

August 1, 2012

To President Barack Obama and the Congressional Leadership,

We are law professors concerned about the Constitution, religious freedom, individual liberty, and gender equality. Today, the egalitarian notion that *every* American deserves to enjoy religious freedom is under attack from those who would cede employees' religious-liberty rights to corporate executives and nonprofit directors. In this cramped and one-sided view of religious freedom, supervisors are entitled to decide, based on their religious sentiments, whether their employees will be permitted to enjoy essential health benefits¹ without the slightest concern for *their* religious beliefs. In particular, advocates claim that the Constitution gives all employers the right to veto their employees' health-insurance coverage of contraception.

This view, which is espoused by the U.S. Conference of Catholic Bishops and others,² is both wrong as a matter of law and profoundly undemocratic. Nothing in our nation's history or laws permits a boss to impose his or her religious views on non-consenting employees. Indeed, this nation was founded upon the basic principle that every individual – whether company president or assistant janitor – has an equal claim to religious freedom.

Nor does religious freedom provide a constitutional entitlement to limit women's liberty and equality, which are protected by the Fourteenth Amendment. Throughout the 1960s, religious leaders advocated laws banning contraception because they believed contraception was immoral. Nonetheless, in 1965 the Supreme Court held that contraceptive use enjoys constitutional protection in *Griswold v. Connecticut*.³ Moreover, the Equal Protection Clause of the Fourteenth Amendment requires that women enjoy the same health and reproductive freedom enjoyed by men.

Women's liberty and equality are well-settled constitutional law and must remain so. Just as the Court ruled in 1983 in *Bob Jones* that the free exercise of religion may not override government policies against racial discrimination, today free exercise must not undermine women's liberty and equality.⁴

The diminishment of women's liberty and equality will be the result if organizations claiming a religious affiliation are granted an exemption from the Obama administration's policy requiring all employers to provide contraceptive insurance to their employees.

¹ The Institute of Medicine and numerous other organizations have demonstrated conclusively the importance of affordable contraception to women's health – as well as for the health of their children. See Institute of Medicine – Committee on Preventive Services for Women, *Clinical Preventive Services for Women: Closing the Gaps* (2011), 102-110.

² See, e.g., "Unacceptable," Letter from Various Academics and Journalists, Feb. 10, 2012, available at <http://www.nationalreview.com/sites/default/files/nfs/uploaded/u498/2012/02/midnightish.docx>.

³ *Griswold v. Conn.*, 381 U.S. 479 (1965).

⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

The battle against legal contraception has been fought and lost before, not only in the 1960s, but also in the 1990s, when state legislatures and courts repeatedly rejected the argument that religious liberty provides a justification for undermining women's equality and denying them contraceptive insurance.

The same principle must apply today in the battle between the U.S. Conference of Catholic Bishops and their allies and the Obama administration over insurance coverage for contraception. Simply put, religious freedom requires religiously affiliated employers to obey the law rather than to become a law unto themselves.

Even forty-seven years after the Supreme Court recognized a constitutional right to contraceptive use, many American women continue to lack access to effective and affordable contraception. One reason for this has been the disparate insurance coverage for men and women. For that reason, twenty-eight states have passed contraceptive equity acts that help women gain equal access to reproductive health care. Several of those acts, just like the Obama administration's policy, require employer insurance plans that offer prescription-drug coverage to include contraceptive drugs and devices in their coverage. Most of those acts, just like the Obama plan, do not apply to houses of worship but to religiously affiliated employers like Catholic Charities, a large social-services organization that receives more than two-thirds of its funding from taxpayers,⁵ as well as to Catholic schools, universities and hospitals that employ both non-Catholics and Catholic women who use contraception.

The bishops and their allies opposed those bills in the legislatures and the state courts, arguing that religious freedom requires a complete exemption for all employers that claim a religious affiliation. As the recent debate demonstrates, that argument has a certain intuitive appeal to religious organizations that believe that free exercise allows religiously affiliated organizations to avail themselves of special rules. Under the leading free exercise case (*Employment Division v. Smith*), however, religious employers are subject to neutral laws of general applicability.⁶ Two state courts, namely the highest courts of New York and California, forcefully rejected the bishops' argument for exemptions from laws requiring the provision of contraception insurance to employees.

The state courts first ruled that providing insurance could not be a matter of internal church governance protected from state interference by the First Amendment. The courts also held that insurance laws applying to all employers were neutral laws of general applicability that could be constitutionally applied to religious employers under *Smith*. The two holdings reinforce each other. As the New York Court of Appeals explained, "The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit."⁷

⁵ See Catholic Charities, *At a Glance*, available at <http://www.catholiccharitiesusa.org/Document.Doc?id=1924>.

⁶ *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

⁷ *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006).

The California Supreme Court took a further step, ruling that its women's health act survived strict scrutiny.⁸ Under strict scrutiny, a law that substantially burdens a religious practice is upheld only if the law represents the least restrictive means of achieving a compelling interest. The court concluded that the women's health care act was narrowly tailored to the government's compelling interest in eliminating gender discrimination, obviating the need to undertake a substantial-burdens analysis.

The California Supreme Court's strict scrutiny analysis remains relevant to criticisms of President Obama's plan. Opponents of the regulations have argued that they violate the Religious Freedom Restoration Act (RFRA), which subjects federal policies to strict scrutiny if they substantially burden a person's exercise of religion. The opponents are wrong. First, under existing case law, the provision of insurance coverage is arguably not the exercise of religion. Moreover, allowing individuals the choice of contraceptives does not substantially burden any exercise of religion.

Even if the courts found a substantial burden on religion, however, the government's interests in protecting women's health and reproductive freedom, and combating gender discrimination, are compelling. The Institute of Medicine panel's report, and a mountain of evidence from other public health groups, amply demonstrate the government's compelling interest in ensuring widespread access to affordable contraception as a means of promoting health and remedying gender inequality.

The California Supreme Court ruled that a law nearly identical to President Obama's initial plan to provide insurance coverage – including a virtually identical exemption for houses of worship – was narrowly tailored to protect women's equality. Thus President Obama's original regulation could have withstood constitutional scrutiny. The constitutional case is even clearer for the accommodation, which requires insurance companies to bear the burden of providing coverage to employees claiming a religious affiliation. The accommodation is even more narrowly tailored than the initial regulation was to reflect the government's interest in women's equality.

In past Supreme Court decisions, religious employers have been required to pay Social Security⁹ and unemployment taxes for their employees and to observe the minimum wage laws.¹⁰ Federal courts of appeals have required religious employers to comply with the child labor laws¹¹ and to observe the equal pay laws even when the employers believed head-of-household pay was required by the Bible.¹² As the California

⁸ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004).

⁹ The Court's decision in that case, *United States v. Lee*, rejected a religious exemption to social security taxes. The Court explained that the Free Exercise does not require a religious waiver that would "operate[] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982) (emphasis added).

¹⁰ *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985).

¹¹ *Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989).

¹² *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986). The Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694 (2012) dismissing a minister's Americans with Disabilities Act claim is easily distinguishable, because the case merely held that a house of worship is

Supreme Court observed, “We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.”¹³

The federal government must continue to protect the rights of women who need insurance laws so that they may make reproductive choices consistent with their individual consciences. Religious freedom must not provide a justification to deprive women of legal rights they should enjoy as employees and citizens. To the contrary, the First Amendment specifically preserves space for their religious liberty, and secures their right to act as individuals who exercise their own conscience on matters pertaining to their faith, body, and health.

Leslie Griffin
Professor of Law
William S. Boyd School of Law
University of Nevada Las Vegas

Signed [Note: Affiliations provided for identification purposes only]:

Paula Abrams
Jeffrey Bain Faculty Scholar and Professor of Law, Lewis & Clark Law School

Libby Adler
Professor of Law, Northeastern University School of Law

Janet Ainsworth
John D. Eshelman Professor of Law, Seattle University School of Law

Sara Ainsworth
Lecturer, University of Washington School of Law

Catherine Albiston
Professor of Law and Professor of Sociology; Executive Committee Member, Thelton E. Henderson Center for Social Justice, University of California, Berkeley School of Law

Jose Alvarez
Herbert and Rose Rubin Professor of International Law, New York University School of Law

exempt from certain employment laws when hiring and firing ministers. In contrast, the no-copy contraception rule exempts houses of worship altogether, and affects the rights of all employees, including those who do not share the faith of their employers.

¹³ *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 93.

Mark Anderson
Associate Professor of Law, Temple University Beasley School of Law

Susan Appleton
Lemma Barkeloo and Phoebe Couzins Professor of Law, Washington University School of Law

Margalynne Armstrong
Associate Professor of Law, Santa Clara University School of Law

Marie Ashe
Professor of Law, Suffolk University Law School

Barbara Babcock
Judge John Crown Professor of Law, Emerita, Stanford Law School

Katharine Baker
Professor of Law, IIT Chicago-Kent College of Law

Susan Smith Bakhshian
Clinical Professor, Director of Bar Programs & Academic Success, Loyola Law School

Ann Bartow
Professor of Law, Pace Law School

Carrie Basas
Visiting Associate Professor of Law, Case Western Reserve University

John Beckerman
Visiting Professor, Rutgers University School of Law - Camden

Valena Beety
Associate Professor of Law, West Virginia University College of Law

Leslie Bender
Professor of Law, Syracuse University College of Law

Mary Berkheiser
Professor of Law, Director of Clinical Programs and Director of Juvenile Justice Clinic,
William S. Boyd School of Law University of Nevada Las Vegas

Adele Bernhard
Associate Professor of Law, Pace Law School

Anita Bernstein
Anita and Stuart Subotnick Professor of Law, Brooklyn Law School

Caroline Bettinger-Lopez
Associate Professor of Clinical Legal Education and Director, Human Rights Clinic,
University of Miami School of Law

M. Gregg Bloche, M.D., J.D.
Professor of Law, Georgetown University

Karen M. Blum
Associate Dean and Professor of Law, Suffolk University Law School

Grace Ganz Blumberg
Distinguished Professor of Law Emerita, UCLA School of Law

Amelia Boss
Trustee Professor of Law, Earle Mack School of Law, Drexel University

Cynthia Bowman
Dorothea S. Clarke Professor of Law, Cornell Law School

Alfred Brophy
Alfred L. Brophy, Judge John J. Parker Distinguished Professor of Law, University of
North Carolina, Chapel Hill

Naomi Cahn
John Theodore Fey Research Professor of Law, George Washington University Law
School

June Carbone
Edward A. Smith/Missouri Chair of Law, University of Missouri-Kansas City School of
Law

David Cassuto
Professor of Law and Director, Brazil-American Institute for Law & Environment, Pace
Law School

Erwin Chemerinsky
Founding Dean, University of California Irvine School of Law

Nancy Chi Cantalupo
Professor, Temple University Beasley School of Law

Margaret Chon
Donald & Lynda Horowitz Professor for the Pursuit of Justice, Seattle University School
of Law

Roger Clark
Board of Governors Professor, Rutgers University School of Law - Camden

David S. Cohen
Associate Professor of Law, Earle Mack School of Law at Drexel University

Clare Coleman
Assistant Teaching Professor and Director of Student Advising, Earle Mack School of Law at Drexel University

Rebecca Cook
Faculty Chair in International Human Rights Faculty of Law and Co-Director of the International Program on Reproductive and Sexual Health Law, University of Toronto

Bridget Crawford
Professor of Law and Associate Dean for Research and Faculty Development, Pace Law School

Lynn Daggett
Professor of Law, Gonzaga School of Law

Anne Dailey
Evangeline Starr Professor of Law, University of Connecticut School of Law

Anne Dalesandro
Director of the Law Library, Rutgers School of Law – Camden

Christine S. Davik
Professor of Law, University of Maine School of Law

Martha Davis
Professor of Law, Northeastern University School of Law

Kate Nance Day
Professor of Law, Suffolk University Law School

Bernard Dickens
Emeritus Professor of Health Law and Policy, University of Toronto

Norman Dorsen
Frederick I. and Grace A. Stokes Professor of Law, New York University School of Law

Margaret Drew
Professor of Clinical Law and the Director of the Domestic Violence and Civil Protection Order Clinic, University of Alabama School of Law

Jennifer Drobac
Professor of Law, Indiana University Robert H. McKinney School of Law

Linda Edwards
E.L. Cord Foundation Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas

Maxine Eichner
Reef C. Ivey II Professor of Law, University of North Carolina Chapel Hill School of Law

Kathleen C. Engel
Associate Dean for Intellectual Life and Professor of Law, Suffolk University Law School

JoAnne Epps
Dean, Beasley School of Law, Temple University

Deborah Epstein
Professor of Law and Associate Dean, Georgetown Law

Martha Ertman
Carole & Hanan Sibel Research Professor of Law, University of Maryland School of Law

Lisa Faigman
Lecturer in Law, University of California Hastings College of the Law

Bryan Fair
Thomas E. Skinner Professor of Law, University of Alabama School of Law

Mary Fellows
Everett Fraser Professor of Law, Emerita, University of Minnesota Law School

Linda Fentiman
James D. Hopkins Professor of Law, Pace Law School

Zanita E. Fenton
Professor of Law, University of Miami School of Law

Victor Flatt
Taft Distinguished Professor of Environmental Law, University of North Carolina Chapel Hill School of Law

Marsha Freeman
Professor of Law, Barry University Dwayne O. Andreas School of Law

Jaqueline Fox
Associate Professor of Law, University of South Carolina School of Law

Katherine Franke
Isidor and Seville Sulzbacher Professor of Law and Director of the Center for Gender and Sexuality Law, Columbia Law School

Theresa Gabaldon
Lyle T. Alverson Professor of Law and Director of Academic Programs and Administration, George Washington University Law School

Ruben Garcia
Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas

Leslie Garfield
Professor of Law, Pace Law School

Marsha Garrison
Suzanne J. and Norman Miles Professor of Law, Brooklyn Law School

Susan Gary
Orlando J. and Marian H. Hollis Professor of Law, School of Law University of Oregon

Bennett Gershman
Professor of Law, Pace Law School

Lauren Gilbert
Professor of Law, St. Thomas University School of Law

Theresa Glennon
Professor of Law, James E. Beasley School of Law at Temple University

Sally Goldfarb
Professor of Law, Rutgers University School of Law - Camden

Julie Goldscheid
Professor of Law, CUNY Law School

Leigh Goodmark
Associate Professor, Director Family Law Clinic and Co-Director of the Center on Applied Feminism, University of Baltimore School of Law

Michele Goodwin
Everett Fraser Professor of Law, University of Minnesota

Cheryl Hanna

Professor of Law, Vermont Law School

Kathy Hessler

Clinical Professor of Law and Animal Law Clinic Director, Lewis & Clark Law School

Steven J. Heyman

Professor of Law, IIT Chicago-Kent College of Law

Tracy Higgins

Professor of Law, Fordham School of Law

Jessie Hill

Professor of Law, Case Western Reserve University School of Law

Cynthia M. Ho

Associate Professor of Law & Vickrey Research Professor; Director, Intellectual Property & Technology Program, Loyola University Chicago School of Law

Sharon Hoffman

Edgar A. Hahn Professor of Law, Professor of Bioethics, Co-Director, Law-Medicine Center, Case Western Reserve University School of Law

Joan H. Hollinger

Lecturer-in-Law, Berkeley Law School University of California

Deena Hurwitz

Associate Professor of Law and Director of the International Human Rights Law Clinic and Human Rights Program, University of Virginia

Melanie Jacobs

Professor of Law, Michigan State University College of Law

Stewart Jay

Pendleton Miller Endowed Chair of Law, University of Washington School of Law

Faye Jones

Director and Professor of Law, Florida State University College of Law

Sital Kalantry

Associate Clinical Professor of Law and Faculty Director of the Avon Global Center for Women and Justice, Cornell University Law School

Margo Kaplan

Assistant Professor of Law, Rutgers School of Law

Harriet Katz

Professor of Law, Rutgers University School of Law – Camden

Linda K. Kerber

May Brodbeck Professor in the Liberal Arts Emerita, and Lecturer in Law, University of Iowa College of Law

Jaime King

Associate Professor of Law, University of California Hastings College of the Law

Kristine S. Knaplund

Professor of Law, Pepperdine University School of Law

Ellen Kreitzberg

Professor of Law, Santa Clara University School of Law

Sylvia Law

Elizabeth K. Dollard Professor of Law Medicine and Psychiatry, New York University School of Law

Nancy Leong

Assistant Professor, University of Denver, Sturm College of Law

Nancy Levit

Curators' and Edward D. Ellison Professor of Law, UMKC School of Law

Francine J. Lipman

William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas

David Luban

University Professor in Law and Philosophy, Georgetown Law

Jody Lynee Madeira

Associate Professor of Law, Indiana University School of Law

Kevin Noble Maillard

Professor of Law, Syracuse University College of Law

Maya Manian

Associate Professor of Law, University of San Francisco School of Law

Thomas McAfee

William S. Boyd Professor, William S. Boyd School of Law, University of Nevada Las Vegas

Joyce E. McConnell

William J. Maier, Jr. Dean, Thomas R. Goodwin Professor of Law, WVU College of Law

Marcia McCormick
Associate Professor, Saint Louis University School of Law

Ann McGinley
William S. Boyd Professor, William S. Boyd School of Law, University of Nevada Las Vegas

Michelle McKinley
Associate Professor, Dean's Faculty Fellow, University of Oregon School of Law

Laura McNally
Professor of Law, Case Western Reserve University School of Law

Carrie Menkel-Meadow
A.B. Chettle, Jr. Professor of Dispute Resolution and Civil Procedure, Georgetown Law

Cynthia Mertens
Associate Dean for Academic Affairs and Professor of Law, Santa Clara University

Vanessa Merton
Professor of Law and Faculty Supervisor of the Immigration Justice Clinic, Pace Law School

Sally Merry
Professor of Anthropology, Institute for Law and Society, New York University School of Law

Carlin Meyer
Professor of Law and Director of the Diane Abbey Law Center for Children and Families, New York Law School

Naomi Mezey
Professor of Law, Georgetown Law

Jennifer Moore
Professor of Law, University of New Mexico School of Law

Karen Moran
Associate Professor of Law, General Faculty, University of Virginia

Daniel Morrissey
Former Dean and Professor of Law, Gonzaga University School of Law

Jill Morrison

Adjunct Professor of Law, University of DC David A. Clarke School of Law

Ann Murphy
Professor of Law, Gonzaga School of Law

Karen Musalo
Clinical Professor of Law and Director of the Center for Gender and Refugee Studies,
University of California, Hastings College of Law

Michael Mushlin
Professor of Law, Pace Law School

Kimberly Mutcherson
Associate Professor of Law, Rutgers University School of Law – Camden

Cynthia Nance
Dean Emeritus & Nathan G. Gordon Professor of Law, University of Arkansas

Michelle Oberman
Professor of Law, Santa Clara University School of Law

Nancy K. Ota
Professor of Law, Albany Law School

Richard L. Ottinger
Dean Emeritus, Pace Law School

Justin Pidot
Assistant Professor, University of Denver, Sturm College of Law

Deana Pollard-Sacks
Professor of Law, Texas Southern University Thurgood Marshall School of Law

Andrew S. Pollis
Assistant Professor of Law, Milton A. Kramer Law Clinic Center, Case Western Reserve
University School of Law

Terrill Pollman
Director of the Lawyering Process Program and Professor of Law, Williams S. Boyd
School of Law University of Las Vegas

Lucille M. Ponte
Professor of Law, Florida Coastal School of Law

Sarah Ricks
Clinical Professor of Law, Rutgers University School of Law – Camden

Angela R. Riley
Professor of Law, UCLA School of Law, Director, UCLA American Indian Studies
Center

Dorothy Roberts
George A. Weiss University Professor of Law & Sociology and Raymond Pace & Sadie
Tanner Mossell Alexander Professor of Civil Rights, University of Pennsylvania

Rand Rosenblatt
Professor of Law, Rutgers University School of Law – Camden

Susan Deller Ross
Professor of Law and Director, International Women's Human Rights Clinic, Georgetown
Law

Margaret Russell
Professor of Law, Santa Clara University School of Law

Carol Sanger
Barbara Aronstein Black Professor of Law, Columbia Law School

Nadia N. Sawicki
Assistant Professor of Law, Beazley Institute for Health Law and Policy, Loyola
University Chicago School of Law

Robert P. Schuwerk
Professor of Law, University of Houston Law Center

Elizabeth Sepper
Associate Professor of Law, Washington University School of Law

Ann Shalleck
Professor of Law, Director of Women and Law Program, Carrington Shields Scholar,
American University Washington College of Law

Laurie Shanks
Clinical Professor of Law, Albany Law School

Julie Shapiro
Professor of Law, Seattle University School of Law

Jessica Silbey
Professor of Law, Suffolk University Law School

Rosalind Simson

Adjunct Professor of Law, Mercer University School of Law and Associate Professor of Philosophy, Mercer University

Jana Singer

Professor of Law, University of Maryland, Francis King Carey School of Law

Abbe Smith

Professor of Law and Director of the Criminal Defense and Prisoner Advocacy Clinic, Georgetown Law

Cynthia Soohoo

Director of the International Women's Human Rights Clinic, CUNY Law School

Roy G. Spece

Professor of Law, University of Arizona James E. Rogers College of Law

Carrie Sperling

Associate Clinical Professor of Law, Sandra Day O'Connor College of Law

Ralph Stein

Professor of Law, Pace Law School

Lara Stemple

Director of Graduate Studies, Director of Health and Human Rights Law Project, UCLA School of Law

Richard Storrow

Professor of Law, CUNY School of Law

John Strait

Associate Professor of Law, Seattle University School of Law

Jennifer Templeton Dunn

Executive Director, UCSF/Hastings Consortium on Law and Adjunct Professor, University of California, Hastings College of the Law

Tracy Thomas

Professor of Law, University of Akron School of Law

Stacey Tovino

Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas

Mary Pat Treuhart

Professor of Law, Gonzaga University School of Law

Ann E. Tweedy

Assistant Professor, Hamline University School of Law

Carole Vance

Associate Clinical Professor of Sociomedical Sciences, Mailman School of Public Health, Columbia University

Valorie K. Vojdik

Professor and Deputy Director, Law Clinic, West Virginia University College of Law

Lois Weithorn

Professor of Law, University of California Hastings College of the Law

Robin West

Frederick J. Haas Professor of Law and Philosophy, Georgetown Law

Lesley Wexler

Thomas M. Mengler Faculty Scholar and Professor of Law, University of Illinois College of Law

Deborah Widiss

Associate Professor of Law, Indiana University Maurer School of Law

Lindsay Wiley

Assistant Professor of Law, American University Washington College of Law

Verna Williams

Professor of Law, University of Cincinnati College of Law

Zipporah Wiseman

Thos. H. Law Centennial Professor, University of Texas at Austin School of Law

Marcia Zug

Assistant Professor of Law, University of South Carolina School of Law