EXHIBIT A

Appellate Division – Third Department Case No. 529350

New York Supreme Court

Appellate Division – Third Department

ROMAN CATHOLIC DIOCESE OF ALBANY; 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 OGDENSBERG; ST. GREGORY THE GREAT 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.; DEPAUL HOUSING MANAGEMENT CORPORATION; and RENEE MORGIEWICZ,

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

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

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INTRODUCTION

The Medically Necessary Abortion Regulation 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 recognize abortions for 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 U.S. Supreme Court's recent decision in *Fulton v City of Philadelphia* (141 S Ct 1868 [2021]) articulated a new, more stringent standard wherein the existence of any exemption within a law triggers strict scrutiny in free exercise challenges, and overruled *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006]). Appellants are wrong on both counts.

Fulton narrowly held that a law creating a mechanism for individualized, discretionary exemptions is not generally applicable, and so triggers strict scrutiny. This is consistent with the Court's free exercise precedents since *Employment Division Department of Human Resources of Oregon v Smith* (494 US 872 [1990]), recognizing that where government officials have the discretion to disfavor religiously motivated conduct, a law is not generally applicable. On remand, this Court is limited to evaluating the Medically Necessary Abortion Regulation for such discretionary exemptions. As there are no such systems of exemptions in the

Regulation, *Fulton* offers no reason for this Court to reevaluate its prior holding that the Regulation is constitutional.

Instead of engaging with *Fulton's* holding, Appellants attempt to rewrite the longstanding standard for evaluating whether laws are generally applicable by asserting that *any* exemption renders a law not generally applicable. This Court should reject Appellants' misrepresentation of *Fulton* and longstanding Free Exercise Clause precedent. This Court, as well as numerous New York state and federal courts, have long held that laws can be generally applicable even where they contain exemptions. And several courts have reaffirmed that holding since *Fulton* was decided.

Properly applying *Fulton* and other relevant free exercise precedents, the "exemptions" that Appellants point to in the Regulation either do not render the law not generally applicable, or are not actually exemptions at all. First, the Medically Necessary Abortion Regulation exempts certain religious employers from providing insurance coverage for abortion, but it is not an individualized, discretionary exemption of the kind at issue in *Fulton*. Further, the exemption privileges religious conduct, not secular conduct, meaning it is not the type of exemption to render the Regulation not generally applicable and trigger strict scrutiny under prior precedent. Second, the fact that the Regulation is limited to ensuring abortion coverage for people who receive coverage through their

employers is not an exemption at all, as the general applicability analysis is concerned with how religious activity that is *actually regulated* is treated in comparison to secular activity. Finally, the existence of exemptions from covering *other* kinds of medical care is irrelevant because they are not exemptions from the Medically Necessary Abortion Regulation that are denied to Appellants but available to others; instead, those other exemptions are made equally available to Appellants, but simply would not offer Appellants the relief they seek here from the Regulation. Accordingly, the Regulation is generally applicable, and despite Appellants' claims, the constitutional guarantee of religious liberty does not confer on religious objectors "a general immunity from secular laws" (*Our Lady of Guadalupe Sch. v Morrissey-Berru*, 140 S Ct 2049, 2060 [2020]).

If this Court were to hold otherwise, it would open the door to challenges to numerous laws containing routine exemptions, triggering strict scrutiny for an unprecedented class of laws. Further, it could risk 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. As the Supreme Court has recognized, because abortion is crucial to women's ability to choose when and whether to have a child, it plays a central role in their ability to participate equally

in the economic and social life of the nation *(see, e.g.*, *Planned Parenthood of Se. Pa. v Casey*, 505 US 833, 856 [1992]).

By contrast, the inability of employees to obtain insurance coverage for abortions results in negative health outcomes for women, forces them below the poverty line, and impedes their constitutional right to abortion. And it is not only women who need access to abortion; transgender men and non-binary individuals need such care as well. 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 interests served by the Regulation, because both before and after *Fulton* it remains neutral and generally applicable and does not trigger strict scrutiny. Accordingly, this Court should not disturb its prior holding.

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 (Appellants' Br. 17–21), *Fulton's* holding is primarily concerned with the existence of such individualized, discretionary exemptions—not simply the existence of any type of exemption within a law or regulation. Further, *Fulton* leaves *Smith* undisturbed. Under *Smith*, the mere existence of an exemption within a law does not inexorably render that law not generally applicable. 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.

Fulton arose when 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). Of note here, 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 it 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 not comply with the nondiscrimination requirements, and 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 incorrectly 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 . . ." (Appellants' Br. 19). They make this rudimentary error repeatedly (*see, e.g.*, Appellants' Br. 2–3 (positing that "the mandate's numerous exceptions mean" under *Fulton* that "it is not generally applicable"); Appellants' Br. 14 ("a law that contains *any* exemptions that undermine its stated purposes may be upheld only if the State carries its burden under strict scrutiny" (emphasis in original)); Appellants' Br. 20–21 (contending that a governmental policy can survive strict scrutiny "only if the policy contains *no* exceptions that undermine its stated purpose" (emphasis in original)); Appellants' Br. 23 (asserting that "any exemption that undermines the stated purposes of a law renders the law subject to strict scrutiny under *Fulton*")). Crucially, the Court's general applicability inquiry in *Fulton* actually focused on whether the provision at issue created a mechanism for discretionary exemptions, not whether exceptions in any form could be granted. That is the analysis that this

Court should apply to the Regulation at issue here. Further, laws that allow for discretionary, individualized exemptions are categorically different from laws that allow for objective, definitive exemptions. *Fulton* does not support a blanket invalidation of the latter, which would sweepingly eviscerate a wide range of established laws and regulations.

B. Courts Applying *Smith* 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, likewise left *Smith* undisturbed (*see* Appellant Br. 18 (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])).[1]

[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.

Under *Smith*, the mere existence of an exemption within a law does not inexorably mean that the law is not generally applicable. *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 basic principle from *Smith* has been repeatedly reaffirmed by New York's state courts. The Second Department recently 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 New York 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.*). And this Court has since 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]).

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 New York 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 Justice & Peace v I.N.S.*, 910 F2d 42, 45 [2d Cir 1990]). Appellants do not cite to any cases from the Second Circuit that refute these repeated holdings.

Other federal appellate courts have similarly distinguished laws that allow for discretionary, individualized exemptions as rendering 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 State 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 Natl Inst. of Family & Life Advocates v Becerra*, 138 S Ct 2361 [2018]; *Lighthouse Inst. 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 Doe v San Diego Unified Sch. 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*, No. 21-56259, 2022 WL 130808 [9th Cir Jan. 14, 2022]; *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); *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]; *Does 1-6 v Mills*, 16 F4th 20, 30–31 [1st Cir 2021] (same), *cert denied sub nom*, *Does 1-3 v Mills*, 21-717, 2022 WL 515892 [US Feb. 22, 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], *cert granted*, No. 21-476, 2022 WL 515867 [US Feb. 22, 2022]), 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.

C. *Fulton* Did Not Overrule *Serio*.

Appellants base much of their argument on the contention that *Fulton* overrules *Serio*, which this Court previously relied on to reject Appellants' claims (Appellants' Br. 13–14, 21–23). But *Serio* remains good law post-*Fulton*, as the only exemption at issue there 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" (*Serio*, 7 NY3d at 522). 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* (*id.* at 522–23). Further, the exemption does not permit *secular* conduct while restricting religious conduct. Instead, it permits *religious* conduct, thus "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions" (*id*. at 522–23 (internal quotation marks omitted)). Moreover, neither *Fulton* nor other recent decisions have held that "the presence of exemptions alone triggers strict scrutiny regardless of the State's subjective purpose" (Appellants' Br. 22). As described above, this is the incorrect standard.

II. THE MEDICALLY NECESSARY ABORTION REGULATION IS NEUTRAL AND GENERALLY APPLICABLE UNDER *FULTON* EVEN WITH OBJECTIVE, CATEGORICAL EXEMPTIONS.

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 (Appellants' Br. 23–31), the Medically Necessary Abortion 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 (a) one exemption that privileges religious activity—not secular activity—and (b) 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 contains express exceptions for objectively defined categories of persons.") (internal quotation marks omitted)); *Lighthouse Inst.*, 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 types of legislative and regulatory text 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 Medically Necessary Abortion 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 (Appellants' Br. 24–28), 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 does not create the kind of individualized, discretionary exemption at issue in *Fulton* (141 S Ct at 1877–78). The exemption is objective and categorical, even including a 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 conduct at all; it permits *religious* conduct, undermining any claim that the exemption is intended to disfavor such activity. Appellants attempt to invoke the analysis in *Tandon* to advance their argument (Appellants Br. 25–26). 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 is a "denominational preference[]" that treats some religious faiths more favorably than others (Appellants' Br. 26–27). 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 Court of Appeals and this Court have already recognized that "[t]he 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 Catholic Diocese of Albany v Vullo*, 185 AD3d 11, 17 n.7 (citing *Serio*, 7 NY3d at 528–29), *appeal dismissed, lv to appeal denied*, 36 NY3d 927 [2020], *and cert granted, judgment vacated sub nom. Roman Catholic Diocese of Albany v Emami*, 142 S Ct 421 [2021]). This is not an uncommon distinction, and many laws contain exemptions for such religious organizations (*see, e.g.*,

Maxon v Fuller Theological Seminary, No. 20-56156, 2021 WL 5882035 [9th Cir Dec. 13, 2021] (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*, No. 21-CV-6303-FPG, 2021 WL 5879090, at *20 [WDNY Dec. 13, 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 filed* No. 22-75, 2021 WL 5879090 [2d Cir Jan. 13, 2022]).

Recognizing this as an exemption that triggers strict scrutiny would incentivize regulation of religious institutions, as described in *Serio*, and "would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion" (7 NY3d at 522–23). However, even if this Court had not already approved of the limited religious-employer exemption, the Supreme Court has made clear that such exemptions must be confined, lest "a long list" of other persons and businesses trample important civil rights protections (*see Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 138 S Ct 1719, 1727 [2018]). Even assuming this is the type of exemption that could trigger strict scrutiny, the State may consider the danger that such a broad 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 (reasoning that where New York could offer no exemption, "the State's more limited exclusion . . . is clearly constitutional")).

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 (Appellants' Br. 28–30). 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. 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 (*Fulton*, 141 S Ct at 1877–78).

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 recently 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*, 19 F4th at 166).

Even so, contrary to Appellants' description, these are not "holes" in the State's plan (Appellants' Br. 29–30); 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 (Appellants' Br. 28–29), 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")). 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)).

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. For example, antidiscrimination laws may address employment discrimination, but not housing discrimination. And public entities may have policies in place for their employees that do not apply to the constituents they serve—but that does not mean the restriction is not generally applicable. To hold otherwise would hinder governments' ability to issue targeted, thoughtful regulations in a way that will be most effective to achieve its ends.

C. The Regulation Is Generally Applicable Even If There Exist Unrelated Exemptions For Other Types Of Medical Care.

Finally, Appellants point to exemptions for other types of health insurance coverage that do not apply to the Medically Necessary Abortion Regulation. Once again, it is irrelevant whether employers can refuse to cover "foot, vision, and dental conditions" (Appellants' Br. 30–31). For purposes of *Fulton*, these are not exemptions from the Medically Necessary Abortion Regulation that are somehow made available to others but denied to Appellants (*see* 141 S. Ct. 1868, 1878, 1881–82). The "exemptions" would simply not grant Appellants the relief they seek, so they do not affect the general applicability analysis. Nor are they

individualized, discretionary exemptions—and Appellants do not contend otherwise. Because none of those exemptions allows employers to get out of covering abortions, or excuse compliance with the Medically Necessary Abortion Regulation, they do not trigger strict scrutiny.

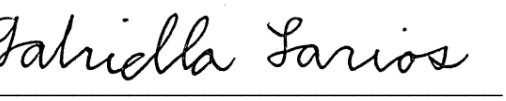
Even where the State "allows for limited objective exceptions" from the general requirement that employers cannot exclude coverage by type of treatment or condition, the Regulation bars any exemptions—except for the religious-employer exemption—from the requirement that employers cover abortions (*Grace United*, 451 F3d at 654). The existence of other exemptions is simply not evidence of "a pattern of ad hoc discretionary decisionmaking amounting to a system of individual assessments that would trigger strict scrutiny" (*id.* at 655). In sum, "these exemptions are not relevant," as Appellants are not seeking an exemption from that coverage, so that argument does not make the laws not generally applicable (*Carpenter*, 2021 WL 5879090, at *20).

CONCLUSION

For these reasons, the Court should not disturb its prior decision affirming the judgment in favor of Defendants-Respondents and the constitutionality of the Medically Necessary Abortion Regulation.

Dated: February 25, 2022
New York, NY

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to the Uniform Practice Rules of the Appellate Division (22 NYCRR) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, Times New Roman typeface was used, as follows:

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