

## Center for Reproductive Rights

### Background: The Religious Exemption and Religious Freedom

- I. The No-Copay-Contraception Mandate Does Not Violate the Constitution, Nor is a Religious Exemption Required**
- The Constitution permits the enactment of neutral, generally applicable laws that happen to burden religious exercise. Because the No-Copay-Contraception Mandate was motivated by medical science, not anti-religious animus, it is not unconstitutional.<sup>1</sup>
  - The Supreme Court has held that the fact that a particular religious exemption is permissible “is not to say that it is constitutionally required.”<sup>2</sup>
- II. The Religious Freedom Restoration Act Does Not Apply to the No-Copay-Contraception Mandate**
- The Religious Freedom Restoration Act<sup>3</sup> (“RFRA”) requires that government actions that “substantially burden a person’s exercise of religion”<sup>4</sup> be in furtherance of a compelling interest and be the least restrictive means of furthering that interest.
  - RFRA is inapplicable because the provision of preventive health services without cost sharing has nothing to do with the “exercise” of religion. The Supreme Court has found religious “exercise” to be burdened when laws interfere with a *particular religious practice or ceremony*.<sup>5</sup> Neither providing health insurance, nor engaging in sexual intercourse without contraception, constitute religious exercise.
  - Opposition to contraception is merely a religious *belief* – not the exercise of religion. The Supreme Court has emphasized that the exercise of religion “often involves not only belief and profession but

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<sup>1</sup> *Employment Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (only “acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display” are presumptively unconstitutional; “neutral law[s] of general applicability” do not violate the Constitution) (emphasis added).

<sup>2</sup> *Id.* at 890.

<sup>3</sup> 42 U.S.C. § 2000bb-1 *et seq.*

<sup>4</sup> 42 U.S.C. § 2000bb-1(a).

<sup>5</sup> For example, the Court has struck down laws prohibiting the ceremonial use of an hallucinogenic tea (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)) and ritual animal sacrifice (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).

the performance of...physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine...”<sup>6</sup>

- Even if the No-Copy-Contraception Mandate burdens churches’ exercise of religion, the burden is not substantial. The Mandate does not interfere with internal church governance;<sup>7</sup> it does not compel speech;<sup>8</sup> and it does not force believers to associate.<sup>9</sup>

### III. A Religious Exemption to the No-Copy-Contraception Mandate is Not Required Because the Mandate Serves a Compelling Governmental Interest and is the Least Restrictive Means of Furthering that Compelling Interest

#### A. The No-Copy-Contraception Mandate Serves a Compelling Governmental Interest

- The No-Copy-Contraception Mandate furthers the government’s compelling interest in **women’s health**. A line of Supreme Court cases “unequivocally express the Supreme Court’s view as to the state’s compelling interest in preserving women’s health.”<sup>10</sup> The IOM panel’s report carefully explained the health impact of unintended pregnancy on women, and the essential role of contraception as a preventive health service to prevent those health impacts.
- The No-Copy-Contraception Mandate furthers the government’s compelling interest in **children’s health**.<sup>11</sup> As the IOM panel explained, children that result from unintended pregnancies are at greater risk of low birth weight and experience higher rates of developmental difficulties.
- The No-Copy-Contraception Mandate furthers the government’s compelling interest in combating **sex-based inequality**. The sponsors of the Women’s Health Amendment emphasized that women pay substantially more out-of-pocket for medical care than men. And Congress has recognized that discrimination against women based on “pregnancy, child-birth, or related medical conditions” constitutes discrimination on the basis of sex.
- The No-Copy-Contraception Mandate furthers the government’s compelling interest in promoting **women’s autonomy**. Only women can become pregnant, and their ability to control their fertility through the use of contraception has been recognized by the Supreme Court to be of paramount importance: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>12</sup>

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<sup>6</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005)

<sup>7</sup> Cf. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (courts may not decide matters of church doctrine or governance).

<sup>8</sup> The Supreme Court has held laws that compel speech favoring a particular viewpoint to be unconstitutional. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down law requiring the motto “Live Free or Die” to be displayed on license plates); *Board of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down mandatory recitation of the Pledge of Allegiance). Under the Mandate, however, churches remain free to preach about the use of contraception.

<sup>9</sup> The instances where the Supreme Court has struck down laws for violating the freedom of expressive association are those where groups sought to exclude **individuals** from their midst. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (permitting the Boy Scouts to exclude a gay scoutmaster); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (permitting the St. Patrick’s parade to exclude members of a gay and lesbian group).

<sup>10</sup> *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 35 (Ariz. 2002) (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

<sup>11</sup> The Supreme Court has stated that “[s]afeguarding the physical and psychological well-being of a minor...is a compelling [interest].” *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, 457 U.S. 596, 607 (1982).

<sup>12</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

## **B. The No-Copay-Contraception Mandate is the Least Restrictive Means of Furthering the Government's Compelling Interest**

- The no-copay-contraception mandate is part of broad and comprehensive healthcare reform. The system cannot function if it is subjected to a series of opt-outs and exemptions. And as described below, expanding the proposed exemption would hinder Congress's purpose even more.
- The Supreme Court has repeatedly rejected religious exemptions to comprehensive national programs. For example, in *United States v. Lee*,<sup>13</sup> the Supreme Court denied an Amish religious exemption to the Social Security system, explaining that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."<sup>14</sup> Indeed, a unanimous Court explained that anarchy would ensue if religious adherents are permitted not to pay for things they believe to be "sinful."<sup>15</sup>
- The Catholic Church seeks an exemption from the requirement to pay for contraceptive coverage, something it finds "sinful."<sup>16</sup> But the Church has no greater claim on opting out of this coverage requirement than do religious adherents who must still pay federal taxes that may pay for wars,<sup>17</sup> contraception, certain abortions, and other expenditures that they may find offensive.

## **IV. There is No Justification for a Broader Exemption**

### **A. A Broader Exemption Would Unconstitutionally Penalize Employees and Insurers**

- Forcing employees to live out the religious beliefs of their employers – notwithstanding a national government mandate to provide no-copay contraception – violates the Establishment Clause. The greater the extent of the exemption, the greater the scope of impermissible delegation of authority.
- Catholic University President John Garvey insisted in a *Washington Post* editorial that "in objecting these regulations, our university does not seek to impose its moral views on others."<sup>18</sup> In fact, imposing its moral views on millions of college students attending religiously affiliated colleges, and hundreds of thousands of doctors, nurses, janitors, secretaries, and receptionists is *precisely* what Garvey and the Catholic Church seek to do – depriving these employees and students of a government-mandated benefit and imposing a de facto "contraception tax" on them.
- The Supreme Court has held that religious exemptions are only permitted insofar as they do not impose a monetary cost on nonbeneficiaries.<sup>19</sup> The Court has upheld limited religious exemptions only where they do not "impose monetary costs on...[those] who opposed, or were indifferent to, the

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<sup>13</sup> 455 U.S. 252 (1982).

<sup>14</sup> *Id.* at 260.

<sup>15</sup> Justice Burger used the example of a religious adherent who wishes not to allocate any taxes to the military, on the grounds that war is sinful.

<sup>16</sup> See, e.g., John Garvey, *HHS's Birth-Control Rules Intrude on Catholic Values*, WASH. POST, Sept. 30, 2011.

<sup>17</sup> See, e.g., *Lull v. Comm'r of Internal Revenue*, 602 F.2d 1166 (1979) (taxpayers not entitled to deductions for military expenditures that violate their conscience) (*quoted in Lee*, 455 U.S. at 260).

<sup>18</sup> John Garvey, *HHS's Birth-Control Rules Intrude on Catholic Values*, WASH. POST, Sept. 30, 2011.

<sup>19</sup> See *Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

religious instruction...”<sup>20</sup> Religious exemptions may not, under the Constitution, “impose substantial burdens on nonbeneficiaries.”<sup>21</sup>

- Here, the religious exemption imposes a de facto tax on two groups: first, religious-institution employees, who are now penalized relative to all other employees by having to pay out of pocket for contraception; and second, insurers for non-religious employees, which are now penalized relative to insurers for religious employees by virtue of having to pay for additional contractive coverage.

### **B. A Broader Exemption Would Impermissibly Give Religious Employers a Veto Over Employees’ Health Benefits**

- Indeed, one of the primary “evils” the Establishment Clause is designed to combat is the “active involvement of the sovereign in religious activity.”<sup>22</sup> That is precisely what is at issue here, where the government is seeking to delegate its authority to religious institutions.
- Vesting a religious entity with secular authority – ceding implementation of the preventive-services mandate to religious institutions – strikes at the very core the anti-establishment principle dating back to Jefferson’s original *Memorial and Remonstrance Against Religious Assessments*: “The core of that principle...is that ‘no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever...’”<sup>23</sup>
- The Supreme Court has specifically held unconstitutional laws that, in effect, give religious institutions a veto over rights enjoyed by others. For example, in *Larkin v. Grendel’s Den, Inc.*,<sup>24</sup> the Supreme Court overturned a statute that allowed religious institutions to veto liquor licenses within a 500-foot radius from the house of worship. In so holding, the Court held that the liquor law unconstitutionally delegated state power to a religious institution.<sup>25</sup> The religious exemption here similarly allows a religious employer to deny a government benefit to hundreds of thousands – and if the exemption is broadened – to millions of women and their families.
- There is no justification for a broader exemption than the one proposed in the interim final rule. The highest courts of California and New York, confronting virtually identical religious exemptions to the one at issue here, both rejected the argument of church-affiliated charities to also be exempted.<sup>26</sup>

### **C. A Broader Exemption Would Defeat the Purpose of the No-Copay-Contraception Mandate**

- Expanding the exemption would greatly undermine the purpose of the comprehensive national preventive-services program. Catholic hospitals employ nearly 800,000 people nationwide; religious schools employ another 300,000; and 1.7 million students attend the nation’s 900 religiously

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<sup>20</sup> *Id.* at 18 n.8.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Comm. For Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).

<sup>23</sup> Thomas Jefferson, *Memorial and Remonstrance Against Religious Assessments*, quoted in *Comm. For Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 770 n.28 (1973).

<sup>24</sup> 459 U.S. 116 (1982).

<sup>25</sup> *Id.* at 122.

<sup>26</sup> *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004).

affiliated colleges. In addition, there are numerous other primarily secular organizations that are owned or affiliated by churches, such as radio<sup>27</sup> and television stations,<sup>28</sup> condominiums,<sup>29</sup> and even paintball courses.<sup>30</sup> These millions of people would be excluded from the preventive services requirement – even though studies reveal that Catholics use birth control at the same rate as the general population.<sup>31</sup>

- Although the Center for Reproductive Rights strongly rejects any religious exemption, at least the proposed exemption is strictly limited to employees of a house of worship. Although not all such employees fulfill a ministerial position, such employees are at least arguably on notice that they may be subject to the religious dictates of their employers. In contrast, nurses at religiously affiliated hospitals, aeronautics professors at religious universities, English teachers at Catholic schools, and the 1.6 million students at religiously affiliated colleges and universities – the vast majority of whom use contraception – should not have a government-mandated benefit stripped of them due to their employers’ religious dogma.

#### **D. Using the ERISA Church-Plan Exemption is Unwise and Contrary to the Trend in Federal Healthcare Protection**

- Religious groups have argued that the Department of Health and Human Services should adopt the broad religious exemption used in ERISA (so-called “church plans”).
- The ERISA church-plans exemption is vague and overly broad. It is not a workable definition. The contours of precisely which employers are eligible for church plans continues even 37 years after the exemption was created. The constitutionality of the church-plan exemption has never been decided by the Supreme Court.
- Notwithstanding the uncertainty about which employers are eligible, the broad church-plan language could exclude millions of women from contraceptive coverage, including many employers with virtually no connection to houses of worship, such as religiously affiliated businesses, schools, universities, broadcasters, and entertainment venues.
- In light of its dubious constitutionality and unworkability, Congress has been moving away from exempting church plans from federal healthcare mandates over the past fifteen years: HIPAA (1996); Newborns and Mothers Health Protection Act of 1996; Michelle’s Law (coverage for certain dependent children); CHIPRA (requiring notice of certain state children’s health insurance programs); the Mental Health Parity and Addition Equity Act; and, of course, the Affordable Care Act.

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<sup>27</sup> For example, Bonneville International, which owns more than a dozen radio stations, is owned by the Church of Latter Day Saints. <http://bonneville.com>.

<sup>28</sup> See, e.g., KSL-TV Utah (NBC affiliate owned by the Church of Latter Day Saints), <http://www.ksl.com/>.

<sup>29</sup> See Lesley Mitchell, *Mormon Church Has Built Downtown Housing; Will People Come?*, SALT LAKE TRIBUNE, Sept. 27, 2011, available at <http://www.sltrib.com/sltrib/news/52583204-78/creek-units-church-lake.html.csp>.

<sup>30</sup> See, e.g., Joshua’s Paintball Jungle, a ministry of First Bible Baptist Church in Rochester, NY. <http://jpp.fbbc.info/about.shtml>.

<sup>31</sup> CENTERS FOR DISEASE CONTROL, NATIONAL SURVEY OF FAMILY GROWTH, NATIONAL HEALTH STATISTICS REPORT, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006–2008 (Mar. 3, 2011) available at <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.