No. 23-35585

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR PARK ASSEMBLY OF GOD OF KIRKLAND, WASHINGTON,

Plaintiff-Appellant,

v.

MYRON KREIDLER, in his official capacity as Insurance Commissioner for the State of Washington, AKA Mike Kreidler; JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON AT TACOMA

CASE No. 3:19-cv-05181-BHS
The Honorable Benjamin H. Settle, United States District Court Judge

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND NORTHWEST HEALTH LAW ADVOCATES IN SUPPORT OF APPELLEES, THE STATE OF WASHINGTON, AND AFFIRMANCE

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION
Taryn Darling, WSBA No. 38276
Adrien Leavitt, WSBA No. 44451
PO Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
tdarling@aclu-wa.org
aleavitt@aclu-wa.org

Counsel for Amici American Civil Liberties Union of Washington Foundation and Northwest Health Law Advocates

CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union of Washington Foundation (ACLU) and Northwest Health Law Advocates are non-profit entities that do not have parent corporations, and no publicly held corporation owns 10 percent or more of any stake or stock in Amici. *See* Fed. R. App. P. 26.1.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Fed. R. App. P. 29(a)(2), the ACLU submits this brief without an accompanying motion for leave to file because all parties have consented to its filing. Pursuant to Fed. R. App. P. 29(a)(4)(E), the ACLU states that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than the ACLU, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

Dated: January 29, 2024.

Respectfully Submitted,

By: */s/ Taryn Darling*
Taryn Darling
Adrien Leavitt
American Civil Liberties Union of Washington Foundation

Counsel for Amici American Civil Liberties Union of Washington Foundation and Northwest Health Law Advocates

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Published Reports and Books

I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington Foundation (ACLU) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the preservation of civil liberties and the principles of liberty and equality embodied in the Washington and United States Constitutions and federal and state civil rights laws. The ACLU has long sought to protect individual privacy and fundamental rights and it has long advocated in support of religious freedom and has particular expertise regarding the First Amendment. The ACLU has participated in numerous cases involving the federal and state constitutional guarantees of religious freedom, and it has participated in numerous cases involving substantive due process rights guaranteed for Const. arts. I, Section 3, and I, Section 7, of the Washington State Constitution. In addition to litigation, the ACLU has participated in legislative and rule-making processes involving abortion care, privacy, and freedom of religion.

Northwest Health Law Advocates (NoHLA) is a nonprofit, nonpartisan legal and policy organization in Washington State whose mission is to achieve a health care system that enables all individuals to receive quality, affordable health care on an equitable and timely basis and ensures they have basic rights and protections. NoHLA advances the health rights of Washington residents, including low-income and marginalized individuals and families, by providing public education and by

advocating for the removal of systemic barriers to accessing care, including reproductive health care, in legislative, administrative, and legal fora.

II. INTRODUCTION

Washington's Legislature has a clear, long, and committed history of supporting and expanding Washingtonians' access to reproductive health care. Washington's Reproductive Parity Act ("RPA")[1] requires that insurance carriers providing "health plans" that cover maternity care services also provide coverage for equivalent abortion care services, and it requires that "health plans" provide contraceptive coverage. WASH. REV. CODE § 48.43.072(1);073(1) (regulating insurance carriers, not employers, like Cedar Park).

Washington's Reproductive Parity Act is a neutral law of general applicability, with generalized categorical exemptions. Any review is, therefore, subject to rational basis review, which Washington readily satisfies.

This Court should affirm the district court's grant of summary judgment in favor of the State on Cedar Park's free exercise claim, because Washington's RPA is rationally related to the government's legitimate interest to provide and ensure access for all Washingtonians to "an essential part of primary care."

[1]The Parties reference "SB 6219" as the original bill. SB 6219 was passed into law in 2018 as WASH. REV. CODE § 48.43.072, which is referred to herein as the Reproductive Parity Act or "RPA".

III. STATEMENT OF THE CASE

The State has described the factual and procedural background in this case, which is incorporated here by reference. The district court properly dismissed Cedar Park's Free Exercise claims on the merits.

IV. ARGUMENT

A. Washington Law Guarantees the Right to Control One's Own Reproduction.

The State of Washington has a long history of recognizing that reproductive health care, including abortion care, is essential primary care. The right is recognized as arising from Washington's Constitution, and it is reaffirmed repeatedly through caselaw and statute. The legislature has reduced barriers and health disparities by increasing access to abortion through insurance coverage, protecting Washingtonian's rights to essential health care.

1. Washingtonians Have Express and Assured Rights To Control One's Own Reproduction.

Existing long-standing Washington law provides for a right to choose to terminate a pregnancy. This right is affirmed and reaffirmed statutorily and in caselaw, which explains that the right arises from Washington's Constitution. In 1975, Washington's Supreme Court recognized the right to abortion involved control of one's own reproduction and is a fundamental right arising from the right of privacy, and subject to the protections in Wash. Const. art. I § 3. *State v. Koome*, 530 P.2d 260, 262-63 (Wash. 1975).

Washingtonians have an express statutory right to abortion pursuant to the Reproductive Privacy Act (WASH. REV. CODE 9.02), which provides that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions…. Every pregnant individual has the fundamental right to choose or refuse to have an abortion[.]"[2] And "the state may not deny or interfere with a pregnant individual's fundamental right to choose or refuse to have an abortion" nor shall the State "discriminate against the exercise of these rights."[3]

2. Washington's Reproductive Parity Act Expands Washingtonians' Access to Abortion Care.

Abortion care and the freedom to decide when and whether to reproduce is "an essential part of primary care[.]"[4] Access to abortion is intentionally supported through RPA, which Appellant Cedar Park challenges here. In passing the RPA, the legislature sought to address barriers to essential primary health care because restrictions to reproductive health care "have a disproportionate impact" on those with low income, people of color, immigrants, and young people who are "already disadvantaged in their access to the resources, information, and services necessary

[2]WASH. REV. CODE 9.02.100(2)
[3]WASH. REV. CODE § 9.02.100(1)-(2). In addition, our legislature has recognized that reproductive health care is "an essential part of primary care for women and teens." Laws of 2018, Ch. 119(3).
[4]WASH. REV. CODE § 48.43.072 Notes, Findings—Declarations—2018 Wash. Sess. Laws, Ch. 119(3).

to prevent unintended pregnancy and to carry a healthy pregnancy to term."[5] Given Washington's "long history of protecting gender equity and [] reproductive health…as guaranteed under the laws of this state[,]"[6] the RPA addressed restrictions "on abortion coverage [that] interfere … with personal, private pregnancy decision making, … with health and well-being, and with [the] constitutionally protected right to safe and legal medical abortion care."[7] The law requires that insurance carriers (not employers) providing "health plans" that cover maternity care services also provide coverage for equivalent abortion care services.[8] It also requires that "health plans" provide contraceptive coverage.[9]

In 2022, Washington's legislature again affirmed its "longstanding public policy…to promote access to affordable, high quality sexual and reproductive health care, including abortion care" when it updated the Reproductive Privacy Act.[10] The legislature recognized that, in 1970, Washington was one of the first states to decriminalize abortion before *Roe v. Wade*; that the Reproductive Privacy Act provided further protections for abortion access; and, that abortion care may be

[5]*Id.* at (5).
[6]WASH. REV. CODE § 48.43.072 Notes, Findings—Declarations—2018 c 119 (1)-(3).
[7]WASH. REV. CODE § 48.43.072 Notes, Findings—Declarations—2018 c 119 (14).
[8]WASH. REV. CODE § 48.43.072.
[9]WASH. REV. CODE § 48.43.072(1);073(1).
[10]WASH. REV. CODE § 9.02.100 Notes, Legislative affirmations—2022 c 65 (1)-(2).

needed by any person who can become pregnant, including transgender, nonbinary, and gender expansive people:[11] The legislature declared its legitimate interest:

> All people deserve to make their own decisions about their pregnancies, including deciding to end a pregnancy. It is the policy of the state of Washington to continue to protect and advance equal rights to access abortion care that meets each individual's needs, regardless of gender or gender identity, race, ethnicity, income level, or place of residence.[12]

Washington's RPA protects rights assured to Washingtonians. Because it is a valid statute of general applicability, as set forth below, it should be enforced.

B. Washington's Reproductive Parity Act Should Be Enforced Because It Is A Valid Statute of General Applicability.

The Free Exercise Clause of the First Amendment, applicable to the States by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.... " U.S. CONST. amend. I, XIV. The free exercise of religion means the right to believe and profess whatever religious doctrine one desires. *Emp. Div. Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 876-77 (1990) (internal citations omitted). It excludes all "governmental regulation of religious beliefs as such." *Id.* The government cannot compel affirmation of religious belief, punish the expression

[11]WASH. REV. CODE § 9.02.100 Notes, Legislative affirmations—2022 c 65 (1), (3), (4).
[12]WASH. REV. CODE § 9.02.100 Notes, Legislative affirmations—2022 c 65 (5).

of religious doctrines, or impose special disabilities on the basis of religious views or status. *Id.* (internal citations omitted).

The Free Exercise Clause does not, however, preclude enforcement of otherwise valid statutes of general application, even where they incidentally burden religious conduct. Those exercising their "religious beliefs, are not excused from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 879. To allow otherwise, would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto [themself]." *Id.* (describing the Court's long-established law and its first occasion to assert the principle when rejecting a claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.). *Smith* provides that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1871 (2021) (citing *Smith*, 494 U.S. at 878-882). Instead, "a valid and neutral law of general applicability" is subject to rational basis review. *Smith*, 494 U.S. at 879; 882-84 (holding a law containing a criminal prohibition of the use of peyote in religious ceremonies was generally applicable, even though it contained medical exemptions). *See also Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

More recently, in *Fulton*, the United States Supreme Court reaffirmed the principals of *Smith* by analyzing laws containing individualized, discretionary exemptions. 141 S. Ct. at 1868. The mere existence of an exemption within a law does not automatically render the law not generally applicable triggering strict scrutiny. 141 S. Ct. at 1878. Rather, *Smith* remains and permits enforcement of a "neutral, generally applicable" law that contains exemptions, so long as the exemptions are not discretionary. *Fulton* narrowly addressed laws containing a "formal system" of "entirely discretionary exemptions," while leaving the *Smith* framework undisturbed. *Id.*

1. Washington's Reproductive Parity Act Is Neutral and Generally Applicable.

Washington's RPA is a valid law that is neutral and generally applicable entitling the State to regulate insurance provision to achieve its rationally related purpose of ensuring that abortion care services are accessible. Cedar Park has no right to become a law unto itself, on the indirect claim that its religious exercise is burdened.

Laws impermissibly burden the right to free exercise where those laws are not neutral or generally applicable. *Fulton*, 141 S. Ct. at 1877. A law is not generally applicable if it (1) includes a formal mechanism for granting individualized, discretionary exemptions or (2) prohibits religious conduct while permitting secular conduct. *Fulton,* 141 S. Ct. at 1877-79. Washington's RPA is neutral, it does not

have a formal mechanism for discretionary exemptions, nor does it prohibit religious conduct while permitting secular conduct.

a. The RPA Is Neutral.

A law is not neutral if it regulates or prohibits conduct because the conduct is undertaken for religious reasons.[13] *Lukumi*, 508 U.S. at 532 (providing examples of invalid state laws including one that disqualified members of clergy from public office resulting in discrimination on the basis of religious status, and a law that prohibited a Jehovah Witness from preaching in a public park where preaching during the course of a Catholic mass or Protestant service was permitted) (citing *McDaniel v. Paty*, 435 U.S. 618 (1978) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953), respectively).

The RPA is neutral. The object of the RPA is provision of necessary care, not to infringe upon or restrict practices because of their religious motivation. *See, e.g., Lukumi*, 508 U.S. at 533 (citing *Smith*). The RPA does not discriminate on its face, nor does it refer to any religious practice. Its central purpose is to provide primary healthcare by ensuring abortion care is accessible to Washingtonians through insurance coverage because "[n]either a [person]'s income level, nor [their] type of

[13]Courts often conflate the neutrality analysis with the analysis regarding general applicability. Amici review neutrality first. Amici incorporate a detailed analysis of additional factors in the general applicability section below.

insurance should prevent [them] from having access to a full range of reproductive health care, including contraception and abortion services[.]"[14] The RPA is readily distinguished from the ordinance in *Lukumi*. There, the record established the text of the ordinance referenced "sacrifice," and "ritual"; the city council's resolution, referenced a clear desire to address residents' concerns "that certain religions may propose to engage in practices which are inconsistent with public morals"; and, "almost the only conduct subject to the [ordinances] is the religious exercise of Santeria church members." *See, e.g., Lukumi*, 508 U.S. at 534-38. The plain text of the RPA, on the other hand, its legislative history, and the law's actual impact on employers who may elect to purchase "health plans" makes clear that the RPA is a neutral law.

b. The RPA Is Generally Applicable.

In *Fulton*, the United States Supreme Court reaffirmed the principals of *Smith* by analyzing laws containing individualized, discretionary exemptions. The Court recited the general principal, that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (quoting *Lukumi*, 508 U.S. at 542-546). A law is not generally applicable if it (1) includes a formal mechanism for granting individualized, discretionary exemptions or (2)

[14]WASH. REV. CODE § 48.43.072 Notes, Findings—Declarations—2018 c 119 (4).

prohibits religious conduct while permitting secular conduct. *Fulton*, 141 S. Ct. at 1877-79.

i. A Law Is Generally Applicable if It Contains Objective, Categorical Exemptions That Do Not Permit Discretion.

Laws can be generally applicable even where they contain exemptions, but a law fails the test if it allows for governmental discretion in its exceptions. *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884). Inviting the government to consider the particular reasons for a person's conduct by providing for a mechanism of individualized exemptions means it is not generally applicable. *Id.* at 1877-79. *Fulton* addresses laws that permit entirely discretionary exemptions, not ones that contain objective, categorical exemptions. *Id. Fulton* is a consistent application of *Smith*, a well-settled and still undisturbed precedent.[15] *See also*, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687 (9th Cir. 2023) (similarly characterizing *Fulton*, 141 S. Ct. at 1877). As discussed below, the Ninth Circuit, as well as numerous other federal courts, have properly applied

[15]*Fulton* unambiguously and explicitly did not overturn *Smith*. *Fulton*, 141 S. Ct. at 1877 ("But we need not revisit [the *Smith*] decision here."); *id*. at 1883 (Barrett, J., concurring); *id*. at 1888 (Alito, J., concurring). The *Fulton* Court explained that "[t]his case falls outside of *Smith* because the City has burdened the religious exercise of [the agency] through policies that do not meet the requirement of being neutral and generally applicable." 141 S. Ct. at 1877.

the analysis set forth in *Fulton* to determine if a law is generally applicable and entitled to rational basis review.

Fulton noted an important example to illustrate the kind of discretionary exemption that renders a law's application subjective, and therefore, subject to strict scrutiny. In *Sherbert v. Verner*, the government denied a Seventh-day Adventist's eligibility for unemployment benefits because she would not work on the Sabbath because she had "failed, without good cause…to accept available suitable work." *Id.* at 1877 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). Because of the obvious discretion employed in determining whether she had provided "good cause," the Court held that the infringement on her free exercise right "could be justified only by a compelling interest." *Id.* at 1877 (citing *Sherbert*, 374 U.S. at 406). Similarly, in *Fulton*, a religious foster care agency that contracted with the City of Philadelphia refused to certify same-sex married couples as prospective foster parents. 141 S. Ct. at 1874. The agency argued certification would violate its religious beliefs—that "marriage is a sacred bond between a man and a woman"—because it would be an endorsement of same-sex marriage. *Id.* But the agency's refusal to issue the certifications violated Philadelphia's anti-discrimination laws, which explicitly included a prohibition on discrimination based on sexual orientation. *Id.* at 1875. Nevertheless, Philadelphia stopped referring cases to the agency until it agreed to certify same-sex married couples. The agency sued, claiming that its First

Amendment right to free exercise of religion entitled it to continue to receive referrals without a requirement that it certify same-sex married couples. *Id.* at 1876. The *Fulton* Court found critical a discretionary provision in the contract between the City and the agency that precluded the agency from rejecting prospective foster parents based upon their sexual orientation "unless an exception is granted by the Commissioner[']" which empowered the government with the "sole discretion" to grant an exception. *Id.* at 1878. Because the contract "incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner," the non-discrimination law was not generally applicable, and was subject to strict scrutiny. *Id.* at 1878.

The basic principle of *Smith* remains; categorical objective exemptions, that are non-individualized and non-discretionary, do not change the generally applicable nature of a law. This consistent rule has been applied by Courts in many contexts, including vaccination requirements, government housing programs, pharmaceutical regulations, and more. Cedar Park's assertion that "'[a]n *exceptionless* policy' is generally applicable" is a misleading statement of well-settled law and a misrepresentation of *Fulton. See e.g.*, Opening Br. 35 (quoting *Fellowship of Christian Athletes,* 82 F.4th at 686). To the contrary, "no case of the Supreme Court

holds that a single objective exemption renders a rule not generally applicable." *Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021).[16]

Tingley v. Ferguson provides a recent illustration of how the two-part *Fulton* analysis should be applied to the RPA. In *Tingley*, this Court upheld a Washington State law (SB 5722) prohibiting state licensed health care providers from practicing "conversion therapy" on youth. 47 F.4th 1055, 1053 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023). A licensed therapist sued the state after the statute banning conversion therapy was passed, arguing (among other claims) that the law violated his free exercise rights under the First Amendment. Although the therapist did not "work under the auspices of a religious denomination," he held himself out as a "Christian provider." *Id.* at 1066. He claimed that his "Christian views inform his work" including his belief that "the sex each person is assigned at birth is a 'gift of God' that should not be changed…" and that sexual relationships should only occur between a man and a woman after marriage. *Id.* Critically here, the legislature expressly stated that:

[16]Amicus Robertson Center also asserts that the key to *Fulton*'s rule is whether a law contains a "formal mechanism for granting exceptions". Amicus Robertson Center Br. 4 (quoting *Fulton*, 141 S. Ct. at 1879). However, the "formal mechanism" at issue in *Fulton* granted individualized, discretionary exceptions. It did not analyze categorical objective exemptions as amici suggests. Key to *Fulton*'s analysis – and lacking from Cedar Park or their amici's arguments – is the existence of individualized, discretionary exemptions, that indicate individual preference may frustrate the general applicability of a law requiring closer scrutiny.

> SB 5722 may not be applied to (1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a [religious organization] that do not constitute performing conversion therapy," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization."

Id. at 1065 (citing 2018 Wash. Sess. Laws, Ch. 300, § 2).

The Ninth Circuit held that SB 5722 was generally applicable and rationally related to the legitimate governmental purpose of protecting the "physical and psychological well-being of its minors." *Id.* at 1055. It offered a detailed analysis of the question of general applicability, considering both *Fulton* and *Smith*. The Court analyzed whether there was a "'formal mechanism for granting exceptions' that 'invite[s] the government to consider the particular reasons for a person's conduct.'" *Id.* at 1088 (quoting *Fulton*, 141 S. Ct. at 1877). The Court found that the law did not contain a "formal and discretionary mechanism for individual exceptions" and the exceptions at issue were not the type of discretionary exemptions contemplated in *Fulton*. *Id.* at 1088. "There is no provision in the Washington law for individual exceptions that would allow secular exemptions but not religious ones. In fact, there is no exemption system whatsoever, not even one that affords 'some minimal

governmental discretion.'" *Id.* (quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081 (9th Cir. 2015)).[17]

Tingley is not the only case decided by the Ninth Circuit since *Fulton*, that finds a law can be deemed generally applicable even when it includes exemptions. This Court reiterated the rule articulated by *Smith* and clarified by *Fulton* in holding that a San Diego high school's COVID-19 vaccine requirement was generally applicable. *Does v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1175 (9th Cir. 2021), *reconsideration en banc* denied, No. 21-56259, 2022 WL 130808 (9th Cir. Jan. 14, 2022). Although the vaccine mandate included numerous exemptions—including medical and religious exemptions—the exemptions did not permit secular activity while prohibiting religious conduct. *Id.* at 1177-1178. *See, e.g., Stormans*, 794 F.3d at 1079-82 (regulations were generally applicable even though they carved out enumerated exemptions, for example, the law exempted pharmacies from delivering medication for lack of payment, because the prescription was fraudulent, and due to certain emergencies). The *Stormans* Court also rejected arguments that the rule contained discretionary exemptions, holding that the law's inclusion of

[17]Cedar Park makes a similar argument about a comment made by a legislator regarding the RPA. See Opening Br. 49. Not only did the *Tingley* Court find this argument unpersuasive regarding the question of whether a law contains individualized discretion, but the Court noted that "[s]tray remarks of individual legislators are among the weakest evidence of legislative intent." *Tingley,* 47 F.4th at 1987.

phrases such as "substantially similar" and "good faith compliance" "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 *Stormans* Court emphasized that discretion is the critical analysis, "the mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability." *Id.* at 1082.

Other federal courts have applied the same analysis: distinguishing laws that allow for discretionary, individualized exemptions from laws that contain objective, categorial exemptions. *See e.g., Brox v. Hole*, 83 F.4th 87 (1st Cir. 2023) (holding a vaccine requirement for public ferry employees generally applicable despite containing medical exemptions but no religious exemptions); *Kane v. De Blasio*, 19 F.4th 152, 158 (2nd Cir. 2021) (holding a vaccine requirement for Department of Education employees was generally applicable despite categorical exemptions); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285-89 (2nd Cir. 2021) (holding a vaccine requirement for employees at healthcare facilities was generally applicable despite categorical medical and religious exemptions); *Does 1-6*, 16 F.4th at 30 (holding a vaccine requirement was generally applicable despite categorical exemptions). *See also Phillips v. City of New York*, 775 F.3d 538, 543 (2nd Cir. 2015); *King v. Governor of the State of New Jersey*, 676 F.3d 216, 242-43 (3rd Cir. 2014); *Ungar v. New York City Hous. Auth.*, 363 Fed. App'x. 53, 56 (2nd Cir. 2010).

ii. The RPA Is Generally Applicable Because It Contains Objective, Categorical Exemptions That Do Not Permit Discretion.

Proper application of *Fulton* establishes that the RPA is generally applicable. The RPA itself does not have any individualized exemptions. It contains two exemptions: (1) an exemption for multistate plans under 42 U.S.C. § 18054(a)(6), that exclude abortion coverage, and (2) an exemption for when the law would conflict with federal funding requirements and cause the loss of federal funds. Neither exemption permits discretion. They are each applied by reviewing objective factors: whether they are multistate plans as defined by 42 U.S.C. § 18054 (that exclude the coverage), or whether federal funding requirements are at play, and would be lost as a result. Contrary to Cedar Park's claim (Opening Br. at 41), an insurance commissioner's reliance on its attorneys to determine whether these objective factors are triggered does not change the analysis and in fact can help to ensure impartial and uniform application.

The various exceptions to "health plan" as defined by the Insurance Code are styled by Cedar Park as "exemptions". Opening Br. 13. But they do not permit discretion, and they are not categorical exemptions to the RPA, in any case, which applies to the term "health plan" as defined by WASH. REV. CODE 48.43.005(31) (providing definitions to the general Insurance Code. Title 48). Compare Cedar Park Opening Br. at 41 with Response Brief at 42-43 (describing the various insurance

plans defined under the general Insurance Code, which do not constitute a "health plan."). Cedar Park claims, for example, that self-funded plans provide an exemption. Brief at 13. But ERISA 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 U.S.C. § 1144(a),(b)(2)(B). Strict scrutiny does not apply to a limit on a law to comply with another law. *San Diego Unified Sch. Dist.*, 19 F.4th at 1179-80 (holding an exemption to a vaccine mandate to comply with the Individuals with Disabilities Education Act did not mean the law was not generally applicable). For purposes of *Fulton,* plans that are not defined as "health plans" by the Insurance Code are not exemptions from the RPA that are made available to others but denied to Cedar Park; they could not give Cedar Park any relief, and so they do not affect the general applicability analysis. *Fulton*, 141 S. Ct. 1868, 1878; 1881-82.

The RPA's exemptions are objective and categorical, rendering the law generally applicable under *Smith* and *Fulton*. The exemptions claimed by Cedar Park contain no formal, discretionary, individualized exceptions. Each exemption is broadly applied to a category of individuals, excluded categorically because they are defined by the Insurance Code as something other than a "health plan", or that would objectively be excluded because they violate federal funding mandates. WASH. REV.

CODE § 48.43.073(5). None of the exemptions vest authority in the government to make determinations for individualized exemptions or to employ any discretion.

Because the RPA does not contain individualized, discretionary exemptions—the kind of exemptions contemplated in *Fulton*—the law is generally applicable and any incidental burden on religious practices is permitted because of its legitimate governmental interests. Furthermore, as is set forth below, the RPA in conjunction with 48.43.065[18] ("the conscience objection statute") does not undermine the State's legitimate interests. Various cases throughout the circuit are helpful to the analysis.

Cedar Park's proposed standard should be denied. It would render a vast array of laws subject to strict scrutiny only because they interact with or incorporate superseding laws, and it would hinder the State's ability to draft legislation intended to effectuate important and legitimate government interests. Accepting Cedar Park's assertion that the RPA's provisions are the type of "exemptions" that trigger strict scrutiny would create a rule wherein the most rigorous standard of review was applied to a myriad of laws that are not contemplated by *Smith* or *Fulton.*

[18]WASH. REV. CODE § 48.43.065 is referred to by the State as "the conscience objection statute" and by Cedar Park as "the conscience law." For simplicity, Amici refer to it as "the conscience statute."

iii. The State's Interest Is Not Undermined Because the RPA Does Not Burden Religious Conduct While Permitting Secular Conduct.

"[A] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, at 1877 (quoting *Lukumi*, 508 U.S. 520, 542-546). A law that "treats *any* comparable secular activity more favorably than religious exercise" is not neutral or generally applicable. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). "Whether secular and religious activity are 'comparable' is evaluated 'against the asserted government interest that justifies the regulation at issue' and requires looking at the risks posed, not the reasons for the conduct." *Tingley*, 47 F.4th at 1088 (quoting *Tandon*, 593 U.S. at 62). The *Tingley* Court found that Washington's law prohibiting the practice of conversion therapy on children did not favor secular conduct over religious activity. The Court rejected the therapist's argument that SB 5722's exemptions rendered the law not generally applicable under *Fulton*. *Id.* at 1064, 1088. The Court dismissed the therapist's reference to comments made by lawmakers, suggesting that SB 5722 "will likely" exempt secular counseling while "punishing counseling … informed or motivated by faith-based convictions." *Id.* at 1088. Critically, the *Tingley* Court noted that the therapist was "unable to identify comparable secular activity that undermines Washington's interest in enacting SB 5722 but is permitted under the law." *Id.*

In *Parents for Privacy v. Barr*, the Ninth Circuit found that a school district regulation allowing transgender students to use the school bathrooms, locker rooms, and showers that aligned with their gender identities was generally applicable. 949 F.3d 1210, 1234 (9th Cir. 2020). After a transgender boy requested the school's permission to use the boys' bathroom and locker room at his high school, the school implemented a "School Safety Plan" to ensure the student's access to school facilities and activities. *Id.* at 2018. The school also permitted the student to use the boys' facilities. *Id.* A group of parents opposing the school's decision, argued, in part, that the Student Safety Plan violated their free exercise rights. *Id.* at 1234. The parents claimed "sincere religious belief" that children "must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom." *Id.* This Court found that the law did not treat religious observers unequally—in other words, the law was not underinclusive—"because it does not require only religious students to share a locker room with a transgender student who was assigned the opposite sex at birth." *Id.* at 1236; *see also, Stormans Inc. v. Selecky,* 586 F.3d 1109 (9th Cir. 2009) (finding that Washington's pharmaceutical regulatory scheme requiring delivery of medications including Plan B was not underinclusive).

Nor does the RPA favor secular activity over religious activity. The availability of religious exemptions does not destroy neutrality or general applicability. *Tingley*, 47 F.4th at 1085, 1088. The RPA, read in conjunction with the conscience objection statute does not undermine the State's legitimate and true interest in ensuring that reproductive health care is available to Washington residents. The RPA, itself, does not grant exemptions from health plans provided to or by health care providers, religiously sponsored health carriers, or health care facilities. Those exemptions are provided by the conscience objection statute, WASH. REV. CODE 48.43.065. The stated purpose of that statute is to recognize every individual's "right to exercise their religious beliefs and conscience" by recognizing "the right of conscientious objection *to participating in specific health services*," while "also" recognizing "the right of individuals enrolled with plans containing the basic health plan services to receive the full range of services covered under the plan." WASH. REV. CODE 48.43.065.

As the Ninth Circuit recognized, the exemption provided in the conscience objection statute for those participating in specific health services is not discrimination based on religion because those providers are not "similarly situated" to Cedar Park. *Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*, 860 F. App'x 542, 543-44 (9th Cir. 2021). Those covered under the conscience objection statute are participating in the provision of specific health services, where Cedar

Park, and any other employer for that matter, is purchasing health coverage. Purchasers of health plans are not required to purchase such plans; they can simply choose not to. The RPA does not require any employer to provide health coverage that includes reproductive care.

Cedar Park and its supporting amici make the blanket assertion that the RPA's exemptions render the law underinclusive, yet point to no specific secular activity that is favored in the RPA. In *Lukumi*, for example, the Supreme Court ruled the law banning certain animal sacrifice was underinclusive because the actual intent of the law was to suppress certain religious animal sacrifice despite the fact that the law's purported purpose was to prevent animal cruelty. *Lukumi*, 508 U.S. at 542-546. Here, the actual intent of the law is to ensure Washingtonians can access essential reproductive care (not to suppress certain religious practices). Just as the Ninth Circuit concluded in *Tingley*, that the therapist was "unable to identify comparable secular activity that undermines Washington's interest in enacting SB 5722 but is permitted under the law" (47 F.4th at 1088), the same is true here. Cedar Park is unable to point to any comparable secular activity that is treated more favorably than religious exercise under the RPA because there is none.

2. Washington's RPA Is Rationally Related to Legitimate Governmental Purposes.

The RPA's provision of insurance coverage for abortion care services easily satisfies rational basis review. The RPA's legislative findings identify fourteen

governmental purposes for enacting the statute including protecting gender equity, reproductive health and bodily autonomy and addressing barriers to essential primary health care to allow all Washingtonians the opportunity to lead healthier, more productive lives. As clearly articulated by the Legislature, unintended pregnancies are associated with negative outcomes "such as delayed prenatal care, maternal depression, increased risk of physical violence during pregnancy, low birth weight, decreased mental and physical health during childhood and lower education attainment for the child" and "[r]estrictions and barriers to health coverage for reproductive health care have a disproportionate impact on" marginalized communities who already face extensive barriers to health care access.[19]

Research strongly supports the governmental interests that underly the Legislature's findings. Studies show that the inability to obtain an abortion can result in significant economic hardship and insecurity, that people turned away from getting an abortion are more likely to stay in contact with a violent partner and that "the financial wellbeing and development of children are negatively impacted when their mothers are denied abortion."[20] The health benefits of abortion access are also

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[19]WASH. REV. CODE § 43.48.072 Notes, Findings—Declaration § 2018 c 119 (5), (8).
[20]*The Harms of Denying Woman a Wanted Abortion, Findings From the Turnaway Study,* https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf.

well-documented by many prominent medical groups that have highlighted how abortion denials increase both mental health and pregnancy risks.[21] Health risks associated with lack of abortion access can also have disproportionate impacts on communities of color. In Washington, the rate of all pregnancy-associated deaths for non-Hispanic Black people, and non-Hispanic Native Hawaiian and Pacific Islander people is more than 2.5 times the corresponding rate for non-Hispanic white people.[22]

Abortion care is essential primary care. By ensuring access to abortion services through insurance coverage, the Legislature, through the RPA, protects Washingtonians' long-standing rights to privacy and bodily autonomy, breaks down barriers to health care, reduces health disparities, and allows Washingtonian's the opportunity to lead healthier, more productive lives. The RPA's provision of insurance coverage for abortion care is clearly rationally related to a legitimate government interest.

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[21] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *Abortion Access Fact Sheet,* https://www.acog.org/advocacy/abortion-is-essential/come-prepared/abortion-access-fact-sheet.

[22] WASHINGTON STATE DEPT. OF HEALTH, *Maternal Mortality Review Panel,* https://doh.wa.gov/sites/default/files/2023-02/141-070-MaternalMortalityReviewPanelReport-2023.pdf.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the order dismissing Cedar Park's Free Exercise claim.

DATED this 29th day of January, 2024.

Respectfully submitted,

/s/ Taryn Darling
Taryn Darling, WSBA No. 38276
Adrien Leavitt, WSBA No. 44451
American Civil Liberties Union
of Washington
P.O. Box 2728
Seattle, WA 98111
Phone: (206) 624-2184
tdarling@aclu-wa.org
aleavitt@aclu-wa.org

Counsel for Amici American Civil Liberties Union of Washington Foundation and Northwest Health Law Advocates

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 29, 2024. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 29, 2024.

By: */s/ Taryn Darling*
Taryn Darling, WSBA No. 38276

American Civil Liberties Union of Washington