No. APL-2022-00089
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Appellate Division – Third Department Case No. 529350

Court of Appeals of the State of New York

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 OGDENSBERG; ST. GREGORY THE GREAT 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,

-against-

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

Defendants-Respondents.

BRIEF OF *AMICI CURIAE* NEW YORK CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANTS-RESPONDENTS

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Dated: February 29, 2024
New York, N.Y.

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union. The American Civil Liberties Union hereby discloses that it is a non-profit, 50l(c)(4) organization and that it has affiliate organizations throughout the United States, including the NYCLU.

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PRELIMINARY STATEMENT

The Medically Necessary Abortion Regulation (11 NYCRR 52.16 [o]) is an effort by the State of New York to promote the health and well-being of New Yorkers by requiring health insurance plans to treat abortions as what they are—a critical component of basic health care. Despite the importance of abortion access for their employees, appellants seek an exemption from the coverage requirement by arguing that the United States Supreme Court's decision in *Fulton v City of Philadelphia* (141 S Ct 1868 [2021]) articulated a sweeping standard wherein the mere existence of any exemptions within a law triggers strict scrutiny in free exercise challenges, and overruled this Court's decision in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006]).

Appellants are wrong on both counts. *Amici curiae* have special expertise in recent cases applying *Fulton* and situating it within longstanding Free Exercise Clause precedent, and write to offer an expanded discussion of why *Fulton* holds only that laws containing individualized, discretionary exemptions trigger strict scrutiny; it does not support a blanket invalidation of rules like the Regulation that contain objective, categorical exemptions. Accepting appellants' arguments would yield untenable results and open the door to challenges to all laws containing routine exemptions, triggering strict scrutiny whenever anyone claims a burden on religious exercise for an unprecedented class of laws.

Further, it could risk denying crucial access to abortion coverage for appellants' employees and others. The Regulation promotes equality on multiple, intersecting fronts, as abortion access is critical to individuals' ability to control their personal and professional lives. New York has made it abundantly clear that "comprehensive reproductive health care is a fundamental component of every individual's . . . equality" in New York State, and "[e]very individual has the fundamental right to . . . have an abortion." (Public Health Law § 2599-aa [McKinney 2019].) By contrast, the inability of employees to obtain insurance coverage for abortions results in negative health outcomes for women and those who can become pregnant, forces them below the poverty line, and impedes their right to abortion. The prohibitive cost of an abortion for those without insurance coverage or subject to high co-payments can delay or prevent access to care entirely. The Regulation removes barriers to abortion care and ensures that New Yorkers have meaningful access to abortion to plan their lives and protect their health.

But this Court need not reach these important (indeed compelling) interests served by the Regulation, because it is neutral and generally applicable and does not trigger strict scrutiny. Accordingly, this Court should affirm the decision below and find that *Serio* remains good law.

INTEREST OF AMICI CURIAE

The ACLU is a nationwide, nonpartisan organization with nearly two million members dedicated to defending the principles of liberty and equality embodied in the

Constitution. The NYCLU—the ACLU's state affiliate in New York—has a long history of advocating for the civil rights and civil liberties of New Yorkers in both state and federal courts across the state. As organizations that advocate for the First Amendment right to religious liberty and the rights of women and other pregnant people to due process, equality, and reproductive freedom under the law, *amici* bring expertise in the relevant law and have a strong interest in ensuring the correct analysis and resolution of questions directly implicating the free exercise of religion and reproductive freedom. Both the ACLU and NYCLU have appeared in some of the key cases at issue in this matter, including *Fulton v City of Philadelphia* (141 S Ct 1868 [2021]), where the ACLU served as counsel of record to intervenor-respondents, and *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006]), where the ACLU and the NYCLU together appeared as *amici curiae*. The ACLU and the NYCLU also appeared together as *amici* in this case at the Appellate Division, Third Department (*Roman Catholic Diocese of Albany v Vullo*, 206 AD3d 1074 [3d Dept 2022]).

Further, the ACLU and NYCLU have appeared as *amici curiae* together in multiple cases addressing how to apply *Fulton* in cases where parties have raised free exercise of religion claims (*see e.g. We The Patriots USA, Inc. v Hochul*, 17 F4th 266 [2d Cir 2021]; *Emilee Carpenter, LLC v James*, 575 F Supp 3d 353 [WDNY 2021]; *Emilee Carpenter, LLC v James*, Docket No 22-75 [2d Cir 2022]). The ACLU has also appeared separately as *amicus curiae* in cases addressing that same issue (*see e.g. Does 1-3 v Mills*, 142 S Ct 17 [2021]; *303 Creative LLC v Elenis*, 6 F4th 1160 [10th Cir 2021]).

ARGUMENT

I. ONLY INDIVIDUALIZED, DISCRETIONARY EXEMPTIONS RENDER A LAW NOT GENERALLY APPLICABLE UNDER *FULTON'S* NARROW HOLDING.

Fulton is a narrow opinion holding only that a regulation allowing for a "formal" system of "entirely discretionary exceptions" is not generally applicable, triggering strict scrutiny under the Free Exercise Clause (141 S Ct at 1878). Contrary to appellants' arguments (brief for plaintiffs-appellants at 20–30), *Fulton*'s holding is primarily concerned with the existence of such individualized, discretionary exemptions—and did not address the existence of *any* type of exemption within a law or regulation. *Fulton* leaves undisturbed the foundational free exercise precedent of *Employment Division Department of Human Resources of Oregon v Smith* (494 US 872 [1990]), which must govern here. Under *Smith*, the mere existence of an exemption within a law does not render that law not generally applicable. Instead, *Smith* instructs that a law is not generally applicable where government officials have broad discretion to disfavor religiously motivated conduct. This basic principle from *Smith* has been repeatedly reaffirmed by state and federal courts in New York, as well as federal appellate courts in other circuits. Appellants do not identify any cases—from New York or elsewhere—that establish otherwise. As a result, appellants also incorrectly argue that *Fulton* overruled *Serio*, which remains good precedent.

A. *Fulton* Held Only that Individualized, Discretionary Exemptions—Not Every Exemption—Fall Outside *Smith*'s Framework.

In *Fulton*, the City of Philadelphia learned that an agency it hired to provide foster care services refused to certify same-sex married couples as prospective foster parents on the grounds that doing so would contravene its religious beliefs (141 S Ct at 1875). This certification refusal violated an antidiscrimination provision in the agency's contract with the City prohibiting sexual orientation discrimination as well as the antidiscrimination requirements of a citywide "Fair Practices Ordinance" (*id.* at 1875). However, the contract between the agency and the City contained a provision that barred rejecting a prospective foster family for services because of their sexual orientation "unless an exception is granted by the Commissioner . . . in his/her sole discretion" (*id.* at 1878). Following an investigation, the City stopped referring children to the agency unless the agency agreed to certify same-sex couples (*id.* at 1875–76). The agency sued the City over the referral freeze, arguing (among other claims) that its First Amendment right to free exercise entitled it to continued referrals from the City without having to certify same-sex couples (*id.* at 1876).

Referencing earlier jurisprudence and analogizing to other laws with similar exemptions, the *Fulton* Court held that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" (*id.* at 1877 (quoting *Smith*, 494 US at 884)). The Court found that the provision in the City contract containing a

mechanism for discretionary exemptions "incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner" (*id.* at 1878). The Court thus held that "the inclusion of a formal system of entirely discretionary exceptions in [the contract] renders the contractual non-discrimination requirement not generally applicable" (*id.* at 1878). Although the Court's holding and analysis was focused on the individualized, discretionary nature of the mechanism, it also noted that, based on earlier precedent, a law is not generally applicable where it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*id.* at 1877 (citing *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 542–546 [1993])).

Appellants are wrong when they state that the *Fulton* Court's analysis of general applicability rested "wholly on the possibility that certain organizations could be granted exceptions to the policy . . ." (brief for plaintiffs-appellants at 21). They make this fundamental error repeatedly (*see e.g.* brief for plaintiff-appellants at 2 (positing that "the Abortion Mandate's religious and secular exemptions mean" under *Fulton* that "it is not generally applicable"); brief for plaintiffs-appellants at 15 ("a law that contains exemptions that undermine its stated purposes . . . may be upheld only if the State carries its burden under strict scrutiny"); brief for plaintiffs-appellants at 22 (contending that a governmental policy can survive strict scrutiny "only if the policy contains no exceptions that undermine its stated purpose"); reply brief for plaintiffs-

appellants at 16 ("*Fulton*, after all, found the mere 'availability of exceptions' in principle to be enough to trigger strict scrutiny")).

But the Court's general applicability inquiry in *Fulton* actually focused on whether the provision at issue created a "formal system of entirely discretionary exceptions" (141 S Ct at 1878), not whether exceptions *in any form* could be granted. As described more fully below, this distinction is critical, because laws that allow for discretionary, individualized exemptions are categorically different from the many commonplace laws that allow for objective, definitive exemptions. *Fulton* does not support a blanket invalidation of the latter, which would eviscerate a wide range of established laws and regulations. Because the Regulation does not include the type of discretionary, individualized exemption at issue in *Fulton*, this Court should find that it is generally applicable under *Smith* and does not trigger strict scrutiny.

B. Courts Applying *Smith*—Including This Court—Have Routinely Found That Laws Containing Exemptions Are Generally Applicable.

Fulton unambiguously left the *Smith* framework for free exercise claims in place (*Fulton*, 141 S Ct at 1877; *id.* at 1883 (Barrett, J., concurring) (observing the majority opinion in *Fulton* did not overturn *Smith*); *id.* at 1887 (Alito, J., concurring) (same)). Further, the Court's order in *Tandon v Newsom* (141 S Ct 1294 [2021] (per curiam)) among other orders cited by appellants (*see* brief for plaintiffs-appellants at 15-16 (referring to *Tandon*, 141 S Ct 1294; *Harvest Rock Church, Inc. v Newsom*, 141 S Ct 889 [2020]; *South Bay United Pentecostal Church v Newsom*, 141 S Ct 716 [2021]; *Gish v Newsom*,

141 S Ct 1290 [2021]; *Gateway City Church v Newsom*, 141 S Ct 1460 [2021]); *Kennedy v Bremerton School Dist*, 142 S Ct. 2407 [2022]), likewise left *Smith* undisturbed.[1] Under *Smith*, the mere existence of an exemption within a law does not mean that the law is not generally applicable. Indeed, *Smith* itself held that a criminal law was generally applicable, even though it contained an exemption for medical use of a controlled substance (494 US at 874, 882–84.)

This Court reaffirmed that basic principle from *Smith* in *Serio* (7 NY3d at 521-24), and lower courts since have continued to find that many laws and rules containing well-defined exemptions are still generally applicable.[2] The only exemption

[1] Appellants' recurrent citations to *Tandon* and related orders also should be contextualized against these orders' procedural posture, as they are not opinions on the merits: The Court neither granted petitions for a writ of certiorari for these emergency orders nor heard oral argument. Before issuing the orders, the Court received only abridged and expedited briefing (*see Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 180-81 [1979] (explaining that summary orders "have considerably less precedential value than an opinion on the merits."); *see also* Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 Buff L Rev 87 [2022]). And even on its own terms, *Tandon* does not alter the result in this case, as *Tandon* only addressed laws that allow secular exemptions while denying religious ones, conditions absent in this case (*see* 15-16, *infra*).

[2] For example, the Second Department upheld a temporary measles vaccination requirement that applied only to people residing or working in certain zip codes hard hit by a measles outbreak (*C.F. v NY City Dept of Health & Mental Hygiene*, 191 AD3d 52, 57, 78 [2020]). Although the regulation contained explicit exemptions for people who could demonstrate either immunity to the disease or entitlement to a medical exemption, the Second Department determined that it was generally applicable and so did not violate the Free Exercise Clause (*id.* at 57–58, 78). The court reasoned that the requirement "treats all persons equally, whether religious or not," and "does not create any favored classes" (*id.* at 78). Despite the exemptions, the court upheld the vaccination requirement on the basis that "the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability, even if the law has the incidental effect of burdening a particular religious practice" (*id.* at 76). The Third Department also held that an immunization requirement for children is generally applicable despite the repeal of a religious exemption, even though the law retained a medical exemption (*F.F. v State*, 194 AD3d 80, 82, 87–88, *appeal dismissed, lv to appeal denied,* 37 NY3d 1040 [2021]).

at issue in *Serio* was for "religious organizations," which are generally "churches and religious orders that limit their activities to inculcating religious values in people of their own faith" (7 NY3d at 522). Contrary to appellants' contention that *Serio* must be rejected because it cannot be reconciled with *Fulton* (brief for plaintiffs-appellants at 32-35), *Serio* remains good law post-*Fulton*. Nothing in the record suggests that the exemption for religious organizations constitutes an individualized, discretionary exemption of the type that was at issue in *Fulton* (7 NY3d at 522–23). Further, the exemption does not permit *secular* conduct while restricting religious conduct. Instead, it permits certain *religious* conduct, thus "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" (*id.* (internal quotation marks omitted)). This Court explained that "[to] hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion" (*id.* at 522). Moreover, neither *Fulton* nor other recent decisions have held that "the presence of exemptions that undermine the State's asserted interest triggers strict scrutiny regardless of the State's subjective purpose" (brief for plaintiffs-appellants at 34). This is the incorrect standard.

Federal courts in New York have also embraced this core principle from *Smith*, repeatedly recognizing that a law can have an exemption and still be generally applicable. The Second Circuit has held, for example, that a public housing program's

tenant assignment policy was generally applicable despite "mak[ing] exceptions to its general policy of acting on a first-come, first-served basis for victims of domestic violence, those living in substandard housing, and others," because "defendant grants exceptions only for specified categories, not on an ad hoc basis, and these exceptions are available to [the religious minority] if they fall into one of those categories" (*Ungar v NY City Hous Auth*, 363 Fed Appx 53, 56 [2d Cir 2010]). The Second Circuit has also held that a New York regulation that permits the temporary exclusion of unvaccinated children from schools was generally applicable, even though those students had received a religious exemption from vaccination and a medical exemption was also available, observing that "New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs" (*Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015] (per curiam)). And the Second Circuit has upheld exemption-containing immigration laws as generally applicable, reasoning that they "do[] not provide for a discretionary exemption that is applied in a manner that fails to accommodate free exercise concerns," and that the "existing exemptions . . . have no relation to religion" (*Intercommunity Ctr for Just & Peace v I.N.S.*, 910 F2d 42, 45 [2d Cir 1990]). Appellants do not cite any cases from the Second Circuit that conflict with these repeated holdings.

Other federal appellate courts have similarly distinguished laws that allow for discretionary, individualized exemptions which render a law not generally applicable, from laws that contain objective, categorical exemptions, which do not. For example,

in *Stormans, Inc. v Wiesman* (794 F3d 1064 [9th Cir 2015]), the Ninth Circuit held that rules requiring pharmacies to deliver prescription medications were generally applicable, even though they carved out enumerated secular exemptions, but not religious exemptions (*id.* at 1079–82). First, the court rejected the argument that the exemptions rendered the rules underinclusive because they exempted pharmacies based on "necessary reasons for failing to fill a prescription"—such as lack of payment, because it is fraudulent, or the pharmacy lacks specialized equipment—and therefore "allow pharmacies to operate in the normal course of business" (*id.* at 1080 (internal quotation marks omitted)). Second, the court rejected plaintiffs' arguments about the discretionary nature of the rules, holding that inclusion of the phrases "substantially similar" and "good faith compliance" in the exemptions "do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria" (*id.* at 1081–82). The court noted that whether the discretion was tied to an objective standard was key, observing that "[t]he mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability" (*id.* 1082). Such exemptions are common, with federal appellate courts repeatedly upholding laws containing comparable exemptions (*King v Governor of the St of New Jersey*, 767 F3d 216, 242–43 [3d Cir 2014] (holding statute prohibiting licensed counselors from engaging in "sexual orientation change efforts" is generally applicable despite including exemptions), *abrogated on other grounds by National Institute of Family & Life Advocates v Becerra*, 138 S Ct

2361 [2018]; *Lighthouse Institute for Evangelism, Inc. v City of Long Branch*, 510 F3d 253, 275–76 [3d Cir 2007] (holding that a land use ordinance was generally applicable, despite allowing certain assemblies and excluding churches from particular zone, because "prohibition applies evenly to all uses that are not likely to further" city's urban revitalization goal); *Grace United Methodist Church v City Of Cheyenne*, 451 F3d 643, 651 [10th Cir 2006] (holding that land use regulation that permits exemptions on a case-by-case basis, but does not permit any exemptions for the type of use plaintiff sought, was generally applicable and "refus[ing] to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption" "[c]onsistent with the majority of our sister circuits")).

Fulton did not change this standard. Since the Supreme Court issued its decision, lower courts have continued to hold that a law may allow for exemptions and still be generally applicable. Applying *Fulton*, federal appellate courts, including the Second Circuit, have reaffirmed this principle when deciding challenges to governmental COVID-19 vaccine mandates that include a medical exemption but do not contain a religious exemption (*see We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 285–89 [2d Cir 2021] (holding rule requiring vaccination for employees at healthcare facilities is generally applicable despite medical exemption), *opinion clarified*, 17 F4th 368 [2d Cir 2021]; *Doe v San Diego Unified School Dist*, 19 F4th 1173, 1175–80 [9th Cir 2021] (holding student vaccination requirement generally applicable despite medical exemption, permitting 30-day conditional enrollment for certain categories of

students, and permitting religious accommodation in school employee vaccination requirement), *reconsideration en banc denied*, 2022 WL 130808 [9th Cir Jan. 14, 2022, No. 21-56259]; *Kane v De Blasio*, 19 F4th 152, 165–66 [2d Cir 2021] (holding vaccination requirement for Department of Education employees and contractors to be generally applicable despite exemptions for certain categories of people); *Does 1-6 v Mills*, 16 F4th 20, 30–31 [1st Cir 2021] (same), *cert denied sub nom*, *Does 1-3 v Mills*, 142 S Ct 1112 [2022]).

Courts' continued application of the principle that a law can allow for exemptions and still be generally applicable post-*Fulton* has not been limited to challenges to vaccine mandates. In *303 Creative LLC v Elenis* (6 F4th 1160 [10th Cir 2021], *revd on other grounds*, 600 US 570 [2023]), the Tenth Circuit held that Colorado's public accommodations law is generally applicable despite permitting an exemption for sex-based discrimination with a "bona fide relationship" to the goods, services, or facilities offered (*id.* at 1188). The court explained that because "a fact-finder may objectively determine whether a public accommodation's discriminatory practice is 'related' to the public accommodation's goods or services," the "bona fide relationship" exemption is "facially unlike the 'entirely discretionary' exemption addressed in *Fulton*" (*id.*). Ultimately, these cases correctly apply the well-established conclusion that the existence of an exemption—even a secular one—does not on its own render a law or regulation not generally applicable.

II. THE MEDICALLY NECESSARY ABORTION REGULATION IS NEUTRAL AND GENERALLY APPLICABLE UNDER *FULTON*.

Applying *Fulton*, the State may not construct a system of individualized, discretionary exemptions, nor may it "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (141 S Ct at 1877). Contrary to appellants' arguments (brief for plaintiffs-appellants at 22–32), the Regulation does not allow for any of the kind of exemptions that would render the law not neutral and generally applicable, whether under *Fulton* or prior precedent. In suggesting otherwise, appellants only identify one exemption that privileges religious activity—not secular activity—and several others that are not even exemptions from the Regulation's coverage, but instead are simply boundaries on the application of the Regulation. None of those "exemptions" triggers strict scrutiny (*see e.g. We The Patriots*, 17 F4th at 288–89 ("The mere existence of an exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny.") (internal quotation marks omitted); *303 Creative LLC*, 6 F4th at 1187 ("[A]n exemption is not 'individualized' simply because it contain[s] express exceptions for objectively defined categories of persons.") (internal quotation marks omitted)); *Lighthouse Institute*, 510 F3d at 275–76). If this Court were to hold that any of the regulatory language appellants identify as "exemptions" could trigger strict scrutiny, that would vastly expand the universe of

laws, regulations, and policies subject to that most rigorous standard of review, even absent any hint of religious discrimination. *Fulton* in no way suggests such an outcome.

A. The Regulation Is Generally Applicable Even Though It Exempts Religious Employers.

The only actual exemption that appellants identify within the Regulation is that "a religious employer may exclude coverage for medically necessary abortions" if certain conditions are met (11 NYCRR 52.16 [o] [2]). Contrary to appellants' claims (brief for plaintiffs-appellants at 22–30), under no applicable precedent—including *Fulton*—does this exemption mean that the Regulation is not generally applicable and triggers strict scrutiny.

First, and most relevant for the analysis here, the religious-employer exemption is not the kind of individualized, discretionary exemption at issue in *Fulton* (141 S Ct at 1877–78). The exemption is objective and categorical, including a clear definition of "religious employer" and what standard employers must meet to qualify (*see* 11 NYCRR 52.2 [y]). There is no discretion to be exercised in determining whether an employer meets this standard, so there is no "suggest[ion of] a discriminatory intent" from the failure "to extend an exemption to an instance of religious hardship," as the State has not created such a mechanism in the first place (*Bowen v Roy*, 476 US 693, 708 [1986] (plurality opinion)).

Second, the religious-employer exemption does not "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)). To the contrary, this exemption does not permit secular refusals of coverage at all; it permits *religious* conduct, undermining any claim that the exemption is intended to disfavor religion. Appellants attempt to invoke the analysis in *Tandon* to advance their argument (brief for plaintiffs-appellants at 24). But even *Tandon* (which was not a decision on the merits) employs the same distinction between secular and religious activity, and appellants cannot point to any "*secular* activity [treated] more favorably than religious exercise" (141 S. Ct. at 1296 (emphasis added)).

Unable to fit the religious-employer exemption into any relevant precedent on general applicability, appellants argue instead that the exemption privileges "certain favored religious organizations" above others that do not "exercise their religion in the manner the State prefers" (brief for plaintiffs-appellants at 24–25), and picks "religious winners and losers" (reply brief for plaintiffs-appellants at 4). However, that description is not actually supported by the exemption, which applies to all religious employers, regardless of the religion or denomination, for whom the "inculcation of religious values is the purpose of the entity," among other requirements (11 NYCRR 52.2 [y] [1]). The State is not discriminating among religions but is instead distinguishing entities that have as their primary goal the advancement of religion from those that are pursuing other ends. "The distinction between qualifying 'religious employers' and other religious entities for purposes of the exemption is not a

denominal classification"; rather, "[t]he distinction turns on the basis of a religious organization's activities and has a rational basis" (*Roman Cath. Diocese of Albany v Vullo*, 185 AD3d 11, 17 n. 7 [2020], citing *Serio*, 7 NY3d at 528–29). This is not an uncommon distinction, and many laws contain exemptions for such religious organizations (*see e.g. Maxon v Fuller Theological Seminary*, 2021 WL 5882035, *1 [9th Cir Dec. 13, 2021, No. 20-56156] (applying Title IX exemption for educational institutions that are "controlled by a religious organization"); *Spencer v World Vision, Inc.*, 633 F3d 723, 724 [9th Cir 2011] (applying Title VII exemption for religious corporations, associations, educational institutions, or societies); *Emilee Carpenter, LLC v James*, 575 F Supp 3d 353, 383-84 [WDNY 2021] ("[T]he Supreme Court has long given special solicitude to exemptions [for religious entities and benevolent orders], and they do not render antidiscrimination laws not generally applicable.") (collecting cases), *appeal pending* No. 22-75, [2d Cir argued Sept. 28, 2022[3]]).

Treating this as an exemption that triggers strict scrutiny would incentivize *more* stringent regulation of religious institutions, as described in *Serio*, and "would . . . discourage the enactment of any such exemptions—and thus . . . restrict, rather than promote, freedom of religion" (7 NY3d at 522). Considering similarly circumscribed religious-entity exemptions, the Supreme Court has in fact endorsed their necessity,

[3] While the Supreme Court's decision in *303 Creative v Elenis* (600 US 570 [2023]) has potential implications for the plaintiff's free speech claims in *Carpenter*, the decision in *303 Creative* does not implicate free exercise claims. Therefore, there is no reason for the Second Circuit to disturb and reconsider the district court's decision as to the plaintiff's free exercise claims.

lest "a long list" of other persons and businesses trample important civil rights protections (*see Masterpiece Cakeshop, Ltd. v Colorado Civ Rights Commn*, 138 S Ct 1719, 1727 [2018]). And in establishing the limits of the exemption, it is necessary and appropriate for the State to consider the danger that any broader exemption would pose to the goals of the Regulation and decline to extend the exemption to businesses like appellants (*see We The Patriots USA*, 17 F4th at 287; *Phillips*, 775 F3d at 543).

By adopting a narrow exemption for religious employers, instead of the broader one that was originally proposed (*see* brief for defendants-respondents at 6-7), the Regulation further promotes religious freedom of employees. The narrow exemption guards against employees being required to accommodate the asserted religious preferences of their employer. As this Court acknowledges, "when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit" (*Serio*, 7 NY3d at 528). The Regulation therefore furthers the State's interest in accommodating religious employers and minimizes the harms to employees who may not agree with their employers' religious beliefs.

B. The Regulation Is Generally Applicable Even Where It Does Not Reach Activity Beyond Its Scope.

Appellants next argue that, because the Regulation only ensures abortion coverage for people who have health insurance through their employers, it is not

generally applicable (brief for plaintiffs-appellants at 30–32). Appellants offer no precedent for interpreting such a limitation as triggering strict scrutiny, nor could they. The standard reaffirmed in *Fulton* does not hold that "underinclusive" laws are not generally applicable (*Fulton*, 141 S Ct at 1877–78). This limitation to the Regulation's scope is neither an individualized system of exemptions, nor does it permit secular activity while prohibiting the same activity when religiously motivated. Rather, the Regulation simply does not extend to some activity at all.

In the primary cases cited by the appellants, the Supreme Court did not hold that the policies at issue in *Tandon* and *Roman Catholic Diocese of Brooklyn v Cuomo* (141 S Ct 63, 66–67 [2020]) were underinclusive. Instead, the Court addressed the disparate ways in which religious activities that *were actually regulated* were treated in comparison to secular activities that were regulated (*Tandon*, 141 S Ct at 1297; *Roman Catholic Diocese of Brooklyn*, 141 S Ct at 66–67). The general applicability analysis looks to how regulated activity is treated—not whether all activity that could possibly impact a governmental interest is encompassed in a single regulation. As the Second Circuit explained, "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 F4th 152, 166 [2d Cir 2021]).

Accordingly, contrary to appellants' description, these are not "holes" in the State's plan (brief for plaintiffs-appellants at 30-32); they are merely the parameters of the Regulation's application. For example, appellants argue that the Regulation does

not apply to employers who use self-insured plans for their employees (*id.*), even though ERISA actually preempts state law, instructing that self-funded plans shall not be considered an insurer "for purposes of any law of any State purporting to regulate insurance companies" (29 USCA § 1144 [a], [b] [2] [B]). Limiting a law's application to comply with another law does not trigger strict scrutiny (*see Doe*, 19 F4th at 1179–80 (holding an exemption necessary to comply with the Individuals with Disabilities Education Act does not render student vaccination requirement not generally applicable, and noting that the Title VII religious accommodation procedure "is not a religious *exemption*" but "a legally required interactive process") (emphasis in original)). The other two limitations of the Regulation—employers who do not provide insurance and individuals who are unemployed—are not exemptions from the law, but fall outside the scope of the Regulation itself (*see C.F.*, 191 AD3d at 57, 78 (limiting geographic boundary of policy)).

III. ACCEPTING APPELANTS' READING OF *FULTON* WOULD YIELD UNTENABLE RESULTS.

Not only is appellants' reading of *Fulton* inconsistent with the text of that decision, as well as prior precedent of this Court and the United States Supreme Court, but it is also entirely unworkable. Appellants' proposed standard would render a vast array of laws not generally applicable simply because they interact with other superseding laws or do not purport to encompass all possibly regulated activity. Such

a reading of *Fulton* would not only inhibit religious freedom but yield untenable results.

For example, antidiscrimination laws may address employment discrimination, but not housing discrimination. Under appellants' theory, an employment antidiscrimination law would be an "underinclusive" statute that is thus not generally applicable and would trigger strict scrutiny if someone claimed application of the law burdened their religious exercise. As another example, public entities may have policies in place for their employees that do not apply to the constituents they serve. Under appellants' theory, this would amount to an "exemption" for constituents that would undermine the policy's purpose and would render it not generally applicable, again triggering strict scrutiny. Accepting appellants' theory would hinder governments' ability to issue targeted, thoughtful regulations in a way that will be most effective to achieve their ends.

Take, for example, a federal employment law like the Family and Medical Leave Act ("FMLA"), which requires employers with at least 50 employees to provide unpaid, job-protected leave for specified family and medical reasons (29 CFR § 825.105). Under appellants' theory, a small business owner who refused to provide FMLA medical leave to her employees because of her religious faith could claim that the law was not generally applicable because it did not apply to employers with fewer than 50 employees. The state would have to apply employment laws like the FMLA to

all businesses, regardless of size, to prevent business owners from raising individual religious objections.

Or consider, for example, the New York State Human Rights Law which prohibits discrimination in employment, housing, and public accommodations. While the State Human Rights Law applies to nearly all housing accommodations, it does not apply to rental units in two-family homes where the owner resides in one unit (Executive Law § 296 [5]). Under appellants' logic, a commercial landlord who refused to rent a unit to a prospective tenant because of their differing religious beliefs could argue that strict scrutiny must be applied because the law exempts owner-occupied housing with fewer than two units.

Further, appellants' proposed standards would disincentivize the government from providing any religious exemptions. Consider, for example, a local zoning ordinance that exempts churches from street parking requirements. Under appellants' logic, the state would have to defeat strict scrutiny to avoid extending the same exemption to a commercial business owner who raised a religious objection. Not only would this destabilize the host of local, state, and federal laws that permit religious exemptions, but it would discourage the government from providing religious exemptions in the first place (*see supra* at 17-18).

In short, appellants' interpretation of *Fulton* would yield untenable results. Not only would it disincentivize the government to accommodate religion, but it would open a Pandora's box. Thousands of laws containing clear and reasonable exemptions

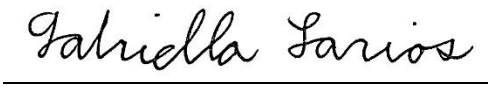
would be struck down under the sweeping and unprecedented new standard proposed by appellants.

CONCLUSION

For these reasons, this Court should affirm the decision below and find that *Serio* remains good law.

Dated: February 29, 2024
New York, NY

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice, 22 NYCRR Part 500.1 §§ G)(l) and Part 500.13 §§ (c)(l) and (c)(1)(3), I certify that the foregoing brief was prepared on a word processor, using 14-point Garamond proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service is 5,767.

Dated: February 29, 2024
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Respectfully submitted,

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