

Testimony of the Center for Reproductive Rights

Hearing: Do New Health Law Mandates Threaten Conscience Rights and Access to Care?

Energy and Commerce Committee
Subcommittee on Health

November 2, 2011

The Center for Reproductive Rights respectfully submits the following testimony to the Energy and Commerce Committee's Subcommittee on Health. Since 1992, the Center for Reproductive Rights has worked toward the time when the promise of reproductive freedom is enshrined in law in the United States and throughout the world. We envision a world where every woman is free to decide whether and when to have children; where every woman has access to the best reproductive healthcare available; where every woman can exercise her choices without coercion or discrimination. More simply put, we envision a world where every woman participates with full dignity as an equal member of society.

Summary

The Majority staff's framing of this hearing, as set forth in the Internal Memorandum dated October 28, 2011, and circulated to Members of the Subcommittee on Health, is fundamentally flawed, because it only conceives of conscience rights as belonging to healthcare providers and employers. By stating that the Affordable Care Act lacks "adequate conscience rights protections," the Majority staff narrowly defines "conscience rights" to mean *only* the rights of the 1% who object to birth control – ignoring the fact that 99% of American women¹ – and 98% of Catholic women² – have used contraception.

The Memorandum presents two related, but distinct, issues: the exemption for "religious employers" from the contraceptive coverage requirements, and a bill, H.R. 1179, that would go much further and allow insurers to opt out of any of the coverage requirements contained in the Affordable Care Act. We will first briefly address the threat posed by H.R. 1179, and then develop the case against any exemption from the contraceptive coverage requirement. In sum, the religious exemption proposed by the Department of Health and Human Services is not

¹ CDC, NATIONAL SURVEY OF FAMILY GROWTH, VITAL AND HEALTH STATISTICS, USE OF CONTRACEPTION IN THE UNITED STATES 1982-2008 (Aug. 2010) *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf (More than 99% of women 15-44 years of age who have ever had sexual intercourse with a male, referred to as "sexually experienced women," have used at least one contraceptive method).

² CDC, NATIONAL SURVEY OF FAMILY GROWTH, NATIONAL HEALTH STATISTICS REPORT, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006-2008 NATIONAL SURVEY OF FAMILY GROWTH (Mar. 3, 2011) *available at* <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.

required by either the Constitution or the Religious Freedom Restoration Act, and would be terrible public policy. But the proposed bill – the so-called “Respect for Rights of Conscience Act” (H.R. 1179) – is far, far worse.

I. The “Respect for Rights of Conscience Act of 2011” (H.R. 1179) is an Insurance-Refusal and Healthcare-Denial Bill that Provides No Protections for Employees or Patients

By embracing a cramped and insupportably narrowly conception of “conscience rights,” the Majority staff endorses H.R. 1179 – an insurance refusal bill that would allow insurance companies, hospital administrators, and employers to impose their religious beliefs on patients and employees – without any regard for patients’ and employees’ consciences or beliefs. The bill would permit, for example, a Catholic-affiliated insurer to deny prenatal coverage for an out-of-wedlock pregnancy. It would permit a Latter Day Saints-affiliated employer to limit insurance benefits for gay or lesbian employees. It would permit a Baptist-affiliated hospital to refuse to treat a Jew. And it would permit a Muslim doctor to refuse to treat injuries resulting from an accident caused by alcoholic intoxication. It would, in short, give every employer the right to veto essential insurance coverage to employees; and give every hospital administrator or individual doctor the right to deny even life-saving treatments to patients in need.

The misleadingly titled “Respect for Rights of Conscience Act of 2011” (H.R. 1179) would allow healthcare administrators and corporations to cut medical benefits and services to employees and patients in the name of religion. The bill aims to strip patients of the protections of the Affordable Care Act by giving companies and hospital bureaucrats a veto over employees’ healthcare benefits. The bill cynically protects the so-called “right” of insurance companies and employers to deny coverage, while doing nothing to protect the rights of patients and employees. The bill undermines every requirement within the Affordable Care Act and is an attack on the nature of insurance, which is intended to spread risk and provide enrollees with access to a basic standard of care.

The bill also fails to protect the consciences of doctors and nurses who have a conscientious duty to provide the highest quality of medical care to patients – even if doing so may contravene official Catholic dogma. The proposed bill would allow hospitals to prevent doctors from treating patients – even when necessary to save a patient’s life – if doing so would contravene the hospital’s official professed belief. For example, Catholic hospitals could block doctors from saving the lives of women with ectopic pregnancies if a therapeutic abortion were required. A 2008 peer-reviewed article in the *American Journal of Public Health*³ reveals that Catholic hospitals are already preventing doctors from treating women suffering from life-threatening miscarriages and late ectopic pregnancies; this bill would give these hospitals legal cover and allow them to force doctors to stand idly by while patients die from treatable conditions.

The bill is particularly dangerous because it provides absolutely no safeguards for patient quality of care. Any policy to protect the right of conscience must be even-handed and protect the conscience rights of both those would deny and those who would provide services, and any

³ Lori Freedman, Uta Landy, and Jody Steinauer, *When There’s a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUBLIC HEALTH 1774 (2008).

institution that would like to make arrangements to accommodate conscience objections must ensure that patient care is not compromised in so doing. Any policy to protect the right of conscience must be even-handed and protect the conscience rights of both those who would deny and those who would provide services. Conscience protections must:

- Limit religious objections to individuals – not institutions or corporations – and limit religious objections to participation in a procedure – not for pre- or post-operative care, health-insurance coverage, or prescription-drug coverage.
- Assure that providers that do want to provide care are insulated from retaliation or other harm.
- Require fully informed consent to medical procedures (or a lack thereof) on the part of patients without any delay in care.
- Require that the employee or patient be referred to another healthcare provider to ensure continuity of care, and protect the rights of doctors and other providers who want to provide care.
- Religious objections may not be invoked in emergencies in which doing so would jeopardize a patient’s health or life.

These basic and minimum safeguards are essential to insure that patient care is not compromised, and that conscience provisions, in practice, preserve the right for those doctors and other providers who do want to provide care to practice medicine consistent with their own views.

Indeed, H.R. 1179 is an attack on the very nature of insurance, as it would allow insurers to deny coverage on allegedly “moral” grounds, however pre-textual these may be. This breathtakingly broad abdication of authority runs counter to the central goal of the Affordable Care Act and numerous other consumer and patient protection laws, which seek to expand coverage (and thereby increase care and diminish costs), and to set out a fundamental and basic level of access to medical care for all Americans.

For example, as with H.R. 358, the “Let Women Die” bill, H.R. 1179 could be invoked to permit the refusal of care to women facing emergency situations by allowing a claim of conscience to supersede the treatment requirements in the Emergency Medical Treatment and Active Labor Act. EMTALA today does provide basic and fundamental levels of protections. As first-hand accounts by doctors from the American Journal of Public Health survey mentioned above show, a religiously-affiliated hospital that refused to complete a miscarriage, essentially risking a woman’s health, was reported for an EMTALA violation:

Dr B, an obstetrician-gynecologist working in an academic medical center, described how a Catholic-owned hospital in her western urban area asked her to accept a patient who was already septic [suffering from infection]. When she received the request, she recommended that the physician from the Catholic-owned hospital perform a uterine aspiration there and not further risk the health of the woman by delaying her care with the

transport. [From the doctor:] “Because the fetus was still alive, they wouldn’t intervene. And she was hemorrhaging, and they called me and wanted to transport her, and I said, “It sounds like she’s unstable, and it sounds like you need to take care of her there.” And I was on a recorded line, I reported them as an EMTALA violation. And the physician [said], “This isn’t something that we can take care of.” And I [said], “Well, if I don’t accept her, what are you going to do with her?” [He answered], “We’ll put her on a floor [i.e., admit her to a bed in the hospital instead of keeping her in the emergency room]; we’ll transfuse her as much as we can, and we’ll just wait till the fetus dies.”⁴

This shocking delay in care is caused by hospitals’ adherence to Religious Directives from the U.S. Conference of Catholic Bishops – including those cases that clearly conflict with medical standards. The Directives require doctors to wait until the fetal heartbeat stops before completing a miscarriage, even if the pregnancy is no longer viable. In the meantime, women risk a life-threatening form of infection.

H.R. 1179 bill would allow institutions to insist on policies that deny patients care, trumping doctors’ professional judgment and training. Freedman’s report tells one such story: a doctor appalled at the denial of care to a woman having a miscarriage – a woman so ill that her eyes filled with blood from the infection caused by the delay – subsequently quit his job in disgust.

Nationally, one-sixth of hospital visits are to religiously affiliated hospitals. The notion that care would differ so drastically from one emergency room to another is out-of-step with public health needs and the beliefs of religious adherents, who, polls indicate, agree that medical care should not be restricted by religion.⁵

Only physicians, not institutions, have a conscience. Granting institutions a right of refusal merely guarantees that doctors who choose to provide care consistent with their own beliefs and training won’t be able to do so, and thereby hurts patients. Chillingly, H.R. 1179 would ensure that hospitals’ and insurers’ institutional dictates, including those at odds with medical science, could override the consciences of doctors, even when those dictates risk women’s lives.

For the first time, H.R. 1179, the “Insurance Refusal” bill, would extend refusal rights to insurers. For those concerned about the rights of individual doctors to refuse to provide a particular medical service, existing law already amply protects doctors, nurses, and other providers who have an objection to performing abortions, sterilizations, and related procedures. H.R. 1179 would go much further than current law, and would harm the rights and care of doctors and patients.

II. A Religious Exemption Broader than that Proposed by the Department of Health and Human Services Would Gut the No-Copy-Contraception Requirement

A. Broader Exemption Would Undermine the Preventive-Services Requirement

⁴ Id.

⁵ See, e.g., Belden, Russonello, and Stewart, *Surveys of Voters in Four Congressional Districts for Catholics for Choice* (2009), available at <http://www.catholicsforchoice.org/documents/DistrictPollingExecutiveSummary.pdf>.

We next address the problematic exemption proposed by HHS to the contraceptive coverage requirements. As set forth below, no religious exemption to the no-copay-contraception requirement is required by the Constitution or the Religious Freedom Restoration Act. To the extent that there is such an exemption, it should be as narrowly drawn as possible, and apply solely to ministerial employees, rather than denying coverage to, for example, a church secretary, a parish groundskeeper, or a gentile hired by a synagogue to perform tasks on the Sabbath.⁶

Broadening the religious-exemption grounds beyond those proposed by the Department of Health and Human Services (“HHS”) risks gutting the entire no-copay-contraception requirement. For example, giving religious hospitals an exemption would create a system in which exemptions swallow the rule and thus become unworkable. According to the Catholic Health Association of the United States, Catholic Hospitals account for 15.8 percent of all hospital admissions – about one out of every six patients – nationwide, and more than one-fifth of all admissions in 22 states.⁷ And Catholic hospitals employ nearly 800,000 people nationwide – 532,011 full-time employees and 237,657 part-time employees.⁸ Many of these employees are not themselves Catholic – regardless, 98 percent of Catholic women use contraception.⁹ Extending the exemption to Catholic hospitals would make Swiss cheese out of the coverage requirement.

Extending a religious exemption to religious schools would strip more than 300,000 workers and their families of critical preventive services, including no-copay contraception.¹⁰ Of these more than 300,000 employees, more than 150,000 work at Catholic schools.¹¹ But the National Catholic Education Association admits that only a tiny fraction of these Catholic school employees – 3.7 percent – are actually members of the clergy. The remaining 96.3 percent of Catholic school employees are laity – and a substantial number of them are not even Catholic.¹²

Allowing religious universities to receive an exemption would further frustrate the purpose of the preventive-services requirement. There are about 900 religiously affiliated colleges and

⁶ Observant Jews are prohibited from doing work on the Sabbath, which some interpret to include tasks such as opening doors and turning on or off lights. Orthodox synagogues often hire a non-Jew to perform these duties on the Sabbath.

⁷ Catholic Health Association of the United States, *Catholic Health Care in the United States*, Jan. 2011, available at <http://www.chausa.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147489259>.

⁸ *Id.*

⁹ CENTERS FOR DISEASE CONTROL, NATIONAL SURVEY OF FAMILY GROWTH, NATIONAL HEALTH STATISTICS REPORT, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006–2008 (Mar. 3, 2011) available at <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.

¹⁰ U.S. Dep’t of Education, National Center for Education Statistics, *Characteristics of Private Schools in the United States: Results from the 2009-2010 Private School Universe Survey*, at 7, Table 2, May 26, 2011, available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011339>. Indeed, because the statistics indicate 314,489 full-time equivalent employees, the real number of religious-school employees, in light of the fact that some employees are part-time, is actually larger.

¹¹ According to the National Catholic Education Association, Catholic schools in the United States employ 151,473 “full-time equivalent professional staff.” Given the number of part-time workers, and non-professional staff (such as groundskeepers and maintenance workers), the number is even greater.

¹² While schools may give a preference to Catholics, it is not a requirement for employment in most positions. See, e.g., Archdiocese Chicago Catholic Schools, *Careers*, available at <http://schools.archchicago.org/careers/elementaryschool/> (“[p]reference in hiring *may* be given to teachers who are Catholic...”).

universities, with 1.7 million students in the United States,¹³ including 244 Catholic degree-granting institutions.¹⁴ These institutions employ tens, if not hundreds, of thousands of people – the vast majority of whom are not members of the clergy, and a substantial percentage of whom are not even Catholic. These thousands of people – plus their families – would be stripped of no-copay access to contraception if the exemption were broadened.

And, of course, there are numerous other kinds of businesses beyond charities, hospitals, schools, and universities that are affiliated with religious organizations – everything from radio¹⁵ and television stations¹⁶ to condominiums¹⁷ to paintball courses.¹⁸ These businesses, many of which operate as secular businesses, employ untold thousands of people across the nation – all of whom could be stripped of their access to no-copay contraception if the exemption were widened. Given the life-altering impact of an unintended pregnancy, even one woman’s health interest should be sufficiently compelling to provide a basis for the rule.

B. The ERISA Church-Plan Exemption Policy is Not a Workable Religious Exemption

The Alliance of Catholic Health Care proposes using the church-plan exemption in the Employee Retirement Income Security Act (ERISA). Under ERISA, an organization is eligible for church-plan status if it “shares common religious bonds and convictions with that church or convention or association of churches.”¹⁹

The ERISA church-plans exemption is vague and overly broad. It is not a workable definition. The contours of precisely which employers are eligible for church plans continues even 37 years after the exemption was created. The constitutionality of the church-plan exemption has never been decided by the Supreme Court. Despite claims to the contrary, the reason for the exemption, as a matter of legislative history, was not related to “church governance,” but rather was the outcome of routine legislative horse-trading needed to enact ERISA. There are no “church governance” reasons why pension plans for religious employers should lack the kind of basic consumer and transparency protections that ERISA provides.

Moreover, notwithstanding the uncertainty about which employers are eligible, the broad church-plan language could exclude millions of women from contraceptive coverage, including many employers with virtually no connection to houses of worship, such as religiously affiliated businesses, schools, universities, broadcasters, and entertainment venues.

¹³ United States Conference of Catholic Bishops, *The Catholic Church in the United States at a Glance*, (figures through 2009) <http://www.usccb.org/comm/catholic-church-statistics.shtml>; Council for Christian Colleges and Universities, *About CCCU*, <http://www.cccu.org/about>; Lutheran Colleges, *Our Colleges* <http://www.lutherancolleges.org/>.

¹⁴ Association of Catholic Colleges and Universities, *Colleges and Universities*, available at <http://www.accunet.org/i4a/pages/index.cfm?pageid=3489>.

¹⁵ For example, Bonneville International, which owns more than a dozen radio stations, is owned by the Church of Latter Day Saints. <http://bonneville.com>.

¹⁶ See, e.g., KSL-TV Utah (NBC affiliate owned by the Church of Latter Day Saints), <http://www.ksl.com/>.

¹⁷ See Lesley Mitchell, *Mormon Church Has Built Downtown Housing; Will People Come?*, SALT LAKE TRIBUNE, Sept. 27, 2011, available at <http://www.sltrib.com/sltrib/news/52583204-78/creek-units-church-lake.html.csp>.

¹⁸ See, e.g., Joshua’s Paintball Jungle, a ministry of First Bible Baptist Church in Rochester, NY. <http://jppj.fbbc.info/about.shtml>.

¹⁹ Title 26, section 414 of the Internal Revenue Code, at (e).

In light of its dubious constitutionality and unworkability, Congress has wisely been moving away from exempting church plans from federal healthcare requirements over the past fifteen years: HIPAA (1996); Newborns and Mothers Health Protection Act of 1996; Michelle's Law (coverage for certain dependent children); CHIPRA (requiring notice of certain state children's health insurance programs); the Mental Health Parity and Addition Equity Act; and, of course, the Affordable Care Act.

There is no reason for Congress to now change course and resuscitate the broken church-plan model. And for the reasons explained below, expanding the scope of the religious exemption would be terrible policy.

C. Expanding the Religious Exemption to Include Hospitals and other Religiously Affiliated Institutions is Unwarranted Under the Law and Would Be Terrible Policy

There is simply no reason for Congress to expand the already overbroad proposed exemption. First, many hospitals, even those with "religious affiliations," do not receive funding from any religious sources, or receive only very *de minimus* funding from religious sources. When St. Joseph's, the Phoenix hospital in which an abortion was performed last year, lost its Catholic designation, hospital officials indicated to news reporters that the only change in hospital practice would be related to the performance of religious services at the hospital. As ABC News reported, "[h]ospital officials insist the severing of ties with the Catholic Church will have no practical implications for health care delivery although the bishop will no longer allow mass to be said at the hospital."²⁰

Such hospitals are also subject to hundreds, if not thousands, of state and federal laws regulating hospital practices, as well as to generally applicable accreditation standards. To name a few, the Medicare Conditions of Participation regulate hospital practice at the federal level, while states license facilities and grant their Certificates of Need. In addition, the Emergency Medical Treatment and Active Labor Act ("EMTALA") imposes conditions requiring emergency treatment when a patient is presented, without consideration of economic or other factors related to the characteristics of the patient. Even more importantly, a majority of employees at most institutions are likely to have no connection to the religious affiliation of the institution. The actions of hospitals and affiliated providers are also subject to generally applicable standards of medical negligence as determined by state law. In sum, hospitals, including those with religious affiliations, serve the health needs of the general public. In both function and form, these institutions perform a secular purpose for the broad and general public.

Separately incorporated social services centers, even if faith-based, are also subject to generally applicable tort standards and a host of federal and state laws and regulations, including those related to hiring practices, discrimination, hygiene and other standards. Those that serve a majority of religious adherents and employ a majority of religious adherents may qualify for the exemption; others, who do not qualify on these two grounds, are clearly serving the general public and employ members of general public who deserve to be able to avail themselves, as

²⁰ Dan Harris, *Bishop Strips Hospital of Catholic Status After Abortion*, ABC NEWS, Dec. 22, 2010. See <http://abcnews.go.com/Health/abortion-debate-hospital-stripped-catholic-status/story?id=12455295>.

they choose, of the benefits of contraceptive coverage. The lines drawn by HHS, while unnecessarily overbroad, do some service by clearly excluding institutions that are performing a secular function.

In both situations, an expansion of the exemption would also raise the specter that some institutions that lack an obvious religious function will claim the exemption for reasons unrelated to religious sentiment. To the extent that no-copay contraception is an expense for insurers, it is indisputable that employers who seek to price and obtain coverage could prefer insurance coverage within the exemption for cost reasons alone. Without a narrowly tailored exemption, it will be exceedingly difficult to patrol the boundaries of the exemption, and to ascertain whether its invocation is purely a pretext for an economic rationale.

The Bishops also claim that a failure to expand the refusal provision will result in hospital and social-services closures. Yet in California and New York, where a similar exemption is in operation, there is no evidence to suggest that religiously-affiliated institutions have closed or are offering diminished care. Indeed, some Catholic Universities, such as Loyola Marymount, apparently offer contraception despite being permitted not to by virtue of a self-insurance loophole.²¹ In light of the Bishops' implied threat that a key source of charity care for low-income individuals might be at risk, it is important to note that, in fact, Catholic hospitals appear to provide less care to Medicaid patients and less charity care than hospitals under other forms of sponsorship.²²

The implied threat of religious hospital and social-services closures also rings hollow given the broad nature of responsibilities for compliance with the requirement under the proposed rule. The religious exemption proposed by HHS does not place the burden of compliance on any particular individual within the institutions regulated. Instead, the requirement rests with the institution as a whole. It begs credulity that the hostility to insurance coverage for contraception is so uniform across healthcare institutions the size and scope of hospital systems; and this notion appears particularly dubious in light of the data regarding religious adherents' widespread use of, and support for, contraception.

D. Evidence Demonstrates Harm to Employees of Catholic Institutions from Denial of Coverage

Research interviews conducted over the past year by the Center for Reproductive Rights underscore the hardships faced by employees at Catholic hospitals from denial of insurance coverage for contraception. At one hospital in Muskegon, Michigan, Hackley Hospital, that was acquired by a Catholic health system, Trinity Health, in 2008, employees told us of their dismay and distress when, without notice, contraceptive coverage was dropped for staff members and employees of affiliated medical practices.

²¹ See Catholics for Choice, "Student Bodies: Reproductive Health Care at Catholic Universities" (2002), at 18; <http://www.catholicsforchoice.org/topics/healthcare/documents/2002studentbodies.pdf>; Brochure, Aetna's health care coverage for Loyola Students, at 22; <http://www.aetnastudenthealth.com/schools/lmu/brochure1112.pdf>.

²² Lois Uttley & Ronnie Pawelko, *No Strings Attached: Public Funding of Religiously-Sponsored Hospitals in the United States*, (2002), at 5.

All of the former Hackley employees the Center interviewed reported that the ban had a harmful impact on themselves and their colleagues. One nurse indicated that the out-of-pocket costs of permanent contraception were prohibitive. (While costs vary by location, costs for tubal ligation generally range from \$1500 to \$6000.²³) Another spoke of her difficult situation and the stress on her relationship:

We are just praying I don't get pregnant until we can figure out how to get something. My doctor is Mercy-employed and he doesn't have samples. ... I got pregnant twice on birth control. One was the Nuva Ring, the second was the minipill when my baby was 4 and a half months old. I'm an OB nurse, so I know how to use birth control. Some patients like me need some form of permanent birth control. ... My third pregnancy I lost twins. ... I can't go through more. It's taken a toll on my marriage.

Intra-uterine devices (IUDs) were also unaffordable for the employees we interviewed. In response, some nurses paid up to \$40 per month for birth control pills or made a special trip to obtain them more cheaply elsewhere. Some hospital employees initially sought sliding scale services at the local Title X clinic, which closed in 2009.

Even employees who had a history of pregnancy complications, high-risk pregnancies or a history of contraceptive failure could not obtain insurance coverage for contraception following the merger at Hackley Hospital. Moreover, medical conditions for which the use of oral contraceptives are recommended went untreated: One nurse had endometriosis, a medical indication for birth control pills, but still had to pay out-of-pocket for her pills.

Every hospital employee we interviewed in this setting condemned the lack of coverage as an unwelcome intrusion by their new employer into a private healthcare decision. One employee noted, "All these other insurances [sic] paid for it. ... If I have health insurance, I should get birth control. ... Why should I have to follow what they believe?"

III. The No-Copay-Contraception Requirement Does Not Violate the Constitution, Nor Is a Religious Exemption Required

The Constitution does not require a religious exemption.²⁴ Statements suggesting otherwise – such as those of Bishop William E. Lori on behalf of the United States Conference of Catholic Bishops (the "Bishops"), as well as the Bishops' comments to HHS²⁵ – are based upon a flawed understanding of both First Amendment and RFRA jurisprudence.

A. The Constitution Permits Neutral, Generally Applicable Laws that May Burden Religious Exercise

²³ YourContraception.com, *Tubal Ligation*, available at <http://www.yourcontraception.com/birth-control-methods/tubal-ligation/tubal-ligation.html>.

²⁴ We note that the HHS's justification for its proposed religious exemption is *not* grounded in either the Constitution or RFRA. Instead, HHS proposed the religious exemption as an attempted "accommodation" of the "religious beliefs of certain religious employers." 76 Fed. Reg. at 46623. We agree with HHS's determination that nothing in the Constitution or federal law compels an exemption from the no-copay-contraception requirement.

²⁵ Comments of the U.S. Conference of Catholic Bishops, Interim Final Rules on Preventive Services (CMS-9992-IFC2) (submitted Aug. 31, 2011) ("Bishops' Comments").

The Supreme Court has made it clear that neutral, generally applicable laws do not violate the Free Exercise Clause of the First Amendment, even if they burden the exercise of religion. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court rejected a challenge to a statute that denied unemployment benefits to drug users, including Native Americans who consumed sacramental peyote.²⁶ Writing for the Court, Justice Scalia explained that under the Constitution,²⁷ a neutral law of general applicability that happens to burden one’s religious practice does not violate the Free Exercise Clause of the First Amendment: “[t]he government’s ability...to carry out...aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”²⁸ The alternative, according to the Court, was to permit every religious objector to “become a law unto himself”²⁹ – a result which “contradicts both constitutional tradition and common sense.”³⁰

The *Employment Division* decision demonstrates that the Constitution permits the enactment of neutral laws that burden religion; it also makes it clear that no exemption or opt-out provision is required. As Justice Scalia wrote, the fact that a religious exemption “is permitted, or even that it is desirable, is not to say that it is constitutionally required...”³¹ In other words, with respect to the Constitution, the question is not whether a religious exemption is required; it is whether a religious exemption is sensible.³² For the reasons set forth in this testimony, a religious exemption to the no-copay-contraception requirement is not “desirable.”

B. The No-Copay-Contraception Requirement is Neutral and Therefore Constitutional

After *Employment Division*, the only laws that remain constitutionally suspect are those based on anti-religious animus. According to the Court, laws targeting “acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display” would be presumptively unconstitutional.³³ Short of such animus, however, “neutral law[s] of general applicability”³⁴ are consonant with the First Amendment, regardless of the fact that they might burden individuals’ religious exercise.

The no-copay-contraception Requirement is a neutral rule that is part of a comprehensive effort to ensure that important preventive services for women are available and affordable. The critical role that contraception plays in preventing unintended pregnancy and promoting healthy birth spacing was articulated in the Institute of Medicine’s comprehensive report, *Clinical Preventive Services for Women: Closing the Gaps*. And as the IOM report noted, “[n]umerous

²⁶ 494 U.S. 872 (1990) (abrogated by statute).

²⁷ As examined below, Congress subsequently created a *statutory* – not constitutional – obligation for government to justify any substantial burden on religious exercise by demonstrating a compelling state interest. See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

²⁸ 494 U.S. at 885 (citation omitted).

²⁹ *Id.* at 885 (citation omitted).

³⁰ *Id.* at 885.

³¹ *Id.* at 890.

³² *Id.* at 890.

³³ *Employment Division*, 494 U.S. 872, at 877 (emphasis added).

³⁴ *Id.* at 879.

health care professional associations... recommend the use of family planning services as part of preventive care for women,” as described above.

Nonetheless, comments submitted to HHS by the United States Conference of Catholic Bishops allege that the IOM’s recommendation is nothing more than a “religious gerrymander” that targets Catholicism for special disfavor *sub silentio*.” This wholly unsupported allegation is absurd on its face, and it should be dismissed out-of-hand. There is not a shred of evidence to suggest that the Institute of Medicine’s recommendations were based on anti-Catholic or anti-religious animus. This unsupported and unsupportable claim is an insult to the countless doctors, researchers, and public-health experts who contributed to the IOM’s conclusions and the rigorous scholarship upon which they rest.

To bolster its outlandish claim, the Bishops’ comment compares the no-copay-contraception requirement to a statute outlawing animal sacrifice, the subject of the Supreme Court’s decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.³⁵ In that case, the City of Hialeah promulgated a thinly veiled ordinance designed to prohibit members of the Santeria religion from practicing the ritual slaughter of animals. The ordinance was preceded by various animus-driven resolutions, such as one condemning “any and all religious groups which are inconsistent with public morals, peace or safety;” another resolution noted “great concern regarding the possibility of public ritualistic animal sacrifices.”³⁶ In light of these resolutions targeting Santeria religious rituals, and a number of other facts, the Court had no trouble determining that “suppression of the central element of the Santeria worship service was the object of the ordinances,” and on that basis held that the ordinance was unconstitutional under the Free Exercise Clause.

In contrast, the Bishops provide no proof whatsoever that the IOM panel was motivated by an anti-Catholic or anti-religious bias. Instead, the Bishops claim that the no-copay-contraception requirement “implicitly” targets Catholicism “by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics.”³⁷ But *Employment Division* and *Church of the Lukumi* stand for the proposition that a party seeking to challenge a government action that burdens religious exercise must demonstrate that the law is not neutral. Merely saying that it is not neutral is not sufficient. And unlike in the case of the ordinance in *Church of the Lukumi* that plainly targeted Santeria practitioners, there is no evidence that the IOM intended to discriminate against Catholics, nor is there a history of actions by the IOM or HHS that demonstrate anti-religious or anti-Catholic animus.

Indeed, IOM took testimony from all members of the public wishing to present it, including representatives of religious organizations, who testified both in support of, and in opposition to, a requirement for contraception. HHS, in adopting the IOM’s recommendations, has provided an unprompted (and, we believe, unnecessary) exemption from the requirement for religious employers, and solicited further comment on the rulemaking, thus inviting submissions regarding the views of religious institutions. Moreover, the legislative history on the Women’s Health

³⁵ 508 U.S. 520 (1993).

³⁶ *Id.* at 526, 527.

³⁷ *Comments of the United States Conference of Catholic Bishops*, Interim Final Rules on Preventive Services, CMS-9992-IFC2, Aug. 31, 2011, at 8.

Amendment is replete with information regarding the financial challenges women face in accessing preventive health services. Nothing in the record suggests even the slightest animus towards religious institutions. In sum, every decision maker, at every stage of the process, has acted with nothing less than civility and solicitude to produce an open and accountable process for decisions. Instead of targeting religious institutions, the IOM and HHS have consistently engaged religious institutions and sought out their views.

In addition, we note that this rule also would fail to affect Catholics in a manner that is any different than the manner in which it affects the general population, underscoring the lack of animus towards religious practice or believers. Like everyone else, those religious adherents who decline to benefit from no-copay contraceptive coverage need not use it. Yet for the 98 percent of Catholic women who use contraception at essentially the same rate as the general population, the benefit will serve their interests as it does those of everyone.³⁸ Because it will actually provide a benefit to, rather than harm, an overwhelming majority of Catholics, the Bishops' argument that the law demonstrates an anti-Catholic animus must fail.

IV. The No-Copay-Contraception Requirement Does Not Violate the Religious Freedom Restoration Act, Nor is a Religious Exemption Required

The Supreme Court has not vacillated on its understanding of the Free Exercise Clause, and it is clear that under the Constitution, the no-copay-contraception requirement is a permissible exercise of governmental authority. For its part, Congress responded to the *Employment Division* decision by enacting the Religious Freedom Restoration Act (42 U.S.C. § 2000bb-1 *et seq.*) (“RFRA”). RFRA explicitly reinstated the compelling-interest test for laws that burden religious exercise – the same test rejected in *Employment Division*.³⁹ Under RFRA, where the federal government⁴⁰ seeks to “substantially burden” a person’s exercise of religion, it must demonstrate that the application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.⁴¹ RFRA applies to all federal law and the implementation of that law, unless the law “explicitly excludes such application.”⁴²

The no-copay-contraception requirement – even without a religious exemption – does not violate RFRA. First, the burden upon religious exercise is not “substantial,” as required by the statute. And second, even if the burden were substantial, the government has sufficiently demonstrated a compelling interest in ensuring access to no-copay contraception, and has shown

³⁸ CENTERS FOR DISEASE CONTROL, NATIONAL SURVEY OF FAMILY GROWTH, NATIONAL HEALTH STATISTICS REPORT, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006–2008 (Mar. 3, 2011) available at <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>.

³⁹ 42 U.S.C. § 2000bb(b)(1).

⁴⁰ RFRA was originally applicable to the States as well as the federal government. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that Congress lacked the statutory authority to apply RFRA to the States. It remains applicable to the federal government.

⁴¹ 42 U.S.C. § 2000bb-1(b).

⁴² 42 U.S.C. § 2000bb-3(b).

that a no-copay-contraception requirement is the least restrictive means of accomplishing that compelling goal.

A. The Religious Freedom Restoration Act’s Compelling-Interest Test is Inapplicable Because the No-Copay-Contraception Requirement Does Not “Substantially Burden” the “Exercise” of Religion

1. Providing Preventive Health Services Without Cost Sharing Has Nothing to Do With the “Exercise” of Religion

RFRA’s compelling-state-interest test only applies where the underlying government action places a substantial burden upon a person’s “exercise” of religion. RFRA’s “definition” of the term, “exercise of religion,” is entirely unhelpful; it defines the “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁴³ The Supreme Court, however, has held that the “exercise of religion” “often involves not only belief and profession *but the performance of...physical acts* [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine...”⁴⁴

The Bishops make no claim that unprotected sexual activity is central to, or even a part of, their worship or religious practice. In fact, health needs addressed by the requirement have no relation to any recognized religious practice, and therefore the Bishops’ statements of their disapproval of contraception constitutes part of their religious beliefs, rather than an exercise of religion.

The Bishops are also unable to point to any case in which the refusal to provide insurance coverage – even on religious grounds – was considered to be a religious exercise, and, as described below, several State supreme courts have upheld similar contraceptive-coverage requirements over objections by religious organizations on similar grounds.⁴⁵

The belief/exercise distinction is of paramount importance to the courts. And, indeed, virtually all cases upholding RFRA-based challenges have focused on the practice of religious worship, rather than abstract beliefs. The Supreme Court, for example, in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*,⁴⁶ upheld a RFRA-based challenge to the Controlled Substances Act, which prohibited members of a religious sect from imbibing *hoasca*, an hallucinogenic tea – a “central” part of the sect’s communion ritual. The lower courts have similarly focused on religious rituals when determining whether a practice constitutes a “religious exercise.”⁴⁷

⁴³ 42 U.S.C. § 2000cc-5(7). RFRA’s definition of “exercise of religion” is the same as “religious exercise” in the Protection of Religious Exercise in Land Use and by Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*

⁴⁴ *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (quoting *Employment Division*, 494 U.S. at 877) (emphasis added).

⁴⁵ *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

⁴⁶ 546 U.S. 418 (2006).

⁴⁷ *See, e.g., Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009) (inmate deprived of the use of sukkah, a mandatory part of the Jewish “Sukkot” festival made a threshold showing of a burden upon “religious exercise”); *Rouser v. White*, 630 F. Supp. 2d 1165 (E.D. Cal. 2009) (prison’s failure to hire a chaplain to attend to Wiccans’ religious

What the Bishops seek is to deny access to needed health services in an effort to coerce employees into kowtowing to church dogma. While religious employers may urge and cajole others to obey religious proscriptions on sexual activity, they may not withhold needed health services from their employees to enforce their will. The very notion that the Bishops would hold their employees' health hostage flies in the face of the very definition of sexual health used by the Centers for Disease Control and the World Health Organization:

Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, *free of coercion*, discrimination and violence.⁴⁸

Moreover, it is clear that the mere availability of a benefit does no violence to their beliefs. Should the Bishops' arguments related to the undesirability of using contraception be accepted, those who accept them will not use the benefit. But those 98 percent of Catholics who use contraception should be entitled to make that choice for themselves, as a matter of their own beliefs and health.

For this reason, it is critical that HHS not permit an exemption that would allow the Bishops or others to deny coverage for needed health services in an attempt to coerce behavior utterly unrelated to religious practice.

2. Even if the No-Copay-Contraception Requirement Imposes a Burden on Religious Exercise, that Burden is Not “Substantial”

RFRA imposes no restrictions whatsoever on government actions that burden religious exercise. Rather, it subjects government action to a “compelling interest” test *only* if the burden upon religious exercise is “substantial.”⁴⁹ Even assuming, *arguendo*, that the no-copay-contraception requirement did burden “religious exercise,” the burden would be *de minimus*, or at most insubstantial.

Religious employers (as well as non-religious ones) already cover health services to which they may, in principle, object. For example, existing Catholic employers' health insurance plans may cover maternity care for unwed mothers or HIV tests without regard to sexual orientation; existing Latter Day Saints employers' insurance may cover emergency services for injuries that happen to have been caused by reckless, alcohol-fueled behavior.

In their comments to HHS, the Bishops attempt to bolster their claim that the religious-exercise burden is “substantial” by claiming that the no-copay-contraception requirement

needs constituted a burden upon the exercise of religion); *Henderson v. Ayers*, 476 F. Supp. 2d 1168 (C.D. Cal. 2007) (inmate prohibited from attending Friday Islamic prayer services stated a claim that his exercise of religion had been burdened).

⁴⁸ Centers for Disease Control, *Sexual Health*, available at <http://www.cdc.gov/sexualhealth> (emphasis added).

⁴⁹ RFRA, 42 U.S.C. § 2000bb-1.

interferes with church governance; that it compels speech; and that it compels unwanted association. Each of these three claims rings hollow.

a. The No-Copay-Contraception Requirement Does Not Interfere With Church Governance

The no-copay-contraception requirement does not interfere with church governance. The Bishops, in their comments, quote the Supreme Court’s decision in *Kedroff v. St. Nicholas Cathedral* for the proposition that churches can “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁵⁰ As a preliminary matter, *Kedroff* concerned an intra-church dispute within the Russian Orthodox Church between those deferring to the head of the American branch and the Moscow-based church hierarchy. The dictum cited by the Bishops stands for the proposition that government should not weigh in on intra-church disputes, and is wholly irrelevant to the instant matter: promulgation of a neutral, generally applicable policy that affects all employers – whether secular or religious – equally.

Moreover, the Bishops only selectively quote the *Kedroff* decision. The very next sentence following the quotation above makes it even more obvious that the Court’s admonition that government not interfere with church governance was strictly limited to *internal* church policies: “Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” Indeed, the notion that government should not interfere in the inner workings of religious institutions is obvious and non-controversial. Thus, for example, courts presumptively avoid wading into religiously motivated hiring decisions: “it would surely be unconstitutional under the First Amendment to order the Catholic Church to reinstate, for example, a priest whose employment the Church had terminated on account of his excommunication based on a violation of core Catholic doctrine.”⁵¹

Here, however, the proposed HHS rule is a neutral and generally applicable policy that requires all employers, including all religiously affiliated employers, to offer insurance coverage for certain preventive services, including contraception. There is no governmental intrusion upon the internal doctrinal workings of the church. The government is not mandating that women be ordained as priests. It is not determining the proper relationship between cardinals and bishops. In short, the no-copay-contraception requirement has nothing to do with church governance.

⁵⁰ 344 U.S. 94, 116 (1952).

⁵¹ *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008).

b. The No-Copay-Contraception Requirement Does Not Compel Speech

The Bishops also contend that the no-copay-contraception requirement compels speech. The gist of this claim is that by requiring religious employers to cover contraception without cost sharing, the religious employers are being forced to communicate a pro-contraception message in violation of their beliefs. This argument is not credible, because nothing in the no-copay-contraception requirement requires the Catholic Church – or any religious institution – to articulate its support for the government policy. It must simply obey the law and provide the coverage. At the same time, religious institutions are free to speak out against contraception; priests may inveigh against birth control in sermons; churches may publish anti-contraception broadsides. They may even indicate to one and all that the extension of coverage for contraception is not the organization’s choice, but the result of a government requirement.

The limited instances where the courts have found unconstitutional compelled speech are cases in which the speaker was forced to make a particular statement of belief. For example, the Supreme Court struck down as unconstitutional a law requiring motorists to display the motto, “Live Free or Die,” on license plates.⁵² Similarly, the state may not compel students to salute the flag or recite the Pledge of Allegiance.⁵³ But as the California Supreme Court held, “Catholic [organizations’] compliance with a law regulating health care benefits is not speech.”⁵⁴ Indeed, the very idea that mere compliance with a law is compelled speech is absurd on its face. Thus, for example, a court dismissed as “ludicrous” a motorcyclist’s claim that a compulsory-helmet law compelled speech in support of the law.⁵⁵

c. The No-Copay-Contraception Requirement Does Not Force Believers to Associate

The no-copay-contraception requirement does not violate religious organizations’ freedom of association. The Bishops claim that including no-cost-sharing contraceptive coverage violates their “freedom of expressive association.” For support, they cite two cases in which groups were permitted to exclude *individuals* from their midst: a gay scoutmaster in the case of the Boy Scouts,⁵⁶ and a gay and lesbian group in the case of the St. Patrick’s Day parade.⁵⁷ The Bishops try to analogize paying for an insurance benefit they disapprove of to being forced to include an unwanted individual in a group.

Here, there is no unwanted association whatsoever. The law is not forcing the Bishops to allow atheists to become members, or to allow women to become ordained priests. Instead, the no-copay-contraception requirement merely requires religious employers to offer coverage to all employees already part of the organization or hired in the normal course of business. Because there is no forced association, the Bishops’ claim must be rejected.⁵⁸

⁵² *Wooley v. Maynard*, 430 U.S. 705 (1977).

⁵³ *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁴ *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

⁵⁵ *Buhl v. Hannigan*, 16 Cal. App. 4th 1612, 1226 n. 11 (1993).

⁵⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁵⁷ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

⁵⁸ In addition, the Bishops’ comments conveniently ignore the Supreme Court’s most recent case about religion and expressive association – *Christian Legal Society Chapter of the University of California, Hastings College of the*

B. The No-Copay-Contraception Requirement Furthers a Compelling Governmental Interest and Is the Least Restrictive Means of Furthering that Compelling Interest

Under RFRA, the government is permitted to substantially burden a person’s exercise of religion if: (1) it is in furtherance of a compelling governmental interest; and (2) if the burden being challenged is the least restrictive means of furthering that compelling governmental interest.⁵⁹ Even if the no-copay-contraception requirement substantially burdened religious exercise – which it does not – it would still be a permissible governmental exercise of power under RFRA.

1. The No-Copay-Contraception Requirement Furthers a Compelling Governmental Interest

The no-copay-contraception requirement is permissible under RFRA because it furthers a compelling governmental interest in women’s health; in children’s health; in women’s equality; in women’s autonomy; and in the health and wellbeing of third parties. In other words, religious employers seek a religious exemption that would adversely affect a host of other actors – women, children, and the families of those employed by religious organizations. The Bishops thus seek a religious exemption from a neutral law at the expense of third parties. But as the court observed in the California decision upholding a similar contraceptive-coverage requirement, “[w]e are unaware of any decision in which...the United States Supreme Court...has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties.”⁶⁰

a. The No-Copay-Contraception Requirement Furthers the Government’s Compelling Interest in Women’s Health

It ought to be axiomatic to state that the government has a compelling interest in the health of its people, including women. For example, in *Planned Parenthood v. Casey*, the Supreme Court held that while the state has an interest in protecting post-viability fetal life, even that interest must give way to the more compelling interest in protecting a woman’s health.⁶¹ Similarly, the Court struck down a law prohibiting so-called “partial birth abortions” as unconstitutional precisely because of the lack of “any exception ‘for the preservation of the...health of the mother.’”⁶²

Law v. Martinez, 130 S.Ct. 2971 (2010). In that case, the Court held that a religious law-school club can be required to admit all-comers pursuant to a neutral, non-discrimination policy. There is no expressive association at stake with regard to the no-copay-contraception requirement; if there were, it would be pursuant to a neutral, generally applicable policy (all employers must offer no-copay contraception), and thus be governed by *Martinez* rather than *Dale* or *Hurley*, neither of which involved the application of a neutral, non-discriminatory policy.

⁵⁹ RFRA, 42 U.S.C. § 2000bb-1(b)(1)-(2).

⁶⁰ *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 93 (2004).

⁶¹ 505 U.S. 833, 846 (1992) (plurality opinion).

⁶² *Stenberg v. Carhart*, 530 U.S. 914, 930 (citation omitted). While the Supreme Court subsequently upheld a federal prohibition on so-called “partial birth abortions,” it do so on the basis of congressional findings – to which the Court

These cases, and others, “unequivocally express the Supreme Court’s view as to the state’s compelling interest in preserving women’s health.”⁶³ And the fact that the Bishops and other religious objectors seek special treatment at the expense of women only strengthens the government’s interest. The California Supreme Court, for example, in reviewing claims regarding a similar law held, “[s]trongly enhancing the state’s interest is the circumstance that any exemption from the [contraceptive-coverage requirement] sacrifices the affected women’s interest in receiving equitable treatment with respect to health benefits.”⁶⁴

The IOM panel fully explained why access to a full range of FDA-approved contraceptives is essential for women’s health. In particular, women without access to safe and affordable contraceptives are more likely to experience unintended pregnancies, leading to a host of health-related complications. Reducing the numbers of pregnant women who suffer from health complications is a critically important state interest: the “United States Supreme Court has recognized that the state has a compelling interest in preserving the health of expectant mothers.”⁶⁵

b. The No-Copay-Contraception Requirement Furthers the Government’s Compelling Interest in Improving Children’s Health

In addition, the IOM panel catalogued the numerous health problems that affect the development of children that result from unintended or improperly spaced pregnancies when those pregnancies are taken to term. Such children can experience low birth weight and developmental difficulties. It is obvious that the state has a compelling interest in ensuring the health of the nation’s children, as the Supreme Court has stated directly: “[s]afeguarding the physical and psychological well-being of a minor...is a compelling [interest].”⁶⁶

c. The No-Copay-Contraception Requirement Furthers the Government’s Compelling Interest in Combating Sex-Based Inequality

While promoting women’s health was a primary motivation behind the no-copay-contraception requirement, it was also designed to help eliminate sex-based inequalities in the healthcare system – namely, the fact that women significantly outspend men on healthcare-related services, in significant part due to costs associated with contraception and unintended pregnancies. And Congress has recognized that discrimination against women based on “pregnancy, child-birth, or related medical conditions” constitutes discrimination on the basis of sex.⁶⁷

deferred – that the procedure was “never medically necessary” to protect a woman’s health. *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

⁶³ *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28, 35 (Ariz. 2002).

⁶⁴ *Catholic Charities of Sacramento*, 85 P.3d at 93.

⁶⁵ *Simat*, 56 P.3d at 33-34.

⁶⁶ *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 607 (1982), *quoted in PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1198 (10th Cir. 2010) (holding that “states have a compelling interest in and a solemn duty to protect the lives and health of the children within their borders.”).

⁶⁷ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

Not surprisingly, the Women’s Health Amendment, which added no-copay coverage of preventive services for women, was motivated by a desire to eliminate sex-based inequalities in healthcare spending. Senator Barbara Mikulski, the driving force behind the Women’s Health Amendment, emphasized that “[w]omen of childbearing age incur 68 percent more out of pocket health care costs than men,” and stated that “We [women] face gender discrimination.”⁶⁸

Consequently, the elimination of sex-based discrepancies is a compelling state interest. For example, in *Catholic Charities of Sacramento v. Superior Court*, the California Supreme Court held that a contraceptive-coverage statute “serves the compelling state interest of eliminating gender discrimination.”⁶⁹ The discrimination the court referred to was the same fact pointed to by Senator Mikulski: “women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in part to the cost of prescription contraceptives and the various costs of unintended pregnancies, including health risks, premature deliveries and increased neonatal care.”⁷⁰ The no-copay-contraception requirement was thus designed to address the state’s compelling interest in eliminating the discriminatory impact of sex-based healthcare-spending inequalities.

d. The Government Has a Compelling Interest in Promoting Women’s Autonomy

Access to affordable contraception is essential – unlike almost any other health service – in ensuring individuals’ independence and autonomy. The Supreme Court has long held, for example, that laws prohibiting the use of contraceptives are an unconstitutional violation of the right to privacy.⁷¹ In so doing, the Court held that, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷²

Because, by virtue of biology, only women can become pregnant, the importance of contraceptive access to women is particularly compelling. As Justice O’Connor explained, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”⁷³ Other courts have similarly noted the important role contraception plays in assuring women’s equal participation as citizens: “the adverse economic and social consequences of unintended pregnancies fall most harshly on women and interfere with their choice to participate fully and equally in the ‘marketplace and the world of ideas.’”⁷⁴ Consequently, the law recognizes women’s special need for access to contraception: “the law is no longer blind to the fact that only women can get pregnant, bear

⁶⁸ Senator Barbara Mikulski, Press Release: *Mikulski Puts Women First in Health Care Debate* (Nov. 30, 2009), available at <http://mikulski.senate.gov/media/pressrelease/11-30-2009-2.cfm>.

⁶⁹ See *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 92 (Cal. 2004).

⁷⁰ *Id.* at 92.

⁷¹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (law prohibiting the use of contraceptives violates married couple’s right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (law prohibiting the distribution of contraceptives to unmarried people violates the right to privacy).

⁷² *Eisenstadt*, 405 U.S. at 453.

⁷³ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992).

⁷⁴ *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266, 1273 (W.D. Wash. 2001).

children, or use prescription contraception. The special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.”⁷⁵

Under RFRA, the government must demonstrate a compelling interest to justify a substantial burden of religious exercise. But with respect to contraception, that burden is effectively neutralized, because the government would be required to simultaneously demonstrate a compelling interest *in limiting access to contraception*. The Supreme Court has held that “[r]egulations imposing a burden on a decision as fundamental as whether to bear or beget a child may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”⁷⁶

As part of any consideration of broadening the exemption, the government must also weigh the resulting incursion on women’s fundamental reproductive rights. Because “the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood,” and preserves the autonomy of decision making concerning the “private realm of family life which the state cannot enter,”⁷⁷ these interests are also acute. Only a rule preserving freedom of a choice of contraceptive and the accompanying insurance coverage fully respects the rights to privacy and decisional autonomy at the heart of this constitutional sphere.

Indeed, we have amply demonstrated that the choice of health-plan coverage is ancillary to any reasonable definition of religious exercise, whereas access to contraception is a constitutionally protected right. The government cannot and should not allow third parties to interpose themselves and thereby interfere with employees’ access to affordable contraception.

e. The No-Copay-Contraception Requirement Furthers the Government’s Compelling Interest in Protecting the Interests of Third Parties

The no-copay-contraception requirement, in addition to promoting women’s and children’s health and women’s equality, also protects others. Pregnancy is a unique condition because it impacts other people – spouses and domestic partners, other children, and extended families. An unintended pregnancy affects the woman, her partner, and often her family in a qualitatively different way than other kinds of medical conditions. Consequently, any determination of the relevant state interest in the no-copay-contraception requirement must take into account not only the interests of women and children, but also of the women’s partners and families.

2. The No-Copay-Contraception Requirement is the Least Restrictive Means of Furthering the Government’s Compelling Interest

Not only does the no-copay-contraception requirement serve a compelling government interest; it is also the least restrictive means of furthering that interest. The system of ensuring

⁷⁵ *Id.* at 1271.

⁷⁶ *Carey v. Population Services Int’l*, 431 U.S. 678, 686 (1977). *See also Casey*, 505 U.S. at 851 (“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”), *quoting Carey*, 431 U.S. at 685.

⁷⁷ *Casey*, 505 U.S. at 852 (*quoting Prince v. Massachusetts*, 321 U.S. 158 (1944)).

coverage for preventive services for women is an essential part of the Affordable Care Act. As Senator Mikulski noted, “[a]ccess to preventive health care is essential for improving the health of our nation and bringing our health care costs back under control.”⁷⁸ This “essential” element of the Affordable Care Act cannot function if every religious objector is permitted to opt out of parts of the system: “[i]nsurance would basically become unworkable if everyone got a veto over what services any other member of the insurance pool could use.”⁷⁹

In *United States v. Lee*, the Supreme Court denied a religious exemption to the social-security system, reasoning that “it would be difficult to accommodate the comprehensive social security system with myriad exceptions flying from a wide variety of religious beliefs.”⁸⁰ Its holding recognized that any complex and all-encompassing system cannot function if every individual is permitted to opt out based on a religious qualm: “The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a matter that violates their religious belief.”⁸¹ The “broad public interest” in maintaining a cohesive system “is of such a high order,” the Court stated, that “religious belief in conflict... affords no basis for resist[ance].”⁸² The Supreme Court has similarly held that religious foundations are not entitled to an exemption from the system of labor standards and must comply with minimum wage, overtime, and employment-related recordkeeping requirements.⁸³

More recently, and in the context of RFRA, the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* held that “the Government can demonstrate a compelling interest in **uniform application** of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.”⁸⁴ While in *O Centro Espirita* the Court permitted a religious exception to the Controlled Substances Act to allow a religious sect to use a hallucinogenic tea, the facts there were utterly different from those present here. For example, in *O Centro Espirita*, the government conceded that it did not have a compelling interest in enforcing the law, and the health impact at stake from permitting the very limited use of the tea was “in equipoise.”⁸⁵ In contrast, with respect to the no-copay-contraception requirement, the government has a compelling interest and the health impact of permitting employers to opt out of providing contraceptive coverage without a copay for women is great.

Other courts have similarly recognized in the context of RFRA that comprehensive systems admitting no exemptions are the least restrictive means of furthering compelling governmental

⁷⁸ Sen. Barbara Mikulski, Press Release: *Mikulski, Senate Colleagues Urge Secretary Sebelius to Swiftly Adopt IOM’s New Recommendations on Women’s Preventive Health* (July 22, 2011), available at <http://mikulski.senate.gov/media/pressrelease/7-22-2011-6.cfm>.

⁷⁹ Adam Sonfield, Senior Public Policy Associate, Guttmacher Institute, *quoted in Lucia Rafanelli, Inaccurate Conceptions*, AMERICAN SPECTATOR: THE SPECTACLE BLOG (Sept. 26, 2011), available at <http://spectator.org/blog/2011/09/26/inaccurate-conceptions>.

⁸⁰ 455 U.S. 252, 259-60 (1982).

⁸¹ *Id.* at 260.

⁸² *Id.* at 260.

⁸³ *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985).

⁸⁴ 546 U.S. 418, 435 (2006)

⁸⁵ *Id.* at 426.

objectives. For example, in *Jenkins v. Commissioner of Internal Revenue*,⁸⁶ the Second Circuit Court of Appeals noted that “It is...well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons” and consequently rejected the claim of a taxpayer challenging on religious grounds the collection of a portion of his taxes to be used for military spending.⁸⁷ Other courts have denied RFRA-based claims seeking exemptions to the Bald and Golden Eagle Protection Act,⁸⁸ the Endangered Species Act,⁸⁹ and the Controlled Substances Act.⁹⁰ Certainly the government’s ability to enforce a comprehensive system to protect women’s health is at least as important as one to prevent the trade in eagle feathers.⁹¹

V. International Human Rights Law Requires Governments to Ensure Access to Affordable Contraception and to Prevent Third Parties – Such as Employers – from Interfering With that Access

A. International Human Rights Law Requires States to Ensure Access to Affordable Contraception

Binding international human rights law recognizes women’s fundamental right to access to contraception. For example, Article 3 of the International Covenant on Civil and Political Rights – to which the United States is a state party – requires states to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the...Covenant.” The Human Rights Committee, the treaty-monitoring body charged with authoritatively interpreting the Convention, has specifically cited the “high cost of contraception” as a potential treaty violation.⁹² And only last year, the Human Rights Committee instructed a state party to “strengthen measures aimed at the prevention of unwanted pregnancies, by *inter alia* making a comprehensive range of contraceptives widely available at an affordable price and including them on the list of subsidized medicines.”⁹³

Other human rights instruments, all of which the United States has signed, similarly require affordable access to contraception. For example, the Convention on the Elimination of All Forms of Discrimination Against Women includes article 12, which requires states to “eliminate discrimination against women in the field of health care in order to ensure...access to health care services, *including those related to family planning*.”⁹⁴ The Committee on the Elimination of

⁸⁶ 483 F.3d 90 (2d Cir. 2007).

⁸⁷ *Id.* at 92. See also *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (RFRA does not prohibit the collection of revenue that will be used for purposes religious adherents find objectionable).

⁸⁸ *United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. 2008) (denying RFRA claim where defendant sought a religious exemption to law prohibiting the possession of eagle feathers and talons).

⁸⁹ *United States v. Adeyemo*, 624 F. Supp. 2d 1081 (N.D. Cal. 2008) (denying RFRA claim where defendant sought a religious exemption to a prohibition on the importation and transportation of leopard skins into the United States).

⁹⁰ *United States v. Lepp*, No. CR 04-0317 MHP, 2007 WL 2669997 (N.D. Cal. 2007) (denying RFRA claim where defendant sought a religious exemption to the Controlled Substances Act).

⁹¹ See *Vasquez-Ramos*, *supra*.

⁹² *Concluding Observations of the Human Rights Committee: Poland*, U.N. Doc. CCPR/CO/82/POL (2004), at para. 9.

⁹³ *Concluding Observations of the Human Rights Committee: Poland*, U.N. Doc. CCPR/C/POL/CO/6 (2010), at para. 12.

⁹⁴ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, at art. 12(1).

All Forms of Discrimination Against Women, the treaty-monitoring body tasked with interpreting the Convention, has held that article 12 obligates states to “take measures to increase the access of women and adolescent girls to affordable health-care services, including reproductive health care, and *to increase access to information and affordable means of family planning...*”⁹⁵

The Committee on Economic, Social and Cultural Rights, charged with monitoring the International Covenant on Economic, Social and Cultural Rights (another treaty the United States has signed) emphasized the importance of access to affordable contraception in its General Comment on the Right to the Highest Attainable Standard of Health. In order to fulfill their treaty obligations, states must endeavor to “provide access to a full range of high quality and *affordable health care, including sexual and reproductive services...*”⁹⁶

B. International Human Rights Law Requires Governments to Protect Access to Contraceptive Service from Interference by Third Parties, Such as Employers

Under international human rights law, the right to health – including the aforementioned right to access affordable contraception – must be respected, protected, and fulfilled by governments.⁹⁷ A government meets its obligation to *respect* the right to health by not interfering with individuals’ enjoyment of the right. And it *fulfills* the right by affirmatively facilitating access to health-related services, including “sexual and reproductive health services.”⁹⁸ The no-copay-contraception requirement is a positive step towards respecting and protecting women’s right to health, including reproductive health.

However, under international human rights law, a government must also *protect* the right to health from interference: “States should also ensure that third parties do not limit people’s access to health-related information and services.”⁹⁹ This means that in order to abide by the United States’ international commitments, it is not enough for the government to facilitate no-cost-sharing access to contraceptives. Instead, the government must also ensure that third parties – such as religious employers – are not permitted to do what government may not, and interfere with individuals’ right to access affordable contraception. Consequently, the proposed religious exemption, which allows private employers to impede individuals’ right to access affordable contraception, violates international norms and our commitments under the international human rights treaties that the United States has signed.

VI. Any Religious Exemption to the No-Copay Contraception Requirement Must be Limited to Individuals Employed Specifically for Ministerial Duties

⁹⁵ See, e.g., *Concluding Observations of the CEDAW Committee: Slovakia*, U.N. Doc. CEDAW/C/SVK/CO/4 (2008), at para. 22.

⁹⁶ *Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003), at para. 21.

⁹⁷ *Id.* at para. 33.

⁹⁸ *Id.* at para. 36.

⁹⁹ *Id.* at para. 35.

For the reasons set forth above, the no-copay-contraception requirement – without any exemption – is both constitutional and permissible under RFRA. Any exemption Congress may contemplate should be strictly limited to employees in ministerial positions.¹⁰⁰ Thus, the proposed language in section 147.130 should be changed as follows:

(a)(1)(iv)(A)) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines **for those individuals employed specifically for ministerial duties.**

This is a more narrow and targeted means of achieving the goal of balancing the conscience-rights interests of insurers/employers/hospitals and employees/patients.

A. Religious-Conscience Rights Belong to Individuals, Not Institutions

As currently phrased, however, the proposed religious exemption protects the rights of religious employers at the expense of individual employees, giving houses of worship a *de facto* veto over the health coverage of their employees. But the Supreme Court has repeatedly emphasized that conscience rights inure to individuals, not institutions. For example, in *McCreary County, Kentucky v. ACLU of Kentucky*, the Court noted that “[t]he Framers and the citizens of their time intended...to protect the integrity of **individual** conscience in religious matters...”¹⁰¹ *Wallace v. Jaffree* similarly held that “the Court has unambiguously concluded that the **individual** freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”¹⁰² And in *Glickman v. Wileman Brothers & Elliott, Inc.*, the Court proclaimed that “at the ‘heart of the First Amendment [is] the notion that an **individual** should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience.”¹⁰³

As written, the exemption proposed by HHS cedes to employers the religious conscience rights that rightfully belong to the employees. But individual employees – and not their employer – should have the religious conscience right to decide whether they wish to receive co-copay coverage for contraception. The draft exemption, however, permits a religious institution to trample upon the religious beliefs of their employees – whether or not they agree with those views, and whether or not they are even members of the same religious group. For example, a Methodist groundskeeper employed by a Catholic parish will be unable to access no-copay contraception – regardless of her own conscience or religious beliefs – by virtue of happening to

¹⁰⁰ We use the term “ministerial position” here to refer to those hired to perform exclusively or almost exclusively religious functions as part of the house-of-worship’s religious hierarchy, such as priests, rabbis, nuns, or imams. We do not endorse the broader meaning of the term that has been used by some of the lower courts, which have incorrectly broadened the term to include music directors, teachers at religiously affiliated colleges, and the like.

¹⁰¹ 545 U.S. 844, 876 (2005) (emphasis added).

¹⁰² 472 U.S. 38, 53 (1985) (emphasis added).

¹⁰³ 521 U.S. 457, 472 (1997) (emphasis added).

work for a church. The fact that the groundskeeper does not share the religious beliefs of the church¹⁰⁴ and engages in no religious duties whatsoever – and indeed, that she performs an essentially secular function – is of no moment. Under the interim rule, the church, as her employer, can dictate to her which health benefits she can access. Indeed, the logic underlying the interim rule would also allow a church to deny neonatal benefits to a mother whose child was born out of wedlock;¹⁰⁵ or to all male employees;¹⁰⁶ or to gay or lesbian employees.¹⁰⁷ And Christian Scientist churches would be entitled to deny all medical coverage except spiritual care.¹⁰⁸

B. Religious Exemptions Should Be Limited to Employees Employed Specifically for Ministerial Duties

Any religious exemption to the no-copay-contraception requirement should be limited to religious-institution employees hired to perform ministerial duties, such as rabbis, priests, or imams. These employees are hired specifically because of their religious beliefs and leadership of the religious institution and have specifically volunteered for such designation. The Fifth Circuit Court of Appeals noted, for example, that “[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose.”¹⁰⁹ Similarly, the Fourth Circuit Court of Appeals recognized that “[t]he right to choose ministers...underlies the wellbeing of a religious community...for perpetuation of a church’s existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.”¹¹⁰

Because ministers are selected precisely because of their religious beliefs and leadership, offering them an exemption is a permissible – though unrequired – accommodation of religion. But other employees of religious institutions – be they secretaries, groundskeepers, or receptionists – are not the “lifeblood” of a house of worship; nor does a house of worship depend upon such non-ministerial employees to “preach its values, teach its message, and interpret its doctrine.” Because non-ministerial employees are not hired because of their religious beliefs and leadership, they ought not to be held hostage to the religious employers’ religious dogma and denied a health benefit generally available to everyone else.

¹⁰⁴ Although the interim rule limits its applicability to organizations that “*primarily* employ[] persons who share [their] religious tenets,” (emphasis added) it is clear that religious institutions would be exempt from providing no-copay contraception to any non-believers who work there.

¹⁰⁵ Numerous religions, including Roman Catholicism, disapprove of sexual relations outside of marriage.

¹⁰⁶ See, e.g., Re-Formed Congregation of the Goddess, International, *RCG-I Membership*, available at <http://www.rcgi.org/members/members.asp> (congregation only permits women to become full members).

¹⁰⁷ Numerous religions disapprove of homosexuality.

¹⁰⁸ Lest this sound like hyperbole, see Fox13now.com, *Should State Health Exchanges Pay for Spiritual Care*, Sept. 25, 2011, available at <http://www.fox13now.com/news/kstu-spiritual-care-should-state-health-exchanges-pay-for-spiritual-care-20110925,0,5284457.story> (Utah’s Legislative Health Care Reform Task Force discussed proposals to permit insurance coverage for ‘spiritual care’... “[t]he legislature heard personal stories [from the] Christian Science... a church[, which] believes spiritual care should replace medical care.”).

¹⁰⁹ *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972).

¹¹⁰ *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985).

VII. Other Key Protections Would Be Required If the Exemption is Maintained or Expanded, Including a Mechanism to Allow Affected Employees to Obtain No-Copay Contraceptive Coverage

As the above history indicates, if Congress decides to maintain or expand the proposed exemption, it must establish a robust and clear set of protections for women's health. For example: 1) Congress should exclude from any exemption contraception prescribed for a medical purpose unrelated to birth control; 2) employees subjected to an employer exemption should be allowed to otherwise obtain contraceptive coverage free of cost through a state or federal program for an extension of coverage; 3) employees should be given appropriate advance notice of the employer's exemption and the resulting absence of coverage and provided at the same time with information required to obtain coverage elsewhere; and 4) employers should be required to certify that they comply with each of the exemption's requirements and this documentation should be submitted to the Department of Health and Human Services.

The distinct autonomy and privacy interests that individuals have in accessing family planning services and in reproductive health require a system in which individuals denied contraceptive coverage due to the religious exemption are provided with an alternative means to obtain contraceptive coverage. Such coverage could be offered through a federally mandated insurance supplement or through a special program in the Exchanges. Without such a mechanism, the religious beliefs or consciences of the many individuals who are employed at houses of worship will be trampled upon by their employers' decision to seek an exemption.

Consistent with privacy safeguards, Congress should require HHS to publish annually data on the extent to which exemptions have been allowed from the rule, the number of policyholders impacted by the exemption by state, the mechanisms by which these policyholders have been offered contraceptive coverage from another source, and any monitoring and enforcement activity related to the exemption or certification of exemption.

VIII. Conclusion

Any policy proposal concerning individuals' right of conscience must proceed from the understanding that *all individuals'* consciences must be protected. That includes individual employers and doctors who object to contraception – but also employees, patients, and doctors who do not object to it. The religious exemption proposed by HHS protects the conscience rights of the church hierarchy at the expense of employees, including non-ministerial employees who may not share the church's dogmatic view of contraception.

The proposed insurance- and care-refusal bill – H.R. 1179 – goes light-years beyond the HHS proposal and permits insurers, employers, and hospital administrators to impose their beliefs on policyholders, employees, and patients. It privileges the conscience rights of the 1% who disavow contraception at the expense of the 99% of American women – including 98% of Catholics – who do use contraception.

Finally, a religious exemption is required by neither the Constitution nor the Religious Freedom Restoration Act. Promulgating a broad religious exemption that trammels upon the

rights of the 99% of women who use contraception is bad policy – undermining the goals of the no-copay-contraception to improve the health of women and children, and reducing America’s astronomical unintended pregnancy rate. Congress should implement policies motivated by public health and science – not dictated by theology or religious dogma.

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