IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CATHOLIC CHARITIES OF SACRAMENTO, INC., Petitioners, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; DEPARTMENT OF MANAGED HEALTH CARE, *et al.*, Real Parties in Interest.	No. S099822 Court of Appeal No. C037025 Sacramento County No. 00AS03942

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA AND THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES AS AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by state and federal Constitutions and cognate statutes. The American Civil Liberties Union of Northern California, the ACLU Foundation of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties are the three regional California affiliates of the ACLU.

The ACLU has a long tradition of supporting religious freedom, women's equality, and reproductive privacy. All of these important values are implicated in the present case, in which a religiously affiliated social service organization seeks a constitutional exemption from a new state law mandating that employee health insurance plans that offer prescription drug benefits include coverage for contraception.

INTRODUCTION

The Women's Contraception Equity Act ("Contraception Equity Act") requires employment health insurance policies that include prescription drug benefits to cover contraception. Insurance Code Section 10123.196; Health and Safety Code Section 1367.25. The Legislature enacted this workers' health measure to address California's high rate of

unplanned pregnancy, which results in part from the failure of many health insurance plans to cover contraception.

Catholic Charities, a social service nonprofit organization, claims that the state and federal Constitutions prevent the state from ensuring that its employees receive insurance for health care that violates Catholic theological doctrine. But the agency's religious rights do not trump its employees' health. Neither free exercise nor establishment clause principles support Catholic Charities' noncompliance with California's important health policy.

The Legislature crafted a constitutional balance between religious liberty and reproductive health in the Contraception Equity Act. The statute exempts "religious employers" that satisfy four criteria:

> (A) The inculcation of religious values is the purpose of the entity.
>
> (B) The entity primarily employs persons who share the religious tenets of the entity.
>
> (C) The entity serves primarily persons who share the religious tenets of the entity.
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> (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code.[1]

[1] These provisions of the federal tax code exempt from certain tax filings "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order." 26 U.S.C. Sections 6033(a)(2)(i), 6033(a)(2)(iii).

In essence, California has exempted from employment regulation clergy officials, members of religious orders, and teachers at church schools established for religious instruction. These employees, who conduct primarily spiritual activities, share their employer's religious tenets, including its doctrines on compensation. In contrast, the Act does not excuse institutions that provide secular services, such as hospitals, universities and relief agencies, from giving their religiously diverse workforce equitable health benefits, regardless of whether the employing organizations have a religious affiliation. The Legislature decided that workers who provide secular services should not have their employment benefits limited by religious doctrines they may not accept.

The Contraception Equity Act represents a sensitive accommodation of fundamental rights: religious freedom, gender equality and, reproductive autonomy. In challenging the Act, Catholic Charities has adopted an extreme position that elevates its interest in institutional autonomy over all other competing interests, including its own employees' health and religious freedom. The state and federal Constitutions do not invalidate, but support, the Legislature's careful balance of fundamental rights in the Act.

I.

THE ACT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

California's contraceptive equity law is not unusual, and certainly not unconstitutional, in drawing a line between spiritual and secular aspects of a religious organization. The federal courts have created a narrowly defined constitutional exemption from labor laws, distinguishing core liturgical officials from the staffs of hospitals, schools and charities. This line-drawing reflects the unremarkable constitutional principle that a religious organization's relationship with the government differs depending on whether it provides spiritual care to its congregation or furnishes secular services to the public.

When churches conduct worship or religious instruction to their faithful, they have the greatest constitutional autonomy from the state (and, correspondingly, the strongest constitutional barriers against receiving public benefits). In contrast, when religious organizations create agencies that enter the secular world, and offer the public secular services, such as medicine, they may receive both public funds and government regulation. Government oversight of religiously affiliated nonprofits, particularly their relationships with consumers and workers, is familiar and constitutionally permissible.

Catholic Charities is the paradigm of a secular organization that is not exempt from state labor policy. Its employees predominantly do not share the Catholic faith. Its charitable work is secular. It is a 501(c)(3) nonprofit organization, which receives substantial government funds. Catholic Charities serves people of all faiths – and people who adhere to no faith – in California's pluralistic population.

A. The Act Does Not Intrude Into Church Autonomy.

The Constitution does *not* bar the government generally from regulating religious institutions outside of their core religious spheres. "Statutes are not invalid just because they affect a religious organization's operation." *Graham v. Commissioner*, 822 F.2d 844, 851 (9th Cir. 1987). While "applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, this sort of generalized and diffuse concern for church autonomy, without more, does not exempt them from the operation of secular laws. Otherwise, churches would be free from all of the secular legal obligations that currently and routinely apply to them." *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

Catholic Charities claims an "unfettered autonomy" that has never been recognized in constitutional doctrine. It argues that because its motivation for charitable works is religious, California may not ensure its workforce equitable health care. This is precisely the kind of "generalized

and diffuse concern for church autonomy" that courts regularly reject in applying a range of secular laws to religiously affiliated organizations—even where the laws directly collide with church doctrine. Thus, religious organizations have failed to interpose constitutional barriers to compliance with boarding house regulations,[2] teacher certification and curricular standards for religious schools,[3] immigration laws,[4] minimum wage laws,[5] collective bargaining laws,[6] and social security laws.[7] In short:

> In a modern, complex nation with extensive regulation and massive subsidization of the independent sector, some interaction between government and religion is inevitable, often useful, and sometimes in the interest of both. Even in the absence of government funding, the state can and does impose reasonable regulation on the educational, health care and charitable activities of religious organizations.

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[2] *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990).

[3] *Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W.2d 373 (Mich. Sup. Ct. 1986).

[4] *American Friends Service Committee Corporation v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991); *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990).

[5] *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985).

[6] *Tressler Lutheran Home for Children v. National Labor Relations Board*, 677 F.2d 302 (1982); *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 150 N.J. 575, 696 A.2d 709 (N.J. Sup. Ct. 1997).

[7] *United States v. Lee*, 455 U.S. 252 (1982).

> Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 914-915 (2001).

Thus, the "Establishment Clause does indeed place limits on the government's regulatory power, but only when the regulation interferes with inherently religious matters." *Id.* In contrast, government regulation is pervasive when religious institutions conduct "activities that have substantial connections with society . . . In this area, church autonomy interests are relatively weak, and the state's interest in requiring adherence to its regulatory scheme is at its apex." Developments in The Law, *Government Regulation of Religious Organizations*, 100 HARV. L. REV. 1740, 1777 (1987). The critical constitutional line is between such inherently religious activities, such as "prayer, proselytization, and worship," where "belief not only motivates the act, but so infuses the act that the two become intertwined," *Id.* at 1774-S, and "activities that are motivated by religion but are not substantively religious." *Id.* at 1779. The former should be immune from government intrusion; the latter should not. This is the line drawn in the Contraception Equity Act.

The true principle of church autonomy involves First Amendment protection for two discrete aspects of religious practice: the church's relationship with its ministers and the church's control of its theological doctrine. The government may not decide who speaks for the church, a violation of the Free Exercise Clause, and the government may not decide

what the church teaches, a violation of the Establishment Clause. *Equal Employment Opportunity Commission v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996); *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200, 251 n. 19 (D. Conn. 2000). California has violated neither of these principles.

1. Free Exercise: The Church's Relationships with Its Ministers

The cases cited by Catholic Charities immunize from secular labor regulation religious employees, like ministers and seminary teachers, whose responsibilities involve sensitive theological matters such as worship and teaching the faith. The courts have drawn a constitutional line against applying employment laws to core religious employees, because the Free Exercise Clause does not permit the government to delve into the relationship between church and clergy. The "lifeblood" of the church is its relationship to its minister, *McClure v. Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972) and thus the church is entitled to freedom "to select those who will carry out its religious mission." *EEOC v. Catholic University supra*, 83 F.3d at 462. This constitutional autonomy from state intrusion extends to pastors, *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), campus chaplains, *Schmoll v. Chapman University*, 70 Cal. App. 4th 1434 (1999), youth ministers, *Bryce v. Episcopal Church in the Diocese of Colorado*,

121 F. Supp. 2d 1327 (D. Col. 2000), and professors of canon law, *Catholic University, supra*.

But Catholic Charities overlooks the corollary principle, which governs this case: outside a narrowly defined category of clerical employees entrusted with sacerdotal functions, employees at religious organizations are entitled to the protection of labor laws. "Of course, the First Amendment is not implicated when a religious institution makes an employment decision about an employee whose 'duties [do not] go to the heart of the church's function in the manner of a minister or a seminary teacher.'" *Schmoll, supra,* 70 Cal. App. 4th at 1439 n. 4, quoting *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272, 1278 (9th Cir. 1982). The "scope of the ministerial exemption is limited to what is necessary to comply with the First Amendment," and therefore it does *not* accord constitutional immunity to "lay employees of a religious institution if they are not serving the function of ministers." *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999). As a federal court summarized the constitutional framework governing the interaction between antidiscrimination laws and religious employers:

> In contrast to those cases in which courts have barred claims by ministers or other employees with spiritual functions against their churches based on the First Amendment stands a line of cases embodying the corollary principle. In these cases, courts have held that secular or lay employees who do

> not perform essentially religious functions are protected by Title VII [and other labor laws] and that religious institutions are not insulated from liability under Title VII or other antidiscrimination statutes for various forms of discriminatory conduct with respect to such employees.
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> *Smith v. Raleigh District of the North Carolina Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 705 (E.D. N.C. 1999).

In a series of cases, courts have ordered religiously affiliated nonprofit organizations to grant male and female employees equal benefits, despite conflicting scriptural doctrines regarding gender roles, family leadership, and civil rights enforcement. *United States Department of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450 (W.D. Va. 1989), *aff'd sub nom. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982); *Equal Employment Opportunity Commission v. Tree of Life Christian Schools*, 751 F. Supp. 700 (S.D. Ohio 1990); *Equal Employment Opportunity Commission v. First Baptist Church,* 59 Fair Empl. Prac. Cas. 517 (N.D. Ind. 1992). The benefits cases squarely reject the claim that Catholic Charities is entitled to shape the compensation of its employees according to Catholic doctrine.

These cases also illustrate that the government may distinguish employees according to the spiritual or secular nature of their functions for

purposes of determining the applicability of labor policy. The judicial tests for defining ministerial employees exempt from labor laws echo the criteria in the Contraception Equity Act. The leading case on the ministerial exemption established, "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship, he or she should be considered clergy" for purposes of exemption from the federal antidiscrimination law. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).[8]

A religious institution's characterization of its employee's role is not conclusive, even where the employee has been ordained. Courts examine the employee's actual functions. Employees are entitled to labor law protection where they "are not intermediaries between church and congregation, attend to the religious needs of the faithful, or instruct students in the whole of religious doctrine." *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477, 485 (5th Cir.

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[8] *Montrose Christian School Corporation v. Walsh*, 363 Md. 565, 770 A.2d 111 (Md. Ct. App. 2001), cited by Catholic Charities, is consistent with this line of cases. The flaw in Maryland's statutory exemption from its antidiscrimination law was not that it distinguished employees based on their spiritual or secular functions; the problem was that the statute exempted only employees whose duties were "exclusively religious." The term "exclusively" nullified the exemption, for even ministers occasionally performing secular chores. The court indicated that had the Maryland Legislature used the definition of the California Act—"primarily"—in defining religious employees, the statute would have been constitutional.

1980). *See, e.g.*, *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998); *Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200 (D. Conn. 2000); *Vigars v. Valley Christian Center of Dublin, California*, 805 F. Supp. 802 (N.D. Cal. 1992); *Tressler Lutheran Home for Children v. National Labor Relations Board*, 677 F.2d 302 (3d Cir.1982); *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infants Jesus Elementary School*, 150 N.J. 575, 696 A.2d 709 (N.J. Sup. Ct. 1997).

In short, "courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Smith v. United Methodist Church*, *supra*, 63 F. Supp. 2d at 718. The California Legislature did not violate church autonomy by applying the contraceptive law to Catholic Charities' employees, who perform secular social services.

2. The Establishment Clause Aspect of Autonomy: Religious Doctrine.

The Contraception Equity Act does not violate the Establishment Clause aspect of church autonomy, which bars secular authorities from resolving matters of theological doctrine. This principle, arising most frequently in church property disputes, prohibits government from choosing between "competing religious visions." *EEOC v. Catholic University*, *supra*, 83 F.3d at 465. Thus, for example, a court may not adjudicate a tenure dispute involving a professor of canon law at Catholic University, for the litigation

would necessarily require a judge to determine the quality of the plaintiff's scholarship in matters of ecclesiastical law. *Id*. Similarly, the government may not cap tuition at parochial schools without necessarily influencing the nature and quality of religious instruction. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979).

The government may, however, impose secular educational standards on religious schools, such as licensing, teacher certification, and curricular standards, without violating the autonomy principle. *Windsor Park Baptist Church, Inc. v. Arkansas Activities Association*, 658 F.2d 618 (8th Cir. 1981); *Sheridan Road Baptist Church v. Department of Education*, 426 Mich. 462, 396 N.W.2d 373 (Mich. Sup. Ct. 1986). Similarly, the state may apply labor laws guaranteeing equal benefits to religious schools, for its laws do not encroach into such matters as the content of instruction, which is entitled to doctrinal autonomy. *EEOC v. Tree of Life Christian Schools*, *supra*. In applying these laws, the government is not determining the institution's religious tenets, but applying the state's secular policy.

Here, California is not entering into, far less adjudicating, a dispute among Catholics as to whether use of birth control is sinful. The Act says nothing about church doctrine; it expresses California's secular state policy. Applying this labor law to ensure equal health benefits to Catholic Charities' workers does not implicate theological autonomy.

B. The Contraception Equity Act Is Neutral And Generally Applicable.

Catholic Charities claims that the California Legislature passed the Act to disadvantage the Catholic Church and that the Act is therefore unconstitutional. Borrowing snippets of case law involving government persecution of unpopular, minority faiths, such as Jehovah's Witnesses, Scientology, Santeria, and the Unification Church, Catholic Charities attempts to characterize the Contraceptive Equity Act as a product of religious gerrymandering aimed at Catholicism. There is simply no support for this charge, either in the text of the law or its legislative history. The law applies neutrally, and its exemption *benefits* the Catholic Church, which requested it.

1. The Mandate is Neutral and Generally Applicable.

The Woman's Contraception Equity Act requires employers to include contraception in their prescription drug package. It applies to large and small employers throughout California. It is neutral and generally applicable. It is light years from the ordinances condemned in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). There, the local government enacted several ordinances with a careful pattern of prohibitions and exclusions to ensure that only animal killings engaged in for Santeria's religious rituals were criminalized; all secular (and mainstream religious) animal killings remained lawful.

The Woman's Contraception Equity Act, in contrast, does not apply only to religious employers and its purpose and effect are not to suppress religious practices.[9] This neutral law does not violate either the Free Exercise or Establishment Clauses, despite its conflict with Catholic theological doctrine on contraception.

a. Free Exercise: No Exemption from Neutral Laws.

The federal Free Exercise Clause does not require that the employer obtain an exemption from a neutral labor law, even if it imposes a burden on a religious employer. *Employment Division v. Smith*, 494 U.S. 872 (1990); *American Friends Service Committee Corporation v. Thornburgh,* 961 F.2d 1405 (9th Cir. 1992); *Intercommunity Center for Justice and Peace v. INS*, 910 F.2d 42 (2d Cir. 1990).

Catholic Charities makes a weak effort to carve out a "hybrid rights" exception to *Smith*, claiming that the Act violates its free speech rights as well as its free exercise rights. In *Smith*, the Supreme Court explained its prior precedents, which do require exemptions from neutral laws, as implicating both religious liberty and a separate constitutional right. The

[9] In earlier phases of this litigation, Catholic Charities rested its gerrymandering claim exclusively on the exemption language. Catholic Charities more recently has changed its approach, arguing that the entire Act, although applying to every California employer, was targeted at Catholic institutions (the asserted "Catholic gap"). The State and the Act's authors as amici curiae show that this extraordinary accusation rests on a distorted revision of the legislative history.

lower federal courts have disagreed about whether the Court created a new "hybrid rights" exception to the *Smith* doctrine, and, if so, what showing it demands of a religious adherent. See *Thomas v. Anchorage Equal Rights Commission,* 220 F.3d 1134 (9th Cir. 2000) at 1147-1148 (O'Scannlon, concurring) and at 1150 (Kleinfeld, dissenting).

But even the most expansive view of the hybrid rights exception would not cover Catholic Charities. A "plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999).

Catholic Charities has failed to establish a colorable claim that providing contraceptive coverage violates its expressive freedom. The Act does not affect Catholic Charities' expressive rights. The agency's compliance with the Act is no more tantamount to endorsement of birth control, than a Catholic university's allowing a gay rights student group access to its facilities under the compulsion of a local ordinance constitute endorsement of homosexuality contrary to its theology. *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 20 (1987). Compliance with a law does not violate the speech rights of a person who disagrees with it. *Buhl v. Hannigan*, 16 Cal. App. 4th

1612, 1626 n. 11 (1993) (dismissing a similar claim as "ludicrous"). Catholic Charities remains free to denounce the use of contraceptive drugs and devices and to urge its employees to refrain from using them.

b. The Establishment Clause: No Religious Discrimination.

The Act does not violate the Establishment Clause simply because it corresponds with the views of some faiths on birth control and collides with the views of others. The Act is the mirror image of the federal Hyde Amendment, which eliminated Medicaid coverage for abortion. The Supreme Court rejected a claim that the statute violated the Establishment Clause because it incorporated "into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Harris v. McRae*, 448 U.S. 297, 319 (1980). The Court stated:

> Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson v. Board of Education*, 330 U.S. 1, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. *Ibid.* The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. 491 F. Supp. at 741. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of

> the Roman Catholic Church does not, without more, contravene the Establishment Clause.
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> 448 U.S. at 319-320.

The Supreme Court has repeatedly applied this principle to uphold Sunday closing laws,[10] federal grants to religious organizations for teen pregnancy prevention,[11] selective service laws,[12] denial of charitable deduction for payments to religions in expectation of spiritual services,[13] and denial of federal tax exemption to racially discriminatory colleges.[14] Laws frequently conflict with some religious tenets and harmonize with other religious tenets, but that fact does not make the laws discriminatory nor make the lawmakers guilty of religious persecution.

This principle is equally applicable to labor laws that conflict with religious doctrines. For example, in *Tree of Life Christian Schools*, the court rejected a religiously affiliated employer's argument that the Equal Pay Act violated the Establishment Clause because it had the "effect of

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[10] *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

[11] *Bowen v. Kendrick*, 487 U.S. 589, 604 n. 8 (1988).

[12] *Gillette v. United States*, 401 U.S. 437, 452 (1971).

[13] *Graham v. Commissioner*, 822 F.2d 844, 853 (9th Cir. 1987).

[14] *Bob Jones University v. United States*, 461 U.S. 574, 604 n. 30 (1983) (rejecting claim that "denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe that racial intermixing is forbidden.").

favoring those religions whose beliefs do not conflict with majoritarian precepts," disfavoring those which feel that God had ordained different roles for men and women. 751 F. Supp. at 713. Similarly, the Woman's Contraception Equity Act does not violate the Establishment Clause simply because it conflicts with Catholic doctrine on birth control.

2. The Religious Employer Exemption Does Not Render the Act Discriminatory.

Since the Act's mandate is plainly neutral and generally applicable, Catholic Charities attempts to create an image of unconstitutional religious gerrymandering from the scope of the religious employer exemption. Since the exemption *benefits* the Catholic Church—which lobbied for it—it does not constitute religious discrimination.

The California Act vividly contrasts with the Minnesota law struck down in *Larson v. Valente*, 456 U.S. 228 (1982), on which Catholic Charities relies. In *Larson*, the Legislature crafted an exemption that, by its terms and on its face, discriminated between novel and established religious organizations. By defining the exemption according to the criterion of internal fundraising, the statute excluded mainstream religions and included emerging religions for regulation. The exemption burdened new religions and benefited established faiths.

Here, in contrast, Catholic organizations fall on *both* sides of the Contraception Equity Act's religious employer exemption. The exemption

benefits the Catholic Church (and, indeed, may exclusively benefit it) as the Court of Appeal observed:

> If, as Catholic Charities alleges, Catholicism is the only religion that prohibits artificial contraception and, thus, is the only one burdened by the limitation of the exemption, then it also is the only religion that benefits from the religious employer exemption enacted by the Legislature. This cannot be viewed as an attempt to target Catholic religious practices for unfavorable treatment.
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> 109 Cal. Rptr. at 191.[15]

Catholic Charities' complaint is simply that the religious employer exemption does not go as far as it would like. But the government is under no constitutional obligation to exempt all religiously affiliated organizations from labor laws if it exempts the ministry. Nor is the government bound to accept the church's definition of its affiliated organizations as integral to the church. In *Dole v. Shenandoah Baptist Church*, *supra,* a religious school made and lost a similar argument:

> Shenandoah relies on *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) and *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) for the proposition that the government should be required to accept the church's characterization of Roanoke Valley [school] as an inseverable part of the church. Shenandoah's reliance is misplaced. These cases only considered whether

[15] Similar exemptions, that apparently benefit a single religion because the doctrines that conflict with secular laws are not widely shared, have been challenged on Establishment Clause grounds as preferential treatment of religion. At present, they have been upheld. *Children's Healthcare is a Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000); *Kong v. Min de Parle*, 2001 WL 1464549 (N.D. Cal. 2001), *appeal pending.*

> legislators could exempt religious organizations from certain statutory provisions without running afoul of the First Amendment. *They concluded that such exemptions were constitutionally permissible; they did not hold that they were mandatory.*
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> 899 F.2d at 1396 (emphasis added).

Catholic Charities' claim that the Legislature cannot exempt the spiritual church without also exempting all of its affiliated enterprises, hospitals, colleges, and charities, no matter how secular, is a radical and unrecognized constitutional position.

The fact that the religious employer exemption is not as broad as Catholic Charities would like hardly makes the Contraception Equity Act unconstitutional, simply because California *did* exempt the Catholic Church. Limited religious accommodations are not proof of bias, but its opposite. *KDM v. Reedsport School District*, 196 F.3d 1046, 1501 (9th Cir. 1999). Indeed, a court should give "more deference to the legislative choice when a religious objector seeks exemption from a statutory scheme that already admits of some exemptions for religious adherents." *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 42 (1987) (_____, J.concurring), citing *United States v. Lee*, 455 U.S. 252, 260-261 (1982).

Moreover, Catholic Charities simply lacks the overwhelming evidence of government bias against unpopular, small or new religions that infected all cases in which courts found religious gerrymandering. In

Larson, the Minnesota Legislature crafted the new exemption—which narrowed a pre-existing exemption for all religions—expressly to target the "Moonies." 456 U.S. at 253-255. In *Lukumi*, the Hialeah city council passed the ordinances in direct response to the Santeria religion's plan to establish a new church. 508 U.S. at 525-526. And in *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 2 F.3d 1514 (11 Cir. 1993), Clearwater commissioners had campaigned on a platform of driving Scientology out of town and proclaimed that its adherents "lie, steal and cheat." 2 F.3d at 1532. The legislative materials provided "explicit evidence that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation." 2 F.3d at 1531.

The California Legislature was simply not on a similar campaign to persecute the Catholic Church. While the First Amendment of course protects mainstream as well as minority faiths, majoritarian faiths are rarely, if ever, the targets of governmental discrimination.[16] Here, the legislative comments are respectful of Catholicism, and indeed discuss the

[16] Catholic Charities argues that while Catholicism is a mainstream faith, its doctrines on birth control are unpopular. But that proves only that the neutral law, embodying a secular and popular policy (access to contraception), happens to collide with a religious tenet. It does not indicate bias.

Church only in response to its successful efforts to obtain an exemption from the law.

Government has broad discretion to fashion an accommodation for religion. *EDD v. Smith*, *supra,* 494 U.S. at, 890; *East Bay Asian Local Development Corp. v. State of California*, 24 Cal. 4th 693, 711-712 (2000). In the Contraception Equity Act, the California Legislature fashioned a neutral exemption that achieved a sensitive balance between the church's need for religious freedom and workers' need for health care.

C. The Act Does Not Entangle the State With Religion.

In arguing that the Act creates excessive governmental entanglement with religion, Catholic Charities mischaracterizes the effect of the exemption and exaggerates the regulatory oversight necessary to implement the law. In fact, protecting Catholic Charities' employees involves far less contact between church and state than many programs upheld in case law.

Catholic Charities' fundamental argument that the state cannot distinguish between religious and secular activities, without unconstitutionally "defining" the Catholic Church, finds no support in the Constitution. Because the government may fund secular but not religious activities, courts, legislators and administrators are frequently obligated to determine whether religious organizations are performing theological or secular activities. For example, the Supreme Court upheld laws providing public funds to religiously affiliated hospitals (*Bradfield v. Roberts*, 175

U.S. 291 (1899)) and universities (*Tilton v. Richardson*, 403 U.S. 672 (1971)) only after determining that their work was secular. In neither of those cases did the legislature or the court "define" the church and its organizations or determine that religious organizations lacked a religious motivation for providing health care and higher education. The government determined only that the functions were sufficiently secular to permit state subsidy.

Here, California is not "defining" Catholic Charities as secular, in derogation of the religious motivation for its social service work. Rather, the Act simply exempts the church organizations conducting core religious activities—those barred from receiving public funds, and, correspondingly, immune from regulation—from the secular activities that do receive public subsidies and, correspondingly, may be subject to labor laws. This line drawing is neither unfamiliar not unconstitutional.

Catholic Charities' subsidiary entanglement claim focuses on the actual administration of the exemption. Catholic Charities paints a lurid picture of a governmental inquisition, with state officials interrogating workers about their faith. Catholic Charities not only exaggerates the need for state inquiry into the applicability of the exemption criteria, but, more basically, ignores the functional interrelationship among the criteria.

The four criteria defining a "religious employer"—*all* of which must be satisfied to qualify for an exemption—together define an organization

engaged in core religious activities, such as worship services and inculcation of religious doctrine. One criterion—exemption from federal tax filings—is obviously easily ascertainable. To qualify for that federal tax exemption an entity must be a church, an integrated auxiliary of a church, a convention or association of churches, or "the exclusively religious activities of any religious order." 26 U.S.C. Section 6033(a)(2)(i), 6033(a)(2)(iii). An entity that qualifies will probably satisfy the Contraception Equity Act's other three criteria, which logically flow from the status as a church, integrated auxiliary or religious order. Those institutions primarily exist to inculcate religious values. Their employees and service recipients primarily share the entity's faith: those conducting worship and religious instruction, and those receiving these spiritual services, would naturally be co-religionists.

Catholic Charities asserts that neither it nor the state can determine whether its workers primarily share its faith (although it alleges with remarkable precision that 74% of its workforce is not Catholic). But this is simply untrue. An entity does not create a workforce comprised primarily of co-religionists by accident. It consciously engages in religious scrutiny in hiring, if its employees' responsibilities (such as teaching theology) make their religious background relevant to their work. Even where an entity exercises its prerogative to hire only co-religionists for nonprofit affiliates that engage in secular work (*Corporation of the Presiding Bishop*

v. Amos, 482 U.S. 327 (1987)), it will certainly *know* that its labor force meets the Act's exemption criteria. There is no reason to speculate that the state will challenge that representation, particularly when the other factors defining a religious entity are present.

Catholic Charities plainly does not qualify for an exemption; it satisfies none of the Act's criteria. The Catholic Church and its religious orders plainly do qualify. For all the hypothetical confusion it posits, Catholic Charities has not identified any religiously affiliated entity that would raise a close question as to its qualification for the exemption. Neither the entities nor the state would experience any confusion in administering the Act.

The Contraception Equity Act, therefore, does not entangle government officials with religion. The Supreme Court has held that "generally applicable administrative and record keeping regulations may be imposed on religious organizations without running afoul of the Establishment Clause." *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 395 (1990). Laws that require religious institutions to pay taxes on religious publications,[17] file minimum wage records[18] or pay federal employment taxes,[19] do not unduly entangle the government with religion.

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[17] *Id.*

[18] *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-306 (1985).

In recent years, the Supreme Court has allowed greater public funding of religiously affiliated organizations, and has, in the process, allowed expanded regulatory oversight into sensitive areas. For example, the Court has permitted federal officials administering grants to review religious organizations' teen pregnancy programs, materials and clinics. *Bowen v. Kendrick*, 487 U.S. 589, 616-617 (1988). The Court has allowed government officials to visit parochial schools to ensure that remedial education conducted by public school teachers remains secular. *Agostini v. Felton*, 521 U.S. 203, 232-235 (1997); *see also KDM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999) (school authorities' case-by-case determination of whether special education services occur in "religiously-neutral" setting not excessive entanglement). The interaction between church and state upheld in case law far exceeds anything necessary to implement California's Contraception Equity Act.

II.

THE ACT DOES NOT VIOLATE THE CALIFORNIA CONSTITUTION

Because the United States Constitution does not require a religious exemption from the Contraception Equity Act's neutral requirement of contraceptive coverage, Catholic Charities' free exercise claim must rest

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[19] *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir.

exclusively on the California Constitution. Although our state Constitution protects religious freedom more broadly than the federal Constitution, Catholic Charities is not constitutionally exempt from the Contraception Equity Act. Nothing in Article I, Section 4 requires that Catholic Charities be excused from complying with California's health benefits policies. The Act does not substantially burden Catholic Charities' exercise of religion. Even if it did, protecting Catholic Charities' labor force is necessary to promote the state's paramount interests in all workers' health, equality and privacy.

A. Article I, Section 4 Requires Accommodation of Religion Substantially Burdened by Neutral Laws.

Article I, Section 4 of the California Constitution remains unaffected by the 1990 United States Supreme Court decision constricting the federal free exercise clause. *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). The California Constitution requires, as it has for over 30 years, strict scrutiny of laws that impose a substantial burden on religion. Applying this Court's traditional framework for independent interpretation of the state Constitution requires that California maintain its strong protection for religious freedom.

In interpreting the state Constitution, this Court, of course, is not bound by federal precedent construing the parallel federal text. The "state

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courts, in interpreting constitutional guarantees contained in state constitutions, are '*independently responsible* for safeguarding the rights of their citizens.'" *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 261 (1981), quoting *People v. Brisendine*, 13 Cal.3d 528, 551 (1975) (emphasis added in Myers). *See also*, California Constitution, Article I, Section 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.").

In *People v. Teresinski*, 30 Cal. 3d 822 (1982), this Court identified four factors that support departing from United States Supreme Court constructions of the federal Constitution: textual differences; stability of precedent; doctrinal criticism of the federal opinion; and maintaining rights Californians have come to enjoy. All four factors compel a conclusion that Article I, Section 4 exempts religious adherents from the application of neutral laws that substantially burden their faith, absent a compelling need for statewide uniform application.

First, Article I, Section 4's protection for religious freedom has a language and history totally distinct from the federal Free Exercise Clause. Article I, Section 4 of the California Constitution provides:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State.

This language has no parallel in the United States Constitution. Included in California's original 1849 Constitution, the provision was strengthened in the 1879 constitutional revision. The framers substituted the word "guaranteed" for the original language, which "allowed" the free exercise and enjoyment of religion. *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 799-800 n. 2 (1978) (Bird, C.J., concurring). The California Constitution, by its express language, protects religiously motivated behavior unless it is "licentious"[20] or endangers paramount state interests. Thus, religious freedom must be balanced against important public needs when faith and law conflict. The strict scrutiny test mandates this balancing: the burden on religious liberty is weighed against the importance of the law's objectives. *People v. Woody*, 61 Cal. 2d 716, 718 (1964).

Moreover, California's Article I, Section 4 was not derived from the First Amendment but from parallel language in the New York State Constitution. The influential New York constitutional provision safeguarding religious practices was also adopted by other states fashioning their highest law, including Minnesota. Following *Smith*, the Minnesota Supreme Court declined to constrict the interpretation of its state provision, retaining traditional strict scrutiny of laws that burden free exercise. *State v. Hershberger*, 462 N.W.2d 393 (1990). In light of the common source of

[20] This language was apparently included to deny constitutional protection to plural marriage, even if mandated by religion.

the Minnesota and California constitutions, the *Hershberger* opinion provides better guidance than the federal *Smith* ruling, interpreting a wholly different constitutional text.

Second, the United States Supreme Court's 1990 *Smith* opinion represented a sharp constriction of federal free exercise doctrine. *Compare Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963) with *Smith*, *supra*. In this situation, respect "for our Constitution as 'a document of independent force' forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter." *People v. Pettingill* 21 Cal.3d 231, 248 (1978) (citation omitted).

Third, rarely has a United States Supreme Court opinion attracted as much academic and judicial criticism as *Smith*. In *Attorney General v. Desilets*, 418 Mass. 361, 321, 636 N.E.2d 233, 236 (S.J.C. Mass. 1994), the Massachusetts Supreme Judicial Court refused to follow *Smith*, calling it "a much criticized opinion that weakened First Amendment protection for religious conduct." See also, *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 1126-1128 (1996) (Baxter, J., dissenting, citing extensive scholarly criticism of *Smith*). This Court has in the past "been influenced not to follow parallel federal decisions by the vigor of the dissenting opinions and the incisive academic criticism of those decisions." *Teresinski*, 30 Cal. 3d at 836, citing *Myers*, 29 Cal. 3d at 267 n. 17 and

People v. Bustamonte, 30 Cal. 3d 88, 100-101 (1981). The overwhelming force of criticism leveled at *Smith*, both by legal scholars and dissenting members of the United States Supreme Court, indicates that the opinion is not entitled to deference.

Fourth, the *Smith* decision, if followed by this Court, would overturn established constitutional doctrine affording greater rights to California's religiously pluralistic people. For more than 50 years, Californians have been entitled to follow their religious convictions, when they conflicted with law, unless accommodations jeopardized important state policies. This framework has not interfered with the promotion of important public policies, such as child abuse protection[21] or equal access to housing.[22] This case also illustrates the flexibility of the traditional standard, for its application results in ensuring contraceptive coverage for Catholic Charities' workers.

Accordingly, California's traditional framework for analyzing free exercise claims governs this case. Catholic Charities must show that the Contraception Equity Act substantially burdens the exercise of its religion. If the law does impose a substantial burden on religion, the state bears the burden of showing that including Catholic Charities' workers within the law's protection is necessary to achieve a compelling interest. In this case,

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[21] *Walker v. Superior Court,* 47 Cal. 3d 112 (1988).

both sides of the constitutional equation require that Catholic Charities comply with the Contraception Equity Act.

B. The Act Does Not Substantially Burden Catholic Charities' Religious Exercise.

A religious freedom claim involves a two-part threshold analysis. The claimant's conduct must be an exercise of sincerely held religious beliefs, and the government's action must amount to a substantial burden on religious exercise. The first inquiry is subjective: it evaluates the sincerity of the claimant's religious motivation. The second inquiry is objective: it evaluates the effect of the challenged governmental action on religion.

Catholic Charities claims that Catholic doctrine imposes obligations and prohibits acts, which together create an unavoidable conflict with the contraceptive equity law. It describes its religious tenets as follows: Catholic theology compels the church to engage in social service work; it considers the use of artificial contraception to be a grave sin by any person, including a person with a different religious tradition; it prohibits a devout Catholic from facilitating any person's use of birth control by subsidizing contraception; and it compels a Catholic employer to provide comprehensive health insurance benefits, including prescription drugs, to its workers. Although, as the state points out, Catholic Charities' behavior

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[22] *Smith v. Fair Employment and Housing Commission*, *supra*.

has not always been consistent with its claimed theology,[23] this Court need not engage in the threshold subjective inquiry into the sincerity of Catholic Charities' asserted religious convictions. Catholic Charities fails the second aspect of its burden: it cannot establish that the Contraception Equity Act objectively imposes a substantial burden on the exercise of its religion.

California requires only that an employee insurance package with a prescription drug benefit include contraceptive coverage. This mandate does not significantly burden Catholic Charities' exercise of its religion, because the link between state compelled action and religiously prohibited behavior is objectively too attenuated to trigger strict scrutiny. The Act compels Catholic Charities to pay money, which purchases insurance, which covers a range of health care, which ultimately may subsidize an employee's use of birth control in her private life, far removed from the office.

Constitutional precedents establish that the long journey between a devout person's paying money and *someone else's* use of that money to engage in behavior that the devout person considers a sin is too attenuated to compel the government to excuse the religious adherent from paying taxes or fees. For example, paying taxes that subsidize Medicaid abortion

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[23] For example, Catholic Charities does not in fact provide disability insurance to its employees.

coverage inflicts so attenuated an injury on taxpayers religiously opposed to abortion that it is inadequate even to support standing to assert a free exercise claim. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000). A taxpayer must show that tax levies cause "direct interference" with religion, "such as use of public funds to prevent members of religious groups from voicing their opposition to abortion." 225 F.3d at 936.[24]

Similarly, a public university does not substantially burden students' exercise of religion by compelling them to pay mandatory fees, although the fees subsidize student health services, including abortion, and the objecting students sincerely consider abortion to be a grave sin. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Erzinger v. Regents of University of California*, 137 Cal. App. 3d 389 (1983). As the state Court of Appeal explained:

> Plaintiffs do not allege or show the University's collecting and using the fees coerced them from holding or expressing their views against abortion. They do not allege or show the University coerced them to advocate a position on abortion contrary to their religious views. They do not allege or show the University forced them to join any pro-abortion organization. They do not allege or show the University forced them to use the student health service programs,

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[24] The courts have routinely rejected similar claims for exemption from paying taxes or providing benefits which conflict with its religious doctrine. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000); *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999); *Droz v. Commissioner,* 48 F.3d 1120 (9th Cir. 1995).

> receive pregnancy counseling, have abortions, perform abortions or endorse abortions.
>
> *Erzinger*, 137 Cal. App. 3d at 392-93.

The Ninth Circuit has also ruled that mandatory fees used to buy student health insurance do not substantially burden the religious rights of students with sincere religious convictions against abortion, because the government's compulsion is only to pay money. The students "are not required to accept, participate in, or advocate in any manner for the provision of abortion services." *Goehring*, 94 F.3d at 1300.[25]

California's Contraception Equity Act parallels the tax upheld in *Tarsney* and the student health fees upheld in *Erzinger* and *Goehring* in its impact on religious exercise. The challenged law requires Catholic

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[25] *Goehring* was brought under the federal Religious Freedom Restoration Act, 42 U.S.C. Section 2000bb (1993) (RFRA), which restored strict scrutiny for free exercise claims following the United States Supreme Court's constriction of First Amendment doctrine in *Smith*. The United States Supreme Court ruled that RFRA is unconstitutional as applied to state and local governmental action. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Most courts have concluded that RFRA is constitutional as applied to the federal government. *See, e.g., Sutton v. Providence Hospital*, 192 F.3d 826 (9th Cir. 1999).

Congress intended courts to interpret RFRA according to the principles developed in pre-*Smith* case, such as *Wisconsin v. Yoder, supra*, and *Sherbert v. Verner*, *supra*, which require strict scrutiny of laws imposing a substantial burden on religion. 42 U.S.C. Section 2000bb(b). Since that framework also governs California constitutional free exercise claims under Article I, Section 4 (*People v. Woody, supra*), RFRA cases, like pre-*Smith* federal free exercise cases, are relevant in analyzing free exercise claims under the California Constitution.

Charities only to provide equitable coverage to its workers if it chooses to include prescription drug benefits in its employees' health insurance. California does not compel devout Catholics to engage in behavior, such as buying or using birth control, in violation of their faith. Insurance typically provides a broad range of benefits, some of which employees will never use. Because Jehovah's Witnesses believe that accepting blood transfusions is a serious sin, devout Jehovah's Witnesses presumably do not use transfusion coverage; but this is a far cry from asserting that a Jehovah's Witness employer is constitutionally entitled to purchase for a religiously diverse workforce customized health plans that exclude coverage for blood transfusions in the face of contrary legislation.

Catholic Charities remains free to attempt to persuade its Catholic and non-Catholic employees not to buy or use contraception. Providing a comprehensive health plan does not interfere with Catholic Charities' ability to oppose birth control and to convey its moral message to its adherents. The California Constitution does not give Catholic Charities the right to refuse to provide its workers health insurance covering contraceptive services, any more than it would give Catholic Charities the right to exact from all employees a promise that they will not use any part of their salaries to buy contraceptives.[26] The link between the conduct the

[26] At oral argument in the court below, counsel for Catholic Charities was asked whether the agency's religious tenets would be burdened if it simply

state requires and the behavior Catholic Charities considers sinful is not sufficiently direct to require an exemption from California's health benefits law.

Catholic Charities' allegation that its faith forbids "facilitating" its employees' sinful behavior by paying for their birth control insurance does not establish that the Act burdens its religion. The Ninth Circuit rejected a parallel claim in *Goehring*:

> The University stipulated that the plaintiffs' sincerely held religious beliefs prohibit them from financially contributing to abortions. However, merely because the University has conceded that the plaintiffs' beliefs are sincerely held, it does not logically follow, as the plaintiffs contend, that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.
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> 94 F.3d at 1300 n. 5.

Similarly, in *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143 (1996),[27] a plurality of this Court concluded that

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eliminated the prescription drug benefit and raised the salaries of its employees to allow them to purchase their own medications, including contraception. Catholic Charities' lawyer responded that he was not prepared to say that this would be permissible. (cite.)

In this context, the employees' rights to use their salaries in any way they see fit should clearly prevail over the employer's religious rights. Catholic Charities' inability to acknowledge this position forthrightly illustrates how extreme an imbalance among competing concerns it has staked out in this case.

[27] *Smith* discussed the burden on religion in applying RFRA. That analysis parallels free exercise analysis under Article I, Section 4. See footnote 5, *supra*.

California's fair housing law did not substantially burden a devout landlady's exercise of religion, although she sincerely believed that renting to unmarried couples was a personal sin so grave that it would prevent her from meeting her husband in heaven. 12 Cal. 4th at 1167-1177. Like Catholic Charities, the landlady asserted that her state-compelled conduct facilitated someone else's sin, which violated the commandments of her faith. Although accepting the sincerity of her convictions, the plurality concluded that the law's compulsion to rent housing to tenants whose behavior she viewed as sinful did not objectively burden the exercise of *her* religion so substantially as to require a constitutional exemption.

Thus, Catholic Charities' free exercise claim fails at the threshold. Even if it did not, California's Contraception Equity Act may be applied to Catholic Charities, because compelling interests require including Catholic Charities' employees within the law's protective ambit.

C. The Act's Application to Catholic Charities Is Necessary to Achieve Compelling State Interests.

Granting Catholic Charities the right to ignore California's Contraception Equity Act would directly harm its workers' rights. As this Court recognized in *Smith*, there is not "a single case in which the [United States] Supreme Court exempted a religious objector from the operation of a general law when the court also recognized that the exemption would

detrimentally affect the rights of third parties."[28] 12 Cal. 4th at 1174. *See also, People v. Peck*, 52 Cal. App. 4th 351, 359 (1996). The Supreme Court has recognized, in the context of social security, another worker protection law, that granting an exemption to a religious employer "operates to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982).

Catholic Charities' noncompliance with California law would injure three fundamental rights of the people who work for the social services agency: gender equality, reproductive autonomy, and religious freedom. These interests, themselves of constitutional stature, should not be sacrificed by granting Catholic Charities an exemption from the law.

1. Equality

An employer that omits contraceptive coverage from a comprehensive benefit package violates women's right to workplace equality. *Erikson v. Bartell Drug Company*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); *EEOC, Decision on Coverage of Contraception*, (December

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[28] The *Smith* plurality included an evaluation of the impact of the claimed religious accommodation in its discussion of burden on religion. 12 Cal. 4th at 1174-1176. Justice Kennard, concurring and dissenting, argued that the impact of an exemption on third parties should be evaluated at the other side of the constitutional equation, that is, in assessing the countervailing strength of the state's interest in refusing an accommodation. 12 Cal. 4th at 1204-1205. We agree with Justice Kennard that the analysis falls more logically on the countervailing interest side of the equation, and discuss it in connection with assessing the state's interest in contraceptive equity.

14, 2000) <http://www.eeoc.gov/docs/decision-contraception.html>. Prescription contraceptives are a form of health care available *only* to women, and the exclusion of birth control drugs and devices is therefore a form of sex discrimination in compensation. *Id.* This discrimination undermines women's control over childbearing, which directly affects women's ability to participate equally in the labor force.

Equal treatment in employment is a compelling state interest. It would "be difficult to exaggerate the magnitude of the state's interest in ensuring equal employment opportunities for all, regardless of race, sex, or national origin." *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). Ending sex discrimination in employment benefits is "equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *EEOC v. Fremont Christian School*, *supra*, 781 F.2d at 1369, quoting *EEOC v. Pacific Press Publishing Association*, *supra*, 676 F.2d at 1280. Ensuring equal benefits to men and women promotes "interests of the highest order." *Dole v. Shenandoah Baptist Church*, *supra,* 899 F.2d at 1398; *EEOC v. Tree of Life Christian Schools*, *supra,* 751 F. Supp. at 712.

Catholic Charities argues that California's Contraception Equity Act is not necessary to achieve the state's interest in workplace equality,

because employed women may buy the contraceptives excluded from their insurance packages. But this contention misunderstands the values at stake in equal treatment. The failure to provide women with medical benefits equivalent to benefits provided to men is the discriminatory act. The "act of discrimination itself demeans human dignity." *Walnut Creek Manor v. Fair Employment & Housing Commission*, 54 Cal. 3d 245, 287 (1991) (Kennard, J., dissenting). Thus, in rejecting a similar claim in *Smith* that unmarried couples could rent other places if a religious exemption to the state's fair housing laws were recognized, a plurality of this Court stated:

> To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say that they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere.
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> 12 Cal. 4th at 1175.

Women are entitled to be treated equally with men in their compensation. Denial of equality offends dignitary interests, regardless of whether women ultimately find a way to obtain contraception.

Requiring Catholic Charities to furnish equal benefits to male and female employees is the only way to achieve equality in the workplace. Catholic Charities' claim that the state itself should subsidize birth control—indeed, that it is constitutionally compelled to do so as the least

restrictive method of achieving its goals—misunderstands the state's interest in equality. The *employer* would still be treating its female workers unequally, even if the government stepped in to remedy the discrimination. In other differential benefits cases, such as *Dole* and *Fremont Christian Schools*, the courts ordered the religiously affiliated employer to treat its workforce equitably; they did not rule that the government itself should shoulder the cost of promoting equality by paying women workers benefits the employer provided only to men.[29]

2. Reproductive Autonomy.

At the core of the right to privacy is every person's right to make the profound, life-altering decision of whether to become a parent. *Committee to Defend Reproductive Rights v. Myers*, *supra*, 29 Cal. 3d at 274. Reproductive health care, including contraception, is constitutionally protected as necessary to implementing fundamental childbearing decisions. *Conservatorship of Valerie N.,* 40 Cal. 3d 143 (1985); *Planned Parenthood Affiliates of California v. Van de Kamp*, 181 Cal. App. 3d 245, 277-278 (1986). California's Contraception Equity Act promotes

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[29] Similarly, in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (1987), the court ruled that denying gay students equal access to facilities at a Catholic University would defeat the purposes of an ordinance requiring equal treatment on the basis of sexual orientation. 536 A.2d at 39. The court did not rule that the least restrictive means of achieving equality was for the government to provide facilities for students whose views conflict with theological doctrine.

employees' interest in planning their families. Protecting access to reproductive health services is a compelling public interest. *American Life League, Inc. v. Reno*, 47 F.3d 642, 655-656 (4th Cir. 1995); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1429-1430 (S.D. Cal. 1994).

Catholic Charities dismisses the importance of California's Contraception Equity Act to reproductive freedom, stressing that its employees may use their own funds to buy birth control. The exclusion of contraception from health insurance coverage results in unintended pregnancies. Law, "Sex Discrimination and Insurance for Contraception," 73 *Wash. L. Rev.* 363, 364 (1998). Denial of contraceptive coverage causes some women to forego birth control or use less expensive and less effective methods of birth control. Thus, the Act is necessary to promote individuals' effectuation of their reproductive decisions. Exempting employers will necessarily interfere with the state's important goal of reducing unplanned pregnancy.

3. Individual Conscience.

Catholic Charities explains that the Catholic theology considers use of artificial birth control to be sinful, because people engaged in sexual intimacy must be open to the creation of new life, and that this is true for everyone, including people who do not accept this doctrine. Catholic Charities' religious tenets are entitled to respect. However, contrary religious traditions exist, which hold that sexual intimacy need not be

linked to procreation and that planning childbearing is a morally responsible act. As a constitutional matter, all religious doctrines are entitled to equal respect. The government's role is neutrality, to allow individuals to follow their own religious traditions.

California's Contraception Equity Act protects each worker's right to follow the dictates of her faith in intimate matters of sexuality and reproduction. Almost three-quarters of Catholic Charities' workers are not Catholic. The Legislature has decided that an employer should not impose its position on birth control on its workforce. Protecting individual conscience is an important state objective, which would be frustrated by allowing Catholic Charities' noncompliance with the law.

CONCLUSION

California's Contraception Equity Act is a protective health measure that promotes important workers' rights. No constitutional principle prohibits Catholic Charities' employees from receiving the protection this law affords to millions of workers throughout the state.

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