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COURT OF APPEALS  
STATE OF NEW YORK

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ROMAN CATHOLIC DIOCESE,  
Appellants,

-against-

VULLO,

Respondent.

NO. 45

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20 Eagle Street  
Albany, New York  
April 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUSTICE ANGELA G. IANNACCI

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: We will continue the  
2 calendar with Number 45, Roman Catholic Diocese v. Vullo.  
3 Counsel?

4 MR. FRANCISCO: Chief Judge Wilson, and may it  
5 please the court. Noel Francisco for the appellants. If I  
6 could reserve three - - - three minutes for rebuttal?

7 CHIEF JUDGE WILSON: Yes, sir.

8 MR. FRANCISCO: The mandate has exemptions for  
9 religious and nonreligious employers, but not for religious  
10 employers like the Teresian House Nursing Home run by the  
11 Carmelite nuns or the others in this diverse group of  
12 plaintiffs.

13 Under the Supreme Court's decisions in *Fulton* and  
14 *Tandon*, the state has to justify that choice. Its asserted  
15 interest is in providing abortion access to women, yet it  
16 excludes many women from that interest. That means the  
17 state has to explain under strict scrutiny why it can't  
18 exclude a few more. This case therefore presents two  
19 issues under the Supreme Court's recent decisions. First,  
20 is this law generally applicable? That is, does it apply  
21 across the board given its exemptions for religious and  
22 nonreligious employers. And secondly, does the law give  
23 the state the discretion to determine who is, on a case-by-  
24 case basis, a religious employer under the statute's - - -

25 JUDGE SINGAS: Well, does it matter in this case

1 that the state wasn't making that decision? That in fact,  
2 people were - - - or organizations could self-certify? And  
3 it wasn't a situation where the government - - - or the  
4 state was saying I'm going to use my discretion and allow  
5 you or not allow you?

6 MR. FRANCISCO: Sure. Well, two responses to the  
7 - - - to that, Your Honor. First, it doesn't actually  
8 matter whether they exercised the discretion. What matters  
9 is that on the face of the law, they have it. That's  
10 exactly what the Supreme Court held in the Fulton case  
11 where the City of Philadelphia had never once exercised its  
12 discretion. But put that entirely to the side.

13 The state's just wrong. If you look at the DFS  
14 guidance that implements the religious employer exemption,  
15 the exact same exemption in the context of the  
16 contraceptive mandate, here is what the state says, and I'm  
17 going to quote from it. It says that this is a quote-  
18 unquote, "narrow exemption". It says - - - and this is  
19 critical to your question, Your Honor, that the  
20 decisionmakers, quote, "may not rely solely on a self-  
21 attestation from the employer", end quote. But then goes  
22 on to say that, "Instead the decisionmaker has to demand  
23 and analyze proof of", again, I'm quoting, "articles of  
24 incorporation, by-laws, charters, mission statements,  
25 brochures, nonprofit determination letters in order to make

1 this assessment." And then finally, to make the rubble  
2 bounce, the state makes clear that the DFS, the Department  
3 of Financial Services, will, quote, "take action against an  
4 insurer for any failure to adhere to all statutory and  
5 regulatory requirements in applying the mandate."

6 JUDGE RIVERA: Is there - - - is there any limit  
7 - - -

8 MR. FRANCISCO: So I think that they're clearly  
9 wrong.

10 JUDGE RIVERA: Sorry. Is there any limitation on  
11 what you're calling that discretion? Are there any  
12 boundaries?

13 MR. FRANCISCO: Well, Your Honor, there are - - -

14 JUDGE RIVERA: Does that matter?

15 MR. FRANCISCO: The - - - well, there - - - I - -  
16 - I can't - - - I can't really say that there are no  
17 boundaries, but I also don't think that the boundaries  
18 matter here. The language of the regulation does have  
19 various provisions in it, but those are extraordinarily  
20 discretionary. Take for example, the requirement that you  
21 serve people of the same religious tenets, or frankly, that  
22 you employ people of the same religious tenets or have a  
23 purpose that is the inculcation of religious beliefs.

24 How on earth do you determine whether the  
25 employer, its employees, and the people that it serves,

1 have the same religious tenets.

2 CHIEF JUDGE WILSON: Well, let me - - - let me  
3 actually ask you that question. How would you construct a  
4 statute that - - - let - - - let's back up a little bit.  
5 There are some employers who are nonreligious, fair?

6 MR. FRANCISCO: Yes.

7 CHIEF JUDGE WILSON: And there are some that are?  
8 How would you construct a statute that doesn't have  
9 discretion in it and makes that determination?

10 MR. FRANCISCO: Your Honor, I would do it just as  
11 the federal government has done it with respect to the  
12 contraceptive mandate, which is essentially the same  
13 definition that DFS initially proposed before adopting the  
14 regulation that they've adopted.

15 Remember, this litigation kind of parallels the  
16 federal contraceptive mandate litigation. Initially, the  
17 federal government proposed the exact same definition that  
18 New York State has adopted here. But in the face of  
19 intense criticism, the federal government withdrew that and  
20 instead adopted a definition that basically said if you're  
21 a nonprofit religious organization and you say that you  
22 have the objection to providing these services, you fall  
23 within the exemption. That's also what DFS initially  
24 proposed and that is something that - - -

25 JUDGE RIVERA: So it's a self-identification,



1 self-declaration? No one confirms it; is that what you're  
2 saying?

3 MR. FRANCISCO: Well, Your Honor, in - - - in a  
4 sense, it's similar to the free exercise clause analysis  
5 generally, where there is a threshold question, do you  
6 sincerely hold those religious beliefs? It's a relatively  
7 low threshold. But yes, it would largely be that - - -

8 JUDGE RIVERA: You would be - - - but it's a  
9 self-declaration? You identify yourself as such?

10 MR. FRANCISCO: You identify yourself as a  
11 nonprofit religious organization that has an objection to  
12 the services provided, yes, Your Honor. And - - - and keep  
13 in mind, the cost of providing this type of coverage is  
14 virtually nothing.

15 CHIEF JUDGE WILSON: Why doesn't - - - why  
16 doesn't profit and nonprofit cut the wrong way?

17 MR. FRANCISCO: I - - - well, Your Honor, I mean,  
18 I'm representing nonprofits.

19 CHIEF JUDGE WILSON: No, no, I understand. As a  
20 definitional matter. I mean, why is that an inappropriate  
21 definition?

22 MR. FRANCISCO: Your Honor, I - - - I - - - look,  
23 the actual definitions that the federal government used and  
24 DFS proposed didn't actually have that distinction. It  
25 also extended to for-profits. And I would have no problem

1 with that. I was simply answering the question what would  
2 it - - - what definition would satisfy my clients.

3 But to follow-up on the - - - the issue of self-  
4 certification. The state in its brief in opposition in the  
5 United States Supreme Court, page 7 footnote 5, made clear  
6 that the cost of providing an insurance-only policy is  
7 between eleven and thirteen cents per month per person,  
8 less than three dollars a year.

9 So I don't think there's any risk that you're  
10 going to have a flood of for-profit organizations - - -

11 JUDGE GARCIA: Counsel, can I ask you -

12 MR. FRANCISCO: - - - or others just making up  
13 objections.

14 JUDGE GARCIA: Counsel, I'm sorry.

15 MR. FRANCISCO: Yes, Your Honor.

16 JUDGE GARCIA: But can I take this a little bit  
17 different direction. It seems we have a fairly limited  
18 mandate here, right? The Supreme Court sent this back to  
19 the Appellate Division to reconsider in light of Fulton.  
20 And we have our old case from 2006, where we passed on this  
21 exact exemption. So what in Fulton changes the analysis we  
22 did in '06 and the Appellate Division did here?

23 MR. FRANCISCO: Sure.

24 JUDGE GARCIA: What specifically?

25 MR. FRANCISCO: Sure. So, two responses. And

1 the first one specifically addresses your question. And  
2 that is in Serio, this court held that the contraceptive  
3 mandate wasn't neutral because it didn't target religion as  
4 such. In Fulton, as well as in Tandon and other cases, the  
5 Supreme Court has clarified that that's only half of the  
6 analysis. The other half of the analysis is that a law has  
7 to be generally applicable - - -

8 JUDGE GARCIA: Didn't overrule it though, which  
9 we all know. Right? They didn't overrule Smith in - - -  
10 in - - - in Fulton. So we apply Smith. We can't do  
11 anything about that, which we did in Serio, right? So  
12 after we get by that, what's changed?

13 MR. FRANCISCO: So Your Honor, two things. The  
14 first is what I just said. The Supreme Court has clarified  
15 the general applicability analysis, and this court never  
16 applied that in Serio. Secondly, the Supreme Court only  
17 GVR's a case if there's a reasonable chance that  
18 intervening precedent actually undermined its decision. So  
19 I think that, in and of itself, is a - - - is an  
20 indication.

21 But the third point, and I think this is actually  
22 the most important one. This court - - - I understand how  
23 the - - - the lower courts in New York were bound by Serio.  
24 This court isn't bound by Serio except under principles of  
25 stare decisis and Fulton and Tandon have taken the legs out



1 from under Serio, respectfully, by clarifying it.

2 JUDGE GARCIA: So your answer would be that  
3 requires us to overrule Serio?

4 MR. FRANCISCO: Well, I, absolutely think yes,  
5 that it requires you to overrule Serio. And I think that  
6 Fulton and Tandon inexorably lead to that result for the  
7 two reasons I identified at the outset.

8 JUDGE GARCIA: Seems to me from Fulton that the  
9 focus now becomes on the exemptions, right?

10 MR. FRANCISCO: Yes.

11 JUDGE GARCIA: If we get by the first part, go to  
12 the exemptions. The exemptions in Fulton are very  
13 different from those here. So how do you analogize these  
14 to - - -

15 MR. FRANCISCO: Sure. In two different ways,  
16 Your Honor. The first is the standard that Fulton set out.  
17 What Fulton says is, that once you open the door to some,  
18 you can't close that door to others if they undermine the  
19 state's interest in a similar way. And that's exactly what  
20 we have here. Because the Carmelite Sisters, who are  
21 operating the Teresian House Nursing Home, from the  
22 perspective of the state's interest in providing abortion  
23 access through insurance plans to women, is no differently  
24 situated than the types of religious employers that are  
25 covered by the religious employer exemption. So they

1           undermine that interest in a similar way.

2                       Secondly, the other, separate part of general  
3           applicability that is separately, I think, fatal here is  
4           the amount of discretion that the decisionmakers have.  
5           That was the specific problem that the holding in Fulton  
6           was based on.

7                       JUDGE CANNATARO: I'm sorry, who's the  
8           decisionmaker in that argument?

9                       MR. FRANCISCO: So in my argument here, the way  
10          that the - - - the way this process works is that insurers  
11          makes the first cut subject to the oversight by the  
12          Department of Financial Services. And the problem is that  
13          when you give decisionmakers discretion under vague  
14          statutory factors, it gives them that authority to put - -  
15          - to pick religious winners and losers.

16                      JUDGE CANNATARO: So DFS is the - - - the  
17          decisionmaker?

18                      MR. FRANCISCO: Ultimately, yes.

19                      JUDGE CANNATARO: And they're - - - and are you  
20          arguing that they are applying discretionary criteria? I  
21          mean, obviously whether a company is a nonprofit or a for  
22          profit, doesn't seem like a very discretionary decision.  
23          So what is it that - - - that - - -

24                      MR. FRANCISCO: Sure.

25                      JUDGE CANNATARO: - - - the exercise of



1 discretion?

2 MR. FRANCISCO: So I'm arguing two things, Your  
3 Honor. First, I'm arguing that the face of the exemption  
4 itself gives them discretion and that alone is fatal,  
5 regardless of whether they actually exercise it. In  
6 Fulton, the fatal flaw in Philadelphia's antidiscrimination  
7 law was it had a - - - it had a good cause exemption to it  
8 that gave them discretion even though the City of  
9 Philadelphia had never once - - -

10 JUDGE CANNATARO: But I don't see anything like a  
11 good - - - a good cause requirement in - - - in this  
12 exemption.

13 MR. FRANCISCO: Well, Your Honor, I think there's  
14 something quite analogous to it. It gives the state the  
15 authority to, first of all, assess what the religious  
16 tenets are of the employer, the employee, and their  
17 customers - - - their clients. And I don't have any idea  
18 how you even make that assessment without running straight  
19 into an Our Lady of Guadalupe problem.

20 JUDGE CANNATARO: I'm sorry. So are you saying  
21 under - - - under this exemption, the - - - DFS has to  
22 engage in some kind of qualitative analysis of what the  
23 tenets of the religious organization is?

24 MR. FRANCISCO: It - - - it absolutely has to.  
25 That's on the face of the statute. But even if you could

1           somehow surmount answering what I think is an impossible  
2           question, they still get to assess what the purpose of the  
3           organization is. Is the purpose to inculcate religious  
4           beliefs? So suppose I followed the teachings of St.  
5           Francis of Assisi who says, you know, preach the gospel at  
6           all times, and use words only if necessary. That's what  
7           the Carmelite Sisters do at the Teresian House Nursing  
8           Home. They provide services - - - nursing home services to  
9           the indigent elderly as an act of faith. The state has the  
10          discretion to determine whether that's good enough. Is  
11          their purpose providing nursing home services or is their  
12          purpose the inculcation of religious values? They seem to  
13          suggest that it's - - - it's the former. Because the DFS  
14          guidance specifically says that religious nursing homes  
15          aren't covered. But this is the type of discretionary  
16          decision that this statute gives to the state and that's  
17          the type of discretion that totally undermines the  
18          constitutionality of the law.

19                   JUDGE SINGAS: So if there were no exemptions for  
20                   religious employers would this regulation be  
21                   constitutional?

22                   MR. FRANCISCO: Your Honor, if there were no  
23                   exemptions for religious employers, I'd be making a  
24                   different set of arguments. But I - - - I would probably  
25                   still be arguing that it's unconstitutional. I'd be

1 relying more on the secular exemptions and I'd also be more  
2 arguing that Smith should be overturned, which I understand  
3 that Your Honors don't have the authority to do. But here,  
4 I do have the religious employer exemption.

5 JUDGE CANNATARO: That would be a law of pure  
6 general applicability if there were no exemptions at all,  
7 right?

8 MR. FRANCISCO: Oh, sure. If a law has  
9 absolutely no - - - no exemptions at all, that is a law of  
10 general applicability. That is not this law.

11 JUDGE TROUTMAN: But here, you're argue - - - are  
12 you arguing that the exemptions don't go far enough? They  
13 don't include enough people?

14 MR. FRANCISCO: Yes, Your Honor. Yeah, I think  
15 that - - - that is the gist of my argument and that's  
16 essentially what the Supreme Court has said.

17 JUDGE RIVERA: But I - - - I thought you were  
18 arguing something perhaps more fundamental. As long as DFS  
19 gets to choose who gets the exemption - - -

20 MR. FRANCISCO: Um-hum.

21 JUDGE RIVERA: - - - that's at the end of the  
22 day, the problem? If, as you say before, they had instead  
23 chosen a - - - what you're describing as the federal  
24 approach, to say you all choose if you should be exempt and  
25 we will honor that? Or I take it you think that that

1 doesn't run afoul of anything the Supreme Court has yet  
2 said and would be constitutional. It's if DFS is going to  
3 ultimately make this decision?

4 MR. FRANCISCO: To - - - to be clear, Your Honor,  
5 and I want to be clear on this. I'm saying two different  
6 but related things. Because general applicability under  
7 Fulton and Tandon have two separate prongs. And both of  
8 them - - - the failure to satisfy either one, means the law  
9 is not generally applicable.

10 Prong one is, does the law exempt some but not  
11 others, even though they undermine the state's interest in  
12 a similar way? I can give you an example. Suppose you  
13 have a statute that says, religious nursing homes are  
14 exempt religious employers as long as they serve only  
15 people of one religion. But religious nursing homes are  
16 not exempt religious employers if they serve people of  
17 multiple religions. Wholly apart from discretion that  
18 wouldn't be generally applicable because it has an  
19 exemption for some but not for others even though they  
20 equally undermine the state's interest.

21 Separate and wholly apart from that, an exemption  
22 is not generally applicable if it gives the state too much  
23 discretion to pick winner - - - religious winners and  
24 losers. And I point you to the Second Circuit's decision  
25 in the Kane against De Blasio case, as an example of that.

1 That was a case that involved New York City's COVID mandate  
2 for public school teachers. And the Second Circuit did two  
3 things. First it held that the mandate on its face was  
4 generally applicable. Because on its face the mandate  
5 didn't have any religious exemption at all. And the  
6 exemptions that it did have, weren't inconsistent with its  
7 larger interests. Put that to the side.

8 The second holding is the more important one.  
9 There they address the constitutionality of a religious-  
10 only accommodation that was imposed in arbitration  
11 proceedings. And what the court said was that that  
12 religion-only accommodation undermined the general  
13 applicability of the law. It had a couple of problems with  
14 it. One was the religion-only accommodation gave  
15 decisionmakers a large amount of discretion to pick winners  
16 and losers. That was the second part of the Fulton  
17 analysis.

18 I would say that another problem with that is it  
19 was dramatically underinclusive. It only applied if you,  
20 you know, for example had a letter from a religious  
21 official in your church attesting to your religious  
22 beliefs. I think we've got both of those problems here, as  
23 well.

24 CHIEF JUDGE WILSON: And I just want to  
25 understand your first prong properly. When you say some

1 but not others, do you mean some religious entities but not  
2 others, or do you mean some employers but not others?

3 MR. FRANCISCO: Well, Your Honor, only, of  
4 course, somebody with a religious exercise claim can bring  
5 an argument under the free exercise clause. So by  
6 definition, the person bringing that claim is going to have  
7 a religious reason for it. But what you do is you look at  
8 the exemptions that are on the books, whether they're  
9 religious or nonreligious. And then you look at the  
10 plaintiff in the case, who, by definition, is religious.  
11 And you ask does that objection on the books undermine the  
12 state's interest in a way similar to extending it to the  
13 religious objection.

14 CHIEF JUDGE WILSON: So that I understand you - -  
15 - make sure I understand you. So if - - - if the state had  
16 very cleanly given a exemption to anybody you claim is a  
17 religious employer, but had not given an exemption to IBM,  
18 let's say, that would be a theoretical problem, but there'd  
19 be no plaintiff to bring the case?

20 MR. FRANCISCO: Well, Your Honor, I'm not sure I  
21 even understand the distinction. It's - - - it's neither a  
22 theoretical problem nor is there a plaintiff, because  
23 there's no - - -

24 CHIEF JUDGE WILSON: No. The state's interest to  
25 be undermined, right? The state's interest would be



1           undermined, in your words, because they're not - - - the  
2           exemption doesn't serve the purpose because now some people  
3           are getting this protection and some aren't?

4                   MR. FRANCISCO:   So arguably the exemption would  
5           not be - - - would make the statute not generally  
6           applicable, but you wouldn't have anybody that would  
7           complain about it.

8                   CHIEF JUDGE WILSON:   Wouldn't have a plaintiff,  
9           right.

10                   MR. FRANCISCO:   So again, it doesn't seem to me  
11           to at all be an issue.   But I think that my main point,  
12           though, is that here you actually do have religious  
13           objectors that undermine the state interest in a similar  
14           way, which means the state does have to satisfy strict  
15           scrutiny.

16                   And so my last point is they haven't even  
17           attempted to satisfy in the now six-odd years of the  
18           litigation of this case.

19                   CHIEF JUDGE WILSON:   Thank you.

20                   MR. FRANCISCO:   Thank you, Your Honor.

21                   MS. ETLINGER:   Good afternoon, Your Honors.   May  
22           it please the court.   Laura Etlinger for the respondent  
23           Superintendent.

24                   Fulton does not require this court to overturn  
25           its precedent in Catholic Charities, and the conclusion in

1 Catholic Charities that a law is neutral and generally  
2 applicable when it contains a limited accommodation. And  
3 the court should not overturn it because here the  
4 regulatory scheme does not involve a mechanism for  
5 individualized exemptions, and it does not treat comparable  
6 secular conduct more favorably.

7 And before I turn - - -

8 JUDGE RIVERA: So then how - - - how - - - how  
9 does DFS figure out the second part, "The entity primarily  
10 employs persons who share the religious tenets of the  
11 entity"?

12 MS. ETLINGER: Well, what we know from the - - -  
13 the history and the enforcement history of the parallel  
14 definition in the contraceptive coverage requirement, is  
15 that this is a self-certification process. And there is no  
16 history that any such questions are asked of an  
17 organization when it self-certifies. And in fact, the very  
18 guidance document that plaintiffs point to in their reply  
19 brief contains additional language that plaintiffs did not  
20 quote that make it clear that there is deference to the  
21 requesting objector.

22 JUDGE RIVERA: What if they - - - what if they  
23 can't answer number 3 because they don't ask anyone's  
24 religious affiliation?

25 MS. ETLINGER: Of their - - - the people that - - -

1 -

2 JUDGE RIVERA: Whoever they serve?

3 MS. ETLINGER: That they serve?

4 JUDGE RIVERA: Yes. Number 3 says, "The entity  
5 serves primarily persons who share their religious tenets  
6 of the entity." What if they don't ask? They feel that  
7 that's not appropriate?

8 MS. ETLINGER: Well, if - - -

9 JUDGE RIVERA: Because they - - - they serve  
10 anyone.

11 MS. ETLINGER: Well, if they feel that they serve  
12 anyone, I think they would feel they couldn't certify that  
13 because they're - - - the - - - their primary - - - the  
14 primary people that they serve would not necessarily - - -

15 JUDGE RIVERA: They can't certify it - - -

16 MS. ETLINGER: - - - be of their faith.

17 JUDGE RIVERA: - - - because they don't know. It  
18 may very well be that they're doing that, but they don't  
19 know.

20 MS. ETLINGER: Well, the - - - the - - - I just  
21 want to step back for - - - for a second, if I may?

22 JUDGE RIVERA: Well, all I'm saying is - - -  
23 before you step back. You can step forward. How would DFS  
24 deal with that situation? An employer that says it may be  
25 that I can satisfy number 3, but I don't know because I

1 don't ask this question.

2 MS. ETLINGER: Well, I don't - - -

3 JUDGE RIVERA: That - - - that doesn't mean they  
4 don't fit in? And what does DFS do in those situations?

5 MS. ETLINGER: Well, first of all, it's not DFS  
6 in - - -

7 JUDGE RIVERA: The insurers.

8 MS. ETLINGER: - - - the first instance, it's the  
9 insurer. And I - - - I think we don't have that history to  
10 know, but it would seem reasonable if an insurer was faced  
11 with a certification that certified it met all the other  
12 criteria, including the pretty narrow definition under the  
13 IRS provision. Because - - -

14 JUDGE RIVERA: Sure.

15 MS. ETLINGER: - - - that's not just not-for-  
16 profit. That's special religious not-for-profits who don't  
17 file tax returns in the first place. And in a request - -  
18 - requestor certified that they primarily serve individuals  
19 within their faith because they mean to - - -

20 JUDGE RIVERA: You say no - - -

21 MS. ETLINGER: - - - I don't think there would  
22 even - - -

23 JUDGE RIVERA: - - - no one - - - no one - - -

24 MS. ETLINGER: - - - be a question.

25 JUDGE RIVERA: - - - goes behind the self-



1 declaration, is that - - -

2 MS. ETLINGER: Well, to be - - -

3 JUDGE RIVERA: - - - I just want to be clear  
4 about that.

5 MS. ETLINGER: Well the way - - - what we know,  
6 is that when DFS was concerned about the certifications it  
7 was when insurance companies were simply ignoring the  
8 criteria and they were issuing exempt policies to what, on  
9 their face, were for-profit businesses, a café, a doctor's  
10 office. That's what we know has been the problem that  
11 arise.

12 JUDGE CANNATARO: But what - - - what would DFS  
13 be authorized to do in a situation where there was an  
14 exemption innocently, but incorrectly submitted? Could - -  
15 - do you have some remedial power or - - -

16 MS. ETLINGER: Well, the - - - the - - - the - -  
17 - DFS has enforcement power over the insurance companies.  
18 So if it became aware through an audit or something that  
19 the insurance companies were committing - - - were - - -  
20 were providing exempt policies to organizations that did  
21 not seem to fit, the - - - DFS could take enforcement  
22 action against the insurance company. And I don't know  
23 exactly - - -

24 JUDGE CANNATARO: Not against the employer?

25 MS. ETLINGER: Not against the employer. No.

1           JUDGE GARCIA: Counsel, let me ask you a little  
2 bit different this - - - differently this issue. So let's  
3 say you have one of these entities and they know they are  
4 not primarily serving people who have this - - - so they  
5 can't apply. So aren't they faced with the very choice the  
6 Supreme Court talks about in Fulton between curtailing  
7 their activities, meaning, we're not going to serve a  
8 broader population. Or doing something they don't - - -  
9 you know, or complying, right? So that's the language of  
10 Fulton which gets you into the problem in the first place,  
11 "Curtail its mission or proving", in this case,  
12 "relationships inconsistent with its beliefs". They have  
13 to either curtail their mission and not serve a more  
14 general population or provide this type of coverage. And  
15 isn't that the very choice Fulton talks about?

16           MS. ETLINGER: Well, that is the - - - the choice  
17 that is identified as a burden in Fulton.

18           JUDGE GARCIA: So your exemption isn't placing  
19 the same burden on them that's the original problem?

20           MS. ETLINGER: Well - - - well, even if it were,  
21 the question's still - - - Fulton goes on to ask the  
22 question whether what we have here is neutral and generally  
23 applicable? And with respect to generally - - - general  
24 applicability because if you don't, even if you have a  
25 burden, Smith says if it's general and neutral it can be

1 applied. And so the question is whether it's generally  
2 applicable. That's - - - that's the emphasis of Fulton.

3 And this is not an individualized - - - a  
4 mechanism for individualized exemption. This question  
5 about how the criteria are applied is not the question you  
6 ask when you are determining whether something is an  
7 individualized exemption. An individualized exemption is  
8 one like good cause, like sole discretion, that allows the  
9 decisionmaker to make value judgments about the motivations  
10 for - - - of the parties seeking an exemption.

11 So I look at your particular circumstances and  
12 your motivations and I say, okay, I think that's good  
13 cause. And I look at somebody else and they have different  
14 circumstances or different motivations and - - - and that's  
15 just not what we have here.

16 JUDGE RIVERA: But isn't what you're - - - isn't  
17 - - - at least three of these, forget number 4 for one  
18 minute - - - minute, the Internal Revenue. Isn't that  
19 already doing the work that you're describing?

20 MS. ETLINGER: No. For - - - for two reasons.

21 JUDGE RIVERA: Why not? Why not?

22 MS. ETLINGER: First of all - - - first because  
23 there is just a distinction between a - - - accommodation  
24 that uses criteria that can be objective and are  
25 standardized, from an individualized exemption which means

1           it's just the exercise of discretion. You - - - you fit in  
2           or you don't fit in because somebody says so.

3                       Here you fit in if you meet those criteria - - -

4                       JUDGE RIVERA: I mean, regardless of the  
5           substance of the criteria, as long as you have - - - as I  
6           was asking your adversary before - - - some boundaries in  
7           which you must exercise that discretion? That's - - -  
8           that's what - - -

9                       MS. ETLINGER: That's what Fulton was getting at.  
10          And there's a reason.

11                      JUDGE RIVERA: But it has to be, this is just my  
12          choice? I can decide for whatever reason I want whether or  
13          not to exempt you?

14                      MS. ETLINGER: Yeah. That's an individualized  
15          exemption. There - - - there are two - - -

16                      JUDGE RIVERA: Um-hum.

17                      MS. ETLINGER: - - - circumstances for lacking  
18          generally applicability. But that is the one - - - that  
19          was the one in Fulton and that was this concern because if  
20          there are no criteria, you're inviting the decisionmaker -  
21          - - and this is what Fulton says - - - to - - - to find  
22          that some circumstances are more favorable to the  
23          decisionmaker than other circumstances. It invites  
24          treating, in Fulton, religious motivations less favorably  
25          than secular motivations.



1 JUDGE RIVERA: So I take it your position would  
2 be that this would go - - - run afoul of Fulton if you had  
3 these criteria and it also said, but the commissioner of  
4 DFS can nevertheless grant an exemption, even if it does  
5 not satisfy these other criteria?

6 MS. ETLINGER: Exactly. That - - - and that part  
7 of it, that would be the individualized exemption problem  
8 in Fulton.

9 JUDGE CANNATARO: But the underlying principle is  
10 that even if some burden is imposed, that's  
11 constitutionally tolerable as long as the burden is  
12 objective and uniformly - - - that the criteria that make  
13 up the burden are objective and uniformly applied?

14 MS. ETLINGER: Well, two things. The - - - the  
15 overarching principle of Smith is not about religious  
16 accommodations. So we have something different here than  
17 what has been looked at in any of the cases and there is a  
18 principle distinction between regulatory requirements and  
19 religious accommodations for purposes of general  
20 applicability. And that's because a religious  
21 accommodation, which by its terms means it's not been  
22 constitutionally required, is a - - - a situation in which  
23 the state has elected to serve another compelling interest,  
24 its interest in promoting free exercise, along with a  
25 competing compelling interest, its regulatory interest

1 here, ensuring access to critical reproductive health  
2 services.

3 JUDGE GARCIA: How is it that that prong,  
4 "primarily serves a population", how does that relate to  
5 the religious exemption at all, in terms of the - - -  
6 what's the purpose - - - what's the work that prong is  
7 doing there? In terms of determining whether this is - - -  
8 should be a religious exemption? What's the relationship  
9 between who you serve and what your beliefs are?

10 MS. ETLINGER: I - - - I - - - the answer to that  
11 question is, there doesn't have to be that kind of direct  
12 connection between the limit that the legislature drew - -  
13 - the line drawing that the legislature chose for its  
14 accommodation that it's offering.

15 JUDGE GARCIA: Then why are you burdening them  
16 with something that's not relevant at all to what you're  
17 trying to get at?

18 MS. ETLINGER: Well - - -

19 JUDGE GARCIA: Because it is a burden to say you  
20 can't serve this population if your mission is to do some  
21 charitable work.

22 MS. ETLINGER: Well, the question would be has  
23 the legislature, in balancing these two competing interests  
24 - - - because that's what makes it very different from a  
25 requirement that religious and nonreligious organizations



1 have to adhere to. Here we have a requirement that applies  
 2 to everybody but then an accommodation for a different  
 3 purpose, not to ensure access to critical health care. In  
 4 fact, the accommodation undermines the state's interest in  
 5 ensuring access to critical health care. So the - - - the  
 6 state is balancing these two interests and the question is,  
 7 has the state drawn a reasonable line?

8 JUDGE GARCIA: And what's the reasonable purpose  
 9 of that prong of the test?

10 MS. ETLINGER: The - - - the reasonable - - -  
 11 it's not the particular prong. It's the - - - it's the  
 12 line drawing that was drawn. And essentially criteria, as  
 13 the court explained in Catholic Charities, that were  
 14 defining houses of worship and the like, versus charitable  
 15 organizations that work in the community. And the  
 16 legislature chose the line here, or initially, the  
 17 superintendent chose the line here for a number of reasons  
 18 but first because this was simply traditionally the  
 19 religious accommodation that was provided for contraceptive  
 20 coverage requirements. It had been the - - - the standard  
 21 in New York for nearly two decades. It had been workable;  
 22 insurance companies were able to readily identify who could  
 23 receive an exempt policy. In fact, it was in use in the  
 24 many states.

25 JUDGE RIVERA: So - - - so - - -



1 JUDGE CANNATARO: So even if - - -

2 JUDGE RIVERA: - - - since an employer cannot  
3 discriminate on the basis of religion, I'm not sure how you  
4 get away with that number 3? I'm not understanding that at  
5 all.

6 MS. ETLINGER: Well, in - - - my understanding -  
7 - -

8 JUDGE RIVERA: To comply, one would have to say  
9 regardless of how - - - how - - - the merits of the - - -  
10 of the applicant for a job, we'll not hire them unless?

11 MS. ETLINGER: Well, I - - - I - - - my  
12 understanding - - -

13 JUDGE RIVERA: Does it further - - - because  
14 you're saying the - - - your line in the sand would be - -  
15 - or DFS line in the sand, if I'm getting this right - - -  
16 is that you wanted to preserve houses of worship but not  
17 charitable institutions who are in a business environment?

18 MS. ETLINGER: That - - - that was the general  
19 principle.

20 JUDGE RIVERA: Um-hum.

21 MS. ETLINGER: And the - - - my understanding is  
22 religious organizations do have some authority under the  
23 Human Rights Law to use religion as a basis for hiring in  
24 principle.

25 JUDGE RIVERA: So this is what I'm saying, that

1           begs the question whether or not they're the kind of  
2           religious organization that should get the exemption?  
3           That's the whole point. That's the point of my question.

4                     MS. ETLINGER: Well - - - well, but the - - - the  
5           question is - - - the question is did the state draw a  
6           reasonable line?

7                     JUDGE RIVERA: Well, I understand the employer.  
8           I'm not talking about - - - yes, I had the question about  
9           the employer. But what about number 3, those who serve? I  
10          mean that is very typically within sort of the - - - if you  
11          think of some of the religious missions, it is to serve  
12          whoever is in need - - -

13                    MS. ETLINGER: Right.

14                    JUDGE RIVERA: - - - regardless of whether or not  
15          they happen to share your religious tenets.

16                    MS. ETLINGER: Yes. And - - - and that's an  
17          effect of the criteria. So it's true - - -

18                    JUDGE RIVERA: But that - - - why doesn't that  
19          undermine the exercise of their religion? That's that  
20          choice, perhaps, that Judge Garcia was referring to.

21                    MS. ETLINGER: I'm sorry. What is - - -

22                    JUDGE RIVERA: That I got to forego this part of  
23          my religious mission?

24                    MS. ETLINGER: Why doesn't it undermine - - -

25                    JUDGE RIVERA: Number 3? Yes.

1 MS. ETLINGER: Undermine what? I'm sorry. I - -  
2 - I missed the undermine what?

3 JUDGE RIVERA: The - - - that the - - -

4 JUDGE GARCIA: Mission of the - - -

5 JUDGE RIVERA: - - - that this particular prong  
6 in this - - - what you're calling discretion, non-  
7 discretion, somehow does not run afoul of Fulton, when it  
8 is, as I think Judge Garcia was saying before, presents the  
9 catch twenty-two, that Fulton is indeed saying is not  
10 permissible?

11 MS. ETLINGER: Because that the - - - the - - -  
12 that aspect of Fulton is talking about whether there's a  
13 burden or not. But you don't - - - you don't go beyond  
14 burden if what you have is neutral and generally  
15 applicable. And we have a scheme here that's neutral and  
16 generally applicable. And we have a religious  
17 accommodation that the state decided, ultimately, would  
18 best serve its regulatory interest while also serving its  
19 other interest by drawing the line here.

20 JUDGE GARCIA: But it does seem unusual that you  
21 could solve your issue with creating a burden by curtailing  
22 the mission or complying by a exception that forces you to  
23 curtail your mission, right? That seems an unusual  
24 solution to the problem.

25 MS. ETLINGER: Well, the - - - to the problem of

1 balancing these twin interests?

2 JUDGE GARCIA: To the problem of an undue burden?  
3 You have an undue burden, and I agree that's what Fulton  
4 says in the beginning. We look at this, they're an undue  
5 burden. And they say, "you're putting this organization  
6 to the choice of curtailing its mission or approving  
7 relationships inconsistent with its beliefs", that's  
8 Fulton. And they go on then to say, okay, how do we look  
9 at this now? Is it neutral or general?

10 And you're saying we can solve that initial  
11 problem by imposing an exemption that - - - that curtails -  
12 - - that forces them to curtail their mission or not get  
13 the exemption?

14 MS. ETLINGER: Well, two things. First, it's  
15 because it's a religious accommodation. So Fulton - - -  
16 everything Fulton said is not directly applicable to a  
17 religious accommodation. So plaintiffs are asking the  
18 court to take what Fulton says, and in an unprecedented way  
19 that has not been accepted by any court - - - no court has  
20 so held - - - to map it onto an accommodation. And this  
21 court said in Catholic Charities, that's very problematic.  
22 Because if you do that, if you suggest - - - subject a  
23 religious accommodation that's not constitutionally  
24 required to this higher scrutiny, you're going to  
25 discourage the state from providing accommodations and the

1 end result will be that you have restrictions on free  
2 exercise rather than promoting free exercise. So it's - -  
3 - it's a - - - the purpose of it just doesn't map on to a  
4 religious accommodation.

5 JUDGE RIVERA: Serio - - - Serio, of course, said  
6 the same. That if you really follow the plaintiffs there,  
7 all the way through, that that means that you would end up  
8 with the question you had before. Why not just get rid of  
9 all the exemptions?

10 MS. ETLINGER: Well, you could. You could.

11 JUDGE RIVERA: I think your adversary's  
12 suggesting that might create another constitutional  
13 problem, which is for another day. This is not this case.

14 MS. ETLINGER: And we don't have that here. And  
15 that - - - and that was exactly what the court was  
16 concerned in - - - concerned about in Catholic Charities.  
17 The - - - the - - - if - - - if that definition, which is  
18 the exact same definition here, were looked at in some way  
19 where more was required than a rational basis, the  
20 government would be discouraged from providing  
21 accommodations or so limited in the accommodations it could  
22 apply. Maybe it can only apply if the rule were it can  
23 only offer an accommodation when it encompasses all  
24 religious objectors.

25 JUDGE CANNATARO: So to the extent that some of



1 the questions you've been asked might indicate that the  
2 court is questioning whether there's even a rational basis  
3 with respect to that third prong, would part of your  
4 argument be that we're just simply bound by stare decisis  
5 from Catholic Charities with respect to that?

6 MS. ETLINGER: No. No. For a couple of reasons.  
7 The - - - the - - - the - - - the - - - the  
8 accommodation, there are some factual differences between  
9 Catholic Charities and - - - and the facts of this case.  
10 So they - - - they don't go to general - - - they don't go  
11 to the court's conclusion that it was generally applicable  
12 and neutral and thus subject to rational basis review. The  
13 differences are that that involved contraceptive care and  
14 this involves abortion services. But that's not a  
15 meaningful distinction because we know it's not the  
16 government's place to question the - - - the - - - how  
17 important a religious belief is to the religious objector.  
18 So it's - - - they're treated all the same.

19 And the other distinction, factually, is just the  
20 manner - - - the mechanism that is used for how the  
21 accommodation operates. So in Catholic Charities the  
22 contraceptive coverage operated so that when it was - - -  
23 an exempt policy was issued, the individual employee was  
24 given the option of purchasing a rider and had to pay for  
25 it. And in this case, the coverage by a rider is automatic

1 and at no cost. So those are the distinctions.

2 JUDGE RIVERA: Before - - - your red light is on.  
3 But just to clarify something that was said before. Is it  
4 - - - is it your representation now, that nursing homes are  
5 not - - - are able to get this exemption? These kinds of  
6 nursing homes? There's no - - - no barrier to them? If  
7 they can answer these questions, of course.

8 MS. ETLINGER: The - - - I think what you're ask  
9 - - - I mean, the - - - in general - - -

10 JUDGE RIVERA: It's in reference to the website.  
11 That's - - - that's what I'm trying to get to.

12 MS. ETLINGER: Well, the - - - the - - - the  
13 guidance document does say based on Catholic Charities - -  
14 -

15 JUDGE RIVERA: Okay.

16 MS. ETLINGER: - - - that the plaintiff - - - one  
17 of the plaintiffs in Catholic Charities was a nursing home  
18 and there was an assumption that the plaintiffs there,  
19 based on concessions, did not meet the criteria. So the  
20 guidance is using that - - - that historical precedent.

21 But I think what you're really asking - - - or  
22 you may be asking, or what I would like to answer is - - -

23 JUDGE RIVERA: Perhaps the last. Yes.

24 MS. ETLINGER: - - - could there be situations on  
25 the very outer edges - - -

1 JUDGE RIVERA: Okay.

2 MS. ETLINGER: - - - that raise difficult  
3 questions. And if there are, the answer is this is not the  
4 case that presents that issue. Plaintiffs have never  
5 sought an exemption. And we know from its long history of  
6 use, and the guidance documents that say look at the name.  
7 And if you're not sure by the name, look at documents or  
8 representations that there's deference. There's no reason  
9 for plaintiffs to fear that if they do request an exempt  
10 policy, they'll be subject to any such questions.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. FRANCISCO: Your Honors, three quick points  
13 and of course, happy to answer any other questions you  
14 have.

15 The first is the guidance document. We printed  
16 this off of the website. As far as I can tell they haven't  
17 pulled it down. They haven't indicated that it's archived  
18 and no longer applicable. This is the operative guidance  
19 document on the religious employer exemption.  
20 Specifically, it says religious schools and religious  
21 nursing homes not covered. It then says, and this goes to  
22 the self-certification point, and I'm quoting. "An issuer  
23 that receives a request for exemption may not rely solely  
24 on a self-attestation from an employer." Full stop.  
25 Period. So I think it's quite clear that this is not a

1 self-certification regime.

2 And Your Honor, well, this isn't in the record  
3 because it only arose in 2019. I would point out that in  
4 2019, the Sisters of St. Joseph, which is a religious order  
5 of nuns based here in the Albany area, was denied a  
6 religious employer exemption for the insurance plan that  
7 covers the roughly 300 nuns and the roughly 100 staff  
8 members that work for them. Because they hadn't put  
9 forward enough documentation to show that - - - that they  
10 were only serving people of the same religion and that  
11 their purpose was the inculcation of religious values.

12 That brings me to my second point. And I'd like  
13 to - - - I know there was a lot of discussion about the  
14 prong about whether you serve people the same - - - of the  
15 same religion. I'd also like to focus on the prong about  
16 whether you employ people of the same religion.

17 That is a prong that is impossible to apply  
18 without running straight into a problem under the Supreme  
19 Court's decision in Our Lady of Guadalupe, which made clear  
20 that it is impossible for the state or a court to determine  
21 whether somebody shares the same religion as another.

22 Take it in the context of this case. Does a pro-  
23 choice Catholic and a pro-life Catholic, do those two  
24 people share the same religious tenets? I have no idea how  
25 to even begin to answer that question, and I certainly know

1 that Our Lady of Guadalupe tells us that that's not an  
2 answer - - - a question that should be answered by any  
3 governmental authority.

4 And this is my final point, Your Honor, and it  
5 goes to the prong that we were talking about, whether or  
6 not you primarily serve people of the same religious  
7 beliefs. Under this law, the state would have the  
8 discretion to deny a religious employer exemption to Mother  
9 Teresa and the Sisters of Calcutta because the last time I  
10 checked, the poor people of Calcutta were not predominantly  
11 Catholic. This is a - - - a regime that is contrary to the  
12 Supreme Court's precedent from root to branch. This court  
13 should make clear that its decision in Serio is no longer  
14 good law and reverse the decision below.

15 JUDGE RIVERA: Well, it sounds like you can't  
16 even have - - - although you said at the - - - I thought  
17 you said initially that if it was truly self-certification,  
18 no one looks behind the curtain, that that would be fine.  
19 But it sounds like from what you just said, one could not  
20 certify to Number 2 because of the very difficult and  
21 challenging issues - - -

22 MR. FRANCISCO: I - - - I think that's - - -

23 JUDGE RIVERA: - - - and perhaps as I suggested to  
24 Number 3 - - -

25 MR. FRANCISCO: I - - - I - - -



1 JUDGE RIVERA: - - - because you'd have to ask.

2 MR. FRANCISCO: Yeah. And I think that's right,  
3 Your Honor, but again, I want to clarify the two strands of  
4 general applicability. One of them goes to discretion, and  
5 maybe the self-certification piece could be relevant to - -  
6 - relevant to discretion.

7 JUDGE RIVERA: Um-hum.

8 MR. FRANCISCO: Put discretion out the window.  
9 Let's assume that this was a regime with zero discretion at  
10 all. It still fails under the first part of the Fulton  
11 analysis, which says that any time you have an exemption,  
12 even a completely categorical, no discretion exemption - -  
13 - any time you have an exemption that undermines your  
14 interests in a similar way relative to the people who are  
15 outside of the exemption, that's a separate problem.

16 Remember in the Tandon case, those were the COVID  
17 cases where you had exemption for - - - an exemption for -  
18 - - for example, movie theatres but not for churches.  
19 There was no discretion at all in that regime. It was  
20 pretty clear what a movie theatre was and what a church  
21 was. But the court held in those cases that that  
22 separately undermined the general applicability of the law.

23 Here we just happen to have both of the problems  
24 in this regime.

25 JUDGE SINGAS: But should - - -

1 JUDGE GARCIA: Counsel, one question with - - -

2 JUDGE SINGAS: Go ahead.

3 JUDGE GARCIA: - - - with the Chief's permission?  
4 You went through a number of cases in the Supreme Court arc  
5 of the decisions there. Before Fulton, do you think our  
6 Serio decision was constitutional?

7 MR. FRANCISCO: Your Honor, I do think Serio was  
8 wrongly decided - - -

9 JUDGE GARCIA: Why?

10 MR. FRANCISCO: - - - the day it was decided.  
11 Because I - - - I don't think it was neutral. I don't  
12 think this law is a neutral law. I think that when you  
13 have factors that require you to assess the religious  
14 tenets of an organization, its employer, and the people  
15 that it serves, and require you to assess whether the  
16 purpose is the inculcation of religious values or providing  
17 services to the poor, I can tell you from my client's  
18 perspective no difference between the two. I don't think  
19 that that's a neutral law. But I think that Fulton and - -  
20 -

21 JUDGE GARCIA: Then let me ask the follow-up  
22 then.

23 MR. FRANCISCO: Yeah.

24 JUDGE GARCIA: Yes, I think you're going to get  
25 there. So we disagreed with that - - -

1 MR. FRANCISCO: Of course.

2 JUDGE GARCIA: - - - so how does Fulton change  
3 that analysis? How does it add to what you just said?

4 MR. FRANCISCO: Because in Serio, the court  
5 didn't have the benefit of the court's explication of  
6 general applicability. Remember, Smith says that a law has  
7 to be both neutral and generally applicable. Prior to  
8 Fulton it wasn't quite clear if that was a unitary test or  
9 two separate prongs. And in Serio this court understood it  
10 to be a unitary test that required religious targeting as  
11 such.

12 In Fulton, the court was presented with a  
13 religious targeting argument. And what the court said is,  
14 we don't have to address the religious targeting argument  
15 because that's part of the neutrality analysis. We're  
16 going to do it on a completely different basis. The  
17 general applicability half of the prong which doesn't have  
18 anything to do with religious targeting but rather has to  
19 do with whether you have exemptions that undermine your  
20 interest or give the decisionmakers too much discretion.

21 And those two things weren't clear before Fulton  
22 and Tandon. This court didn't address either of them in  
23 Fulton and Tandon. The Supreme Court GVR'd in light in  
24 Fulton and Tandon - - - in light of Fulton and Tandon,  
25 specifically to address that second half of the analysis



1 that it had since clarified.

2 CHIEF JUDGE WILSON: And so if only the fourth  
3 factor were in the statute, not the first three, does that  
4 survive?

5 MR. FRANCISCO: Your Honor, I would - - - no.  
6 Because I would still say that you've got an exemption that  
7 undermines the interest. And I'd also point out that  
8 fourth factor is completely irrational. What the fourth  
9 factor says is that - - - look, all - - - you know, or most  
10 religious organizations are tax exempt, including all of my  
11 clients. All the fourth factor is, it's a tax law that  
12 says some types of tax-exempt organizations have to, at the  
13 end of the year, file a piece of paper with the IRS that  
14 says I'm in fact a tax-exempt organization. Other types of  
15 tax-exempt organizations don't have to file that piece of  
16 paper.

17 That has absolutely nothing to do with the - - -  
18 with the state's interest here. So I'd be arguing that  
19 that failed rational basis. But wholly apart from that, it  
20 still constitutes an exemption that undermines the state's  
21 interest in a similar way relative to extending that  
22 exemption to my client.

23 JUDGE SINGAS: But shouldn't we be looking at  
24 health insurance policies for general applicability, those  
25 that are issued to secular employers and those that are

1 issued to religious employers? And why aren't they  
2 comparable?

3 MR. FRANCISCO: I - - - Your Honor, I - - - I'm  
4 not sure I'm following - - -

5 JUDGE SINGAS: Like, are there any circumstances  
6 that permit a secular employer to opt out of providing  
7 coverage that a religious employer would be denied that  
8 exemption? Like, in other words, this regulation is being  
9 applied to both secular employers and religious employers  
10 in the same exact manner. So where's the constitutional  
11 infirmity?

12 MR. FRANCISCO: Yeah. I think the constitutional  
13 infirmity is that - - - well, look, if you - - - if you had  
14 a set of insurance plans that covered everybody the same  
15 with zero exemptions for anybody, that would be generally -  
16 - - generally neutrally applicable and we'd have maybe  
17 different problems. We wouldn't have the problem that I'm  
18 talking about here. If you had an insurance regime that  
19 created exemptions for, you know, secular employers but not  
20 religious employers, well, I think that's effectively the  
21 Supreme Court's decision in Fulton. And that's where you  
22 have the type of problem that you have here.

23 Likewise, if you have exemption for some  
24 religious employers but not other religious employers, even  
25 though they undermine the state's interest in a similar

1 way, you have the same problem as you have here and in the  
2 Fulton case. I'm not sure I answered your question, Your  
3 Honor.

4 JUDGE SINGAS: I'm not sure either.

5 MR. FRANCISCO: Yeah.

6 JUDGE SINGAS: I'm just saying that the  
7 regulation is applied the same way, whether you're a  
8 secular employer or whether you're a nonsecular employer.

9 MR. FRANCISCO: But it's not, Your Honor.  
10 There's a religious employer exemption that applies to some  
11 religious employers but not to other religious employers.  
12 And - - - so - - - so that gives rise to the first part of  
13 the general applicability problem. And in addition, it's a  
14 regulation that's got such vague and nebulous terms that it  
15 gives the decisionmakers the discretion to pick winners and  
16 losers. Much as the exemption that was at issue in the  
17 second part of the Kane against De Blasio decision out of  
18 the Second Circuit, which I would submit has factors that  
19 are at least as objective as the one at issue here and  
20 probably much more objective than the ones at issue here.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. FRANCISCO: Thank you, Your Honor.

23 (Court is adjourned)  
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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Roman Catholic Diocese v. Vullo, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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