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## Exempt or Not Exempt: Mandated Prescription Contraception Coverage and the Religious Employer

In 1999, the California legislature passed the Women's Contraception Equity Act (WCEA).<sup>1</sup> The WCEA requires all private employers who offer prescription drug coverage in health and disability insurance plans to include prescription contraception coverage for female employees and their covered spouses and children.<sup>2</sup> A "religious employer" may be exempt from the requirement to provide coverage for prescription contraceptives and may request health and disability plan contracts without coverage for prescription contraception.<sup>3</sup> "Religious employers" are defined in the WCEA as those that have the purpose of inculcating religious values, primarily employ persons who share their religious tenets, primarily serve persons who share their religious tenets, and qualify as a nonprofit organization under § 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986.<sup>4</sup>

The first challenge to the WCEA and its exemption for religious employers came before the California Supreme Court in March 2004.<sup>5</sup> Catholic Charities of Sacramento (Catholic Charities) did not meet any of the four criteria for the religious em-

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<sup>1</sup> 1999 Cal. Stat. 92 (codified at CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000) and CAL. INS. CODE § 10123.196 (West 2005)).

<sup>2</sup> CAL. HEALTH & SAFETY CODE § 1367.25(a); CAL. INS. CODE § 10123.196(a).

<sup>3</sup> CAL. HEALTH & SAFETY CODE § 1367.25(b); CAL. INS. CODE § 10123.196(d).

<sup>4</sup> CAL. HEALTH & SAFETY CODE § 1367.25(b)(1); CAL. INS. CODE § 10123.196(d)(1).

<sup>5</sup> Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004).

ployer exemption.<sup>6</sup> Catholic Charities argued that the WCEA violated the establishment and free exercise clauses of the United States and California Constitutions.<sup>7</sup> The California Supreme Court disagreed and held that the WCEA was constitutional.<sup>8</sup>

In this Comment, I will argue that the religious employer exemptions of the WCEA and similar state statutes mandating contraceptive coverage are too narrow. The decision in *Catholic Charities* upholding the WCEA's exemption will cause religious employers who do not meet the exemption criteria to refuse to offer prescription drug benefits to employees in order to follow their religious tenets against contraception. This will defeat the purpose of mandated contraception coverage statutes by forcing some women to pay more for health services. Further, religious employers will be less attractive to job seekers if they refuse to offer prescription drug coverage to employees.

Part I of this Comment will provide an overview of the mandated prescription contraceptive coverage issue. This Part will explain the statistical and social factors requiring action to eliminate discrimination in health care costs between men and women and will give a brief summary of the concerns raised by religious organizations.

Part II will discuss the various state, federal, and administrative solutions to the problem of mandated contraceptive coverage and religious employers. Part II.A will examine the various state statutes mandating prescription contraception coverage, focusing on the exemptions for religious employers, the problems with the exemptions, and the solutions different states have created. Part II.B will examine Congress' efforts to eliminate discrimination in prescription coverage for women. Administrative endeavors, specifically by the Equal Employment Opportunity Commission, will be considered in Part II.C. And Part II.D will look at efforts by the federal courts to guarantee coverage for prescription contraception.

Part III will examine recent developments concerning mandated prescription contraceptive coverage, including the recent California Supreme Court decision in *Catholic Charities*. Finally, Part IV will consider the implications of *Catholic Charities*. In Part IV, I will argue that the exemptions for religious employers

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<sup>6</sup> *Id.* at 76.

<sup>7</sup> *Id.* at 73.

<sup>8</sup> *Id.* at 74.

should be broader, with an option for employees to purchase prescription contraception coverage directly from the insurer if an employer takes the exemption.

## I

### OVERVIEW OF THE PRESCRIPTION CONTRACEPTIVE COVERAGE ISSUE

#### A. *Discrimination in Health Care Costs*

Concern over disparities in health care costs between men and women became a hot topic in the mid- to late-nineties.<sup>9</sup> Around that time, insurance companies that for years had refused to cover prescription contraception began to offer coverage for Viagra, a pill prescribed to men to overcome impotency problems.<sup>10</sup> Women and various members of the media spoke up about the quickness by which Viagra was offered to men and covered by insurance companies, even though contraceptives for women still were not covered.<sup>11</sup>

At this time in the nineties, statistics showed that women paid 68% more than men for health care.<sup>12</sup> The costs of contraceptives and other reproductive health care services accounted for much of the disparity,<sup>13</sup> as did unintended pregnancies.<sup>14</sup> Findings from a study of private insurance revealed that almost half of large group health insurance plans did not provide contraceptive coverage.<sup>15</sup> The same study showed that only 33% of the 97% of large group plans that covered prescription drugs cov-

<sup>9</sup> See, e.g., Breena M. Roos, Note, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives*, 82 B.U. L. REV. 1289, 1290 (2002).

<sup>10</sup> See, e.g., Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 180 (1999). "The pill" has been available since 1960 when the Food and Drug Administration approved distribution of Enovid, a contraceptive pill. Planned Parenthood Federation of America, Inc., *A History of Contraceptive Methods*, June 2002, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-020709-contraception-history.xml>.

<sup>11</sup> See, e.g., Sarah E. Bycott, Note, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. REV. 779, 779-80 (2001).

<sup>12</sup> Center for Reproductive Rights, *Contraceptive Coverage for All: EPICC Act is Prescription for Women's Equality*, Aug. 1 2005, [http://www.crlp.org/pub\\_fac\\_epicc.html](http://www.crlp.org/pub_fac_epicc.html).

<sup>13</sup> *Id.*

<sup>14</sup> NARAL FOUNDATION, *INSURANCE COVERAGE FOR CONTRACEPTION 2* (2002). Forty-nine percent of all pregnancies in the United States are unintended. *Id.* at 2.

<sup>15</sup> Center for Reproductive Rights, *supra* note 12.

ered oral contraceptives, and only 15% of those plans that covered prescription drugs covered the five most common methods of reversible contraception: oral contraceptives, diaphragms, Depo Provera, IUDs, and Norplant.<sup>16</sup> In contrast, insurance companies covered over half of all Viagra prescriptions.<sup>17</sup> Many insurance plans also offered coverage for other services related to pregnancy, including nonreversible birth control. For example, tubal ligations were covered by 86% of all private insurance plans.<sup>18</sup>

Data indicates that the costs to employers for requiring equity in prescription contraceptive coverage are minimal.<sup>19</sup> If employers were to provide coverage for the full range of Food and Drug Administration approved prescription contraceptives, the average monthly cost to the employer would be \$1.43 per employee.<sup>20</sup> This slight increase translates into an overall rise in insurance costs for employers of only 0.6%.<sup>21</sup> Further, estimates suggest that not providing prescription contraceptive coverage “may in fact cost an employer 15-17% more than providing coverage.”<sup>22</sup> This increase is due to the costs of unintended pregnancies, for which insurance companies generally pay.<sup>23</sup> Thus, the costs of

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<sup>16</sup> *Id.* Eight of ten women in the United States born after 1945 have used oral contraceptives at some time during their lives. POPULATION INFO. PROGRAM, THE JOHNS HOPKINS SCHOOL OF PUBLIC HEALTH, SERIES A, No. 9, ORAL CONTRACEPTIVES: AN UPDATE (2000), available at <http://www.infoforhealth.org/pr/a9edsum.shtml>.

<sup>17</sup> Center for Reproductive Rights, *supra* note 12.

<sup>18</sup> *Id.* A tubal ligation is a permanent sterilization procedure where a woman's fallopian tubes are tied, preventing eggs from release during the menstrual cycle. Hayden, *supra* note 10, at 178.

<sup>19</sup> *E.g.*, Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Aug. 1998, available at <http://www.guttmacher.org/pubs/tgr/01/4/gr010405.html>. These estimates are based on the actual experiences of employers whose insurance plans cover oral contraceptives, and they illustrate the change in cost for employers whose insurance plans do not currently cover any form of prescription contraception. *Id.* Plans that offer some coverage for contraceptives would experience a smaller increase in costs due to a mandate requiring coverage for all FDA approved contraceptive methods. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Susan A. Cohen, *Federal Law Urged As Culmination of Contraceptive Insurance Coverage Campaign*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Oct. 2001, available at <http://www.guttmacher.org/pubs/tgr/04/5/gr040510.html>.

<sup>23</sup> *E.g.*, NARAL PRO-CHOICE AMERICA FOUNDATION, INSURANCE COVERAGE FOR CONTRACEPTION: A PROVEN WAY TO PROTECT AND PROMOTE WOMEN'S HEALTH 2 (2005), available at <http://noral.org/facts/loader.cfm?url=/commonsport/security/getfile.cfm&PageID=16208>.

mandating coverage are minimal and may even be outweighed by the economic benefits of mandated coverage due to fewer unintended pregnancies.

In the face of these statistics concerning the disparities in healthcare costs between men and women, the burden placed on women financially, and the combination of relatively low expense and possible financial benefit to employers, there are still those who oppose mandated prescription contraceptive coverage.

### *B. The Conscience Clause*

The strongest opponents to mandated prescription contraceptive coverage are religious entities, especially those affiliated with the Catholic Church. Opposition stems from teachings of the Catholic Church that prohibit Catholics from using artificial birth control.<sup>24</sup> The Catholic Church teaches that in order to follow the natural law of God, “each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.”<sup>25</sup> This doctrine is based upon the Church’s belief in the connection between the unitive significance and procreative significance of the marriage act.<sup>26</sup> The Church believes that the marriage act not only unites husband and wife in loving intimacy, but also provides them the opportunity to generate new life.<sup>27</sup> Thus, the Church teaches that the use of birth control frustrates the purpose of the marital act and, therefore, disturbs God’s plan or design.<sup>28</sup>

To accommodate the Catholic Church’s belief that artificial contraception is a sin, “conscience clauses” are often included in legislation. Conscience clauses permit health care providers, some employers, and other entities to refuse to provide services which are in opposition to their religious, moral, or ethical beliefs.<sup>29</sup> The first conscience clause was the Church Amendment,

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<sup>24</sup> See, e.g., Second Vatican Council, *Gaudium Et Spes*: Pastoral Constitution on the Church in the Modern World ¶ 51 (Dec. 7, 1965), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html).

<sup>25</sup> Encyclical Letter of Pope Paul VI, *Humanae Vitae* (On the Regulation of Birth) ¶ 11 (July 25, 1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

<sup>26</sup> *Id.* ¶ 12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* ¶ 13.

<sup>29</sup> E.g., RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, WORDS OF CHOICE:

which amended the Public Health and Welfare Act.<sup>30</sup> The Church Amendment, enacted in response to *Roe v. Wade*,<sup>31</sup> provided protection for individuals and entities who received federal funds and opposed sterilizations or abortions due to religious beliefs or moral convictions.<sup>32</sup> Similar laws were passed by forty-five states.<sup>33</sup>

Conscience clauses are meant to accommodate religious freedom, but opponents of conscience clauses see them as “loop-holes” that prevent information concerning reproductive health from reaching women.<sup>34</sup> Arguments over conscience clauses are central to the issue of mandated prescription contraceptive coverage.

## II

### BACKGROUND LAW

State legislatures, Congress, the Equal Employment Opportunity Commission, and federal courts have examined the issue of insurance coverage for contraceptives since discussion over the problem heightened in the nineties. Part II of this Comment examines the efforts made by these bodies.

#### A. State Legislative Solutions

Statutes in twenty-three states currently require private insurance plans that cover prescription drugs to cover prescription contraceptives as well.<sup>35</sup> Texas and Virginia, for instance, require insurance companies to offer plans covering contraceptives to employers but do not mandate that employers purchase the cov-

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COUNTERING ANTI-CHOICE RHETORIC, <http://www.rcrc.org/pdf/wordsofchoice.pdf> (last visited Mar. 8, 2006).

<sup>30</sup> 42 U.S.C. § 300a-7 (2000); see Christine Vargas, Note, *The EPICC Quest for Prescription Contraceptive Insurance Coverage*, 28 AM. J.L. & MED. 455, 459 (2002).

<sup>31</sup> 410 U.S. 113 (1973). *Roe* held that laws making it illegal to procure an abortion for any reason other than saving the life of the mother are unconstitutional. *Id.* at 164.

<sup>32</sup> 42 U.S.C. § 300a-7(b).

<sup>33</sup> Vargas, *supra* note 30, at 459.

<sup>34</sup> *Id.* at 459-60.

<sup>35</sup> GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES (2006) [hereinafter GUTTMACHER, STATE POLICIES], available at [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf). Oregon also recently proposed legislation mandating prescription contraceptive coverage. S.B. 756, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 2509, 73d Legis. Assemb., Reg. Sess. (Or. 2005). The bills were still in committee upon adjournment of the legislature.

erage.<sup>36</sup> Three other states require that when insurers provide individuals or small employers with prescription drug coverage the insurers must also offer contraceptive coverage.<sup>37</sup>

### 1. *The Religious Exemption*

Of the twenty-three states that mandate health insurers to cover prescription contraceptives, fourteen have an exemption for religious employers.<sup>38</sup> At least three of these fourteen states provide some sort of exemption for both employers and insurers on religious grounds.<sup>39</sup> Additionally, Nevada exempts insurers associated with a religious organization from providing insurance plans with contraceptive coverage.<sup>40</sup> All but Massachusetts and New Mexico require notice to enrollees concerning the refused coverage.<sup>41</sup> The notice required is either given by the employer<sup>42</sup> or the insurer through enrollment forms and information.<sup>43</sup> Hawaii requires that an employer must also provide information to the enrollee concerning where the “enrollee may directly access contraceptive services and supplies in an expeditious manner.”<sup>44</sup>

Some states restrict the exemption further. For instance, in six states the exemption does not apply to contraceptive devices or drugs prescribed for reasons other than contraception.<sup>45</sup> Addi-

<sup>36</sup> See GUTTMACHER, STATE POLICIES, *supra* note 35.

<sup>37</sup> *E.g.*, COLO. REV. STAT. ANN. § 25-6-203 (LexisNexis 2004); *see also* GUTTMACHER, STATE POLICIES, *supra* note 35.

<sup>38</sup> GUTTMACHER, STATE POLICIES, *supra* note 35. The proposed Oregon legislation contained no exemption for religious employers. *See* Or. S.B. 756; Or. H.B. 2509.

<sup>39</sup> CONN. GEN. STAT. ANN. § 38a-503e(b)(1), (e) (West Supp. 2005); 215 ILL. COMP. STAT. ANN. 5/356m(b)(2) (West 2000); MO. ANN. STAT. § 376.1199(4)(1), (3) (West 2002).

<sup>40</sup> NEV. REV. STAT. ANN. § 689B.0376(5) (LexisNexis 2003). The statute requires an insurer to notify enrollees in writing of the refused coverage. *Id.*

<sup>41</sup> *See* MASS. ANN. LAWS ch. 176B, § 4W (LexisNexis Supp. 2005); N.M. STAT. ANN. § 59A-22-42(D) (West 2003).

<sup>42</sup> ARIZ. REV. STAT. ANN. § 20-2329(C) (Supp. 2005); CAL. HEALTH & SAFETY CODE § 1367.25(b)(2) (West 2000); CAL. INS. CODE § 10123.196(d)(2) (West 2005); DEL. CODE ANN. tit. 18, § 3559(d) (Supp. 2004); HAW. REV. STAT. § 431:10A-116.7(c)(1) (Supp. 2004); ME. REV. STAT. ANN. tit. 24-A, § 2756(2) (2000); MD. CODE ANN., INS. § 15-826(c)(2) (West 2002); N.Y. INS. LAW § 4303(cc)(1)(B) (McKinney Supp. 2006); R.I. GEN. LAWS § 27-18-57(e) (2002).

<sup>43</sup> CONN. GEN. STAT. ANN. § 38a-503e(c); MO. ANN. STAT. § 376.1199(6); N.C. GEN. STAT. ANN. § 58-3-178(e) (West 2000).

<sup>44</sup> HAW. REV. STAT. § 431:10A-116.7(c)(2).

<sup>45</sup> CAL. HEALTH & SAFETY CODE § 1367.25(c); CAL. INS. CODE § 10123.196(e); CONN. GEN. STAT. ANN. § 38a-503e(d); HAW. REV. STAT. § 431:10A-116.7(d); ME. REV. STAT. ANN. tit. 24-A, § 2756(2); N.Y. INS. LAW § 4303(cc)(3); N.C. GEN. STAT.

tionally, California, Hawaii, Maine, and North Carolina do not include contraception necessary to preserve the life or health of the covered person.<sup>46</sup> To further protect women, Hawaii, New York, and Missouri allow an enrollee whose employer takes the religious exemption to purchase insurance coverage that includes contraceptives directly from the insurer.<sup>47</sup> Generally, the cost to the enrollee who takes this option must be no more than the enrollee would have paid had the employer not been exempted.<sup>48</sup> These three states also require either the employer or the insurer to notify the enrollee of this option.<sup>49</sup>

## 2. *Religious Entity Defined*

The most important aspects of these religious exemptions for purposes of this Comment are the descriptions and definitions of the exempted religious entities, which range from vague and inclusive to detailed and exclusive. Vague descriptions include such general terms as “religious entity.”<sup>50</sup> Four other exemptions have similarly vague descriptions.<sup>51</sup> The less ambiguous term “qualified church-controlled organization” as defined in 26 U.S.C. § 3121 is used in two statutes.<sup>52</sup> The most detailed and exclusionary descriptions of religious employers list statutory definitional requirements for classification as a religious entity.

These statutory definitional requirements are the types of defi-

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ANN. § 58-3-178(e). Reasons other than contraception may include decreasing the risk of ovarian cancer or elimination of menopause symptoms. *E.g.*, HAW. REV. STAT. § 431:10A-116.7(d).

<sup>46</sup> CAL. HEALTH & SAFETY CODE § 1367.25(c); CAL. INS. CODE § 10123.196(e); HAW. REV. STAT. § 431:10A-116.7(d); ME. REV. STAT. ANN. tit. 24-A, § 2756(2); N.C. GEN. STAT. ANN. § 58-3-178(e).

<sup>47</sup> HAW. REV. STAT. § 431:10A-116.7(e); MO. ANN. STAT. § 376.1199(5); N.Y. INS. LAW § 4303(cc)(2)(A).

<sup>48</sup> *E.g.*, HAW. REV. STAT. § 431:10A-116.7(e).

<sup>49</sup> HAW. REV. STAT. § 431:10A-116.7(c)(2); MO. ANN. STAT. § 376.1199(6)(3); N.Y. INS. LAW § 4303(cc)(2)(B).

<sup>50</sup> *E.g.*, N.M. STAT. ANN. § 59A-22-42(D) (West 2003).

<sup>51</sup> DEL. CODE ANN. tit. 18, § 3559(d) (Supp. 2004) (“if the required coverage conflicts with the religious organization’s bona fide religious beliefs and practices”); 215 ILL. COMP. STAT. 5/356m(b)(2) (West 2000) (“religious institution or organization [and the statute’s requirements] violate its religious and moral teachings and beliefs”); MD. CODE ANN., INS. § 15-826(c)(1) (West 2002) (“if the required coverage conflicts with the religious organization’s bona fide religious beliefs and practices”); MO. ANN. STAT. § 376.1199(4)(1) (“if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity”).

<sup>52</sup> CONN. GEN. STAT. ANN. § 38a-503e(f) (West Supp. 2005); R.I. GEN. LAWS § 27-18-57(e) (2002); *see also* ME. REV. STAT. ANN. tit. 24-A, § 2756(2) (2000); MASS. ANN. LAWS ch. 176B, § 4W(c) (LexisNexis Supp. 2005).



nitions that I believe are too narrow and will lead to problems for religious entities. For example, California and New York define religious employers as those which have the purpose of inculcating religious values, primarily employ persons who share their religious tenets, primarily serve persons who share their religious tenets, and qualify as a nonprofit organization under § 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986.<sup>53</sup> Arizona and Hawaii have similar statutory definitional requirements. Arizona requires that a religious employer must primarily employ persons with the same religious tenets as the religious entity, primarily serve persons with the same religious tenets as the religious entity, and meet the nonprofit organization requirements under § 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986.<sup>54</sup> And Hawaii defines a religious employer as one that has the purpose of inculcating religious values, primarily employs persons of the same religious tenets, is not staffed by public employees, and is tax exempt under § 501(c)(3) of the Internal Revenue Code of 1986.<sup>55</sup>

The most troublesome of these statutory definitional requirements are those that require religious organizations to have the purpose of inculcating religious values and to primarily serve persons who share the same religious tenets. Many religious organizations do not focus solely on evangelism and the inculcation of religious beliefs.<sup>56</sup> The Catholic Church, for example, does not separate social services from its core religious mission.<sup>57</sup> In light of that, the Catholic Church also does not discriminate in the provision of services by serving only those who share the same religious beliefs.<sup>58</sup> In this instance, the Church's role in evangelism does play a part. A religious organization affiliated with the Catholic Church may not primarily serve or employ persons who share the same religious tenets because one mission of the Church is to share the word of the Gospel throughout the world.<sup>59</sup> Thus, strict statutory definitional requirements often ex-

<sup>53</sup> CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A)-(D) (West 2000); CAL. INS. CODE § 10123.196(d)(1)(A)-(D) (West 2005); N.Y. INS. LAW § 4303(cc)(1)(A)(i)-(iv) (McKinney Supp. 2006).

<sup>54</sup> ARIZ. REV. STAT. ANN. § 20-2329(F)(1)-(3) (Supp. 2005).

<sup>55</sup> HAW. REV. STAT. § 431:10A-116.7(a)(1)-(4) (Supp. 2004).

<sup>56</sup> See, e.g., Susan J. Stabile, *Religious Employers and Statutory Prescription Contraceptive Mandates*, 43 CATH. LAW. 169, 171 (2004).

<sup>57</sup> See, e.g., *id.*

<sup>58</sup> See, e.g., *id.*

<sup>59</sup> See, e.g., *id.* at 173-74.

clude religious organizations such as Catholic hospitals, schools, and charitable groups from inclusion as a religious employer.<sup>60</sup>

### B. Congressional Efforts

#### 1. *The Equity in Prescription Insurance and Contraceptive Coverage Act*

First introduced in 1997, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), similar to many of the state laws discussed in Part II.A, proposed to require those health plans that offered coverage for prescription drugs to provide equitable coverage of prescription contraceptive drugs, devices, and services.<sup>61</sup> The EPICC would have also disallowed health plans from denying enrollment to participants because of the use or potential use of contraceptives by the enrollee.<sup>62</sup> Additionally, the EPICC would have prohibited penalizing or reducing the reimbursement to a health care professional because the professional prescribed contraceptives to an enrollee.<sup>63</sup> Unfortunately, the EPICC has died in subcommittee each time it has been proposed.<sup>64</sup> The EPICC contained no exemption for religious employers, which might explain its failure to pass.<sup>65</sup>

#### 2. *The Federal Employees Health Benefit Program*

In 1998, Congress passed a law providing federal employees with a guarantee of prescription contraception coverage.<sup>66</sup> The law requires that all Federal Employees Health Benefits Program

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<sup>60</sup> See, e.g., *id.* at 171.

<sup>61</sup> Prevention First Act, S. 20, 109th Cong. §§ 301-304 (2005); Equity in Prescription Insurance and Contraceptive Coverage Act of 2003, H.R. 2727, 108th Cong.; S. 1396, 108th Cong.; Equity in Prescription Insurance and Contraceptive Coverage Act of 2001, H.R. 1111, 107th Cong.; S. 104, 107th Cong.; Equity in Prescription Insurance and Contraceptive Coverage Act of 1999, H.R. 2120, 106th Cong.; S. 1200, 106th Cong.; Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong.; S. 743, 105th Cong.

<sup>62</sup> E.g., Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. §§ 3(a), 4(a).

<sup>63</sup> E.g., *id.*

<sup>64</sup> The EPICC has recently been incorporated into the Prevention First Act, but will probably not fair any better in the 109th Congress. See Prevention First Act, S. 20, 109th Cong. §§ 301-304 (2005).

<sup>65</sup> See Vargas, *supra* note 30, at 457.

<sup>66</sup> Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

(FEHBP) insurance plans cover prescription contraceptives.<sup>67</sup> However, unlike the EPICC, which has not passed in Congress, FEHBP does contain a religious exemption. Specifically exempt from the mandate are five plans.<sup>68</sup> Other plans, existing or future, may also be exempt if they object to contraception because of “religious beliefs.”<sup>69</sup> Additionally, plans may not discriminate against doctors or other providers whose individual religious beliefs or morals preclude them from prescribing contraceptives.<sup>70</sup> This mandate sets an important precedent for states and private-sector employers.

*C. An Administrative Agency Statement: The Equal Employment Opportunity Commission*

In response to charges filed by two nurses against their employers alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Pregnancy Discrimination Act (PDA),<sup>71</sup> the Equal Employment Opportunity Commission (EEOC) issued a statement requiring the employers to provide prescription contraceptive coverage if they offered to cover other comparable prescriptions.<sup>72</sup> The two nurses alleged that the health insurance plan offered by their employers failed to offer prescription contraception coverage and, therefore, discriminated on the bases of sex and pregnancy.<sup>73</sup>

First, the EEOC decision established that the PDA pertains to prescription contraceptives. The EEOC found that the PDA applied to contraceptives through the Act’s plain language, interpretations of the statute by the Supreme Court, and the legislative intent of Congress.<sup>74</sup> As the EEOC noted, the PDA requires equal treatment in all aspects of employment for women “affected by pregnancy, childbirth, or related medical condi-

<sup>67</sup> ABBY L. BLOCK, U.S. OFFICE OF PERSONNEL MGMT., BENEFITS ADMIN. LETTER NO. 98-418 (1998), available at <http://www.opm.gov/asd/pdf/98-418.pdf>.

<sup>68</sup> Pub. L. No. 105-277 § 656(b)(1). The excluded plans are: Providence Health Plan, serving Oregon and Washington; Personal Cares HMO, serving Illinois; Care Choices, serving Iowa, Nebraska, South Dakota, and Michigan; OSF Health Plans, serving Illinois; and Yellowstone Community Health Plan, serving Montana. *Id.*

<sup>69</sup> *Id.* § 656(b)(2).

<sup>70</sup> *Id.* § 656(c).

<sup>71</sup> 42 U.S.C. § 2000e(k) (2000).

<sup>72</sup> U.S. Equal Employment Opportunity Comm’n, Commission Decision on Coverage of Contraception (Dec. 14, 2000) [hereinafter EEOC Decision], available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

tions.”<sup>75</sup> This includes the receipt of fringe benefits.<sup>76</sup> The EEOC stated that this explicit language “prohibits employers from singling out pregnancy or related medical conditions in their benefit plans.”<sup>77</sup>

The EEOC also followed the Supreme Court’s reasoning regarding the PDA’s prohibition against discrimination related to the ability of a woman to become pregnant, not just to the pregnancy itself.<sup>78</sup> Noting that contraception is a means by which women control their ability to become pregnant, the EEOC concluded that the PDA “necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”<sup>79</sup> Because under the PDA an employer could not fire an employee based on her use of contraceptives, it follows that an employer cannot discriminate in providing health insurance benefits by denying coverage of prescription contraceptives to women.<sup>80</sup>

Looking at both the language of the PDA and Congress’ intent in enacting it, the EEOC found further support for the conclusion that the PDA applies to prescription contraception.<sup>81</sup> In most cases, the PDA explicitly exempts employers from being obligated to offer health benefits for abortions.<sup>82</sup> The EEOC noted that Congress, knowing that the PDA would apply to a women’s decision to terminate her pregnancy, provided this exemption for abortion.<sup>83</sup> If Congress had meant to limit the PDA’s application to contraceptives, an exemption similar to the one provided for abortion would have been included.<sup>84</sup> Thus, from the PDA’s language, congressional intent, and rulings by the Supreme Court, the EEOC determined that the PDA protected prescription contraceptives.<sup>85</sup>

Next, the EEOC found that coverage for prescription contraceptives is required by the PDA.<sup>86</sup> The EEOC noted that the PDA requires equality in the “expenses related to pregnancy,

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<sup>75</sup> *Id.* (quoting 42 U.S.C. § 2000e(k)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 211 (1991)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (citing 42 U.S.C. § 2000e (2000)).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

childbirth, or related medical conditions” and those related to other medical conditions.<sup>87</sup> Therefore, since contraceptives are used to prevent the medical condition of pregnancy, the determination of whether the employer’s health insurance plan provided equal coverage for prescription contraception centered on the plan’s coverage of prescription drugs, devices, and services used to prevent the occurrence of medical conditions.<sup>88</sup>

The EEOC then noted that the employer’s health insurance plan covered vaccinations, drugs to prevent certain medical conditions such as high blood pressure, and screening tests such as pap smears and mammograms.<sup>89</sup> The EEOC stated that the health insurance plan failed to provide the necessary equal treatment for prescription contraceptives because prescription contraceptives were not covered while similar preventative drugs, devices, and services were.<sup>90</sup>

Ultimately, the EEOC found that the discrimination would violate the PDA whether the contraceptives were prescribed as birth control or for other medical purposes.<sup>91</sup> The decision states that regardless of the purpose of the prescription contraceptives, the insurance plan restricted the treatment options available to women but not to men.<sup>92</sup> Unfortunately, since Title VII and the PDA only apply to employers with more than fifteen employees, the EEOC decision does not extend the guarantee of coverage to most women.<sup>93</sup>

#### *D. Federal Court Decisions*

##### *1. Erickson v. Bartell Drug Co.*

The United States District Court for the Western District of Washington was the first federal court to consider the issue of prescription contraceptive coverage.<sup>94</sup> Jennifer Erickson filed a class-action lawsuit against her employer, the Bartell Drug Company, alleging that the exclusion of prescription contraceptives from the company’s prescription drug plan constituted sex dis-

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g.,* Vargas, *supra* note 30, at 456.

<sup>94</sup> Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

crimination against female employees.<sup>95</sup> Examining the language of Title VII and the PDA, the legislative history of the statute, and the relevant case law, the court held that Bartell's otherwise comprehensive insurance plan discriminated against female employees in violation of Title VII and the PDA.<sup>96</sup>

In *Erickson*, the court first looked at the language of Title VII that prohibits an employer from refusing to hire, firing, or otherwise discriminating against an individual based on "race, color, religion, sex, or national origin."<sup>97</sup> The court noted that the legislative history of Title VII is not useful in determining congressional intent concerning discrimination based on sex.<sup>98</sup> However, the law has been applied broadly and Congress has generally only interfered with judicial interpretations of Title VII that restrict the law's application.<sup>99</sup> The court then discussed the PDA, which amended Title VII, and Congress' enactment of the amendment following a narrow interpretation of Title VII by the Supreme Court.<sup>100</sup>

In *General Electric Co. v. Gilbert*,<sup>101</sup> the Supreme Court held that a short-term disability plan which did not provide coverage for pregnancy-related disabilities did not violate Title VII's prohibition against discrimination based on sex.<sup>102</sup> The Court reasoned that pregnancy does not affect all women equally and, therefore, held that pregnancy discrimination is not the same as gender discrimination.<sup>103</sup> Further, the Court found that the short-term disability plan covered the same categories of risk for men and women.<sup>104</sup> Thus, the Court held that the plan provided equal coverage to men and women and did not violate Title VII merely because the disability plan was less than all-inclusive.<sup>105</sup>

The *Erickson* court found that the enactment of the PDA was

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1271.

<sup>97</sup> *Id.* at 1268 (quoting 42 U.S.C. § 2000e-2(a)(1) (2000)).

<sup>98</sup> *Id.* at 1268-69 (discussing the law's focus on racial equality and the inclusion of "sex" as a possible attempt to impair the law's passage).

<sup>99</sup> *Id.* at 1269.

<sup>100</sup> *Id.* at 1269-71.

<sup>101</sup> 429 U.S. 125 (1976), *superseded by statute*, Act of Oct. 31, 1978, Pub. L. No. 95-555, 97 Stat. 2076 (amending Title VII to prohibit sex discrimination on the basis of pregnancy).

<sup>102</sup> *Id.* at 145-46.

<sup>103</sup> *Id.* at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 & n.20 (1974)).

<sup>104</sup> *Id.* at 138.

<sup>105</sup> *Id.* at 138-39.

in direct response to *Gilbert*.<sup>106</sup> Congress specifically noted the *Gilbert* dissents of Justices Brennan and Stevens.<sup>107</sup> Congress discussed Justice Brennan's argument that General Electric's short-term disability plan provided males with comprehensive coverage while women were not given the same comprehensive coverage.<sup>108</sup> Justice Stevens' position that the ability to become pregnant is precisely what differentiates females from males was also noted by Congress.<sup>109</sup> Further, the *Erickson* court found that "[p]roponents of the PDA 'repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision.'"<sup>110</sup>

Next, the *Erickson* court addressed the PDA's importance to the case at hand. Stating that the PDA was enacted in response to *Gilbert*, the *Erickson* court noted that the language of the PDA does not specifically mention prescription contraceptives.<sup>111</sup> However, the court also noted that in enacting the PDA, Congress adopted a broad interpretation of Title VII, recognized that there are differences between men and women due to sex, and "required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."<sup>112</sup> Thus, the court found that Congress' reversal of *Gilbert* through the PDA demonstrated that coverage which appears equal on its face "does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."<sup>113</sup>

Further, the *Erickson* court looked to relevant case law to determine if prescription contraceptives are covered under Title VII and the PDA. The court found that the Supreme Court has affirmed that in Title VII claims equality is measured by assessing the coverage offered to both sexes and the relative compre-

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<sup>106</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269-71 (W.D. Wash. 2001).

<sup>107</sup> H.R. REP. NO. 95-948, at 2 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Erickson*, 141 F. Supp. 2d at 1269 n.6 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 (1983)).

<sup>111</sup> *Id.* at 1270.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1271.

hensiveness of coverage for each.<sup>114</sup> The court also noted that the Supreme Court has reiterated the idea, confirmed by the PDA, that discrimination based on sex-based characteristics is sex discrimination.<sup>115</sup> The court stated that the Supreme Court has determined that classifying employees based upon their ability to bear children, whether they are pregnant or not, is discrimination based on sex.<sup>116</sup>

After reviewing the relevant case law, the court stated that “the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception.”<sup>117</sup> The court then held that generally comprehensive prescription plans that exclude women-only benefits violate Title VII’s prohibition against sex discrimination.<sup>118</sup>

## 2. Mauldin v. Wal-Mart Stores, Inc.

In 2002, Lisa Mauldin, an employee of Wal-Mart Stores, Inc. (Wal-Mart), succeeded in establishing class certification in her claim against Wal-Mart for violations of Title VII and the PDA.<sup>119</sup> Mauldin claimed that Wal-Mart offered a health insurance plan to employees that included a comprehensive prescrip-

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<sup>114</sup> *Id.* (citing *Newport News*, 462 U.S. 669). In *Newport News*, the Court found that employers must provide complete health insurance coverage to the female spouses and dependants of male employees. 462 U.S. at 685. The Newport News Shipbuilding & Dry Dock Company limited the amount of pregnancy coverage for hospital stays for the dependants of male employees but provided full coverage for the pregnancy-related hospital stays of female employees. *Id.* at 671. The Court found that the plan violated Title VII because the protections afforded to married male employees were less complete than the protections afforded to female employees. *Id.* at 676.

<sup>115</sup> *Erickson*, 141 F. Supp. 2d at 1271.

<sup>116</sup> *Id.* (citing *UAW v Johnson Controls, Inc.*, 499 U.S. 187 (1991)). In *Johnson Controls*, female employees of Johnson Controls, which manufactured batteries, were not allowed to work in positions that could expose them to lead, a primary ingredient in batteries. 499 U.S. at 192. The company was concerned that the lead exposure could harm a fetus carried by a female employee. *See id.* at 190. The Court found that the policy violated Title VII because it treated the reproductive capacity of women differently than the reproductive capacity of men, since the exposure to lead could also create health risks for the children fathered by male employees. *Id.* at 198. Reiterating its holding in *Newport News*, the Court stated that the policy of Johnson Controls discriminated against employees who could become pregnant and, therefore, must be considered sex discrimination as well because it effectively dealt with all female employees as if they were pregnant. *Id.* at 199.

<sup>117</sup> *Erickson*, 141 F. Supp. 2d at 1271.

<sup>118</sup> *Id.* at 1272.

<sup>119</sup> *Mauldin v. Wal-Mart Stores, Inc.*, No. Civ.A.1:01-CV2755JEC, 2002 U.S. Dist. LEXIS 21024, at \*54-\*55 (N.D. Ga. Aug. 23, 2002).



tion plan covering drugs and devices to prevent illness or disease, but did not cover prescription contraceptives.<sup>120</sup>

First, Mauldin claimed disparate treatment based on sex, alleging that Wal-Mart sets apart female employees for unfavorable treatment in its provision of employee benefits.<sup>121</sup> Second, she claimed disparate impact, based on the claim that Wal-Mart's facially neutral policy of excluding coverage for prescription contraceptives has an adverse disparate impact on women, since only women use prescription contraceptives.<sup>122</sup>

Mauldin moved for class certification, asserting her claim against Wal-Mart on behalf of herself and all others similarly situated.<sup>123</sup> She defined the class as "all women nationwide who are covered, or have been covered, by [Wal-Mart's] health insurance plan . . . who use or wish to use prescription contraceptives not covered by the plan."<sup>124</sup> Mauldin argued that because Wal-Mart's health insurance plan excluded prescription contraceptives the plan constituted facial discrimination; therefore, any relief granted would benefit all members of the class.<sup>125</sup>

Wal-Mart argued that the definition was too vague and indefinite for certification as a class.<sup>126</sup> Wal-Mart asserted that the inclusion of women who "wish to use" prescription contraceptives flawed the class as it would require too much inquiry into the minds of every woman covered by the plan.<sup>127</sup>

The district court looked to the *Erickson* decision and certified the same class as the *Erickson* court had; that is, those women covered by the plan who were "using" prescription contraceptives.<sup>128</sup>

### 3. *Cooley v. DaimlerChrysler Corp.*

Another federal district court denied defendant Daimler-Chrysler's motion to dismiss a female employee's claim under Title VII and the PDA for failure to cover prescription

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<sup>120</sup> *Id.* at \*3. The plan did cover preventative drugs such as drugs to prevent high levels of cholesterol, allergic reactions, and blood clotting. *Id.*

<sup>121</sup> *Id.* at \*4.

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

<sup>123</sup> *Id.* at \*2.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*5.

<sup>126</sup> *Id.* at \*17.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*25.

contraceptives.<sup>129</sup> Cooley alleged disparate treatment on the basis of sex stemming from the exclusion of prescription contraceptives from DaimlerChrysler's Health Care Benefits Plan.<sup>130</sup> She also asserted a claim of disparate impact, alleging that DaimlerChrysler's policy of excluding prescription contraceptives from its Health Care Benefits Plan, though facially neutral, adversely affected women since only women use prescription contraceptives.<sup>131</sup> DaimlerChrysler moved to dismiss the claim by asserting that all employees were treated the same way and suffered the same harm.<sup>132</sup> Further, DaimlerChrysler argued that prescription contraceptives were not protected under the PDA.<sup>133</sup>

The district court first looked to the language of Title VII and noted that "compensation, terms, conditions, or privileges of employment" has been interpreted by the Supreme Court to include health insurance and fringe benefits.<sup>134</sup> Then the court discussed the PDA, determining that "discrimination on the basis of pregnancy is a per se violation of Title VII."<sup>135</sup> The court also noted that the PDA mandates equal treatment for all employment-related purposes and discussed Congress' intent to reverse the Supreme Court's decision in *Gilbert* with the enactment of the PDA.<sup>136</sup>

As for Cooley's disparate treatment claim, the court denied DaimlerChrysler's motion to dismiss, even though the Health Care Benefits Plan appeared facially neutral.<sup>137</sup> The court found that Title VII and the PDA recognize that women have needs different than men based upon their sex, for which provisions must be made to the same extent as other health care requirements.<sup>138</sup> Further, Cooley alleged that contraceptives are often prescribed to women for purposes other than contraception.<sup>139</sup>

Cooley also asserted that men were protected from all catego-

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<sup>129</sup> Cooley v. DaimlerChrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003).

<sup>130</sup> *Id.* at 981. The Health Care Benefits Plan was provided to all employees as a term and condition of employment. *Id.*

<sup>131</sup> *Id.* at 985-86.

<sup>132</sup> *Id.* at 982.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 982-83.

<sup>137</sup> *Id.* at 985.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

ries of risk under the insurance plan, while women were only given partial coverage.<sup>140</sup> Thus, Cooley argued, excluding prescription contraceptives from the plan resulted in less comprehensive benefits for women, given that such medication constitutes a portion of basic health care for women.<sup>141</sup> The court found these assertions sufficient to state a claim for disparate treatment.<sup>142</sup>

The court also denied DaimlerChrysler's motion to dismiss the disparate impact claim.<sup>143</sup> To establish a *prima facie* disparate impact case, Cooley needed to show that the employment practice in question fell more harshly, without justification, on one group, women, than another, men.<sup>144</sup> Because prescription contraceptives are only available for women, the court found that the exclusion of prescription contraceptives from DaimlerChrysler's health insurance plan would impact women alone.<sup>145</sup> Therefore, the exclusion would fall more harshly on one group than another.<sup>146</sup>

Thus, the district court held that Cooley sufficiently established a claim of disparate impact under Title VII.<sup>147</sup> Cooley's claims of disparate treatment and disparate impact survived DaimlerChrysler's motion to dismiss.<sup>148</sup>

#### 4. *Alexander v. American Airlines, Inc.*

In contrast to the previous three decisions, one federal district court has granted a defendant employer's motion to dismiss a claim under the PDA.<sup>149</sup> An American Airlines employee, Alexander, alleged that American Airlines violated the PDA by denying coverage for prescription contraceptives.<sup>150</sup> American Airlines moved to dismiss Alexander's claim, arguing that since

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 986.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* Later, DaimlerChrysler agreed to cover prescription contraceptives after negotiations with the United Auto Workers Union. Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S ENEWS, July 1, 2002, <http://www.womensenews.org/article.cfm/dyn/aid/957>.

<sup>149</sup> *Alexander v. Am. Airlines, Inc.*, No. 4:02-CV-0252-A, 2002 U.S. Dist. LEXIS 7089 (N.D. Tex. Apr. 23, 2002).

<sup>150</sup> *Id.* at \*3. Alexander also claimed that American Airlines discriminated

Alexander suffered no injury in fact, she lacked standing to raise any claim related to contraceptives.<sup>151</sup> The district court agreed with American Airlines and found that Alexander, having admitted she never sought to use prescription contraceptives under American Airlines' health insurance plan, suffered no injury in fact and lacked standing to pursue her claim under the PDA regarding contraceptives.<sup>152</sup>

Further, the district court stated in dicta that even if Alexander had standing to pursue her claim, American Airlines' motion to dismiss would still be granted.<sup>153</sup> The court stated that "[b]y no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition' require the provision of contraceptives as part of the treatment for infertility."<sup>154</sup> The court erroneously examined the claim regarding contraceptives as related to and part of Alexander's claims concerning infertility, and not as a separate issue concerning sex discrimination in the disparities between comprehensive health insurance coverage provided to men and women.<sup>155</sup>

Finally, the court stated that the plan American Airlines provided to its employees did not cover prescription contraceptives for anyone, male or female.<sup>156</sup> Incorrectly, the court did not even examine the issue of sex discrimination, but merely implied that the provision of health insurance to employees was facially neutral.<sup>157</sup>

In summary, these efforts by federal courts to interpret how Title VII and the PDA apply to coverage of prescription contraception are notable in that there is no mention of an exemption for religious employers. Seemingly, the mandate in Title VII and the PDA against sex-based discrimination in prescription coverage found by some federal courts applies broadly to all employers. However, if this can be seen as a victory for women, the victory may not be as widespread as women would wish. Title

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against women by not providing coverage for pap smear tests and infertility treatments and medications. *Id.* at \*2.

<sup>151</sup> *Id.* at \*7.

<sup>152</sup> *Id.* at \*8.

<sup>153</sup> *Id.* at \*11.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

VII covers employers defined as “person[s] engaged in an industry affecting commerce who ha[ve] fifteen or more employees for each working day.”<sup>158</sup> Employers with fifteen or more employees encompass less than one-fifth of all employers in the United States.<sup>159</sup> In addition, Title VII does not apply to private insurers,<sup>160</sup> which provide coverage for nearly sixteen million Americans.<sup>161</sup> Thus, more widespread mandates requiring prescription contraceptive coverage are needed to ensure equity in healthcare costs for women.

### III

#### CURRENT DEVELOPMENTS: *CATHOLIC CHARITIES OF SACRAMENTO, INC. v. SUPERIOR COURT*

##### A. *Facts*

As discussed above, in 1999, the California Legislature enacted the Women’s Contraceptive Equity Act (WCEA), which requires employers that offer health and disability insurance coverage for prescription drugs to also offer coverage for prescription contraceptives.<sup>162</sup> The WCEA contains a narrow religious exemption clause for employers opposed to contraceptives based upon their moral and religious tenets.<sup>163</sup> Because of the narrowness of the WCEA’s religious exemption clause, Catholic Charities of Sacramento (Catholic Charities) sought a declaratory judgment and preliminary injunction declaring the law unconstitutional and barring its enforcement.<sup>164</sup>

Catholic Charities is an independently incorporated nonprofit corporation operated for the public benefit, which “describes itself as ‘operated in connection with the Roman Catholic Bishop of Sacramento’ and as ‘an organ of the Roman Catholic Church.’”<sup>165</sup> However, Catholic Charities does not meet any of

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<sup>158</sup> 42 U.S.C. § 2000e(b) (2000).

<sup>159</sup> Roos, *supra* note 9, at 1310. Title VII does not reach the fourteen million Americans who work for small employers. *Id.*

<sup>160</sup> *Id.* (citing 42 U.S.C. § 2000e(b)).

<sup>161</sup> *Id.*

<sup>162</sup> CAL. HEALTH & SAFETY CODE § 1367.25(a) (West 2000); CAL. INS. CODE § 10123.196(a) (West 2005).

<sup>163</sup> CAL. HEALTH & SAFETY CODE § 1367.25(b); CAL. INS. CODE § 10123.196(d). For further analysis of the WCEA’s religious exemption, see *supra* Part II.A.1.

<sup>164</sup> Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76 (Cal. 2004).

<sup>165</sup> *Id.* at 75.

the four statutory requirements for the religious employer exemption under the WCEA.<sup>166</sup> For example, instead of the inculcation of religious values, Catholic Charities describes its purpose as offering social services to the community and the general public.<sup>167</sup> Catholic Charities also employs persons who do not share its belief in the Roman Catholic faith.<sup>168</sup> Further, Catholic Charities serves persons who do not particularly share its Roman Catholic religious beliefs, but those who represent any and all faiths.<sup>169</sup> Finally, Catholic Charities does not fall under § 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986.<sup>170</sup>

Prior to the enactment of the WCEA, Catholic Charities provided health insurance to its employees, including prescription drug coverage.<sup>171</sup> Prescription contraceptives, however, were not covered by Catholic Charities' health insurance plan because Catholic Charities follows the religious teachings of the Roman Catholic Church.<sup>172</sup> The Church considers contraception to be a sin.<sup>173</sup> As such, Catholic Charities felt that offering prescription contraceptive coverage in its health insurance plan would be facilitating sin.<sup>174</sup> However, Catholic Charities also felt obliged to follow the religious teachings of the Catholic Church concerning an employer's "moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family."<sup>175</sup> Catholic Charities found neither the option of providing insurance coverage for prescription contraceptives nor the option of denying coverage for any and all prescription drugs

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<sup>166</sup> *Id.* at 76. Catholic Charities acknowledged in its complaint that it did not meet the statutory definition. *Id.*

<sup>167</sup> *Id.* Catholic Charities sought "to reduce the causes and results of poverty, and to build healthy communities through social service programs such as counseling, mental health and immigration services, low-income housing, and supportive social services to the poor and vulnerable." *Id.*

<sup>168</sup> *Id.* As explanation, Catholic Charities stated that it employs persons from a diverse group with many different religious beliefs, but who all share in the commitment Catholic Charities has made to support a just and compassionate community that encourages and seeks to develop the dignity of individuals and families. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* Catholic Charities is an exempt organization under 26 U.S.C. § 501(c)(3). *Id.*

<sup>171</sup> *Id.* at 75.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 76.

under its health insurance plan to be consistent with its beliefs.<sup>176</sup>

Bringing an action for declaratory judgment and injunctive relief, Catholic Charities was denied relief by the Superior Court and Court of Appeals of California.<sup>177</sup> Catholic Charities appealed to the California Supreme Court, challenging the WCEA under the establishment and free exercise clauses of the United States and California Constitutions.<sup>178</sup> Catholic Charities argued that the WCEA impermissibly interfered with the autonomy of religious organizations, impermissibly burdened Catholic Charities' right of free exercise, and failed even the rational basis test.<sup>179</sup>

## B. California Supreme Court Decision

### 1. Establishment Clause Analysis

In *Catholic Charities*, the California Supreme Court began its analysis with Catholic Charities' claims that the WCEA violated the Establishment Clause. First, the court examined Catholic Charities' contention that "the WCEA impermissibly interfere[ed] with matters of religious doctrine and internal church governance."<sup>180</sup> Catholic Charities claimed that the WCEA contradicted the church property cases by rejecting the decision of the Catholic Church that contraception is sinful.<sup>181</sup> However, the court held that the case did not involve issues of internal church governance, but merely "the relationship between a non-profit public benefit corporation and its employees, most of whom do not belong to the Catholic Church."<sup>182</sup> Therefore, the court reasoned that even though the WCEA clashed with the religious beliefs of Catholic Charities, the California Legislature had not decided a religious question.<sup>183</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* To support this claim, Catholic Charities invoked the rule of the "church property cases," which states that the state must accept the decision of appropriate church authorities on such matters as religious doctrine and internal church governance. *Id.* (citing, e.g., *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960)).

<sup>181</sup> *Id.* at 77.

<sup>182</sup> *Id.* Seventy-four percent of Catholic Charities' employees are not Catholic. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 183 (Cal. Ct. App. 2001), *aff'd*, 85 P.3d 67 (Cal. 2004).

<sup>183</sup> *Catholic Charities*, 85 P.3d at 77. The court stated as explanation that "Congress has created, and the high court has resolved, similar conflicts between employ-

Next, the court evaluated Catholic Charities' argument that, through the WCEA, the legislature intervened in a religious conflict concerning the Catholic Church by taking the side of those who oppose the Church's teachings regarding contraception.<sup>184</sup> To support this argument, Catholic Charities pointed to a statement from a supporter of the WCEA on the floor of the state senate, in which the senator cited a poll showing that not all Catholic women agree with the Church's teachings regarding contraception.<sup>185</sup> The senator agreed with the poll's findings that "someone who practices artificial birth control can still be a good Catholic," and stated that it was "time to do the right thing."<sup>186</sup>

In examining this argument, the California Supreme Court agreed that the state cannot lend its power to one side over another in controversies concerning religious authority or dogma, but then found that one senator's remarks were not necessarily the motivation for the entire legislature.<sup>187</sup> The court found that other legislators might have voted for the WCEA to eliminate discrimination in healthcare costs without regard to the religious controversy over contraception.<sup>188</sup>

The court then addressed Catholic Charities' argument that the four statutory criteria for the religious exemption allowed the government to "premise[ ] a religious institution's eligibility for an exemption from government regulation upon whether the activities of the institution are deemed by the government to be 'religious' or 'secular,'" in violation of the First Amendment.<sup>189</sup> The court stated that this argument lacked merit because the United States Supreme Court has long acknowledged it is permissible for legislation to alleviate significant governmentally created burdens on religious exercise.<sup>190</sup> According to the court, this permissible legislative purpose would not be possible if governments were forbidden from distinguishing between the religious organizations and actions that are entitled to the

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ment law and religious beliefs without deciding religious questions and without reference to the church property cases." *Id.* (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-06 (1985); *United States v. Lee*, 455 U.S. 252, 256-61 (1982)).

<sup>184</sup> *Catholic Charities*, 85 P.3d at 78.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 79.

<sup>190</sup> *Id.*



accommodation and the secular ones that are not.<sup>191</sup>

Next, Catholic Charities asserted that the WCEA's religious exemption violated the Establishment Clause by requiring a complicated inquiry into the religious purpose of the employer and the religious beliefs of the employer's employees and clients.<sup>192</sup> This argument stemmed from the Establishment Clause test articulated by the United States Supreme Court in *Lemon v. Kurtzman*.<sup>193</sup> The California Supreme Court noted that recent opinions have criticized laws that provoke governmental entanglement and inquiry into the religious beliefs of a person or institution.<sup>194</sup> However, the court held that in this case no entangling inquiry into the religious beliefs of Catholic Charities, its employees, or its clients was necessary because Catholic Charities conceded that it did not meet any of the statutory requirements and, therefore, no inquiry had occurred or was likely to occur.<sup>195</sup> The court conceded that another case with a different employer may require an entangling inquiry, but held that, as applied to Catholic Charities, the Establishment Clause was not violated.<sup>196</sup>

## 2. *Free Exercise Analysis*

Next, the California Supreme Court analyzed Catholic Charities' claims under the free exercise clauses of the United States and California Constitutions. Catholic Charities argued that the WCEA requirement that employers offer coverage for prescription contraceptives if other prescription drugs are covered forced Catholic Charities to violate its religious beliefs in violation of

<sup>191</sup> *Id.* Then the court noted laws containing such distinctions that have been found constitutional. *Id.* (citing, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding the statutory exemption of "religious" employers from liability for religious discrimination under 42 U.S.C. § 2000e-1(a)); *E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1140 (Cal. 2000) (upholding certain state laws exempting "religiously affiliated" organizations from landmark preservation laws).

<sup>192</sup> *Catholic Charities*, 85 P.3d at 80.

<sup>193</sup> *Id.* at 80 n.6 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). There are three prongs to the *Lemon* test: (1) whether the statute has a secular legislative purpose; (2) whether the principal or primary effect of the statute is one that neither advances nor inhibits religion; and (3) whether the statute fosters an "excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

<sup>194</sup> *Catholic Charities*, 85 P.3d at 80 (citing *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342-48 (D.C. Cir. 2002)).

<sup>195</sup> *Catholic Charities*, 85 P.3d at 80-81.

<sup>196</sup> *Id.*

the Free Exercise Clause.<sup>197</sup> To analyze this argument, the court looked to the Supreme Court's decision in *Employment Division v. Smith*.<sup>198</sup> The *Catholic Charities* court stated that the *Smith* rule, at first glance, appeared to dismiss Catholic Charities' free exercise claim.<sup>199</sup> Since the WCEA applied neutrally and generally to all employers, the court reasoned that the law did not violate the *Smith* rule.<sup>200</sup> The court then noted that Catholic Charities argued four grounds for applying strict scrutiny to the WCEA under exceptions to the general *Smith* rule.<sup>201</sup>

First, Catholic Charities argued that the "WCEA should not be considered neutral or generally applicable and should, thus, be subject to strict scrutiny under an exception to the rule of *Smith*."<sup>202</sup> To support this argument, Catholic Charities claimed that the WCEA showed lack of neutrality on its face.<sup>203</sup> Catholic Charities argued that the language of the WCEA included religious terms that lacked any secular meaning or purpose, illustrating a facial lack of neutrality.<sup>204</sup> The court rejected this argument, holding that the law used religious terms and terminology "in order to identify and *exempt* those organizations from an otherwise generally applicable duty."<sup>205</sup>

Catholic Charities' second argument for strict scrutiny of the

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<sup>197</sup> *Id.* at 81.

<sup>198</sup> 494 U.S. 872 (1990). The rule of *Smith* requires compliance, regardless of religious beliefs, with otherwise valid laws that regulate matters that the government is free to regulate. *Id.* at 877-82. The Supreme Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The Court reasoned that permitting religious beliefs to excuse compliance with the law would allow religious beliefs to become superior to all laws and citizens with religious beliefs to become laws unto themselves. *Id.*

<sup>199</sup> *Catholic Charities*, 85 P.3d at 82.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 83. Catholic Charities referred specifically to the terms "inculcation of religious values" and "religious tenets." *Id.*

<sup>205</sup> *Id.* The court rejected Catholic Charities' reliance on *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). In *Lukumi*, the Supreme Court held that a law prohibiting the killing of animals for sacrificial purposes but allowing it for pleasure purposes such as hunting is unconstitutional. *Id.* at 542. The *Catholic Charities* court reasoned that *Lukumi* was inapposite because *Lukumi* struck down a law that "referred to religious practices ('sacrifice' and 'ritual') in order to *prohibit* them." *Catholic Charities*, 85 P.3d at 83.

WCEA was that the legislative history and practical effect of the WCEA demonstrated the legislature's attempt to "gerrymander" the law to affect only Catholic employers.<sup>206</sup> Catholic Charities argued that the WCEA discriminated against the Catholic Church and any religious organization engaged in charitable work, as opposed to purely evangelical work, in an effort by the legislature to deny the religious exemption to Catholic organizations.<sup>207</sup>

The California Supreme Court found no merit in this argument, since it was at the request of Catholic organizations that the religious employer exemption was included in the WCEA.<sup>208</sup> The court stated that the mere fact that the religious exemption was not broad enough to cover all Catholic-affiliated organizations did not imply discrimination against the Catholic Church.<sup>209</sup> In fact, the court noted that the exemption could be viewed as an acceptable benefit to the Catholic Church since it is the only religious organization identified as being opposed to contraception.<sup>210</sup>

Third, Catholic Charities argued that the WCEA deserved strict scrutiny because it violated "hybrid rights."<sup>211</sup> "Hybrid rights" is a theory derived from the United States Supreme Court's *Smith* decision.<sup>212</sup> In *Smith*, the Court noted that the only cases that had successfully established a First Amendment violation when a neutral and generally applicable law applied to religiously motivated actions involved claims under the Free Exercise Clause in tandem with other constitutional protections.<sup>213</sup> Thus, Catholic Charities argued that the WCEA violated the First Amendment's Free Exercise, Free Speech, and Establish-

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<sup>206</sup> *Catholic Charities*, 85 P.3d at 82.

<sup>207</sup> *Id.* at 84.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 84 n.9. The court noted that this type of benefit does not violate the Establishment Clause because it is intended to alleviate a governmentally created burden, as discussed above. *Id.*; see also discussion *supra* Part II.B.2.

<sup>211</sup> *Id.* at 87.

<sup>212</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, employees were denied unemployment benefits after being terminated from their employment for the use of peyote during a religious ceremony. *Id.* at 882-83. The Supreme Court held that the neutral and generally applicable law against the use of controlled substances did not violate the employees' religious rights of free exercise. *Id.* at 890.

<sup>213</sup> *Id.* at 881. The Court called this a "hybrid situation." *Id.* at 882. The Court has not elaborated on the hybrid rights theory or invoked it as a justification to apply strict scrutiny to a free exercise claim. See *Catholic Charities*, 85 P.3d at 88.

ment Clauses.<sup>214</sup>

After criticizing the hybrid rights theory, the California Supreme Court analyzed the hybrid rights claim by assuming, for the sake of argument, that the theory was valid.<sup>215</sup> In doing so, the court held that Catholic Charities did not allege a meritorious constitutional claim to establish a hybrid rights argument.<sup>216</sup> Catholic Charities argued that the WCEA's mandate requiring prescription contraceptive coverage violated the Free Speech Clause by forcing Catholic Charities to engage in symbolic speech it found objectionable through the implied endorsement of contraception.<sup>217</sup> Catholic Charities asserted that providing insurance coverage for prescription contraceptives would be viewed as an endorsement of contraception.<sup>218</sup> The court held that in complying with the WCEA, Catholic Charities would not be forced to engage in speech because Catholic Charities would be free to denounce the use of contraception and encourage its employees to denounce contraceptives as well.<sup>219</sup> The court stated that the rule proposed by Catholic Charities' argument would allow each individual to choose which laws to obey and which not to obey simply by declaring his agreement or disagreement.<sup>220</sup>

Finally, Catholic Charities' fourth argument for strict scrutiny under an exception to the *Smith* rule asserted that strict scrutiny was required under the California Constitution.<sup>221</sup> Catholic Charities argued that California's free exercise clause prohibited the state from burdening the practice of religion, incidentally or not, if the law did not serve a compelling state interest and was not narrowly tailored to meet that interest.<sup>222</sup> The court decided to apply strict scrutiny to review the claim under California's free

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<sup>214</sup> *Catholic Charities*, 85 P.3d at 87-88.

<sup>215</sup> *Id.* at 88.

<sup>216</sup> *Id.* The court declined to discuss the hybrid rights claim regarding the Establishment Clause because that claim had already been determined to lack merit. *Id.* at 89 n.15.

<sup>217</sup> *Id.* at 88.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 89.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* The California free exercise clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." CAL. CONST. art. I, § 4.

<sup>222</sup> *Catholic Charities*, 85 P.3d at 89.

exercise clause.<sup>223</sup> Under the strict scrutiny standard applied, “a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored.”<sup>224</sup>

Applying strict scrutiny, the court first considered whether Catholic Charities’ beliefs were, in fact, burdened by the WCEA.<sup>225</sup> The court noted that requiring Catholic Charities to offer coverage for prescription contraceptives would be religiously unacceptable to the organization, but stated that Catholic Charities could avoid the burden by simply not offering coverage for any prescription drugs.<sup>226</sup> Catholic Charities argued that this solution would be unacceptable because of its religious beliefs, which require it to offer benefits to its employees “as a matter of justice and charity.”<sup>227</sup> The court then stated that a determination as to the validity of “justice and charity” as firmly held religious beliefs was required.<sup>228</sup> However, in order to avoid putting itself in the position of determining the plausibility of a religious claim, the court decided to assume that the WCEA substantially burdened Catholic Charities’ religious beliefs or practices.<sup>229</sup>

Nevertheless, the court found that the WCEA served a compelling state interest and was narrowly tailored to meet that interest.<sup>230</sup> The court held that the WCEA served the compelling state interest of eliminating discrimination based on sex.<sup>231</sup> After reviewing statistical evidence of discrimination in healthcare costs between the sexes, Title VII and the PDA, and the *Erickson* decision, the court reasoned that eliminating gender discrimination was compelling.<sup>232</sup> The court also noted that any exemption from the WCEA reduced the number of women protected from

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<sup>223</sup> *Id.* at 89-91 (discussing the various tests that have been used and determining that strict scrutiny should apply here because Catholic Charities’ challenge would fail under strict scrutiny or a lower standard and, therefore, the decision of which scrutiny to apply should await a case where the decision will effect the outcome).

<sup>224</sup> *Id.* at 91.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 92.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* The court noted that a free exercise claim “must be ‘rooted in religious belief’ and not on ‘philosophical’ choices.” *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 92-93.

gender discrimination.<sup>233</sup> Thus, the means were narrowly tailored to the state's compelling interest because any broader exemption would increase the number of women subject to gender discrimination.<sup>234</sup>

### 3. *Rational Basis Analysis*

Catholic Charities' final challenge argued that the WCEA failed the rational basis test.<sup>235</sup> In particular, Catholic Charities argued that the definition of "religious employer" in the WCEA's religious exemption was arbitrary.<sup>236</sup> Specifically, Catholic Charities asserted that, in effect, the definition chosen by the legislature implied that any religious organization that employed persons of other faiths or served persons of other faiths, "in effect any 'missionary' church or church with social outreach," would not qualify for exemption because it would not be sufficiently religious.<sup>237</sup> Catholic Charities argued that these distinctions were completely unrelated to any legitimate state interest.<sup>238</sup> However, the court found that the definition for religious employers in the WCEA "rationally serve[d] the legitimate interest of complying with the rule barring interference with the relationship between a church and its ministers."<sup>239</sup>

Interestingly, though the court held that the WCEA passed rational basis review, the court did note that the third criterion to be a "religious employer" under the WCEA was problematic.<sup>240</sup> The court found it difficult to imagine a legitimate purpose for the requirement that religious employers "serve[ ] primarily persons who share the religious tenets of the entity."<sup>241</sup> In fact, the court stated that the California Legislature may want to address the issue, but then reiterated that Catholic Charities could not

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<sup>233</sup> *Id.* at 93.

<sup>234</sup> *Id.* at 94.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* The court noted that the "ministerial exception" has survived the *Smith* decision in federal courts. *Id.* (citing, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000)).

<sup>240</sup> *Id.* at 95.

<sup>241</sup> *Id.* (quoting CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(C) (West 2000)). The court hypothesized that a soup kitchen, which inculcated religious values to those who ate there and operated entirely by ministers of a church, would lose its claim to a religious exemption if it did not discriminate in determining to whom food was served. *Id.*

challenge the WCEA, in any case, because Catholic Charities conceded that it did not meet any of the criteria.<sup>242</sup>

#### IV

#### IMPLICATIONS

##### A. *Possible Consequences of Catholic Charities*

As *Catholic Charities* illustrates, narrow exemptions for religious employers in mandated prescription contraceptive coverage laws do not cover many religious organizations other than churches. For example, regarding the Catholic religion, churches, parish rectories, and seminaries would be exempted from these types of mandates, but Catholic hospitals, Catholic institutions of higher learning, and Catholic service organizations such as Catholic Charities would be required to provide prescription contraceptive coverage.<sup>243</sup> Since providing prescription contraceptive coverage is contrary to Catholic religious teachings, these nonexempt organizations may look to other solutions if their objections to the prescription coverage mandates do not succeed in court.

##### 1. *No Prescription Drug Coverage Offered*

One alternative for religious organizations may be to refuse to offer coverage for all prescription drugs since the mandates only apply to employers who offer prescription drug coverage.<sup>244</sup> Legislatures and women's activists want to eliminate the discrimination in healthcare costs between men and women, but if religious employers refuse to offer prescription coverage to everyone, no one is better off, including women.<sup>245</sup> Though men and women would then be treated equally, the equality may not feel like a victory for women who would then be worse off financially.<sup>246</sup> This would be especially problematic for women of lesser financial means who may choose to forgo contraception entirely, leading to unintended pregnancies and more medical expenses.<sup>247</sup>

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<sup>242</sup> *Id.*

<sup>243</sup> See Stabile, *supra* note 56, at 171.

<sup>244</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 1367.25(a)(1); CAL. INS. CODE § 10123.196(a)(1) (West 2005); *Catholic Charities*, 85 P.3d at 106 (Brown, J., dissenting); Stabile, *supra* note 56, at 179-80.

<sup>245</sup> See, e.g., Stabile, *supra* note 56, at 180.

<sup>246</sup> See, e.g., *id.*

<sup>247</sup> See, e.g., Center for Reproductive Rights, *supra* note 12.

Other than potentially placing women in the position of paying even more for healthcare, there is another major consequence if religious employers do not offer prescription drug benefits to employees. If religious employers like Catholic Charities are forced to forgo offering insurance coverage for prescription drugs, they may have problems hiring employees.<sup>248</sup> Benefits packages, including health insurance plans, are an incentive to potential employees, especially employees of organizations who cannot pay generous salaries, like nonprofit religious organizations.<sup>249</sup> If religious employers do not offer plans that are competitive with other employers, job seekers may be less attracted to religious employers.<sup>250</sup> Thus, religious employers who often work to serve the underprivileged and poor may have problems hiring workers and remaining staffed.<sup>251</sup> If that were to happen, religious employers may have more difficulty providing quality care to less fortunate members of society.<sup>252</sup>

## 2. *Reductions in Scale for Religious Employers and Their Services*

Another option for religious employers who do not qualify for the religious exemptions in mandated prescription contraception coverage laws is to either cease operations entirely or severely reduce the scale of the organization.<sup>253</sup> If religious organizations—Catholic hospitals in particular—were forced to close because of the controversy involved in providing prescription contraceptive coverage, the spiritual and moral dimensions of these organizations' business would be lost.<sup>254</sup> The closure of Catholic hospitals may reduce the healthcare industry to business-model services with no regard for the spiritual or holistic healing that Catholic hospitals often provide.<sup>255</sup> Profit motive and not the spiritual and moral dimensions of healthcare may become the motivation behind the healthcare industry.<sup>256</sup>

Examples of reductions in the scale of services may include

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<sup>248</sup> See Stabile, *supra* note 56, at 180-81.

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See *id.* at 181.

<sup>254</sup> See Leonard J. Nelson, III, *God and Woman in the Catholic Hospital*, 31 J. LEGIS. 69, 126 (2004).

<sup>255</sup> See *id.*

<sup>256</sup> See *id.*



employing and serving only persons who share the religious organization's religious beliefs in order to qualify under the narrow definitional requirements of the religious employer exemptions of the WCEA and similar statutes.<sup>257</sup> However, religious organizations, especially Catholic hospitals that seek to focus on more religious aspects of their businesses, may be denied public funding because the sectarian nature of the organization would become too small or disappear.<sup>258</sup>

### 3. *Greater Incursions into Religious Freedoms in the Future*

A slippery slope argument can also be made regarding the consequences of *Catholic Charities* and narrow religious employer exemptions to prescription contraceptive coverage mandates. Catholic organizations in particular are concerned that mandated prescription contraceptive coverage is only the beginning of legislation requiring Catholic hospitals to provide services against their religious tenets, such as abortions and sterilizations.<sup>259</sup> Catholic healthcare providers see a national push toward requiring Catholic hospitals to provide all reproductive services, including abortions.<sup>260</sup> Since emergency contraception, seen by Catholic healthcare providers as an abortifacient, has already been made a required service for some hospitals, Catholic organizations fear that the line between contraception and abortion has become illusory.<sup>261</sup> The argument that Catholic hospitals should be required to provide the full range of reproductive services would be strengthened if legislatures could already require Catholic employers to provide insurance coverage for prescription contraceptives and Catholic hospitals to administer emergency contraception to patients.<sup>262</sup>

#### *B. A Better Solution: Broad Religious Exemptions with Employee Purchase Options*

Statutes mandating prescription contraceptive coverage should have a religious employer exemption that accommodates the ma-

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<sup>257</sup> Stabile, *supra* note 56, at 181.

<sup>258</sup> See Nelson, *supra* note 254 at 126.

<sup>259</sup> See generally *id.* (discussing how some laws have already been passed requiring Catholic hospitals to provide prescription contraceptive coverage to employees and emergency contraception to patients).

<sup>260</sup> See *id.* at 80-81.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

jority of religious employers. This type of exemption would require a much less significant intrusion into religious freedom. Broad exemptions would require much less entanglement and may be more amenable to Establishment Clause concerns.<sup>263</sup> Broad exemptions would not require excessive inquiry into the secular versus religious components of an organization.<sup>264</sup> Further, broad exemptions do not trigger free exercise concerns because religious organizations would be free to declare themselves opposed to prescription contraceptives and take the exemption.<sup>265</sup> Religious organizations would not be forced to act in opposition to their own beliefs under such a regime.

However, in addition to the need for religious exemptions to prescription contraceptive mandates, there is also a need to further the legitimate government interest in eliminating gender discrimination in healthcare costs and services. The purpose of narrow exemptions is to ensure that as many women as possible are covered under mandated prescription coverage laws.<sup>266</sup> Therefore, statutes containing exemptions should also contain an option for employees to obtain prescription contraceptive coverage directly from the insurer at a cost that is no more than the employee's pro rata share of what the employer (or group purchaser) would have paid if the employer had not taken the exemption.<sup>267</sup>

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<sup>263</sup> See *California Supreme Court Upholds Compulsory Insurance Coverage of Contraceptives over Establishment and Free Exercise Objections*—Catholic Charities of Sacramento, Inc. v. Superior Court, 117 HARV. L. REV. 2761, 2768 (2004).

<sup>264</sup> The dissent in the *Catholic Charities* case questioned the constitutional implications of a law that required a religious organization to provide a benefit to employees despite the organization's theological objections. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 100 (Cal. 2004) (Brown, J., dissenting). Justice Brown's dissent found problems with the WCEA's exemption because of issues regarding the government's inquiry into the religious and secular portions of an organization. *Id.* Justice Brown argued that the government may not entangle itself in this inquiry in order to impose a burden on the secular portion of the organization. *Id.*

<sup>265</sup> See generally Inimai M. Chettiar, Comment, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867, 1879 (2002).

<sup>266</sup> See *Catholic Charities*, 85 P.3d at 106 (Brown, J., dissenting). The dissent stated that there is no support for the claim that a broad exemption could potentially affect several hundred thousand employees of employers who could possibly fall under a broader exemption. *Id.* The dissent stated that the WCEA was meant to eliminate gender discrimination in health care costs, not to provide access to prescription contraceptives. *Id.*

<sup>267</sup> See, e.g., HAW. REV. STAT. § 431:10A-116.7(e) (Supp. 2004); MO. ANN. STAT. § 376.1199(5) (West 2002); N.Y. INS. LAW § 4303(cc)(2)(A) (McKinney Supp. 2006).

With this solution, religious employers would not be required to violate their religious beliefs by providing and paying for what they view as a sin. The government would not impose on the establishment and free exercise rights of religious organizations. And women would be able to obtain prescription contraceptive coverage if they wished. Therefore, gender discrimination in healthcare costs would be eliminated or reduced, and religious organizations would still maintain their religious identity and preserve their religious values.

#### CONCLUSION

Coverage for prescription contraceptives is obviously an important issue. The statistics are difficult to dispute. Not only do women pay more for healthcare services than men, but women are often forced to face the consequences when prescription contraceptives are not covered. These consequences include, among other things, the costs of unwanted pregnancies. However, religious employers have a legitimate argument that requiring them to cover prescription contraceptives interferes with their religious freedoms and rights. Therefore, a program should be enacted that requires coverage for prescription contraceptives, that exempts a broad range of religious employers, and that allows employees to obtain their desired contraceptive coverage directly through the insurer or a third party at no extra cost.

The Oregon Legislature and Congress, which have considered mandated prescription coverage laws,<sup>268</sup> should reevaluate the legislation and add a broad exemption for religious employers with an option for employees to purchase the coverage directly from the insurer or from a third party.

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<sup>268</sup> See S.B. 756, 73d Legis. Assemb., Reg. Sess. (Or. 2005); H.B. 2509, 73d Legis. Assemb., Reg. Sess. (Or. 2005); see also discussion *supra* Part II.B.1.

