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THE CONTRACEPTION MANDATE[†]

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ABSTRACT—Under the new health care regime, health insurance plans must cover contraception. While religious employers are exempt from this requirement, religiously affiliated employers are not. Several have sued, claiming that the "contraception mandate" violates the Free Exercise Clause, the Free Speech Clause, and the Religious Freedom Restoration Act. This Essay explains why the contraception mandate violates none of them.

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INTRODUCTION

Health care in the United States is undergoing a sea change thanks to the Patient Protection and Affordable Care Act.[1] Among the many firsts: employers that offer health insurance must cover certain preventive services for women, including contraception.[2] This requirement—often called the "contraception mandate"—has generated a huge outcry, especially from the U.S. Catholic hierarchy.[3] Although churches, synagogues, mosques, and other religious institutions that predominately serve and employ people of their own faith are exempt, religiously affiliated institutions that serve and employ people of many different faiths—such as schools, hospitals, and social services providers—are not.[4]

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[1] Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 26 and 42 U.S.C.).

[2] The Act requires an employer's group health plan to cover women's "preventive care." Patient Protection and Affordable Care Act § 2713(a)(4), 124 Stat. at 131 (codified at 42 U.S.C.A. § 300gg-13(a)(4) (West 2011 & Supp. 2012)). As recommended by the independent Institute of Medicine, women's preventive care was defined to include FDA-approved contraception methods. Press Release, U.S. Dep't of Health & Human Servs., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html.

[3] *See, e.g.*, Steven Spearie, *United States Conference for Catholic Bishops Files Challenge to Contraception Mandate*, METROWEST DAILY NEWS (June 15, 2012, 12:32 PM), http://www.metrowestdailynews.com/2012-elections/x1106456357/United-States-Conference-for-Catholic-Bishops-files-challenge-to-contraception-mandate (quoting Catholic Bishop Thomas John Poprocki as saying that the mandate was "an unprecedented attack by the federal government on one of America's most cherished freedoms: the freedom to practice one's religion without government interference").

[4] An entity is exempt if it meets the following four criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

It is the lack of an exemption for the latter organizations that has generated protests.

According to the United States Conference of Catholic Bishops (the "Bishops"), forcing their religiously affiliated institutions to facilitate access to contraception—the use of which clashes with fundamental tenets of the Catholic faith—violates their religious conscience.[5] President Obama's proposed compromise, where insurance companies rather than the religious employers would pay for the coverage, did not assuage them: "The only complete solution to this religious liberty problem is for [the government] to rescind the mandate of these objectionable services."[6] When the White House declined to revoke the contraception mandate, over forty Catholic dioceses, schools, and social services organizations filed lawsuits against the federal government. The complaints argue that making religiously affiliated organizations offer comprehensive insurance coverage contravenes, among other things, the Free Exercise Clause, the freedom of association guaranteed by the Free Speech Clause, and the Religious Freedom Restoration Act (RFRA).[7]

In fact, the contraception mandate violates none of these. As a neutral law of general applicability, it does not violate the Free Exercise Clause. Nor does it interfere with associational membership in violation of freedom of association. It does not trigger RFRA because it fails to qualify as a substantial burden on anyone's conscience and would survive strict scrutiny in any case. To start, most American Catholics do not consider the ban on contraception central to their faith,[8] as a vast majority of Catholic women have used birth control.[9] In addition, the claim that the contraception mandate illegally forces Catholic institutions to send a message that clashes with their fundamental beliefs overlooks the way that

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Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (Aug. 3, 2011) (to be codified at 45 C.F.R. § 147.130(B)(1)–(4)).

[5] The Church teaches that "each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life." Pope Paul VI, *Humanae Vitae: Encyclical of Pope Paul VI on the Regulation of Birth* (July 25, 1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html. Consequently, the use of artificial contraception to prevent new human beings from coming into existence is "repugnant" and "in opposition to the plan of God and His holy will." *Id.*

[6] Press Release, U.S. Conference of Catholic Bishops, Bishops Renew Call to Legislative Action on Religious Liberty (Feb.10, 2012), *available at* http://www.usccb.org/news/2012/12-026.cfm.

[7] *See, e.g.*, Complaint at 20–22, 23–24, Ave Maria Univ. v. Sebelius, No. 2:12-cv-88-FTM-29SPC (M.D. Fla. Feb. 21, 2012) (arguing violations of the Free Exercise Clause, freedom of association, and the Religious Freedom Restoration Act); Complaint at 16–19, Belmont Abbey Coll. v. Sebelius, No. 1:11-cv-01989-GK (D.D.C. Nov. 10, 2011) (arguing the same violations).

[8] *See infra* notes 28–30 and accompanying text (discussing American Catholics' views of contraception).

[9] *See infra* note 29 (stating that 98% of Catholic women who have had sex have used contraception).

the genuine and independent choice of individuals to use contraception breaks the chain of causation, such that contraception use cannot be attributed to the religious entity. Finally, whatever burden "facilitating" prohibited conduct imposes, it is simply too attenuated to justify an exemption when balanced against the direct burden on women's autonomy and equality.

I. FREE EXERCISE

There is little basis for a constitutional free exercise claim. As its name indicates, the Free Exercise Clause protects the free exercise of religion.[10] However, it only protects religious practices against discriminatory laws; *Employment Division, Department of Human Resources v. Smith* held that neutral laws of general applicability do not violate the Free Exercise Clause.[11] A law is neutral as long as it does not intentionally single out a religion for disfavor,[12] and it is generally applicable if it applies across the board.[13] Given that the mandate neither targets religiously affiliated institutions nor is riddled with exceptions, it meets the neutrality and general applicability requirements. *Smith* embodies the shift in Free Exercise Clause jurisprudence towards more equal treatment between religious and secular organizations.[14] This view is usually expressed by the idea that if religious organizations are able to compete for federal contracts, grants, and vouchers on equal footing with secular organizations then they ought to abide by the same rules as secular organizations.[15] In any event, the contraception mandate is a neutral law of general applicability and therefore does not violate the Free Exercise Clause.

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[10] U.S. CONST. amend. I.

[11] 494 U.S. 872, 879–80 (1990). The Supreme Court has noted that "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[12] *See, e.g.*, *Hialeah*, 508 U.S. at 534 (finding that the ordinances were not neutral because "suppression of the central element of the Santeria worship service was the object of the ordinances").

[13] *See, e.g.*, *id.* at 543–45 (finding that the ordinances were not generally applicable since they were grossly underinclusive).

[14] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1990 (2007).

[15] The Supreme Court's recent recognition of the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* does not alter the Free Exercise Clause analysis. 132 S. Ct. 694 (2012) (holding that under the religion clauses, a church's decision to terminate a minister was not subject to antidiscrimination law, even if the decision was not religiously required). The ministerial exception does not apply here as the mandate involves neither ministers nor matters of internal church governance. Indeed, whether an organization must supply comprehensive health insurance to people outside their religion is not at all the same as whether they must retain a minister. *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 77 (Cal. 2004) ("This case does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church.").

II. FREEDOM OF EXPRESSIVE ASSOCIATION

The freedom of association argument is no more successful than the Free Exercise one. The Free Speech Clause[16] is designed to promote the free flow of ideas and opinions. It protects expressive associations because they allow like-minded people to associate and thereby amplify their voice and message.[17] Under freedom of association, expressive associations cannot be forced to accept members whose presence might undermine the association's message.[18]

The freedom of association argument is often made by analogy to *Boy Scouts of America v. Dale*, a case that strengthened associational rights.[19] In *Dale*, the Supreme Court held that the Boy Scouts were entitled to an exemption from a public accommodation law that would have required them to admit members regardless of their sexual orientation.[20] The Boy Scouts of America argued that because their association taught that homosexuality was wrong, forcing them to accept a homosexual scout would undermine that message in violation of their freedom of expressive association, and the Court agreed.[21] Here, the Bishops argue that because their religion teaches that contraception is wrong, forcing them to provide contraception would undermine that message and therefore violate their freedom of expressive association.

This expansive view of *Dale* strays too far from its expressive association roots. Not every act triggers the freedom of association;[22] only those involving the right to associate or not associate with someone do. In *Dale*, the Boy Scouts of America asserted its right to not associate with a gay scout.[23] Unlike the law in *Dale*, the contraceptive mandate does not

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[16] U.S. CONST. amend. I.

[17] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.").

[18] Boy Scouts of Am. v. Dale, 530 U.S. 640, 651–55 (2000).

[19] *Id.* at 640.

[20] *Id.* at 644.

[21] *Id.* at 651–55.

[22] Similarly, not every action that has an expressive component is expressive or symbolic conduct for purposes of the Free Speech Clause. That is, only conduct that is meant to convey a message and is understood as conveying that message—like burning a draft card or flag—triggers the Free Speech Clause. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). To hold otherwise would create a rule that all conduct is presumptively expressive. *Id.* at 293 n.5.

> [C]ompliance with a law regulating health care benefits is not speech. . . . For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen [as] a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual [or entity] to choose which laws [to] obey merely by declaring his agreement or opposition.

Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 89 (Cal. 2004). In short, providing health insurance does not trigger the Free Speech Clause.

[23] *Dale*, 530 U.S. at 646.

force any religiously affiliated institution to associate with anyone against its will.[24]

In addition, freedom of association is meant to protect the creation and development of the association's voice, which is not in jeopardy here. That is, the freedom to associate allows an association to control its membership because it recognizes that the views of its members will influence its overall message.[25] If there are many gay scouts in the Boy Scouts, then its anti-homosexuality message may dissipate. Including contraception in an employee's health insurance package, however, does not pose this same risk for religiously affiliated associations. These employers are not being forced to accept people whose views on contraception will dilute the Vatican's anti-contraception stance. Indeed, this would be a peculiar argument to make, given that these organizations, often by definition, hire many non-Catholics.

Furthermore, to extend freedom of association rights beyond the right to associate or not associate with particular people would provide an end run around the Supreme Court's Free Exercise Clause jurisprudence. Instead of arguing that a neutral law of general applicability violated their constitutional rights by forcing them to *act* in a way that burdened their free exercise, a religious institution could argue that the law burdened their free association by forcing them to *condone that act*. Such an expansive reading of expressive association could make *Smith* inapplicable to religious organizations. It would allow any religious employer to claim that doing something they would rather not—provide men and women equal benefits, pay taxes, comply with health or labor laws, etc.—violates their right to freedom of association. Acknowledging such a right would risk making every religious entity a law unto itself, as the *Smith* Court feared.[26]

III. RELIGIOUS FREEDOM RESTORATION ACT

In order to receive an exemption under the Religious Freedom Restoration Act, the plaintiffs must establish that the mandate imposes a substantial religious burden.[27] There are many reasons to conclude that it does not and that it is actually granting an exemption that would impose a substantial burden on the women who would otherwise have access to free

[24] *Cf.* Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) ("The legislation does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone.").

[25] *Dale*, 530 U.S. at 648 ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").

[26] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (arguing that a regime that granted exemptions from neutral laws of general applicability unless a state demonstrated a compelling interest would allow an individual "to become a law unto himself" (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878))).

[27] 42 U.S.C. § 2000bb-1(a) (2006).

contraception. In any case, the law would survive strict scrutiny, as it is narrowly tailored to advance the compelling state interest in women's autonomy and equality.

A. Whose Conscience?

The first problem with the Bishops' claim is that it is not clear whose conscience is being violated when religiously affiliated institutions include contraception in their insurance plans. Polls consistently show that most Catholics in the United States believe that contraception use is not inconsistent with being a "good Catholic."[28] Indeed, 98% of American Catholic women have used contraception,[29] and most American Catholics, men and women, express a desire for the Pope to relax the Church's official position on the issue.[30] If the vast majority of American Catholics have no religious objection to contraception and actually wish that the religious doctrine were different, then it is a stretch to say that the provision of contraception violates their conscience.

The obvious rebuttal is that whatever American Catholics say, official Church dogma condemns contraception. But even if the Vatican's position is absolutely clear on this issue, what should count as central religious tenets for purposes of determining whether the government has substantially burdened free exercise? Should they be whatever the Church leadership declares them to be? Or should they be what the actual members of the Church live and experience them to be? Many have insisted that when one joins a hierarchical organization, one concedes that the hierarchy decides. But what if members of the faith disagree with this view? What if, as is the case for an overwhelming percentage of American Catholics, their

[28] When American Catholics were asked, "Do you think someone who practices artificial birth control can still be a good Catholic?," 84% responded "yes," 11% answered "no," and 5% didn't know or wouldn't answer. *CBS News Poll, Mar, 2011*, ROPER CTR., http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html (last visited Apr. 10, 2013) (subscription required). When the question was phrased, "Do you think it's possible to disagree with the Pope on issues like birth control, abortion or divorce and still be a good Catholic?," 83% answered it was possible compared to 13% who thought it was not. *CBS News/New York Times Poll, Feb, 2013*, ROPER CTR., http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html (last visited Apr. 10, 2013) (subscription required).

[29] Among Catholic women who have had sex, 98% have used a contraception method other than natural family planning. RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 4 (2011).

[30] When polled, 78% of American Catholics thought the next Pope should allow Catholics to use birth control, while 21% thought he should not. *USA Today/CNN/Gallup Poll Results*, USA TODAY (May 20, 2005, 11:56AM), http://usatoday30.usatoday.com/news/polls/tables/live/2005-04-03-poll.htm (asking, "Do you think the next pope should—or should not . . . [a]llow Catholics to use birth control?"); *see also CBS News/New York Times Poll, Feb, 2013*, *supra* note 28 (finding that 71% thought the next Pope should be for the use of artificial methods of birth control compared to 25% who thought he should be against it).

conception of what it means to be Catholic does not include unquestioning deference?[31] Is a court to say otherwise?

It might be argued that it is inappropriate for the state to make these determinations, and indeed the Establishment Clause bars the state from resolving theological disputes.[32] This exact concern was a main reason the Supreme Court abandoned the substantial burden inquiry for free exercise challenges and replaced it with the *Smith* regime.[33] Courts forced to address the issue, as those confronted with a RFRA claim must, have two choices: they can either do their best to determine in each particular case whether a law imposes a substantial burden on the plaintiffs, or they can assume that it has whenever the hierarchy claims that it has.[34] Either way, when the beliefs of members and leadership do not align, as here, the court risks resolving a theological dispute about what qualifies as a central tenet of the faith. Deciding to defer to the hierarchy, however, means the courts always favor the most powerful members of the religious community, sometimes at the expense of less powerful members and definitely at the expense of the people who will be burdened by the accommodation.[35]

B. Forced Endorsement or Facilitation

In any event, the mandate works no direct infringement on anti-contraception religious beliefs. No religious individual or entity is forced to

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[31] In fact, when American Catholics were asked, "Do you think Catholics should always obey official Church teachings on such moral issues as birth control and abortion, or do you think it is possible for Catholics to make up their own minds on these issues?," 88% thought they could make up their own minds, compared to a scant 11% who believed that Catholics should always obey official Church teachings. *Abortion and Birth Control*, *CNN/ORC Poll*, POLLINGREPORT.COM (Feb. 10–13, 2012), http://www.pollingreport.com/abortion.htm. A similarly large number—77%—answered "yes" to the question: "Do you think that someone who does not believe in the authority of the Pope can still be a good Catholic, or not?" CBS News/New York Times Poll, Americans, Catholics React to Reports of Child Abuse by Priests, question 18 (May 4, 2010), http://www.cbsnews.com/htdocs/pdf/poll_catholics_050310.pdf.

[32] *See*, *e.g.*, Andrew Koppleman, *Secular Purpose*, 88 VA. L. REV. 87, 108 (2002) ("The Establishment Clause forbids the state from declaring religious truth.").

[33] *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 872 (1990). Prior to *Smith*, the Free Exercise Clause mandated exemptions from laws (including neutral laws of general applicability) that imposed a substantial burden on religious exercise unless the challenged law passed strict scrutiny. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

[34] I suppose there is a third option for courts, which is to assume without deciding that the law imposes a substantial burden, and let the court's view of centrality inform the strict scrutiny analysis.

[35] It is also odd to discuss the religious conscience of an organization. Indeed, RFRA purports to protect "person[s]" from substantial burdens. 42 U.S.C. § 2000bb-1(a) (2006) ("Government shall not substantially burden a *person's* exercise of religion . . . ." (emphasis added)). People have consciences; they can feel indignity, shame, or remorse. Institutions do not. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 422–23 (1987). Perhaps the conscience of an institution is the collected consciences of its members. However, as discussed, most American members of the Catholic Church generally do not equate contraception use with an infringement on their conscience.

use, supply, or for the most part even pay for contraception.[36] Nonetheless, the mandate's opponents insist that it is an affront to religious conscience to include contraception in insurance plans. According to the Bishops, religiously affiliated employers "will be forced by government to violate their own teachings within their very own institutions. This is not only an injustice in itself, but it also undermines the effective proclamation of those teachings to the faithful and to the world."[37] In their view, merely making contraception available communicates endorsement of what they believe to be sinful and facilitates this religiously proscribed conduct.[38]

Similar arguments about endorsement and facilitation were made when the constitutionality of school voucher programs was challenged in *Zelman v. Simmons-Harris*.[39] In *Zelman*, families were given vouchers to help pay for tuition at secular or religious private schools. Ninety-six percent of voucher recipients chose religious schools.[40] Opponents of the program complained that making federal money available to religious organizations with no strings attached violated the Establishment Clause in two ways. First, it signaled the state's endorsement of religion, which is forbidden by the Establishment Clause.[41] Second, it facilitated religious teaching in violation of the Establishment Clause's prohibition on government funding of or participation in proselytization.[42]

The Supreme Court rejected both claims.[43] The Court held that although government money may ultimately have been used to buy religious texts or pay for religious lessons, the religious conduct could not be attributed to the state.[44] In other words, the state cannot be said to have paid for or endorsed the religious conduct, even though it was ultimately facilitating religious schooling. Why? The money ended up in the coffers of the religious schools as a result of the genuine and independent decisions of private individuals. It was not the state that decided to fund and endorse religion; it was the private individuals participating in the voucher program

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[36] As it stands now, insurance companies will cover the cost of contraception rather than the employers. However, this compromise does not address religiously affiliated employers that are self-insured. *See, e.g.*, Katie Thomas, *Self-Insured Complicate Health Deal*, N.Y. TIMES (Feb. 15, 2012), http://www.nytimes.com/2012/02/16/business/self-insured-complicate-health-deal.html.

[37] Admin. Comm. of the U.S. Conference of Catholic Bishops, United for Religious Freedom (Mar. 14, 2012), http://www.usccb.org/issues-and-action/religious-liberty/upload/Admin-Religious-Freedom.pdf.

[38] In other words, there is an expressive component (forcing them to send the message that they condone that conduct) and a material component (forcing them to facilitate forbidden conduct) to the harm.

[39] 536 U.S. 639 (2002).

[40] *Id.* at 647.

[41] *Id.* at 654.

[42] *Id.* at 649.

[43] *Id.* at 653–55.

[44] *Id.* at 649–53.

who did so.[45] That private individual choice broke the chain of attribution linking the religious conduct and the state.

The same reasoning about individual choice breaking a link can be applied to the contraception debate. In *Zelman*, it was the parent receiving the government-provided voucher who broke the chain of attribution by deciding to send the child to a religious school.[46] With the contraception mandate, the female employee—often not even Catholic—who receives the employer-provided insurance breaks the chain. The link is even more attenuated when the employer's insurance company, not the employer, pays for the contraception. In each case, the conduct at issue—the funding of religious schooling forbidden by the Establishment Clause or the use of birth control forbidden by the Catholic Church—is attributable to the private individual, not the entity furnishing the voucher or insurance.[47] Because the problematic conduct is not attributable to the state or employer, no reasonable person would think that they engaged in or endorsed it.

The mandatory nature of the coverage also weakens the "forced to condone contraception" argument. The Supreme Court rejected as groundless the fear that state-subsidized religious speech in a public forum would lead reasonable people to conclude that the state was endorsing religious viewpoints in violation of the Establishment Clause.[48] The Court argued that reasonable people would understand that the state was merely complying with the rules of a public forum; once the state opens up a forum, it must allow access to all viewpoints, including religious ones. The same reasoning readily applies to the contraception mandate. Reasonable people would understand that religiously affiliated employers were not condoning or endorsing contraception. Rather, reasonable people would understand that these employers were providing contraception because health insurance law requires them to cover all basic services. Furthermore, the mandate does not prevent a religiously affiliated organization from making its position on contraception clear in any number of ways.[49]

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[45] *Id.*

[46] *Id.* at 653.

[47] The Bishops might argue that there is a key difference in the analogy: they are being coerced into doing something while the state is not. That is true. But the analogy is meant to help answer the question of whether they are forced to do something religiously burdensome. In this case, the answer to that question is no, so long as there is true private choice to break the chain of attribution. Just as no reasonable person would think the state is endorsing the theology facilitated by its vouchers, no reasonable person should think that the religiously affiliated institution is endorsing the medical services facilitated by its health insurance.

[48] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841–42 (1995).

[49] *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 64–65 (2006) (holding that the requirement that law schools accommodate military recruiting did not restrict what the law schools may say about the military's policies).

Still, even if no reasonable person would conclude that the religiously affiliated schools, hospitals, or social services providers endorse or condone contraception, these institutions are nevertheless facilitating its use. After all, if these institutions did not make it available through their health insurance, the expense would likely mean fewer employees would use it. Without insurance, birth control pills could cost over $1000 dollars every year.[50] Given that the median annual salary in this country for working women 25–34 years old with a high school diploma is $25,000,[51] the expense is not insignificant.

Nonetheless, if merely "facilitating" third-party conduct that one disapproves of can violate religious liberty, there is no limit to the number of exemptions that would have to be granted to preserve a religious employer's freedom of conscience. Indeed, providing a salary above minimum wage "facilitates" contraception use by making it more affordable, yet no one would argue that religiously affiliated organizations should be exempt from minimum wage laws as a result.[52] Clearly, not every act of facilitation implicates religious liberty. Which ones do? Should a religiously affiliated homeless shelter be allowed to deny admission to gay and lesbian couples on the theory that it would condone and facilitate homosexuality? Should religiously affiliated hospitals be able to deny visitation in the ICU by same-sex spouses for similar reasons? What about a religiously affiliated university's ability to deny spousal life insurance coverage to legally married same-sex couples? Few would answer these questions in the affirmative—the facilitation is simply too indirect and works too great a harm to those outside the faith. The same is true for the contraception mandate.[53]

C. Compelling State Interest

Even if a law imposes a substantial burden on religious conscience, an exemption will not be granted under RFRA if the law passes strict

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[50] CTR. FOR AM. PROGRESS, THE HIGH COSTS OF BIRTH CONTROL: IT'S NOT AS AFFORDABLE AS YOU THINK 1–2 (2012) (noting that with out-of-pocket costs for the birth control pill ranging from $180–$960 per year, and average out-of-pocket doctor visits ranging from $35–$250, birth control can cost up to $1210 per year without insurance).

[51] *Income of Young Adults*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/fastfacts/display.asp?id=77 (last visited Apr. 10, 2013).

[52] Arguably, providing comprehensive health insurance, which is really part of the employee's compensation package anyway, is not all that different.

[53] *See* O'Brien v. U.S. Dep't of Health & Human Servs., No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012) ("RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.").

scrutiny.[54] It is one thing to provide an exemption from a law when such an accommodation hurts no one, but the calculus should be different if the challenged accommodation imposes a significant burden on others. In this case, denying women free access to contraception results in serious and direct harms to women's autonomy, equality, and equal access to health care. The state has a compelling interest in avoiding these harms.

Contraception is crucial to women's health.[55] The Institute of Medicine recommended that contraception be fully covered precisely because it is so essential for women's well-being.[56] Contraception allows women to better space their children. It improves prenatal care since women with intentional pregnancies start care earlier.[57] Birth control also prevents unwanted pregnancies for women with chronic medical conditions like diabetes, for whom pregnancy can be especially risky.[58] Indeed, pregnancy is contraindicated for women with serious health issues such as pulmonary hypertension and cyanotic heart disease.[59] Finally, millions of American women need the pill for reasons other than birth control, including managing polycystic ovary syndrome, endometriosis, dysfunctional uterine bleeding, menstrual cycle irregularities, excessive menstrual bleeding (menorrhagia), and severe menstrual pain (dysmenorrhea).[60]

The ability to control one's reproduction is also central to women's liberty and equality. It is fundamental to personal and bodily integrity—after all, how can one be an autonomous agent without the power to decide

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[54] 42 U.S.C. § 2000bb-1(b) (2006). Recall that a law passes strict scrutiny if it advances a compelling state interest, such as avoiding serious harm to others, and does so in a narrowly tailored manner.

[55] It is also crucial for children's health. For example, short intervals between pregnancies are associated with low birth weight, prematurity, and small-for-gestational-age births. COMM. ON PREVENTIVE SERVS., INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103 (2011). *See also generally* COMM. ON UNINTENDED PREGNANCY, INST. OF MED., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES (Sarah S. Brown & Leon Eisenberg eds., 1995) (detailing the consequences of unintended pregnancy on children, women, men, and families).

[56] COMM. ON PREVENTIVE SERVS., INST. OF MED., *supra* note 55, at 109–10. Contraception is also extremely cost-effective. According to the Institute of Medicine report: "The direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002, with the cost savings due to contraceptive use estimated to be $19.3 billion." *Id.* at 107.

[57] COMM. ON UNINTENDED PREGNANCY, INST. OF MED., *supra* note 55, at 66. Good prenatal care can help prevent complications, such as preeclampsia and eclampsia, both of which can be fatal. *Can a High-Risk Pregnancy Be Prevented?*, NAT'L INST. OF CHILD HEALTH & HUM. DEV., http://www.nichd.nih.gov/health/topics/high-risk/conditioninfo/pages/prevented.aspx (last updated Nov. 30, 2012).

[58] COMM. ON PREVENTIVE SERVS., INST. OF MED., *supra* note 55.

[59] *Id.* at 103–04. The health ramifications—nausea, fatigue, weight gain—of even healthy pregnancies should also be acknowledged.

[60] RACHEL K. JONES, GUTTMACHER INST., BEYOND BIRTH CONTROL: THE OVERLOOKED BENEFITS OF ORAL CONTRACEPTIVE PILLS 3 (2011); Andrew M. Kaunitz, *Oral Contraceptive Health Benefits: Perception Versus Reality*, 59 CONTRACEPTION 29S (1999).

what happens to one's own body?[61] Nor should the importance of contraception to women's equality be underestimated. Without the ability to control when or whether to beget a child, a woman cannot participate as an equal in the social, economic, and political life of this country.[62] In any case, if an employer provides health insurance, it should not discriminate against employees based on their sex, race, or other protected characteristic in its provision. Yet, omission of a benefit that only women—and essentially all women—rely on seems to do just that. Indeed, a health insurance plan that covers all basic preventive care except for contraception likely amounts to sex discrimination in violation of Title VII.[63]

Excluding contraception not only discriminates against female employees, it also imposes the employer's religious values onto them. Yet, as one district court recently noted, "RFRA is a shield, not a sword. . . . [I]t is not a means to force one's religious practices upon others."[64] Many employees do not share their employer's religious beliefs and indeed may have their own religious beliefs about not bearing children they are unwilling or unable to support. Thus, just as granting an exemption from social security taxes to an employer "operates to impose the employer's

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[61] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (recognizing that the decision of whether to "bear or beget" a child is a fundamental one).

[62] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992); *see also* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 465, 465 (2013) ("A majority of respondents reported that birth control use had allowed them to take better care of themselves or their families (63%), support themselves financially (56%), complete their education (51%), or keep or get a job (50%).").

[63] 42 U.S.C. § 2000e–2(a) (2006). The Pregnancy Discrimination Act (PDA) defines sex discrimination to include discrimination based on pregnancy. *Id.* § 2000e(k); *see also* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (holding that the exclusion of contraception from a health plan violated Title VII as amended by the PDA); EEOC, Decision on Coverage of Contraception (Dec 14, 2000), http://www.eeoc.gov/policy/docs/decision-contraception.html (finding that the PDA applies to prescription contraception). *But cf. In re* Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 942 (8th Cir. 2007) (holding that the exclusion of contraception from a health plan did not violate the PDA because contraception was not "related to" pregnancy). The only reason state-mandated health insurance without contraception coverage does not raise serious Equal Protection Clause issues is because of an ill-reasoned, much-derided Supreme Court decision (by an all-male Court) holding that pregnancy discrimination was not sex discrimination. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974). Even twenty-five years ago, Sylvia Law could remark that "[c]riticizing *Geduldig* has since become a cottage industry." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984).

[64] O'Brien v. U.S. Dep't of Health & Human Servs., No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012) (rejecting a RFRA challenge to the contraception mandate); *cf.* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own [religious] interests others must conform their conduct to his own religious necessities." (alteration in original) (quoting Otten v. Balt. & Ohio R., 205 F.2d 58, 61 (2d Cir. 1953))).

religious faith on the employees,"[65] granting an exemption from the contraception mandate foists the Catholic Bishops' religious views onto employees, whether or not they are Catholic.[66]

One plaintiff argues that religious employers are not coercing their employees or forcing their values on them: "[W]e are simply choosing not to participate in the use of these drugs. Our 350 employees, many of whom are not Catholic, freely chose to work here and . . . are aware of the values we practice . . . ."[67] In other words, if women do not like their religiously affiliated employer's policies, they can work somewhere else.[68] Of course, the same reasoning applies to the religiously affiliated institutions—if they do not like the professional responsibilities and requirements that come with running a hospital, school, or charity, then they could freely choose to not enter the field.

This point is made even stronger by the fact that so many of these religiously affiliated organizations are heavily subsidized by public tax dollars. According to Catholic Charities USA, a leading social services provider with over 150 affiliates, roughly two-thirds of its total income comes from the government.[69] Network, a Catholic social justice lobbying group, reports that the federal government has provided more than 1.5 billion dollars of direct funding to Catholic nonprofit organizations and programs in the past two years.[70] If a religiously affiliated organization

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[65] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004) (quoting United States v. Lee, 455 U.S. 252, 261 (1982)) (rejecting a religious employer's request for an exemption from taxes).

[66] *See id.*

[67] Michael P. Warsaw, Op-Ed., *Contraception, Against Conscience*, N.Y. TIMES (Feb. 21, 2012), http://www.nytimes.com/2012/02/22/opinion/why-ewtn-wont-cover-contraception.html; *see also* Editorial, *Contraception Mandate Violates Religious Freedom*, USA TODAY (Feb. 5, 2012, 6:28 PM), http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-02-05/contraception-mandate-religious-freedom/52975796/1 ("[H]aving freely chosen their employer, they'd have a dubious case for grievance against institutions that choose not to offer contraception coverage.").

[68] First, finding a new job in this economy is easier said than done, especially in a field where Catholic-affiliated institutions are a major employer. *See* CATHOLICS FOR A FREE CHOICE, THE FACTS ABOUT CATHOLIC HEALTH CARE IN THE UNITED STATES 1 (2005) (noting that 12% of all hospitals—over 600—are affiliated with the Catholic Church, and one-quarter of those are located in rural areas, where alternatives are likely sparse). Second, free market arguments against employee protection laws have been discredited since the *Lochner* era.

[69] CATHOLIC CHARITIES USA, CATHOLIC CHARITIES AT A GLANCE (reporting that in 2009, 67% of its total income was from the government). In contrast, only 3% of its income came from Diocesan Church support. *Id.*

[70] Press Release, Network, Setting the Record Straight on Federal Funding for Catholic Organizations (Jan. 31, 2012), *available at* http://www.networklobby.org/news-media/federal-funding-catholic-organizations. Catholic universities receive additional government funds from their students' federal student aid, while Catholic hospitals receive billions from Medicaid and Medicare. *See* CATHOLICS FOR A FREE CHOICE, *supra* note 68, at 2 (noting that in 2002 religiously affiliated hospitals "received more than $45 billion in public funds," including Medicaid and Medicare funds).

provides a public service with public money, it should be bound by the same public laws as its secular counterparts.

In short, ensuring equal access to health care and an equal opportunity to participate in the social, economic, and political life of the country are compelling interests.[71] Furthermore, requiring all employers who provide insurance to cover contraception is narrowly tailored to achieve those interests.[72] It has been argued that government-provided health insurance would be a less restrictive means of achieving these goals.[73] Apart from the practical questions, accepting such an argument could potentially decimate equal protection; it would mean a private company could argue that a law banning discrimination on the basis of race in the provision of health (or other) benefits was not narrowly tailored because the government could simply provide the benefit instead. Such a claim is a distortion of strict scrutiny and should fail.

CONCLUSION

The contraception mandate is perfectly legal. As a neutral law of general applicability, it does not violate the Free Exercise Clause. As a law that does not compel religiously affiliated institutions to speak or associate with unwanted members, it does not violate the Free Speech Clause. Finally, the Religious Freedom Restoration Act is violated only if the contraception mandate imposes a substantial burden on religious conscience and fails strict scrutiny. The mandate does no such thing. It imposes, at most, an uncertain and indirect religious burden on organizations that are often heavily financed by taxpayer dollars. On the other hand, an exemption would directly burden women who do not share their employer's religious views. Whatever place religious exemptions may have in our legal scheme, this is not it.

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[71] Plaintiffs have argued that the government's interests cannot be compelling given all the exceptions to the contraception mandate. For example, the mandate does not apply to companies with fewer than fifty employees or to grandfathered plans. *See, e.g.*, Newland v. Sebelius, No. 1:12-cv-1123-JLK, 2012 WL 3069154, at *7 (D. Colo. July 27, 2012) (finding that the exceptions undermined the state's claim that its interests were compelling). Exceptions might inform the compelling interest analysis when there is a question about the importance of the state's goal. If we are uncertain whether the state's interest in the uniform appearance of police officers really is compelling, the existence of numerous exceptions to its policy might help us conclude it is not. *See, e.g.*, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999). However, exceptions should not matter when the state's goals—such as its interest in promoting health, bodily integrity, and sex equality—have long been recognized as compelling.

[72] How strict the tailoring must be under RFRA is not altogether clear. If RFRA were meant to reinstate the pre-*Smith* test as practiced, then it is not very demanding, since the Supreme Court rarely found that laws failed strict scrutiny in Free Exercise Clause challenges. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983); United States v. Lee, 455 U.S. 252 (1982).

[73] *See, e.g.*, *Newland*, 2012 WL 3069154, at *7–8 (considering the plaintiff's argument that government-provided insurance is one alternative in determining whether to grant a preliminary injunction).