

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. SO99822

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CATHOLIC CHARITIES OF SACRAMENTO, INC.,  
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
Respondent.

CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE, et al.  
Real Parties in Interest

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After an Opinion by the Court of Appeal,  
Third Appellate District (Case No. CO37025)

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On a Petition for Writ of Mandate to the  
Superior Court of Sacramento County  
(Case No. 00AS03942, Honorable Joe S. Gray, Judge)

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**BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY,  
FOCUS ON THE FAMILY,  
FAMILY RESEARCH COUNCIL, AND  
ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE  
SOUTHERN BAPTIST CONVENTION  
IN SUPPORT OF PETITIONER  
CATHOLIC CHARITIES OF SACRAMENTO, INC.**

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**APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE  
BY CHRISTIAN LEGAL SOCIETY,  
FOCUS ON THE FAMILY,  
FAMILY RESEARCH COUNCIL, AND  
ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE  
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**Application.** *Amici* Christian Legal Society, Focus on the Family, Family Research Council, and Ethics and Religious Liberty Commission of the Southern Baptist convention respectfully apply to this Court for permission to file a brief *amici curiae* to be filed by CLS and *co-amici* in support of Petitioners Catholic Charities of Sacramento, Inc., in the case *Catholic Charities of Sacramento, Inc. v. Superior Court of the State of California, California Department of Managed Health Care, et al.*, Real Parties in Interest, No. S099822.

**Applicant's Interest.** This case raises important issues regarding the constitutionality of a California statute, the Women's Contraception Equity Act, as it applies to religious organizations throughout the state. *Amici curiae* have both the expertise and interests at stake to provide legal authorities and analysis helpful to this Court in its deliberation of these issues.

Christian Legal Society (CLS) has over 20 years experience with issues related to the free exercise of religion. This experience encompasses both litigation matters and legislative initiatives. For instance, CLS has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case to come before the U.S. Supreme Court involving church-state relations since 1980, including cases controlling in this case such as *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), *Larson v. Valente*, 456 U.S. 228 (1982) and *Widmar v. Vincent*, 454 U.S. 253 (1981).

CLS, through the Center for Law and Religious Freedom (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical

professional association of Christian attorneys, judges, law students, and law professors, with chapters in every state and at over 100 law schools. The Center's two decades of experience and professional resources, combined with the national membership of CLS, enable it to offer an informed perspective on the constitutional issues raised in this case.

As set forth in their respective statements of interest in the attached brief *amici curiae*, the other *amici* also have extensive experience with and interest in issues related to the free exercise of religion.

In the brief *amici curiae*, CLS et al. focus particularly upon how the fundamental policy considerations articulated in the relevant Supreme Court case law apply to the issues in this case. The brief argues that the Women's Contraception Equity Act (the "Act") is neither facially nor substantively neutral with respect to religion because it distinguishes among religious institutions based on religious criteria unrelated to the interests furthered by the Act. For similar reasons, the Act is not generally applicable. As a result, the Act is subject to strict scrutiny review under the Free Exercise clause. Since the immediate objectives of the Act are not compelling interests, and the religious criteria are not narrowly tailored to any broadly stated interests furthered by the Act, the religious criteria do not satisfy the strict scrutiny requirements.

The religious criteria contained in the Act also violate the Church Autonomy doctrine developed by the U.S. Supreme based on First Amendment principles. By requiring state officials to interpret religious doctrine, these criteria involve state officials in activities outside their competence and result in government entanglement with religion in a way that leads to government favoritism and influence.

For the reasons set forth above, CLS and the co-amici request this Court's permission to file a brief *amici curiae* in this case. Co-counsel on the brief Stephen W. Reed is an active member in good standing of the Bar of the State of California (No. 45803).

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## OTHER AUTHORITIES

- Carter, Stephen L., *God's Name in Vain: The Rights and Wrongs of Religion in Politics* (2000).....27
- Clancy, William, *Religion as a Source of Tension, in Religion and the Free Society* (1958) .....26, 27
- Esbeck, Carl H., *The Establishment Clause as a Structural Restraint on Government Power*, 84 Iowa L. Rev. 1 .....26
- Hunter, James Davison, *Culture Wars: The Struggle to Define America* (1991).....36
- Jefferson, Thomas, *Letter to Rev. Samuel Miller* (1808) from *Thomas Jefferson: Writings* (Merrill D. Peterson ed. 1984) .....26
- Laycock, Douglas, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25 (2000)..... 11, 13
- Laycock, Douglas, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).....25
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## SUMMARY OF FACTS AND ARGUMENT

*Amici* adopt Petitioner's Statement of the Case set forth in its Brief on the Merits. *Amici* particularly note that that the Women's Contraception Equity Act requires group and individual health insurance policies and disability insurance policies that include prescription drug benefits to also include coverage for prescription contraceptive methods. Health & Safety Code § 1367.25(b)(1); Ins. Code § 10123.196(d)(1) (the "Act"). The Act exempts "religious employers," but only if contraception "is contrary to [their] religious tenets." Health & Safety Code § 1367.25(b)(1); Ins. Code § 10123.196(d)(1).

Further, the statutory phrase "religious employers" does not encompass all religious institutions. Instead, the phrase applies only to those institutions that satisfy the following 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; (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code of 1986, as amended [which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order]." Health & Safety Code § 1367.25(b)(1); Ins. Code § 10123.196(d)(1). Because Catholic Charities does not satisfy these criteria, the Act "present[s] Catholic Charities with the dilemma of either refusing to provide

health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs.” *Catholic Charities v. Superior Court*, 109 Cal. Rptr. 2d 176, 182, 187 (Cal. Ct. App. 2001).

Because the Act’s religious employer exemption distinguishes among religious institutions based on religious criteria, it is neither facially nor substantively neutral with respect to religion. In addition, the Act is underinclusive with respect to the interests it is intended to further. As a result, the religious employer exemption is subject to strict scrutiny review. Since the immediate objectives of the Act are not compelling interests, and the religious employer exemption criteria are not narrowly tailored to any broadly stated interests furthered by the Act, the religious employer exemption fails strict scrutiny.

The religious employer exemption criteria also violate the Church Autonomy doctrine embedded in the First Amendment. By requiring state officials to interpret religious doctrine, these criteria involve state officials in activities outside their competence and result in government entanglement with religion in a way that leads to government favoritism and influence.

## ARGUMENT

### I. THE ACT IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IS NOT NEUTRAL AND GENERALLY APPLICABLE.

In evaluating claims under the federal Free Exercise Clause, the U.S. Supreme Court has adopted the rule that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990)). However, “[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.” *Lukumi* at 531–32. Because the Act is not neutral and generally applicable, the burden it imposes on the religious practice of Catholic Charities must be evaluated under strict scrutiny.

The Court has not fully delineated the contours of the neutrality and general applicability requirements, although it has noted that “failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Lukumi*, 508 U.S. at 531. As discussed below, the general applicability requirement evaluates the extent to which burdens imposed by a law apply broadly to all persons or conduct implicating the interests the law seeks to advance. By

contrast, the neutrality requirement focuses more narrowly on the specific treatment of religious considerations by a particular law.

**A. THE ACT IS NOT NEUTRAL BECAUSE IT USES RELIGIOUS CRITERIA UNRELATED TO THE INTERESTS FURTHERED BY THE ACT TO FAVOR CERTAIN RELIGIOUS GROUPS.**

First and foremost, the Act is not neutral with respect to religion because it uses religious criteria to determine whether or not a religious institution is exempt. The Court in *Lukumi* stated that “the minimum requirement of neutrality is that a law not discriminate on its face.” 508 U.S. at 533. The Court noted that “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.” *Id.* With respect to the Act’s religious employer exemption criteria, there is clearly no secular meaning for “inculcating religious values,” sharing of “religious tenets,” or organizing as a church. As a result, the Act does not even satisfy the minimum requirement of facial neutrality.

Second, the religious criteria set forth in the Act are unrelated to the interests furthered by the Act. In other words, the religious criteria serve not to protect or promote the interests of the Act, but rather merely to distinguish between favored and unfavored religious institutions. In *Lukumi*, the Court evaluated several city ordinances that banned the ritual sacrifice of animals; these laws directly burdened the religious practice of local members of the Santeria religion, who challenged the laws in court. 508 U.S. at 525-28. The Court held that the ordinances were not neutral in part because they

were drafted to suppress religious conduct without reference to the legitimate ends asserted in their defense. *See id.* at 535-40. The Court acknowledged that the ordinances address concerns “unrelated to religious animosity” such as public health and prevention of cruelty to animals. *Id.* at 535. However, in reading the ordinances together, the Court concluded that they “disclose an object remote from these legitimate concerns.” *Id.* Specifically, “although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.” *Id.* at 536. The same “remote object” appears with respect to the Act’s religious employer exemption criteria.

In fact, the Court of Appeal identified one such “object” when it characterized the religious employer exemption as a rational attempt to protect employees from the imposition of an employer’s faith. *Catholic Charities*, 109 Cal. Rptr. 2d at 191-92. The court noted that the exemption does not apply to employers who employ persons who do not “agree with or willingly defer their personal choices to the religious tenets espoused by their employer.” *Id.* at 189. Far from rendering the Act neutral, as the Court of Appeal suggests, this analysis merely emphasizes the exemption’s explicit preference for the interests of employees over the religious values of employers.

Further, even assuming the state has a religiously neutral interest in protecting employees of religious institutions from the religious values of their employers (which it does not), such justification does not explain any of the criteria in the exemption

except the employment condition. There is no reason related to this justification, or to the other purposes of the Act, to make exemptions turn on whether religious institutions have the purpose of inculcating religious values, or serve only persons who share their religious tenets, or qualify under Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code. As the Court in *Lukumi* stated, “a law which visits gratuitous restrictions on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.” *Lukumi*, 508 U.S. at 538.

In *Larson v. Valente*, the Court stated that “the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.” 456 U.S. 228, 246 (1982) (quotation omitted).<sup>1</sup> The state law at issue in *Larson* required charitable and religious organizations soliciting contributions to register with the state and submit periodic reports on its solicitation activities. The law contained an exemption, however, for religious organizations that received more than half of their total contributions from members or affiliated organizations. *Id.* at 231–32. The law was challenged by a religious organization that did not qualify for the exemption.

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<sup>1</sup> Even though *Larson* was decided under the Establishment Clause, the Court applied the same strict scrutiny test once it determined that the law at issue did not treat all religious denomination equally. 456 U.S. at 247. Further, the Court in *Larson* expressly noted that the “constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.” *Id.* at 245.

In striking down the exemption, the Court held that even though the distinction between covered and exempt religious organizations was formally neutral in that it did not turn on religious criteria, the exemption was not actually neutral with respect to religion. Rather, the Court determined that the criteria “effectively distinguish[ed] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members . . . .” *Id.* at 245 n.23 (internal citation and quotation omitted). As a result, the statute was “not simply a facially neutral statute, the provisions of which happen to have a ‘disparate impact’ upon different religious organizations,” but rather the statute made “explicit and deliberate distinctions between different religious organizations.” *Id.*

The treatment of religious organizations under the Act is of the same fundamental character as the treatment arising under the challenged statute in *Larson*. The exemption criteria in the Act make “explicit and deliberate distinctions” that “effectively distinguish” between religious institutions with different beliefs regarding social service. Specifically, the Act exempts institutions that hold as a matter of doctrine that it is necessary to employ and serve only those who share their religious “tenets,” but it does not exempt institutions that hold as a matter of doctrine that when providing social services it is appropriate to employ and serve all people without regard to their

faith. Likewise, it distinguishes religious institutions that believe that service is part of the process of inculcating religious values from institutions that believe that service can be provided apart from inculcation of values.

The Circuit Court for the District of Columbia recently examined a classification similar to the exemption criteria in the Act. In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court struck down the “substantial religious character” test used by the NLRB to determine whether it may exercise jurisdiction over a religious employer. This test involved, among other things, an examination of the religious beliefs of the student body and faculty and a determination of the extent to which other views are tolerated on campus. *Id.* In support of its conclusion, the court noted that the test “may minimize the legitimacy of the beliefs expressed by the religious entity.” *Id.* at 1345. The court correctly observed that if an entity “is ecumenical and open-minded, that does not make it any less religious.” *Id.* at 1346. Therefore, “[t]o limit the . . . exemption to religious institutions with hard-nosed proselytizing [and] that [serve only] members of their religion . . . is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.” *Id.* (citing *Larson*, 456 U.S. at 244).

This distinction among types of religious institutions undermines the Court of Appeal’s argument that the exemption in the

Act is neutral and generally applicable because “[i]t does not discriminate among religions, but applies to all faiths in the same manner, exempting some but not all parts of all religious organizations.” *Catholic Charities*, 109 Cal. Rptr. 2d at 189. As an initial matter, this statement is factually wrong. The exemption does not exempt any part of those religious organizations that do not oppose contraception on religious grounds. Likewise, it does not exempt any part of those religious organizations that employ or serve in significant numbers persons who do not share their religious tenets.

On another level, the court’s observation is simply a misleading truism. Virtually any law may, in some sense, apply “to all faiths in the same manner.” For instance, the ordinances struck down in *Lukumi* prohibiting the ritual sacrifice of animals applied to all faiths in the same manner. The relevant inquiry is whether a law imposes the same burdens on all institutions, secular and religious, without consideration of religious criteria or use of ostensibly neutral criteria designed to single out one or more religions. From this perspective, the Act clearly fails.

Finally, *amici* note that the Act creates an impermissible governmental incentive for religious institutions to adjust their theology and form of ministry.<sup>2</sup> For instance, religious institutions have an incentive to emphasize to a greater degree the extent to which

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<sup>2</sup> See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1980) (Brennan, J., concurring) (discussing the incentives that would result from a rule distinguishing between the secular and religious activities of a religious organization).

inculcation is an ultimate purpose that underlies all of its service activities. Likewise, the Act creates an incentive for religious institutions to employ and serve only those persons who share their religious tenets. These incentives work deterrence on religious doctrine that emphasizes service apart from evangelism and that downplays the importance of association with co-religionists in the provision of services.

In applying the neutrality requirement, the Court has stated that it must “survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted). In the instant case, the survey is not difficult. With respect to its express terms, its purpose, its disparate impact and its incentives, the religious employer exemption in the Act fails to comply with the neutrality principles worked out in *Lukumi* and *Larson*. Therefore, the provisions must be reviewed under strict scrutiny.

**B. THE ACT IS NOT GENERALLY APPLICABLE BECAUSE IT CONTAINS EXEMPTIONS HARMFUL TO ITS IMMEDIATE OBJECTIVES.**

In assessing the general applicability of a law, the U.S. Supreme Court has stated that “categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Lukumi*, 508 U.S. at 542. Part of the rationale underlying this concern can be stated as follows:

First, the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion. Second, . . . if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process. . . . If a burdensome proposed law is generally applicable, other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs. But this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to . . . groups too weak to prevent enactment.

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35–36 (2000) (footnotes omitted).

Because the city ordinances at issue in *Lukumi* were "underinclusive" with respect to the city's interests in preventing cruelty to animals and protecting public health, the Court determined that the city's laws were not generally applicable. The Court noted that the ordinances "fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than *Santeria* does." *Lukumi*, 508 U.S. at 543. Further, the Court noted that "we need not define with precision the standard used to evaluate whether a prohibition is of general application, *for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.*" *Id.* (emphasis added). See also *Fraternal Order of Police, Newark Lodge No. 12 v City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924

F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for married students, older students, and students commuting from their parents' home as well as for reasons such as familial responsibility, medical need, or emotional difficulties).

In *Fraternal Order*, the court distinguished between (1) exemptions from a general law for activity that does *not* implicate the interests protected by the law and (2) exemptions for activity that *does* directly impact those interests. The court noted that the generally applicable ban on the possession of peyote upheld in *Smith* included an exception for prescribed medical use. *Fraternal Order*, 170 F.3d at 366 (citing *Smith*, 494 U.S. at 874). However, the court explained that this exception did not undermine the state's interest in curbing the unregulated use of drugs. *Id.* By contrast, the court noted that the medical exemption from the "no-beards" policy at issue in that case directly undermined the police department's interest in uniformity. The court held that the *Smith* exemption was comparable to the police department's exemption for undercover officers since such officers are not held out to the public as law enforcement personnel. *Id.* Accordingly, "[t]he prescription exception and the undercover exception do not trigger strict scrutiny because the Free Exercise Clause does not require the government to apply its law to activities that it does not have an interest in preventing." *Id.* However, because

the medical exemption from the “no-beards” policy did undermine the government’s interests, it triggered strict scrutiny. *Id.*

The “religious employers” exemption in the Act is comparable to the medical exemption to the “no-beards” policy in *Fraternal Order*. By allowing certain employers to offer prescription drug benefits that do not include contraceptives, the “religious employers” exemption directly implicates the state’s interests under the Act. Since the exemption is not limited to employers who only employ persons having a religious objection to the use of contraceptives, there is no assurance that the exemption will not affect female employees wishing to use prescription contraceptives. Because the Act grants such exemptions to some employers but not others, the protections of the general applicability standard are not present.<sup>3</sup>

This lack of protection is also evident when considering the effective exemption related to the employers not covered by the Act. Specifically, the Act does not apply to any employer that does not provide prescription drug coverage. However, the failure of such

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<sup>3</sup> Similar concerns arise with respect to the vagueness of the exemption criteria, which require case by case discretionary evaluation as to whether an institution falls within the exemption. For instance, the Act provides no standards for how government administrators are to determine whether employees and/or service recipients “share the religious tenets” of the employer, or whether certain values are “religious” and whether the purpose of the entity is to inculcate such values. Such vague criteria “are a virtual invitation to uneven enforcement, in which government grants exceptions to the politically powerful or well connected . . . but not to other claimants with fewer connections or less appeal.” Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 *Cath. Law.* 25, 33 (2000).

employers to provide prescription contraceptive benefits to their female employees impacts the state's interests in women's health, economic security and gender equity every bit as much as the failure of employers covered by the Act. In both cases, female employees do not have access through benefit plans to prescription contraceptives that prevent unwanted pregnancies, which are the root cause of the harms to which the Act is directed. Because the Act fails to encompass all employment situations that directly impact the interests protected by the Act, the Act is not generally applicable.

Further, this effective exemption of certain employers indicates that the state has determined that the economic cost of requiring such employers to provide prescription contraceptives for their female employees (and the political cost of imposing such a requirement) is greater than the social cost of requiring religious employers to provide such coverage in violation of their religious conscience. This political preference for the economic interests of the implicitly exempt employers over the religious interests of religious institutions covered by the Act represents another sense in which the Act is not neutral with respect to religion. The government is not acting neutrally with respect to religion when it places a higher value on economic interests than religious interests. *See generally Lukumi*, 508 U.S. at 532-542; *Horen v. Commonwealth*, 479 S.E.2d 553, 556-57 (Va. App. 1997) (holding that state law banning possession of owl feathers is not neutral because it includes secular use exemptions, *e.g.*, for museums, but does not exempt religious uses).

## II. THE ACT DOES NOT SURVIVE STRICT SCRUTINY

The U.S. Supreme Court initially articulated the compelling interest test under the Free Exercise Clause as follows:

A law burdening an individual's free exercise of religion must "be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate."

*Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (quotation omitted). In *Lukumi*, the Court restated the test, emphasizing the rigorous standards it is intended to apply:

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S., at 628, 98 S.Ct., at 1328, quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] ... down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S., at 888, 110 S.Ct., at 1605.

*Lukumi*, 508 U.S. at 546.

In the instant case, this Court should consider two distinct aspects of the strict scrutiny test. First, the test sets a high standard for determining whether a particular interest is actually a "compelling" governmental interest. Second, the Act is not "narrowly tailored" or

“least restrictive” with respect to religion unless the government can show that exempting Catholic Charities would substantially undermine a compelling governmental interest.

**A. THE IMMEDIATE OBJECTIVES FURTHERED BY THE ACT, PROPERLY CHARACTERIZED, ARE NOT COMPELLING INTERESTS.**

In *Sherbert*, the Court set forth the standard for a compelling governmental interest as follows:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation. . . .

*Sherbert*, 374 U.S. at 406 (quotation omitted). In *Sherbert*, the Court ruled that the government did not have a compelling interest in preventing fraud in the unemployment compensation system. By way of contrast, the Court has ruled that the government has a compelling interest in maintaining the tax system, enforcing participation in the social security system, and maintaining national security and safety. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *United States v. Lee*, 455 U.S. 252, 258-9 (1982); *Gillette v. United States*, 401 U.S. 437 (1971); *Prince v. Massachusetts*, 321 U.S. 158 (1944). However, as noted above, the Court has continued to emphasize that only “interests of the highest order” may constitute compelling interests. *Lukumi*, 508 U.S. at 546.

Accordingly, in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10<sup>th</sup> Cir. 1996), the court rejected the City of Albuquerque's assertion that it had a compelling interest in complying with conditions in a federal funding law that prohibited use of a senior citizen center for sectarian instruction or worship. The court noted that "[a] city or state's desire for federal funds is not a compelling governmental interest." *Id.* at 1280. Similarly, the Eighth Circuit has ruled that "the interests advanced by the bankruptcy system are not compelling." *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1420 (8<sup>th</sup> Cir. 1996). In reaching this conclusion, the court noted that "bankruptcy is not comparable to national security or public safety" and that "allowing debtors to get a fresh start or protecting the interests of creditors is not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system." *Id.*

Likewise, the court in *Rader* ruled that a state university does not have a compelling interest in "promoting academic success, fostering diversity, promoting tolerance . . . insuring the financial stability of its residential hall programs." *Rader*, 924 F. Supp. at 1557. The *Rader* court's conclusion was based largely on the fact that the policy at issue included many exemptions that directly undermined one or more of the asserted interests. The court concluded that "[b]ecause [the university] already allows exceptions to over one third of the students affected by it, any contention that denying a religious observer an exception to the policy serves a

compelling state interest is without merit.” *Id.* This analysis follows the Court’s guidance in *Lukumi*:

It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited."

*Lukumi*, 508 U.S. at 546-47 (citations omitted).

The Court of Appeal identified four broadly stated purposes for the Act: promoting women’s health; promoting “economic and social parity and independence for women;” promoting the “nation’s economic well-being;” and eliminating gender discrimination. *Catholic Charities*, 109 Cal. Rptr. 2d at 182, 187. Stated at this level of generality, the interests are of course more likely to appear “compelling” than if the interests were characterized as “preventing unwanted pregnancies” or “facilitating cost effective access to prescription contraceptives.” However, the foregoing cases indicate that this Court should neither accept the Court of Appeal’s characterization of the interests nor merely assume that such interests are compelling. Rather, this Court should closely examine the state’s asserted interests and the evidence that such interests are indeed compelling. For instance, in *Smith* the relevant interest was not promoting public health but rather controlling the unregulated use of drugs. *Fraternal Order*, 170 F.3d at 366. Likewise, in *Fraternal Order*, the relevant interest was uniformity and not public safety. *Id.* In the instant case, this Court should consider only the more narrowly

stated direct immediate objectives of the Act when applying the strict scrutiny test. To accept the Court of Appeal's characterization is to "water down" the test. These immediate objectives, "preventing unwanted pregnancies" or "facilitating cost effective access to prescription contraceptives," though legitimate state interests, are clearly not compelling.<sup>4</sup>

Similarly, this Court should examine closely the particular form of gender discrimination targeted by the Act. The Act does not eliminate a direct form of discrimination that treats two similarly situated persons differently based on their gender. Rather, it addresses situations where, in their prescription drug programs designed to alleviate abnormal health conditions among employees, employers decline to account for a biological difference between men and women that is unrelated to any abnormal health condition. It is clear that a prescription drug plan that covers all prescription medications related to the treatment or prevention of abnormal health conditions should treat men and women equally with respect to such conditions. But the fact that men and women are not similarly situated with respect to normal health conditions (e.g., the ability to become pregnant) does not mean that a benefit program geared toward abnormal health conditions treats men and women differently by

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<sup>4</sup> Even if the more broadly stated interests are considered, the state must demonstrate that the interests, which are undoubtedly important, are state interests comparable to protecting national security or public safety. Further, as explained in the next section, it is much more difficult to demonstrate that a law is "narrowly tailored" to such broadly stated interests.

failing to provide contraceptives to prevent a normal condition. Although the state may have a legitimate interest in mitigating the impact of the differences in normal health conditions between men and women, this interest does not rise to the level of the state's interest in eliminating direct gender discrimination.

**B. THE STATE HAS NOT DEMONSTRATED THAT PROVIDING AN EXEMPTION FOR CATHOLIC CHARITIES WOULD UNDERMINE ITS BROADLY STATED INTERESTS.**

The narrow tailoring prong of the strict scrutiny test often does the work in Free Exercise challenges. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court ruled that the government had failed to establish that applying a compulsory education law through age 16 to the Amish was the least restrictive means of furthering its interests. The Court focused its analysis on “*the impediment to those objectives that would flow from recognizing the claimed Amish exemption.*” *Id.* at 221 (emphasis added). The Court concluded that “it was incumbent on the State to show *with more particularity* how its admittedly strong interest in compulsory education would be *adversely affected* by granting an exemption to the Amish.” *Id.* at 236 (emphasis added). In other words, the narrow tailoring test requires the government to show that removing the burden on the religious exercise in question would undermine its compelling interests.

The Third Circuit in *Fraternal Order* applied this analysis to the Police Department prohibition on beards. The court rejected the

City's arguments that exempting Muslim officers would undermine either the public's ability to identify genuine police officers, the police force's morale, or public confidence in the police force. *Fraternal Order*, 170 F.3d at 366. The court noted that the government had failed to explain why these interests would be undermined by a religious exemption but not by the medical exemption already in the policy. *Id.*

In the instant case, the state must demonstrate that allowing Catholic Charities not to provide employees with prescription contraceptive coverage will undermine the state's interests in promoting health, economic security and gender equity (assuming these broadly stated interests are accepted and are determined to be compelling). In evaluating the state's evidence, this Court should consider, among other things, the number of Catholic Charities employees affected and the number of women in California that do not have prescription contraceptive benefits and are not protected by the Act. Considering the relative numbers involved and the fact that the state has not sought to further its interests with respect to women who are unemployed or whose employers do not provide any prescription drug benefits, it is simply not credible to assert that providing an exemption for Catholic Charities will have any measurable impact on the overall health, economic security or equal treatment of women in the State of California.

It should also be noted that in establishing that its compelling interests would be undermined, the state must show (among other

things) that laws less burdensome to Catholic Charities' religious exercise cannot adequately protect its interests. In *Lukumi*, the Court ruled that the laws at issue were not narrowly tailored because "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546. In *Sherbert v. Verner*, 374 U.S. 398, 407 (1963), the Court stated that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the [State] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." As set forth in Petitioner's Brief on the Merits, the state does indeed have other means of promoting its interests under the Act that do not burden the religious exercise of Catholic Charities. Pet. Br. at 43-44.

**C. THE STATE MAY NOT RELY UPON MERE SPECULATION TO SATISFY ITS BURDEN OF PROOF UNDER THE STRICT SCRUTINY TEST.**

Finally, the case law makes it clear that the state cannot rely upon mere unfounded assertions or speculation in establishing that it has a compelling interest or that removing the burden on Catholic Charities would undermine this interest. In *Sherbert*, the Court refused the government's unsubstantiated assertions regarding the impact of an exemption on its interests, stating that:

The [State] suggest[s] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. ... there is no proof whatever to warrant such fears of malingering or deceit as those which the [State] now advance[s].

*Sherbert*, 374 U.S. at 406-07.

Likewise, in *Wisconsin v. Yoder*, the Court rejected the government's mere assertion that permitting the Amish to opt out of an additional one or two years of compulsory high school education would leave Amish children who choose to leave the Amish community ill-equipped. The Court noted that:

[t]here is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

406 U.S. at 224-25.<sup>5</sup> To the extent the state has not presented evidence that its interests are compelling, that exempting Catholic

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<sup>5</sup> See also *Larson v. Valente*, 456 U.S. 228, 249 (1982) (rejecting government's assertions regarding narrow tailoring because the record contained no substantial support for the premises upon which the assertions relied); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (in applying the strict scrutiny test, "the state must do more than simply offer conclusory statements" to satisfy its burden); *United*

Charities would undermine its interests, or that no laws less burdensome to Catholic Charities' religious exercise would adequately protect its interests, this Court must rule that the state has not satisfied its burden under the strict scrutiny test.

### **III. THE ACT EXCEEDS THE GOVERNMENT'S AUTHORITY OVER RELIGIOUS INSTITUTIONS.**

#### **A. THE CHURCH AUTONOMY DOCTRINE PROHIBITS THE GOVERNMENT FROM USING RELIGIOUS CRITERIA TO CLASSIFY RELIGIOUS INSTITUTIONS.**

The religious employer exemption in the Act requires state officials – particularly the courts - to interpret religious doctrine, to discern the religious significance of the activities and values of religious institutions, and, ultimately, to distinguish among religious institutions based on an assessment of the religious nature of their activities. In addition to violating the Free Exercise clause, these requirements also violate the Church Autonomy doctrine since they interfere with the self-identity of religious institutions, involve government officials in activities outside of their competence, and entangle government officials with religion in a way that results in government favoritism and influence.

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*States v. Abeyta*, 632 F. Supp. 1301 (D. N.M. 1986) (government failed to present evidence that taking some eagles would have harmful impact on remaining eagle population); *Horen v. Commonwealth*, 479 S.E.2d 553 (Va. App. 1997) (state failed to provide evidence that its interests in protecting wild birds was advanced by prohibition on possession of bird feathers for bona fide religious use).

Three branches of religious liberty jurisprudence grow from the trunk of the First Amendment: Free Exercise law, Non-Establishment law, and Church Autonomy law.<sup>6</sup> The rationale underlying Church Autonomy law was expressed by Thomas Jefferson:

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<sup>6</sup>University of Texas law professor Douglas Laycock is the first to have named the principle invoked here as the Doctrine of "Church Autonomy." The United States Supreme Court has subsequently adopted the term. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341-46 (1987) (Brennan and Marshall, JJ., concurring). Professor Laycock identifies the Church Autonomy principle as a Free Exercise value. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). The courts have recognized the principle sometimes as a Free Exercise value, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 107 (1952), sometimes as a non-establishment value, *Meek v. Pittenger*, 421 U.S. 349 (1975), Esbeck, *infra*, at 42-58; and sometimes as a value which springs both from the Free Exercise Clause and from the anti-entanglement notions of the Establishment Clause. *Presbyterian Church of the United States v. Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). The Court generally has taken the latter approach by identifying the value as a general "First Amendment" value without specifying whether it springs from the Free Exercise Clause, the Establishment Clause, or both. *Parish of the Advent*, 426 Mass. 268, 688 N.E.2d 923 (1997); *United Kosher Butchers*, 349 Mass. 595, 211 N.E.2d 332 (1965); *Wheeler*, 378 Mass. 58, 389 N.E.2d 966 (1979); *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985) (while quoting extensively from Professor Laycock's article, *supra*); *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E.2d 1352 (1994); *but cf. Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113 (1985) (applying a Free Exercise Clause compelling state interest test).

I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government.

. . . Every religious society has a right to determine for itself the times for [it religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

Thomas Jefferson Letter to Rev. Samuel Miller (1808) from *Thomas Jefferson: Writings*, 1186-87 (Merrill D. Peterson ed. 1984). Thus, "[The First] amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself . . ." Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 Iowa L. Rev. 1, 10, n. 34 (quoting Max L. Stackhouse, "Religion, Rights, and the Constitution," *An Unsettled Arena: Religion and the Bill of Rights* 92, 111 (1990)).<sup>7</sup>

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<sup>7</sup> William Clancy summarizes well the settlement of church/state relations in America:

[T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two orders of

The doctrine of Church Autonomy is at the very heart of the Religion Clauses because it -- unlike the Free Exercise Clause's compelling governmental interest and least restrictive means analyses and unlike the Establishment Clause's secular purpose and primary effect analyses -- involves no weighing of competing interests between church and state. Application of the doctrine of Church Autonomy simply inquires whether the law at issue requires an interpretation of or interference with religious doctrine, polity, discipline, canon law, or ecclesiastical relationships.

The line of cases articulating the Church Autonomy principle begins with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a property dispute between the pro-slavery and anti-slavery factions of a divided Presbyterian congregation in postbellum Kentucky. The *Watson* Court held that disputes in hierarchical churches should be decided by a rule of judicial deference to the

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competence. Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension, in Religion and the Free Society* 23, 27-28 (1958). As Professor Stephen Carter has observed, government is invariably tempted to regulate, and reduce the influence of, religion, precisely because religious faith posits a separate and higher authority than that of the state, and is therefore subversive of the state's excessive ambitions. *See generally*, Stephen L. Carter, *God's Name in Vain: The Rights and Wrongs of Religion in Politics* (2000).

ecclesiastical hierarchy. The court first reasoned that this rule is required by the right of religious institutions to determine their own religious identity:

The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association is unquestioned . . . .

*Id.* at 728-29.

The court explained that the rule also recognizes the limits of judicial competence. “It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so.” *Id.* at 729.

Finally, the court recognized that should it and other civil courts assert jurisdiction over internal church affairs, the civil litigation would inevitably result in wholesale entanglement of government in religious affairs:

[I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and

fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, and would open the way to all the evils which we have depicted . . . .

*Id.* at 733-34.

Even though *Watson* was decided on a pre-*Erie*,<sup>8</sup> pre-incorporation<sup>9</sup> basis and, therefore, was theoretically not founded upon the First Amendment Religion Clauses, the Supreme Court later constitutionalized *Watson's* principles. In *Kedroff*, the Court held that

[*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

344 U.S. at 116.<sup>10</sup>

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<sup>8</sup>*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>9</sup>The Free Exercise and Establishment Clauses were not incorporated into the Fourteenth Amendment until the 1940s. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause) and *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947) (incorporating the Establishment Clause).

<sup>10</sup> Although outside the scope of this brief, *amici* note that, at a fundamental level, the contraceptive coverage mandate of the Act violates the Church Autonomy doctrine by intruding into internal operations that express and define the religious character of Catholic Charities. Catholic Charities administers its religious values by

*Watson's* wake is wide and deep.<sup>11</sup> Its holding and rationale, as the Supreme Court itself predicted, have had "far-reaching consequences," *id.*, and have caused courts to decline jurisdiction in at least six types of cases, including:

- Intra-church property disputes, *Kedroff*, 344 U.S. 94 (1952) and *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979);
- Certain disputes arising from church-related trusts, *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *see Krauthoff v. Attorney General*, 240 Mass. 88, 132 N.E. 865 (1921);
- Church-minister disputes, *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972) and *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989);
- Clergy malpractice claims, *Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988); *Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250 (D. Colo.)
- Parishioner discipline controversies, *O'Connor v. Diocese of Honolulu*, 889 P.2d 261 (Hawaii 1994) and *Parish of the*

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providing prescription drug benefits that do not include contraceptives. The contraceptive coverage mandate in the Act interferes with this administration in a way that denies Catholic Charities the ability to define itself by its religious doctrine. Such an intrusion exceeds the government's authority under the Church Autonomy doctrine.

<sup>11</sup>Published precedents approvingly invoke *Watson* over 920 times.

*Advent v. Episcopal Diocese of Massachusetts*, 426 Mass. 268, 688 N.E.2d 923 (1997); and

- Church speech claims. *United States v. Ballard*, 322 U.S. 78 (1944), *Klagsbrun v. Va'Ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D.N.J. 1999), and *Parish of the Advent*, 426 Mass. 268, 688 N.E.2d 923 (1997).

In these cases and others, the Court has consistently refused to permit government officials to use religious criteria to classify or distinguish among religious institutions. With respect to the rationale underlying *Watson*, such classifications invade upon the right of religious institutions to define and interpret their own doctrine, including the religious significance of their activities. In addition, government officials are not competent to interpret and apply such classifications. Finally, such classifications result in excessive entanglement between government officials and religious institutions, creating a substantial risk of undue influence or government favoritism. This risk is heightened by the fact that to apply such classifications, the state must (implicitly at least) adopt and promote a particular orthodoxy.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court faced an ordinance that was, in a sense, the reverse of the religious employer exemption in the Act. In *Fowler*, a city permitted churches and similar religious bodies to conduct worship services in its parks, but religious meetings were excluded. The ordinance resulted in the arrest of a Jehovah's Witness as he conducted a peaceful meeting. Justice Douglas, in an opinion from which no Justice dissented,

overturned the conviction because the distinction between “worship” and an “address” on religion was inherently a religious question and invited discrimination:

Appellant’s sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

*Id.* at 69-70.

Almost thirty years after *Fowler*, when a dissenting opinion urged a distinction between “religious worship” and other forms of religious expression, an eight-Justice majority of this Court refused, observing that “the distinction [lacked] intelligible content,” that it was “highly doubtful that [the distinction] would lie within the judicial competence to administer,” and that, in any event, the proposed distinction was constitutionally irrelevant. *Widmar*, 454 U.S. at 269 n.6 (1981). Indeed, the *Widmar* majority stated that the proposed categorization of religious expression was not only unintelligible and unnecessary, it was unconstitutional. *Id.* (“Merely to draw the distinction would require the [State]—and ultimately the courts—to inquire into the significance of words and practices to

different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.”); *see also id.* at 271 n.9, 272 n.11.

Most recently, in *Great Falls*, the Circuit Court for the District of Columbia concluded that the “substantial religious character” test, which granted an exemption only to those religious institutions whose primary purpose is the propagation of a religious faith, violated these First Amendment principles. *Great Falls*, 278 F.3d at 1341. The court held that the test, which distinguished among religious institutions based on an evaluation of religious criteria, constituted an impermissibly “intrusive inquiry” into the “religious mission” of the institution. *Id.* (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) and *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).<sup>12</sup>

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<sup>12</sup> *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the “core” of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (stating that petty officials

**B. THE EXEMPTION CRITERIA IN THE ACT IMPERMISSIBLY USE RELIGIOUS CRITERIA TO CLASSIFY RELIGIOUS INSTITUTIONS.**

The first prong of the exemption contained in the Act requires state officials to determine what values of a religious institution are “religious values” and whether the purpose of the institution is to inculcate such values. Put differently, in order to ensure that a religious institution does not have the purpose of “inculcating religious values,” a government administrator must discern the religious significance (or lack thereof) of the values and activities of a religious institution. For instance, if an institution promotes honesty, or respect for parents, or care for the needy, state officials must determine if any of these values are religious. Clearly, some religious institutions would identify these as religious values, whereas others may not. But the important point is that state officials cannot make this inquiry without offending the Church Autonomy doctrine.

On the one hand, state officials may attempt to discern the religious nature of an institution’s values by interpreting its religious doctrine, a task which is clearly outside of their competence. State officials are no more competent to identify and interpret a value as a “religious value” than were the officials in *Fowler* competent to discern between whether a particular event constituted “worship” or a “religious address.” Alternatively, state officials may compare the

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are not to be given discretion to determine what is a legitimate “religion” for purposes of issuing permit).

institution's values with values they implicitly consider to be "religious values." However, this approach also fails since it creates an implicit state defined orthodoxy regarding religious values and interferes with the right of religious institutions to determine and apply their own doctrine. In short, as with the rejected test in *Fowler*, *Widmar*, and *Great Falls*, the "religious values" test entangles the government in theological classification, and invites covert religious favoritism.

Similar problems also arise with respect to discerning whether the purpose of an activity is to "inculcate" or merely "express" religious values. Such discernment requires precisely the inquiry into the religious significance of words and practices rejected in *Widmar*. For instance, suppose a religious institution expresses its religious value of caring for the needy solely by providing meals and shelter. Further, suppose the religious institution believes as a matter of doctrine that it is to "teach by example" rather than by preaching. In this case, the religious institution has two purposes related to its religious values for its activities: to serve and to teach.<sup>13</sup> However, because state officials are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the purpose of the institution is to inculcate its religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the

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<sup>13</sup> *Amici* note that the exemption language provides no guidance for determining which of multiple purposes constitutes "the" purpose of an institution.

purpose of the institution is not to inculcate religious values. But this conclusion favors one religious doctrine of inculcation over another.<sup>14</sup> Indeed, a more discriminatory rule than one that privileges some theological traditions over others could hardly be devised.

The second and third prongs of the religious employer exemption also raise insurmountable issues of lack of competence and interference. These prongs require state officials to determine whether employees and service recipients share the religious tenets of a religious institution. As such, they require the state to inquire into the beliefs and tenets of both the employees and the service recipients of a religious institution, and to compare these beliefs and tenets with

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<sup>14</sup> There is simply no way to avoid the fact that theologically “liberal” activities will often appear to minor local officials as “secular” whereas theologically “conservative” or orthodox activities will more likely be regarded as “inculcating religious values.” It is increasingly recognized that, when it comes to religion and public life, the significant distinctions no longer track the denominational lines separating Protestants, Catholics, Jews, and Muslims. Instead, religious believers are more meaningfully categorized as traditional or “orthodox” (whether Protestant, Catholic, Jewish, or Muslim) and theologically liberal or “progressive” (whether Protestant, Catholic, Jewish, or Muslim). See James Davison Hunter, *Culture Wars: The Struggle to Define America* 42-46 (1991). Professor Hunter explains that orthodox believers are devoted “to an essential, definable, and transcendent authority,” whereas progressives “resymbolize historic faiths according to the prevailing assumptions of contemporary life.” The latter type of religious organizations, those most likely to align with contemporary culture, will, unsurprisingly, appear less “religious” or sectarian to government officials, while those who are more conservative in their theology and who ignore cultural assumptions will appear more sectarian.

those of the religious institution. This is precisely the type of “intermeddling” the Founders proscribed (and that most recently has been rejected in *Great Falls*). Further, this is essentially the same comparison of doctrine the Court refused to conduct in *Watson*. Finally, as discussed above, this is a task for which state officials (and the courts) are manifestly not competent.<sup>15</sup>

The requirement that contraception be “contrary to [the] religious tenets” of a religious institution creates an additional level of inquiry into religious doctrine. This is because a religious institution may be opposed to some forms of contraception (*e.g.*, abortifacients), but not others. Hence, state officials may need to determine whether each federally approved prescription contraceptive violates the religious tenets of a religious institution.

The religious criteria set forth in the exemption in the Act casts government employees adrift in the same uncharted waters as would tackling the questions that the Court has consistently avoided in a wide range of First Amendment cases. We emphasize, however, that the problem here is not that government officials are simply interacting with religious organizations. Some regulatory interaction—indeed, some adjustments and cooperation—between government and religious organizations is inevitable, given that government keeps getting bigger and society more complex. Thus,

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<sup>15</sup> These prongs also lead to the untenable result that two otherwise identical institutions might have different status under the Act depending upon the religious demographics of the population the serve and/or from which they obtain employees.

*Amici's* argument here is not that the inevitable and unremarkable regulation that affects the operation of religious organizations necessarily invades the “privacy” of religious groups. Rather, we object to a government effort to exceed its constitutionally limited powers by adjudicating subject matters reserved to the sole cognizance of religion and religious organizations, matters that were, using Professor Rakove’s apt term, “deregulated” at the Nation’s founding.<sup>16</sup>

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<sup>16</sup> See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 311-12 (1997) (“[A]t the heart of [Madison’s and Jefferson’s] support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, [and] placed beyond the cognizance of the state[.]”).

## CONCLUSION

The Act violates both the Free Exercise Clause and the Church Autonomy doctrine of the First Amendment. Consequently, the opinion of the Court of Appeal should be reversed.

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## Appendix A

### STATEMENTS OF INTEREST OF *AMICI CURIAE*

**The Christian Legal Society**, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those

enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

**Focus on the Family** is a California non-profit religious corporation committed to strengthening the family in the United States and abroad. One of its express purposes is to propagate and spread the Gospel of Jesus Christ. Focus on the Family's interest in this case stems from the fact that it is actively involved in the promotion of the freedom of speech and expression and actively opposes restriction on private religious speech. Focus on the Family

distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. Topics addressed in the daily radio broadcast and in printed literature published and distributed by Focus on the Family frequently concern religious expression, freedom of speech, and the right of individuals, privately, to express their opinions, whether religious or otherwise.

**Family Research Council (FRC)** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family and religious liberty issues that affect the nation. FRC is committed to ensuring that the legacy of family, faith and freedom is not forgotten in America. FRC endorses parental involvement and parental choice in education and works to reduce the federal government's intrusion into local schools, including private and religious schools. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The **Ethics & Religious Liberty Commission** is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest non-Catholic denomination, with sixteen million members in over 42,000 autonomous local churches. The Commission is charged with addressing public policies affecting religious liberty domestically and abroad. We are concerned with government attempts to define the mission and ministry of the church, believing this to be outside the purview of government and a direct violation of the First Amendment of the Constitution.

Case Name: Catholic Charities of Sacramento, Inc., v.  
Superior Court of the State of California

Case No. California Supreme Court Case No. S099822

PROOF OF SERVICE

STATE OF CALIFORNIA            )  
  )        ss  
COUNTY OF LOS ANGELES       )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Reed & Brown LLP, 35 N. Lake Avenue, Suite 960, Pasadena, California 91101-1856.

On March 8, 2001, I served the foregoing document described as BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER CATHOLIC CHARITIES OF SACRAMENTO, INC. on all interested parties in this action as stated on the attached service list.

I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested party as shown above. Each such envelope was on this date deposited with postage thereon fully prepaid in the United States Postal Service at Pasadena, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that this declaration is executed on March 8, 2002, at Pasadena, California.

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing *amici curiae* brief complies with the type-volume limitation set forth in Cal. Rule of Court 14(c)(1) and contains 7973 words, exclusive of the Table of Contents, Table of Authorities, Statements of Interest (Appendix A) Proof of Service and Service List, and Certificate of Compliance.

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Stephen W. Reed