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Via Federal Express and Electronic Filing

August 27, 2020

Hon. John P. Asiello
Chief Clerk
New York Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: The Roman Catholic Diocese of Albany, NY, et al., v. Vullo
Appellants' Rule 500.11 Letter
Albany County Clerk Index No. 7536-17
Appellate Division Third Department Case No. 529350
Motion No. 2020-549

Dear Mr. Asiello:

We enclose herewith Appellants' Rule 500.11 Letter in response to your request dated August 4, 2020, and affidavit of service of same on the Office of the Attorney General.

Thank you for your attention to this matter.

Very truly yours,

TOBIN AND DEMPF, LLP

Michael L. Costello

MLC/slc
Enclosure
cc: Hon. Letitia James
(Attn: Laura Etlinger, Esq.)

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Dear Mr. Asiello:

We respond herewith to your letter dated August 4, 2020 requesting comments on the issue of subject matter jurisdiction on the above-captioned matter. We have been informed the return date was adjourned to July 31, 2020.

We represent the plaintiffs-appellants, The Roman Catholic Diocese of Albany, New York, The Roman Catholic Diocese of Ogdensburg; Trustees of the Diocese of Albany, Sisterhood of St. Mary, Catholic Charities, Diocese of Brooklyn, Catholic Charities of the Diocese of Albany, Catholic Charities of the Diocese of Ogdensburg, St. Gregory the Great Roman Catholic Church Society of

Amherst, N.Y., First Bible Baptist Church, Our Savior's Lutheran Church, Albany, N.Y., Teresian House Nursing Home Company, Inc., Renee Morgiewicz and Murnane Building Contractors, Inc., who commenced two actions for declaratory and injunctive relief in Albany County Supreme Court challenging defendants-respondents, Maria T. Vullo, Acting Superintendent, New York State Department of Financial Services ("DFS"), promulgation of its Model Language and subsequent regulatory abortion insurance mandate.

The challenges were based on the New York State Constitution (Free Exercise and Enjoyment of Religion and Liberty of Conscience, Establishment Clause, Preference Clause, Free Speech and Associational Liberty and Separation of Powers), the United States Constitution (Free Exercise of Religion, Establishment Clause, Free Speech, Associational Liberty, Equal Protection and Hybrid Rights) and New York Statutes (Human Rights Law and Religious Corporations Law).[1]

The trial Court dismissed the consolidated actions on a motion for summary judgment and the Appellate Division Third Department affirmed. Appellants seek to appeal, as a right, from the Appellate Division decision.

Appellants' appeal should be granted because subject matter jurisdiction is proper. The Appellate Division decision referenced the constitutional claims

[1] Plaintiffs reserve all arguments made to the lower Courts not addressed herein. 22 N.Y.C.R.R. § 500.11(f).

advanced by appellants but concluded as an intermediate appellate court it was required to adhere to *stare decisis* as the Supreme Court did and rejected the constitutional and statutory claims under the authority of *Catholic Charities v. Serio*, 7 N.Y.3d 510 [2006]. The Appellate Division further affirmed the finding of the Supreme Court that the DFS had the rulemaking authority to promulgate the abortion mandate.

STATEMENT OF FACTS

In June of 2015 and again in April of 2016, the DFS approved and posted its abortion mandate in the form of "Model Language" requiring individual and small group employers offering health insurance benefits to include in their renewal contracts coverage of non-therapeutic and therapeutic abortions. (R. 38, 143-153).[2] Prior to June 2015, the DFS separately mandated abortion coverage in employer health benefit plans under the service category of "medically necessary" surgery. (R. 39-40). This undisclosed abortion mandate was encrypted in health insurance contracts under the generic rubric of "medically necessary" surgery by the DFS and health insurance providers. (R. 40).

The undisclosed abortion mandate was never communicated to plaintiffs and other employers, including those who have conscience, moral or religious objection to abortion. (R. 40). Plaintiffs were caught unawares of this encrypted

[2] Citations to (R. ___) indicate references to the Record submitted to the Third Department.

coverage up to the 2015/2016 renewal/enrollment period when the Model Language abortion mandate was disclosed for the first time and put into effect by the DFS in the renewal of health benefits contracts by providers. (R. 37-40). Plaintiffs on moral, ethical, conscience and religious grounds protested to DFS the inclusion of coverage and funding of all abortions and demanded complete exemption from all abortion coverage in their health insurance contracts. (R. 40, 199, 206-207, 386, 392, 427, 430, 445-446, 448, 450).

In August 2017, the DFS finalized by regulation its abortion mandate requiring employers offering health insurance benefits to affirmatively include in plan contracts coverage for "medically necessary abortions," "abortion services" and "elective abortions." (R. 483-494, 535-537). The regulatory abortion mandate included "an optional limited exemption for religious employers." (R. 535). The penultimate version of the DFS regulatory abortion mandate included two additional exemptions for "qualified religious organization employers" and "closely held for profit entities." (R. 496, 563-565). Those exemptions were abandoned by the DFS in the final regulatory abortion mandate.

As ultimately promulgated the religious exemption was restricted to the narrow category of "religious employers" that excludes the vast majority of religiously-related employers in the State. It narrowly defines a "religious employer" as "an entity for which each of the following is true":

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

(ii) The entity primarily employs persons who share the religious tenets of the entity.

(iii) The entity serves primarily persons who share the religious tenets of the entity.

(iv) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)(i) or (iii), of the Internal Revenue Code of 1986, as amended. (R. 535). The DFS was well aware that this narrowly drawn exemption would not cover numerous religious entities and numerous other religiously-affiliated organizations.

THE PLAINTIFFS

The Plaintiffs are thirteen Roman Catholic Churches and Dioceses, Baptist and Lutheran Churches, an Episcopal Diocese, an order of Anglican Sisters, a construction entity, a consumer and several human service organizations that are integral parts of the Roman Catholic Church which provide a variety of educational and social services to their communities. With one exception, the construction entity, they administer to people in need of their services, regardless of their religious beliefs, and therefore cannot say that they serve "primarily" those who share their religious tenets. Some cannot verify that they "primarily" employ persons who share their religious tenets. Some do not have "the inculcation of

religious values" as their "purpose," although all transmit religious values through their religiously motivated work. And some do not qualify under the designated provision of the Internal Revenue Code, although they are charitable organizations exempt from taxation.

PROCEEDINGS BELOW

The first action for declaratory and injunctive relief was commenced in May 2016 in direct response to the revelation of the DFS so-called Model Language abortion mandate and the recently discovered longstanding DFS undisclosed and encrypted abortion mandate. The complaint set forth causes of action under the New York State Constitution (free exercise and enjoyment of religion and liberty of conscience, establishment clause, preference clause, free speech and associational liberty); the United States Constitution (free exercise of religion, establishment clause, free speech, associational liberty, equal protection and hybrid rights); and New York statutes (Human Rights Law and Religious Corporations Law). (R. 28-73).

The Attorney General moved to dismiss the complaint on September 30, 2016 pursuant to CPLR 320(a) and 3211(a)(7). (R. 74-75). An amended complaint for declaratory and injunctive relief dated October 21, 2016 was served asserting fourteen causes of action. (R. 79-134). Plaintiffs by cross-motion dated December 25, 2016 sought a preliminary injunction pursuant to CPLR 6311. (R. 135-136).

Oral arguments were heard before the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.) on May 23, 2017. The Court reserved decision on the motion and cross-motion.

On November 21, 2017 during the pendency of the undecided first action, plaintiffs commenced a second action challenging the regulatory abortion mandate newly promulgated by the DFS. In addition to the causes of action under the New York Constitution, the United States Constitution and New York statutes, plaintiffs asserted a cause of action that the DFS regulatory abortion mandate violated the separation of powers doctrine and rulemaking provisions of Articles III, § 1, IV, § 8 of the New York Constitution. (R. 484-567).

On January 23, 2018 following plaintiffs' motion, the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.) issued a decision and order consolidating both actions. (R. 576-578).

The Attorney General moved to dismiss the complaint in the second action pursuant to CPLR 320(a), 3211(a)(1) and 3211(a)(7). (R. 566-567). Plaintiffs by cross-motion, dated May 17, 2018 sought an order pursuant to CPLR 3212 and 6311 granting summary judgment and a preliminary injunction. (R. 674-675). The Court thereafter converted the pending motion by the Attorney General to a summary judgment motion.

On August 30, 2018 oral arguments were heard by the Supreme Court, Albany County (Hon. Richard J. McNally, Jr.). On December 28, 2018 the Supreme Court issued its decision and order dismissing the consolidated actions. (R. 15-27).

Supreme Court dismissed plaintiffs' claims under the New York Constitution and the United States Constitution stating that it was "obligated to follow the determinations of the Court of Appeals" in *Catholic Charities of the Diocese of Albany v Serio,* 7 N.Y.3d 510 [2006] because it found that "the constitutional claims challenged in the case to be the same as those raised in Catholic Charities." The Supreme Court "[l]iterally speaking" acknowledged the difference between "contraceptives" and "abortion" as "obviously different" but concluded that "[l]egally… petitioners' claims challenging medical coverage for both contraceptives and abortions are identical." The Supreme Court did not conduct any balancing or analysis of interests and burdens as required by *Catholic Charities v. Serio*. The Supreme Court having concluded that abortion and contraceptives were "[l]egally" indistinguishable next proceeded to dismiss plaintiffs' claim that the DFS "abortion mandate" violated the constitutional limits of administrative rulemaking. The Supreme Court held that the regulatory "abortion mandate" was not "an improper delegation of legislative authority to

DFS" after its consideration of the coalescing factors referenced in *Boreali v. Axelrod,* 71 N.Y.2d 1 [1987]. (R. 15-27).

The Plaintiffs filed a timely notice of appeal on January 28, 2019. (R. 2-27).

On May 18, 2020 after briefing in the Third Department was complete oral argument was held. On July 2, 2020 the Third Department issued its opinion and order affirming the dismissal of the complaint. See, *Roman Catholic Diocese of Albany, et al. v. Vullo,* 2020 N.Y. App.Div. LEXIS 3802. Service with notice of entry was made by NYSCEF by the Attorney General on July 6, 2020.

The Third Department referenced the constitutional claims advanced by plaintiffs but concluded that as an intermediate appellate court it was required to similarly adhere to *stare decisis* and reject the claims under the authority of *Catholic Charities.* The Third Department further affirmed the finding of the Supreme Court that the DFS had the authority to promulgate the abortion mandate.

JURISDICTIONAL/PRESERVATION STATEMENT

Jurisdiction for this appeal is provided by Civil Practice Law and Rules Section 5601(b)(1) as of right involving a substantial constitutional question.

The constitutional issues raised herein were asserted by plaintiffs-appellants before the Supreme Court in the form of three separate verified complaints, two cross-motions and briefs. (R. 28-76, 79-134, 135-464, 674-675, 677-821). Plaintiffs-appellants raised the following constitutional issues: (1) Free Exercise

and Enjoyment of Religion Clause, Article I, § 3 of the New York Constitution; (2) Establishment Clause Article 1, § 3, New York Constitution; (3) Preference Clause Article I § 3, of the New York Constitution; (4) Free Speech, Article 1 § 8, New York Constitution; (5) Associational Liberty Rights, Article 1 § 9, New York Constitution; (6) Free Exercise Clause, First Amendment of the United States Constitution; (7) Establishment Clause, First Amendment of the United States Constitution; (8) Free Speech and Associational Rights, United States Constitution; (9) Equal Protection Clause, United States Constitution; (10) "Hybrid Claims" under the United States Constitution; and (11) the constitutional limits of administrative rulemaking under Article III, § 1 of the New York Constitution.

ARGUMENT

I. THIS COURT SHOULD PERMIT A DIRECT APPEAL TO CORRECT THE MISAPPLICATION OF *STARE DECISIS* AND THEREBY CLARIFY THE MEANING AND SCOPE OF ITS CONSTITUTIONAL RULING IN *CATHOLIC CHARITIES* TO ENSURE THE CORE VALUE OF RELIGIOUS LIBERTY IN NEW YORK

This case is about whether the New York Constitution means what it says (and what the founders intended it to mean), or whether "when confronted with this or any issue of such constitutional dimension, controversial or otherwise, [it] is more straight forward - to apply neutral principles to the issue at hand and, through the vigors of judicial reasoning, arrive at a resolution of the specific controversy." (Opinion on Appeal).

The New York Constitution "is the voice of the people, speaking in their sovereign capacity." *In re New York Elev. Ry.Co.,* 70 N.Y. 327, 342 [1877]. It is the "most solemn and deliberate of all human writings," ordaining "the fundamental law of states." *Newell v. People,* 7 N.Y. 9, 97 [1852].

New York's constitutional guarantee of freedom of religion is both older and broader than the U.S. Constitution's guarantee. It was included in New York's Constitution in 1777, more than a decade before the First Amendment to the United States Constitution was adopted. New York's constitutional guarantee provides as follows:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices *inconsistent with the peace or safety of this state.*

(N.Y. Const. Art. I, § 3) (emphasis added).

This Court has emphasized that Article 1, Section 3 "manifest[s] the importance which our State attaches to the free exercise of religious beliefs, a liberty interest which has been called a 'preferred right.'" *Rivera v. Smith*, 63 N.Y.2d 501, 511, (1984), *quoting Matter of Brown v. McGinnis,* 10 N.Y.2d 531, 536 (1962). The magnitude of this right cannot be understated. It was among the

broadest guarantees of religious freedom among the original states,[3] and its interpretation is not limited by the more general language of the free exercise clause of the First Amendment. *See People v. Barber,* 289 N.Y. 378, 384 (1943). ("[I]n determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.")

Article 1, Section 3 affirmatively protects "the free exercise and enjoyment of religious profession and worship" and provides the standard by which limitations on those rights are to be judged: the right to free exercise and enjoyment of religion may not be invoked to "justify practices inconsistent with the peace or safety of this state." In other words, New York's free exercise provision "would exempt religiously motivated conduct from [generally applicable laws] up to the point that such conduct breached public peace or safety." Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L.Rev. 1409, 1462 (1990).

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[3] *See* David H.E. Becker, Note: *Free Exercise of Religion Under the New York Constitution*, 84 Cornell L. Rev. 1088, 1094 (1999); Charles Z. Lincoln, *The Constitutional History of New York*, 543-544; and Vol. IV p. 54-65 (1906).

This Court has stated that a court must balance "the interest of the individual right of religious worship against the interest of the [s]tate which is sought to be enforced." *People ex rel. DeMauro v. Gavin,* 92 N.Y.2d 963, 964 (1998), (*quoting, People v. Woodruff,* 26 A.D.2d 236, 238 (2d Dept. 1966), *aff'd,* 21 N.Y.2d 848 (1968)). But the balance itself must be struck with due regard for "the importance which our State attaches to the free exercise of religious beliefs," *Rivera v. Smith*, 63 N.Y.2d 501, 511 (1984), and the fact that "*[f]reedom of exercise of religion is... a preferred right.*" *LaRocca v. Lane,* 37 N.Y.2d 575, 583 (1975) (emphasis added).

Fourteen years ago in *Catholic Charities* this Court addressed the standard for the religious freedom guarantee and its analysis under the New York State Constitution. This Court began by saying, "we have not applied, and we do not now adopt, the inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute." *Catholic Charities,* 7 N.Y.3d at 525. This Court stated that it would use a balancing test, "we must consider the interest advanced by the legislation that imposes the burden," and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified." Id.

Notably, *Catholic Charities* involved a contraception mandate imposed by a statute, viz., the Women's Health and Wellness Act. This Court went on to state

that "the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." Id.

In *Catholic Charities* this Court held that the burden of demonstrating unreasonable interference is on the religious objector claiming an exemption from generally applicable and neutral laws. The Court stated that the burden "should not be impossible to overcome." Id. at 527. The Court by way of example cited Professor McConnell and four hypothetical laws which would be deemed "well beyond the bounds of constitutional acceptability." Id. What does this mean?

The religious belief at issue here is abortion and the coerced financing for it by plaintiffs in their health benefit plans. Abortion for the Catholic plaintiffs represents a "moral evil,"[4] "gravely contrary to moral law,"[5] and an "unspeakable crime,"[6] violating core religious teachings involving the dignity and respect for each and every human life, whether in utero or not, and the religious teaching against being morally complicit with the facilitation or conduct of sinful and immoral conduct. (R. 196-204, 383-390, 410-412, 422-425, 426-428, 435-437, 438-443, 444-446). For the Episcopal,[7] Baptist and Lutheran plaintiffs abortion is

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[4] *The Catechism of the Catholic Church,* copyright 1997, # 2271; *Humanae Vitae,* July 25, 1968 by Pope Paul VI; and *Familiaris Consortio,* November 22, 1981 by Pope John Paul II.

[5] The *Catechism of the Catholic Church,* copyright 1997, # 2270, 2271.

[6] *Pastoral Constitution on the Church in the Modern World Gaudium et Spes, 51: "Abortus necnon infanticidium nefanda sunt crimina."*

[7] *Episcopal Diocese 2007 Annual Convention Resolution 4.* "Resolved, that the 2007 Convention of the Diocese of Albany affirms the sanctity of human life as a gift of God from conception to natural death."

contrary to moral law and Scriptures[8] and violates those deeply rooted religious beliefs. (R. 410-412, 431-434, 498-499).

The Third Department acknowledged the heightened importance and impact of plaintiffs' religious belief when it stated that it "is held with deep religious fervency" and that abortion "has been among the most divisive issues in our politics for several decades..." Id. The Third Department improperly reasoned that abortion "amounts to a distinction without a legal difference," but on the other hand acknowledged that it was "confronted" with an "issue of such constitutional dimension" and then proceeded as "an intermediate appellate court" to summarily adjudicate the constitutional issues without analysis solely on the basis of *stare decisis.* Notably it is recognized that a court should "not ... apply *stare decisis* as rigidly in constitutional as in non-constitutional cases." *Glidden Co. v. Zdanok,* 370 U.S. 530, 543 [1962], *People v. Garvin,* 30 N.Y.3d 174, 185 [2017]; *People v. Taylor*, 9 N.Y.3d 129, 149 [2007].

The Third Department misconstrued *Catholic Charities.* It conflated the instant regulatory abortion mandate challenge with the statutory contraception mandate challenged in *Catholic Charities* and ignored required balancing of the competing interests. The Third Department reached its result by deftly avoiding the *Charities* balancing standards. By not engaging in any analysis of the various New

[8] *Jeremiah* 1:4; *Luke* 1:39.

York and United States constitutional challenges raised by plaintiffs the Third Department impermissibly overlooked the competing interests of the plaintiffs and the extraordinary burden imposed by the abortion mandate.

The Third Department misapplied the doctrine of *stare decisis*. In a telling finding it stated, "The factual differences in the cases are immaterial to the relevant legal analyses that are identical in both cases." (Op. at 6). This Court has stated that "the doctrine of *stare decisis* provides that once a court has decided a legal issue, subsequent appeals *presenting similar facts* should be decided in conformity with the earlier decision." *People v. Bing,* 76 N.Y.2d 331, 337-338 [1990] (emphasis supplied); *People v. Crespo,* 32 N.Y.3d 176, 191 [2018]. The Third Department by its decision has effectively revised the doctrine of *stare decisis* to hold that it may be invoked where similar claims are presented in the absence of similar facts. The implications of same, especially within the sphere of constitutional adjudication, are far reaching. For this reason alone review by this Court is warranted.

The *Catholic Charities* religious freedom standard inverts traditional constitutional analysis and eviscerates the most fundamental of rights under the New York Constitution. *Catholic Charities* signals that the justification for interfering with religious freedom need only be reasonable and that the religious objector bears the burden to demonstrate otherwise. It is respectfully submitted

that the *Catholic Charities* religious freedom standard is amorphous and vulnerable to inconsistent application. Ambiguity dominates the application of the standard: how does a court evaluate the degree of seriousness of a religious tenet or practice; the competing interest at stake; the degree of interference; and the degree of unreasonableness?

The Third Department also summarily dismissed plaintiffs' federal free exercise claim again stating it was controlled by this Court's decision in *Catholic Charities* which discussed *Employment Division v. Smith,* 494 U.S. 872 [1990]. It bears emphasis that the abortion mandate cannot survive even if *Smith* does control plaintiffs' Free Exercise Claim as there is no rational basis for withholding the "religious employer" exemption from these plaintiffs. But *Smith* does not control this claim for a variety of reasons:

- *Smith* held that the compelling state interest test is not required to justify a religiously neutral law of general applicability. The abortion mandate is neither religiously neutral nor generally applicable in the sense that the law at issue in *Smith* was.

- The abortion mandate interferes not only with the free exercise rights of individuals, but also with the institutional rights of religious organizations. *Smith* expressly recognized the continued vitality of decisions that

extend what amounts to absolute protection to the institutional rights of religious organizations.

- *Smith* recognized that the compelling state interest standard is still applicable when other rights are affected in addition to free exercise rights. By compelling the plaintiffs to finance conduct that they teach is sinful, the abortion mandate compels a form of endorsement that affects not only the plaintiffs' free exercise rights, but also their rights of free speech and association.

The assessment of federal free exercise claims was recently addressed by the Second Circuit Court of Appeals in *New Hope, Family Services, Inc. v. Poole,* 2020 U.S. App. LEXIS 22630 [July 21, 2020]. In reversing the premature dismissal of free exercise and free speech claims brought by a faith-based adoption agency involving a state agency regulation the Court stated that plaintiffs' "Free Exercise claim should not have been dismissed even under the *Smith* standard as presently applied. A court construing pleadings in the light most favorable to [plaintiff] could not conclude as a matter of law that [the state agency] was simply applying a neutral law of general application," Id. The Court noted "Almost from its pronouncement, *Smith's* construction of the Free Exercise Clause has prompted criticism." (citations omitted). Id. Here the Third Department ignored the extensive motion record which contained eleven affidavits submitted by plaintiffs

addressing their religious beliefs at issue and the impact of paying for the abortion mandate.

Affirming the protection of religious liberty under the New York State and the United States Constitutions warrants a reconsideration of *Catholic Charities* with necessary refinement and clarification. *Catholic Charities* "leads to an unworkable rule, or … creates more questions than it resolves, [and therefore] may ultimately be better served by a new rule." *People v. Taylor,* 9 N.Y.3d 129, 149 [2007]. This case presents a "compelling justification" under the principles of constitutional jurisprudence to revisit *Catholic Charities. Matter of State Farm Mut. Auto. Ins. Co. v. Fitzgerald,* 25 N.Y.3d 799, 810 [2015].

The Court's intervention is needed to ensure that the principles protecting religious liberty in New York are correctly identified and applied.

II. UNDER THE FOUR-FACTOR ANALYSIS SET FORTH IN *BOREALI v. AXELROD* (71 N.Y.2d 1 [1987]) THE DEPARTMENT OF FINANCIAL SERVICES EXCEEDED ITS REGULATORY AUTHORITY IN PROMULGATING THE ABORTION MANDATE

The Third Department held that the specific grant of authority for the issuance of the challenged abortion mandate was grounded on Insurance Law § 3217 and a regulation, the so-called "non-exclusion regulation." 11 NYCRR § 52.16(c). (Op. at 9). The statute provides the superintendent the authority to "issue regulations --- to establish minimum standards of full and fair disclosures, for the form, content and sale of accident and health insurance policies…"

Insurance Law, §3217 (a). The regulation states that "No policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition." The regulation has four stated exceptions, viz., (1) preexisting conditions or diseases; (2) mental or emotional disorders, alcoholism and drug addiction; (3) pregnancy and except for complications of pregnancy; and (4) illness, accident, treatment or medical condition arising out of war, suicide and aviation. 11 NYCRR § 52.16 (c). Neither the generic statute nor the generic regulation make reference to abortion or reproductive health services.

The Third Department and the DFS directly pegged their justification for the 2017 Abortion Mandate Regulation on a neutral statute adopted in 1984 and a so-called "non-exclusion" regulation adopted in 1972 which have never been applied by the DFS in this manner.

The 2017 abortion mandate is a regulation based on a negative statute and regulation. In a further finding the Third Department sought to bolster its justification for the abortion mandate as "ma[king] explicit what was implicitly mandated in Insurance Law § 3217 and the 1972 regulation." (Op. at 9). The Court incorrectly treated the 1984 statute coupled with the 1972 so-called "non-exclusion" regulation as a broad gateway to compel abortion insurance coverage without legislative authority. The record confirms that between 1993 and 2017 multiple bills were introduced addressing abortion coverage. (R. 680-755).

The most instructive guidance for the analysis of the challenged regulation here is the decision in *Health Ins. Ass'n v. Corcoran*, 154 A.D. 2d 61 [3d. Dept. 1990], affd 76 N.Y. 2d 995 [1990]. The Court examined the legislative history, purpose and application of Insurance Law § 3217 and held that the authority extended by the statute to the superintendent to enact regulations thereunder was "consumer protective in orientation" to provide "simplification of coverages to facilitate understanding and comparisons... eliminate: misleading or confusing provisions... deceptive practices in connection with the sale of policies... coverages... so limited in scope as to be of no substantial economic value to the holders." Id., at 72. The authority available to the superintendent under § 3217 is "to issue regulations governing undesirable underwriting practices." Id., at 72.

Following review of the legislative history and purpose of § 3217 the Court invalidated a regulation which would have banned HIV testing by insurance in determining an applicant's insurability. The Court found that it was "unreasonable and clearly not supported by the legislative history, to construe Insurance Law § 3217(b) (4) as giving respondent and the Commissioner of Health *carte blanche* to drastically disturb long-standing principles of accepted insurer underwriting practices in order to further the Commissioner of Health's own objective in public health policy...such a construction, in our view, would at least move § 3217 (b) (4) toward, if not bring it directly into, conflict with the teachings of *Boreali v.*

Axelrod." Id., at 72 (citation omitted). Similarly the so-called "non-exclusion" regulation at § 52.16 (c) is structured as a generic underwriting guidance which also serves as "consumer protection in orientation" and not an authoritative source to adopt a regulation to affirmatively compel abortion coverage insurance in underwriting policies. ("Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator." *Matter of Leading Age N.Y. Inc. v. Shah,* 32 N.Y.3d 249, 260 [2018] (internal citation omitted).

The DFS has conceded that its abortion mandate regulation represents the advancement of a public policy objective. ("The Department has authority to prescribe regulations and in doing so may interpret statues: the amendment is entirely consistent with § 3217 and with the public policy of ensuring and advancing women's full access to health care services, in particular reproductive care, which the Legislature has consistently set forth in the Insurance Law."). (R. 655). In fact, the Insurance Law does not address reproductive health care including abortion insurance coverage.

The challenged abortion mandate represents unconstitutional social engineering by the State in violation of the constitutional limits on rule making. *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y. 3d 249, 260 [2018]. ("Thus, in promulgating regulations, an agency may rely on a general but comprehensive grant of regulatory authority. To be sure, a broad grant of authority is not a license

to resolve – under the guise of regulation – matters of social or public policy reserved to legislative bodies.") (*Boreali v. Axelrod*) (citation omitted).

CONCLUSION

For the foregoing reasons, plaintiffs' appeal as of right should be granted because subject matter jurisdiction is present.

DATED: August 27, 2020
Albany, New York

Respectfully submitted

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs-Petitioners-Appellants

--against--

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; et al.,

Defendants-Respondents.

AFFIDAVIT OF SERVICE

Index No. 7536-17

App. Div. No. 529350

STATE OF NEW YORK)
COUNTY OF ALBANY)ss:

DIANE SEGNERI, being duly sworn, deposes and says: I am not a party to this action. I am over the age of eighteen years. That on the 27th day of August 2020, I served a copy of Appellants' Rule 500.11 Letter upon:

Hon. Letitia James
Attorney General for the State of New York
(Attn: Laura Etlinger, Esq.)
The Capitol
Albany, NY 12224

by depositing a true and correct copy of same in a post-paid wrapper in the Official Depository maintained and exclusively controlled by Federal Express at 515 Broadway, Albany, New York.

Diane Segneri

Sworn to before me this 27th
day of August 2020.

Notary Public

SHERI CAMPRONE
Notary Public State of New York
Qualified in Rensselear County
Reg # 4970392
Commission Expires August 13, 2022