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Court of Appeals of New York - Catholic Charities of the Diocese of Albany v. Serio

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COURT OF APPEALS OF NEW YORK

Catholic Charities of the Diocese of Albany v. Serio[1] (decided October 19, 2006)

"Ten faith-based social service organizations" affiliated with the Roman Catholic Church and the Baptist Bible Fellowship International challenged the validity of the Women's Health and Wellness Act ("WHWA"), an act designed to promote greater equality in access to healthcare.[2] The plaintiffs argued that the WHWA violated religious rights guaranteed by the United States Constitution[3] and the New York State Constitution.[4] Accordingly, the plaintiffs sought to enjoin the State Superintendent of Insurance from enforcing the WHWA.[5] The state contended that "while the Legislature might have made another choice in balancing those two interests, it could not say that its choice was an unreasonable interference with petitioners' ex-

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[1] Catholic Charities of the Diocese of Albany v. Serio (*Serio II*), 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 128 S. Ct. 97 (2007).

[2] Women's Health and Wellness Act of 2002, N.Y. Legis. Memo 554 (McKinney 2000); *Serio II*, 859 N.E.2d at 462-63.

[3] U.S. CONST. amend. I states, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[4] N.Y. CONST. art. I, § 3 states, in pertinent part:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

[5] *Serio II*, 859 N.E.2d at 463.

ercise of their religion."[6] The Supreme Court of Albany County granted summary judgment in favor of the defendant, dismissed the plaintiffs' complaint, and upheld the WHWA as constitutional.[7] The plaintiffs appealed, and a divided appellate division affirmed.[8] The plaintiffs then appealed to the New York Court of Appeals, which affirmed, holding the WHWA was constitutional.[9]

The WHWA requires expanded insurance coverage for women's health services, including mammograms, cervical cytology, bone density screening, and contraception.[10] The statute provides an exemption for "religious employers."[11] This exemption permits "a religious employer . . . [to] request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets."[12] An employer must provide contraception coverage in its health care plan if it does not meet the "religious employer" exemption.[13] Individual employees of religious employers, however, may obtain contraception coverage through purchasing an insurance rider "at the prevailing small group community rate."[14] The plaintiffs argued that this exemption is too narrow, and thus violates their right to free exercise

[6] Respondent's Brief in Opposition for a Writ of Certiorari at 20, *Serio II*, 128 S. Ct. 97 (No. 06-1550), 2007 WL 2174220.

[7] Catholic Charities of the Diocese of Albany v. Serio (*Serio I*), 808 N.Y.S.2d 447, 452-53 (App. Div. 3d Dep't 2006).

[8] *Id.* at 474 (Cardona, P.J., dissenting) ("[A] statute drafted in such an 'all or nothing' manner is not narrowly tailored so as to expand benefit coverage to women and is, in our view, unconstitutional.").

[9] *Serio II*, 859 N.E.2d at 463, 469.

[10] *Id.* at 461.

[11] *See* N.Y. INS. LAW §§ 3221(16)(A)(1), 4303(cc)(1)(A) (McKinney 2007).

[12] *Id.* §§ 3221(16)(A)(1), 4303(cc)(1).

[13] *Serio II*, 859 N.E.2d at 468.

[14] N.Y. INS. LAW §§ 3221(16)(B)(i)(A), 4303(cc)(1)(2)(A).

of religion because it forces them to facilitate employee conduct they deem morally reprehensible and adverse to core religious beliefs.[15]

This argument underscores the problem with mandatory coverage for prescription contraception: allowing all FDA-approved contraception coverage in a health care plan may interfere with the religious beliefs of employers opposed to abortion or contraception.[16] Further, the legislature contemplated a broader "conscience clause" to include more religious employers, but the majority favored the narrower definition at issue here.[17]

The plaintiffs' main contention concerned the definition of "religious employer." The plaintiffs argued the definition distinguishing between organizations that are exempt from the statute and those that are not was too narrow.[18] Of the ten plaintiffs, eight are affiliated with the Roman Catholic Church.[19] Three are associated with

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[15] *Serio II*, 859 N.E.2d at 462, 463.

[16] Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 751-52 (2005). Professor Stabile explains that the Catholic Church's moral opposition to mandatory prescription contraceptive coverage extends beyond birth control, given that FDA-approved prescription contraception includes abortifacients, such as the "morning-after" pill. *Id.*

[17] *Serio II*, 859 N.E.2d at 462. *See* Edward T. Mechmann, *Illusion or Protection? Free Exercise Rights and Laws Mandating Insurance Coverage of Contraception*, 41 CATH. LAW. 145 (2001).

> It should be stressed that the failure to grant conscience protection means that thousands of Catholics will be forced to pay for medicines and procedures they find morally repugnant, and that priests and bishops will be forced by state law to directly support conduct that they would otherwise seek to oppose or correct in their preaching, teaching and sacramental activity.

Id. at 158. *See also*, John Caher, *Panel Finds Constitutional Women's Health Care Act*, 235 N.Y. L.J. 1 (2006) ("A far broader 'conscience clause' that would have permitted religious employers much more leeway was specifically rejected by the New York Legislature in a bill that underwent many revisions and was enacted as an election-year compromise.").

[18] *Serio II*, 859 N.E.2d at 462.

[19] *Id.* at 462-63.

large entities that provide immigrant resettlement programs, affordable housing, job development services, and domestic violence shelters; three operate healthcare facilities, including hospice centers, nursing homes, and rehabilitative facilities; the other two operate private schools.[20] The remaining two plaintiffs are affiliated with the Baptist Bible Fellowship International; one plaintiff offers social services, including prison ministry, crisis pregnancy centers, job placement, and homeless services; the other is involved in an organization that operates a K-12 school, providing day-care, preschool, and youth services.[21] All ten plaintiffs conceded they do not qualify as "religious employer[s]" under the WHWA because they employ people of other faiths and provide social services outside of their ministerial functions.[22] Further, only three of the plaintiffs qualify for federal tax exemption under the relevant IRS statute.[23]

The New York Court of Appeals determined the WHWA was constitutional as applied to the plaintiffs.[24] The court applied the United States Supreme Court's tests for upholding the Free Exercise and Establishment Clauses, as well as its own standard in assessing the WHWA against the free exercise clause of the New York State Constitution.[25] Furthermore, the court held the plaintiffs had the bur-

[20] *Id.*

[21] *Id.* at 463.

[22] *Id.*

[23] *Serio II*, 859 N.E.2d at 463; 26 U.S.C.A. § 6033(a)(3)(A)(i) (West 2007) provides, in relevant part: [The entities exempt from filing tax returns under 26 U.S.C.A § 501(a) are]: "churches, their integrated auxiliaries, and conventions or associations of churches."

[24] *Serio II*, 859 N.E.2d at 463.

[25] *Id.* ("Plaintiffs' strongest claim is under the New York Free Exercise Clause . . . .").

den to meet these tests.[26]

To show the WHWA violates the Free Exercise Clause of the Federal Constitution, the plaintiffs had to establish the statutes at issue were not "valid and neutral law[s] of general applicability."[27] The Court of Appeals followed the Supreme Court's definition of neutrality, explaining that a law is neutral if it "does not 'target[] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.' "[28] The court found the Supreme Court's neutrality test subject to several exceptions, such as compelling state interests,[29] having other constitutional protections in addition to freedom of religion,[30] and preserving church autonomy.[31]

First, the court reasoned the plaintiffs had not met their bur-

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[26] *Id.* at 467.

[27] *See, e.g.*, United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). In *Lee*, the Court held a federal statute requiring an Amish employer to pay Social Security tax did not violate the employer's right to free exercise of religion because it is in society's best interest to uniformly apply the tax law. *Id.* at 254, 260.

[28] *Serio II*, 859 N.E.2d at 464 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527, 533, 542 (1993)) (alteration in original) (holding a city resolution opposing ritual animal sacrifice violated the plaintiffs' right to exercise their belief in Santeria since the text of the ordinances were gerrymandered to include most secular animal killings).

[29] *Serio II*, 859 N.E.2d at 464-65 (quoting Employment Div. v. Smith, 494 U.S. 872, 881, 888 (1990)). In *Smith*, two plaintiffs were fired based on their religiously-motivated use of Peyote. *Smith*, 494 U.S. at 874. The termination was held constitutional by the Supreme Court because the state's interest in not opening every civic obligation to religious exemption was compelling. *Id.* at 890.

[30] *Serio II*, 859 N.E.2d at 465. *See* Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 64 (2006) (holding that military recruitment at a law school is not unconstitutional because it does not interfere with the law school's right to communicate and speak freely).

[31] *Serio II*, 859 N.E.2d at 465. *See* Serbian E. Orthodox Diocese. v. Milivojevich, 426 U.S. 696, 709-10 (1976) (holding states should be prohibited from interfering with church governance since it violates a Church's First Amendment rights); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969) (stating ecclesiastical questions are matters for state determination in civil disputes).

den respecting the state's interest, given the WHWA's purpose was to provide broad contraception coverage to women in New York.[32] The court appeared concerned that "[t]o hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."[33]

Next, the court assessed the "hybrid rights" exception—an exception to the neutrality requirement when other constitutional rights, in addition to the free exercise of religion, are allegedly infringed.[34] The court stated, "this is not a case that involves free exercise 'in conjunction with other constitutional protections,' "[35] reasoning "[t]he legislation does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like."[36] The court did, however, acknowledge the WHWA created a burden on free exercise, though to an extent insufficient to strike down the statute.[37]

The last exception to the constitutional neutrality doctrine analyzed by the court was church autonomy, "which prevents states

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[32] *Serio II*, 859 N.E.2d at 464.

[33] *Id.*

[34] *Id.* at 464-65.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children.

Id. (quoting *Smith*, 494 U.S. at 881).

[35] *Serio II*, 859 N.E.2d at 465 (quoting *Smith*, 494 U.S. at 881).

[36] *Id.*

[37] *Serio II*, 859 N.E.2d at 465 ("[The WHWA] does burden their exercise of religion—but that alone . . . cannot call the validity of a generally applicable and neutral statute into question.").

from interfering in matters of internal church governance."[38] The court found this exception inapplicable to the plaintiffs here, because church autonomy was not at issue.[39]

The court separately analyzed the claim that the WHWA violated the free exercise clause of the New York State Constitution.[40] The court balanced the free exercise burden created by the statute against the interest it advances, giving "substantial deference" to the legislature.[41] This test is two-fold and fact sensitive.[42] First, a plaintiff must show "a sincerely held religious belief" effected by the statute's requirement.[43] Second, the state must demonstrate the statute "serves a compelling governmental purpose" and that granting "an exemption [to the plaintiff] would substantially impede fulfillment of that goal."[44] The *Catholic Charities* court stressed the amount of deference afforded to the legislature and explained "the party claiming an exemption bears the burden of showing that the challenged legislation . . . is an unreasonable interference with religious freedom."[45] The New York test is designed to provide greater religious constitutional protection than *Employment Division v. Smith*.[46]

The court refused to interpret the New York free exercise

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[38] *Id.* (citing *Milivojevich*, 426 U.S. at 709-10; Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church, 344 U.S. 94, 107-08 (1952)).

[39] *Serio II*, 859 N.E.2d at 465 ("The legislature has not attempted through the WHWA to 'lend its power to one or the other side in controversies over religious authority or dogma.' " (quoting *Smith*, 494 U.S. at 877)).

[40] N.Y. CONST. art. I, § 3.

[41] *Serio II*, 859 N.E.2d at 466-67.

[42] Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420, 426 (N.Y. 1989).

[43] *Id.*

[44] *Id.* (citations omitted).

[45] *Serio II*, 859 N.E.2d at 466.

[46] *Id.*

clause as requiring strict scrutiny review for religious exemption requests, reasoning "the WHWA does not literally *compel* them [the plaintiffs] to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives."[47] The court appeared to reach this conclusion by noting the statute does not force anyone to provide drug coverage benefits.[48] In rejecting strict scrutiny as the appropriate standard, the New York Court of Appeals stressed the need to heed legislative decisions and promote efficient governmental operations.[49] Further, the appellate division's decision in *Serio I*, affirmed by the Court of Appeals in *Serio II*, noted "[o]nly in the context of prison administration has the Court of Appeals articulated a quantum required of the state's interest, and [even] then it has required that the state show only a 'legitimate' institutional interest to outweigh state constitutional free exercise claims."[50]

After balancing the respect for the plaintiffs' religious beliefs against the state's interest in establishing better and more equal healthcare for women, the court held the WHWA did not violate New York's free exercise clause.[51] The court supported its holding by

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[47] *Id.* at 468 (emphasis in original).

[48] *Id.*; *Serio I*, 808 N.Y.S.2d at 474 (Cardona, P.J., dissenting) ("It is the fact that their opposition is so public and widespread which makes the Catholic plaintiffs, in particular, more susceptible to charges of hypocrisy, especially since . . . these plaintiffs could avoid supporting contraceptive use by choosing not to provide any prescription coverage to their employees."). *But see* Stabile, *supra* note 16, at 751-52 (arguing Catholic institutions will not be as competitive with other employers who provide better health coverage if they choose to not follow the coverage mandate by refusing to provide health insurance to their employees).

[49] *Serio II*, 859 N.E.2d at 467.

[50] *Serio I*, 808 N.Y.S.2d at 456.

[51] *Serio II*, 859 N.E.2d at 468.

finding the legislature carefully considered extensive evidence, including a study showing women in New York paid sixty-eight percent more than men for out-of-pocket healthcare expenses, mostly due to reproductive healthcare.[52]

The appellate division, in *Serio I*, also examined the plaintiffs' claims under the Federal Constitution's Establishment Clause.[53] The *Serio I* court did not analyze the New York State Constitution's Establishment Clause because the plaintiffs did not assert a violation on that ground. The appellate division applied the infamous three-part *Lemon* test: the statute must (1) "have a secular legislative purpose"; (2) not advance or inhibit religion; and (3) not "foster an excessive government entanglement with religion."[54]

The appellate division held the WHWA did not violate the Federal Establishment Clause.[55] That court reasoned that the WHWA's four criteria for an exemption were "facially objective" and noted that a government official was not vested with the discretion to distinguish between religious and secular organizations.[56] The court held that a distinction "not between denominations, but between

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[52] *Id.* at 462.

[53] The *Serio I* court did not analyze the New York State Constitution's Establishment Clause because the plaintiffs did not assert a violation on that ground. *Serio I*, 808 N.Y.S.2d at 461 n.7 ("[T]he Establishment Clause is applicable to the states by virtue of the Fourteenth Amendment." (citing Roemer v. Bd. Pub. Works, 426 U.S. 736, 744 nn.6, 7 (1976))).

[54] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *See, e.g.*, Corp. for the Presiding Bishop v. Amos, 483 U.S. 327, 336-39 (1987). In *Amos*, a statute providing state aid to church-related elementary and secondary schools did not create excessive entanglement between church and state. The Court found the level of state inspection and evaluation of funding, teachers, materials, and curriculum was found constitutional because the entity's ability to spread its religion was not any greater—the statute was neutral on its face—and thus it did not foster an impermissible entanglement between church and state.

[55] *Serio I*, 808 N.Y.S.2d at 462.

[56] *Id.* at 463.

religious organizations based on the nature of their activities" does not violate the Constitution.[57] Further, "[i]t cannot be convincingly argued that the WHWA was designed to favor or disfavor Catholics, Baptists or any other religion. . . . [The statute is] generally applicable and neutral between religions."[58]

Under the Federal Constitution, courts look to whether or not a statute meets the neutrality and general applicability test articulated in *Sherbert v. Verner*,[59] or an exception to strict scrutiny articulated in *Smith*,[60] while New York courts apply a balancing test in analyzing a statute under the State Constitution, as articulated in *La Rocca v. Lane*.[61] The Court of Appeals' analysis of the constitutional issues surrounding the interpretation of the Free Exercise Clause shows how the New York State Constitution allows for a broader interpretation

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[57] *Serio II*, 859 N.E.2d at 468-69 (citing Larson v. Valente, 456 U.S. 228, 249-51 (1982)) (holding a state act allowing for exemption of religious organization that received more than half of total contributions from members or affiliated organizations was not unconstitutional as applied to the plaintiffs, given a sufficient governmental interest in regulating charitable contributions from the public).

[58] *Id.* at 468.

[59] 374 U.S. 398, 403-06 (1963) (invalidating a statute despite the existence of a "compelling state interest" where that interest specifically discriminates against a particular religion and where there is a strong connection between the state interest and the abuse, and the abuse is grave and not merely attenuated in relation to the state interest).

[60] *See* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000).

> The determination of whether the *Sherbert* exception is triggered proceeds in two steps. The first focuses on whether a law contains a mechanism similar to the "good cause" criterion in that it is open to unfettered discretionary interpretation. If such a mechanism exists, the second step requires courts to determine whether it is enforced in a discriminatory manner. Absent evidence of discrimination in the actual enforcement of the regulation, the Sherbert exception is not triggered, and there is no need to apply the compelling state interest test.

Id. at 1081.

[61] 338 N.E.2d 606, 613 (N.Y. 1975) ("The respective interests must be balanced to determine whether the incidental burdening is justified."). *See* People v. Woodruff, 272 N.Y.S.2d 786, 789 (App. Div. 2d Dep't 1966).

of the free exercise of religion than the Federal Constitution.[62]

In analyzing these different interpretations of the Free Exercise Clause, it is instructive to first examine the nature of the constitutional doctrine articulated by the United States Supreme Court. In *Sherbert*, the Court upheld the constitutionality of a state unemployment compensation law because it was neutral and generally applicable.[63] Under *Smith*, a state must show a compelling interest to overcome a law that is not neutral and generally applicable.[64] However, it was not until *Lukumi* that the Supreme Court gave clear guidance on the meaning of neutrality and general applicability. In analyzing neutrality, three questions must be asked: (1) is the law facially targeting religion?;[65] (2) is the law's object or purpose discriminatory?;[66] and (3) is the operation or effect of the law discriminatory?[67]

> [I]t is [also] possible to discern a set of questions that should be addressed as part of the general applicability

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[62] *See* Letter from John D. Murnane to Serphin R. Maltese, New York State Senator (Feb. 15, 2002), *in* N.Y. Bill Jacket, 2002 Assemb. B. 11723, ch. 554 ("The New York Court of Appeals has maintained that the state constitution guarantees a higher level of individual rights than the federal constitution.").

[63] *Sherbert*, 374 U.S. at 409-10.

[64] Kaplan, *supra* note 61, at 1074 (holding unconstitutional laws that are neither neutral nor generally applicable, or laws containing "a system of individualized exemptions," absent a state showing of "a compelling reason for burdening an individual's religious freedom").

[65] Kaplan, *supra* note 61, at 1077. *See also Lukumi*, 508 U.S. at 533 (explaining laws lack "facial neutrality if [they] refer[] to a religious practice without a secular meaning discernible from the language or context.").

[66] Kaplan, *supra* note 61, at 1077. *See also Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."); *id.* at 540 ("Relevant evidence [of legislative object] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977))).

[67] Kaplan, *supra* note 61, at 1077. *See also Lukumi*, 508 U.S. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

> inquiry, which focuses on the actual operation and effect of a law. First, is the law designed to achieve a general or a specific purpose? . . . [Second,] is the law constructed so that in its actual operation it targets only religious conduct or singles out a particular religion?[68]
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> . . . .
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> The combined effect of the five-step neutrality and general applicability inquiries is to identify intentionally discriminatory laws, whether they do their work overtly or covertly, that impose a burden on plaintiffs because of their religion. When laws are found to fail this prong of the *Smith* test, they are automatically subjected to strict scrutiny. However, if the laws pass muster under this prong of *Smith*, the inquiry shifts to the second prong, which considers whether or not the challenged law falls within the *Sherbert* exception.[69]

In *Smith*, the Court upheld the constitutionality of an Oregon law prohibiting the knowing and intentional possession of a controlled substance. Although the plaintiffs were were fired from their jobs for using peyote, in accordance to their Native American beliefs, the Court reasoned, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[70]

State Employment Relations Board v. Christ the King Region-

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[68] Kaplan, *supra* note 61, at 1078-79.

[69] Kaplan, *supra* note 61, at 1080 (emphasis added).

[70] *Smith*, 494 U.S. at 874, 885 (quoting Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 451 (1988)).

al High School,[71] in contrast, involved a challenge to a law granting the New York State Employment Relations Board the right to compel parties to negotiate in good faith.[72] The New York Court of Appeals held the law did not violate the Free Exercise Clause of the First Amendment, reasoning that although the Roman Catholic secondary school compelled the board, pursuant to the challenged law, to bargain in good faith with the Lay Faculty Association, it only did so in an effort to improve labor relations.[73] The plaintiff challenged the law as infringing upon its right to free exercise of religion.[74] In upholding the law, the court explained the "mere potentiality for transgression" in the Employment Relations Board's supervision over collective bargaining was insufficient to claim its authority under the law infringed on the plaintiff's right to free exercise or establishment of religion.[75]

In *La Rocca v. Lane*, the New York Court of Appeals upheld the constitutionality of a criminal court judge's decision to prohibit a Roman Catholic priest from wearing his clerical garb while defending a client at trial.[76] The court reasoned that a criminal court's obligation to ensure a fair trial for the defendant and the People outweighed the plaintiff's interest in exercising his right to wear the ceremonial religious clothing of his faith.[77] The court considered the following factors:

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[71] 682 N.E.2d 960 (N.Y. 1997).
[72] *State Employment Relations Board*, 682 N.E.2d at 962-63.
[73] *Id.* at 963-64.
[74] *Id.* at 963.
[75] *Id.* at 965-67.
[76] 338 N.E.2d at 608, 613.
[77] *La Rocca*, 338 N.E.2d at 613.

> The gravity of the harm which would be caused by an excess of power . . . . whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity. . . .
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> If an adequate remedy is available, the burdening of judicial process with collateral proceedings, interruptive of the orderly administration of justice, would be unjustified. If, however, appeal or other proceedings would be inadequate to prevent the harm, and prohibition would furnish a more complete and efficacious remedy, it may be used even though other methods of redress are technically available.[78]

Moreover, it is important to analyze these precedents in light of the cannon of constitutional avoidance, which requires a court to avoid passing on a constitutional issue if some other means of reaching a decision are available.[79] Notably, the Court of Appeals is more reluctant to rule on the constitutionality of a statute without the plaintiff satisfying a high burden of proof, as opposed to a plaintiff in a case before the Supreme Court, who has already met a high burden of proof for the Supreme Court to have heard the issue.[80] For example, in *Ware*, the Court of Appeals was reluctant to declare a state education statute, mandating AIDS awareness education for elementary and high school students, unconstitutional because genuine issues of material fact precluded summary judgment. More specifically, the

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[78] *Id.* at 610 (internal citations omitted).

[79] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[80] *See* Scheiber v. St. John's Univ., 638 N.E.2d 977, 979-80 (N.Y. 1994) (holding that where there are disputed issues of fact as to whether or not a religiously-exempt university was lawful or discriminatory in exercising its preference to not keep plaintiff as its Vice President of Student Life, the Court of Appeals will choose "the narrower evidentiary ground").

state failed to show the plaintiffs, in comparison to the Amish, were an isolated religious community because the plaintiffs were actively involved in community life.[81] Contrastingly, in *Wisconsin v. Yoder*,[82] the Supreme Court held:

> [T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of the Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.[83]

In addition, a statute enacted by California, the Women's Contraceptive Equity Act[84] ("WCEA"), also provides a helpful reference point in analyzing the WHWA's constitutionality. The WCEA defines "religious employer" identically to the WHWA, and similarly permits a "religious employer" to request an exemption from prescription contraception coverage if it is "contrary to the religious employer's religious tenets."[85] Like *Serio I* and *Serio II*, a religiously-

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[81] *Ware*, 550 N.E.2d at 422, 423, 426, 430.

[82] 406 U.S. 205 (1972).

[83] *Yoder*, 406 U.S. at 235.

[84] CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2007); CAL. INS. CODE § 10123.196(d) (West Supp. 2007).

[85] A "religious employer" is

> an entity for which each of the following is true: (A) The inculcation of religious values is the purpose of the entity; (B) The entity primarily employs persons who share the religious tenets of the entity; (C) The entity serves primarily persons who share the religious tenets of the entity; (D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A) (i) or (iii), of the Internal Revenue Code of 1986, as amended.

CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (West Supp. 2007); CAL. INS. CODE § 10123.196(d)(1) (West 2005).

affiliated social organization challenged the constitutionality of this California statute.[86]

The plaintiff in *Catholic Charities*, Catholic Charities of Sacramento, like the plaintiffs in *Serio I* and *II*, was a faith-based, Catholic non-profit organization which provided social services to the community such as food, clothing, and affordable housing.[87] Catholic Charities of Sacramento, like the *Serio* plaintiffs, also conceded it did not meet the statutory definition of "religious employer" because it too performed social services outside of its ministerial functions.[88] Catholic Charities of Sacramento claimed the WCEA violated its constitutional religious rights by creating an overly-narrow exemption for religious employers.[89] In another similarity between the three cases, all of the Catholic Charities organizations sought a declaratory judgment claiming the statutes violated the Free Exercise Clause and Establishment Clause of the United States Constitution and their respective state constitutions, and an injunction against their enforcement.[90] The Supreme Court of California, after examining *Sherbert* and its progeny, held strict scrutiny did not apply to striking down a statute under the Free Exercise Clause.[91]

In *Catholic Charities*, the plaintiff had four theories explaining why an exception to the general rule articulated in *Smith* ap-

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[86] Catholic Charities v. Super. Ct., 85 P.3d 67, 75-76 (Cal. 2004).

[87] *Id.* at 75.

[88] *Id.* at 75-76.

[89] *Id.* at 84 ("That the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church does not mean the exemption discriminates against the Catholic Church.").

[90] *Id.* at 76.

[91] *Catholic Charities*, 85 P.3d at 88-89.

plied.[92] First, the plaintiff argued "the face of the statute demonstrate[d] a lack of neutrality." Second, the plaintiff argued that given the "WCEA's legislative history and practical effect . . . the Legislature 'gerrymandered' the law to reach only Catholic employers."[93] Further, the plaintiff argued that strict scrutiny applied to the free exercise of religion under the California Constitution, and that the court should interpret the state constitution in "the same way the United States Supreme Court interpreted the [F]ederal Constitution's [F]ree [E]xercise [C]lause in *Sherbert*."[94] Third, the plaintiff argued the "WCEA is underinclusive, and therefore not narrowly tailored, because it does not facilitate access to prescription contraceptives" to women who fall into certain categories.[95] Finally, the plaintiff argued the WCEA failed strict scrutiny because it "is not narrowly tailored [and] it is overinclusive. . . . [because] it applies to employers that do not discriminate on the basis of gender . . . ."[96] Alternatively, the plaintiff argued the WCEA failed rational basis review.[97]

The Supreme Court of California, like the New York Court of Appeals, upheld the constitutionality of the exemption for religious employers despite plaintiff's invocation of comparable Supreme Court precedents.[98] The *Catholic Charities* court rejected those comparisons, indicating that Supreme Court jurisprudence reflected an

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[92] *Id.* at 82, 89.

[93] *Id.* at 82.

[94] *Id.* at 89.

[95] *Id.* at 94.

[96] *Catholic Charities*, 85 P.3d at 94.

[97] *Id.* at 76, 94 (holding, regardless of its applicability to the plaintiffs, the exemption "rationally serves the legitimate interest of complying with the rule barring interference with the relationship between a church and its ministers").

[98] *See id.* at 83-84, 95.

opposite trend.

> The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice. To the contrary, the court has repeatedly indicated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[99]

Further, the Supreme Court of California held "[t]he law treats some Catholic organizations more favorably than all other employers by exempting them; nonexempt Catholic organizations are treated the same as all other employers."[100] Lastly, the *Catholic Charities* court held the WCEA was facially neutral toward religion; the Act did not favor distribution and subsidization of contraceptives, but sought to prevent health benefits discrimination.[101]

The Supreme Court of California concluded that under *Sherbert*, the WCEA withstood strict scrutiny, but also held meeting this test was not a prerequisite to upholding the law's constitutionality; *Serio II* applied more of a balancing test. The *Catholic Charities* court first analyzed the free exercise claim under the *Smith* standard, concluding the plaintiff could only overcome the WCEA by demonstrating an exception to the general rule that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening

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[99] *Id.* at 83; *Serio II*, 859 N.E.2d at 464 (quoting *Amos*, 483 U.S. at 335).

[100] *Catholic Charities*, 85 P.3d at 87. However, this statement may raise concerns under the Establishment Clause.

[101] *Id.* at 94.

a particular religious practice."[102] The court ruled that the WCEA exemption was neutral and generally applicable because it only referred to religion and did not apply to one religion differently than another.[103] Further, the court held the WCEA was not an attempt at religious gerrymandering because it was sufficiently broad, especially considering the exemption was added at the insistence of Catholic organizations.[104] The court also rejected the plaintiffs' argument for a hybrid rights exception, because the plaintiffs failed to assert a meritorious constitutional claim in addition to the free exercise of religion claim.[105]

The Supreme Court of California stated that while the WCEA meets the *Sherbert* strict scrutiny test, "[w]e do not hold that the state free exercise clause requires courts to apply the *Sherbert* test . . . [i]nstead . . . we leave that question for another day."[106] Thought the Supreme Court of California did apply strict scrutiny, the dissent, like the New York Court of Appeals, asserted that the Supreme Court of California's analysis of the WCEA under strict scrutiny was inadequate.[107] This comparison indicates that California may follow a sim-

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[102] *Id.* at 82 (quoting *Lukumi*, 508 U.S. at 531).

[103] *Catholic Charities*, 85 P.3d at 83 ("[T]he burden arises not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives. The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice.").

[104] *Id.* at 84.

[105] *Id.* at 87-88.

[106] *Id.* at 91, 94.

[107] *See id.* at 105 (Brown, J., dissenting).

> Strict scrutiny is not what it once was. Described in the past as "strict in theory and fatal in fact," it has mellowed in recent decades. . . . If recent precedent is any guide, a state's interest is compelling if the state says it is. Thus, consistent with federal precedent compelling interest now seems more or less coextensive with the state's asserted exercise of

ilar balancing test for determining the constitutionality of a statutory religious employer exemption as New York.

The New York Court of Appeals, in *Serio II*, stated,

> In interpreting our Free Exercise Clause we have not applied, and we do not now adopt, the inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute. Rather, we have held that when the State imposes "an incidental burden on the right to free exercise of religion" we must consider the interest advanced by the legislation that imposes the burden, and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified."[108]

Despite technical differences in legal analysis, comparing and contrasting California's case law respecting a statute similar to the WHWA leads to the conclusion that New York will follow the more liberal trend set forth in *Catholic Charities of Sacramento*, and *Serio I* and *II*. One commentator reached a similar prediction in the midst of the legislative and constitutional debate before these two decisions were even rendered.[109]

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police power . . . .

Id. at 105. *See also Serio II*, 859 N.E.2d at 467 ("Often . . . the courts rejected claims to religious exemptions, and it is questionable whether the scrutiny applied by those courts is really as strict as their statement of the rule implies.").

[108] *Serio II*, 859 N.E.2d at 466 (quoting *La Rocca*, 338 N.E.2d at 613).

[109] Mechmann, *supra* note 17, at 167.

> Even assuming that New York State courts would apply a broader standard under the state constitution . . . there is no guarantee that litigation to obtain a religious exemption will be successful. As a result, the Church may be hard pressed to find a safe harbor for its religious beliefs regarding the immorality of contraception, and may be faced with the unpalatable choice of conforming to the values of society or finding other avenues to maintain its integrity.

The Court of Appeals' conclusion of the constitutionality of the WHWA is likely to remain a significant point of contention for years to come. Those who believe in the sanctity of life feel the WHWA creates a slippery slope on which their core beliefs are compromised.[110] Further, religious organizations that choose not to follow the insurance coverage mandate by not providing their employees with health insurance may be worse off than employers who are able to provide their employees with competitive health care coverage.[111] However, a few commentators have pointed out religious exemptions, such as the WHWA, stifle access to, and quality of, healthcare available to women.[112] These commentators posit the remedy to this controversy is achieved by creative solutions which compromise between those who value life and those who value choice.[113]

In conclusion, when one balances moral objections to a constitutionally neutral statute against the societal impact on cost and access to healthcare,[114] the *Serio II* court's decision to uphold the

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[110] Stabile, *supra* note 16, at 745 ("Regardless of one's own religion or one's personal view of the Catholic Church's position on birth control, the state action here establishes a dangerous precedent that fails to respect the integrity of religious institutions, threatening the Church's autonomy and right of self-definition.").

[111] *See* Stabile, *supra* note 16 and accompanying text.

[112] Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725 (2004). "While refusal clauses recognize that certain medical procedures may be antithetical to the beliefs of some individual providers, broad-based refusal clauses also have the potential to significantly burden patients by creating obstacles and absolute impediments to patients' ability to make their own health care decisions." *Id.* at 727.

[113] *See id.* at 747 (explaining how the "community model" adopted in California allows for all forms of contraception, as well as sterilization, but permits neither abortions nor fertility treatments).

[114] Sponsor's Memo, in N.Y. Bill Jacket, L. 2002, ch. 554 ("[I]n the NYC area, only 50% of managed care plans cover the cost of contraceptives leaving a significant number of women to pay full price for what may be the only prescription that they will fill all year, despite

constitutionality of a statute that seeks to balance access to health care between the sexes, is easily understood.[115]

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their $3,000 per year health insurance premium.").

[115] Division of the Budget, in N.Y. Bill Jacket, L. 2002, ch. 554 ("Allowing religious employers to exclude coverage for prescribed contraceptives, except for employees who need contraceptives to treat a medical condition, and allowing employees to purchase this coverage themselves is an appropriate compromise."); Memo of Gregory V. Serio in N.Y. Bill Jacket, L. 2002, ch. 554 states:

> [T]he mandates included in this bill to provide coverage for services such as bone density screening, contraceptives and expanded frequency of mammography screenings will advance the overall health of women. The early diagnosis and treatment of cancer and osteoporosis should prove to be cost effective, result in more favorable outcomes and thus is clearly in the best interest of the women of this State.