Nos. 19-431 & 19-454

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Petitioner,

—v.—

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

—v.—

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, THE ACLU OF NEW JERSEY, AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF RESPONDENTS

Witold J. Walczak
Sara J. Rose
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
PO Box 23058
Pittsburgh, PA 15222

Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
570 Broad Street
Newark, NJ 07102

Brigitte Amiri
Counsel of Record
Louise Melling
Lindsey Kaley
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
bamiri@aclu.org

David D. Cole
Daniel Mach
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS & RULES

STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million 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 gender and racial justice, 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. The ACLU of Pennsylvania and the ACLU of New Jersey are state affiliates of the national ACLU.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including women and people of color. It is the nation's largest and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by leaders of the civil rights and labor rights movements, grounded in the belief that civil rights would be won not by one group alone but through coalition. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

---

[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. *Amici* agree with Respondents that neither the Patient Protection and Affordable Care Act ("ACA") nor the Religious Freedom Restoration Act ("RFRA") authorizes the federal government to promulgate the rules challenged here, which allow employers and universities to deny their female employees and students contraceptive insurance coverage benefits guaranteed by law. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (together the "Exemption Rules"). In effect, the Exemption Rules permit employers with religious objections to contraception to pay their female employees less than other employers for the same work, and permit universities to provide unequal coverage to female students. Religious freedom demands tolerance. But nothing in the ACA or RFRA authorizes the government to allow religious believers to inflict harm on third parties in the name of their religion.

A. The ACA does not authorize the Exemption Rules, because it was expressly designed to guarantee all covered female employees and students preventive care identified by the Department of Health and Human Services ("HHS"), and HHS has determined that such care includes contraception. Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 119, 131 (2010) (codified at 42 U.S.C.A. § 300gg-13); 45 C.F.R. § 147.130(b)(1). The ACA itself affords the agency no discretion to selectively deny that coverage to certain employees.

The law includes an accommodation for religiously affiliated nonprofit organizations that have religious objections to covering contraception, which was extended to "closely held" for-profit companies by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Critically, this Court has recognized that the accommodation *both* respects employers' religious objection to paying for contraception, *and* furthers the government's compelling interest in ensuring that employees and students retain no-cost access to contraception. The ACA does not authorize the government to go further to deny women contraceptive coverage in the name of respecting religious exercise.

Because the ACA guarantees contraceptive coverage to all covered employees as part of women's preventive care, RFRA can authorize the denial of such coverage only if it affirmatively *requires* such an accommodation. It does not. This Court in *Hobby Lobby* held that RFRA required an accommodation of the ACA's contraceptive coverage requirement for closely held private corporations that objected on religious grounds to contraception. It reasoned that requiring such corporations to pay for the coverage was a substantial burden on their religion, and was not the least restrictive means to furthering the government's compelling interest in guaranteeing women that coverage, because "HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Id.* at 692; *see also id.* at

738 (the "accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs") (Kennedy, J., concurring). The accommodation required in *Hobby Lobby*, in short, *preserved* women's contraceptive coverage, and merely altered who paid for it. *Id.* at 693, 728 (majority op.). The Exemption Rules, by contrast, would wholly frustrate the compelling interest in guaranteeing women contraceptive coverage, and impermissibly allow the religious beliefs of employers and universities to nullify altogether the right to equal treatment of their female employees and students.

Accordingly, RFRA does not authorize the Exemption Rules, which would burden the very people the ACA was designed to protect. First, the contraceptive coverage requirement does not impose a "substantial burden" on employees or universities that object to contraception. Under *Hobby Lobby*, the law already accommodates employers and universities with religious objections by lifting their obligation to pay anything for their employees' contraceptive coverage. The mere requirement that such institutions notify the government of their objection is not a "substantial burden" on religion.

Second, even if it were a substantial burden to have to notify the government of one's religious objection, that requirement is the least restrictive means to furthering the compelling interest in ensuring that women continue to receive contraceptive coverage. RFRA does not authorize religious objectors to harm third parties. *See id.* at 734–36; *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). The Exemption Rules wholly frustrate the

interest in ensuring women contraceptive coverage. They are therefore not required or authorized by RFRA. And if there were any doubt, the rule of constitutional avoidance supports the decision below, because giving official sanction to employers and universities to invoke their religious beliefs to harm third parties would run afoul of the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985).

B. The ACA's contraception coverage requirement addresses a vestige of sex discrimination. As this Court has recognized, women's ability to control their reproductive capacities is essential to their equal 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 a career, or to care responsibly for children, may be significantly compromised. By establishing meaningful access to contraception for many women, the contraception coverage requirement seeks to level the playing field. To give individual employers and universities the right to invoke their religious beliefs to deny their female employees and students this critical benefit—even where it would be paid for entirely by others—is therefore not only unauthorized by statute, but impermissibly permits religion to be a justification for discrimination.

II. The struggle to overcome discrimination while respecting religious liberty has been a recurring challenge. That history provides an important lesson here. By recounting this history,

amici do not question the sincerity of objecting employers' and universities' religious faith. Nor do we suggest that the historical invocation of religion to justify sex and race discrimination is equivalent to the religious claims that the employers have raised here. But that is not the test and should not be the legal measuring rod. As this Court observed in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), religious objections to anti-discrimination laws are often "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* at 2602; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (noting that if businesses could invoke religion to refuse to treat customers equally, those practices would inflict "community-wide stigma inconsistent with the history and dynamics of civil rights laws").

Religion is a powerful force that shapes individual lives and influences community values. Like other belief systems, it has been used both to support change and to oppose it, to promote equality and to justify inequality. Religious leaders – such as Dr. Martin Luther King, Jr., Mahatma Gandhi, Dorothy Day, and Harriet Tubman – have been inspiring and influential advocates for social justice and equality. Religious principles promoting the equal dignity of all human beings have often supported calls for equal treatment by law, and

churches, synagogues, and mosques have played important parts in advancing equal justice for all.

Others, however, have opposed equality on the basis of their religious beliefs, and sought exemptions from laws furthering that end. From the early years of the Republic, for example, religious beliefs were used both to condemn and to defend slavery. While many abolitionists were religiously motivated, slaveholders often spoke of their religious beliefs when defending the "peculiar institution." Courts cited religious doctrine in upholding racial segregation and anti-miscegenation laws. Even as the nation's standards evolved to reject racial discrimination in employment, education, marriage, and public accommodations, religious arguments continued to fuel resistance. Congress and the courts faced repeated calls for religious exemptions from non-discrimination standards. But, by the middle of the twentieth century, both this Court and Congress had rejected those calls. The nation came to recognize the vital state interest in ending racial discrimination in public arenas and in embracing a vision of equality that does not sanction piecemeal application of the law.

The story of women's emerging equality follows a similar pattern. Again, while religiously motivated activists fought for women's suffrage and equality, others cited religious doctrine to support restrictions on women's roles, including in voting, employment, and access to birth control. As attitudes toward women changed, legislatures enacted laws prohibiting sex discrimination and protecting women's ability to control their reproductive capacity. But these measures, too, were met with

resistance, including religiously motivated requests for exemptions from anti-discrimination dictates. While courts at times accepted religious doctrine as a justification for limiting women's equal rights, those decisions are viewed today as fundamentally misguided.

The court of appeals correctly enjoined the Exemption Rules. They are not authorized by the ACA or RFRA, and violate the Establishment Clause. Moreover, the history recounted above suggests that the Court should be extremely reluctant to sanction government action that permits institutions to invoke religion to inflict discriminatory harm. Courts have at times in our past given credence to religious claims that contravene basic equality norms. This Court should hesitate before doing so again. Employers and universities need not forfeit their right to oppose contraceptives on religious grounds, but a religious objection should not be a license to deny others critical health benefits intentionally designed to further equality.

ARGUMENT

I. THE EXEMPTION RULES ARE NOT AUTHORIZED BY RFRA, AND WOULD IMPERMISSIBLY ALLOW EMPLOYERS AND UNIVERSITIES TO INVOKE RELIGION TO DENY EQUAL TREATMENT TO WOMEN.

The Exemption Rules effectively permit employers and universities that raise a religious or moral objection to contraception to pay their female employees less for the same work than similarly situated employers, and offer their students unequal

coverage, by denying them benefits guaranteed to employees and students of similarly situated institutions. In essence, the Exemption Rules give official imprimatur to the invocation of religion to deny equal treatment to women. Moreover, they do so despite the fact that the pre-existing accommodation already frees religious objectors of any obligation to pay for the contraceptive care of their employees – but simultaneously ensures that those employees would not be denied that critical coverage. No statute authorizes these exemptions, which directly undermine the equality aims of the ACA, are not authorized by RFRA, and raise serious Establishment Clause concerns.

A. The Exemption Rules Are Not Authorized by Statute.

Nothing in the ACA authorizes the Exemption Rules. The ACA requires health insurance plans to cover certain preventive services without cost-sharing. ACA, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32. The Women's Health Amendment ("WHA") was adopted during debate over the ACA specifically to ensure that the list of covered services would include preventive services unique to women. *Id*. § 2713(a)(4), 124 Stat. at 131. The WHA was intended to address gender disparities in out-of-pocket health care costs, which stem in large part from the cost of reproductive health care. *See, e.g.*, 155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

Congress delegated the responsibility for developing a list of women's preventive services covered by the ACA to HHS. Adopting the

recommendations of the Institute of Medicine ("IOM"), HHS promulgated 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 Guidelines*, https://www.hrsa.gov/womens-guidelines/index.html (last visited Apr. 4, 2020).

The ACA delegated to HHS only the decision of *which preventive health services* are essential to be covered for women. ACA, Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 119, 131. It did not give the agency authority to pick and choose *which institutions should be governed by the obligation.* And by leaving the contraceptive coverage requirement in place for all other health coverage plans, HHS has conceded that contraception falls within the preventive medical coverage that Congress guaranteed to female employees and students in the ACA.

Nor does RFRA authorize the Exemption Rules. It says nothing whatsoever about accommodating *moral* objections. And it also does not authorize an exemption for religious objections.[2] RFRA requires the government to accommodate only where (1) a law imposes a substantial burden on

[2] The regulations also authorize an exemption for the group health plan of a "religious employer," 78 Fed. Reg. 39,896 (July 2, 2013), which is not challenged in this case.

religious exercise, and (2) the obligation is the least restrictive means of achieving a compelling government interest. *Hobby Lobby*, 573 U.S. at 691–92. Here, RFRA would not require an exemption, for two reasons. First, the accommodation to the contraception coverage requirement does not impose a substantial burden on religion, because it already allows employers and universities with religious objections to contraception to avoid paying for contraceptive coverage, while ensuring that their employees continue to receive the coverage, paid for by the insurance companies at no cost to the employers. 26 C.F.R. § 54.9815-2713A(a); *id.* § 54.9815-2713A(c)-(d). The employers merely provide notice of their objection, and that de minimis requirement does not impose a substantial burden on religion. Pet. App. 39a–41a & 39a n.30.

Second, the contraceptive coverage requirement's accommodation is the least restrictive means to further the compelling interest in advancing women's equality by guaranteeing contraceptive coverage – even as it accommodates employers' and universities' religious objections to paying for the contraceptive care themselves. *Hobby Lobby*, 573 U.S. at 692. Outside of the narrow context of the ministerial exception, neither RFRA nor the Free Exercise Clause has *ever* been interpreted by this Court to require the government to permit institutions to inflict discriminatory harm on third parties in the name of furthering their religion. Yet the Exemption Rules do just that.

RFRA affords no right to force unwilling third parties to bear the costs of the religious adherent's faith. This Court has cautioned that religious

exemption claims may not prevail if they inflict harm on non-believers. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 734–36; *id.* at 739 (Kennedy, J., concurring); *Cutter*, 544 U.S. at 720 ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Thornton*, 472 U.S. at 709–10. The Constitution therefore commands that any religious accommodation must be "measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]." *Cutter*, 544 U.S. at 722, 726. Yet the Exemption Rules here effectively authorize employers and universities to deny their female employees and students compensation (in the form of benefits) that those employees and students would otherwise be guaranteed.

To read RFRA to authorize such discrimination would go further than this Court has ever gone before in interpreting that statute. On both occasions that this Court has considered RFRA challenges to the contraception coverage requirement, the Court has expressed concern that religious exemptions should not impose burdens on third parties. In *Hobby Lobby*, this Court emphasized that the effect of the accommodation that RFRA required "on the women employed by Hobby Lobby . . . would be precisely zero," because employees would still be entitled to "all FDA-approved contraceptives without cost sharing." 573 U.S. at 693. Indeed, every Justice in *Hobby Lobby* reaffirmed that burdens on third parties must be considered in assessing a RFRA claim. *See id* at 729 n.37; *id.* at 737–39 (Kennedy, J., concurring); *id.* at 745–46, 745 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting). In *Zubik v. Burwell*, 136

S. Ct. 1557 (2016), this Court directed the parties to look for an approach that would "ensur[e] that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (internal quotations omitted). The Exemption Rules at issue here, in contrast, permit employers and universities to deny women contraceptive coverage altogether.

The federal Petitioners argue that even if RFRA does not require the Exemption Rules, it has discretion to adopt them. But because the ACA seeks to guarantee these benefits to all covered women, the agency can permit them to be denied *only* if RFRA affirmatively requires that result. Moreover, if there were any doubt about whether the government has such authority, the doctrine of constitutional avoidance should lead the Court to conclude that it does not. If the statute is construed to permit the Exemption Rules, it would raise serious questions under the Establishment Clause. The Rules impermissibly subject employees and students to the religious practices of their employer or university. *See, e.g.*, *Thornton*, 472 U.S. at 709–10. This Court has long recognized that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (alteration in original) (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Accordingly, "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)); *Bd. of Educ. of Kiryas Joel Vill. Sch.*

Dist. v. Grumet, 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8 (1989).

B. The Exemption Rules Impermissibly Authorize Employers and Universities to Inflict Discriminatory Harm on Their Female Employees and Students.

The conclusion that neither the ACA nor RFRA authorizes the Exemption Rules is reinforced by the fact that the contraception coverage envisioned by the ACA and the WHA was expressly designed to further equitable treatment of the very people the Exemption Rules authorize employers and universities to harm. Contraceptive care enables women to decide if and when to become a parent, allowing them to make educational and employment choices that benefit themselves and their families.[3] "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." Susan A. Cohen,

[3] Moreover, the requirement is also important to protect women's health. This is particularly true for women of color who disproportionately suffer from health conditions that can be aggravated by pregnancy. *See, e.g.*, Black Mamas Matter Alliance & Ctr. for Reproductive Rights, *Black Mamas Matter: Advancing the Human Right to Safe and Respectful Maternal Health Care* 24 (May 2018). *Amici* further note that it is not only women's health that is affected by access to contraception, as transgender men and non-binary persons also use contraceptives covered by the ACA.

The Broad Benefits of Investing in Sexual and Reproductive Health, 7 Guttmacher Rep. on Pub. Pol'y 5, 6 (2004). The availability of the oral contraceptive pill alone accounts for roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; a 20% increase in women's college enrollment; 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), http://www.nber.org/papers/w17922 (last visited Apr. 4, 2020); *see also* 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), https://dash.harvard.edu/ handle/1/2624453 (finding causal relationship between availability of the pill and women's career advancement). As this 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); *see also* Br. for *Amici Curiae* the Nat'l Women's Law Ctr. in Supp. of Respondents.

The Exemption Rules would directly undermine the gender equity intent of the ACA and WHA. They authorize employers and universities to reinstate the very discrimination that Congress intended the contraceptive coverage requirement to eliminate. As Senator Kirsten Gillibrand emphasized in her support of the WHA, which authorized the contraceptive coverage requirement, "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." 155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009); *see also* 155 Cong. Rec. S11,985, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Often 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.").

This intent was reflected in the regulations implementing the contraception coverage requirement. In recommending that contraception be included in the list of preventive services, 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." IOM, *Clinical Preventive Services for Women: Closing the Gaps* 109 (2011). It further noted that these cost barriers are aggravated by the fact that women "typically earn less than men and . . . disproportionately have low incomes." *Id*. at 19. And in announcing the regulations, HHS itself emphasized the importance of including contraception, not only to equalize women's health care costs but also to help women become equal participants in society. The inability of women to access contraception, HHS noted, "places women in the workforce at a disadvantage compared to their male co-workers . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including

contraceptive services." 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012) (footnotes omitted).

The Exemption Rules would not only contravene Congress's intent to equalize access to preventative care for women; they would put a government stamp of approval on gender stereotypes that have reinforced women's inequality, particularly the notion that "a woman is, and should remain the 'center of home and family life.'" *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). As this Court has stated, "these sacrifices [to become a mother] have from the beginning of the human race been endured by woman 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. Contraception is central to women's ability to participate equally in the workforce, education, and civic life. As HHS put it:

> 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 . . . .

77 Fed. Reg. 8,725, 8728 (Feb. 15, 2012) (footnote omitted); *see also supra* note 3. With greater control over their fertility, women have greater and more equal access to education, careers, career

advancement, and higher wages. *See* Br. for *Amici Curiae* the Nat'l Women's Law Ctr. in Supp. of Respondents.

The lack of access to contraception contributes to the problem of unintended pregnancies. Many women are unable to afford contraception – even with insurance – because of high co-pays or deductibles. 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 (2011). Others cannot afford to use contraception consistently. Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions* 5 (Sept. 2009), http://www.guttmacher.org/pubs/RecessionFP.pdf. And cost considerations drive some women to less expensive and less effective methods. Jeffrey F. 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).

The ACA and WHA sought to lift these barriers, resulting in increased opportunity for women. A study in St. Louis, which essentially simulated the conditions of the contraceptive coverage requirement, illustrates its impact. Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291

(2012). Seventy-five percent of the participants opted for a long-acting reversible contraceptive method, including 58% who chose an IUD. *Compare id*. at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (July 2018), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states (showing approximately 12% of all contraceptive users have IUDs as their method). As a result, the unintended pregnancy rate among women in the study plummeted, and the abortion rate was less than half the regional and national rates. Colleen McNicholas et al., *The Contraceptive CHOICE Project Round Up: What We Did and What We Learned*, 57 Clinical Obstetrics & Gynecology 635 (Dec. 2014); *see also* Br. of *Amicus Curiae* Guttmacher Inst. in Supp. of Respondents.

Contraception, in short, is more than a service, device, or type of medicine. Meaningful access to birth control is an essential element of women's equal participation in civic life. The Exemption Rules are not only not authorized by the ACA, the WHA, or RFRA, but directly contravene Congress's intention to guarantee coverage for women's preventive health care, including contraception, deemed critical to their equal treatment. HHS concedes, through the contraceptive coverage requirement, that contraception is an essential element of the preventive care for women that Congress sought to guarantee. Yet the Exemption Rules allow employers and universities to impose their own religious faith on their employees and students by denying them the benefit, even when it comes at no cost to the institution. Given the absence of any express authority for this extraordinary action, and its direct contravention of Congress's intent to further

women's equality, the courts below properly enjoined the Exemption Rules.

II. RELIGIOUS JUSTIFICATIONS FOR RESISTING EQUALITY CLAIMS HAVE A DISTURBING HISTORY, AND HAVE PROPERLY BEEN ROUTINELY REJECTED IN THE MODERN ERA.

The Exemption Rules fit a disturbing historical pattern that warrants caution as the Court considers this case. While religiously motivated actors have often been important voices for equality, religion has also been invoked to resist efforts to ensure equal treatment of historically disadvantaged groups. Courts have sometimes accepted such religious justifications for unequal treatment, but today those decisions are widely viewed as deeply misguided. While *amici* do not mean to equate opposition to contraceptive coverage with support of slavery, segregation, or denying women the ability to practice law, we cite this history to show that religious objections to equality that may have seemed reasonable at one time are today widely recognized as fundamentally wrong.

A. Racial Discrimination

Religiously motivated actors have played a central part in many of our nation's most controversial and consequential battles over racial equality – on both sides. Religious leaders were some of the leading abolitionists of their time, and churches and synagogues played a significant part in the fight for civil rights. *See generally* John R. McKivigan ed., History of the American Abolitionist Movement: Abolitionism and American Religion (1999); Patrick Allitt, Religion in America Since

1945: A History 47–51 (2003). Religion, however, has also been invoked to oppose equality.

Early in our country's history, courts, politicians, and clergy often invoked religious faith to defend slavery. The Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, suggested that slavery was "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). Jefferson Davis, President of the Confederate States of America, proclaimed that slavery was sanctioned by "the Bible, in both Testaments, from Genesis to Revelation." R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433, 437 (2011) (citation and quotations omitted). Christian pastors and leaders declared: "We regard abolitionism as an interference with the plans of Divine Providence." Convention of Ministers, *An Address to Christians Throughout the World* 8 (1863), https://archive.org/details/addresstochristi00phil (last visited Apr. 4, 2020).

Religion was also cited 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.

Scott v. State, 39 Ga. 321, 326 (Ga. 1869). In upholding the criminal conviction of an interracial couple under Virginia's anti-miscegenation law, the Virginia Supreme Court similarly reasoned that "the Almighty" dictated the two races should be kept "distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." *Kinney v. Commonwealth*, 71 Va. 858, 869 (Va. 1878); *see also Green v. State*, 58 Ala. 190, 195 (Ala. 1877) (upholding conviction for interracial marriage, reasoning that God "has made the two races distinct"); *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (declaring right "to follow the law of races established by the Creator himself" to uphold constitutionality of conviction of a black man who married a white woman).

Similar justifications supported segregation. In 1867, Mary E. Miles defied railroad rules by refusing to take a seat in the "colored" section of the train car. She brought suit against the railroad for physically ejecting her from the train. A jury awarded Ms. Miles five dollars. The Supreme Court of Pennsylvania reversed, citing "the order of Divine Providence" that 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) (citing *Miles* to affirm judgment for railroad that forcibly ejected African-American woman from the "whites only" section of rail car). In 1906, the

Kentucky Supreme Court affirmed the enforcement of a law prohibiting whites and blacks from attending the same school, noting that the separation of the races was "divinely ordered." *Berea College v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff'd,* 211 U.S. 45 (1908).

Over time, such arguments lost currency, but not without resistance. In 1954, in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court repudiated the "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declared racial segregation in public schools to be unconstitutional. Ten years later, Congress passed the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations.

Some opponents of desegregation, however, continued to rely on religious claims. 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). Indeed, the Florida justices condemned *Brown* as advising "that God's plan was in error and must be reversed." *Id*.

In the years following this Court's enforcement of *Brown*, the number of private, often Christian, segregated schools expanded exponentially and many white students fled the public schools for private religious schools that remained segregated. *See* Note, *Segregation Academies and State Action*, 82 Yale L.J.

1436, 1437–40 (1973); *see also* U.S. Comm'n on Civil Rights, *Discriminatory Religious Schs. and Tax Exempt Status* 1, 4–5 (1982) (recounting the massive withdrawal of white students from public schools after *Brown*, and a proliferation of private schools, many associated with churches).

In response, the Treasury Department declared that racially segregated schools would not be eligible for tax-exempt status. Attempts by the IRS to enforce the Treasury Department's rule met resistance in the courts. Most notably, Bob Jones University brought suit after the IRS revoked the University's tax-exempt status based on its policies of refusing to admit African-American students and 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-plaintiff, Goldsboro Christian Schools, operated a K-12 school that refused to admit African-American 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. Both schools argued that the rule could not constitutionally apply to schools engaged in racial discrimination based on sincerely held religious beliefs.

Significantly, this Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on religious beliefs. *Id.* at 602–04. The Court did not question the sincerity of

the institutions' religious commitments, or the burden imposed by denying them tax benefits, but squarely held that religious objections did not permit the schools to inflict discriminatory harms on third parties. *Id.* at 604.

Religious resistance to racial equality was not limited to schools. Although the anti-miscegenation laws eventually fell, the path to that rightful conclusion was not a smooth one. The trial court in *Loving v. Virginia*, 388 U.S. 1 (1967), reasoned that "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . . The fact that he separated the races shows that he did not intend for the races to mix.'" *Id.* at 3 (quoting trial court). But this Court expressly rejected the trial court's reasoning and declared Virginia's anti-miscegenation law unconstitutional. *Id.* at 2.

In debates over the Civil Rights Act of 1964, Congress considered and rejected objections based on religion. Most notably, the House version of the bill exempted religious 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). As enacted, however, the law permitted no employment discrimination based on race; it permitted religious entities to hire only co-religionists, but not to discriminate on the basis of race or sex – even if religiously motivated. *Id.* Later

efforts to pass a blanket exemption for religious employers again failed. *Id.* at 1277.[4]

Religious resistance to the 1964 Civil Rights Act did not stop with its passage. The owner of a barbeque chain who was sued in 1964 for refusing to serve blacks responded by claiming that serving black people 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.

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

As courts rejected religious justifications for racial discrimination and societal attitudes evolved, religious arguments were no longer offered in mainstream society to defend racial segregation and subordination. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." Kelso, Modern Moral Reasoning, *supra*, at 439. Bob Jones University, for

---

[4] The Act permits discrimination in favor of co-religionists in certain religious institutions and positions. *See Amos*, 483 U.S. 327; *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (recognizing ministerial exception).

example, has apologized for its prior discriminatory policies, stating that by previously subscribing to a "segregationist ethos . . . we failed to accurately represent the Lord and to fulfill the commandment to love others as ourselves." *See* Statement about Race at BJU, Bob Jones Univ., http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Apr. 4, 2020).

Again, we do not equate opposition to contraceptive coverage with support of racial discrimination, but note that the struggle to recognize racial equality was repeatedly met with objections that religious scruples required discrimination. That history at a minimum warrants skeptical consideration of the effort to interpose religion as a justification for imposing discriminatory harms on women here.

B. Gender Discrimination

Religion has also been invoked both to advance and to resist women's equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (chronicling the long history of sex discrimination in the United States). Some religious adherents have found in the religious principle affirming the equal dignity of all human beings support for both gender and racial equality. *See generally* Anna M. Speicher, The Religious World of Antislavery Women: Spirituality in the Lives of Five Abolitionist Lecturers (2000); Nell Irvin Painter, Sojourner Truth: A Life, A Symbol (1996). But others looked to religion to justify both race and sex discrimination. One champion of slavery in the antebellum South, George Fitzhugh, maintained that God gave white men dominion over "[s]laves, wives, and children." Armantine M. Smith,

The History of the Woman's Suffrage Movement in Louisiana, 62 La. L. Rev. 509, 511 (2002).

Perhaps most infamously, when this Court held that Illinois could prohibit women from practicing law, Justice Bradley opined that:

> 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 fulfil 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 divinely destined for the role of wife and mother – was a prominent argument against women's suffrage. A leading anti-suffragist, 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)).

At the California Constitutional Convention in 1878-79, one representative contended that women's

suffrage "attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood." *Id.* at 978 (internal citation and quotations omitted). It was in this same time period that the first laws against contraception were enacted 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 (1992) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888)); *see also id.* at 293 (quoting physician in lecture opposed to interruption of intercourse: "She sins because she shirks those responsibilities for which she was created.").

Even as times changed, and 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 this Court recognized in *Frontiero*, "[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." 411 U.S. at 685.[5] A creature of its times, this Court was not immune. For example, in *Muller v. Oregon*, 208 U.S. 412 (1908), the Court upheld workday limitations for women

[5] Concomitant with a restricted vision of women's roles were constraints on the roles of men. In the idealized role, men were heads of households, wage earners, not caretakers. *See, e.g.*, *Hibbs*, 538 U.S. at 736 (recognizing that the historic "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men").

because "healthy mothers are essential to vigorous offspring, [and therefore] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Id.* at 421; *see also Hoyt*, 368 U.S. at 62 (permitting women to be exempt from mandatory jury duty service because they are "still regarded as the center of home and family life").

But over time, society began to recognize that women had the right to pursue goals other than, or in addition to, becoming wives and mothers, and began rejecting religious based assertions to the contrary. Thus, in enacting the Civil Rights Act of 1964, Congress rejected a proposed exemption that sought to permit religiously affiliated organizations to engage in gender-based employment discrimination.

The courts also began to reject arguments that divine law required women to be confined to roles as wives and mothers. For example, this Court held a state law that treated girls' and boys' age of majority differently for the purposes of calculating child support unconstitutional, rejecting the state's argument that girls did not need support for as long as boys because they would marry quickly and will not need a secondary education. *Stanton v. Stanton*, 421 U.S. 7 (1975). This 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, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

Id. at 14–15 (internal citation omitted); *see also Orr v. Orr*, 440 U.S. 268, 279 n.9 (1979) (holding unconstitutional a law that allowed alimony from husbands but not wives, as "part and parcel of a larger statutory scheme which invidiously discriminated against women, removing them from the world of work and property and 'compensating' them by making their designated place 'secure'").

The Court has also rejected the notion, once supported by religious doctrine, that women should be barred from certain jobs because of their role as mothers. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Hibbs*, 538 U.S. at 738 (upholding the Family Medical Leave Act as a measure to offset sex discrimination under Section 5 of the Fourteenth Amendment). The courts and Congress have recognized that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second." *Hibbs*, 538 U.S. at 736.

As with race, this progress has been tested by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted the principle that women and men must receive equal compensation by proclaiming 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 this claim, finding 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 (citation and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (same); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).

Even today, laws and policies designed to protect against gender discrimination continue to face challenges in the name of religious belief, but courts have generally rejected such arguments, just as they rejected them in the race context. *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, holding that the school seemed "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex"); *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) (same).

Like many of the arguments detailed above, the Exemption Rules permit some members of society

to invoke religion to deny equal treatment to others. They permit those who object on religious grounds to women's access to contraception to deny them that benefit, a core feature of their equal participation in civil society. They do so, moreover, without any authority in statute. The history outlined here should lead the Court to hesitate before sanctioning such official action here.

CONCLUSION

The Court should affirm the judgments below.

Respectfully Submitted

Witold J. Walczak
Sara J. Rose
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
PO Box 23058
Pittsburgh, PA 15222

Jeanne LoCicero
AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY
FOUNDATION
570 Broad Street
Newark, NJ 07102

Brigitte Amiri
Counsel of Record
Louise Melling
Lindsey Kaley
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
bamiri@aclu.org

David D. Cole
Daniel Mach
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Dated: April 8, 2020