



## FACT SHEET

# If You Care about Religious Freedom You Should Care about Reproductive Justice!

*The Reproductive Justice (RJ) movement places reproductive health and rights within a social justice and human rights framework.<sup>1</sup> The movement supports the right of individuals to have the children they want, raise the children they have, and plan their families through safe, legal access to abortion and contraception. In order to make these rights a reality, the movement recognizes that RJ will only be achieved when all people have the economic, social, and political power to make healthy decisions about their bodies, sexuality, and reproduction.<sup>2</sup>*

Reproductive Justice demands that women be able to access and make informed decisions about their reproductive health care. Unfortunately, hospitals and pharmacies sometimes use their religious beliefs to justify denying women not only access to but also information about reproductive health care, including contraception, abortion, and in vitro fertilization. However, the religious freedom protections embodied in the First Amendment do not include the right to use religion to discriminate. While individual providers may refuse to provide a service based on personal religious objections, the pharmacies and hospitals that employ them may not discriminate against the women who seek healthcare at their facilities by denying them the appropriate standard of medical care. Such religious discrimination violates a woman's right to make informed decisions about her health care<sup>3</sup> and her reproductive freedom.

## Religious Discrimination Harms Women's Health

Hospitals and pharmacies that use religious beliefs to deny women needed care may jeopardize women's health and future fertility. Catholic-affiliated hospitals, for example, are governed by the Ethical and Religious Directives for Catholic Health Care Services (the Directives), which prohibit abortion and contraception, as well as in vitro fertilization.<sup>4</sup> Therefore, women who go to a Catholic-affiliated hospital may not only be denied basic reproductive care but also may not even be informed of the full range of health care options available to them. For example, women seeking treatment for miscarriages and ectopic pregnancies at Catholic-affiliated hospitals have been denied the appropriate standard of care and placed in life- and health-threatening situations.<sup>5</sup> Rape survivors seeking care at hospitals have been refused information about and access to emergency contraception (EC), denying them the ability to prevent pregnancy.<sup>6</sup> Pharmacies sometimes also deny women access to birth control or EC.<sup>7</sup>

Women denied needed services are forced to bear the burden of additional costs, delays, and health risks incurred by going elsewhere. Some women may even be prohibited from going elsewhere because their insurer prevents them from seeking care outside the plan. Religious refusals are particularly detrimental to women of color, low-income women, and rural women because many already face considerable barriers that impede their access to care.<sup>8</sup> Low-income women and women of color are significantly

more likely than other women to have trouble gaining access to medical care because of inflexible work schedules and difficulty arranging childcare or transportation.<sup>9</sup> Rural women and women living without health care providers in their communities might have to travel long distances to obtain care. Rural residents are four times more likely to live in a medically underserved area.<sup>10</sup> Providers practicing certain specialties, such as obstetrics/gynecology, are particularly lacking in rural areas; this often presents a major barrier for rural women who need reproductive health services. A woman and her family in a rural area, and even some urban areas, may need to travel for hours—sometimes by multiple modes of transportation—in order to reach a pharmacy that stocks contraceptives or an abortion provider. Thus, women of color, low-income women and rural women may have to marshal considerable resources to see a provider and in the event of a refusal, may have a harder time getting to another provider to access needed care. Although religious refusals jeopardize all women's health, they have the greatest effect on women with the fewest resources and who face the most barriers in accessing care.

## Reproductive Justice & Religious Freedom

The First Amendment protects religious freedom, an individual's right to practice or not practice any religion and an individual's right to be free from religious coercion.<sup>11</sup> First, the Establishment Clause mandates government neutrality in religious matters by stating that the government "shall make no law respecting an establishment of religion."<sup>12</sup> Second, the Free Exercise Clause protects an individual's right to practice his or her faith by stating that the government "shall make no law...prohibiting the free exercise [of religion]."<sup>13</sup> As envisioned by the founders of the Constitution and interpreted by the Supreme Court today, religious freedom also includes the right to be free from religion and does not include a right to impose one's religion on another.<sup>14</sup> Yet hospitals and pharmacies that refuse to provide reproductive healthcare to women do impose their religion on others.

In fact, reproductive health advocates have successfully used the Establishment Clause to challenge hospitals engaging in religious discrimination. For example, in 2011, Kentucky Governor Steve Beshear refused to approve a merger among several hospitals, including the University of Louisville Medical Center, which could have required all the hospitals to operate under the Directives, citing Establishment Clause concerns.<sup>15</sup> According to a report about the proposed merger by the state's Attorney General, approval of the transaction would have had "the impermissible effect of advancing religion by authorizing and requiring a public, state-owned hospital to be governed by the Catholic Church's religious directives."<sup>16</sup> Similarly, local residents in Newport, Oregon were able to stop an operating agreement under which the only hospital in their area would have been operated in accordance with the Directives while continuing to receive significant public funding and be overseen by a public corporation.<sup>17</sup>

Moreover, when religious hospitals, pharmacies, or employers are required to provide women reproductive services that meet the standard of care, they may claim the requirement violates their free exercise of religion.<sup>18</sup> However, the Free Exercise Clause is only triggered when a law intentionally targets a religion – it is not implicated by a neutral law of general applicability, like a law that regulates all hospitals or all employers.<sup>19</sup> Neutral laws of general applicability are subject to minimal judicial scrutiny so that, as Justice Scalia has stated, "each conscience" does not become "a law unto itself."<sup>20</sup> For these reasons, the highest state courts in California and New York upheld those states' contraceptive coverage laws against challenges by Catholic-affiliated organizations claiming that the laws, which required them to provide insurance coverage for contraceptives because their employee health plans provided otherwise comprehensive prescription drug coverage, violated their religious freedom.<sup>21</sup>

In both instances, the courts held that the laws furthered the compelling state interest of preventing gender discrimination and were neutral and generally applicable. Thus, the laws were allowed under the First Amendment.<sup>22</sup>

## **Religious Freedom Does Not Include the Freedom to Discriminate Against Women**

The First Amendment's religious freedom principles do not include the right to impose one's religious views on others.<sup>23</sup> In order to make healthy decisions about their bodies, women must have access to all of their options when they seek medical care. Hospitals and pharmacies that refuse women needed reproductive care because of their religious beliefs are using their religion to discriminate against and harm others. This denies women the right to make informed decisions about their care and unnecessarily jeopardizes their health.

## **How You Can Support Reproductive Justice and First Amendment Values**

- Advocate in your community for hospitals that provide the full range of reproductive health services to ensure that pregnant women will be provided all of their medical options and sexual assault survivors will have access to emergency contraception.
- Work with religious organizations in your community that support reproductive justice to advocate for policies that support both reproductive health and religious freedom.
- Urge public officials to oppose the merger of public hospitals and religiously-affiliated healthcare systems by informing them of possible Establishment Clause violations and the threat such mergers pose to women's reproductive health.
- Demand that pharmacies provide contraception and emergency contraception. If you have had trouble getting your prescription for EC or birth control pills filled or getting non-prescription EC, please contact the National Women's Law Center at 1-866-PILL-4-US or [pill4us@nwlc.org](mailto:pill4us@nwlc.org).

- 1 SISTERSONG, WHAT IS REPRODUCTIVE JUSTICE?, *available at* [http://www.sistersong.net/index.php?option=com\\_content&view=article&id=141&Itemid=81](http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81) (last visited Nov. 6, 2012).
- 2 EXPANDING THE MOVEMENT FOR EMPOWERMENT AND REPRODUCTIVE JUSTICE, THE EMERJ REPRODUCTIVE JUSTICE LENS TOOLKIT 1 (2008), *available at* <http://forwardtogether.org/assets/docs/ACRJ-RJ-Lens-Toolkit.pdf> (last visited Nov. 6, 2012).
- 3 AMA standard of care/informed consent
- 4 "Ethical and Religious Directives for Catholic Health Care Services, Fifth Edition," *available at* <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>
- 5 Lori R. Freedman et al., When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals, 98 AM. J. PUB. HEALTH 1774 (2008).
- 6 See, e.g., Sabrina Rubin Erdely, Doctor's Beliefs Can Hinder Patient Care, SELF, June 2007, *available at* <http://www.msnbc.msn.com/id/19190916/>.
- 7 Pharmacists in at least twenty-four states have refused to sell birth control or EC to women. Gretchen Borchelt, Pharmacists Can't Be Allowed to Deny Women Emergency Contraception, U.S. New & World Report, Oct. 15, 2012, *available at* <http://www.usnews.com/opinion/articles/2012/10/15/pharmacists-cant-be-allowed-to-deny-women-emergency-contraception>.
- 8 NARAL Pro-Choice America, Refusal Laws: Dangerous for Women's Health, *available at* <http://www.prochoiceamerica.org/media/fact-sheets/abortion-refusal-clauses-dangerous.pdf>. (last visited Nov. 6, 2012).
- 9 Kaiser Family Found., Women and Health Care: A National Profile 24 (July 2005), *available at* <http://www.kff.org/womenshealth/upload/women-and-health-care-a-national-profile-key-findings-from-the-kaiser-women-s-health-survey.pdf>; U.S. Dept. of Health & Human Services, Office on Women's Health, The Health of Minority Women 4 (July 2003), *available at* <http://www.4woman.gov/owh/pub/minority/minority.pdf>.
- 10 See U.S. Dep't of Health & Human Serv., Facts about...Rural Physicians, [http://www.shepscenter.unc.edu/rural/pubs/finding\\_brief/phy.html](http://www.shepscenter.unc.edu/rural/pubs/finding_brief/phy.html) (last visited Apr. 2, 2009).
- 11 Rob Boston, A Delicate Balance: A History of the Separation of Church and State in the US, 33 CONSCIENCE 13, 16 (2012).
- 12 U.S. Const. amend. I.
- 13 Id.
- 14 Boston, *supra* note iv, at 15.
- 15 Gov. Beshear Rejects Proposed Hospital Merger; Hospitals Plan to Fight Decision, WHAS1, (Dec. 30, 2011, 6:40 PM), <http://www.whas11.com/news/Hospital-merger-details-might-be-announced-136424478.html>. See also JACK CONWAY, PROPOSED CONSOLIDATION OF JEWISH HOSPITAL HEALTHCARE SERVICES, INC., CHI KENTUCKY, INC., CATHOLIC HEALTH INITIATIVES, UNIVERSITY MEDICAL CENTER, INC., JEWISH HOSPITAL & ST. MARY'S HEALTHCARE, INC., FLAGET HEALTHCARE, INC., SAINT JOSEPH HEALTH SYSTEM, INC., AND JH PROPERTIES, INC., TO CREATE A STATEWIDE NETWORK HEALTHCARE ENTITY (THE KENTUCKY STATEWIDE NETWORK) SPONSORED BY CATHOLIC HEALTH INITIATIVES (70%), JEWISH HOSPITAL HEALTHCARE SERVICES, INC. (14%) AND THE UNIVERSITY OF LOUISVILLE (16%): REPORT OF THE ATTORNEY GENERAL, 10, (2011), *available at* <http://www.khpi.org/dwnlds/ag-merger-report.pdf>.
- 16 CONWAY, *supra* note xv, at 10.
- 17 *Calif. Health System Ends Pursuit of Ore. Hospital Amid Community Concerns*, Kaiser Health News, (Oct. 31, 2012), <http://www.kaiserhealthnews.org/Daily-Reports/2012/October/31/states-mergers-and-acquisitions.aspx>. See also NAT'L WOMEN'S LAW CTR, HOSPITAL MERGERS AND THE THREAT TO WOMEN'S REPRODUCTIVE HEALTH SERVICES: USING THE ESTABLISHMENT CLAUSE OF THE CONSTITUTION TO FIGHT BACK, (2006).
- 18 *Stormans, Inc. v. Selecky*, 854 F. Supp.2d 925 (W.D. Wash. 2012) (District Court upheld pharmacy's Free Exercise challenge to state regulation requiring pharmacies to dispense all lawfully prescribed drugs, including EC. Case is on appeal to the Ninth Circuit).
- 19 *Employment Division v. Smith*, 494 U.S. 872 (1990).
- 20 494 U.S. at 890.
- 21 *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y. 3d 510 (N.Y. 2006).
- 22 See *Catholic Charities of Sacramento*, 85 P.3d; See *Serio*, 7 N.Y. 3d.
- 23 SARAH LIPTON-LUBET, ACLU, PROMOTING EQUALITY: AN ANALYSIS OF THE FEDERAL CONTRACEPTIVE RULE 2 (2012), *available at* [http://www.aclu.org/files/assets/promoting\\_equality\\_-\\_an\\_analysis\\_of\\_the\\_federal\\_contraceptive\\_coverage\\_rule.pdf](http://www.aclu.org/files/assets/promoting_equality_-_an_analysis_of_the_federal_contraceptive_coverage_rule.pdf).