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Court of Appeals

of the

State of New York

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; THE SERVANTS OF RELIEF FOR INCURABLE CANCER; TEMPLE BAPTIST CHURCH; OUR LADY OF CONSOLATION GERIATRIC CARE CENTER; DELTA DEVELOPMENT OF WESTERN NEW YORK, INC.; ST. JOHN THE BAPTIST CHURCH; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; BISHOP LUDDEN HIGH SCHOOL; FIRST BIBLE BAPTIST CHURCH; CARMELITE SISTERS FOR THE AGED AND INFIRM, INC.,

Plaintiffs-Appellants,

– against –

GREGORY V. SERIO, Superintendent,
New York State Department of Insurance,

Defendant-Respondent.

BRIEF *AMICI CURIAE* OF BECKET FUND FOR RELIGIOUS LIBERTY, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, EVANGELICAL COVENANT CHURCH, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, LUTHERAN CHURCH-MISSOURI SYNOD, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AND WORLDWIDE CHURCH OF GOD, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICI*

The Becket Fund for Religious Liberty, Catholic Health Association of the United States, Evangelical Covenant Church, General Conference of Seventh-day Adventists, International Church of the Foursquare Gospel, Lutheran Church-Missouri Synod, United States Conference of Catholic Bishops, and Worldwide Church of God unite here as *amici curiae* in support of Appellants.[1/] The *amici* are religious and civil rights organizations. While they do not necessarily share the same views about artificial contraception, all the *amici* recognize that this case involves legislation that seeks to establish a precedent in New York dangerous to our State and national tradition of protecting the integrity of religious institutions against the intrusive power of the government. The State of New York has enacted a law that forces church institutions with a mission outreach, in violation of their self-identity, to pay for services for their own employees that the institutions hold and teach to be sinful. At issue is an effort by the State radically to rewrite the Appellants' self-definition as churches – and by rewriting, effectively to threaten the present right of those churches to constitute and govern themselves and to engage in public ministry and service in a manner consistent with their own religious teaching – by forbidding them in their own house to practice what they preach. That attempt by the State is an unprecedented

[1/]An individual description of each amicus is included in the motion to file which accompanies this brief.

interference with religious governance and mission which, if unchecked here, could support even more expansive and corrosive inroads into religious institutions in the future.

At least as alarming as the fact of government intrusion into the precincts of churches in this case is the manner in which the State has accomplished the intrusion, namely, by defining certain church agencies as, in essence, "not religious enough" – and therefore not entitled to any exemption from the contraceptive mandate – based on who they serve, how they constitute their workforce, and whether "inculcation of religious values" is "the purpose" of the agency. Thus, New York has concluded that a church is not a "religious employer" if it (a) ministers is to those who are not already members of the church, or (b) fails to discriminate based on religion, or (c) its charitable and missionary purposes do not consist strictly in inculcating religious values. Under such inexplicably narrow and intrusive criteria – criteria bearing no reasonable relation to any legitimate (let alone compelling) government purpose – even the ministry of Jesus and the early Christian Church would not qualify as a "church" because they did not confine their ministry to their co-religionists or engage only in a preaching ministry. Simply put, though the State can distinguish between a church and a secular entity for purposes of accommodating religion (*e.g.*, because of church autonomy or religious exercise concerns), the State constitutionally has no business gerrymandering religion so that some churches are "in" and others are "out"

for regulatory purposes based on who they serve, how they constitute their workforce, or whether they engage in "hard-nosed proselytizing." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002).

The resulting danger of government intrusion into, and re-definition of, churches is real. The State's suggestion that Appellants are not "purely religious" (R. 981) shows just how radical the State's agenda is to redefine these churches, since it implies that the State itself, not the religious body, is entitled to decide what is and is not an agency of the church. If Appellants' constitutionally-grounded right of self-definition and autonomy is not vindicated here, no denomination will be safe from the threat of being shaped by the government's command. Religious bodies as a consequence will be at risk of losing their distinctiveness, and will be forced to conform to the State's own concept of what those organizations should look like and "how religious" they must be. Today's case is about contraceptives. Tomorrow's will present some other issue over which the public disagrees, such as abortion, assisted suicide, cloning, or some issue of self-governance such as the use of resources for evangelization or who a religious agency may hire to do ministry work.

The freedom to organize religious agencies and institutions in conformance with religious standards is among the most cherished of human rights. Those institutions, whose very purpose is to minister consistent with an often counter-cultural message, have a long-recognized and fundamental right to be distinctive, a right (indeed a

religious duty) to speak prophetically to their members and to society, and to constitute themselves, free from state interference, in a manner consistent with their own particular teaching. That is what this case is about, and why this Court's intervention is so essential.

QUESTIONS PRESENTED

Amici adopt the Appellants' statement of the questions presented.

STATEMENT OF THE CASE

Amici adopt the Appellants' statement of the case.

ARGUMENT

I. THIS CASE HAS GRAVE IMPLICATIONS FOR ALL RELIGIOUS DENOMINATIONS.

This case presents an issue of historic consequence for all churches.[2/] At stake is the ability of all churches and church institutions to organize, govern, and constitute themselves in a manner consistent with their religious convictions. Apart from an outright ban on churches, a requirement that a church agency pay in its own workplace for private conduct that church teaches to be sinful is one of the most serious invasions of church autonomy imaginable. Such a mandate forces a church to act and speak in a manner directly contrary to the message it preaches, interfering with its ability to organize and govern itself and its agencies.

[2/] We use the term "churches" to refer to all religious denominations, not just Christian churches.

The Appellant-churches, in one form or another, oppose contraceptives and, consistent with religious doctrine, do not provide it in their workplaces, believing it inconsistent with their teaching. Paying for the act is cooperating in sinful activity thus condemned. But the States says they must because these agencies serve their communities (and thus are not exempt "religious employers"). They could avoid the mandate if they abandoned prescription drug coverage. But that is no answer for as the uncontested record shows, the Appellants consider it a religious duty to provide such coverage and thus do so as an act of religiously-motivated justice for their employees.[3] Thus the churches have a choice of evils – fund sinful activity, harm their employees, or withdraw from public ministry to gain the exemption. In the end, the common good suffers under each alternative. A victory for the State can only hurt the community, injure the very employees the State is trying to benefit, or weaken the churches' witness. That is plainly wrong and irrational.[4]

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[3] Further, as a matter of the common good and common sense, the health and welfare of employees cannot possibly be bettered if no prescription drug coverage is provided. One would hope the State could find some means to promote public health and gender equity that does not actually reduce health insurance coverage and exacerbate the very problems the State asserts it is trying to solve. For us, this one factor speaks eloquently to the fact that the State's overriding concern is not contraceptive coverage but establishing the principle, in conflict with the U.S. and New York Constitutions, that the State can force a religion to submit to the State's will.

[4] Compounding the statute's irrationality is the fact that only employees of church agencies that meet the restrictive definition of "religious employer" can opt for an insurance rider that includes contraceptive coverage not available from the employer. Thus, employees who desire contraceptive coverage but are employed by church agencies that do not qualify for the exemption are left without such coverage. How this odd state of affairs furthers the State's claimed interests in either health

Once allowed, there is little in principle to stop further destructive intrusions into the self-governance and organization of churches, for if a church can be required in its own house to provide programs or pay for services repugnant to its deeply held religious convictions, it would seem that no church or church body is safe from the ad hoc nullification of its practices and teaching at the hands of the State. Even the late Mother Teresa's Missionaries of Charity could be forced to abandon their work or violate religious principle by paying for contraceptives, sterilizations, or abortions, all squarely in contradiction of their identity and purpose.[5/] This Court's intervention is necessary to prevent the state from undermining the integrity of Appellants, as the State has done here, and other church agencies.

II. FORCING APPELLANTS TO PAY FOR INSURANCE COVERAGE FOR CONTRACEPTIVES IN THEIR OWN WORKPLACES VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The challenged mandate is a direct assault on the internal organization and beliefs of churches and their agencies, and their right to express those beliefs and act in accordance with them, in violation of their constitutionally protected freedom of religion, speech and association. We address these constitutional interests in turn.

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care or gender equity is beyond easy or rational explanation.

[5/]Of course, Mother Teresa's sisters would not be exempt from the challenged contraceptive mandate because, among other things, they serve everyone, not just Catholics, and their purpose is not the inculcation of religious values.

1. Freedom of Religion

The Free Exercise and Establishment Clauses (collectively "Religion Clauses") represent an historic moment in church-state relations. As distinct from earlier eras in which the lines separating government power and religious authority were either non-existent or indistinct,[6/] the federal Constitution provides that government will stay out of the precincts of churches, while churches stay out of the precincts of the state. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (the purpose of the Religion Clauses is "to prevent, as far as possible, the intrusion of either [state or religious institutions] into the precincts of the other"); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212 (1948) ("the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere"); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) ("The structure of our government has, for the preservation of civil liberty, rescued the

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[6/] Religious and secular governance in ancient times was merged into a single person or group. In the roughly 1,000 year period bridging the ancient and modern eras, distinctions between religious and secular governance become more recognizable, but secular leaders frequently exercised religious authority and religious leaders in turn exercised secular authority. The First Amendment's historic innovation was to recognize as a rule of law a legitimate distinction between government and religious authority. *See, e.g.*, Thomas J. Curry, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA (2001), at 12. As a consequence of that distinction, secular authorities under our constitutional order may not interfere with the governance of churches and their agencies, *see* cases cited *infra*, nor may churches exercise government power. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (allowing church to decide whether liquor license may be issued to neighboring premises is an unconstitutional delegation of government authority). Ninth Circuit Judge John Noonan does not overstate the case when he says of the First Amendment that "[t]here had been nothing like it in history." John T. Noonan, Jr., "The End of Free Exercise?," 42 DePaul L. Rev. 567 (Winter 1992).

temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."), quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1872).[7] The principle of church autonomy and self-governance, one aspect of the constitutionally mandated separation between government and religious bodies,[8] is well settled. *Watson v. Jones*, *supra*, established that questions of ecclesial discipline, faith or church law belong to the church, not the government, and hence are not subject to the review of civil courts. A half century after *Watson*, the Court applied the same rule to hold that the government may not prescribe the standards of church office. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses

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[7] There is no denying the preferential value the Founders placed on religious freedom. "Madison looked upon ... religious freedom ... as the fundamental freedom." *Everson*, 330 U.S., at 34 n.13 (Rutledge, J., dissenting) (quoting Irving Brant, JAMES MADISON, THE VIRGINIA REVOLUTIONIST 243 (1941). Indeed, Madison objected to the use of the phrase religious "toleration" in the Virginia Constitution as suggesting that the right to practice one's own religion was a governmental favor as opposed to an inalienable right. Sanford H. Cobb, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 492 (1902) (reprinted 1970), cited by Justice O'Connor in *Boerne v. Flores*, 521 U.S. 507, 556 (1997). Jefferson saw religious freedom as "the most inalienable and sacred of all human rights." THE WRITINGS OF THOMAS JEFFERSON (Memorial ed., 1904) at 414-17, quoted in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 245 n.11 (Reed, J., dissenting). Madison thought government should not interfere in religion "beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others." IX THE WRITINGS OF JAMES MADISON 484, 487 (Hunt, ed., 1901-10), quoted in *Everson*, 330 U.S., at 40 n.28 (Rutledge, J., dissenting). *See also Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (liberties guaranteed by the First Amendment have a "preferred position in our basic scheme").

[8] *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 672 (1970) (our cases have tried to "chart a

them").

Decided on non-constitutional grounds before the First Amendment had been applied to states through the Fourteenth Amendment, *Watson* and *Gonzalez* and the principles they stand for were elevated to constitutional status in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952).[9/] In *Kedroff*, the New York legislature, in an attempt to free the Russian Church in America from "infiltration of ... atheistic or subversive influences" by the Russian government, and out of fear that church pulpits would be used for political purposes, had passed a law transferring complete control of Russian Orthodox churches from the hierarchy of the Russian Orthodox Church in Russia to the church's diocese in America. 344 U.S., at 109. The Supreme Court invalidated the legislation, holding that the Free Exercise Clause bars a state legislature from regulating "church administration, the operation of the churches, [or] the appointment of clergy...." *Id.* at 107-08.[7/] The *Watson* decision, the Court explained in *Kedroff*, "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

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course that preserve[s] the autonomy and freedom of religious bodies").

[9/] *Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church*, 393 U.S. 440, 447 (1969) ("In *Kedroff*... the Court converted the principle of *Watson* as qualified by *Gonzalez* into a constitutional rule.") *See also Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1538 n.24 (11th Cir. 1993) (explaining the basis of, and relationship among, *Watson*, *Gonzalez*, and *Kedroff*), *cert. denied*, 513 U.S. 807 (1994).

well as those of faith and doctrine," freedom that "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116.

The principle of church autonomy and self-governance was again dispositive in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The "right to organize voluntary religious associations," the Court wrote, "is unquestioned." 426 U.S., at 711, quoting *Watson*, 80 U.S., at 728-29. The First Amendment permits religious organizations "to establish their own rules and regulations for internal discipline and government...." 426 U.S., at 724.[10/] *See Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring in the judgment) ("religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to ... select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions") (internal quotation marks omitted).

In each case – *Watson*, *Gonzalez*, *Kedroff*, and *Milivojevich* – interference with church governance was adjudged to be unconstitutional *per se*, and the Court made no attempt to apply a balancing test. An interest as compelling as the avoidance of

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[10/] *See also Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church*, *supra* note 9 (holding that it is constitutionally impermissible for civil courts to adjudicate a church dispute arising out of a church schism). The Court in *Presbyterian Church* cites the First Amendment, *id.* at 441, 444 n.3, 449-51, with reference to both free exercise and establishment concerns. *Id.* at 449.

Communist infiltration at the height of the Cold War made absolutely no difference to the Court's conclusion that New York had stepped out of constitutional bounds when it attempted to interpose itself in a church's organization and self-governance. *See also Church of Scientology v. City of Clearwater*, 2 F.3d at 1539-40 ("The criteria adopted in *Lemon* and elaborated in its progeny are absolute in themselves, and a law that fails to meet any of them is per se invalid.... The Establishment Clause prevents seemingly important justifications from becoming a shield to defend the subtle and incremental advance of government administration into the field of church activities."); *see* Carl H. Esbeck, "The Establishment Clause as a Structural Restraint on Governmental Power," 84 Iowa L. Rev. 1 (Oct. 1998) (the Establishment Clause is an affirmative restraint on government, depriving it of *any* power whatever to interfere with religion); Thomas J. Curry, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 194 (1986) ("Americans in 1789 ... agreed that the federal government had no power in [religious] matters").

Contrary to the Appellate Division's majority opinion, 808 N.Y.S.2d 447, 464-65 (2006), the principle of church autonomy is not limited to the rule that civil courts defer to ecclesiastical tribunals, but applies to any attempt by government to regulate the internal affairs and organization of churches. *Gonzalez*, for example, involved an attempt, through judicial enforcement of a private trust, to vary church rules on the

choice of ministers.[11/] *Kedroff* involved a legislative attempt to decide who would hold power in a church. Any government attempt, whether judicial or legislative, to intrude into the inner workings of a church by artificially declaring some matters non-religious is *per se* unconstitutional. *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (neither courts nor legislatures may decide questions of church governance). The State lacks the constitutional power to determine which issues are "religious" for a religion, or "determine the place of a particular belief in a religion." *Employment Division v. Smith*, 494 U.S. 872, 887 (1990); *Thomas v. Review Board*, 450 U.S. 707, 714 (1981).

Church of Scientology, supra, provides another example of the wide application of the autonomy principle in protecting the internal workings of churches. In that case, the City of Clearwater had enacted an ordinance requiring the Church of Scientology to disclose detailed financial and other information. The Eleventh Circuit held that it

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[11/] A related application of the principle of church autonomy which continues to recur and to be restated and affirmed by the courts is the constitutionally compelled ministerial exception to laws forbidding discrimination in employment. *See, e.g., EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000). The ministerial exception demonstrates the continuing strength of the constitutional right of churches to organize and govern themselves free of state interference. As these cases hold, the government may not second guess a church's choice of ministers, even if that choice is not based on religious conviction. *E.g., Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997) (religious organization's decision to terminate minister for financial rather than religious reasons was not subject to civil court review); Ira C. Lupu & Robert Tuttle, "The Distinctive Place of Religious Entities in Our Constitutional Order," 47 Vill. L. Rev. 37, 41-42 (2002) (the ministerial exception "immunizes religious institutions that assert no theological claim to engage in gender discrimination. Indeed, it even protects religious institutions that assert their full compliance with and support for anti-discrimination norms"). The infringement on Appellants' right of self-organization is more serious here because the agency's decision not to pay for contraceptive coverage in its own workplace is based on religious reasons.

was constitutionally impermissible for the government to impose its own preferences concerning what information the church should disclose not just to the public but to its members. 2 F.3d at 1536-37. The civil mandate requiring disclosure of information to church members subtly, yet impermissibly, shifted the balance of authority within the church in ways contrary to the church's doctrine. *Id.* at 1536. Appellants' claims are even stronger than those presented by Church of Scientology because this legislation requires Appellants themselves to pay in their own workplaces for what they explicitly condemn as sinful.[12/] This case therefore involves more than a reordering of decision-making within a church agency. It contravenes not only the agency's consistency with its doctrine, but, in some measure, the very religious convictions that are its *raison d'etre*.[13/] Here the State has decided that each of Appellants' employees may have the power to decide whether Appellants, notwithstanding their religious convictions, pay for contraceptives for that employee. In effect, the State has turned religious authority, resting on religious doctrines and principles, upside down. *Cf. Amos*, 483 U.S., at 341

[12/] To be sure, payment is through an intermediary insurer, but as a matter of Appellants' religious principles there is material cooperation. The Appellate Division was correct when it unanimously found a burden on Appellants' religious beliefs. 808 N.Y.S.2d 447, 454 & n.1, 457 (2006); *id.* at 471 (Cardona, P.J., dissenting).

[13/]For a fuller treatment of why a church's charitable activities must be rooted in the values that that church espouses, see Pope Benedict XVI's Encyclical Letter *Deus Caritas Est* ("God is Love"), Part II (Dec. 25, 2005), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/index_en.htm (visited June 12, 2006).

(Brennan, J., concurring in the judgment); *Church of Scientology*, 2 F.3d at 1536.[14/]

It is rare indeed that one witnesses such a serious intrusion into the organization and polity of a religious organization. Attempts to require a church to pay within its own institutions for programs or services that the church specifically preaches against are virtually unprecedented. The only conscientiously opposed funding even attempted in times leading up to adoption of the Religion Clauses involved not compulsory funding by churches of programs or services to which they objected (that apparently was never attempted), but compulsory funding of churches and ministers by individual taxpayers – a practice that met with stiff resistance and culminated in the enactment of the Religion Clauses. Curry, THE FIRST FREEDOMS, *supra* at 89, 106-07, 109, 111, 116, 137, 143-45, 149, 153. Madison's well-known Memorial and Remonstrance, described as "at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is an 'establishment of religion,'" *Everson*, 330 U.S., at 37 (Rutledge, J., dissenting), was itself directed at a proposal to impose a tax for the support of religious teachers.[15/]

[14/]For more detailed and recent treatment of the scope of the autonomy doctrine, see Mark E. Chopko & Michael F. Moses, "Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy," 3 Georgetown J. of L. & Pub. Pol'y 387 (Summer 2005).

[15/]There is nothing to suggest that Madison or Jefferson, principal actors in the Virginia drama on which the Supreme Court has heavily relied in its Religion Clauses jurisprudence (*see, e.g., Everson*, 330 U.S., at 11-13), would have wanted religious organizations to be forced to pay for services to which they had a religious objection as a condition of being allowed to exist and serve its members

There is, of course, no general constitutional right not to pay a tax. *United States v. Lee*, 455 U.S. 252 (1982); *Droz v. Commissioner*, 48 F.3d 1120 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996). The present case, however, does not involve a tax of any kind. New York is not imposing or collecting tax revenues so that it may pay for contraceptives. The State instead has forced Appellants themselves to pay for contraceptives. Put another way, taxpayer cases like *Lee* involve how the government collects and uses its own funds. Such cases implicate the state's interest in maintaining the viability of the tax system, in part to maximize the collection of revenue; the present case does not. The present case involves neither a commercial enterprise nor payment of taxes into government coffers nor use of government money, but a mandate that a private church organization itself provide its own workforce, through a private insurance program, with direct payments for what the church teaches and preaches against. Government can spend its own funds as it wishes (*Bowen v. Roy*, 476 U.S. 693 (1986)), but an attempt to determine how a church agency uses its funds as is presented here is unconstitutional. *See People ex rel. Deukmejian v. Worldwide Church of God*, 127 Cal.App.3d 547, 551, 178 Cal.Rptr. 913, 915 (Cal. App. 1981) (stating, in dicta, that a government attempt to control church property and the receipt and expenditure of church funds would violate the constitutional prohibition

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or others. If the issue did not arise, it is only because no government was thought to have the power to dictate religious choices to religious institutions.

against government establishment and interference with the free exercise of religion). This case is not about the government's taxing power. This case is about direct and compulsory private funding inside a religious institution in contravention of the teachings of that religion was therefore beyond the contemplation of the Framers, an evil that rears its head in another guise in this case.[16/]

Only one other appellate court has upheld a funding mandate like that at issue here. *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004). We believe that the California case, far from being "highly instructive" (808 N.Y.S.2d at 454 n.2) for resolution of the present case, (a) is factually distinguishable and (b) was wrongly decided. The California case involved a single party and different facts. Among other things, it involved no "rider" like the one at issue here. *See* note 4, *supra*. Significantly, in opposing a petition for certiorari, the State of California conceded that a "closer question" might be presented on the constitutional issues by different parties and different facts. Respondents' Brief in Opposition, at 10, *Catholic Charities of Sacramento v. California*, 543 U.S. 816 (2004) (No. 03-1618) (denying petition for certiorari). In any event, the case conflicts with settled authority in at least

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[16/]Also distinguishable are the equal pay and minimum wage cases, where either no burden or, at most, minimal burden was found to be imposed on religion. *E.g.*, *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985) (no burden); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397-98 (4th Cir. 1990) (limited burden). The Appellate Division was unanimous in its conclusion that the contraceptive mandate imposes a significant burden on the Appellants.

two respects. First, it fails to recognize that, under the right of church autonomy, government has no power to wrest control of a church's treasury to make it fund, in its own house and within its own workforce, private conduct to which the church is religiously and morally opposed. Second, the court assumes incorrectly that government can classify religious organizations on the basis of which are "purely" religious and which are not. *See* discussion *infra* at pp. 23-30. This Court should not make the same mistake.

The autonomy cases demonstrate that under the Religion Clauses, Appellants have a right to retain their self-identity and distinctiveness as church organizations. The State's attempt to place a wedge between Appellants and their employees runs afoul of this vital freedom. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), is illustrative. In that case, the National Labor Relations Board attempted to insert itself into the relationship between religious schools and their teachers by asserting jurisdiction to certify a union. The Supreme Court held that the Board's attempt would give rise to "serious constitutional questions," and it refused to interpret the authorizing statute to permit such an intrusion. 440 U.S., at 501. The contraceptive mandate forced upon Appellants does here what NLRB union certification would have done in *Catholic Bishop* had the courts not intervened; indeed, this case is a more egregious violation of religious liberty because the Appellants have a specific religious objection to contraceptives (even though the parties in *Catholic Bishop* had no religious

objection to unions).

2. Freedom of Speech and Association[17/]

The presence of two additional constitutional interests – free speech and association – bolster Appellants' case. The constitutional protection of speech goes beyond mere spoken and written word to embrace expressive conduct. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-07 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966). The right of association is also well established. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) ("'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"), quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Together these guarantees – speech and association – are a safeguard against state-enforced ideology, an assurance that diversity of thought and belief will be permitted and indeed protected, not banished by the state. *See, e.g., Dale, supra.*

There is no question that compulsory funding can violate the constitutional guarantees of speech and association. *See Abood v. Detroit Bd. of Educ.*, 431 U.S.

[17/]We discuss free speech and association together because, as will become evident, they involve related analyses and court decisions frequently link the two. If this Court were to disagree that free speech is implicated, the right of association would still be at issue because it is implicit in the right to engage in all activities protected by the First Amendment, including religion. *Boy Scouts of*

209, 222, 235 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990). A mandate that an organization, in its own workplace, pay for a program or service that contradicts the organization's very *raison d'etre* is serious enough even when one sets aside the religious interests at stake here. One can imagine how Planned Parenthood, a proponent of legislative mandates like the one challenged here, might react if the political landscape were altered so that it was required to pay its own employees for services that directly contradicted its associational mission and message. Consider, for example, the likely reaction were a legislature to require all insurance plans that pay for abortion to pay for post-abortion trauma services and counseling based on a legislative finding that such trauma poses a significant public health risk. Planned Parenthood denies that women suffer trauma as a result of abortion,[18/] just as Appellants deny that contraceptives benefit either women or men. Planned Parenthood would be required to notify its employees of available, insured services for post-abortion trauma, and pay for those services, all the while denying that such trauma exists, just as Appellants here are required to notify their employees of coverage for contraceptives. The same speech and associational interests Planned Parenthood would undoubtedly raise in such circumstances are enhanced when those interests involve the internal operations of a

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America v. Dale, 530 U.S. 640, 647 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), cited with approval in *Smith*, 494 U.S., at 882.

[18/]Planned Parenthood, "Choosing Abortion – Questions and Answers," at 3, available at

church, for the latter has a particular constitutional right to autonomy arising out of the Religion Clauses that Planned Parenthood, as a secular organization, does not.[19/]

In this case, church agencies have employed persons to further an explicitly religious mission, a mission known to its employees and tacitly agreed to by them. *Cf. Watson*, 80 U.S. (13 Wall.), at 729 ("All who unite themselves to ... a [religious] body do so with an implied consent to this government, and are bound to submit to it"). Yet Appellants have been forced by the State indirectly to pay, for these same employees, for services that directly contravene the religious teachings that identify the Appellants as Catholic and Baptist, respectively.

At stake here is a principle not only of constitutional law but common sense:

> [I]t is generally accepted that companies can hire those who agree with the mission of the company. The American Civil Liberties Union (ACLU) would not be forced to retain a staffer who publicly rebuked efforts to promote civil liberties. An environmental protection group would not be required to retain a staffer who argued the Endangered Species Act was unnecessary and wasteful... The ACLU ... [and] other advocacy groups, ... like other employers, are entitled to a work force that does not publicly discredit the institution....

Mark E. Chopko, "Shaping the Church: Overcoming the Twin Challenges of

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www.plannedparenthood.org/ABORTION/chooseabort3.html (visited June 12, 2006).

[19/] The example is not purely hypothetical. *See Summit Medical Center of Alabama v. Riley*, 274 F.Supp.2d 1262 (M.D. Ala. 2003), in which abortion providers brought a successful challenge to a statute requiring them to pay for informational materials for their patients concerning alternatives to abortion.

Secularization and Scandal," 53 Cath. U. L. Rev. 125, 137-38 (2003).[20/]

The impact of the contraceptive mandate on the Appellants is no less startling than the examples cited above. What message does it send to the elementary and/or high school students of Appellants St. John the Baptist, Bishop Ludden, and First Bible Baptist Church when they learn that the schools are providing their teachers with insurance coverage for the very thing they teach is sinful? What message is sent to the clients of Appellant Catholic Charities of Albany, whose mission is to support and advance "the dignity of ... families" (R. 531), if Catholic Charities, in contravention of Catholic teaching, is made to support artificial means of preventing children from being born at all? What message is conveyed to the women who avail themselves of Appellant Temple Baptist's crisis pregnancy center (R. 503-507) if Appellant is required to pay for abortifacient contraceptives on the one hand while on the other hand working to help pregnant women and prevent abortions? What message is conveyed by the Appellants Carmelite and Dominican Sisters when, committed to the Church's teaching on human sexuality, and furthering those teachings through their own communal life and vows of chastity, they are now required to pay in their own

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[20/]To similar effect are *Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), and *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996). Religious organizations have a particular right to act, in regard to their own employees, in accordance with their religious principles, and not be forced to support actions that would contravene those principles.

workforce for services that contravene that explicit teaching?[21] In principle this is no different, in the example we proffered earlier, from requiring Mother Teresa's sisters to pay for abortions. *See* discussion *supra* at pg. 6 n.5. In each instance, the State is attempting to force these religious organizations to abandon their principles, to violate the very reason they exist and serve the community and public.

As *Dale* demonstrates, government may not, even in the interest of furthering such an important social value as non-discrimination, command uniformity when it treads upon a private group's right to insist that its leaders and members reflect the group's mission and purpose.[22] The constitutional case is all the stronger when the organization is, as here, a church or church organization. If the state is allowed to run roughshod over those interests, it will spell the end not only of associational and expressive freedom but also religious diversity. It will force church organizations in

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[21]/Far from being perceived as "compliance under protest" (808 N.Y.S.2d at 460), the payment for contraceptives by Appellants risks being viewed as evidence that their moral teaching is relatively unimportant or that the churches themselves are simply hypocritical in funding conduct they condemn. 808 N.Y.S.2d at 474 (Cardona, P.J., dissenting) (suggesting that payment of contraceptives by Catholic Appellants makes them "more susceptible to charges of hypocrisy"), citing Susan Stabile, "State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers," 28 Harv. J. L. & Pub. Pol'y 741, 761 (2005) ("It is not enough for religious employers to say they are morally opposed to contraception if they are simultaneously paying for employees to obtain it; the condemnation of the act is inauthentic if religious employers are paying for what they believe to be immoral"). The audience that will be hearing this message includes schoolchildren, as some of the Appellants are schools.

[22]/ Interestingly, the government makes no claim here that Appellants' exclusion of contraceptive coverage is itself discriminatory; therefore it cannot claim even that interest in support of its mandate.

their own house to pay for what they preach against, effectively undermining their teaching and message, which they consider to be not a mere human construct but divinely revealed and mandated. All of these – religious exercise, speech and association – are constitutionally protected values. These values are attacked by the challenged legislation.

III. THE STATUTORY EXEMPTION IS NEITHER CONSTITUTIONAL NOR RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT OBJECTIVE.

Whatever the State may argue, the exemption in this case is not an effort to accommodate, but rather to penalize, religion and religious groups, an effort which hinges on the State's expressed intent to decide which organizations are "purely religious" (R. 981) and which are not. If the Religion Clauses means anything, they mean that government is prohibited from deciding which church organizations are "religious enough" to qualify for a regulatory exemption. *Lemon*, 403 U.S., at 637 (Douglas, J., concurring) (government may not decide "what is or is not secular, what is or is not religious"); *NLRB v. Catholic Bishop*, *supra* (affirming Seventh Circuit's decision that government may not decide which employers are "completely religious" and which are not); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002) (holding that government constitutionally may not decide which organizations are "substantially religious" and which are not); *Montrose Christian School Corp. v. Walsh*, 770 A.2d 111 (Md. App. 2001) (holding that government

constitutionally may not distinguish between what is "purely religious" and what is not).

Three of these cases warrant extended treatment on this point.

First, as noted earlier, in *NLRB v. Catholic Bishop*, *supra*, the NLRB asserted jurisdiction over secondary religious schools and certified a union representing lay teachers. At the time, the Board's practice was to decline jurisdiction only if the employer was "completely religious, not just religiously associated." 440 U.S., at 498. The high schools taught secular and religious subjects, so the Board thought jurisdiction appropriate.

The Seventh Circuit disagreed, concluding that the distinction between "completely religious" and "merely religiously associated" was not a workable guide to the Board's exercise of discretion and that the First Amendment barred the NLRB from having jurisdiction. 559 F.2d 1112 (1977), *aff'd*, 440 U.S. 490 (1979). In a passage later recounted by the Supreme Court, the Seventh Circuit wrote: "The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition." 559 F.2d at 1118, quoted in 440 U.S., at 495. The Seventh Circuit "reasoned that from the initial act of certifying a union as the bargaining agent for lay teachers, the Board's action would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion." 440 U.S., at 496

(describing the Seventh Circuit's opinion). Unlike state or local laws requiring fire inspections or mandating attendance, exercise of Board jurisdiction here had the potential to interfere with "the bishops' control of the religious mission of the schools." 559 F.2d at 1124, quoted in 440 U.S., at 496. If union certification presented a risk of skewing the church's freedom to shape its teachings, requiring a church organization to pay for private activities directly contrary to those teachings could be no less so.

Plainly sympathetic to these concerns, but in keeping with its prudential policy of avoiding constitutional questions when cases can be resolved on statutory grounds, the Supreme Court concluded that Congress itself did not intend to grant the Board jurisdiction in light of "serious constitutional questions" that would otherwise be raised. 440 U.S., at 501, 507. Citing its earlier decisions forbidding state aid to religious schools based on the risk of excessive entanglement in the church's workforce (*id.* at 501-02), the Court concluded that the exercise of jurisdiction by the Board presented a "significant risk" that the First Amendment would be infringed. *Id.* at 502, 507.

Catholic Bishop reflects the idea that "[p]art of the freedom of a church to operate a school is its ability to deal with its agents in accordance with church doctrine, otherwise the church's strength and distinctiveness as a religious educator would be threatened." Michael W. McConnell, "Accommodation of Religion," 1985 Sup. Ct. Rev. 1, 28 (commenting specifically on the *Catholic Bishop* decision). *See* discussion

infra at pp. 25-30. The same may be said for Appellants' internal, religiously-based decisions about whether to pay for actions they consider sinful.

The theme of preserving the strength and distinctiveness of religious institutions free from government intrusion resurfaces in *University of Great Falls v. NRLB*, 278 F.3d 1335 (D.C. Cir. 2002). In that case, the NRLB asserted jurisdiction over the faculty of a religious university on the ground that the university lacked a "substantial religious character" (*id.* at 1337) a dilution of the Board's earlier view that jurisdiction could be exercised over any school that was not "completely religious." *Catholic Bishop*, 440 U.S., at 498. The Board concluded that the University of Great Falls, though owned by a Catholic religious order, was not "substantially" religious because, among other things, the "propagation of a religious faith" was not the University's "primary purpose." 278 F.3d at 1338.

The D.C. Circuit concluded that the Board's inquiry into the religious character of the University was precisely the sort of "intrusive inquiry that *Catholic Bishop* sought to avoid" and held that the Board therefore lacked jurisdiction. *Id.* at 1341. The court noted that "since *Catholic Bishop*, at least a plurality of the Supreme Court itself has rejected 'inquiry into ... religious views' as 'not only unnecessary but also offensive,' ... declaring that ... 'courts should refrain from trolling through a person's or institution's religious beliefs.'" *Id.* at 1341-42, quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). "Here too," the court wrote, "we have the NLRB

trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University." 278 F.3d at 1342. The Board's inquiry boils down to whether the University is "sufficiently religious," a question that government has no right or place to ask. *Id.* at 1343.

The court characterized the Board's position itself as a potential First Amendment violation:

> To limit the *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board ..., 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. at 1346.[23/]

The right of a church-affiliated organization to decide the constitution of its workforce, including non-ministerial employees, was again recognized in *Montrose Christian School Corp. v. Walsh*, 770 A.2d 111 (Md. App. 2001). In that case, Maryland's highest court upheld the right of a church-affiliated school to insist on membership in the church as a condition of employment. Three employees – a

[23/] By contrast, the court in *Great Falls* understood an organization to be "religious" if it holds itself out as religious, is organized as a nonprofit, and is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization or with an entity, membership of which is determined, at least in part, with reference to religion. *Id.* at 1343. Defining what is "religious" is

teacher's aide, a bookkeeper/secretary, and a cafeteria worker – sued the school under a county human rights ordinance after it terminated their employment because they were not members of the church. The ordinance excepted from its prohibition against religious-based discrimination those persons employed to perform "purely religious functions," but the court held that the exception did not go far enough because religious organizations have a constitutional right to insist that only persons belonging to the church perform its work, *id.* at 122-130, because government was not entitled to define pure religiosity. *Id.* at 129 n.10.

The similarity between the State of New York's claimed right to decide what is "purely religious" (R. 981) and the efforts by the NLRB and/or local regulators to decide what is "completely religious" (*Catholic Bishop*, 440 U.S., at 498), "substantially religious" (*University of Great Falls*, 278 F.3d at 1337), or – in language identical to that used by New York (R. 981) – "purely religious" (*Montrose Christian Schools*, 770 A.2d at 114), should be evident.[24/]

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left to the organization in question, as it should be. *United States v. Ballard*, 322 U.S. 78 (1944).

[24/] *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307 (2004), is not to the contrary. A state sometimes retains the discretion to distinguish between those entitled and those not entitled to a religious exemption as long as it does not engage in an unconstitutional inquiry or make an unconstitutional distinction. Here the State claims unlimited authority to decide who should be subjected to a regulatory burden; in *Locke*, the State asserted only some limited authority to decide who would not receive some government benefit. *Locke* was based on the historic reluctance of government directly to fund the education of preachers, a restriction the state sought to preserve. This case, on the other hand, implicates the historic reluctance of government to intrude into religious governance, a restriction the State here seeks to eliminate.

Indeed, not only the statutory exemption, but each prong of the exemption, is constitutionally deficient.[25/] First, the State may not decide which church agencies are "purely religious" because they "inculcate ... religious values" (R. 184). *Lemon*, 403 U.S., at 637 (Douglas, J., concurring) (the government may not decide "what is or is not secular, what is or is not religious"). Even though the Appellants are not engaged in "hard-nosed proselytizing" (*University of Great Falls*, 278 F.3d at 1346) when they deliver social services, they provide those services as a means of furthering the Gospel. Inasmuch as actions speak louder than words, they are all involved, indirectly at least, in inculcating religious values even if they do not consider themselves to be "preaching" and, therefore, "inculcating religious values" as that requirement might be read.[26/]

Similarly, the State may not decide that organizations are "purely" religious (R. 981) if they serve and employ only their co-religionists. In effect, the State purports to distinguish among religious denominations and religious organizations that are, so to speak, insular in their workplace and ministry, from those that have a missionary outlook. That is blatantly unconstitutional. *Larson v. Valente*, 456 U.S. 228 (1982)

[25/]Under the New York scheme, those "religious employers" are exempt if their "purpose" is the inculcation of religious values", they "primarily" employ and serve "persons who share the religious tenets of the employer," and they are not required to file an annual information return (Form 990) by virtue of section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code, 26 U.S.C.§ 6033. R.184.

[26/]*See* note 13 *supra*.

(state may not pick and choose among different religious organizations when it imposes some burden); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) (state may not target one religion for a particular burden); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that Section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible judicial inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992). Church agencies with the temerity (in the State's view) to hire and serve persons other than their own members are penalized by this legislation or, alternatively, forced to fire the non-members and withdraw from public service. Such a state-imposed choice is offensive, discriminatory, and unconstitutional under the Religion Clauses. *Id.*[27/]

[27/]Contrary to the majority's conclusion, the challenged New York law does "selectively impose" (808 N.Y.S.2d at 455) a burden on some religious adherents, but not others, by creating an artificial distinction between church agencies that are "purely" religious and those which are not. Such distinctions, even if they could constitutionally be made (which they cannot), *see University of Great Falls*, *supra*, have no rational relation to either the purpose of the mandate or the purpose of the exemption.

Contrary to the suggestion made in the Appellate Division's opinion (808 N.Y.S.2d at 462), neither Appellants nor any amici have argued at any stage of this litigation that the government is prevented from distinguishing between "religious" and "secular" organizations. What the

The last prong of the exemption, which tracks certain of the annual Form 990 exemptions available under section 6033 of the Internal Revenue Code,[28/] is constitutionally defective because it bears no rational relation to either the State's claimed interest in gender equity in health insurance generally or to the health insurance plans that churches offer to their employees specifically.

Some explanation is necessary. The Form 990 filing requirement – the requirement from which Sections 6033(a)(2)(A)(i) and (iii) carve out exemptions – serves a two-fold purpose: it provides IRS with information necessary to the administration of the tax laws, and it makes tax-exempt organizations financially accountable to the IRS and the general public. This federal exemption from filing the annual Form 990 reflects Congressional sensitivity to the church-state entanglement

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challenged law does is distinguish among religious organizations based on who they serve and employ, and how they live out their religious values, criteria having nothing to do with the objective of the law or the exemption. Put another way, the State cannot rationally and constitutionally claim that church agencies that serve or employ persons other than their co-religionists thereby cease to be religious. Indeed, many if not most churches are open to the public and do not exclude persons of other faiths even from their central act of worship. Plainly such distinctions are no business of the government. *United States v. Ballard*, *supra* note 23.

[28/] Section 6033 provides a number of exemptions from the annual Form 990 filing requirement. Some are described in the statute itself, others in regulations and IRS revenue procedures promulgated under the statute. Most of these exemptions apply to religious organizations, including: churches, integrated auxiliaries, and conventions and associations of churches (26 U.S.C. § 6033(a)(2)(A)(i)); the exclusively religious activities of a religious order (26 U.S.C. § 6033(a)(2)(A)(iii)); mission societies sponsored by or affiliated with a church (26 C.F.R. § 1.6033-2(g)(1)(iv)); interchurch organizations of local units of a church (26 C.F.R. § 1.6033-2(g)(1)(i)); elementary and secondary schools operated by churches or religious orders (26 C.F.R. § 1.6033-2(g)(1)(vii)); men's and women's organizations, seminaries, and youth groups (26 C.F.R. § 1.6033-2(h)(5)); and organizations managing church or religious order assets or financing church or religious

issues inherent in mandating financial reporting and accountability on the part of churches and religious organizations. The exemption is an attempt to strike a balance between the requirements of tax administration, on the one hand, and the desire to avoid unnecessary entanglement in the financial affairs of certain organizations closely affiliated with churches.

The filing exemption, however, has no relevance whatsoever to church welfare or benefit plans, having been devised, as noted above, to serve an entirely different purpose. Ironically, in deciding to track certain of the Form 990 filing exemptions, the New York State legislature overlooked another exemption that was developed specifically to accommodate pension and welfare plans[29/] offered by churches, namely the "church plan" exemption found in section 414(e) of the Internal Revenue Code. 26 U.S.C. § 414(e). Congress exempted "church plans" from the Employee Retirement Income Security Act of 1974 ("ERISA"), *see* 29 U.S.C. § 1002(33), and in 1980 broadly defined "church plan" to include any pension or welfare plan that covers employees of a church or tax-exempt organization associated with a church. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364. The term

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order retirement programs (Rev. Proc. 96-10, 1996-1 C.B. 577).

[29/] A welfare plan includes any plan or program established by an employer to provide employees with medical, surgical or hospital care or benefits; benefits in the event of sickness, accident, disability, death or unemployment; vacation benefits, apprenticeship or other training programs; or day care centers, scholarship funds, or prepaid legal services. 29 U.S.C. § 1002(1).

"associated with a church" is defined expansively to include any organization that shares common religious bonds and convictions with a church. 26 U.S.C. § 414(e)(3)(D); 29 U.S.C.§ 1002(33)(C)(4).[30/] Under this comprehensive exemption, the employees of church agencies – including social welfare organizations, adoption agencies, hospitals, universities, and nursing homes, to name but a few – are covered under church health plans that are exempt from ERISA. Congress enacted the church plan exemption precisely to avoid the church-state entanglement that would likely result from a narrower or more begrudging exemption. *Cf. University of Great Falls*, 278 F.3d at 1343 (defining "religious" organization expansively). The benefit of a broad exemption is that it avoids government entanglement into religious governance. The State's chosen exemption does precisely the opposite.

Instead of following a reasonable course, such as that taken by Congress when it exempted church plans from ERISA regulation of pension and welfare plans, the New York legislature lifted an exemption out of an entirely different statutory context, one having no bearing whatsoever on health insurance plans. Congress's concern in enacting the Form 990 filing exemptions was financial accountability and tax administration – not health insurance or gender equity.[31/] As the fourth prong of the

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[30/] Congress reaffirmed this expansive section 414(e) church plan definition in the Church Plan Parity and Entanglement Act of 1999 (Pub. L. No. 106-244), which clarified the status of church welfare plans under provisions of certain state insurance laws.

[31/] Obviously we are not suggesting that the New York legislature was constitutionally required to

New York exemption bears no rational relationship to any legitimate State interest that the challenged legislation purports to advance, it does not withstand constitutional scrutiny any more than the rest of the exemption does. *See* 808 N.Y.S.2d at 469 n.14 (Cardona, P.J., dissenting) (agreeing that the "tax return provision appears to have no relationship to the health care goals" of the Act).

IV. THE CONTRACEPTIVE MANDATE IS *PER SE* UNCONSTITUTIONAL; IN THE ALTERNATIVE, THE MANDATE IS NOT THE MOST RESTRICTIVE MEANS OF FURTHERING A COMPELLING STATE INTEREST.

Any infringement of a church's right of autonomy is a *per se* violation of the Constitution, so there is no need to balance that right against other interests. *See* discussion *infra* at 34-35. Even were this not the case, the Appellants still should prevail because the mandate in this case is not the least restrictive means of furthering a compelling state interest.

For at least three reasons, no balancing test is appropriate in this case. First, the autonomy cases posit an absolute rule against intrusion; those cases do not engage in balancing. When, for example, courts hold that no anti-discrimination claim can be brought by a minister against a church, no consideration is given (nor should any be) to

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enact the same exemption from the contraceptive mandate as the one Congress enacted with respect to ERISA. Rather, this demonstrates that out of the entire universe of possible exemptions, the New York legislature chose one that had no logical relationship to health plans or gender equity.

the state's claimed interest in eradicating discrimination.[32/] Second, insofar as the autonomy cases rely on the Establishment Clause, no balancing is appropriate because a law is *per se* invalid if it fails to meet the tests which have been articulated for deciding Establishment Clause claims. *Lemon v. Kurtzman*, 403 U.S., at 612-13 (setting out a three-pronged test which on its face calls for no evaluation of competing state interests); *Church of Scientology v. City of Clearwater*, 2 F.3d at 1539-40 (noting that *Lemon* and subsequent cases require no balancing test in the evaluation of Establishment Clause claims); Esbeck, "The Establishment Clause as a Structural Restraint on Governmental Power," *supra* (the government has no power over religion). Third, the challenged mandate is not neutral and generally applicable, but instead specifically targets institutions with a missionary outreach. *Lukumi* says such laws are rarely valid. The mandate is not generally applicable because it includes an exemption for some church organizations; the exemption, in turn, is not neutral because it discriminates among religions, *Larson v. Valente*, 456 U.S. 228 (1982), and

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[32/] All subsequent lower courts taking up the question have concluded that *Smith* does not overrule, or in any way undermine the principles announced in, the autonomy cases. *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 n.* (4th Cir. 2000) (*Smith* does not abolish the ministerial exception); *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343, 347-50 (5th Cir. 1999) (same); *EEOC v. Catholic University*, 83 F.3d 455, 461-63 (D.C. Cir. 1996) (same); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000) (same). *Smith* itself, which cited the autonomy cases with approval (494 U.S., at 877), dealt with claims for religious accommodation on the part of individuals, not institutions. *E.g.*, 494 U.S., at 878-79 ("We have never held that an *individual's* religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate") (emphasis added); *id.* at 879 ("the right of free exercise does not relieve an *individual* of the obligation to comply with a

uses religious criteria in deciding which are "religious enough" to be exempt. *Lemon*, 403 U.S., at 637 (Douglas, J., concurring) (the state may not decide "what is or is not religious").

Were this Court, however, to apply a balancing test, strict scrutiny would apply because, as we and Appellants have demonstrated, this case implicates religious, speech, and associational rights, each a fundamental right standing alone and in combination triggering *Smith*'s hybrid rights exception.[33/] *Smith*, 494 U.S., at 881-82 (strict scrutiny applies when free exercise is combined with some other constitutional interest). New York's contraceptive funding mandate does not pass that test. We offer the following reflections, not in any way to denigrate the importance of the issues New York raises, but to illustrate that the facts do not justify the State's assertions.

On a more fundamental level, it needs to be dramatically emphasized just how far removed this case is from *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* rejected an individual's claimed exemption from having to obey a criminal drug law. This case, in contrast to *Smith*, involves a command by the State that an agency of a church itself, as a condition of conducting its ministry in New York, pay for private conduct by its own employees that the church explicitly and unqualifiedly holds to be

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'valid and neutral law of general applicability...'") (emphasis added).

[33/]The rights implicated here are those guaranteed under the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, and the First Amendment right of association.

morally evil. Forcing religious organizations to subsidize the very thing they preach against strikes at the very heart of the church's ability simply to govern itself and to engage its members and society in the church's message and mission. *See Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring in the judgment) (recognizing a right on the part of religious organizations to order their own affairs and run their own institutions). Indeed, *Smith* distinguished and cited with approval a long list of cases that recognized the right of church autonomy, 494 U.S., at 877, and all lower courts taking up the question have concluded that *Smith* does not overrule or undermine the church autonomy principles announced in those cases. *See* note 32, *supra*, and cases cited therein.

In any event, to uphold all "generally applicable laws" that violate church autonomy, even if this were such a law, is a *reductio ad absurdum*. Under such a regime, the government could regulate selection of ministers under a neutral law forbidding discrimination based on sex, forbid the celebration of the Mass through a neutral law forbidding possession and consumption of alcohol, and outlaw kosher slaughterhouses under neutral laws regulating food handling. If the Appellate Division is correct that the State's interest in having employers pay for their employees' birth control can supersede a church's right to organize its own workplace with no express consideration of the free exercise rights of the church, it is difficult to see how other

intrusions would not be equally permissible.[34/] Indeed, the legislation challenged here is the camel's nose under the tent, the cutting edge of an attempt, by making the church pay for what it explicitly opposes, to silence a church's message and mission anytime it does not conform to the prevailing secular wisdom. That is bad law, bad policy, and unconstitutional.

Here the State claims an interest in promoting gender equality. But Appellants' insurance plans exclude all services they consider to be immoral. For the Catholic Appellants, that would mean all artificial means of preventing procreation -- whether unique to women (*e.g.*, contraceptive drugs, tubal ligations), unique to men (*e.g.*, condoms, vasectomies) or common to both sexes. Appellants' action is explained by religious principles, and is gender-neutral. Accordingly, no interest in gender equality is legally furthered by requiring Appellants to pay for contraceptives.

A useful analogy is found in court cases that uphold, against a claim of employment discrimination, the termination of an employee who engages in conduct incompatible with the employer's mission. *Hall v. Baptist Memorial Health Care*

[34/] Even to state the proposition is to expose the disparity in interests. Prescription oral contraceptives cost about a dollar a day. It cannot be maintained that preventing people from having to pay for birth control themselves is an interest of greater importance than the constitutionally protected values of religious liberty, speech and association that are implicated here. There is little in principle to distinguish the forced subsidization of private contraceptive use by a church's own employees from forced subsidization of their abortions. The government has no good answer why one should be permitted but not the other. Indeed, as appellants point out, that is the next contemplated step. Appellants' Brief at 52 & n.29 (citing bill requiring abortion subsidization).

Corp., 215 F.3d 618, 627 (6th Cir. 2000) (Baptist Memorial College did not engage in religious discrimination when it fired an employee for taking a leadership position in an organization that expressed public support for homosexual conduct); *Pedreira v. Kentucky Baptist Homes for Children*, 186 F.Supp.2d 757 (W.D. Ky. 2001) (Kentucky Baptist Homes did not engage in religious discrimination when it fired an employee engaged in homosexual lifestyle). Appellants likewise do not engage in sex discrimination when they exclude from their employee health plans those programs and services that violate church teaching, and the government does not claim otherwise.

As applied to employers with serious objections to all or some contraceptive use, and as noted by the dissenters in the opinion of the Appellate Division, the mandate may actually undermine the State's claimed interests in advancing health and expanding insurance coverage by encouraging employers to drop prescription coverage[35/] because that is the only available means of avoiding the mandate. As a purely economic matter, one would expect that expanding benefits for persons with prescription drug coverage would tend to decrease the pool of employers who offer

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[35/]Any suggestion that the New York law can be satisfied simply by not offering any prescription drug coverage overlooks these Appellants' religious belief that taking such action would violate the moral imperative to pay just wages. It is reasonable to infer, however, that other employers will be tempted to drop prescription drug coverage altogether rather than pay for expanded and more expensive coverage. If there is a problem in providing or ensuring equity in coverage that the New York legislature is trying to fix, causing prescription drug coverage to be dropped does not address that problem.

such coverage at all. Given the large numbers of persons without any kind of prescription drug coverage, or who are wholly uninsured,[36/] the creation of such reverse incentives cannot truly advance public health. It is especially hard to defend the claim that the public welfare is served by penalizing Appellants for not paying for prescription contraceptives when other employers pay for no health insurance, or no prescription drugs or services, whatsoever.

Finally, in this litigation the State asserts the need to intrude into the internal operations of a religious institution to protect the rights of employees who might disagree with Appellants on contraception and desire such coverage.[37/] That assertion is based on *United States v. Lee*, 455 U.S. 252 (1982), in which the U.S. Supreme Court stated, without authority or explanation, that allowing a private commercial for-profit company to refuse payment of Social Security taxes for all employees because of the owner's beliefs violated the rights of the employees when protecting the rights of employers. Even if one might say such an interest is compelling for employees of for-

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[36/]The U.S. Census Bureau estimates that in 2004, 45.8 million Americans were without private or public health insurance coverage. U.S. Census Bureau, *Health Insurance Coverage* (Aug. 2005). A recent survey shows that 40 percent of employers offer no health insurance to their employees, and among employers that do provide such insurance only 80% of workers are eligible for coverage. Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits: 2005 Summary of Findings, available at http://www.kff.org/insurance/7315/index.cfm (visited May 25, 2006).

[37/] *See* R.981 (asserting the "goal of covering the maximum number of women" and distinguishing "purely religious employers" from others); *see also* R.49 (statement by the lower court that the exemption "serves to protect the rights and health of large numbers of employees

profit private commercial institutions, that interest fails when the subject of regulatory interest is religion and its nonprofit social service operations.

Context matters for constitutional law. In his opinion in *Amos*, Justice Brennan recognized the commercial status of the employer made a difference for labor exemptions. 483 U.S., at 343-45 (Brennan, J., concurring in the judgment). *Lee* involved tax resistance, something that the courts have never tolerated in any case for any reason, and treated religious reasons for the non-payment of taxes as indistinguishable from a number of possible secular justifications. That is not the case here. Appellants were established for the very purpose of espousing specific religious values and beliefs in action; otherwise they could not legitimately represent themselves as being affiliated with the Catholic Church or Baptist Bible Fellowship. The adults who choose employment there see at least two of those principles in action, the extension of health coverage as a matter of the religiously-derived requirements of workplace justice, when many secular employers choose to forego it, and the refusal to fund those practices church agencies hold as evil, based on religious values that many in society eschew. In this context, *Lee* is inapposite, *Amos* controls.

There are limits to what the State may accomplish with respect to a religious employer, in dealing with its own employees who understand the nature and purposes of the employer, and in being forced to fund that which it condemns. *Amos*, 483 U.S.,

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wo do not share their employer's religious views").

at 337 n.15 (recognizing the burden on non-conforming employees). The State has not shown that there is any compelling need here.

CONCLUSION

It would be a grave mistake for this Court to allow the freedom of church agencies to organize and operate internally in a manner consistent with their religious convictions to be extinguished. Deference to laws of general applicability should not, and does not, override the freedom of churches and their agencies to be distinctively different from their secular counterparts. That would be to enforce the state's uniform views over a church's own in contravention of that church's freedom to govern and organize itself in accord with its religious faith. Such intolerance on the part of the State is inconsistent with the commands of the U.S. and New York Constitutions.

The judgment below should be reversed.

Respectfully submitted,

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