UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and PATRICK PIZZELLA, in his official capacity as Acting Secretary of Labor, *Defendants.*	:	**Case No. 17-cv-11930-NMG**

ASSENTED-TO MOTION OF THE ACLU, ACLU OF MASSACHUSETTS, INC., NARAL PRO-CHOICE MASSACHUSETTS, AND THE PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Non-party movants, the American Civil Liberties Union ("ACLU"), The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM"), NARAL Pro-Choice Massachusetts ("NARAL"), and the Planned Parenthood League of Massachusetts ("PPLM") (collectively, "amici") respectfully move for leave to submit the attached amici curiae brief in support of the plaintiff Commonwealth of Massachusetts's motion for summary judgment.[1] As grounds, amici state as follows:

[1] A copy of the proposed brief is attached with this motion as **Exhibit A**.

1. This Court has inherent authority to accept amicus submissions. *See Verizon New England, Inc. v. Main Pub. Utils. Comm'n*, 229 F.R.D. 335, 338 (D. Me. 2005) ("Although the Federal Rules of Civil Procedure are silent on the standard for appointing amicus curiae, 'the district court retains the inherent authority to appoint amicus curiae to assist it in a proceeding.'") (quoting *Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 306 (D. Me. 2003)); *see also Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("[D]istrict courts have inherent authority to appoint or deny amici . . . .") (quoting *Smith v. Chrysler Fin. Co., L.L.C.*, 2003 WL 328719, at *8 (D.N.J. Jan. 15, 2003)). Indeed, district courts "frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved," *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005), particularly when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *See Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Amici's attached brief meets these standards.

2. ACLU, ACLUM, NARAL and PPLM have a keen interest in the issues raised by the instant case, as set forth more fully in the Interests of the Amici at p. 3 of their attached brief. As organizations firmly committed to gender equity and reproductive justice, this case presents questions of law that are deeply important to the work of the amici. In particular, amici support the Commonwealth's position that the Final Rules which are the subject of the Commonwealth's suit violate the equal protection component of the Fifth Amendment. Among other things, the Final Rules impermissibly discriminate against women in the name of religious freedom and undefined "morality." Amici submit their attached brief to provide this Court with additional insight into the discriminatory nature of the Final Rules, and why the

Court must reject Defendants' effort to resurrect the discredited notion that religious beliefs may trump a law designed to ensure equal protection in society.

3. In deciding whether to permit the filing of an amicus brief, federal courts often consider whether the potential amici have attempted to obtain consent to the filing and whether in fact the parties have consented. *See, e.g.*, *Cobell v. Norton*, 246 F. Supp. 2d 59, 63 (D.D.C. 2003) (denying leave to file an amicus brief in part because both parties submitted motions in opposition). Here, in accordance with Local Rule 7.1(a)(2), amici have sought and obtained assent from the Commonwealth of the Massachusetts and the Defendant Departments to their motion for leave to file their amicus brief. *See* Certificate of Compliance with Local Rule 7.1, *infra*.

4. Although the local rules do not provide any guidance as to the length of an acceptable amicus curiae brief, amici have used both the Federal Rules of Appellate Procedure (Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)) and Local Rule 7.1(b)(4) for reference and have, accordingly, limited their brief to no more than 20 pages and 6,500 words.

WHEREFORE, amici ACLU, ACLUM, NARAL and PPLM request that the Court grant their motion and accept for filing the attached *amici curiae* brief in Support of the Plaintiff's Motion for Summary Judgment.

Dated: August 15, 2019

Respectfully Submitted,

ACLU, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC., NARAL PRO-CHOICE MASSACHUSETTS, and PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I hereby certify that counsel for the Amici Curiae conferred with counsel for the plaintiffs, the Commonwealth of Massachusetts and with counsel for the defendants, the Departments, and both parties indicated their assent to this motion.

/s/ Kate R. Cook

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent via mail to those indicated as non-registered participants on August 15, 2019.

/s/ Kate R. Cook

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff,* v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and PATRICK PIZZELLA, in his official capacity as Acting Secretary of Labor, *Defendants.*	:	**Case No. 17-cv-11930-NMG**

[PROPOSED] AMICUS BRIEF OF THE ACLU,
ACLU OF MASSACHUSETTS, INC.,
NARAL PRO-CHOICE MASSACHUSETTS, AND
THE PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS
SUPPORTING THE COMMONWEALTH'S
MOTION FOR SUMMARY JUDGMENT

August 15, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, each *amicus curiae* individually certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

At stake in this case are two Final Rules promulgated by the Trump administration that would broadly allow employers and universities to invoke religion or morality to block their employees' and students' access to contraceptive coverage that is otherwise guaranteed by the Patient Protection and Affordable Care Act (ACA). *Amici* submit this brief to highlight an important lesson of history: As our society has moved toward greater equality for racial minorities and women, it has increasingly and properly rejected the idea that religion can be used as a justification for discrimination in the marketplace.

Religion is a powerful force that shapes individual lives and influences community values. It has been used at different times and places to support change and oppose it, to promote equality and justify inequality. Our constitutional structure recognizes the importance of religion by protecting its free exercise, and a full range of statutes and regulations reinforce our collective commitment to religious acceptance, diversity, and pluralism. The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), understood the accommodation to the contraceptive coverage requirement of the ACA (the contraception rule) as a reflection of that commitment. Critically, however, the accommodation also recognizes that access to contraceptive care is an important means of ending discrimination against women in the workplace, and that eliminating such discrimination is a compelling state interest.

The struggle to overcome discrimination while respecting religious liberty is a recurring challenge in our nation's history. By recounting that history, we do not question any individual's or entity's religious faith or suggest that the historical invocation of religion to justify the most odious forms of racial discrimination is equivalent to the religious claims that Defendants raise on behalf of employers and universities here. But that is not the test and should not be the legal

measuring rod. As recently observed in *Obergefell v. Hodges*, 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." 135 S. Ct. 2584, 2602 (2016).

Religious leader have often led the movement against discrimination. Yet, throughout our history, religion has also been used to defend discriminatory practices, to oppose evolving notions of equality, and to seek broad exemptions to new legal norms. We can and should learn from that experience.[1]

From the early years of the Republic, religious beliefs were used to justify racial subordination, including the forced enslavement of African people. Far too often, those views found support in judicial decisions upholding racial segregation and anti-miscegenation laws. Even as the nation's standards evolved to prohibit racial discrimination in employment, education, marriage, and public accommodations, religious arguments continued to be used to fuel resistance to progress. Congress and the courts faced repeated calls for religious exemptions to non-discrimination standards. But by the middle of the twentieth century, they rejected these calls. The country 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. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access

[1] This brief focuses on efforts to justify discrimination against racial minorities and women on religious grounds, but other disadvantaged and marginalized groups have shared similar experiences. *See* 15 n.8, *infra*.

to birth control. Religion inspired legislation purportedly designed to "protect" women, including their reproductive capacities. As attitudes changed, laws were enacted prohibiting discrimination and protecting women's ability to control their reproductive capacity. These measures were met with resistance, including religiously motivated requests to avoid compliance with evolving legal standards. As with race, Congress and the courts have held firm to the vision embodied in newly passed anti-discrimination measures.

The contraception rule addresses a remaining vestige of sex discrimination. As the Supreme Court has recognized, women's ability to control their reproductive capacities is essential to their participation in society.[2] Contraception is a tool, like education, that is essential to women's equality. Without access to contraception, women's ability to complete an education, to advance in a career, or to care for children, may be significantly compromised. By establishing meaningful access to contraception for many women, the contraception rule takes a long overdue step to level the playing field.

If the Final Rules are upheld, employers and universities that object to providing contraceptive care on religious or moral grounds would be wholly exempt from the contraception rule leaving employees and students unable to obtain coverage through the accommodation scheme. Employers and universities need not forfeit their individual right to oppose contraceptives on religious grounds, but a personal religious objection should not be a license to disregard the law and deprive their employees and students of a critical health benefit designed to further equality.

INTERESTS OF THE AMICI

[2] This brief uses the term "women" because the data cited in this brief concerns women and because women are targeted by the Final Rules. *Amici* recognize, however, that the denial of reproductive health care (and insurance coverage for such care) also affects people who do not identify as women, including gender non-conforming people and some transgender men.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 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 vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the ACLU, is a statewide nonprofit membership organization dedicated to the principle of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has litigated numerous cases seeking to protect women's reproductive rights. *See, e.g.*, *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629 (1981) (state constitution requires equal funding for all pregnancy-related services including abortion); *ACLU v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012) vacated on grounds of mootness, 705 F.3d 44, 48, 53 (1st Cir. 2013) (United States Department of Health and Human Services cannot impose religiously based restrictions on reproductive health services for human trafficking victims).

NARAL Pro-Choice Massachusetts (NARAL), formerly Mass NARAL, is the state affiliate of NARAL Pro-Choice America and is the political grassroots arm of the pro-choice movement in Massachusetts. NARAL is a non-profit organization whose mission is to develop and sustain a grassroots constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing safe, legal and accessible abortion. NARAL advocated on behalf of An Act Relative to Advancing Contraceptive Coverage and Economic Security in our State (ACCESS), which is now Chapter 120 of the Massachusetts Acts of 2017.

The Planned Parenthood League of Massachusetts (PPLM) is a non-profit organization whose mission is to protect and promote sexual and reproductive health and freedom of choice by providing clinical services, education, and advocacy. PPLM is the largest freestanding reproductive health care provider in Massachusetts, and is particularly familiar with the negative consequences the Final Rules' restriction of contraceptive care will have for women's sexual and reproductive health. Since its founding in 1928, PPLM has provided accessible and affordable family planning in Massachusetts and worked to remove financial barriers to contraception and reproductive health services. As part of its mission, PPLM spearheaded a coalition effort to pass a law in Massachusetts to protect access to affordable contraception.[3]

ARGUMENT

I. THE HISTORICAL MOVEMENT TOWARD GREATER EQUALITY FOR WOMEN AND RACIAL MINORITIES HAS BEEN ACCOMPANIED BY A GROWING REJECTION OF RELIGIOUS JUSTIFICATIONS FOR DISCRIMINATION IN THE MARKETPLACE.

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. God and "Divine Providence" were invoked to validate segregation, and, for decades, these arguments trumped secular and religious calls for equality. Eventually, due to evolving societal attitudes and the steadfast efforts of civil rights advocates, systems of enslavement and segregation were dismantled, and those who clung to religious justifications for racial discrimination were required to obey the nation's anti-

[3] No counsel for any party has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund preparing or submitting this brief; and no person−other than *amici*, their members, or their counsel−contributed money intended to fund preparing or submitting the brief. Fed. R. App. Proc. (29)(c)(5).

discrimination laws. Although 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.

Early in our country's history, religious beliefs were invoked to justify the most fundamental of inequalities: slavery. Indeed, courts, politicians, and clergy often invoked 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 Aug. 12, 2019).

Religion was also invoked to justify anti-miscegenation laws. 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 for violation of Virginia's anti-miscegenation law, the Virginia Supreme Court reasoned that, based on "the Almighty," 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 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).

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. She sued the railroad for ejecting her from the train. A jury awarded Ms. Miles five dollars. The Supreme Court of Pennsylvania reversed, relying in part on "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) (looking to *Miles* to affirm judgment for railroad that ejected African-American woman from the "whites only" section of train). In 1906, the Kentucky Supreme Court affirmed the enforcement of a law prohibiting white people and Black people 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).[4]

These religious 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.

[4] Religious justifications for segregation also had a direct impact on the availability and quality of health care for African Americans. *See, e.g.*, Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 Am. J.L. & Med. 203, 211 (2001) ("Historically, most hospitals were 'white only.' The few hospitals that admitted Blacks strictly limited their numbers [and] segregated [the facilities and equipment]").

537 (1896), and declared racial segregation in public schools to be unconstitutional. The second was Congress's passage of the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations.

Resistance to the movement for racial equality was particularly intense in the context of education. 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, they went so far as to characterize *Brown* as advising "that God's plan was in error and must be reversed." *Id*.

In the years following the Supreme Court's enforcement of *Brown*, the number of private, often Christian, segregated schools 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). *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). The schools were often open about their motives. Brother Floyd Simmons, who founded the Elliston Baptist Academy in Memphis, said, "I would never have dreamed of starting a school, hadn't it been for busing." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 334 (2001).

In response, the Treasury Department issued a ruling declaring that racially segregated schools would not be eligible for tax-exempt status. IRS attempts to enforce the Treasury Department's rule were challenged in the courts. Most notably, Bob Jones University brought

suit after the IRS revoked the University's tax exempt status based first on its policy of refusing to admit African-American students, and subsequently on its policy of 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 co-plaintiff, Goldsboro Christian Schools, operated a school from kindergarten through high school, which 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 sued under the Free Exercise Clause, arguing that the rule could not constitutionally apply to schools engaged in racial discrimination based on sincerely held religious beliefs. The Supreme 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.

Progress toward racial equality was not limited to schools. Although anti-miscegenation laws eventually fell, the path to that conclusion 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 the Supreme Court expressly rejected the trial court's reasoning and declared Virginia's anti-miscegenation law unconstitutional. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, all of which were ultimately rejected. Most notably, the House 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). However, the enacted law permitted no employment discrimination based on race; it only authorized religious employers to discriminate on the basis of religion. *Id.* Later efforts to pass a blanket exemption for religious employers failed. *Id.* at 1277.[5]

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 Black people responded by claiming that serving Black people violated his religious beliefs. The court rejected this defense, holding 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).

Since the middle of the twentieth century, the argument that religious beliefs trump measures designed to eradicate racial discrimination has slowly lost its force. As courts shifted to a wholesale rejection of 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." R. Randall Kelso, Modern Moral Reasoning, *supra*, at 439. Reflecting this evolution, Bob Jones

[5] While barring race discrimination by religious organizations, the Act permits discrimination in favor of co-religionists in certain religiously affiliated institutions and positions. *See Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

University 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. For these failures we are profoundly sorry. Though no known antagonism toward minorities or expressions of racism on a personal level have ever been tolerated on our campus, we allowed institutional policies to remain in place that were racially hurtful.

See Statement about Race at BJU, Bob Jones Univ., http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Aug. 12, 2019). Although there are many differences in the discrimination described above and the contraception rule, this history highlights the hazards of recognizing a religious exemption to a federal anti-discrimination measure 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).[6] Efforts to advance women's equality, like those furthering other civil rights, were supported—and thwarted—in the name of religion. Those who invoked God and faith as justification for slavery and segregation also invoked God and faith to limit women's roles. One champion of slavery in the antebellum South, George Fitzhugh, plainly stated that God gave white men dominion over "slaves, wives, and children." Armantine M. Smith, *The History of the Woman's Suffrage Movement in Louisiana*, 62 La. L. Rev. 509, 511 (2002).

[6] 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. 411 U.S. at 685.

Religious arguments were invoked to limit women's roles in society, and as with race, these arguments were initially embraced by courts. The Supreme Court held that the State of Illinois could prohibit women from practicing law, and in his famous concurrence, Justice Bradley opined:

> 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 divinely destined for the role of wife and mother—was a prominent argument against suffrage. A leading 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). 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 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888).

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 the Supreme 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. Those statutes

were often upheld by the Supreme Court. For example, in *Muller v. Oregon*, the Court upheld workday limitations for women 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." 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 like society's views of race evolved, society's views of women progressed, and gradually women's ability to pursue goals other than, or in addition to, becoming wives and mothers was recognized. Indeed, the passage of the Civil Rights Act of 1964 was a step forward for race and gender equality because Title VII of the Act barred discrimination based on sex and race in the workplace. The protection against gender discrimination, like that for race, passed in the face of religious objection and without the proposed exemption that sought to permit religious organizations to engage in gender-based employment discrimination.[7]

Slowly the courts began dismantling the notion that divine ordinance and the law of the Creator require women to 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 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,

[7] *But see* Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a)(3) (providing an exemption for "an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization").

> 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'"). When striking a ban on the admission of women to the Virginia Military Institute, the Court noted:

> "Inherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications . . . may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.

United States v. Virginia, 518 U.S. 515, 533-34 (1996) (internal citations omitted).

The Supreme Court has 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 has affirmed legislation that addresses "the fault-line between work and family—precisely where sex-based overgeneralization has been and remains strongest," *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 738 (2003). The courts and Congress have thus 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." *Id.* at 736 (internal citations and quotations omitted).

As with race, this progress has been tested by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted the notion that women and men must receive equal compensation by invoking the 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 this 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) (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 beliefs, 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, holding 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 a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, noting "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).[8]

II. THIS COURT SHOULD NOT ALLOW DEFENDANTS TO RESURRECT THE DISCREDITED NOTION THAT RELIGIOUS BELIEFS MAY TRUMP A LAW DESIGNED TO ENSURE EQUAL PARTICIPATION IN SOCIETY.

The contraception rule, like Title VII and other anti-discrimination measures, is a purposeful effort to address the vestiges of gender discrimination. And like those other anti-

[8] Attempts to use religion to discriminate are not limited to race and sex. *See, e.g.*, The Leadership Conference Education Fund, *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty* (Jan. 2016), http://civilrightsdocs.info/pdf/reports/2016/religious-liberty-report-WEB.pdf. For example, religion has been invoked in an attempt to justify discrimination based on marital status, *see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), and discrimination based on sexual orientation, *see, e.g.*, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004); *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011).

discrimination laws, this rule is being resisted in the name of religion. Defendants defend the Final Rules on the ground that employers and universities should be entitled to evade the mandates of the law based on their religious beliefs. As discussed *supra*, the argument that religious belief justifies discrimination is an old, discredited theory that should, once again, be rejected.

The contraception rule has, and will continue to, transform women's lives, by enabling women to decide if and when to become a parent and allowing women to make educational and employment choices that benefit themselves and their families.[9] "By enabling [women] to reliably time and space wanted pregnancies, women's ability to obtain and effectively use contraception promotes their continued education and professional advancement, contributing to the enhanced economic stability of women and their families." *California v. Health and Human Services, et al.*, No. 18-15144, (9th Cir. 2018), ECF No.12-2 (Excerpts of Record, hereinafter "ER") at 162. In a recent study, 63% of women reported that access to contraception allowed them to take better care of themselves and their family, 56% reported it allowed them to support themselves financially, 51% reported that it allowed them to stay in school or complete their education, and 50% reported that it allowed them to get or keep a job or pursue a career. *Id*. at 163. 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).

If implemented, the Final Rules would undermine the equalizing impact of the contraception rule and discriminate against women in at least three ways.

[9] Moreover, the rule 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 California v. HHS, et al.*, (9th Cir. 2018) No. 18-15144, ECF No. 45, Br. of *Amici Curiae* Nat'l Women's Law Ctr.

First, the Final Rules target and single out care that women need for unique and discriminatory treatment, authorizing employers and universities to reinstate the very discrimination that Congress intended the contraception rule to address. As Senator Kirsten Gillibrand emphasized in her support of the Women's Health Amendment (WHA),[10] which authorized the contraceptive rule, "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. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("[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"). The Final Rules sanction employers and universities to harm women by cutting their benefit packages, and convey the distinct message that women are second class citizens, who can have inferior benefit packages to their male peers.

Second, the Final Rules put a government stamp of approval on gender stereotypes that have been used to hold women in a place of inequality, particularly 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). The rules attack a fundamental premise underlying access to contraception, namely that society no longer demands that women either accept pregnancy or refrain from nonprocreative sex. As stated in *Casey*, "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.

[10] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 119, 131-32 (2010) (codified at 42 U.S.C.A. § 300gg-13).

Finally, the Final Rules are designed to burden women in a way that frustrates their ability to participate equally in the workforce, education, and civic life. When adopting the contraception rule, the government emphasized that the discrimination addressed by the rule was not limited to financial disparities:

> 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.

Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted); *see also supra* note 9. The Final Rules will make it harder for women to access and consistently use the most effective methods of contraception. *California v. Health and Human Services, et al.,* 18-15144, (9th Cir. 2018), ER at 145. Greater access to contraceptives means fewer unintended pregnancies. *Id*. at 146-150. With greater control over their fertility, women have greater and more equal access to education, career advancement, and higher wages. Susan A. Cohen, The Broad Benefits of Investing in Sexual and Reproductive Health, 7 Guttmacher Rep. on Pub. Policy 5, 6 (2004); 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 o. 17922, 2012), http://www.nber.org/papers/wl 7922; Claudia Goldin & Lawrence F. Katz, The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions, 110 J. of Pol. Econ. 730, 749 (2002), https://dash.harvard.edu/handle/1 /2624453.

Indeed, approximately half of pregnancies are unintended. Guttmacher Institute, *Unintended Pregnancy in the United States* (July 2015), *available at* http://www.guttmacher.org/ pubs/FB-Unintended-Pregnancy-US.html (last visited Jan 24, 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 (2011); 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* 5 (Sept. 2009), http://www.guttmacher.org/pubs/RecessionFP.pdf (last visited Jan 24, 2014); and costs drive women to less expensive and less effective methods, *see California v. Health and Human Services, et al*., 18-15144, (9th Cir. 2018) ER at 152-53 (reporting many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost).

The contraception rule lifted these barriers, with the promise of increased opportunity for women. 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* (Oct. 2015), http://www.guttmacher.org/pubs/fb_contr_use.html (showing approximately 10% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted, and the abortion rate was less than half the regional and national rates. Colleen McNicholas et al., *The Contraceptive CHOICE Project Round Up,* 57 Clinical Obstetrics & Gynecology 635 (Dec. 2014).

For these reasons, contraception is more than a service, device, or type of healthcare. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *See 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). An exemption countenancing a religious objection to contraception suggests that religious objections are more important than women's equality in our society. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial step forward.

CONCLUSION

The Final Rules discriminate against women in violation of Equal Protection. The Court should reject Defendants' effort to revive the discredited notion that religious beliefs may trump a law designed to ensure equal participation in society. Accordingly, *amici* respectfully request the Court to grant the Commonwealth's motion for summary judgment, declare that the Religious and Moral Exemption Rules are unlawful, vacate the Religious and Moral Exemption Rules, and enter judgment in favor of the Commonwealth.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Amici certify that they have both used the Federal Rules of Appellate Procedure (Fed. R. App. P. 29(a)(5) and 32 (a)(7)(B)) and Local Rule 7.1(b)(4) for reference and have, accordingly, limited their brief to no more than twenty pages and fewer than 6,500 words.

Dated: August 15, 2019

/s/ Kate R. Cook
Kate R. Cook

CERTIFICATE OF SERVICE

I certify that on August 15, 2019, the foregoing Amici Curiae Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

Dated: August 15, 2019

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