UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; Eric D. Hargan, in his official capacity as Acting 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 R. ALEXANDER ACOSTA, in his official capacity as Secretary of Labor, Defendants.	Civil Action No. 1:17-CV-11930-NMG

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

December 6, 2017

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INTRODUCTION AND SUMMARY OF ARGUMENT

From 2012 until two months ago, the U.S. government guaranteed that, subject to narrow exceptions, any woman with health insurance could receive contraceptive coverage at no cost. This guarantee protected the ability of women to make their own decisions about education, employment, family and health. But in October 2017, the federal government abruptly ended this guarantee by promulgating rules that make a woman's access to no-cost contraception dependent on the "religious" and "moral" views professed by her boss or school. These rules reflect rank discrimination against women. Although they would be right at home in the Republic of Gilead,[1] they have no place in the United States of America. In this country, they are illegal.

In 2009, Congress adopted the Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA) specifically to address gender disparities in out-of-pocket health care costs. *See, e.g.,* 155 Cong. Rec. S12,019, S12,027 (Dec. 1, 2009). Responding to this concern, the Amendment required no-cost coverage for the women's preventative services identified by the Health Resources and Services Administration (HRSA). 42 U.S.C. § 300gg-13(a)(4). In turn, the HRSA adopted the Institute of Medicine's (IOM) recommendation that FDA-approved contraceptives be guaranteed at no-cost (Contraception Mandate).

This guarantee came at no cost to institutions with a religious objection to paying for women's contraception. Churches, their integrated auxiliaries, and conventions of churches exempt from taxation, were entirely exempted from the Contraception Mandate (Church Exemption). *See* 77 Fed. Reg. 8725 (Feb. 15, 2012); 76 Fed.Reg. 46, 621, 46,623 (Aug. 3, 2011); Ins. of Med., *Clinical Preventative Services for Women: Closing the Gaps* 21, 109-10 (IOM Report) (July 2011). Other non-profit religious organizations could claim an accommodation, whereby the organization did not have to pay for contraception coverage, but the organization's

[1] *See* Margaret Atwood, *The Handmaid's Tale* (1985).

insurance provider or third-party administrator (TPA) would have to reimburse women for the cost of any contraceptive services they used. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 80 Fed. Reg. 41,318 (Sept. 14, 2005).[2] Women working for companies claiming an accommodation therefore received seamless no-cost contraception.

The two Interim Final Rules (IFRs) recently issued by the federal government rip apart the fabric of this coverage, ignoring the wealth of medical studies and social science demonstrating the benefits of the Contraception Mandate. The first IFR expands the Church Exemption to cover any employer, university, or insurer—including publicly-traded corporations—that advances a religious objection to providing contraceptive coverage. 82 Fed. Reg. 47,792, 47,809-47,812 (Oct. 13, 2017) (Religious Exemption). The second IFR does the same for any non-profit or for-profit entity, except publicly traded companies, that "object[s] to coverage of some or all contraceptives based on sincerely held moral convictions." 82 Fed. Reg. 47,838, 47,844 (Oct. 13, 2017) (Moral Exemption). Critically, both IFRs remove the requirement that the objecting entities' insurer or TPA continue to pay for no-cost contraception. As a result, according to the federal government's own estimates, the IFRs will take away no-cost contraception from approximately 120,000 women, with an estimated increase in total-out-of-pocket costs of $70.1 million. 82 Fed. Reg. 47,823-24; 82 Fed. Reg. 47,858.

The IFRs threaten grave harm to women across the country, and the Commonwealth of Massachusetts has appropriately alleged that they are unlawful and unconstitutional. *Amici* submit this brief to offer two arguments in support of the Commonwealth's claim that the IFRs

[2] The accommodation option was ultimately extended to closely-held, for-profit employers with religious objections. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

violate the equal protection component of the Fifth Amendment. *See* Commonwealth Mem. of Law pp. 37-40 (ECF No. 22).[3]

First, the IFRs impermissibly discriminate based on gender. To begin, because access to contraception is so crucial to equal educational and employment opportunities for women, and because the Contraception Mandate has proven to be so successful at assuring that access, the IFRs amount to a direct attack on the full citizenship of women. The Supreme Court "has repeatedly recognized" that the government violates equal protection when it "denies to women . . . full citizenship stature—equal opportunity to aspire, achieve, participate and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). In addition, the IFRs perpetuate outmoded gender stereotypes that have long been used to subordinate women. The belief that it is wrong for women to control their fertility or to have non-procreative sex, and the corresponding view of women as mothers and homemakers, is not new. The IFRs unlawfully exalt these views, elevating an employer's belief that contraception use is immoral or sinful above a woman's bodily autonomy. Finally, the actions and words of this particular Administration and this particular President—which have repeatedly targeted services for women and embraced gender stereotypes—further highlight that the IFRs discriminate against women.

Second, the puzzling manner in which the government has advanced its purported interest in respecting the religious and moral beliefs of certain employers and institutions amplifies, rather than justifies, the discrimination inherent in the IFRs. Even assuming that such an interest could save a seemingly discriminatory action from an equal protection challenge when the government acts broadly to respect *all* religious and moral beliefs—a generous assumption—

[3] *Amici* also agree with the Commonwealth that the IFRs violate procedural and substantive components of the Administrative Procedure Act, lack a foundation in any departmental authority, cannot be justified under the Religious Freedom Restoration Act, and violate the Establishment Clause.

such an interest cannot possibly salvage an otherwise impermissible government action when the government acts narrowly to respect *only the subset of religious and moral beliefs that disadvantage women.* Yet that is the situation here. The IFRs do not permit employers and other institutions to advance religious or moral objections to *any* medical service of their choosing, or even to *a single* service used by men. Instead, the IFRs respect religious and moral objections only to medical care used by women. This targeted deployment of religion and morality against women is redolent of long-discredited arguments—no longer favored in U.S. courts—that use the language of religious and moral beliefs to justify discrimination.

Contraceptive care is vitally important to women's lives. Access to contraception protects a woman's ability to make her own decisions about her education, employment, family and health. By abandoning the requirement that women be able to obtain no-cost contraceptive services irrespective of their employer's objections, the government has robbed women of the right to control their own future without interference from their bosses. If the IFRs are permitted to stand, they will explicitly permit employers and universities to be the religious and moral arbiters of women's—but not men's—medical care. Because our Constitution does not countenance such subjugation, the IFRs should be enjoined.[4]

INTERESTS OF THE AMICI

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national American Civil Liberties Union, 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. As part of its mission, ACLUM has litigated numerous

[4] This brief uses the term "women" both because the data *amici* cite throughout this brief concerns women and because women are targeted by the IFRs. *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 some gender non-conforming people and some transgender men.

cases seeking to protect women's reproductive rights. *See, e.g., Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E. 387 (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 grnds 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 victims of human trafficking).

NARAL Pro-Choice Massachusetts (NARAL), formerly Mass NARAL and founded in 1972, 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 champions access to contraception and abortion. Recently, 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. It operates five medical facilities across the Commonwealth and serves over 32,000 patients annually. 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. PPLM is committed to protecting and promoting the reproductive choices of all patients who walk through

its doors. Through this longstanding commitment as a provider of reproductive health services, PPLM has witnessed firsthand the harm women suffer when they cannot afford or access contraception. As part of its educational and advocacy mission, PPLM spearheaded a coalition effort to pass a law in Massachusetts to protect access to affordable contraception. PPLM has also published 18 research studies related to sexual and reproductive health. Through this and other work to effect its mission, PPLM is particularly familiar with the negative consequences the Interim Final Rules restricting contraceptive care will have for women's sexual and reproductive health.

ARGUMENT

I. The IFRs Impermissibly Discriminate Based on Gender.

Targeting only care that women use, the IFRs roll back contraceptive coverage that was expressly introduced to help alleviate gender discrimination. This backwards step impermissibly discriminates on the basis of gender in several distinct ways.

A. The IFRs Hinder Women's Equal Participation In Society.

As the Commonwealth details, no-cost contraception positively impacts women's and children's health. *See* Commonwealth's Mem. of Law pp. 3-4 (ECF No. 22). But accessible and affordable contraception is also an essential tool for equal participation in our society. Quite simply, "[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) (citations omitted).[5] Indeed, the

[5] It bears mentioning that, as a matter of law, women have constitutional rights to reproductive autonomy. A woman's right to reproductive autonomy is not subject to the religious views of others, including her employer. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). And many women and girls, including those whose religious traditions might disapprove of contraception, exercise that right by choosing to use contraception. *See, e.g.*, *Contraceptive Use in the United States*, Guttmacher Institute, Sept. 2016, at 2, http://www.guttmacher.org/sites/default/files/factsheet/fb_contr_use_0.pdf. (68% of Catholics, 73% of Mainline

Centers for Disease Control and Prevention has declared contraception one of the ten great public health achievements of the twentieth century. *See* https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm. "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 Guttmacher Rep. on Pub. Pol. 5, 6 (2004). The availability of the oral contraceptive pill alone is associated with roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; a 20% increase in women's college enrollment; and a sharp increase in the percentage of women lawyers, judges, doctors, dentists, architects, economists, and engineers. *See* Martha J. Bailey et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat'l Bureau of Econ. Research Working Paper No. 17922, 2012), http://www.nber.org/ papers/w17922; 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).

Fostering such equal participation lies at the foundation of the Contraception Mandate. In announcing the Mandate's regulations, the U.S. Department of Health & Human Services ("HHS") emphasized that the inability of women to access contraception

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

Protestants, and 74% of Evangelicals at risk of unintended pregnancy use sterilization, oral contraceptives, IUDs, or other hormonal methods).

77 Fed. Reg. 8725, 8728 (Feb. 15 2012) (footnote omitted). This is hardly a controversial statement.

The Contraception Mandate was therefore designed to enable equal participation in the workforce. And we know that its desired aim to increase contraceptive access for that purpose is working. By eliminating the costs of contraception under the Mandate, it is estimated that 62.4 million women—including over 1.4 million women in Massachusetts—have access to no co-pay preventive care including contraception. *See* National Women's Law Center, "New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out of Pocket Expenses," https://nwlc.org/wp-content/uploads/2017/09/New-Preventative-Services-Estimates-3.pdf [hereinafter NWLC Report]. Moreover, women's use of highly effective, long-acting reversible contraception (LARC) methods has significantly increased in Massachusetts since the implementation of the Contraception Mandate. LARC methods, including contraceptive implants and intrauterine devices (IUDs) are the most effective non-permanent forms of contraception and are associated with the highest continuation rates. *See* Center for Health and Information Analysis, Mandated Benefit Review of H.536/S.499, An Act Relative to Advancing Contraceptive Coverage and Economic Security In Our State, pp. 7-8 (Oct. 2017), http://www.chiamass.gov/mandated-benefit-reviews; *see also* Massachusetts Health Policy Commission data, http://www.mass.gov/anf/budget-taxes-and-procurement/oversight-agencies/health-policy-commission/publications/datapoint-3-june-26-2017.html. It is therefore particularly telling that the percentage of Massachusetts patients with IUDs rose 34% (from 13,800 to 18,500) after passage of the Mandate. *See Id.*

Threatening to eliminate this contraceptive access for thousands of women, the IFRs deliberately reinstitute the very barriers to equal participation that the Contraception Mandate was designed to remove. 82 Fed. Reg. 47,823-24. By giving third parties the right to deny

women the contraceptive coverage specifically adopted to address longstanding unequal treatment, the IFRs intentionally burden women in a way that will frustrate their ability to participate equally in the workforce, education, and civic life. This is discrimination, plain and simple.[6] *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 464-65 (1979) (adherence "to a particular policy or practice, with full knowledge of the predictable [gender-biased] effects" is a factor in determining discrimination).

B. The IFRs Foster and Sanction Gender Stereotypes.

The IFRs not only increase barriers for women to participate equally in our society, but also put the government's imprimatur on gender stereotypes that have long been used to hold women in a place of inequality.

As the Supreme Court has recognized, gender stereotypes perpetuate gender inequity:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003). Like Title VII and other anti-discrimination measures, the Contraception Mandate contributes to the dismantling of outmoded sex stereotypes by giving women better access to reproductive autonomy and thus offering women the tools to decide whether and when to become mothers. The Mandate

[6] The relevant benchmark for determining whether the IFRs discriminate is measured by the rights that existed when the IFRs were promulgated, not circumstances that pre-dated the Contraception Mandate. *Jane Doe et al v. Donald J. Trump, et al.*, (D.D.C.), October 30, 2017, C.A. No. 17-1597 (CKK) (citation omitted) (holding "[t]he targeted revocation of rights from a particular class of people which they had previously enjoyed—for however short a period of time—is a fundamentally different act than not giving those rights in the first place, and it will be the government's burden in this case to show that this act was substantially related to important government objectives.").

therefore helps to eliminate the antiquated notion that "a woman is, and should remain the 'center of home and family life.'" *Id.* at 729. (internal citations omitted).

The IFRs directly threaten these strides toward gender equity. By permitting employers and universities to exempt themselves from the Contraception Mandate because of religious or moral objections, the IFRs sanction and perpetuate gender stereotypes. In doing so, the IFRs not only reject the wealth of supportive data relied upon by the IOM and HHS in establishing the Contraception Mandate, but also promote the contrary message: that controlling fertility is wrong, even "immoral;" that a woman's employer has the right to be the moral arbiter of its women employees' lives; and that a woman's primary role is to have children. This stereotyping is grossly out of step with our society and is a form of intentional and impermissible gender discrimination. *See e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (rejecting government action based on "fixed notions concerning the roles" of women).

C. President Trump's Extensive History of Statements and Actions Against Women is Further Evidence that the IFRs Discriminate Based on Gender.

These arguments amply demonstrate that the IFRs discriminate against women. However, the discriminatory features of the IFRs are even more apparent when considered in light of their provenance. The IFRs were issued as a consequence of an executive order issued by President Donald J. Trump, whose repeated statements and actions against women confirm that the IFRs are the products of discrimination.

The federal government promulgated the IFRs at the direction of the President's executive order entitled "Promoting Free Speech and Religious Liberty." *See* Executive Order No. 13798 (May 4, 2017), 82 Fed. Reg. 21675 [hereinafter Executive Order]. The Executive Order singled out preventative care required by women, specifically instructing the relevant Departments to "consider issuing amended regulations" to address only "conscience-based

objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of Title 42, United States Code"—i.e. the Women's Health Amendment. *Id.* § 3. It did not ask the Departments to do the same for immunizations, preventative care for infants, children and adolescents, or any the other subsection of that same provision. *See* 42 U.S.C. § 300gg-13(a)(1)-(3). Because the IFRs were issued as a consequence of an Executive Order expressly targeting women's health—and not the health of any other group—President Trump's actions and statements regarding women are relevant to this Court's analysis of the IFRs. And the evidence that President Trump has singled out women for disapprobation, both since his election and before, is plentiful.

President Trump has repeatedly targeted women, both at home and abroad. Immediately after taking office, he signed an executive order to expand the global "gag rule," stopping U.S. funding to international aid organizations that provide any information about abortion.[7] In April 2017, he also cancelled funding for the United Nations Population Fund (UNFPA), which provides crucial maternal health, family-planning, and other essential health services to some of the poorest women in the world.[8] That same month, he signed legislation that allows states to withhold family planning grants under Title X to service providers,[9] and signed an executive order that eliminated the 2014 Fair Pay and Safe Workplaces Order, which had provided paycheck transparency and a ban on forced arbitration clauses for sexual harassment, sexual assault or discrimination claims on federal government contractors.[10] This fall, President

[7] *See* https://medium.com/@NARAL/trumps-anti-woman-first-100-days-b4ef5a3123ad; https://www.plannedparenthoodaction.org/blog/how-the-trump-administration-has-threatened-womens-health-in-just-a-few-months.

[8] *Id.*

[9] *Id.*

[10] https://www.nbcnews.com/news/us-news/trump-pulls-back-obama-era-protections-women-workers-n741041.

Trump's Department of Education eliminated existing guidance on investigating campus sexual assault, a change which is expected to discourage survivors from speaking out against their attackers.[11]

The discrimination and improper gender stereotyping behind these actions is reflected in President Trump's oft-expressed view that women belong at home. For example, in 2005 he told Howard Stern, "I won't do anything to take care of [children]. I'll supply funds and she'll take care of the kids. It's not like I'm gonna be walking the kids down Central Park."[12] President Trump has also said that he would "never again give a wife responsibility within my business" because when his ex-wife Ivana worked outside the home, she wanted to talk about work when Trump "got home at night, rather than talking about the softer subjects of life[.]"[13] President Trump's gendered comments continued throughout his campaign, asking, for example, of Hillary

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[11] https://www.bloomberg.com/news/articles/2017-09-22/obama-campus-assault-guidance-gets-scrapped-under-trump.

[12] Andrew Kaczynski and Megan Apper, *Donald Trump Thinks Men Who Change Diapers Are Acting "Like the Wife,"* BuzzFeed News, Apr. 24, 2016, https://www.buzzfeed.com/andrewkaczynski/donald-trump-thinks-men-who-change-diapers-are-acting-like-t?utm_term=.pigapdwdb#.aj7zpD3DA. Regarding his stay-at-home mother's accommodation of a husband who worked almost nonstop, President Trump recently said,"My mother was always fine with it," he said, recalling her "brilliant" management of the situation. "If something got interrupted because he was going to inspect a housing site or something, she would handle that so beautifully." "She was an ideal woman," he said. Michael Barabaro and Megan Twohey, *Crossing the Line: How Donald Trump Behaved With Women in Private*, NY Times, May 14, 2016, https://www.nytimes.com/2016/05/15/us/politics/donald-trump-women.html

[13] Brittany Wong, *17 of the Most Absurd Things Donald Trump Has Said About Marriage*, Huffington Post, June 23, 2016 (updated June 24, 2016), https://www.huffingtonpost.com/entry/marriage-rules-according-to-donald-trump_us_576c3886e4b0dbb1bbb9e5a8.; *see also id.* ("My big mistake with Ivana was taking her out of the role of wife and allowing her to run one of my casinos in Atlantic City, then the Plaza Hotel. The problem was, work was all she wanted to talk about"). The President also said of Ivana's successful business: "I don't want to sound like a chauvinist, but when I come home at night and dinner's not ready, I go through the roof," going on to say "Ivana had a great softness that disappeared. She became an executive not a wife." "http://www.hollywoodreporter.com/news/donald-trump-women-unearthed-1994-primetime-interview-nancy-collins-938176. When asked about hiring working mothers, President Trump replied "she's not giving me 100%. She's giving me 84%, and 16% is going towards taking care of children." Rana Foroohar, *The 100% Solution*, TIME, May 23, 2011, http://content.time.com/time/magazine/article/0,9171,2071119,00.html.

Clinton "does she look Presidential, fellas? Give me a break."[14] Along with the targeted actions of his Administration, President Trump's repeated statements that childcare is a woman's duty and that women should not work outside the home are highly relevant to assessing the discriminatory nature of the IFRs issued at his direction.

II. The IFRs' Attempt to Use Religion And Morality To Justify Discrimination is Unpersuasive.

The IFRs attempt to justify this discrimination by resting on the religious beliefs and undefined moral beliefs of employers and schools. But this justification falls short for two reasons. First, the IFRs do not apply to *all* religious or moral objections against medical procedures, or even to *any* religious or moral objections other than those against services that, pointedly, women use. The religious and moral justification rings hollow when the Administration has selectively used this rationale to target women and women alone. Second, while individuals have long-cited religious and moral beliefs to justify both race and gender discrimination, courts have increasingly rejected such arguments. The Administration's reliance on this discredited theory to justify discrimination should similarly be rejected.

A. The IFRs' Religious and Moral Justifications Are Unpersuasive Because They Only Are Selectively Applied to Women.

The Administration's invocation of religious and moral beliefs to justify discrimination must be viewed with significant skepticism since the IFRs only target services women use. While the federal government claims the IFRs are needed to protect religion, it is undisputed that the IFRs do not grant religious exemptions for all medical procedures. The selective nature of the

[14] Tina Nguyen, *Trump Attacks Clinton for Coughing, Not Having A 'Presidential Look,'* Vanity Fair, Sept. 6, 2017, https://www.vanityfair.com/news/2016/09/trump-clinton-presidential-look. On Carly Fiorina, he said, "Look at that face... Would anyone vote for that...Can you imagine that, the face of our next president? . . . I mean, she's a woman, and I'm not supposed to say bad things, but really, folks, come on. Are we serious?" Paul Solotaroff, *Trump Seriously: On the Trail with the GOP's Tough Guy*, Rolling Stone, Sept. 9, 2015,

Administration's invocation of religion and morality is telling, suggesting that discrimination, not religion, is at the heart of these rules.

As described above, the selective targeting of women was evident from the earliest inception of the IFRs. The Executive Order did not address "conscience-based objections" to the Affordable Care Act or to federal laws in general. *See* Executive Order No. 13798 (May 4, 2017), 82 Fed. Reg. 21675. Instead, it singled out preventative care required by women. *Id.* § 3.

Consistent with the Executive Order, the IFRs create a gender-based classification by establishing a religious and moral exemption to the Contraception Mandate, while leaving all coverage for male employees intact. The federal government cannot veil the discriminatory impact of restricting access to a medical service that women use by inconsistently invoking religious or moral beliefs. Indeed, there are a number of religious beliefs that conflict with a variety of medical treatments and services. Yet the IFRs do not address comparable religiously-based or morally-based exemptions for non-gender based medical services, like blood transfusions, which are objectionable to Jehovah's Witnesses. Rather, the IFRs insert a gender-based classification into the Affordable Care Act's preventive care provisions by selectively authorizing employers to use their religious or moral beliefs to deny critical preventive care for women alone. *See* Commonwealth's Mem. of Law pp. 39-40 (ECF No. 22).

B. The IFRs' Religious and Moral Justifications Are Unpersuasive Because Courts Have Long Rejected Such Reasoning to Justify Discrimination.

The IFRs' reliance on religious and moral beliefs is not unique: individuals, businesses and organizations have long-cited such beliefs as justifications for continued discrimination. But these arguments have been repudiated as out of place in our modern democracy. Indeed, the historical movement toward greater gender and race equality has been accompanied by the

courts' steady rejection of claimed religious justifications for discrimination in the marketplace. This Court should do the same.

(i) Racial Discrimination[15]

It is important to recall that slavery itself was often defended in the name of faith. Indeed, in rejecting Dred Scott's claim for freedom, the Missouri Supreme Court 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). Religion was also invoked to justify and sustain anti-miscegenation laws and segregation. *See, e.g., Scott v. State*, 39 Ga. 321, 326 (Ga. 1869) (upholding conviction for miscegenation reasoning that equality between the races did not exist because "the God of nature made it otherwise");[16] *The West Chester & Phila. P.R. Co. v. Miles*, 55 Pa. 209, 213 (Pa. 1867) (upholding segregation on railroad because "the order of Divine Providence" dictates that the races should not mix).[17]

Religious arguments supporting racial segregation eventually lost currency, but not without resistance. Despite the passage of the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations, individuals and

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[15] *Amici* do not suggest that that the historical invocation of religion to justify the most odious forms of racial discrimination is equivalent to the religious claims cited by the IFR, but rather describe this history because the lessons derived from that experience are instructive here.

[16] *See also Kinney v. Commonwealth,* 71 Va. 858, 869 (Va. 1878) (reasoning that based on "the Almighty" the two races should be kept "distinct and separate"); *Green v. State,* 58 Ala. 190, 195 (Ala. 1877) (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 miscegenation conviction).

[17] *See also Berea College v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), aff'd, 211 U.S. 45 (1908) (affirming the enforcement of a law prohibiting whites and blacks from attending the same school, noting that the separation of the races was "divinely ordered"). 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]"); Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health,* 9 DePaul J. Health Care L. 735, 757 (2005) ("Many hospitals were not available to Blacks in the first half of the twentieth century.").

organizations still used religious beliefs to justify the very discrimination the Act sought to eliminate. Critically, however, our courts have routinely rejected those efforts.

For example, in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), Bob Jones University and Goldsboro Christian Schools sued the United States under the Free Exercise Clause, arguing racial discrimination based on sincerely held religious beliefs should be constitutionally exempt from the Treasury Department's rule making racially segregated schools ineligible for tax-exempt status. Bob Jones University argued that it "genuinely believe[d] that the Bible forbids interracial dating and marriage." 461 U.S. at 580. Similarly, Goldsboro Christian Schools cited its religious beliefs in support of its refusal to admit African-American students, arguing that "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id.* at 583 n.6. The Supreme Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on religious beliefs. *Id.* at 602-04.

Similarly, the courts have rejected the use of religious beliefs to justify discrimination in the marketplace. *E.g. Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 91, 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). In *Newman*, a restaurant owner was sued for violating the 1964 Civil Rights Act when he refused to serve black customers. The defendant attempted to justify his discrimination against others by arguing that serving Black people violated his religious beliefs. The court rejected this defense, holding that the owner

> has a constitutional right to espouse the religious beliefs of his own choosing, however he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.

Id. In short, as these decisions illustrate, since the middle of the twentieth century, the argument that religious beliefs can be valid grounds for evading measures designed to eradicate racial discrimination has rightfully lost its force.

(ii) Gender Discrimination

Just as religion was used to perpetuate and justify race discrimination, religious arguments have also long been raised to limit women's roles in society. And as in the case of race discrimination, arguments which were initially embraced by courts have since been rightfully rejected. But it was not always so. For example, concurring in the United States Supreme Court's holding that the State of Illinois could prohibit women from practicing law, Justice Bradley now infamously 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 same invocation of religion and depiction of women as divinely destined for the role of wife and mother was also a central argument against suffrage. A leading antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to everyone 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, 6 (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).

Not coincidentally, it was during this same time period that the first laws against contraception were enacted to address what was characterized as "physiological sin," thus firmly linking attempted restrictions on contraceptive access to religious doctrine. Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 292 (1992) (quoting H.S. Pomeroy, The Ethics of Marriage 97 (1888)); *see also id.* at 293 (quoting physician in lecture opposed to interruption of intercourse: "She sins because she shirks those responsibilities for which she was created.").

And even as women began entering the workforce in greater numbers, they continued to be constrained by the longstanding and religiously imbued stereotype of women as primarily mothers and wives. As the Supreme Court recognized in *Frontiero v. Richardson*, "[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. 677, 685 (1973).[18]

Initially, those statutes were often upheld. For example, in *Muller v. Oregon*, workday limitations for women were upheld 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 as society's views of race evolved, so too did society's views of women. Indeed, the passage of the

[18] For both sexes, these visions were idealized and unrealistic for many households, particularly those of the working poor, where women as well as men labored outside the home.

Civil Rights Act of 1964 was a step forward for both racial and gender equality because Title VII of the Act barred discrimination based on sex and race in the workplace.

Once again, this progress toward equality was opposed by groups who tried to invoke religious liberty defenses against the enforcement of anti-discrimination measures. And once again, courts rejected such efforts. For example, courts refused to endorse religious schools' attempt to avoid the requirement that women and men receive equal compensation based on 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). Such moral or religious beliefs about men and women's "appropriate" role in society do not overcome the state's interest of the "highest order" in remedying the discriminatory view that men should be paid more than women. *Id.* at 1398. *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).

Courts have similarly rejected schools' efforts to assert religious objections to premarital sex as a valid justification for impermissible pregnancy discrimination. *See Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998). As *Ganzy* explained, a religious school cannot rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, because "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace." *Id.* at 350. *See also Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage, holding that the school seemed "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had

premarital sex"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (same).

* * * *

As these cases illustrate, the use of religious doctrine or undefined moral beliefs, however sincerely held, as the vehicle for discrimination of any kind is highly suspect. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2016) (when "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."). Here, the IFRs are nothing more than an attempt by this Administration to revive the long-discredited argument that one person's religious or undefined moral beliefs is an appropriate basis for interfering with another individual's personal liberty and rights, and that such beliefs are a permissible basis for discriminating against women. They are not.

CONCLUSION

As Justice Kennedy recently explained, an entity's religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (upholding a Religious Freedom Restoration Act challenge to the Contraception Mandate). The accommodation adopted by *Hobby Lobby* did not run afoul of this principle, as it had "precisely zero" impact on a woman's access to contraception. *Id.* at 2760. In contrast, the IFRs significantly burden a woman's access to contraception whenever her school or employer elects the proffered exemption. It imposes this burden in a way that impermissibly discriminates based on gender, critically hindering women's ability to participate equally in our society. As a result, and for the reasons articulated by the Commonwealth, this Court should declare that the IFRs are unlawful and permanently enjoin their implementation.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Amici certify that they 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 fewer than twenty pages and fewer than 6,500 words.

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