No. ___

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State may compel an organ of the Catholic Church, contrary to its religious teachings, to include contraceptives in the prescription drug plan it provides to its employees, and thereby to finance conduct that the Church teaches is sinful.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the Supreme Court of California were:

> Catholic Charities of Sacramento, Inc., plaintiff;
>
> Superior Court of Sacramento County, defendant;
>
> State of California, California Department of Managed Health Care, and California Department of Insurance, real parties in interest.

Pursuant to Supreme Court Rule 29.6, petitioner states that Catholic Charities of Sacramento, Inc., is a single member corporation in which the sole member is the Roman Catholic Bishop of Sacramento, a corporation sole. Catholic Charities of Sacramento, Inc., is accordingly neither publicly held nor affiliated with any entity that is so held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Catholic Charities of Sacramento, Inc., respectfully petitions for a writ of certiorari to review the decision and judgment entered on March 1, 2004, by the Supreme Court of California.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of California is reported at 85 P.3d 67 (Cal. 2004) and is reproduced in the Appendix ("App.") at 1a. The Supreme Court of California's grant of petition for review is reported at 31 P.3d 1271 (Cal. 2001) and is reproduced in the App. at 84a. The Court of Appeal of California's order modifying opinion and denying rehearing is unreported, is available at 2001 Cal. App. LEXIS 584, and is reproduced in the App. at 85a. The original opinion of the

Court of Appeal of California is reported at 109 Cal. Rptr. 2d 176 (Cal. App. 2001) and is reproduced in the App. at 87a. The opinions of the Superior Court of Sacramento County on the original motion and on reconsideration are unreported and are reproduced in the App. at 134a and 136a.

JURISDICTION

The judgment of the Supreme Court of California was entered on March 1, 2004. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant portions of the California Women's Contraception Equity Act ("WCEA"), Cal. Health & Safety Code § 1367.25 (2004) and Cal. Ins. Code § 10123.196 (2004), are reproduced in the App. at 139a.

STATEMENT OF THE CASE

The Supreme Court of California has upheld a state law that requires Catholic Charities of Sacramento, Inc. ("Catholic Charities"), an organ of the Catholic Church, to include contraceptives in the prescription drug plan that it provides to its employees—or to deprive its employees altogether of prescription drug coverage. This is, to our knowledge, the first case in which a court has upheld a law coercing a religious institution to spend its money to

finance non-governmental conduct that conflicts with its religious beliefs.[1]

The State of California does not justify this unprecedented intrusion upon the religious freedom of Catholic Charities by reference to any interest in making prescription drug coverage or contraceptive coverage generally available. Instead, it allows employers to deny prescription drug coverage altogether—and allows employers meeting the State's narrow definition of a "religious employer" to exclude contraceptive coverage from the prescription drug plans they choose to offer. The result, as explained below, is a statute that coerces some religious organizations, such as Catholic Charities, to sacrifice their religious principles based on nothing more than the State's restrictive view of what it means to be "religious."

A. Catholic Charities

Catholic Charities is a California public benefit non-profit corporation whose sole member is the Roman Catholic Bishop of Sacramento, itself a corporation sole. "[A]lthough separately incorporated and a distinct civil entity," Catholic Charities "is ecclesiastically part of the Catholic Church." 13 California Court of Appeal Documentary Appendix ("Cal. App.") A003743.

The purpose of Catholic Charities is to carry out the social justice ministry of the Catholic Church to care for the sick, the poor, the needy and the oppressed. 2 Cal. App. A000341. Catholic Charities' religious ministry includes a variety of social services that are offered to anyone in need, regardless of race, creed, sex, age or national origin.

Catholic Charities provides health insurance and prescription drug coverage to its approximately 180 employees

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[1] After this case was decided by the California Court of Appeal, a New York Supreme Court upheld a virtually identical statute. *Catholic Charities v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003). That case has been appealed.

through a group health plan underwritten by Blue Shield of California and Kaiser Permanente and held in the name of the Roman Catholic Bishop of Sacramento. 2 Cal. App. A000392-553. The plan has historically excluded coverage for prescription contraceptives.

B. Catholic Religious Beliefs

This case implicates three important religious and moral principles of the Catholic Church.

First, the Catholic Church teaches that artificial contraception is "intrinsically evil." 2 Cal. App. A000317. This is an historic and theologically grounded teaching of the Roman Catholic faith.[2]

Second, as the Bishop of Sacramento explained below, "Catholic Charities . . . , as part of the Catholic Church, cannot be complicit, directly or indirectly, in facilitating conduct or activities that violate Catholic religious teaching or belief." 13 Cal. App. A003744. Thus, Catholic Charities is prohibited from providing material financial support for the purchase and use of contraceptives. *Id*.

Third, "[t]he clear teaching and firm doctrine of the Roman Catholic Church is that all employers . . . are to provide just wages and benefits to employees . . . as an obligation arising from the Gospel message of justice and charity." 2 Cal. App. A000335. Consistent with that teaching, Catholic institutions such as Catholic Charities "have a moral and religious obligation to provide adequate health insurance benefits to their employees . . . includ[ing] providing employees access to prescription medications." 2 Cal. App. A000313-314. Any insurance plan providing such benefits, however, must itself conform to Catholic religious teaching. It cannot, therefore, offer coverage for artificial contraception or other

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[2] *See* John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1965).

procedures, such as abortion, voluntary sterilization and *in vitro* fertilization. *Id*.

C. California Women's Contraception Equity Act

California's legislative effort to mandate prescription contraceptive coverage dates back to the 1993-1994 legislative session. The original statute enacted by the legislature did not include any exemption for religious institutions, which prompted then-Governor Pete Wilson to veto the bill. 7 Cal. App. A002006-08; 8 Cal. App. A002326-27. The legislature then enacted a bill with a broad exemption for religious employers, along with a public funding mechanism for uninsured women with incomes below a certain level. 9 Cal. App. A002390-96. Governor Wilson vetoed that bill, because he believed that its threshold income for public funding eligibility was too high. *Id.* A002640-42.

After Gray Davis became governor, bills were again introduced in both the Assembly and the Senate that omitted any exemption for religious employers. The sponsors asserted that the bills were intended to further gender equity and to facilitate the broadest possible access to prescription contraceptives for women. As before, the sponsors made clear that they "strongly object to a religious exemption." 3 Cal. App. A000781; 4 Cal. App. A000905. Granting an exemption for religious employers, they argued, would "defeat[] the original purpose of the bill." 11 Cal. App. A003050-51.

Eventually the legislature recognized the political and constitutional need for some kind of religious exemption. When the sponsors turned their attention to drafting an exemption, however, they fashioned it to cover only the narrowest range of institutions and to exclude numerous institutions that could legitimately claim a religious objection. As enacted, the exemption covers a "religious employer,"

which is defined as "an entity for which each of the following is true":

> (A) The inculcation of religious values is the purpose of the entity.
>
> (B) The entity primarily employs persons who share the religious tenets of the entity.
>
> (C) The entity serves primarily persons who share the religious tenets of the entity.
>
> (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1). The cited provisions of the Internal Revenue Code—which excuse certain entities not only from federal taxation, but also from federal tax filing—refer to (i) "churches, their integrated auxiliaries, and conventions or associations of churches;" and (iii) "the exclusively religious activities of any religious order."

Every one of these four prongs was "need[ed]," the authors explained, to ensure that the contraceptive mandate extended to Catholic religious institutions—including Catholic hospitals, colleges and universities, and "other possible situations." 11 Cal. App. A003063. It was "time," the chief sponsor of the Senate bill argued, to make those institutions responsive to the practices of Church members:

> [L]et me point out that 59 percent of all Catholic women of childbearing age practice contraception. 88 percent of Catholics believe in a *New York Times* poll that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.

Id. A003080.

The California Legislature passed both the Assembly and Senate Bills on September 9, 1999. The two statutes, together comprising the WCEA, became effective January 1, 2000. Under their provisions, health insurance plans that cover prescription drugs must cover prescription contraceptives. A "religious employer" that believes it meets the four criteria above may request a policy that excludes coverage for "contraceptive methods that are contrary to the religious employer's religious tenets." Cal. Health and Safety Code § 1367.25(b); Cal. Ins. Code § 10123.196(d). Catholic Charities does not claim to meet any (let alone all) of those criteria.

D. Decisions Below

Catholic Charities filed suit in the Superior Court for Sacramento County on July 20, 2000, seeking declaratory and injunctive relief against application of the contraceptive mandate. Catholic Charities sought this relief under the Free Exercise and Establishment Clauses of the First Amendment, as well as Article I, § 4 of the California Constitution. On September 28, 2000, the Superior Court denied a motion for a preliminary injunction, ruling that Catholic Charities had shown no reasonable probability of success. On October 31, 2000, on reconsideration, the court reaffirmed that ruling. App. 134a.

Catholic Charities sought review by a writ of mandate to the California Court of Appeal, again asserting its First Amendment claims. The Court of Appeal issued an alternative writ and assumed jurisdiction. The Court denied the petition for a writ of mandate on July 2, 2001, holding that Catholic Charities was unlikely to prevail on the merits of its constitutional challenges. App. 87a. It denied a petition for rehearing on July 26, 2001. App. 85a.

The Supreme Court of California granted Catholic Charities' timely petition for review, which again asserted its

constitutional claims, on September 26, 2001. App. 84a. On March 1, 2004, the court affirmed the judgment in an opinion by Justice Werdegar, rejecting all of Catholic Charities' claims on the merits. App. 1a-49a. The Court rejected Catholic Charities' free exercise arguments based on its reading of this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In its view, the WCEA was a neutral law of general applicability that was justified, in any event, by the State's compelling interest in eliminating gender discrimination. App. 42a-46a.

Justice Kennard concurred but noted that she was "not persuaded" that the limitation of the exemption to entities whose purpose is the "inculcation of religious values" could be reconciled with the Establishment Clause. App. 51a. She concluded, however, that the requirement that the entity be exempt not only from federal taxes, but also from federal tax filing, "is constitutional." *Id*.

Justice Brown dissented. After distinguishing *Smith* on the ground that it involved the claim of an *individual*, not a *church*, App. 59a-61a, Justice Brown concluded that the act was not religiously neutral, App. 66a-72a, and sought impermissibly to "parse a bona fide religious organization into 'secular' and 'religious' components solely to impose burdens on the secular portion." App. 61a. The act's "religious employer" exemption reflected "such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity," Justice Brown observed, and "the Legislature's refusal to grant a broader exemption . . . is inexplicable." App. 74a, 79a. Justice Brown thus concluded that the act failed to pass strict scrutiny. App. 77a-79a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify the meaning and scope of its ruling in *Employment Division v. Smith*, 494 U.S.

872 (1990), and to resolve important First Amendment questions of national importance. There are at least twenty-one states that have adopted laws mandating contraceptive coverage, only five of which contain comprehensive exemptions for religious employers.[3] The specific issues in this case, as well as the broader principles at stake, are therefore of interest to religious institutions across the country.

Over the years, the Court has struggled in a variety of settings to define the proper scope of the First Amendment's Free Exercise Clause. In *Smith*, the Court articulated a principle that the California Supreme Court thought was dispositive of the federal constitutional issue in this case—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

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[3] Five states provide no exemption for religious employers. *See* Ga. Code Ann. § 33-24-59.1 (1996); Iowa Code § 514C.19 (2001); N.H. Rev. Stat. Ann. §§ 415:18-1, 420-A:17-c, 420-B:8gg (2001); Vt. Stat. Ann. tit. 8 § 4099c (2000); Wash. Admin. Code § 284-43-822 (2002).

Ten states, including California, have exemptions that fail to cover all religiously affiliated employers. *See* Ariz. Rev. Stat. §§ 20-1057.08, 20-2329, 20-826 (2002); Haw. Rev. Stat. §§ 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (2000); Me. Rev. Stat. Ann. tit. 24-A, §§ 2756, 2847-G, 4247 (West 2000); Mass. Gen. Laws chs. 175, § 47W; 176A, § 8W; 176B, § 4W; 176 G, §4O (West 2002); Nev. Rev. Stat. §§ 689A.0415. 689A.0417. 689B.0376, 689B.0377, 695B.1916, 695B.1918, 695C.1964, 695C.1695 (West 2001); N.Y. Ins. Law §§ 3221 (16), 433(cc), 4322 (35) (McKinney 2000 & Supp. 2003); N.C. Gen. Stat. §§ 58-3-178, 58-50-125 (2000); R.I. Gen. Laws §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2000); Tex. Ins. Code Ann. Art. 21.52L (Vernon 2001).

Five states provide broader exemptions. *See* Conn. Gen. Stat. § 38a-503e, §38a-530e (2001); Del. Code Ann. Tit. 18, §3559 (1999); Md. Code Ann. Ins. § 15-826 (2001); Mo. Rev. Stat. § 376.1199 (Vernon 2002); N.M. Stat. Ann. §§ 59A-22-42, 59A-46-44, 59A-23-4 (Michie 2001). Illinois has no such exemption in its contraceptive coverage statute, 215 Ill. Comp. Stat. 5/356z.4 (2004), but it does have a comprehensive Health Care Right of Conscience Act. 745 Ill. Comp. Stat. 70 (2004).

prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). That principle, however, does not dispose of this case.

As explained below, this law's requirement of contraceptive coverage is not generally applicable. And it interferes in the most fundamental way with the freedom of a church to communicate its religious beliefs, the right of individuals to associate with others to promote a set of beliefs, and the right of a church to conduct its relations with its own employees in conformity with its beliefs—rights that this Court emphasized were not at issue in *Smith*. *See id*. at 877, 881.

By requiring some religious institutions, but not others, to include contraceptive coverage in their prescription drug plans, the State of California has assumed for itself the impermissible task of judging what is and is not religious exercise worthy of recognition—and simultaneously placed an unprecedented burden on those church institutions, like Catholic Charities, that are deemed insufficiently religious. There is, to our knowledge, no other context in which a court has upheld coerced financing by a church institution of non-governmental conduct that the church teaches is wrong. This Court should grant the writ to clarify that its prior decisions do not mandate this result, and to offer guidance on the principles that govern such a case.

I. THE COURT SHOULD CLARIFY THE SCOPE OF ITS DECISION IN *EMPLOYMENT DIVISION v. SMITH*.

Smith held generally that a "valid and neutral law of general applicability" may be enforced over the objection of religious dissenters. 494 U.S. at 879. To hold otherwise, the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id*. at 879 (quotation omitted). This case involves different principles.

A. The California Statute Is Not a "Law of General Applicability."

When the state enacts a law prohibiting "socially harmful conduct," *Smith*, 494 U.S. at 885—for example, a law against polygamy—the state has an obvious interest in the uniform application of that law. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878). And when the state enacts a law requiring conduct deemed important to the community—such as the payment of taxes—the state has an equally obvious interest in the uniform application of that law. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982). In *Smith*, this Court held that the interest in uniform application of such laws—"neutral laws of general applicability"—is such that the government is not required, in the ordinary course, to grant exemptions to individuals who articulate a religious objection.

This case calls upon the Court to offer guidance in a different kind of case. Here, the State of California has identified no conduct so harmful that no employer should be permitted to engage in it, and no benefit so important that all employers should be required to provide it. California asserts no interest in mandating the uniform provision of prescription drug coverage or the uniform provision of contraceptive coverage. It has not enacted any "generally applicable" requirement of prescription or contraceptive coverage. To the contrary, it permits employers to deny prescription drug coverage altogether, and it permits some religious employers to exclude contraceptives from prescription plans that they choose to offer. Indeed, if anything, the statute at issue here undermines any interest the State might assert in encouraging uniform provision of prescription drug coverage—by discouraging those who object to providing *contraceptive* coverage from providing *any* prescription drug coverage at all.

In short, California asserts no interest in uniform provision of the benefit with which the law is concerned. Under this

circumstance, there is a threshold question, appropriately addressed by this Court, whether the basic principle of *Smith* has any applicability at all.

B. The California Statute Interferes with "Hybrid" Rights

In *Smith*, the Court noted that even neutral, generally applicable laws are vulnerable to attack based on the Free Exercise Clause "in conjunction with other constitutional protections." 494 U.S. at 881. Among those "other constitutional protections," the Court noted, were "freedom of speech" and "freedom of association." *Id.* at 881-82. This case involves both of those rights. It interferes with the freedom of a religious organization to communicate its religious beliefs and the right of individuals to associate with others to promote a set of beliefs. It therefore presents precisely the "hybrid situation" that warrants stricter scrutiny under *Smith*. *Id.* at 882.[4]

In *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), this Court held that the Boy Scouts' "freedom of expressive association" prevented the state from enforcing its public accommodations law to require the inclusion of a gay

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[4] The California Supreme Court, while rejecting the "hybrid" claim here on the merits, noted that this Court has not, since *Smith,* "determined whether the hybrid rights theory is valid," App. 32a, and that the lower courts have differed as to its application. *Compare Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) *and Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (requiring an independently valid constitutional claim) *with Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (requiring a likelihood of success on the merits) *with Swanson v. Guthrie Ind. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (requiring a "colorable claim") *with Leebaert v. Harrington*, 332 F.3d 134, 143-144 (2d Cir. 2003) *and Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting hybrid theory altogether as non-binding *dicta*). This split of authority is another reason to grant the petition.

assistant scoutmaster. Forcing the Boy Scouts to retain a gay assistant scoutmaster, the Court explained, would "significantly burden the organization's right to oppose or disfavor homosexual conduct." *Id*. at 659. Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574. The parade organizers had that right even though they had no particular message on the subject that they wished to convey—only a preference "not to propound a particular point of view." *Id*. at 575.

Catholic Charities and its supporters have an even stronger right than parade organizers and the Boy Scouts to join together in an organization that stands for something. They have the additional protection of the Free Exercise Clause. And if non-religious organizations have a constitutional right to exclude individuals whose mere presence might send a message on the subject of homosexuality that they do not like, then how much more clear it must be that a *church* organization has a right not to *subsidize* conduct that *contradicts its teachings*.

There is no question that financial support is a form of sponsorship or endorsement.[5] When an organization pays for

[5] Our argument is limited to the coerced subsidization of *non-governmental* conduct. A citizen may be compelled to pay taxes to support the general activities of government, even when he objects to particular activities on religious grounds. *See, e.g., United States v. Lee,* 455 U.S. 252, 258-61 (1982). That is principally because "[t]he tax system could not function" if individuals and organizations could pick and choose the policies that they could in conscience support. *Id.* at 260. But it also reflects the reality that compliance with such a fundamental duty of citizenship can hardly be understood as an expression of support for all of the government's policies.

an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. When a religious institution subsidizes particular conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur. Catholic Charities cannot persuasively communicate the Church's teaching that contraceptive use is immoral, if it pays for contraceptives for its employees. At least Catholic Charities is entitled to reach that judgment. As the Court emphasized in the *Boy Scouts* case, "we must . . . give deference to an association's view of what would impair its expression." 530 U.S. at 653.

In other settings, this Court has recognized that private citizens' expenditures of money can themselves be a form of speech, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 19 (1976), and that an individual cannot be required to subsidize activities that he opposes. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), the Court held that it violated the First Amendment rights of state employees to require them to provide financial support for ideological union activities unrelated to collective bargaining.[6] And in *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990), the Court held that state bar members could not be compelled to finance political and ideological activities with which they disagreed. In both cases, the court recognized that compelled subsidization

[6] Although the Court reaffirmed its previous rulings that the state had an overriding interest that justified compelling employees to subsidize the collective bargaining activities of the union, it recognized that even that form of compelled subsidization might interfere with an employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. In an observation that is pertinent to this case, the Court noted that an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Id.*

amounted to a compelled message of approval or support in violation of the First Amendment.

The connection between subsidization and endorsement has been recognized in other contexts as well. It is because of that connection that direct government funding of religious activity gives rise to Establishment Clause concerns. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring). Indeed, the Court has emphasized that the government chooses to fund certain activities and not others precisely to "*encourage*[] . . . activity deemed in the public interest." *Harris v. McRae,* 448 U.S. 297, 315 (1980) (emphasis added). In *Harris* and *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld legislative decisions to encourage "childbirth over abortion by means of subsidization of one and not the other." *Harris*, 448 U.S. at 315. So too here, Catholic Charities sends a message of discouraging—indeed, morally condemning—contraception when it withholds funding for contraceptives.[7]

It is ultimately up to the speaker to choose its message, and "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. Catholic Charities has a right to choose its moral message—and to have that message uncompromised by a requirement that it subsidize the very conduct that it condemns. California's law interferes directly with the ability of Catholic Charities to communicate its chosen religious message and to make clear what the Catholic Church does and does not condone.

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[7] Like *Harris* and *Maher*, the Court's recent decision in *Locke v. Davey,* 124 S. Ct. 1307 (2004), recognizes that the government has discretion to decide what activities to finance, even when its decisions adversely affect the exercise of a fundamental constitutional right. Even more obviously, religious organizations *whose constitutional rights are at stake* must retain some discretion not to spend their money to support non-governmental conduct that offends their religious beliefs.

The California Supreme Court noted that Catholic Charities "may . . . avoid the conflict with its religious beliefs simply by not offering coverage for prescription drugs." App. 40a-41a. But that observation slights the Church's teachings. The uncontradicted evidence is that Catholic Charities operates under an "obligation," arising from "[t]he clear teaching and firm doctrine of the Roman Catholic Church" and "the Gospel message of justice and charity," App. 41a, to provide prescription drug coverage to its employees. *See* 2 Cal. App. A000313-14. The California court questioned whether that reflected a mere "philosophical" choice rather than a "religious belief." App. 41a-42a. But no one can seriously doubt that a "firm doctrine . . . arising from the Gospel message" is religious in nature, and no court may second-guess a church entity's construction of that Gospel message. *See, e.g., United States v. Lee*, 455 U.S. at 257 ("It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'") (alteration in original) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)).

There is simply no question, as the California court ultimately assumed, that this law "substantially burdens a religious belief." App. 42a. Indeed, that is an understatement. The law forces a choice between violating two religious teachings—and, in either case, compromising an important religious message.

In *Smith*, the Court emphasized that the free exercise claim was "unconnected with any communicative activity" and unrelated to "the communication of religious beliefs." 494 U.S. at 882. By contrast, the compelled subsidization in this case strikes at the heart of the Catholic Church's ability to communicate its unambiguous commitment to basic moral

teachings and to form associations, like Catholic Charities, that maintain their adherence to those moral teachings.

It is no accident that until now no state has seen fit to coerce a religious institution to subsidize non-governmental conduct that it regards as sinful. One can scarcely think of a more direct and substantial interference with the religious mission of a church. If the State of California can coerce Catholic agencies to pay for contraceptives, it can force them to pay for abortions. *Smith* does not begin to answer the question whether the state may take such action.

C. The California Statute Interferes with the Institutional Autonomy of the Church.

Smith involved only "individual" rights. 494 U.S. at 876, 878-79. This case involves critical issues of institutional autonomy—specifically, a church's relationship with those whom it employs to carry out its mission. In *Smith*, 494 U.S. at 877, the Court noted the continuing validity of the cases that bear upon those issues—*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Those cases recognize that the protection of the First Amendment extends not only to matters of faith, but also to "church administration," *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107.

Applying these cases, courts have held uniformly that the First Amendment protects the right of a church to make decisions about the employment of those who carry out the church's religious mission.[8] Congress, of course, recognized

[8] *See, e.g., Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003) (hispanic communications manager); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (folk choir director);

that important principle when it adopted an exception from Title VII to permit religious groups and schools to restrict hiring to members of their faith. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption against Establishment Clause challenge). The cases cited above have held that Congress's exemption did not go far enough—that the First Amendment protects the right not only to restrict hiring to members of the church, but more generally to decide who is fit to carry out the church's religious mission.

Just as a church entity has a First Amendment right to decide who is fit to carry out its religious mission, so too must it have the right to structure its relationship with its employees in conformity with church teachings.[9] If it chose to, a church entity could require its employees to promise to conform their conduct to church teachings. Surely it can take the more "hands-off" approach of not funding conduct by its employees that would violate those teachings. That is all that Catholic Charities has done here.

Catholic Charities' employees have chosen to associate themselves with the social justice ministry of the Catholic Church, and Catholic Charities has hired them to advance that ministry. There may be limits upon a church entity's right to

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Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (minister); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (minister); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (associate professor of canon law); *see also Bryce v. Episcopal Church in the Diocese of Colo*., 289 F.3d 648 (10th Cir. 2002) (church autonomy doctrine bars youth minister's claim of sexual harassment based on statements regarding homosexuality).

[9] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408-09 (1981).

conform its employee relations to church teachings. *See, e.g., United States v. Lee*, 455 U.S. 252. But neither *Smith* nor any other decision of this Court suggests that a church institution may be compelled to finance private employee conduct that violates church teachings.

II. THE COURT SHOULD CLARIFY THE LIMITS ON THE STATE'S POWER TO FORCE A CHURCH INSTITUTION TO SUBSIDIZE CONDUCT THAT IT BELIEVES IS SINFUL.

There is no case in which this Court has upheld a law that coerces a church institution to subsidize non-governmental conduct that is contrary to the church's moral code. Indeed, to our knowledge, until contraceptive mandate statutes were adopted in California and elsewhere, there had not been any legislative effort to coerce a church institution to subsidize such conduct. There is a national interest in clarifying the constitutional standards that apply to these recent legislative efforts—specifically, whether and, if so, how the Court's "compelling state interest" test applies.

A. Does the Compelling State Interest Test Apply?

In the *Boy Scouts* case, the Court held that not even a compelling state interest is enough to prevail when, as in this case, government action would "materially interfere with the ideas that the organization sought to express." 530 U.S. at 657. "[I]n the associational freedom cases," the Court explained, "*after finding a compelling state interest*, the Court went on to examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Id.* at 658 (emphasis added). In *Boy Scouts*, as in *Hurley* (and this case), the state asserted a compelling interest in eliminating discrimination. The Court concluded, however, that appli-

cation of the state's anti-discrimination law "would significantly burden the organization's right to oppose or disfavor homosexual conduct," and that "[t]he state interests embodied in [that] law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659. The same reasoning applies here.

A similar approach has been taken in the church autonomy cases. This Court has rejected government interference in matters of church administration without considering whether a compelling government interest might be served. *See, e.g., Serbian Eastern Orthodox Diocese*, 426 U.S. 696*; Kedroff,* 344 U.S. 94. And the courts of appeals have held that anti-discrimination laws may not be applied to the claims of ministerial employees, regardless of any compelling interest that might be asserted. *See* note 8, *supra.* A similar approach is warranted when, as in this case, the state seeks to rearrange the relationship between a church institution and its employees in contravention of church teachings.

The Court has applied a compelling interest analysis, however, in cases involving content regulation of religious and other speech. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (no compelling interest to justify denial of use of public space for private religious speech); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (no compelling interest to warrant prohibition of religious speech on school property); *Wooley v. Maynard*, 430 U.S. 705 (1977) (no compelling interest to warrant compelled display of license plate slogan that offended religious beliefs); *see generally United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). It is at least arguable that these cases supply the applicable standard here.

There is, we respectfully submit, need for guidance from this Court on whether laws like California's *need not* be justified by a compelling government interest (the *Smith* standard), *may* be justified by a compelling government interest (the content-based speech standard), or *may not* be justified even by a compelling government interest (the expressive association and church autonomy approach).

B. Is There a Compelling State Interest?

There is need for guidance as well on *how* the compelling interest standard is to be applied if it is, indeed, the applicable standard. Although the California Supreme Court held that California need not show a compelling interest to satisfy the federal constitution, it nevertheless concluded that the State had met that standard. App. 42a-46a. That conclusion is itself worthy of review.

The interest asserted here is the State's interest in promoting gender equity. *Even the State, however, does not assert that that interest trumps religious freedom*. Its lawyers may now find it necessary to argue that the interest in gender equity amounts to a compelling state interest, but *it is dispositive that the state legislature decided otherwise*—by deciding not to force compliance by "religious employers." How can the State assert that its interest in promoting gender equity outweighs the First Amendment rights of religious organizations, when its legislature has decided that the First Amendment rights of "religious employers" outweigh its interest in promoting gender equity? Or, to put the question another way, how can the State maintain that it has a compelling interest in applying the contraceptive mandate to some religious organizations and not others? The reality is that respecting Catholic Charities' First Amendment rights would do little to compromise the State's interest in eliminating alleged gender inequities beyond the point to which that interest has already been compromised by the State's own statutory exemption.

The asserted interest here is not compelling in any event. California is not seeking to eliminate a form of overt or invidious discrimination. Indeed, Catholic Charities does not engage in any discrimination at all. The Church maintains a religious belief that applies equally to men and women and that does nothing to foster any segregation between them. It prohibits contraceptive use by men and women alike. Catholic Charities, therefore, has traditionally denied coverage for contraceptive methods used by men (*e.g.*, vasectomies) and women (*e.g.*, birth control pills).

The Catholic Church's teaching conflicts with California's view of gender equity only because California has chosen to focus on *prescription* contraceptives alone—and because, at least for now, only women use prescription contraceptives. California's notion of gender equity, however, is by no means self-evident. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (exclusion of pregnancy-related disabilities from disability plan is not gender discrimination).[10] Men and women share an interest in contraception. For every woman who seeks contraception, there is presumably a man. And men use contraceptives (condoms) for which no insurance is available.

Notwithstanding these facts, California is certainly entitled to decide that extending employer prescription drug coverage to include contraceptives is a matter of gender equity. The question is whether the State has a compelling interest in promoting this notion of gender equity. More precisely, *the question is whether the State's interest in enforcing its notion of gender equity is more important than its obligation to respect the religious beliefs of the Church and the right of the*

[10] The result in *Gilbert* was overruled by the Pregnancy Discrimination Act, an amendment to Title VII, Pub. L. No. 95-555, 92 Stat. 2076 (1979) (codified as 42 U.S.C. § 2000e(k)), but that only underscores that there is more than one view of gender equity in such situations.

Church's institutions to maintain their doctrinal integrity. That is a question that is itself worthy of this Court's attention.

In the final analysis, this case is less a conflict between religious freedom and the public welfare than it is, as Justice Brown's dissent observed, "a clash of ideas"—the State's view of gender equity versus the Church's view of moral truth. App. 70a n.4. Significantly, it is a clash that takes place not in the community at large, but within a Church institution—in the context of Catholic Charities' relationship with those who have joined in a religious mission undertaken in the name of the Catholic Church. In such a clash of ideas, the First Amendment dictates that the State recede, for that is the only way in which both the State and the Church can continue to promote their messages. As the State has already conceded, its commitment to gender equity can be expressed and advanced without requiring Church institutions to go along. But the Church's message, once altered by the State, is forever diminished.[11]

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[11] Professor Laurence Tribe made the same point in commenting upon the Court's *Boy Scouts* decision, noting that the case involved "a direct clash of competing images of 'the good life,'" and observing that "in such a clash, the teaching of the First Amendment has long been that the state loses." Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 651-52 (2001). Professor Tribe elaborated:

> When the state's position on the matter can prevail only by significantly undercutting a particular individual's or group's ability to carry out its expressive or otherwise constitutionally protected mission, one cannot automatically assume that the state's condemnation of the contested practice as "discrimination" furnishes a compelling justification sufficient to negate the liberty of the individual or group. For that *"discrimination" is but a pejorative label for the very thing the individual or group must do in order to express its contrary philosophy and transmit that philosophy to the next generation*.

Id. at 652 (emphasis added).

III. THE COURT SHOULD CLARIFY THE LIMITS ON THE STATE'S POWER TO JUDGE WHETHER A CHURCH ENTITY IS SUFFICIENTLY RELIGIOUS TO EXERCISE ITS RELIGION FREELY.

The State of California recognized that a blanket requirement of contraceptive coverage would intrude upon the religious freedom of churches that proscribe the use of contraceptives. It made a judgment that "religious employers" need not subsidize coverage that conflicts with their religious beliefs. But the State then so limited its definition of "religious employers" as to exclude organizations such as Catholic Charities, which is part of the Catholic Church and which carries out an essential part of the Church's religious mission. In the judgment of the State of California, a "religious employer" is entitled to an exemption from its law, but Catholic Charities is simply not religious *enough* to exercise its religion freely.

The State, however, lacks the power to judge what Church institutions are "*sufficiently* religious" to be allowed to exercise their religious beliefs. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002) (emphasis in original). To ask that question "is to tread upon that which the First Amendment protects." *Id.* at 1344. *See also NLRB v. Catholic Bishop*, 440 U.S. 490, 493 (1979) (noting constitutional problems arising from the NLRB's decision to exempt religiously sponsored organizations from its jurisdiction "only when they are *completely religious*, not just religiously associated") (emphasis added).

To be sure, there is a threshold requirement that must be satisfied before any individual or institution can claim the protection of the Free Exercise Clause. But the question is simply whether the asserted belief is religious in nature and "sincerely held," *United States v. Seeger*, 380 U.S. 163, 185 (1965)—and, in the case of an organization, whether it is a

bona fide religious organization. *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982); *Great Falls*, 278 F.3d at 1344.[12]

The State of California has erected a statutory test that distinguishes among Church institutions—insisting in effect that a church organize and conduct itself in a manner that conforms to the State's model of a church. In California's judgment, an employer is not entitled to assert its religious objections to paying for contraceptives unless, among other things, the "purpose of the entity" is the "inculcation of religious values," and the entity "primarily" employs and serves persons who "share [its] religious tenets." In addition, the employer must be one of the two sub-categories of "religious organizations" that the Internal Revenue Code exempts not only from taxes, but also from filing annual returns.

Catholic Charities' stated purpose is not to "inculcat[e]" religious values,[13] but to carry out the Church's religious mission to perform corporal works of mercy. It provides social services to anyone in need, whatever his or her religious beliefs. And it employs those who, regardless of their own religion, embrace Catholic Charities' mission and under-

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[12] Drawing upon then-Judge Breyer's opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400 (1st Cir. 1985) (en banc), the D.C. Circuit in *Great Falls* embraced a simple test for determining whether a school was exempt from NLRB jurisdiction—whether it "holds itself out" as "providing a religious educational environment," whether it is "organized" as a 'nonprofit,'" and whether it is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization." 278 F.3d at 1343. That test, of course, was designed for educational institutions. Adjusted only slightly to cover non-educational institutions, it is easily met by Catholic Charities.

[13] The Oxford English Dictionary (2d ed. 1989) defines "inculcate" to mean "endeavour to force (a thing) into or impress (it) on the mind of another by emphatic admonition, or by persistent repetition; to urge on the mind, esp. as a principle, an opinion, or a matter of belief; to teach forcibly."

stand that it is pursued in conformity with the faith and teachings of the Church of which it is a part. In the judgment of the State, Catholic Charities' religious rights are forfeited for these reasons—because, to put it bluntly, it puts its religion into practice and does so in an all-inclusive way. There is, California seems to say, something *less* religious about such an organization. A *truly* religious organization, in its view, would be more exclusive in its associations, more single-minded in its purpose, and less concerned about the welfare of others. It would be concerned only with drilling, or "inculcating," its beliefs into the minds of its adherents.

There is no precedent for such a narrow view of religion. The First Amendment protects the right freely to "exercise" one's religion, and there is no question that Catholic Charities exercises its religion when it serves the needy in the name of the Church. That is indisputably part of the "mission" of the Church. 2 Cal. App. A000341. Catholic Charities' "purpose" need not be the inculcation of religious values to invoke the protection of the Free Exercise Clause. *See, e.g., Great Falls,* 278 F.3d at 1346 (First Amendment protection not limited to "religious institutions with hard-nosed proselytizing"). Nor does its "purpose" need to be expressive to invoke its rights to free speech and association. In *Boy Scouts of America v. Dale*, this Court recognized that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." 530 U.S. at 655. It is enough that an association "merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* There is no question that Catholic Charities engages in expressive activity—from calling itself "Catholic" to communicating its religious values through its charitable work—and that the law at issue compels it to engage in expressive activity at odds with the message that it wishes to communicate.

Nor is there any basis for the proposition that a religious organization must discriminate against non-adherents to claim the protection of the First Amendment. That it employs others to assist in its religious mission and extends its mission to the service of others makes it no less a *bona fide* religious organization. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982) (religious organization that solicited more than fifty percent of its funds from nonmembers has First Amendment rights); *Great Falls*, 278 F.3d at 1346 (First Amendment protection not limited to "religious institutions . . . that limit their enrollment to members of their religion").

California's attempt to define religion in this way finds no support in any of this Court's pronouncements about religious freedom. Its test unquestionably excludes organizations, like Catholic Charities, that are clearly entitled to the protection of the Free Exercise Clause.

But that is not all. California's test invites intrusive and subtly coercive scrutiny that is itself offensive to the First Amendment. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that the state may not condition the solicitation of aid for religious purposes upon a license, "the grant of which rests in the exercise of a determination by state authority as to what is a religious cause." *Id.* at 307. Applying that principle in *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982), the court of appeals invalidated a city licensing scheme that exempted solicitations for a church's "evangelical, missionary or religious" purposes, 634 F.2d at 479, but not for a church's charitable activities, such as the provision of food, clothing and shelter. Making such distinctions was "necessarily a suspect effort," the court observed, and "the continuing

necessity for making judgments as to what is or is not religious" rendered the scheme unconstitutional. *Id.* at 481.[14]

Likewise, in *Great Falls* the court held that any inquiry into whether an employer is "*sufficiently*" religious "intrude[s] upon the free exercise of religion" by subjecting religious organizations to unwarranted scrutiny and interference. 278 F.3d at 1344 (emphasis in original). How "important [is] the religious mission . . . to the institution"? *Id.* Precisely how much attention does the organization pay to religious teaching, as opposed to social welfare work? How do the group's overall activities promote the "inculcation of religious values"? What is the religious affiliation of those who are served?

Such questions serve no legitimate purpose in this context. And their effect is undeniably to coerce religious organizations to tailor their methods and restrict their activities to satisfy the State—in this case, to begin proselytizing and to stop hiring and serving non-Catholics.

California and other states have embarked on a dangerous course in attempting to identify some religious institutions that are free to practice what they preach and others to whom that freedom is denied. Guidance is needed to make clear that all religious institutions are entitled to the protection of the First Amendment.

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[14] *See also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. at 343 (Brennan, J., concurring in the judgment) ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.") (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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