**Nos. 13-354 & 13-356**

IN THE

# Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,

—v.— *Petitioners*,

HOBBY LOBBY STORES, INC.,

*Respondents.*

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,

—v.— *Petitioners*,

KATHLEEN SEBELIUS, *et al.*,

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

## BRIEF *AMICI CURIAE* OF JULIAN BOND, THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, THE ACLU OF OKLAHOMA, THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE NATIONAL COALITION ON BLACK CIVIC PARTICIPATION, IN SUPPORT OF THE GOVERNMENT


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## STATEMENT OF INTEREST[1]

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

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

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[1] The parties in 13-356 have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. Petitioners in 13-354 have also filed a blanket letter of consent. A letter of consent to the filing of this *amicus* brief from Respondents in 13-354 has been lodged with the Clerk of the Court. 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 of the submission of this brief.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has worked to support and provide equal treatment and high-quality medical services, care, and opportunities to African Americans. *E.g., Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community). LDF has a substantial interest in this case because of its continuing commitment to promoting opportunity for African Americans, including access to affordable health insurance and health care.

The National Coalition on Black Civic Participation ("The National Coalition") has been actively engaged in social justice movements on the national, state and local level through our coalition-

based campaigns and organizing networks for nearly four decades. The National Coalition is dedicated to the empowerment of women and girls and black youth, particularly Black males through its Black Women's Roundtable and Black Youth Vote! networks, leadership development, and civic engagement programs. The National Coalition believes that utilizing the judicial system to protect individuals right to worship, and to express their religious beliefs, and protecting reproductive freedoms are key to the organization achieving its empowerment goals now and in the future.

## FACTUAL BACKGROUND

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

out-of-pocket health care costs, which stem in large part from reproductive health care:

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

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

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

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

The federal government adopted IOM's recommendations and enacted regulations that require non-grandfathered plans covered by the ACA to provide health care coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* 45 C.F.R. § 147.130(b)(1); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/ womensguidelines (last visited Jan. 24, 2014).[2]

In announcing the rule, the federal government emphasized the importance of the rule not only to equalize women's health care costs, but to ensure women have the ability to be equal participants in society. As it noted, the inability of women to access contraception

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women.

[2] The regulations authorize an exemption for the group health plan of a "religious employer," 45 C.F.R. § 147.131(a), and an accommodation for the group health plans of religious nonprofit organizations that have religious objections to providing coverage for all or some contraception, 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39870 (July 2, 2013). Neither the accommodation nor the exemption is at issue in this case.

> Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

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

## SUMMARY OF ARGUMENT

*Amici* support the government's argument that the contraception rule does not violate the religious exercise rights of the businesses before the Court, whether those rights arise under the Religious Freedom Restoration Act ("RFRA") or the Free Exercise Clause. *Amici* do not repeat those arguments here. Instead, we submit this brief to highlight an important lesson of history: as our society has moved towards greater equality for racial minorities and women, it has been less willing to accept religion as a justification for discrimination in the marketplace, and properly so.

Religion is a powerful force that shapes individual lives and influences community values. Like other belief systems, it has been used at different times and in different places to support change and to oppose it, to promote equality and to justify inequality. Our constitutional structure recognizes the importance of religion by protecting

its free exercise, a commitment to religious tolerance and pluralism that was reinforced by Congress when it enacted RFRA. Public debate can be and often is enhanced by those whose participation in that debate is informed by their faith. But once that debate is resolved through the democratic process, those who disagree with that resolution on religious grounds are no more entitled to an exemption from anti-discrimination laws governing commercial activity of the sort involved here than those who dissent on other ideological grounds. That is because the elimination of discrimination – in the marketplace and outside the realm of constitutionally protected associations, religious or otherwise – has long been recognized as a state interest of the highest order. That is what is at stake in this case given that the contraception rule addresses a vestige of gender discrimination.

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

Slavery was once defended on religious grounds. So were Jim Crow laws. Even the courts embraced religion to justify continued segregation. A civil war, followed by decades of protest and advocacy, eventually led to change. The change was met with resistance, including resistance motivated by religious beliefs. Congress and the courts faced calls for exemptions to enable those objecting for reasons of faith to avoid compliance with evolving standards in employment, education, marriage recognition, and public accommodation. The courts rejected these claims, recognizing the vital state interest in ending discrimination in these public arenas and embracing a vision of equality that did not sanction piecemeal exemptions.

The story of women's emerging equality follows a similar pattern. Women have been celebrated as mothers while long denied rights and opportunities on the premise that the home was their proper domain. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access to birth control, and later inspired legislation purportedly to "protect" women, including their reproductive capacities. The last century brought great changes, with women – and men – increasingly able to opt for parenthood and caregiving, as well as to participate in an ever greater array of educational and career opportunities. Many factors contributed to this change, including laws prohibiting discrimination and protecting women's ability to control their reproductive capacity. These measures, like those for racial equality, were met with resistance, including calls based on religion to avoid compliance with evolving legal standards. Again, as with race,

Congress and the courts held firm to the vision embodied in newly passed anti-discrimination measures.

This history offers some guidance to this Court as it analyzes the currently claimed right to religious exercise and exemption. The contraception rule addresses a remaining vestige of sex discrimination: the disparities in the cost of health care as between women and men, the longstanding exclusion of services needed only by women from health care coverage, and the need for women to have meaningful access to all forms of contraception if they are to control unintended pregnancies and thus enjoy greater equality in society. As this Court has recognized, women's ability to control their reproductive capacities is essential to women's participation in society. Contraception is not simply a pill or a device; it is a tool, like education, essential to women's equality. Without access to contraception, women's ability to complete an education, to hold a job, to advance in their careers, to care for their existing children, or to aspire to a higher place, whatever that may be, is compromised. The contraception rule makes access to contraception, including the most effective methods, meaningful, and thus takes a giant and long overdue step to level the playing field.

In other contexts, calls for religious exemptions from laws advancing women's equality – be they to pay women less or deny employment to women who violate traditional social norms – have been rejected. The result should be the same here. Those who own a business do not forfeit their right to object to the contraception rule on religious grounds,

but their personal religious objection does not give the businesses they own license to disregard the law.

## ARGUMENT

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

#### A. Racial Discrimination

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

At the beginning of our country's history, religious beliefs were invoked by some to justify the most fundamental inequalities. Indeed, slavery itself was often defended in the name of faith. The Missouri Supreme Court, in rejecting Dred Scott's

claim for freedom, noted that the introduction of slavery was perhaps "the providence of God" to rescue an "unhappy race" from Africa and place them in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852). 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), *available at* https://archive.org/details/addresstochristi00phil (last visited Jan. 24, 2014).

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

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

> reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.

*Scott v. State*, 39 Ga. 321, 326 (Ga. 1869). 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).

Similar justifications were accepted by courts 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 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, relying in part on the fact that "the Creator" made two distinct races, which "God has made . . . dissimilar," and "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

reasoning from *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 that 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).

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

The resistance, both religiously based and other, was most profound in the context of education. 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 this Court's enforcement of *Brown*, the number of private, segregated schools – many of which were Christian – expanded exponentially and white students left the public schools in droves. *See* Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1437-40 (1973). In one Mississippi county, within two months of a desegregation order, three private schools opened and the number of white pupils in public school in first through fourth grade dropped from 771 to 28. *See Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1391 n.7 (S.D. Miss. 1969); *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. For example, 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. The Treasury Department's ruling reflected the changing of the tides:

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

Rev. Rul. 71-447, 1971-2 C.B. 230.[3] 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 policy of first refusing to admit African-American students altogether, and subsequently refusing to admit students engaged in or advocating interracial relationships. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The sponsors of Bob Jones University "genuinely believe[d] that the Bible forbids interracial dating and marriage." *Id.* at 580. Bob Jones's lesser-known co-plaintiff, Goldsboro Christian Schools, operated a school from kindergarten through high school and refused to

[3] Subsequent efforts by the IRS to adopt guidelines for assessing whether private schools were not discriminatory, and thus eligible for tax exempt status, met with resistance. At a hearing, for example, Senators expressed concern about the impact on religious schools, emphasizing that the issue "involve[d] the rights of two groups of minorities." *See Tax-Exempt Status of Private Schs.: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the Comm. on Fin.*, 96th Cong. 18, 21 (1979) (statement by Sen. Laxalt).

admit black students. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id.* at 583 n.6. 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. This Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on their religious beliefs. *Id.* at 602-04.

Progress toward racial equality was not limited to schools. The anti-miscegenation laws fell, although again the path was not a smooth one. The trial court in *Loving v. Virginia* adhered to the reasoning of earlier decades: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U.S. 1, 3 (1967) (quoting trial court). But in the 1960s, unlike in the 1870s, this reasoning did not hold, and this Court struck Virginia's anti-miscegenation law. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, but they were ultimately rejected. During the Act's passage, for example, Senator Robert Byrd articulated some of these arguments, including reciting Leviticus 19:19, which discusses the need to keep cattle separate from other animals, to argue that "God's statutes . . . recognize the natural order of the separateness of things." 110

Cong. Rec. 13,207 (1964).[4] And the House passed a broad exemption to exclude religiously affiliated employers entirely from the proscriptions of the Act. *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964). However, the law as enacted permitted no employment discrimination based on race; it only authorized religiously affiliated employers to discriminate on the basis of religion. *Id.* Later efforts to pass a blanket exemption for religiously affiliated employers again failed. *Id.* at 1277.[5]

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

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

[5] The Act, while barring race discrimination by religiously affiliated entities, respects the workings of houses of worship and also 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 and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception).

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

*Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Thus, throughout our country's history, the argument that religious beliefs should trump measures designed to eradicate racial discrimination – whether in toto or piecemeal – has slowly lost its standing. Once having achieved a commitment to end discrimination in education, employment, and public accommodations, society, through the courts and Congress, has refused to grant religious exemptions. And resistance to these measures has steadily waned. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." R. Randall Kelso, Modern Moral Reasoning, *supra*, at 439. Reflecting this evolution, Bob Jones 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., *available at* http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Jan. 21, 2014). Although there are many differences between the racially biased religious justifications described above, and the proposed exemption now before the Court, this experience establishes that close scrutiny is required where, as here, the Court considers a religious exemption to a federal anti-discrimination statute that promotes a compelling governmental interest in equality and opportunity.

### B. Gender Discrimination

The path to achieving women's equality has followed a course similar to the struggle for racial equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (chronicling the long history of sex discrimination in the United States).[6] Efforts to

[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

advance women's equality, like those furthering 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).

Religious arguments were invoked to limit women's roles in society. And in this context, as with race, they initially were embraced by courts. For example, this Court held that the State of Illinois could prohibit women from practicing law, and in his famous concurrence, 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 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).

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slave codes," emphasizing that women, like slaves, could not "hold office, serve on juries, or bring suit in their own names," and that married women traditionally could not own property or even be legal guardians of their children. *Id*. at 685.

This vision of women – as destined for the role of wife and mother – featured in opposition to suffrage. A prominent antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.'" Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981 n.96 (2002) (quoting Rev. Justin D. Fulton, *Women vs. Ballot*, *in* The True Woman: A Series of Discourses: To Which Is Added Woman vs. Ballot 3, 5 (1869)); *see also id.* at 978 (quoting Rep. Caples at the California Constitutional Convention in 1878-79 as saying of women's suffrage: "It attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood.") (internal citation and quotations omitted). And in this same period, the first laws against contraception were enacted, so as to address what was characterized as "physiological sin." Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 292 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888)); *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.[7] Those statutes were often upheld by this Court. For example, in *Muller v. Oregon*, this Court upheld workday limitations for women because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . [H]ealthy 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 as with the movement for racial justice, society progressed, and gradually our country started recognizing women's ability to pursue goals other than, or in addition to, becoming wives and mothers. Indeed, the passage of the Civil Rights Act of 1964 was a gain not just for racial equality but

[7] 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, the wage earners, and the actors in the polity. They were not caretakers, for example. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (recognizing that the historic "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men"). And, for both sexes, the visions were idealized, but not dominant in real lives, particularly the lives of the working poor, where women as well as men labored outside the home.

also for gender equality: Title VII of the Act barred discrimination based on sex, as well as race, in the workplace. This protection, like that for race, passed in the face of religious objection and without the broad exemption proposed to permit continued employment discrimination based on sex by religiously affiliated organizations. *See* 110 Cong. Rec. 13,207-08 (1964) (testimony of Sen. Byrd) (noting that the parable of the laborers in Matthew 20:1-15 demonstrates that Christ did not condemn the householder who practiced discrimination when paying employees who worked in his vineyards); *see also Pac. Press Pub. Ass'n*, 676 F.2d at 1276 (discussing legislative history of Civil Rights Act of 1964).[8]

Slowly the courts too began dismantling the notion espoused by Justice Bradley in *Bradwell* that, based on divine ordinance and the law of the Creator, women should be confined to roles as wives and mothers. For example, this 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). This Court reasoned:

> No longer is the female destined solely for the home and the rearing of the

[8] *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").

> 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 law that allowed alimony from husbands but not wives, as law was "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 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 affirmed legislation that addresses "the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest," *Hibbs*, 538 U.S. at 738. 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, including by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted notions that women must receive compensation equal to men, invoking their belief that the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). The courts rejected the claim, emphasizing a state interest of the "highest order" in remedying the outmoded belief that men should be paid more than women because of their role in society. *Id.* at 1398 (citations and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (rejecting religious school's argument that it was entitled to offer unequal benefits to female employees based on a similar "head of household"

religious tenet); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).[9]

The outer bounds of measures designed to protect against gender discrimination continue to be tested in the name of religious beliefs. In more recent cases, religious employers have essentially claimed that their religious beliefs entitle them to violate Title VII's prohibition on sex discrimination, but courts have limited such arguments. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of

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[9] Courts considering forms of discrimination other than race or sex have also rejected religious beliefs as a defense to such measures. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (rejecting free exercise and RFRA defenses in case involving housing discrimination based on marital status); *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (rejecting secular school's argument that the court should allow it to discriminate based on religion like religiously affiliated employers); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (holding that company was not required to accommodate religious beliefs of employee under Title VII by allowing him to display anti-gay posters in his cubicle because "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers"); *Matthews v. Wal-Mart Stores, Inc.,* 417 F. App'x 552 (7th Cir. 2011) (rejecting employee's claim that she was fired for her religious beliefs rather than violating the company's policy against harassing co-workers after she made religiously based comments against homosexuality to other employees); *see also* Br. of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al. in Support of the Government.

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) (rejecting free exercise challenge to Title VII by religious school that fired librarian for becoming pregnant outside of marriage, and noting that the school may have discriminated based on sex because "*only* women can *ever* be fired for being pregnant without benefit of marriage").[10]

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[10] Even outside the context of anti-discrimination measures, this Court has generally refused to allow claims of religious liberty to prevail if third parties would be harmed. *See United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant religious exemption to social security tax collection because it would "operate[] to impose the employer's religious faith on the employees"); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977) (holding that it would be an undue hardship to accommodate an employee who asked for his Sabbath off because doing so would violate the union contract rights of other employees with respect to shift preferences based on seniority). Even in cases where this Court has exempted claimants from complying with laws that substantially burden their religious exercise, the Court has been careful to note that such exemptions did not harm others. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (granting religious exemption to unemployment benefits law but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties"); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 720

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

The contraception rule stands in line with Title VII and other anti-discrimination measures as one further step to address a vestige of gender discrimination. And like those laws, the rule is being resisted. The companies before this Court argue that they are entitled to violate the rule based on the owners' religious beliefs.[11] It is a familiar argument and, like similar arguments in the past, should be rejected.

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(2005) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (in excusing students from reciting the Pledge of Allegiance for religious reasons, noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so"). *See also* Br. for *Amici Curiae* Church-State Scholars in Support of the Government.

[11] Although the owners of the companies in this case have religious objections to the rule, it does not mean that all people of faith similarly object to the rule. *See, e.g.,* Tom Howell, Jr., *Catholic Hospitals are OK with Obama Contraception Mandate, Protections*, *The Washington Times*, July 19, 2013, *available at* http://www.washingtontimes.com/blog/inside-politics/2013/jul/9/report-catholic-hospital-ok-contraception-mandate/ (last visited Jan. 24, 2014); *see also* Br. of Faith Groups as *Amici Curiae* Supporting the Government.

The contraception rule is an essential step to further equal opportunities for women. At the most fundamental level, the rule ensures women will have meaningful access to contraception. Indeed, nothing evidences the importance of the rule more clearly than the following fact: Today, approximately half of pregnancies are unintended. Guttmacher Institute, *Facts on Unintended Pregnancy in the United States* (Dec. 2013), *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 (2010); others cannot afford to use contraception consistently, *see* Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, *available at* http://www.guttmacher.org/pubs/RecessionFP.pdf (last visited Jan. 24, 2014); and costs drive women to less expensive and less effective methods, *see* Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible Contraception*, 117 Obstetrics & Gynecology 1105, 1105-06 (2011) (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost).[12]

[12] Moreover, long-acting methods of contraception, like IUDs, are particularly effective because there is less room for human error, unlike, for example, oral contraceptive pills. *See id*. at 1111-12 (noting that the majority of unintended pregnancies

A rule that makes all FDA-approved methods available to women, without a copay or deductible, lifts these barriers. A study in St. Louis, which essentially simulated the conditions of the rule, illustrates its impact: Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291 (2012). In this setting, 75% of the participants opted for a long-acting reversible contraceptive method, with 58% choosing an IUD. *Compare id*. at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Aug. 2013), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Jan. 24, 2014)(showing less than 6% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted. Indeed, the researchers estimate that changes in contraceptive policy simulating their project "would prevent as many as 62-78% of abortions performed annually in the United States." Peipert et al., *Preventing Unintended Pregnancies*, *supra*, at 1296.[13]

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result from "incorrect or inconsistent" contraception use, but IUDs are not "user-dependent" and thus are highly effective).

[13] Notably, the companies seeking an exemption in the cases before this Court object to providing IUDs – the method most often selected by women when given full information and opportunity, and when cost barriers are removed – and methods to prevent pregnancy after contraceptive failure. They would thus deny women meaningful access to the full range of contraception that can radically change women's lives.

In giving women effective access to the tools to control their reproduction, the rule has the promise to transform women's lives, including enabling women to decide whether and when to become a parent, and allowing women to make educational and employment choices that benefit themselves and their families.[14] "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, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 The Guttmacher Report on Public Policy 5, 6 (2004). The availability of the oral contraceptive pill alone is associated with a 20% increase in women's college enrollment; roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; and a sharp increase in the percentage of women lawyers, judges, doctors, dentists, architects, economists, and engineers. *See* Martha J. Bailey, et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat'l Bureau of Econ. Research Working Paper No. 17922, 2012), *available at* http://www.nber.org/papers/w17922 (last visited Jan. 22, 2014); Claudia Goldin & Lawrence F. Katz*, The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions,* 110 J. Pol. Econ. 730, 749 (2002).

[14] Moreover, as the Government and other *amici* argue, 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* Br. of Nat'l Health Law Program, et al., as *Amici Curiae* in Support of the Government.

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).

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

The contraception rule changes women's status in one other fundamental respect. Health care plans that cover preventive care that men need, but not that which women need, send the message that women are second-class citizens, and that they are not employees equally valued by the employer. Plans that cover care that men need, but exclude contraception, suggest that pregnancy is solely a woman's problem. And an exemption countenancing a religious objection to contraception, or to many of

the most effective methods, suggests that religious objections are more important than women's equality in our society. For all these reasons, contraception is more than a service, device, or type of medicine. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *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).

This Court should reject the companies' attempt to resurrect the long-discredited notion that they are entitled to discriminate against their female employees because of the owners' religious beliefs. Although the business owners are certainly entitled to their religious beliefs, the companies are not permitted to invoke those beliefs to discriminate against their female employees. Just as the companies' owners would not be able to use religion to hire only men, or refuse to pay their female employees equally, they should not be allowed to use religion to violate a contraception rule that is designed to promote gender equality. In rejecting the companies' arguments, this Court will not be breaking new ground, but instead will be following a well-established path. *See supra* Sections I and II. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial next step forward.

## CONCLUSION

The Court should affirm the judgment in *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, and reverse in *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

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