IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CATHOLIC CHARITIES OF SACRAMENTO, INC., Petitioners, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; DEPARTMENT OF MANAGED HEALTH CARE, *et al.*, Real Party in Interest	No. S099822 Court of Appeal No. C037025 Sacramento County No. 00AS03942

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF INTERNATIONAL UNION, AFL-CIO & CLC, COALITION OF LABOR UNION WOMEN, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 535, AND CALIFORNIA NURSES ASSOCIATION IN SUPPORT OF RESPONDENT SUPERIOR COURT OF SACRAMENTO COUNTY AND REAL PARTIES IN INTEREST OF STATE OF CALIFORNIA, ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE BRIEF*

To the Honorable Ronald M. George, Chief Justice of the California Supreme Court:

Pursuant to Rule 29.3(c) of the California Rules of Court, the United Food and Commercial Workers International Union, AFL-CIO, Coalition of Labor Union Women, Service Employees International Union-Local 525, and the California Nurses Association respectfully request permission to file the accompanying *amici curiae* brief in support of real parties in interest in this case.

The United Food and Commercial Workers Union (UFCW) is North America's largest private sector union. The UFCW is made up of 1.4 million members employed in many different industries. The UFCW International Headquarters is located in Washington, D.C., but there are hundreds of UFCW local unions all over the country and 28 UFCW local unions in California alone. UFCW works to improve the wages, benefits and working conditions of workers through organizing and collective bargaining. UFCW workers work under the protection of nearly 13,000 collective bargaining agreements. More than half of all UFCW members are women who participate at all levels of their union in leadership, at the

bargaining table and in organizing. Through the UFCW Working Women's Department and the UFCW Women's Network, analysis and research projects on how to improve the health care and benefits of women workers have been a longstanding priority.

The Coalition of Labor Women (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. For more than 20 years, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its 75 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as *amicus curiae* in numerous legal cases involving issues of gender discrimination and reproductive freedom. The CLUW Center for Education and Research engages in research, educational and training activities

designed to inform women about their reproductive choices and their freedom to choose various means of birth control and other protections for reproductive autonomy. The CLUW Center's Reproductive Rights Project and its Contraceptive Equity Project are two of many programs that are designed to educate and inform workers, union leaders and employers about issues of reproductive freedom and gender equality in the workplace. CLUW's educational and advocacy efforts have led to the adoption of numerous collective bargaining proposals and policies establishing insurance coverage for prescription contraceptives, drugs and other preventive care on the same terms as coverage afforded for other types of drugs, devices and preventive care and medical services.

The Service Employees International Union, Local 535 ("SEIU Local 535") is a labor organization representing over 23,000 employees throughout the State of California. Its members are predominately social services employees, who work for many different employers including those who are in some way associated with religious organizations, but are not religious employers within the meaning of the California Women's Contraceptive Equity Act. SEIU Local 535 is vitally interested in the issues before the Court since many of its members risk the loss of health

plan coverage for prescription contraceptives if the plaintiffs prevail in these proceedings.

California Nurses Association ("CNA") was formed in 1903 and was created and exists and operates for various purposes, including to establish and promote standards of nursing practice and patient care, to initiate and support quality health care and protect nursing practice in the State of California, and to represent Registered Nurses in relations with their employers concerning terms and conditions of employment and standards of professional practice and patient care. CNA has long been recognized as a leader in California in developing the professional role of Registered Nurses in meeting new and changing needs of patient care, and in assisting the legislature, licensing boards, and health regulatory agencies in responding to new developments in health care. CNA has assumed an active and very public role in the current debate on health care reform and ongoing controversies over the danger to the public health and risks to patients arising from the growing commercialization of health care and hospital industry restructuring and resulting erosion of patient care standards, elimination of health care services, and increasing restrictions on access to adequate and necessary health care services, including

reproductive health services. CNA represents some 44,000 Registered Nurses employed at 150 facilities statewide.

The ability of workers to access critical healthcare needs through their workplace is at the core of the present case, in which a religiously affiliated non-profit organization alleges that a state law mandating that employee health plans that offer prescription drug coverage include contraceptives violates constitutional protections of religious freedom.

Amici are familiar with the issues presented in this case and with the scope of the parties' presentation of the issues. Amici believes that there is necessity for additional argument, directed to the following issues: the religious exemption in the California Women's Contraception Equity Act is not a departure from current labor law, and the exemption appropriately accommodates diverse religious views while simultaneously serving the State's compelling interest in protecting the rights and health of the women workers of California.

For the foregoing reasons, UFCW, CLUW, SEIU Local 535, and CNA respectfully request leave to participate in the case as *amici* curiae pursuant to Rule 29.3(v) of the California Rules of Court and to file the accompanying *amici curiae* brief.

Sacramento, California
March 28, 2002

Respectfully submitted,

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STATEMENT OF FACTS

The California Women's Contraception Equity Act (the "Act) provides that every group or individual health care service plan contract and every group or individual disability (health) insurance policy that includes a pharmaceutical benefit package must provide coverage for prescription contraceptives. (Health and Safety Code Section 1367.25, and Insurance Code Section 10123.196)

The Act includes a religious employer exemption that excludes from the contraceptive coverage requirement all religious employers whose teachings prohibit the use of prescription contraceptive methods. (Health and Safety Code Section 1367.25(b), and Insurance Code Section 10123.196(d).)

The definition of "religious employer," for purposes of the Act applies to employers who satisfy the four following criteria:

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

Petitioner, Catholic Charities, is a California public benefit non-profit social services organization exempt from Federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code. (Declaration of James F. Rodgers A 000383) Petitioner is separately incorporated and administered, although it was

originally formed and operated in connection with the Roman Catholic Bishop of Sacramento, Inc. (Declaration of James F. Rodgers A 000383)

Catholic Charities provides child care, community development, counseling disaster relief, elderly services, family support, housing assistance, refugee and immigration assistances and other services to the general public. (Declaration of James F. Rodgers A 000384) Funding for Catholic Charities comes largely from federal, state and local government agencies. Private fees and grants, and public donations make up another significant portion of the revenue to Catholic Charities. Very little financial support comes from the Church. (Declaration of James F. Rodgers A 000387 (*see, also,* Catholic Charities of Sacramento 1990 Form 990, available at www.guidestar.org)

Catholic Charities reports that it currently employs approximately 183 full-time employees. Its workforce is made up of individuals of various religions, 74 percent of whom are not Roman Catholic. (Declaration of James F. Rodgers A 000385) Three health plan options are offered to its full-time employees, each of which includes a pharmacy benefit package. (Declaration of James F. Rodgers A 000385) None of the health care coverage options is an indemnity insurance program regulated pursuant to the Insurance Code provisions of the Act. (Declaration of James F. Rodgers A 000387) Catholic Charities concedes that it does not meet any of the four elements specified in the religious employer exemption of the Act. (Declaration of James F. Rodgers A 000383) In response to their failure to qualify for the exemption, Catholic Charities argues that the

religious accommodation in the law is too narrow, and that the law would be constitutionally sound only if the exemption were broad enough to include Catholic Charities, and all Catholic-related organizations that sought a waiver from the law. (Pet Brief at page 22)

INTRODUCTION

The California Women's Contraception Equity Act (the "Act") is an anti-discrimination statute, as well as a law that is intended to protect the health and welfare of the people of California. Because of the religious employers' exemption in the Act, it is also a labor law affecting the terms and conditions of employment. (*see, Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 682 [health insurance and other fringe benefits are "'compensation, terms, conditions, or privileges of employment'" within the meaning of Title VII's prohibition against sex discrimination in employment]; see also 29 C.F.R. Pt. 1604, Appen. Intro. ["any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions."].)

The Legislature's purpose in adopting the Act was to eliminate gender discrimination in health insurance coverage relative to the constitutionally protected privacy interest in reproductive freedom. *Griswold v. Connecticut,* 381 U.S. 479 (1965) (establishing access to contraceptives a privacy right); *Carey v.*

Population Services Int'l, 431 U.S. 678 (1977) (right to privacy includes right to choose and obtain contraceptives); *People v. Belous,* 71 Cal.2d 954 (the decision whether to bear children implicates a woman's fundamental right to life because of the risks associated with childbirth.)

Working women currently make up 46% of the workforce in the United States, and are expected to grow to 48% by 2008.[1] 54% of working Americans receive health care coverage through their employer. (2000 U.S. Population Data Sheet, Population Reference Bureau (2000)). In addition, when one includes the female dependents of male employees with employer-based health care coverage, there is no doubt that most women of child-bearing years rely on employers to provide their health care benefits.

Access to prescription contraceptives is a basic element of any comprehensive health plan for women.[2] Contraceptives provide women with the ability to choose the size of their families and the timing of their pregnancies. These life-altering decisions are directly tied to the ability of women to compete in the workforce. *See, Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The 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")[3] Further, as Judge Lasnik noted in *Erickson v. Bartell Drug*

[1] U.S. Department of Labor, Women's Bureau, "Facts on Working Women," March 2000.
[2] For a full discussion of the health care issues addressed by the Act, *see* Amicus Curiae Brief of the California Medical Association and the American College of Obstetricians and Gynecologists.
[3] For a full discussion of the gender equity issues addressed by the Act, *see* Amicus Curiae Brief of the California Women's Law Center, et al.

Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001), "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate health-care need uncovered." (*Id,* holding that failure to provide coverage of prescription contraceptives constitutes gender discrimination under Title VII of the Civil Rights Act of 1964.[4])

ARGUMENT

TO ENSURE SEPARATION OF CHURCH AND STATE THE GOVERNMENT IS FORCED TO DIFFERENTIATE BETWEEN SECULAR AND RELIGIOUS ORGANIZATIONS

Differentiating activities of religiously affiliated social service programs is a product of the tension between the need of government to contract for social services and its concern over funding religious groups, or granting religious exemptions from compliance with state requirements and is mandated by the California Constitution Article XVI, Section 5, the Establishment Clause and the Free Exercise Clause. In response to these constitutional considerations, the Legislature and the courts require that religiously affiliated groups must endure governmental restrictions to ensure that public funds are not used for religious purposes, and that religious exceptions to state or federal laws are sufficiently narrow to avoid constitutional concerns.

[4] For a full discussion of the Title VII issues addressed by the Act, *see* Amicus Curiae Brief of Planned Parenthood Federation of America, et al.

Harmonizing with this requirement, California law allows Catholic Charities the option of incorporating as a religious nonprofit organization, or a nonprofit public benefit organization. Many religiously affiliated nonprofit organizations choose to incorporate as public benefit organizations rather than religious organization in order to separate the religious from the secular activity into two distinct bodies thereby qualifying for public contracts or grants. "By choosing to incorporate as a nonprofit public benefit corporation, an entity gives up the relatively high degree of freedom in the management of its own affairs, and freedom from oversight by the Attorney General, that religious corporations enjoy." *McKeon v. Mercy Healthcare Sacramento* 19 Cal.4th 321, 330 (1998) (*citing* Corp. Code, § 9230, subd. (a) ["the Attorney General shall have no powers with respect to any nonprofit religious corporation except in the enforcement of criminal law and as set out in section 9230."])

Catholic Charities Holds Itself Out as a Secular Entity

Catholic Charities of Sacramento is a social service provider. It is an affiliate of Catholic Charities USA, which is one of the largest social service nonprofit organizations in America.[5] Catholic Charities USA describes itself in the tag line of its press releases in this way:

> Catholic Charities USA, founded in 1910, is one of the nation's largest, private networks of people helping people. Our members-

[5] Daniel T. Oliver and Vernon L. Kirby, Catholic Charities: Mired in the Great Society? 1998, www.capitalresearch.org/ap/ap-0298.html

> 1,400 local agencies and institutions-provide services to nearly 10 million people in need each year regardless of religious, social, or economic backgrounds. Catholic Charities agencies provide social services ranging from adoption and counseling to food and housing.
>
> www.catholiccharitiesusa.org/media/releases (Aug.1,2001)

In their attempt to persuade Catholic Charities and its supporters that the organization has wandered far from its religious identity, Daniel Oliver and Vernon Kirby write:

> Given Catholic Charities' heavy reliance on government funds the organization is more accurately described as a government contractor or an operating agency of the government, rather than a "private," "independent" charity.
> (Catholic Charities: Mired in the Great Society? 1998, www.capitalresearch.org/ap/ap-0298.html

Catholic Charities USA describes the work of its affiliates as two separate and distinct efforts. The first is a religious, "church-focused" ministry, funded primarily through the Church. (*supra*) Services provided to the general public fall within the more secular component of the social service program.

> For almost 40 years in Catholic Charities we have emphasized "parish social ministry," helping the local congregation to reach out to those in need in its own neighborhood, across town and around the world. In many dioceses, this is one of our church-focused initiatives, such as Respect Life, marriage preparation, and peace and justice education. We consider these to be in direct service of the Gospel and the church.
>
> We also have another, equally important, role. Catholic Charities acts as the diocese's instrument of community service, caring for cocaine-addicted infants, providing foster homes for abused children, building housing for the elderly, feeding hungry families, welcoming refugees and providing job training. In this capacity, we

> work in active concert with local, state and federal governments, which contract with us for specific services to people of all faiths and none.

Fred Kammer, SJ, President of Catholic Charities USA, Partners Against Poverty, www.catholiccharitiesusa.org/Media/opinion/2001/02001/poverty.html

Catholic Charities USA differentiates between community service to the general public, and "church-focused initiatives" in essentially the same way the Legislature articulated its purpose in drawing a narrow religious employer exemption.[6]

The Acceptance of Government Funding Invites Government Regulation of Catholic Charities

Catholic Charities of Sacramento provides services falling within the purely secular arena of social services described by the Catholic Charities USA, above - child care, community development, counseling disaster relief, elderly services, family support, housing assistance, refugee and immigration assistance. (Pet. Brief at page 2.)

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[6] "The intention of the religious exemption in both these [Contraceptive Equity Act] bills is an intention to provide for exemption for what is religious activity. The more secular the activity gets, the less religiously based it is, and the more we believe that they should be required to cover prescription drug benefits for contraception." [quote from Sen. Jackie Speier supporting AB 39 in Sen. Insurance Committee, DA 11 A0036068 - 69]

"...I hope that you'll see the difference between the practice of religion and the practice of health care and support this Bill." [quote from Assemblymember Audie Bock during Assembly Floor Debate on SB 41, DA 11 A003100]

This focus on non-religious activities is easily explained when one looks at the sources of revenue Petitioner uses to perform its services. The lion's share of funding for Catholic Charities USA, as well as a substantial portion of the revenue of the Sacramento affiliate, are comprised of public funds and private donations. A small percentage of Catholic Charities revenues comes from the Church. (*See* Catholic Charities: Mired In the Great Society?, supra, www.capitalresearch.org/ap/ap-0298.html; Declaration of James F. Rodgers, A000383, p. 4, line 1; *see also* Internal Revenue Service Form 990, Catholic Charities of Sacramento (1999), www.guidestar.org.) Catholic Charities determined that it was in its best interest to compete for public funds; in order to enjoy a more expansive domain, Catholic Charities chose to look beyond the Church for its monetary support and human resources. When a religiously affiliated nonprofit organization competes in the private sector for government funds, there is a price to pay. The constitution requires that there be a separation between the church and the state-funded services for which the government has contracted.

The Role of Catholic Charities' Employees is Not Religious Worship or Teaching

Petitioner states that individuals who work for Catholic Charities, whether or not they are Catholic, have the "express understanding" that Catholic Charities conducts its operations in conformity with the faith and teachings of the Catholic

Church. (Pet. Brief at page 2) Others familiar with the work of Catholic Charities lament its "secularization," and offer quite a different story:

- Sister Linda O'Rourke, vice president of the Boston agency's day-care programs, says that "some clergy think we should be teaching Catholic theology. But it's not the mission of a social outreach movement to teach and evangelize"[7]

- Father Phillip Earley of the Boston affiliate remarks, "When a person becomes an employee of Catholic Charities, I'm not so sure they're doing it because of any spiritual thing, or because of our mission. It's a job. They're a social worker and there's a position available."[8]

- Likewise, secretary for social services Joseph Doolin, when asked if the agency advances an overtly Catholic or spiritual mission, replied simply, "That's not what we do."[9]

- Catholic Charities of San Jose announces on its Internet web site that "despite our name, Catholic Charities; services are completely non-denominational." [10]

Catholic Charities: Mired in the Great Society?, *supra* at p. 8.

RELIGIOUS EMPLOYERS LIMIT THEIR AUTONOMY WHEN THEY ENTER THE COMPETITIVE MARKETPLACE

Lawmakers and the courts have long struggled with the conflict between the rights of religiously-affiliated employers balanced against the rights of the employees. In *U. S. v. Lee*, 455 U.S. 252 (1982), the Court held that the statute

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[7] Sister Linda O'Rourke, quoted in Joe Loconte, *Seducing the Samaritan: How Government Contracts Are Reshaping Social Services,* (Boston, Pioneer Institute: (1997), pp. 85-86

[8] Phillip Earley quote, *Id,* p. 79

[9] Joseph Doolin quote *Id,*,p. 86

[10] Catholic Charities of San Jose, Internet web site: www.ccsj.org

requiring the payment of social security taxes by an employer who objects on religious grounds to the payment or receipt of benefit from those taxes was constitutional. This case involved an Amish employer who, because of the religious prohibition on paying social security contributions and receiving benefits therefrom, refused to withhold social security tax from his employees, or pay the employer's share of social security taxes. The Court acknowledged the conflict between the Amish faith and the obligations imposed by the social security system, but noted that "not all burdens on religion are unconstitutional" (*citing, Prince v. Massachusetts,* 321 U.S. 158 (1944); *Reynolds v. United* States, 98 U.S. 145 (1897); *Thomas v. Review Bd. Of Indiana Employment Security Div.,* 450 U.S. 707 (1981); *Wisconsin v. Yoder,* 406 U.S. 205 (1972; *Gillette v. United States,* 401 U.S. 437 (1971); *Sherbert v. Verner,* 374 U.S. 398 (1963).)

The Court noted that the Legislature included in the Social Security Act, at 26 U.S.C. 1402(g), a religious exemption for self-employed individuals, in order to accommodate religious opposition to participation in the social security system. It found, however, that "[G]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." (*U. S. v. Lee*, 455 at p. 253) "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (*U. S. v. Lee*, 455 at p. 261)

NARROWLY FOCUSED RELIGIOUS EXEMPTIONS ARE COMMON IN LAWS AFFECTING THE WORKPLACE

A number of labor laws have been challenged on the basis of First Amendment burdens on religious organizations.[11] The collective bargaining arena has seen more than its share of conflicts over regulation of religious employers. The National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq., (1988)) ensures collective bargaining rights of employees involved in commerce, as enforced by the National Labor Relations Board (NLRB).

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[11] **A sampling of Federal Labor Laws and relevant cases:**
The Fair Labor Standards Act - 29 USC § 201-219 (1988) regulates and enforces laws regarding Overtime, Minimum Wages, Child Labor Protections, and the Equal Pay Act. *See, Tony and Susan Alamo Foundation v. Secretary of Labor* 471 U.S. 290 (1985), held FLSA is applicable to a religious organization where activities were part of competitive marketplace.
Equal Pay Act of 1963 – 29 USC § 206(d) (1988) prohibits discrimination in compensation for employment. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir.), *cert denied*, 111 S. Ct. 131 (1990) and *EEOC v. Tree of Life Christian Schs.* 751 F. Supp. 700 (S.D. Ohio 1990) courts found despite Biblical basis,"head-of-household" pay differential only for male teachers with dependent children, but not for similarly situated females, violated the Act.
The Immigration Reform and Control Act – 8 USC §. 1324a (1986)
American Friends Service Committee v. Thornberg, 718 F. Supp. 820 (C.D. Cal 1989), *aff'd*, 941 F2d 808 (9th Cir. 1991) Quaker organization not exempt; *Intercommunity Ctr. For Justice and Peace* v. INS, 910 F.2d 42 (2d Cir. 1990) Catholic center for peace and justice not exempt; *American Baptist Churches v. Meese*, 666 F. Supp. 1358 (N.D. Cal. 1987) sanctuary workers' religious rights not violated.
Occupational Safety and Health Act – 29 U.S.C. Secs. 651-678, establishes and enforces safety requirements in the workplace. The federal act applies to all corporations, including nonprofit corporations 29 USC 652. No exemptions obtain for religious, education, or charitable corporations.
Title VII of the Civil Rights Act of 1964 – 42 U.S.C. § 2000e-2(b) (1988) – prohibits discrimination in employment practices on the basis of race, color, religion, sex, or national origin. Although there is a religious employer exemption, it applies only to decisions based on religion, not on gender or the other protected classes.
See, also Carl Esbeck, Government Regulation of Religiously Based Social Services: The First Amendment Considerations, Hastings Constitutional Law Quarterly, vol. 19, page 343 (1992)

Application of the NLRA to religious organizations has been hotly debated by Congress and addressed numerous times by the courts. In 1974 Congress expanded the NLRB's jurisdiction to cover nonprofit hospitals, including religiously affiliated hospitals. During deliberations, members of Congress rejected calls by the Seventh-Day Adventist Church - which operates many health care institutions -- to exempt religiously sponsored hospitals whose religious tenets opposed unionization of workers. Adventist spokespersons pointed out Congress' previous accommodations for Catholic hospitals, which allowed them to refuse to provide abortion and sterilization services, and urged Congress to create an exemption to accommodate Adventist hospitals' policies against unions. [120 Cong Rec 12950-12951 (1974)]

In testimony before Congress, Adventist officials explained that the Adventist church "has taught and is teaching its members not to belong to or contribute to a labor organization, and has based this teaching on passages in the Bible, thereby making this teaching part of the religious doctrine of the Church." [120 Cong. Rec. 12950 (1974)] Adventist leaders also testified that if the exemption were not enacted, the Church would "give serious consideration to not operating any hospitals at all." [120 Cong. Rec. 12951 (1974)]

During the Congressional debate on the Adventist request, Senator Alan Cranston opposed such an exemption noting that religious hospitals

> ... were supported by a variety of governmental subsidies and grants.

> ... are publicly regulated. They are touched by public policy, affected by public policy and governed by public policy and law... ... religiously affiliated hospitals and nonreligiously affiliated hospitals are often indistinguishable. The objective of each is clearly the same--to achieve the highest standard of professional health care. Both must adhere to the same medical and health codes; both must follow local ordinances and laws to the same extent.
>
> ...Likewise, people who work for a hospital, regardless of its affiliation, think of their jobs purely in nonsectarian occupational terms, not with respect to any particular religious ideology. There concerns, their hopes, and their frustrations are not different than one would expect of other similarly situated employees. [120 Cong. Rec. 12956(1974).]

Congress agreed with Senator Cranston and approved the expansion of jurisdiction of the NLRB to include religiously-affiliated hospitals, which has been upheld by the courts in its application to social service programs as well. (*See, NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991) (*U.S. cert denied* 112 SC 2965) held Catholic residential home and school for boys not exempt from NLRB jurisdiction; *NLRB v. Kemmerer Village, Inc,* 907 F.2d 661 (7th Cir. 1990) held Presbyterian foster home funded by the Illinois Dept. of Children and Family Services not exempt; *Volunteers of America v. NLRB,* 777 F.2d 1386 (9th Cir 1985) alcohol abuse services of church not exempt from NLRB jurisdiction; *NLRB v. the Salvation Army of Massachusetts Dorchester Day Care Center*, 763 F.2d 1 (1st Cir 1985) church-affiliated child care program not exempt from NLRB jurisdiction; *St. Elizabeth Community Hospital v. NLRB,* 708 F2nd 1436 (9th Cir 1983) church-affiliated hospital not exempt from NLRB jurisdiction (where the court noted that although the hospital was owned and operated

by the sisters of Mercy, neither the order nor the Catholic church contribute financial support).

The Secular Nature of the Work Allows Government to Impose Requirements on Church-related Entities

In a number of cases involving religious employers and union activity, courts have looked specifically to the activities or purposes of the employers challenging NLRB jurisdiction to determine if regulation by the NLRB would violate First Amendment protections. Courts have found that where the institution's primary activity is secular, assertion of NLRB jurisdiction does not violate the First Amendment.

In *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (6th Cir. 1981), the Court found that a Christian children's home that provided emergency residential treatment for battered, abused and neglected children between the ages of five and seventeen was not a religious employer exempt from the NLRA. "[T]he Christian Church may perceive its religious mission to include caring for unfortunate children, but the actual business of the Home and of its employees does not involve a religious enterprise comparable to a church-operated school. The home operates in the same way as a secular childcare institution." 663 F.2d at p. 64. Another factor defeating the church's claim was that the Home received funds primarily from government resources. The court suggested that "if the Home were not secular in nature, this collaboration could lead to constitutional problems under *Lemon v. Kurtzman*." *Id.* at p. 64, n.6 (*Lemon v. Kurtzman*, 663 F.2d 602 (1971).)

The NLRB, in *Tressler Lutheran Home v. NLRB,* 677 F.2d 302 (3rd Cir. 1982), maintained that the services provided at the nursing home were not religious in nature, thus no entanglement issues would prevent NLRB jurisdiction. The Court found that "the actual physical care given is comparable to that furnished by secular facilities." (677 F.2d at p. 305.)

Finally, in *St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436 (9th Cir 1983), the Court of Appeals held that the Catholic hospital's prisoner ministry, youth recreational program, camps and retreats are not exempt from the NLRA, noting "[U]nlike a church school, however, St. Elizabeth does not have a substantial religious character. Its primary purpose, like that of any secular hospital, is rather humanitarian, devoted to medical care for the sick. St. Elizabeth's principal function, unlike a parochial school, is to care and heal, not to indoctrinate and propagate Catholicism."

Recently, in *Ukiah Adventist Hospital dba Ukiah Valley Medical Center and California Nurses Association* 332 NLRB No. 59 (2000), the NLRB found that asserting jurisdiction over a hospital operated by the Seventh Day Adventist Church did not infringe on First Amendment protections. Ukiah Hospital restated the testimony presented to Congress during the debate on the 1974 "healthcare amendment," asserting that the teachings of the Adventist faith prohibit Adventist institutions from recognizing or bargaining with unions, and to impose collective bargaining on Ukiah Hospital was a violation of their First Amendment rights. The

facts presented showed that the Church forbids its members from "participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions, and that the Church strictly adheres to these prohibitions to the point where the Church was prepared to divest itself of another health care facility should the employees have voted to unionize." (332 NLRB at page 2)

The NLRB followed the three pronged test of *Lemon v. Kurtzman, supra,* and found :

- that the employer's primary purpose was secular,
- that the government had a compelling interest in preventing labor strife and that the employees had a constitutionally protected fundamental right to self-organize implicit in the First Amendment's free assembly language. (*citing Shelton v. Tucker,* 364 U.S. 479, 485-487 (1960); *Thomas v. Collins*, 323 U.S. 516, 532 (1945), and *Cap Santa Vue,* 424 F.2d at 890 (D.C. Cir. 1970); and
- that applying the NLRA to the employer was the least restrictive means of furthering the government's interest in protecting the rights of employees, noting that "[T]he RNs that the Petitioner seeks to represent do not forfeit their statutory rights simply because of the Employer's beliefs."[12]

[12] Footnote 10 of the decisions noted "Of the approximately 170 RNs, about 20 are Church members."

The Board noted that granting an exemption to Ukiah Hospital and other church-operated health care facilities would "defeat Congress' intent in enacting the National Labor Relations Act, by denying many thousands of employees the opportunity to self-organize and choose bargaining representation..." (*Ukiah* at page 4)

Each of the considerations identified by the NLRB in *Ukiah* are essential elements of the case at bar.

- The work of Catholic Charities is secular;
- the state has a compelling interest in protecting the fundamental reproductive rights of employees, eliminating gender bias in the workplace, and protecting the health and welfare of California's families; and
- applying the mandate to the employer allows the employees the unrestricted ability to exercise their own religious rights without being burdened by the religious dictates of the employer. This approach does not interfere with the religious beliefs of Catholic employees who would be free to reject prescription contraceptives, or any family planning benefits covered by the employer-based insurance.

In the Religious Institutions Amicus Brief in Support of Petitioner Catholic Charities of Sacramento, it is proposed that the recent D. C. Circuit decision in *University of Great Falls v NLRB*, 278 F.3d 1335 (D.C. Cir 2002), is applicable to the instant case. This is simply not true.

In *Great Falls* the University of Great Falls, which is owned and operated by the Sisters of Providence, challenged the jurisdiction of the NLRB. At the lower level, the Board determined that the University was not exempt from jurisdiction by the NLRB because the purpose of the school was not primarily religious. Because the case involves a school, the court agreed with the NLRB that *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979) must be used as the standard for analysis, but reversed the decision of the Board because "they used the wrong test." *Great Falls, supra* at page 1340. The court then set out a new test to determine whether a religiously-affiliated University falls within the jurisdiction of the NLRB, and amici argue that this test is relevant here.

Great Falls is easily distinguishable from the instant case for four reasons.

1. This case can only be read within the narrow line of cases arising from the *Catholic Bishop* decision which addresses the unique intersection of religious schools and the NLRA, a statute which explicitly provides and limits its own jurisdiction in a most detailed fashion in its definitions of "employer," "employee," and "labor organization." *See* Section 2, NLRA, 29 U.S.C. sec. 151 et seq. Regardless of the single limit on jurisdiction extended to certain religious schools and the Supreme Court's concerns for religious freedom, other than schools the exemptions have not been extended to any other manner of religious employer as shown by the cases cited above. (*See, e.g., St.*

Elizabeth Community Hospital v. NLRB, supra; NLRB v. St. Louis Christian Home, supra; Tressler Lutheran Home v. NLRB, supra.)

2. *Catholic Bishop* speaks to a very narrowly held concern, which has never been expanded beyond schools, that the NLRB would get too entangled in inquiring into the extent of the school's religious mission.
3. *Great Falls* essentially adopts, and arguably narrows further *Catholic Bishops*, by stating a unique test for religious schools that turns on whether the school holds itself out as a religious environment.
4. The newly crafted test for schools which hinges on whether a religiously affiliated University holds itself out as a religious institution does not apply here where there is no school involved, but even if it did, as demonstrated above, Catholic Charities would fail.

CONCLUSION

The California Women's Contraceptive Equity Act protects working women from gender discrimination in the workplace, intrusion on their constitutionally recognized reproductive rights, and infringement by their employer on their religious beliefs. The religious employer exemption in the Act honors this country's basic commitment to separation of church and comports with both the State and U.S. Constitution. The judgment of the Court of Appeal should be affirmed.

Sacramento, California
March 28, 2002

Respectfully submitted,

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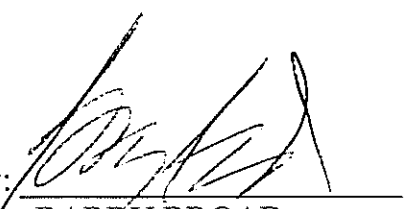

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CERTIFICATION

I certify, pursuant to Rule 14, subd. (c), Cal. Rules of Court, that the attached Amici Curiae Brief contains no more than 5,000 words, as measured by the word count of the computer program used to prepare this brief.

Dated: March 26, 2002

By: _____
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PROOF OF SERVICE BY U.S. MAIL
Catholic Charities of Sacramento, Inc. v.
Superior Court of Sacramento County,
California Dept. of Managed Health Care, et al.., Real Parties in Interest
No. S099822

I, Melissa Mayorga, declare that I am a citizen of the United States, employed in the City and County of Sacramento; I am over the age of 18 years and not a party to the within action or cause; my business address is 1127 11th Street, Sacramento, CA 95814.

On March 28, 2002, I served a copy of the attached

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF INTERNATIONAL UNION, AFL-CIO & CLC, COALITION OF LABOR UNION WOMEN, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 535, AND CALIFORNIA NURSES ASSOCIATION IN SUPPORT OF RESPONDENT SUPERIOR COURT OF SACRAMENTO COUNTY AND REAL PARTIES IN INTEREST OF STATE OF CALIFORNIA, ET AL.

on each of the interested parties in this action as stated on the attached service list by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 28, 2002 at Sacramento, California.

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