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August 31, 2020

Hon. John P. Asiello
Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: *Roman Catholic Diocese of Albany v. Vullo*
Third Dept. No. 529350

Dear Mr. Asiello:

Respondents Superintendent of Financial Services and the Department of Financial Services submit this letter in response to this Court's letter dated August 4, 2020, inquiring whether a substantial constitutional question is directly involved to support an appeal as of right under C.P.L.R. 5601(b)(1). The appeal should be dismissed because it does not present a substantial constitutional question.

Background

Our brief to the Third Department contains a detailed statement of the background facts, including the statutory and regulatory scheme at issue. As we did in our memorandum opposing plaintiffs' motion for leave to appeal, we summarize those facts briefly here for the Court's convenience. Except for reference here to the free-speech, expressive-association and equal-protection claims, as to which plaintiffs did not seek leave to appeal, the summary provided below is the same as the summary provided in that memorandum.

In 1972, the Superintendent of Insurance promulgated a general regulation—a regulation not challenged here—prohibiting the exclusion from coverage of any particular type of medically necessary treatment or condition, with specified exceptions, none of which is relevant here. 11 N.Y.C.R.R. § 52.16(c) ("No policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition, except as follows."). In 2017, the Superintendent amended its regulations to clarify that provisions withholding coverage for medically necessary abortions are not permitted. The 2017 amendment thus made explicit what was already implicit in the 1972 regulation:

> Subject to certain limited exceptions, Insurance Law section 3217 and regulations promulgated thereunder (section 52.16(c) of this Part) have long prohibited health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition. None of the exceptions apply to medically necessary abortions. As a result, insurance policies that provide hospital, surgical, or medical expense coverage are required to include coverage for abortions that are medically necessary.

11 N.Y.C.R.R. § 52.1(p)(1); *see also* 11 N.Y.C.R.R. § 52.16(o)(1) (requiring coverage of medically-necessary abortions when a policy provides hospital, surgical, or medical expense coverage).

The 2017 amendment also added an express exemption for policies offered by "religious employers." The amendment defined the term "religious employer" exactly as that term is defined for purposes of the statutory exemption from the requirement that health insurance policies providing prescription drug coverage include coverage for contraceptive drugs and devices. *Compare* Insurance Law §§ 3221(l)(16)(E)(1), 4303(cc)(5)(A) *with* 11 N.Y.C.R.R. § 52.2(y). As in that context, a "religious employer" is 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 the Internal Revenue Code. 11 N.Y.C.R.R. § 52.2(y).

Plaintiffs—multiple Catholic dioceses, churches and religious-ministry organizations, as well as a single individual employee and a construction

company—commenced the underlying action to challenge the 2017 regulation.[1] Plaintiffs' complaint mirrored, in nearly identical language, the original complaint submitted in *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006), *rearg. denied,* 8 N.Y.3d 866, *cert. denied,* 552 U.S. 816 (2007), asserting, among other things, the same federal and state free-exercise, free-speech, and expressive-association claims as were asserted in that case, merely substituting the word "abortion" for "contraceptive." In addition, plaintiffs' complaint asserted that the 2017 regulation violated equal protection and ran afoul of separation-of-powers principles.

On cross-motions for summary judgment, Supreme Court dismissed the complaints, and the Third Department unanimously affirmed. *Roman Catholic Diocese of Albany v. Vullo*, __ A.D.3d __, 2020 N.Y. App. Div. LEXIS 3800 (July 2, 2020).

The Third Department unanimously held that, notwithstanding any factual or religious distinction between contraceptives and abortion, the principle of *stare decisis* required dismissal of plaintiffs' free-exercise, free-speech, expressive-association, and equal-protection claims. The Third Department reasoned that the primary ground on which this Court rejected those claims in *Catholic Charities* applied equally here, and thus that the regulation at issue is neutral and treats, for purposes of insurance coverage, medically necessary abortions the same as any other medically necessary procedure. 2020 N.Y. App. Div. LEXIS 3800, at *8. The court held that the difference between contraceptives and abortion was "immaterial" to the legal analysis, as was the fact that the matter at hand involved a regulation, while the earlier case involved a statute, because a properly promulgated regulation is entitled to the same deference as a legislative act. *Id.*

The Third Department rejected plaintiff's separation-of-powers claim on finding that the "coalescing circumstances" outlined in *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987), weighed in favor of a finding that the Superintendent had not exceeded delegated authority. 2020 N.Y. App. Div. LEXIS 3800, at *9-15. Pointing to the authority of Insurance Law § 3217(b)(1) and the non-exclusion rule (11 N.Y.C.R.R. § 52.16(c)), the court noted that the regulation at issue "is based upon longstanding legislative and regulatory efforts to standardize and simplify health insurance coverages," and thus did not represent prohibited

[1] The standing of at least some of the plaintiffs is uncertain, as some, if not many, of them may well satisfy the criteria necessary to be recognized as a religious employer.

regulatory policy-making. 2020 N.Y. App. Div. LEXIS 3800, at *11-12. Rather, the court found that the amendment simply "makes explicit what is, at the very least, implicit in more general regulations unquestionably based upon statutory authority." 2020 N.Y. App. Div. LEXIS 3800, at *14. Accordingly, the Superintendent did not write on a clean slate. 2020 N.Y. App. Div. LEXIS 3800, at *12. Further, the fact that bills had been introduced to either include or exclude coverage of abortion services did not support a separation of powers violation where the bills were never voted out of committee and thus did not represent "vigorous debate" on the issue. 2020 N.Y. App. Div. LEXIS 3800, at *13 (internal quotation omitted). And the subject matter of the regulation was within the expertise of the Superintendent as it related to statutory authority to standardized health insurance coverage. 2020 N.Y. App. Div. LEXIS 3800, at *14.

No Substantial Constitutional Question is Directly Involved

An appeal as of right under C.P.L.R. 5601(b)(1) must directly involve a substantial constitutional issue. *See Rivka Cohen v. Tzvi Cohen*, 35 N.Y.3d 947 (2020); *Matter of New York Public Interest Research Group, Inc., v. N.Y. State Thruway Authority*, 77 N.Y.2d 86, 89 (1990). A question is not sufficiently substantial where the constitutional issue already has been resolved by the Court of Appeals under "essentially identical" circumstances. *New York Public Interest Research Group*, 77 N.Y.2d at 89.

In the decision below, the Third Department rejected plaintiffs' free-exercise and related claims under the principle of *stare decisis,* finding such claims controlled by this Court's decision in *Catholic Charities,* 7 N.Y.3d 510. And the Third Department rejected plaintiffs' separation-of-powers claim upon properly applying the well-settled criteria set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1, to the particular facts of this case. As we previously demonstrated, the Third Department's decision thus presents no issues warranting this Court's view. It similarly presents no substantial constitutional question.

In *Catholic Charities*, this Court upheld as a valid and neutral law of general application a statute requiring coverage of contraceptive drugs and devices if prescription drugs more generally are covered, notwithstanding that the statute exempted some religious entities—those qualifying as "religious employers"—and not others. 7 N.Y.3d at 522. The Court's conclusion that the law easily survived a challenge under the federal free-exercise clause, *see id.* at 524, applies equally here. Like the law at issue in *Catholic Charities,* the regulation requires coverage of medically necessary abortion services if

medically necessary hospital, surgical, or medical expense coverage is provided, and it provides the same exemption for religious employers as the law at issue in that case.

Catholic Charities also controls plaintiffs' state free-exercise claim. The *Catholic Charities* Court rejected the analogous state claim at issue there, because plaintiffs were not literally compelled to provide contraceptives coverage and many of plaintiffs' employees did not share their beliefs. *Id.* at 527-28. And given the Legislature's strong interests in fostering equality between the sexes and providing women with better health care—the same purposes underlying the medically-necessary abortion regulation, the Court concluded that the insurance coverage requirement was not "an unreasonable interference with plaintiffs' exercise of their religion." 7 N.Y.3d at 528.

While plaintiffs rely on the fact that a statutory contraceptive insurance requirement is not the same as a regulatory abortion insurance requirement, the Third Department correctly concluded that these factual distinctions are legally immaterial. In the court below, plaintiffs asserted that abortion is a "moral evil" that violates core religious teachings and is contrary to "moral law and the Scriptures." (Br. at 22-23.) But the plaintiffs in *Catholic Charities* similarly believed that contraception was "sinful" and that the challenged statute caused them to violate their religious tenets by compelling them to finance "conduct that they condemn." *Catholic Charities*, 7 N.Y.3d at 520-21. And the Court in that case noted "the centrality of those beliefs to their faiths." *Id.* at 521. Indeed, 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* R598.) Moreover, as the Third Department correctly reasoned, the applicable constitutional tests do not require the "Court to enter the thicket of making a religious value judgment." 2020 N.Y. App. Div. LEXIS 3800, at *6. As this Court has explained, "[n]either the courts nor the administrative agencies of the State or its subdivisions may go behind the declared content of religious beliefs any more than they may examine into their validity." *Holy Spirit Ass'n for Unification of World Christianity v. Tax Com. of N.Y.*, 55 N.Y.2d 512, 521 (1982).

Here, as in *Catholic Charities*, plaintiffs are not compelled to provide coverage of abortion services. Many plaintiffs likely have two alternatives to purchasing such coverage, and all have at least one alternative. First, plaintiffs can choose to self-fund health insurance coverage for their respective employees and if they do so, would not be subject to state regulation of health

insurance policies. *See* 29 U.S.C. § 1144(a), (b)(2)(B). The Department of Financial Services advises that larger employers often choose to self-fund for economic reasons. Second, many of the plaintiffs likely can forego the provision of health insurance coverage without violating federal law. In that case they could satisfy their stated moral obligation to provide just wages and benefits by choosing instead to compensate their employees for the value of such coverage, as the Court of Appeals said of the plaintiffs in *Catholic Charities*, 7 N.Y.3d at 527.

And as the Third Department concluded, the fact that *Catholic Charities* involved a statute while plaintiffs here challenge a regulation is of no moment. The Superintendent's regulations are accorded a high level of deference like that accorded the statute at issue in *Catholic Charities. See State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 321 (2005) ("Where, as here, the Superintendent has properly crafted a rule within the scope of h[er] authority, that rule has the force of law and represents the policy choice of this State."). Consequently, the Court's conclusion in *Catholic Charities* that an insurance coverage requirement does not violate the state free-exercise clause is equally applicable here.

While plaintiffs argued below that the state free-exercise test applied in *Catholic Charities* should be re-examined (Br. 62-63), they set forth no grounds for doing so. No legal standards have changed since the Court articulated in that case how the balancing test should be applied, and courts since then have ably applied that test without difficulty. *See, e.g., Matter of Gifford v. McCarthy*, 137 A.D.3d 30, 39-40 (3d Dep't 2016). *Catholic Charities* thus remains good law.

Catholic Charities likewise controls plaintiffs' free-speech, expressive-association, and equal-protection claims. In that case, this Court found plaintiffs' free-speech and expressive-association claims to be "insubstantial." 7 N.Y.3d 523. Here, as in *Catholic Charities,* the regulation "does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone." *Id.* And, as the Third Department correctly held, the decision in *Catholic Charities* controls plaintiffs' equal protection claim because the Court there held that "the distinction between qualifying 'religious employers' and other religious entities for purposes of the exemption is not a denominal classification," but "turns on the basis of a religious organization's activities and has a rational basis." 2020 N.Y. App. Div. LEXIS 3800, at *9 n.7.

Because *Catholic Charities* controls plaintiffs' free-exercise and related claims, those claims are insubstantial.

Plaintiffs' separation-of-powers claim is likewise insubstantial. In rejecting that claim, the Third Department applied the well-accepted criteria set forth in *Boreali v. Axelrod*, 71 N.Y.2d at 11.

In particular, the Third Department pointed to Insurance Law § 3217, which authorizes the Superintendent to promulgate regulations that "establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies" for the purpose, among others, of establishing "reasonable standardization and simplification of coverages to facilitate understanding and comparisons." The court recognized that, using that authority, the Superintendent had promulgated the 1972 non-exclusion rule, 11 N.Y.C.R.R. § 52.16(c), which prohibits a policy, except for enumerated exceptions not applicable here, from excluding coverage based on "type of illness, accident, treatment or medical condition." Thus, the 1972 regulation—which was not challenged here—already required the coverage of abortion services when other surgical or medical services are covered. The 2017 regulation simply "makes explicit what is, at the very least, implicit in more general regulations unquestionably based upon statutory authority." *Roman Catholic Diocese of Albany,* 2020 N.Y. App. Div. LEXIS 3800, at *14. Consequently, in promulgating the 2017 regulatory amendment, the Superintendent was not engaging in prohibited policy-making or writing on a clean slate, but rather was exercising her expressly delegated authority to standardize health insurance coverage.

Contrary to plaintiffs' argument in the court below (Reply Br. at 9-10), the decision in *Matter of Health Ins. Ass'n v. Corcoran*, 154 AD2d 61 (3d Dep't), *aff'd on dec. below,* 76 N.Y.2d 995 (1990), is distinguishable. In that case, the Superintendent had acted against a backdrop of legislative authorization for the type of activity that the Superintendent sought to ban by regulation. As the Third Department explained in that case, Insurance Law § 3217 did not give the Superintendent "carte blanche to drastically disturb long-standing principles of accepted insurer underwriting practices in order to further the Commissioner of Health's own objectives in public health policy." *Corcoran*, 154 A.D.2d at 72. Here, in contrast, the law has long required inclusion of specific treatments and conditions and the Superintendent acted in furtherance of that goal in requiring that medically necessary abortions be included in plans covering other medically necessary services.

Nor does the fact that bills were introduced proposing to include or exclude coverage of abortion services support plaintiffs' separation-of-powers claim. The subject bills never made it out of committee, and evidence of such bills is insufficient to suggest that the Legislature seriously debated the issue but declined to take action.[2] *See Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 265-66 (2018).

Thus, as the Third Department correctly found, the *Boreali* circumstances weigh in favor of sustaining the regulation here.

For all of these reasons, this Court should dismiss the appeal for lack of a substantial constitutional question.

Respectfully submitted,

LETITIA JAMES
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By: _____
LAURA ETLINGER
Assistant Solicitor General

[2] For the accuracy of the record, we note that in stating that none of the bills was introduced after the 2017 regulation was promulgated, 2020 N.Y. App. Div. LEXIS 3800, at *13, the Third Department relied on an unrefuted statement in our brief that we have found to be erroneous. In fact, one such bill was introduced during the 2019-2020 session. *See* Assembly Bill A2807 (2019-2020 sess.). That bill was introduced in only one house and has never made it out of committee. That fact does not change the analysis, however. And the Third Department did not in any event place particular reliance on this fact in rejecting plaintiffs' reliance on the unsuccessful bills that generated no rigorous debate.

cc: Michael L. Costello
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515 Broadway
Fourth Floor
Albany, New York 12207

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

William Sportman, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the 31st day of August, 2020, I served the annexed **Jurisdictional Inquiry Response Letter** upon the attorney named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said individual at the address within the State and Respectively designated by him for that purpose as follows:

Michael L. Costello
Tobin and Dempf, LLP
515 Broadway, 4th Floor
Albany, New York 12207

Sworn to before me this
31st day of August, 2020.

Cristal R. Gazelone
NOTARY PUBLIC
CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6259001
Qualified in Rensselaer County
Commission Expires April 2, 2024