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Rebutting Cases Commonly Cited by Groups Seeking an Expanded Religious Exemption

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A number of religiously affiliated organizations[1] submitted comments to the Department in favor of a broader religious exemption. These comments, which are nearly identical in substance, commonly cite a handful of cases to bolster their argument that the Free Exercise Clause of the First Amendment to the U.S. Constitution requires a broader exemption. All of these cases, however, are inapposite to the question, as demonstrated below.

Case	**Holding**	**Proposition for Which the Case is Cited**	**Why the Case is Distinguishable**
Larson v, Valente, 456 U.S. 228 (1982).	Under the First Amendment, a law granting a denominational preference – preferring one religion to another – is subject to strict scrutiny and can only be justified by a compelling governmental interest. *Larson*, 456 U.S. at 246-47.	"The government may not pick and choose among difference religious organizations when it imposes some burden." **Note:** The Council for Christian Colleges and Universities, Wheaton College, and the University of Sioux Falls all claim to be quoting *Larson*. In fact, no such sentence appears in *Larson* or in any other case.	The statute in Larson targeted religious groups that solicited more than 50 percent of their funds from nonmembers. The Supreme Court found that this statute made "explicit and deliberate distinctions between different religious organizations." *Larson*, 456 U.S. at 247. This violated the Constitution's prohibition on laws favoring one religious denomination over another. In contrast, the no-copay-contraception requirement is a neutral, generally applicable law that mandates a baseline benefit for members of the public. The law is not based on anti-religious animus or a denominational preference.
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).	The National Labor Relations Board does not have jurisdiction over teachers at church-operated schools, whether those schools are	"It is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very	In *NLRB*, the NLRB differentiated between "religiously affiliated schools" and "completely religious schools," and claimed jurisdiction only over "religiously

[1] The religiously affiliated groups that have submitted nearly identical comments include the Council for Christian Colleges and Universities, Wheaton College, and the University of Sioux Falls.

	"completely religious" or "religiously associated."	process of inquiry leading to findings and conclusions." *NLRB*, 440 U.S. at 502. The comments of the religiously affiliated institutions argue that *NLRB* stands for the proposition that the government may not determine which institutions qualify or do not qualify for a religious exemption.	affiliated schools." The case is not applicable with respect to the no-copay-contraception requirement, because the proposed religious exemption distinguishes between houses of worship and religiously affiliated entities. In order to be analogous to *NLRB*, the exemption would have to distinguish between "completely religious" versus "religiously associated" houses of worship. In addition, NLRB explicitly underscored the appropriateness of the NLRB's exercise of jurisdiction over non-teacher employees at religious schools, including rectors, procurators, clerical employees, cafeteria workers, etc.
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).	A religious exemption to Title VII's prohibition on religious discrimination in employment does not violate the Establishment Clause, even where a religious employer is hiring for a nonreligious position.	"The line [between secular and religious activities] is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Latter-Day Saints*, 483 U.S. at 336. The comments claim the case stands for the proposition that the government may not distinguish between an organization's religious and secular activities.	The comments quote a non-controversial statement of dictum – that line-drawing can be difficult in the context of determining which activities of a religious institution are religious and which are secular – and use that statement to suggest that the government may not engage in any such line-drawing. This analysis fails because it reads a singular sentence in a particular case in a complete vacuum, ignoring the fact that the Supreme Court and the lower courts have repeatedly upheld such line drawing – and that the highest courts of California and New York both rejected claims that the U.S.

			Constitution prohibits distinguishing between houses of worship on the one hand and religiously affiliated organizations on the others. *See Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 465 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal. 2004).
Mitchell v. Helms 530 U.S. 793 (2000).	A plurality of the Court held that a program to aid school programs, including parochial-school programs, does not violate the Establishment Clause.	"It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institutions religious beliefs." *Mitchell,* 530 U.S. at 828 The comments cite *Mitchell* for the proposition that the Department of Health and Human Services, by proposing the no-copay-contraception requirement, is "trolling" through organizations' religious belief.	This case is completely inapposite, because in no sense does the no-copay-contraception requirement have anything to do with an organization's particular religious beliefs. Instead, it is a neutral, generally applicable law. Indeed, the plurality opinion in *Mitchell* cited in the comments actually supports the constitutionality of the no-copay-contraception requirement, because according to the Court, the religious nature of an organization that may be affected by a law is irrelevant; the relevant inquiry is whether there is a "secular purpose." *Mitchell,* 530 U.S. at 827. Here, the no-copay-contraception requirement is based on sound medical and public health findings and the recommendation of the expert panel convened by the Institute of Medicine.

New York v. Cathedral Academy, 434 U.S. 125 (1977).	A statute allowing reimbursement to private schools – including parochial schools – for the costs of testing services required by state law violates the Establishment Clause.	"The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *Cathedral Academy*, 434 U.S. at 133. The comments cite this case for the proposition that the government cannot distinguish a "religious employer" from a "non-religious employer."	The quotation is taken out of context. The subject of the sentence is the Court's concern that in a broad program of reimbursement to parochial schools, the government cannot know whether the funds are being used to reimburse secular or religious expenses. The case is wholly inapplicable to the no-copay-contraception requirement, because nothing in the interim final rule requires the government to determine whether particular expenses by religious employers are religious or secular.
Keller v. State Bar of California, 496 U.S. 1 (1990).	State bar association may not use compulsory dues to pay for political activities not reasonably related to the regulation of the legal profession.	The comments cite *Keller* for the proposition that the Department of Health and Human Services may not require a religious institution to adopt a practice to which it objects.	The use of compulsory dues to fund purely ideological activities is completely different than requiring all employers – including religiously affiliated employers – to include certain services in their health-insurance coverage. Whereas the acts in *Keller* were purely ideological, here the no-copay-contraception requirement is based on sound medical science. Moreover, the majority in *Keller* distinguished a state bar association and its "very specialized characteristics" from government, which is obligated to "espouse the views of a majority." *Keller*, 496 U.S. at 12.
Boy Scouts of America v. Dale, 530 U.S. 640 (2000).	A state public-accommodation law may not be invoked to require the reinstatement of group member expelled for identifying as	The comments invoke *Dale* for the proposition that "compelling an organization to do something that they [sic] had a conscientious objection to	This case is not relevant, because it deals exclusively with organizations' rights to exclude individuals. The no-copay-contraception requirement in no way

	homosexual.	would violate their [sic] freedom of expressive association."	forces any organization to accept or exclude any individual as a member. Nothing in *Dale* suggests that a neutral, generally applicable law cannot be enforced against both secular and religious employers.