Nos. 14-1430 & 14-1431

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GRACE SCHOOLS, et al., *Plaintiffs-Appellants*, v. KATHLEEN SEBELIUS, et al., *Defendants-Appellees*.	**On Appeal from the United States District Court for the Northern District of Indiana (3:12-cv-00459) (DeGuilio, J.)**
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., et al., *Plaintiffs-Appellants*, v. KATHLEEN SEBELIUS, et al., *Defendants-Appellees*.	**On Appeal from the United States District Court for the Northern District of Indiana (1:12-cv-00159) (DeGuilio, J.)**

CONSOLIDATED BRIEF OF *AMICI CURIAE* JULIAN BOND AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 14-1430 & 14-1431

Short Caption: Grace Schools v. Sebelius & Diocese of Fort Wayne-South Bend, Inc. v. Sebelius

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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American Civil Liberties Union; Julian Bond

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

American Civil Liberties Union Foundation

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Daniel Mach Date: May 13, 2014

Attorney's Printed Name: Daniel Mach

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N/A

Attorney's Signature: /s/ Jennifer Lee Date: May 13, 2014

Attorney's Printed Name: Jennifer Lee

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

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STATEMENT OF *AMICI*

Identity and Interests of *Amici*

Julian Bond has spent his lifetime seeking justice for people of color. He is currently a professor, and is Chairman Emeritus of the NAACP. Given his life's work, Mr. Bond is all too aware that religion has been used through the decades to sanctify slavery, subjugation and segregation. Mr. Bond signs this brief because he believes that the need to prevent the misuse of religion to promote discrimination is as urgent now as ever.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has a long history of furthering racial justice and women's rights, and an equally long history of defending religious liberty. The ACLU also vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

Source of Authority to File *Amicus* Brief

Pursuant to Federal Rule of Appellate Procedure 29(b), this brief is accompanied by a motion for leave to file.

Authorship and Funding of *Amicus* Brief

No party's counsel authored this brief in whole or in part. With the exception of *amici*'s counsel, no one, including any party or party's counsel, contributed money that was intended to fund preparing or submitting this brief.

FACTUAL BACKGROUND

The Affordable Care Act requires that health insurance plans cover certain preventive services without cost-sharing. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C.A. § 300gg-13). The preventive services coverage requirement did not initially include many preventive services unique to women, prompting passage of the Women's Health Amendment ("WHA"). *Id.* § 2713(a)(4), 124 Stat. at 131. In passing the WHA, Senator Mikulski noted, "[o]ften those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ." 155 Cong. Rec. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski); *see also id.* at S11,987 (noting that the ACA did not cover key preventive services for women). In particular, with the WHA, Congress intended to address gender disparities in out-of-pocket health care costs, which stem in large part from reproductive health care:

> Not only do we [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

To implement the WHA, the U.S. Department of Health and Human Services ("HHS") looked to the Institute of Medicine ("IOM"), an independent, nonprofit organization, to recommend services that should be covered. IOM recommended that the covered preventive services include, among other things, the full range of Food and Drug Administration ("FDA") approved contraceptives. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109-10 (July 2011). In making the recommendation, the IOM noted that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions

have increased in recent years." *Id.* at 109. These cost barriers are aggravated by the fact that women "typically earn less than men and . . . disproportionately have low incomes." *Id.* at 19.

The federal government adopted IOM's recommendations and enacted regulations that require non-grandfathered plans covered by the ACA to provide health care coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* 45 C.F.R. § 147.130(b)(1); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/womensguidelines (last visited Jan. 24, 2014).[1]

The federal government has emphasized the importance of the rule not only to equalize women's health care costs, but to

[1] The regulations authorize an exemption for the group health plan of a "religious employer," 45 C.F.R. § 147.131(a), which are not at issue in this appeal.

ensure women have the ability to be equal participants in society. As it noted, the inability of women to access contraception

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

On June 28, 2013, HHS released the final rule as it relates to religious nonprofit organizations that object to covering contraceptives. HHS determined that such organizations are exempt if the following requirements are satisfied:

> (1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections. (2) The organization is organized and operates as a nonprofit entity. (3) The organization holds itself out as a religious organization. (4) The organization self-certifies . . . that it satisfies the criteria [in paragraphs (1)-(3)].

26 C.F.R. § 54.9815-2713A(a) (2013); 29 C.F.R. § 2590.715-2713A (2013); 45 C.F.R. § 147.131 (2013). The self-certification form simply requires the organization to certify that it meets the rule's requirements. *See* Ctrs. for Medicare & Medicaid Servs., CMS Form No. CMS-10459: Coverage of Certain Preventive Services under the Affordable Care Act (2013), *available at* http://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing-Items/CMS-10459.html (last visited April 21, 2014).

Religiously affiliated nonprofit organizations like the Appellees must then provide their insurance company or third-party administrator with a copy of this form. In practice, this requirement is likely no different from what the Appellees did prior to the rule. As HHS noted in issuing the rule: "Even prior to the proposed regulations, because contraceptive benefits are typically in standard product designs, many eligible organizations directed their issuers and third party administrators not to make payments for claims for medical services to which they object on religious grounds." *See* Coverage of Certain Preventive Services

Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013). Once an insurance company or a third party administrator receives the self-certification form, it will provide payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The insurance company or third-party administrator will also notify the organization's employees that it – not the organization – will be providing payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d).

SUMMARY OF ARGUMENT

Amici support the government's and its *amici*'s arguments that the contraception rule does not burden – much less, substantially – the Appellees' religious exercise rights. The rule only requires Appellees to submit a two-page form to their insurance company or third party administrator informing it that they object to covering contraceptives. *Amici* do not repeat those arguments here. Instead, we submit this brief to highlight an important lesson of history: As our society has progressed toward greater equality for racial minorities and women, it has been less

willing to accept religion as a justification for discrimination in the marketplace, and properly so. This is equally true for religiously affiliated nonprofit employers, like Appellees.

Religion is a powerful force that shapes individual lives and influences community values. Like other belief systems, it has been used at different times and in different places to support social change and to oppose it, to promote equality and to justify inequality. Our constitutional structure recognizes the importance of religion by protecting its free exercise, a commitment to religious tolerance and pluralism that was reinforced by Congress when it enacted RFRA. Public debate can be and often is enhanced by those whose participation in that debate is informed by their faith. But once that debate is resolved through the democratic process, those who disagree with that resolution on religious grounds are no more entitled to an exemption from anti-discrimination laws than those who dissent on other ideological grounds. That is because the elimination of discrimination in the marketplace has long been recognized as a state interest of the

highest order. This is especially true when – as here – the government has already provided a religious accommodation.

Religious leaders, of course, have often led the movement against discrimination. To choose one obvious example, Dr. Martin Luther King, Jr. was a minister whose faith informed and inspired his social justice work. But it is also true that religion has frequently played the opposite role in our nation's history, invoked by those who sought to perpetuate discrimination based on race or gender, whether by opposing changing standards or seeking an exemption to new legal norms. We do not recount that history to suggest that the invocation of religious beliefs to justify the most odious forms of racial discrimination is equivalent to religious opposition to contraception. Rather, we provide this history because it demonstrates that the issues in this case are not new.

Slavery was once defended on religious grounds. So were Jim Crow laws. Even the courts embraced religion to justify continued segregation. A civil war, followed by decades of protest and advocacy, eventually led to change. The change was met with

resistance, including resistance motivated by religious beliefs. Congress and the courts faced calls for exemptions to enable those objecting for reasons of faith to avoid compliance with evolving standards in employment, education, marriage recognition, and public accommodation. The courts rejected these claims, recognizing the vital state interest in ending discrimination in these public arenas and embracing a vision of equality that did not sanction piecemeal exemptions.

The story of women's emerging equality follows a similar pattern. Women have been celebrated as mothers while long denied rights and opportunities on the premise that the home was their proper domain. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access to birth control, and later inspired legislation purportedly to "protect" women, including their reproductive capacities. The last century brought great changes, with women – and men – increasingly able to opt for parenthood and caregiving, as well as to participate in an ever greater array of educational and career opportunities. Many factors contributed to this

change, including laws prohibiting discrimination and protecting women's ability to control their reproductive capacity. These measures, like those for racial equality, were met with resistance, including calls based on religion to avoid compliance with evolving legal standards. Again, as with race, Congress and the courts held firm to the vision embodied in newly passed anti-discrimination measures, including as applied to religiously affiliated nonprofit employers.

This history offers some guidance to this Court as it analyzes the currently claimed right to religious exercise and exemption. The contraception rule addresses remaining vestiges of sex discrimination: the disparities in the cost of health care as between women and men, the longstanding exclusion of services needed only by women from health care coverage, and the need for women to have meaningful access to all forms of contraception if they are to control unintended pregnancies and thus enjoy greater equality in society. As the Supreme Court has recognized, women's ability to control their reproductive capacities is essential to women's participation in society. Contraception is not simply a

pill or a device; it is a tool, like education, essential to women's equality. Without access to contraception, women's ability to complete an education, to hold a job, to advance in their careers, to care for their existing children, or to achieve their goals, whatever they may be, is compromised. The contraception rule – which already significantly accommodates Appellees' religious beliefs while ensuring that their employees and students benefit from the rule – makes access to contraception meaningful, and thus takes a giant and long overdue step to level the playing field.

In other contexts, calls for religious exemptions from laws advancing women's equality – be they to pay women less or to deny employment to women who violate traditional social norms – have been rejected. The result should be the same here.

ARGUMENT

I. THE HISTORICAL MOVEMENT TOWARD GREATER EQUALITY FOR RACIAL MINORITIES AND WOMEN HAS BEEN ACCOMPANIED BY A GROWING REJECTION OF EFFORTS TO JUSTIFY DISCRIMINATION IN THE MARKETPLACE ON THE BASIS OF RELIGION.

A. Racial Discrimination

There was a time in our nation's history when religion was used to justify slavery, Jim Crow laws, and bans on interracial marriage. Eventually our laws changed, and those who continued to believe in racial discrimination on religious grounds were nonetheless required to obey the nation's anti-discrimination laws. Although, as previously noted, the history of religious justification for slavery, racial discrimination, and racial segregation are different in many ways from the instant request for a religious exemption, the lessons derived from that experience are instructive.

At the beginning of our country's history, religious beliefs were invoked by some, including the courts, to justify the most fundamental inequalities. Indeed, slavery itself was sometimes defended in the name of faith. The Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, noted that the introduction of slavery was perhaps "the providence of God" to rescue an "unhappy race" from Africa and place them in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852). Religion

was also invoked to justify anti-miscegenation laws. For example, in upholding the criminal conviction of an African American woman for cohabitating with a white man, the Georgia Supreme Court held that no law of the State could

> attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.

Scott v. State, 39 Ga. 321, 326 (Ga. 1869); *see also Kinney v. Commonwealth*, 71 Va. 858, 869 (Va. 1878) (upholding the criminal conviction of an interracial couple reasoning that the two races should be kept "distinct and separate" because God demands it); *Green v. State*, 58 Ala. 190, 195 (Ala. 1877) (same); *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (same).

Courts accepted similar justifications to sustain segregation. In 1867, Mary E. Miles defied railroad rules by refusing to take a seat in the "colored" section of the train car. The Supreme Court of Pennsylvania reversed a jury verdict in her favor, relying in

part on the fact that "the Creator" made two distinct races, which "God has made . . . dissimilar," and that "the order of Divine Providence" dictates that the races should not mix. *The West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (Pa. 1867); *see also Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1018-19 (Ala. 1900) (same); *Berea College v. Commonwealth,* 94 S.W. 623, 626 (Ky. 1906) (affirming law that prohibited whites and blacks from attending the same school, noting that the separation of the races was "divinely ordered"), *aff'd,* 211 U.S. 45 (1908).

These arguments in favor of racial segregation slowly lost currency, but not without resistance. The turning point in our country's history was marked by two events. The first was the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which repudiated the "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held unconstitutional racial segregation in public schools. The second was Congress's passage of the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations. Those leading the movement for

racial equality included men and women of faith. And those resisting that change included those with religious beliefs opposed to integration.

The resistance, both religiously based and other, was most profound in the context of education. For example, members of the Florida Supreme Court invoked religion to justify resistance to integration in the schools, noting that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *State ex rel. Hawkins v. Bd. of Control*, 83 So.2d 20, 28 (Fla. 1955) (concurring opinion).

In the years following the Supreme Court's enforcement of *Brown*, the number of private, segregated schools – many of which were religiously affiliated – expanded exponentially and white students left the public schools in droves. *See* Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1437-40 (1973). In one Mississippi county, within two months of a desegregation order, three private schools opened and the number of white pupils in public school in first through fourth grade dropped from

771 to 28. *See Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1391 n.7 (S.D. Miss. 1969).

In response, the Treasury Department issued a ruling declaring that racially segregated schools would not be eligible for tax-exempt status. The Treasury Department's ruling reflected the changing of the tides:

> Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. . . . Therefore, a school not having a racially nondiscriminatory policy as to students is not "charitable" . . . [and] does not qualify as an organization exempt from Federal income tax.

Rev. Rul. 71-447, 1971-2 C.B. 230. Attempts by the IRS to enforce the Treasury Department's rule met resistance in the courts. Most notably, Bob Jones University brought suit under the Free Exercise Clause after the IRS revoked the University's tax exempt status based on its policy of first refusing to admit African American students altogether, and subsequently refusing to admit students engaged in or advocating interracial relationships. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The sponsors of Bob Jones University "genuinely believe[d] that the Bible forbids

interracial dating and marriage." *Id.* at 580. Bob Jones's lesser-known co-petitioner, Goldsboro Christian Schools, operated a school from kindergarten through high school and refused to admit black students. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id.* at 583 n.6. The Supreme Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on their religious beliefs. *Id.* at 602-04.

Progress toward racial equality was not limited to schools. The anti-miscegenation laws fell, although again the path was not a smooth one. The trial court in *Loving v. Virginia* adhered to the reasoning of earlier decades: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U.S. 1, 3 (1967) (quoting trial court). But in the 1960s, unlike in the 1870s, this reasoning did not hold, and

the Supreme Court struck Virginia's anti-miscegenation law. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, but they were ultimately rejected. During the Act's passage, for example, Senator Robert Byrd articulated some of these arguments, including reciting Leviticus 19:19, which discusses the need to keep cattle separate from other animals, to argue that "God's statutes . . . recognize the natural order of the separateness of things." 110 Cong. Rec. 13,207 (1964).[2] And the House passed a broad exemption to exclude religiously affiliated employers entirely from the proscriptions of the Act. *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964). However, the law as enacted permitted no employment discrimination based on race; it authorized religiously affiliated

[2] Byrd also noted that "[t]he American Council of Christian Churches, representing 15 denominational groups with a total of more than 20 million members wired President Johnson" protesting the civil rights bill. *Id.* at 13,209. His expression of the religious arguments against the bill was only part of the story, of course; religious arguments were also advanced in favor of the bill. *See, e.g., id.* (recognizing the 4,000 clerical and lay representatives at the interfaith rally at the Nation's Capital in support of the bill).

employers to discriminate only on the basis of religion. *Id.*[3] Later efforts to pass a blanket exemption for religiously affiliated employers again failed. *Id.* at 1277.

Resistance to the 1964 Civil Rights Act based on religion did not stop with its passage. The owner of a barbeque chain who was sued for refusing to serve blacks defended the lawsuit by claiming that serving blacks violated his religious beliefs. The court rejected the restaurant owner's defense, holding that the owner

> has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*,

[3] The Act, while prohibiting religiously affiliated entities from discriminating based on race, color, sex, and national origin, permits those entities to discriminate in favor of co-religionists. *See Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). The First Amendment provides additional latitude for religious employers in the selection of religious ministers. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception).

377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Thus, throughout our country's history, the argument that religious beliefs should trump measures designed to eradicate racial discrimination – whether *in toto* or piecemeal – has slowly lost its standing. Once having achieved a commitment to end racial discrimination in education, employment, and public accommodations, our society, through the courts and Congress, has refused to grant religious exemptions that would undermine this goal. And resistance to these measures has steadily waned. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433, 439 (2011).

Although there are many differences between the racially biased religious justifications described above and the proposed exemption now before this Court, this experience establishes that

close scrutiny is required where, as here, this Court considers a religious exemption to a federal anti-discrimination statute that promotes a compelling governmental interest in equality and opportunity.

B. Gender Discrimination

The path to achieving women's equality has followed a course similar to the struggle for racial equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (chronicling the long history of sex discrimination in the United States).[4] Efforts to advance women's equality, like those furthering civil rights, were supported – and thwarted – in the name of religion. And in this context, as with race, the resistance to equality was initially embraced by courts. For example, the Supreme Court held that the State of Illinois could prohibit women from practicing law, and in his famous concurrence, Justice Bradley opined that:

[4] The Court in *Frontiero* noted that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes," emphasizing that women, like slaves, could not "hold office, serve on juries, or bring suit in their own names," and that married women traditionally could not own property or even be legal guardians of their children. *Id*. at 685.

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

This vision of women – as destined for the role of wife and mother – featured in opposition to suffrage. A prominent antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.'" Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981 n.96 (2002) (quoting Rev. Justin D. Fulton, *Women vs. Ballot*, *in* The True Woman: A Series of Discourses: To Which Is Added Woman vs. Ballot 3, 5 (1869)). And in this same period, the first laws against contraception were enacted, so as to address what was characterized as "physiological sin." Reva B. Siegel, *Reasoning from the Body: A Historical*

Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 292 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888)).

Even as women began entering the workforce in greater numbers, they were constrained by the longstanding and religiously imbued vision of women as mothers and wives. As the Supreme Court recognized, "[a]s a result of notions such as [those articulated in Justice Bradley's concurrence in *Bradwell*], our statute books gradually became laden with gross, stereotyped distinctions between the sexes." *Frontiero*, 411 U.S. at 685. Those statutes were often upheld by the Supreme Court. For example, in *Muller v. Oregon*, the Supreme Court upheld workday limitations for women because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence." 208 U.S. 412, 421 (1908); *see also Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (holding women should be exempt from mandatory jury duty service because they are "still regarded as the center of home and family life").

But just as with the movement for racial justice, society progressed, and gradually our country started recognizing women's ability to pursue goals other than, or in addition to, becoming wives and mothers. Indeed, the passage of the Civil Rights Act of 1964 was a gain not just for racial equality but also for gender equality: Title VII of the Act barred discrimination based on sex, as well as race, in the workplace. This protection, like that for race, passed in the face of religious objection and without the broad exemption proposed to permit continued employment discrimination based on sex by religiously affiliated organizations. *See* 110 Cong. Rec. 13,207-08 (1964) (testimony of Sen. Byrd); *see also Pac. Press Pub. Ass'n*, 676 F.2d at 1276 (discussing legislative history of Civil Rights Act of 1964).

Slowly the courts, too, began dismantling the notion espoused by Justice Bradley in *Bradwell* that, based on divine ordinance and the law of the Creator, women should be confined to roles as wives and mothers. For example, the Supreme Court held unconstitutional a state law that treated girls' and boys' age of majority differently for the purposes of calculating child support,

rejecting the state's argument that girls do not need support for as long as boys because they will marry quickly and will not need a secondary education. *Stanton v. Stanton*, 421 U.S. 7 (1975). The Supreme Court reasoned:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable . . . .

Id. at 14-15 (internal citation omitted).

The Court also dismantled notions that women could be barred from certain jobs because of their reproductive capacity, *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and affirmed the Family Medical Leave Act, federal legislation that addresses "the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest," *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003).

As with race, this progress has been tested, including by religious liberty defenses to the enforcement of anti-discrimination

measures. Religious schools resisted notions that they should have to provide their female employees with the same compensation as their male employees, invoking their belief that the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). The courts rejected the claim, emphasizing a state interest of the "highest order" in remedying the outmoded belief that men should be paid more than women because of their role in society. *Id.* at 1398 (citations and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (rejecting religious school's argument that it was entitled to offer unequal benefits to female employees based on a similar "head of household" religious tenet); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).

The outer bounds of measures designed to protect against gender discrimination continue to be tested in the name of religious beliefs. In more recent cases, religious employers have essentially claimed that their religious beliefs entitle them to

violate Title VII's prohibition on sex discrimination, but courts have limited such arguments. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (holding that a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, noting that "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (rejecting free exercise challenge to Title VII by religious school that fired librarian for becoming pregnant outside of marriage, and noting that the school may have discriminated based on sex because "*only* women can *ever* be fired for being pregnant without benefit of marriage").

II. THIS COURT SHOULD NOT ALLOW THE APPELLEES TO REVIVE THE DISCREDITED NOTION THAT THEIR RELIGIOUS BELIEFS SHOULD TRUMP A LAW DESIGNED TO ENSURE EQUAL PARTICIPATION IN SOCIETY.

The contraception rule stands in line with Title VII and other anti-discrimination measures as one further step to address a vestige of gender discrimination. And like those laws, the rule is being resisted. Appellees argue that they are entitled to violate the rule based on their religious beliefs. It is a familiar argument and, like similar arguments in the past, should be rejected.

The contraception rule is an essential step to further equal opportunities for women. At the most fundamental level, the rule ensures women will have meaningful access to contraception. Indeed, nothing evidences the importance of the rule more clearly than the following fact: Today, approximately half of pregnancies are unintended. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 549 (7th Cir. 2014). Several facts underlie this statistic: Many women are unable to afford contraception – even with insurance – because of high co-pays or deductibles, *see generally*, Su-Ying Liang, et al., *Women's Out-of-Pocket Expenditures and Dispensing*

Patterns for Oral Contraceptive Pills Between 1996 and 2006, 83 Contraception 528, 531 (2010); others cannot afford to use contraception consistently, *see* Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, *available at* http://www.guttmacher.org/pubs/RecessionFP.pdf (last visited Jan. 24, 2014); and costs drive women to less expensive and less effective methods, *see* Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible Contraception*, 117 Obstetrics & Gynecology 1105, 1105-06 (2011) (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost). *See also Univ. of Notre Dame*, 743 F.3d at 549.

A rule that makes all FDA-approved methods available to women, without a copay or deductible, lifts these barriers. A study in St. Louis, which essentially simulated the conditions of the rule, illustrates its impact: Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey Peipert et al., *Preventing Unintended*

Pregnancies by Providing No-Cost Contraception, 120 Obstetrics & Gynecology 1291 (2012). In this setting, 75% of the participants opted for a long-acting reversible contraceptive method, with 58% choosing an IUD. *Compare id.* at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Aug. 2013), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Jan. 24, 2014) (showing less than 6% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted. Indeed, the researchers estimate that changes in contraceptive policy simulating their project "would prevent as many as 62-78% of abortions performed annually in the United States." Peipert et al., *Preventing Unintended Pregnancies*, *supra*, at 1296.

In giving women meaningful access to contraception, the rule has the promise to transform women's lives, including enabling women to better decide whether and when to become a parent, and allowing women to make educational and employment choices that benefit themselves and their families. "'Women who

can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community.'" *Univ. of Notre Dame*, 743 F.3d at 549 (quoting Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 The Guttmacher Report on Public Policy 5, 6 (2004)). The availability of the oral contraceptive pill alone is associated with a 20% increase in women's college enrollment; roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; and a sharp increase in the percentage of women lawyers, judges, doctors, dentists, architects, economists, and engineers. *See* Martha J. Bailey, et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat'l Bureau of Econ. Research Working Paper No. 17922, 2012), *available at* http://www.nber.org/ papers/w17922 (last visited Jan. 22, 2014); Claudia Goldin & Lawrence F. Katz*, The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions,* 110 J. Pol. Econ. 730, 749 (2002). As the Supreme Court has

recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

Moreover, the contraception rule contributes to the dismantling of outmoded sex stereotypes because, as made plain above, contraception offers women the tools to decide whether and when to become mothers. The rule therefore remedies the notion, long endorsed by society, that "a woman is, and should remain the 'center of home and family life.'" *Hibbs*, 538 U.S. at 729 (quoting *Hoyt*, 368 U.S. at 62). It reinforces the fundamental premise underlying access to contraception, namely that society no longer demands that women's place is either to accept pregnancy or to refrain from nonprocreative sex. As the Supreme Court has so eloquently stated, "these sacrifices [to become a mother] have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others . . . [but they] cannot alone be grounds for the State to insist she make the sacrifice." *Casey*, 505 U.S. at 852.

The contraception rule changes women's status in one other fundamental respect. Health care plans that cover preventive care that men need, but not that which women need, send the message that women are second-class citizens, and that they are not employees equally valued by the employer. A wholesale religious exemption suggests that religious objections are more important than women's equality in our society. For all these reasons, contraception is more than a service, device, or type of medicine. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *Cf. Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that sodomy laws do not simply regulate sex but infringe on the liberty rights of gays and lesbians).

This Court should reject Appellees' attempt to revive the long-discredited notion that they are entitled to discriminate against their female employees and students because of their religious beliefs. Although Appellees are certainly entitled to their religious beliefs, they are not permitted to invoke those beliefs to discriminate against their female employees and

students. Just as Appellees would not be able to use religion to hire only men, or refuse to pay their female employees equally, they should not be allowed to use religion to violate the contraception rule, which is designed to promote gender equality. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial next step forward.

CONCLUSION

Accordingly, this Court should reverse the decisions below.

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Respectfully submitted,

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DATED: May 13, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2014, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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