. Thus, the Court should reject plaintiffs' argument that *Catholic Charities* conflicts with *Fulton* because it failed to consider separately the general applicability of the statute before it.

B. There Is No Irreconcilable Conflict Between *Fulton* and *Catholic Charities*.

In addition to applying the rule that a government policy lacks general applicability when it provides a mechanism for individualized exemptions granted on a discretionary basis that allows the government to consider the reasons for the person's conduct, *Fulton* described the second circumstance in which a

government policy lacks general applicability—when it treats religious conduct less favorably than comparable secular conduct that undermines the government's asserted interests in a similar way. *Fulton* has been consistently interpreted and applied, including by the Supreme Court, as recognizing that a government policy is not generally applicable under these two circumstances. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (citing *Fulton* as so holding); *see also, e.g., We the Patriots USA v. Conn. Office of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023); *Doe v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1184, 1188 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2023); *YU Pride Alliance v. Yeshiva Univ.*, 211 A.D.3d 562, 564-65 (1st Dep't 2022).

There is no irreconcilable conflict between *Fulton* and *Catholic Charities* because the statute at issue in *Catholic Charities* did not implicate either circumstance.

1. *Catholic Charities* did not involve a mechanism for individualized exemptions.

Catholic Charities did not involve a system of discretionary individualized exemptions like the one faulted in *Fulton*.

Philadelphia's contract with the plaintiff foster-care agency constituted such a mechanism because it provided that services had to 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* concluded that, like the unemployment benefits system with a "good cause" exemption at issue in *Sherbert v. Verner*, 374 U.S. 398 (1963), Philadelphia's nondiscrimination policy incorporated an entirely discretionary "mechanism for individualized exemptions," that invited "the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 1877, 1879 (citing *Smith*, 494 U.S. at 884).

The contraceptive insurance requirement at issue in *Catholic Charities* applied uniformly to all insurance policies providing prescription drug coverage, except those available to "religious

employers," as defined. There was no mechanism for the Superintendent to grant an exemption allowing contraceptive coverage 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. The coverage requirement at issue here likewise applies uniformly to all policies that provide medical or hospital coverage, and similarly contains no individualized discretionary exception.

Contrary to plaintiffs' contention (Br. 27-30), the accommodation for religious employers is not itself a mechanism for individualized discretionary exemptions, as contemplated by *Fulton*. The religious-employer accommodation is not standardless and "does not give government officials discretion to decide whether a particular individual's reasons for requesting exemption are meritorious." *We the Patriots USA v. Conn. Office of Early Childhood Dev.*, 76 F.4th at 150. Rather, an entity obtains an accommodation by submitting a request to an insurance carrier for a policy without the objected-to coverage, along with a certification

that the entity is a "religious employer," as defined by four specific criteria set forth in the regulation: its purpose is to inculcate religious values; it primarily employs persons who share its religious tenets; it primarily serves persons who share those tenets; and it is a nonprofit organization as described in sections of the Internal Revenue Code that exempt churches, their integrated auxiliaries, and the exclusively religious activities of any religious order from the requirement to file an annual return. *See Catholic Charities*, 7 N.Y.3d at 519; 11 N.Y.C.R.R. § 52.2(y). None of those criteria involves individualized discretionary consideration of the *reason* that the employer seeks the accommodation.

Any entity seeking a policy excluding abortion coverage under the religious accommodation is invoking religious beliefs. The accommodation does not assess the reason that a policy excluding the objected-to coverage is sought.

Indeed, because the accommodation for religious employers is premised on a *religious* objection to the coverage requirement, it necessarily does not implicate the free-exercise concern that a system of individualized exemptions implicates, namely "the

prospect of the government's deciding that secular motivations are more important than religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.). As the Second Circuit recently explained, individualized exemptions create "the risk that administrators will use their discretion to exempt individuals from complying with the law for secular reasons, but not religious reasons." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288 (2d Cir.), *clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied sub nom. Dr A. v. Hochul,* 142 S. Ct. 2569 (2022); *see also Fulton*, 141 S. Ct. at 1878 (the government "'may not refuse to extend [the individualized exemption] system to cases of 'religious hardship' without compelling reason'") (quoting *Smith*, 494 U. S. at 884)). The statute at issue in *Catholic Charities*, like the regulation challenged here, presents no such risk. To the contrary, by accommodating religious employers, it "expressly *favors* religious exercise over" secular activities and thus should not trigger strict scrutiny. *See 303 Creative LLC v. Elenis*, 6 F.4th at 1187 (addressing exemption for places "principally used for religious purposes").

Even assuming a religious accommodation that, as here, does not invite consideration of the reason an accommodation is sought could constitute a mechanism for individualized discretionary exemptions under some circumstance, the religious-employer accommodation at issue here does not create such a mechanism. Contrary to plaintiffs' argument (Br. 26-30), the religious-employer accommodation is not rendered individualized and discretionary merely because it uses defined criteria concerning the religious entity's activities to identify which entities may invoke the accommodation.

The defined criteria for the religious-employer accommodation distinguish the accommodation from the mechanisms allowing religious exemptions that were found to be improperly individualized in the two Circuit decisions relied on by plaintiffs in their reply brief below. Unlike the accommodation here, those mechanisms either provided a standardless exemption with no defined criteria, thus facilitating unbridled discretion, *see Dahl v. Board of Trustees of Western Michigan Univ.*, 15 F.4th 728 (6th Cir.

2021), or the criteria were not neutral and were inconsistently applied, *see Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021).

The defined criteria for the religious-employer accommodation likewise distinguish the accommodation from the exemption to the vaccination requirement law that Justice Gorsuch opined was individualized in his decision dissenting from the denial of certiorari in *Doe v. Mills*, 142 S. Ct. 17 (2021). Plaintiffs cite that dissenting opinion as support for their argument that an exemption can be individualized even if it based on specified criteria. (Br. 29.) But the problem Justice Gorsuch identified in *Doe* was that the medical exemption contained no specified criteria at all, and thus appeared to allow an exemption based on "mere *trepidation* over vaccination . . . but only so long as it is phrased in medical and not religious terms." *Id.* at 19 (Gorsuch, J., dissenting from denial of certiorari (noting the exemption required only a statement from a medical professional that immunization "may be medically inadvisable" (internal quotation omitted))). The religious-employer accommodation does not suffer from any such "double standard." *See id.; see also We the Patriots USA v. Conn. Office of Early*

Childhood Dev., 76 F.4th 130, 150 & n.19 (distinguishing vaccine medical exemption from the one at issue in *Doe v. Mills* because it was based on individual's physical condition).

Plaintiffs additionally mistakenly contend (Br. 27-28) that the religious-employer accommodation invites individualized discretion because it contemplates the exercise of governmental judgment in determining whether the criteria are satisfied. Plaintiffs ignore the fact that the certification procedure relies principally on the exercise of judgment by the religious entity itself rather than by a government official; the entity seeking the accommodation is required to certify that it is a "religious employer," as defined. And plaintiffs, who have not sought an accommodation themselves, point to no evidence that insurers engage in an evaluation, much less a searching one, of the religious entity's certification that it meets the specified criteria.

Nor is there any evidence that enforcement action by the Department of Financial Services against insurance companies that issue policies in response to such certifications involves a searching evaluation of the certification. Indeed, as we explained in

the courts below and discuss *infra* 56-57, the only evidence of any enforcement action involved the analogous contraceptive coverage accommodation in instances where it should have been plain to the insurers from the face of the employers' certifications that accommodations were not warranted.[14] Thus, there is no evidence that application of the criteria for the religious-employer accommodation invites the unbridled exercise of governmental discretion, which is a key factor in the individualized decisionmaking that triggers strict scrutiny, and not merely an "aggravating factor" as plaintiffs assert. (Br. 29.) *See, e.g., We the Patriots United States v. Conn. Office of Early Childhood Dev.*, 76 F.4th at 150-151.[15]

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[14] *See* Department of Financial Services, Press Release, *DFS Takes Action Against Health Insurers for Violations of Insurance Law Related to Contraceptive Coverage* (May 3, 2019) (certifications had been accepted from "a wood floor refinisher, a café, a chimney cleaning service, a gastroenterologist, a tax consultant, and a construction company") (internet).

[15] Nor, for the reasons explained *infra* Point III(A), do these criteria raise other free-exercise concerns, as plaintiffs contend (Br. 27-30). As we explain *infra*, the accommodation is neutral between religions (as this Court held in *Catholic Charities*, 7 N.Y.3d at 522, 528), and there is no evidence that its enforcement will involve

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2. *Catholic Charities* did not involve secular exemptions and the less favorable treatment of religious conduct.

The coverage requirement at issue in *Catholic Charities* also did not involve the second circumstance in which, under *Fulton,* a government policy will be found to lack general applicability. Like the analogous coverage requirement challenged here, the contraceptives coverage requirement contained no secular exemptions that undermined the government's asserted interests in a similar way. *See Fulton*, 141 S. Ct. at 1877.

Fulton cited *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 544-46 (1993), as a case in which the Court had applied this principle. *See Fulton*, 141 S. Ct. at 1877. And although *Fulton* had no occasion to apply that principle, the Supreme Court had recently applied that principle in cases challenging on free-exercise grounds COVID-19 restrictions on gatherings. For example, in a per curiam order in *Tandon*, which preliminarily enjoined such a restriction pending appeal, the Court explained that a government

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intrusive "adjudicat[ions]" (Br. 27) concerning an entity's religious practices, as plaintiffs hypothesize.

regulation is "not neutral and generally applicable" if it treats "any comparable secular activity more favorably than religious exercise," with comparability "judged against the asserted government interest that justifies the regulation." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (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); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (citing to *Fulton* for this principle and applying it to application of disciplinary directives).

Plaintiffs argue that this second circumstance is implicated by the religious-employer accommodation, but their argument in fact seeks an extension of *Fulton* that is not required by that decision. Specifically, plaintiffs argue that the second circumstance discussed in *Fulton* should not be limited to secular exemptions that result in distinctions between secular and religious conduct, but rather should be extended to distinctions drawn among religious entities. (Br. 23-24, 27.) Neither *Fulton* nor the Court's per

curiam orders on which plaintiffs rely addressed that issue. To the extent plaintiffs argue otherwise, they are mistaken.

Fulton's express language is clear: government policies are not generally applicable if they "prohibit[ ] religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (emphasis added). And applying this rule in *Tandon*, the Court held that the challenged policy was not generally applicable because it treated "comparable *secular* activity more favorably than religious exercise." 141 S. Ct. at 1296 (emphasis added); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. at 2423 (describing how the subject disciplinary rule was not applied equally to secular and religious conduct). Consequently, the existence of a *religious* accommodation, even one that does not extend to all religious entities, does not implicate this second circumstance concerning general applicability.

Indeed, and as *Catholic Charities* recognized, 7 N.Y.3d at 522, 528, were the Court to find that a religious accommodation implicated free-exercise concerns whenever it was not all-

encompassing, that finding would undermine, rather than promote, religious exercise because it would place a government policy without *any* religious accommodation "on stronger footing under the Free Exercise clause than rules that provide exceptions on religious grounds and, thus, treat religious conduct more favorably." *George v. Grossmont Cuyamaca Cmty. Coll. Dist. Bd. of Governors*, No. 22-cv-0424, 2022 U.S. Dist. LEXIS 201835, at *38-39 (S.D. Cal. Nov. 3, 2022) (rejecting argument that a religious accommodation subjects a policy to strict scrutiny under *Fulton*); *accord Ferrelli v. State Unified Court Sys.,* No. 1:22-cv-0068, 2022 U.S. Dist. LEXIS 39929, at *21 (N.D.N.Y. March 7, 2022).

And even if *Fulton*'s second circumstance were extended to such a religious accommodation, *Fulton* still would require a comparability analysis, namely a showing that, as compared to the religious activity subject to regulation, the religious activity excepted from regulation "undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877. Plaintiffs cannot make that showing. The regulation's religious-employer accommodation excepts only those religious entities that principally employ

and serve adherents of their religion. Such adherents are far less likely to seek abortion services than the employees of religious entities that employ and serve substantial numbers of non-adherents. The accommodation thus does not undermine the government's asserted interests (assuring access to those services and promoting equality in health care between the sexes) in the same way an all-encompassing exception would.

C. Plaintiffs' Remaining General Applicability Argument Is Unpreserved and Lacks Merit.

On remand from the Supreme Court, plaintiffs asserted a new argument, not directly controlled by *Catholic Charities*, to support their contention that the challenged regulation is not generally applicable under *Fulton*.[16] The argument is both unpreserved and without merit.

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[16] Plaintiffs additionally reiterated the argument raised for the first time in their petition for certiorari that the regulation is not generally applicable because the underlying nondiscrimination rule it implements recognizes secular exemptions. (Plaintiffs' Appellate Division Supplemental Brief 30-31.) As the Superintendent explained (Defendants' Appellate Division Supplemental Brief 35-38), that argument raised comparability issues requiring further factual development to resolve. Though plaintiffs'

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Noting that the regulations' coverage requirement does not apply to employers who self-insure or provide no employee health insurance at all, plaintiffs argue (Br. 30-32) that these "holes" in coverage defeat the general applicability of the regulation, which is therefore subject to strict scrutiny. In plaintiffs' view, the regulation in effect exempts such employers from the coverage requirement, while declining to exempt comparable religious employers. (*See* Br. 31-32 (citing *Tandon*)).

Plaintiffs failed to preserve this underinclusivity argument for the Court's review. They raised it for the first time in their supplemental brief to the Third Department following the remand order of the Supreme Court. *See, e.g., Branch v. County of Sullivan*, 25 N.Y.3d 1079, 1082 (2015) (theory of liability not raised before trial court is not preserved for Court of Appeal's review); *People v. Mejias*, 21 N.Y.3d 73, 78-79 (2013) (same). And nothing prevented

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brief to this Court references such secular exemptions (*see* Br. 4-5, 44), plaintiffs avoid expressly making a general applicability argument on that basis.

plaintiffs from raising the argument in the initial state court proceedings.

More specifically, the argument relies on settled law that, to warrant rational-basis review under *Smith,* a governmental policy must be both neutral and generally applicable. And in discussing general applicability, *Fulton* relied on *Church of Lukumi Babalu Aye,* 508 U.S. at 542-46, for the proposition that a governmental policy "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. Indeed, *Church of Lukumi Babalu Aye* specifically focused on the fact that the ordinances challenged there were underinclusive as to the government interests they were intended to serve. *See* 508 U.S. at 545; *see also Central Rabbinical Congress of the United States v. New York City Department of Health & Mental Hygiene*, 763 F.3d 183, 196-97 (2d Cir. 2014) (applying *Lukumi*'s underinclusivity analysis).

In any event, plaintiffs' underinclusivity argument lacks merit. The State chose to ensure access to essential reproductive

healthcare by, among other things, requiring insurance policies to cover abortion services. The regulation challenged here is accordingly directed at insurers that issue or deliver insurance policies in the State. Employers who self-fund insurance are outside the scope of the regulation, not because they are exempted from the regulation's scope, but because federal law preempts state regulation of the insurance they provide. And employers who do not provide health insurance are not subject to any exemption; they are simply outside the scope of the regulated subject matter—the content of group health insurance policies issued or delivered in the State. The coverage requirement thus is not underinclusive in a manner that implicates the principle of general applicability that is relevant to a free-exercise claim. Except for the accommodation for religious employers, as defined, the regulation applies to all insurance policies subject to New York regulation, and to all employers who obtain such group policies.[17] As the Second Circuit

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[17] For this same reason, plaintiffs are wrong to argue (Br. 30-31) that the regulation is also underinclusive because it does not address the coverage needs of those who are not employed. Plaintiffs' argument is also based on a misapprehension of the

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recently explained in rejecting a similar argument, "neither the Supreme Court, our court, nor any other court of which we are aware has ever hinted that a law must apply to all people, everywhere, at all times, to be 'generally applicable.'" *Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021). Rather, "a law can be generally applicable when, as here, it applies to an entire *class* of people."[18] *Id.*

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regulation. The regulation does not provide abortion coverage only to those women who are employed (and whose employer purchases insurance subject to regulation by the Superintendent). The regulation also ensures coverage to those who purchase insurance directly through a New York-regulated insurance company and those who are covered as a dependent under a New York-issued policy, whether or not they are employed.

[18] Indeed, *Catholic Charities* itself rejected a similar argument when it held that the contraceptives coverage requirement there was generally applicable notwithstanding the fact that employers who chose not to provide prescription drug coverage were not subject to the coverage requirement. 7 N.Y.3d at 522. And the plaintiffs there specifically argued to this Court that the scope of the contraceptive coverage requirement rendered the law at issue not generally applicable. *See* Appellants' Brief, *Catholic Charities v. Serio* (N.Y. Ct. of Appeals No. 2006-0110), at 37-38; *see also Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 144-45 (3d Dep't 2006) (dissenting op.) (finding a violation of free exercise under the New York constitution on this basis).

Tandon and the other COVID-19 per curiam orders relied on by plaintiffs for their underinclusivity argument are not to the contrary. Those cases concerned restrictions on gatherings during a public health emergency involving a communicable disease, and the Supreme Court found that *within* that broad category of conduct, the challenged restrictions treated religious gatherings less favorably than comparable gatherings convened for secular purposes. In contrast, within the scope of conduct regulated by the Superintendent—the provision of insurance policies subject to New York regulation—the regulation at issue here does not treat religious entities that obtain such policies less favorably than secular entities that do so.

For all of these reasons, *Fulton* did not overrule *Catholic Charities* and it otherwise provides no basis for reversal here.

POINT III

PLAINTIFFS' ADDITIONAL ARGUMENTS DO NOT REST ON *FULTON* AND PROVIDE NO BASIS TO REVERSE IN ANY EVENT

Plaintiffs mischaracterize their additional arguments as implicating the issue of general applicability addressed in *Fulton*

and the Supreme Court's COVID-19 per curiam orders. More specifically, plaintiffs contend that because the regulation's religious accommodation extends to some but not all religious entities, it improperly discriminates *among* religions and intrudes on internal church matters. (Br. 24-25.) Neither *Fulton* nor the Supreme Court's COVID-19 per curiam orders considered the free-exercise implications of a religious accommodation that does not extend to all religious entities. Plaintiffs' remaining arguments are thus outside the scope of the remand order, and the Court need not consider them.

Plaintiffs also ignore the fact that the *Catholic Charities* plaintiffs raised these same arguments, and *Catholic Charities* rejected them. Because no intervening case law conflicts with *Catholic Charities*' rulings in this regard, the Court need not re-examine those rulings anew. In any event, this pre-enforcement challenge presents a poor vehicle for any such re-examination.

A. *Catholic Charities* Correctly Held that the Scope of the Religious-Employer Accommodation Does Not Violate Principles of Free Exercise.

The additional arguments pressed by plaintiffs in their brief to this Court were similarly made by the plaintiffs in *Catholic Charities*, and this Court rejected them.

First, plaintiffs argue (Br. 16, 24-25), as did the *Catholic Charities* plaintiffs, that the religious-employer accommodation improperly discriminates among religious entities "because the Legislature chose to exempt some religious institutions and not others." 7 N.Y.3d at 522. Like the *Catholic Charities* plaintiffs, plaintiffs rely on the Supreme Court's decision in *Larson v. Valente,* 456 U.S. 228 (1982), to support their contention. (Br. 24-25.) However, *Catholic Charities* concluded that *Larson* does not stand for that broad proposition and accordingly rejected plaintiffs' attempt in that case to base their free-exercise claim on *Larson*.

More specifically, the Court in *Catholic Charities* explained that *Larson* involved an exemption available to all religious faiths except a disfavored one, a distinction that resulted in an improper denominational preference. 7 N.Y.3d at 528; *see also Corporation of*

Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987) (describing *Larson* as suggesting "that laws discriminating among religions are subject to strict scrutiny"). And *Catholic Charities* specifically rejected the argument, also pressed here, that by distinguishing among religious entities on the basis of their activities, as opposed to their beliefs, the religious-employer accommodation resulted in an improper denominational preference. *See Catholic Charities*, 7 N.Y.3d at 528-29. The Court reasoned further that to find a neutral religious accommodation impermissible because it was not all-inclusive "would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion." *Id.* at 522; *see also id.* at 528. The Court thus declined to adopt the reasoning of the dissent at the Appellate Division, that the religious-employer accommodation should be treated like a denominational preference. *See Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 149-50 (3d Dep't 2006) (dissenting op.).

In addition to *Larson*, plaintiffs rely on two subsequent decided federal court of appeals decisions to support their argument that

distinguishing among religious entities on the basis of their activities constitutes impermissable discrimination under the Free Exercise Clause. (*See* Br. 25.) These decisions are readily distinguishable.

Duquesne University of the Holy Spirit v. NLRB, 947 F.3d 824 (D.C. Cir.), *rehearing denied*, 975 F.3d 13 (D.C. Cir. 2020), rests on findings that the government policy at issue—a test then used by the National Labor Relations Board to determine whether it could exercise jurisdiction over certain employment positions at religious institutions—required excessive entanglement by the Board in the religious affairs of the institutions. *Id.* at 835. *Duquesne* did not, as petitioners imply (Br. 25), turn on a finding that the Board's test impermissibly discriminated among religious institutions. Rather, *Duquesne* referred to the Board "sid[ing] with a particular view of religious functions" merely to illustrate the court's point that the Board had improperly intruded into religious matters. *See Duquesne,* 947 F.3d at 835.

Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008) (McConnell, J.), likewise focused on entanglement

concerns that arose from a state program denying otherwise eligible students public scholarships if they attended institutions the State deemed "pervasively sectarian." *Id.* at 1250, 1261-66. Though *Weaver* also criticized the state scholarship program for discriminating against religious institutions on the basis of "religiosity," 534 F.3d at 1259, a form of discrimination that it equated to denominational discrimination, *id.* at 1259-60, that criticism was not necessary to its decision.[19] Moreover, the criteria for the religious-employer accommodation at issue here does not evaluate an entity's "religiosity" to deny government benefits, but

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[19] Research reveals that only two opinions—both concurring ones—have since followed this dictum. *See A.H. v. French*, 985 F.3d 165, 186 (2d Cir. 2021) (Menashi, concurring); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 728-29 (9th Cir.) (O'Scannlain, concurring), *cert. denied*, 565 U.S. 816 (2011). And the latter opinion was thereafter criticized by the same court. *See Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016), *rev'd on other grounds sub nom.*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). *But cf. Michael W. McConnell, Freedom From Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819 (Feb. 1998) (using historical analysis to support a more protective view of the Free Exercise Clause), *cited approvingly* in *Fulton*, 141 S. Ct. at 1907 (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.).

rather makes an accommodation available to certain religious entities based on their activities.[20]

To the extent *Catholic Charities* found that the criteria used to determine eligibility for the religious accommodation distinguishes between "churches and religious orders that limit their activities to inculcating religious values in people of their own faith" and other religious entities, 7 N.Y.3d at 522, that distinction is "a long-recognized and permissible distinction" for purposes of granting a religious accommodation, *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 272 (D.C. Cir. 2014), *vacated on other grounds, Zubik v. Burwell,* 136 S. Ct. 1557 (2016). Numerous federal laws have historically drawn that distinction. *See Rollins v. Dignity Health*, 830 F.3d 900, 911 (9th Cir. 2016)

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[20] A federal district court recently rejected a free-exercise challenge to Washington's abortion coverage requirement, where the plaintiff religious organization argued as here that the statutory scheme included exemptions that treated some religious organizations less favorably than others. *See Cedar Park Assembly of God v. Kreidler*, No. C19-5181, 2023 U.S. Dist. LEXIS 128295 (July 25, 2023). And the Ninth Circuit had earlier rejected an equal protection claim based on that differing treatment. *See Cedar Park Assembly of God of Kirkland v. Kreidler*, 860 Fed. Appx. 542, 543-544 (9th Cir. 2021).

(citing statutes), *rev'd on other grounds sub nom. Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

Plaintiffs failed to preserve their second argument concerning the scope of the religious-employer accommodation—that the criteria for the accommodation impermissibly intrude on matters of "church government . . ., faith and doctrine"' (Br. 25-26 (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020))), an argument that was correctly rejected by the Court in *Catholic Charities* in any event.

Plaintiffs never pressed a church-autonomy argument in the original state court proceedings—not by generally referencing Establishment Clause or hybrid-rights claims in their complaint, as they claim here (Br. 3 n.1), nor by making fleeting references to "institutional autonomy" and to "principles of autonomy" in their briefs in the courts below (*see* Plaintiffs Appellate Division Opening Brief 19, 61). While plaintiffs sought to raise a religious-autonomy claim for the first time in their petition for certiorari, *see* Pet. 29-30, *supra* n.9, that fact does not render the claim preserved for state

court review. *See Herzog Bros. Trucking, Inc. v. State Tax Com.*, 72 N.Y.2d 720, 725-26 (1988).

In any event, *Catholic Charities* correctly observed that the church-autonomy principles cited by the plaintiffs there (and by plaintiffs here (Br. 25-26)) have not been applied to allow a "religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings." S*ee* 7 N.Y.3d at 524. *Catholic Charities* thus correctly rejected reliance on those principles as a basis to invalidate the contraceptive-coverage requirement at issue. The Court explained that when church-autonomy principles have been applied to the relationship between religious entities and their employees, the principles have only been applied to protect religious entities from interference with their decisions regarding the employment of those in "ministerial" positions. The same remains true today. The Supreme Court has recognized this "ministerial exception" to employment discrimination claims, but has not extended it to other aspects of the employment relationship. *See Our Lady of Guadalupe*

Sch., 140 S. ct. at 2063-64; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190-192 (2012).

Moreover, we are aware of no evidence that limiting the religious accommodation in the context of the statute at issue in *Catholic Charities* or the regulation at issue here has prompted unduly intrusive inquiries into religious entities' religious duties and practices. The only evidence we have located consists of a report by the Department of Financial Services documenting a series of enforcement actions taken against insurance companies for improperly accepting employer certifications of eligibility for the religious accommodation available in connection with the contraceptives-coverage requirement.[21] In each enforcement case described in the report—and there were only a handful of such cases—it was plain on the face of the employer's certification that the employer was not eligible for the accommodation, and therefore no searching inquiry by either the insurer or the Department of

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[21] *See DFS Takes Action Against Health Insurers for Violations of Insurance Law Related to Contraceptive Coverage*, *supra* n. 14.

Financial Services would have been warranted. The subject employers had represented themselves as "a wood floor refinisher, a café, a chimney cleaning service, a gastroenterologist, a tax consultant, and a construction company," respectively,[22] entities that clearly could not qualify as religious employers; among other reasons, there was no reason to think that any of these employers were nonprofit organizations or that their purpose was to inculcate religious values. *See* 11 N.Y.C.R.R. § 52.2(y). The determinations by the Department of Financial Services that these certifications should have been rejected by the respective insurers thus involved no intrusion into matters of church doctrine.

In the end, plaintiffs provide no reason for the Court to depart from its conclusion in *Catholic Charities* that the religious-employer accommodation does not violate free-exercise principles merely because it is "not all-inclusive" and is based on criteria concerning the entities' activities. 7 N.Y.2d at 522. As there, the accommodation here is based on denominationally neutral criteria,

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[22] *Id.*

and it accommodates religious entities whose employment practices and operations minimize the harms that the regulation addresses. (*See infra* 6-7 (citing regulatory documents at SA107-111).) And it remains true today that, as the Court expressly reasoned in *Catholic Charities,* to hold otherwise would call into question the scope of any religious accommodation and thereby discourage the creation of such accommodations. *Id.* at 522, 528.

B. This Pre-enforcement Challenge Presents a Poor Vehicle to Re-examine Whether the Religious Accommodation Implicates Free Exercise Concerns.

To the extent plaintiffs seek to have this Court re-examine the rulings discussed above, this pre-enforcement challenge presents a poor vehicle for doing so because the precise delineation of the religious-employer accommodation is not clear on this record.

Plaintiffs brought suit without seeking to invoke the religious accommodation by certifying their status as qualifying "religious employers" to their insurers. Thus, none of the named plaintiffs has requested and been denied an exempt policy by an insurer under the accommodation at issue. *See supra* 9-10 & n.5. Nor does the

record contain facts sufficient to demonstrate that any of the plaintiffs necessarily fails to satisfy the criteria for a "religious employer," as defined.[23] To the contrary, some plaintiffs—for example, the dioceses, the religious order and the churches—likely satisfy those criteria.[24] Others may satisfy the criteria as well.[25] And the record here provides no information about the experience of any other entities that may have requested an exempt policy

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[23] Plaintiffs do not even expressly state that they fail to satisfy the religious-employer criteria. The record here thus contrasts with that in *Catholic Charities*, where the plaintiffs made specific record-based concessions that they did not meet the criteria for the religious-employer accommodation, and the Court relied on those concessions for its conclusion that none of the plaintiffs there qualified as religious employers. *See* 7 N.Y.3d at 520. Indeed, while the state defendants in *Catholic Charities* similarly conceded that the plaintiffs did not qualify for the accommodation, they did so on the basis of the plaintiffs' specific admissions. (*See* Respondents Brief, *Catholic Charities v. Serio* (N.Y. Ct. of Appeals No. 2006-0110), at 10-12.)

[24] For example, while the plaintiff churches may serve *some* individuals who do not share their tenets through their outreach programs (*see* Br. 9), they may nonetheless *primarily* employ and serve individuals who do share their tenets.

[25] The record does not indicate whether any of the plaintiffs who primarily provide services in the community are sufficiently affiliated with a diocese, church, or religious order so as to qualify for the religious-employer accommodation on the basis of such affiliation.

under the accommodation. Thus, the actual impact of the coverage requirement remains unclear.

The record similarly provides no evidence regarding how requests based on the religious employer's certification are evaluated. Plaintiffs' contention that such evaluation will require intrusive determinations by "adjudicator[s]" regarding matters of religious doctrine (Br. 27) is based on mere conjecture. Contrary to plaintiffs' assertions (Br. 28), there is no evidence that an insurer who receives a request for a policy excluding the objected-to coverage engages in a searching inquiry that involves evaluating the extent to which the religious entity has the purpose of inculcating religious values or how the entity defines those who share its tenets. Nor, as we have explained, *supra* at 56-57, is there any evidence that any enforcement activity by the Department of Financial Services involving an insurer's issuance or denial of an exempt policy involves intrusive inquiries and adjudications that intrude on matters of church doctrine. Indeed, the record provides no information about what steps, if any, the government might take if it had reason to question an insurer's reliance on an employer's

certification where the application of the criteria was not plain on the face of the certification.

Accordingly, to the extent plaintiffs seek a re-examination of whether the scope of the religious-employer accommodation raises free-exercise concerns, this case provides a poor vehicle for doing so.

CONCLUSION

Judgment dismissing the complaint should be affirmed.

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September 28, 2023

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Laura Etlinger, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,725 words, which complies with the limitations stated in § 500.13(c)(1).

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