ADL | Never Is Now 2019

Religious Freedom, Shield or Sword:

Constitutional and Jewish Law Perspectives

November 21, 2019, 12:10pm-1:10pm

Jacob K. Javits Convention Center

429 11th Avenue

New York, NY 10001

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Speaker Biographies

Rabbi Saul Berman
Professor of Jewish Studies, Yeshiva University, Adjunct Professor of Law, Columbia Law School

Rabbi Saul J. Berman was born and raised in the Bed-Stuy neighborhood of Brooklyn, NY. He was ordained at Yeshiva University, from which he also received a B.A. and an M.H.L. He completed a degree in law, a J.D., at New York University Law School, and an M.A. in Political Science at the University of California at Berkeley. He did advanced studies in Jewish Law at Hebrew University and Tel Aviv University Law Schools.

He was a Rabbi in Berkeley CA (1963-1969), Brookline, MA (1969-1971) and at Lincoln Square Synagogue in Manhattan (1984-1990.) He was an early leader in the Soviet Jewry movement in the 1960s and 1970s. In March 1965 he participated in voter registration efforts in Selma, Alabama and was twice arrested just prior to the march from Selma to Montgomery.

From 1971 until 1984 he served as Chair of the Department of Jewish Studies at Stern College for Women of Yeshiva University, which grew into the largest Undergraduate academic Department of Jewish Studies in the U.S. He continued since 1984 to serve as Professor of Jewish Studies at Stern College where he teaches Jewish Law related to medical ethics, contemporary social and political issues, the status of women, and Liturgy.

Since 1990, Rabbi Berman serves also as an Adjunct Professor at Columbia University School of Law, as the Nathan and Rose Rotter Fellow in Talmudic Law, teaching seminars in Jewish Law. From 1997 until 2007 he also served as Director of Edah, an advocacy organization for Modern Orthodox Judaism, and in 2009-2010 he was an Inaugural Fellow of the Tikvah Center for Law and Jewish Civilization at NYU Law School.

Rabbi Berman is the author of many articles and of a book entitled "Boundaries of Loyalty: Testimony Against Fellow Jews in Non-Jewish Courts." He and his wife, Shellee, have four children, plus in-law children, and ten grandchildren, three living in Israel and seven living in the New York area.

Melissa Rogers
Nonresident Senior Fellow, Governance Studies, Brookings Institution
Visiting Professor, Wake Forest University School of Divinity

Professor Rogers is a nationally known expert on religion in American public life. Her areas of expertise include the First Amendment's religion clauses and the interplay of religion, law, policy, and politics. Professor Rogers previously served as Special Assistant to President Barack Obama and Executive Director of the White House Office of Faith-based and Neighborhood Partnerships (2013-2017), Chair of President Obama's Advisory Council on Faith-based and Neighborhood Partnerships (2009-2010), Director of the Center for Religion and Public Affairs at the School of Divinity (2003 – 2013), Executive Director of the Pew Forum on Religion and Public Life (2000 – 2003), and Associate Counsel/General Counsel of the Baptist Joint Committee for Religious Liberty (1994 – 2000).

Professor Rogers is author of Faith in American Public Life (2019) and co-author of Religious Freedom and the Supreme Court (2008). In 2014, Professor Rogers gave the baccalaureate address at Wake Forest University and was awarded an Honorary Doctor of Divinity. In 2017, President Barack Obama appointed Professor Rogers to serve as a member of the United States Holocaust Memorial Council. Baylor University awarded her its Pro Texana Medal of Service and the First Freedom Center gave Professor Rogers its Virginia First Freedom Award. She has been recognized by National Journal as one of the church-state experts "politicians will call on when they get serious about addressing an important public policy issue."

Moderator:
David Barkey
National Religious Freedom Counsel, ADL

David Barkey serves as ADL's National Religious Freedom Counsel. In that position, he oversees ADL's religious freedom portfolio. His responsibilities include addressing complex national legal, legislative, and public policy issues relating to the separation of church and state, free exercise of religion, and religious discrimination. He also serves as ADL's Senior & Southeastern Area Counsel.

Prior to joining ADL eighteen years ago, Mr. Barkey served as a Trial Attorney at the New York District Office of the U.S. Equal Employment Opportunity Commission where he specialized in federal employment discrimination litigation. He also worked as an associate at the national law firm of Jackson Lewis where he specialized in labor and employment law. Mr. Barkey received his J.D. from Brooklyn Law School and B.A. from Northwestern University. He is admitted to practice law in Florida, Connecticut, and New York.

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BY E-MAIL

September 16, 2019

Harvey D. Fort
Acting Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs, Room C-3325
200 Constitution Avenue, N.W., Washington, D.C. 20210

Re: RIN 1250-AA09

Dear Mr. Fort,

On behalf of ADL (Anti-Defamation League), we are writing to offer our comments on the proposed amendments to 41 CFR part 60-1, "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption," as outlined at [XX] ("Proposed Rule" or "Part 60-1").

For more than a century, ADL has been an ardent advocate for religious freedom for all Americans – whether they hold majority or minority religious beliefs. Among our core principles is strict adherence to the separation of church and state effectuated through both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when: all individuals are able to practice their faith or choose not to observe any faith; government neutrally accommodates religion but does not favor any particular religion; and religious belief is not used by government or other actors in the public marketplace to harm or infringe on the rights of individuals.

The Proposed Rule purports to parallel Title VII's Section 702 religious employer exemption. *See* 42 U.S.C. § 2000e–1(a). In realty, however, Part 60-1 is far broader and effectively makes any federal contractor eligible to discriminate in hiring and firing on the basis of religion. The Proposed Rule opens the door to discrimination against millions of applicants for publicly funded employment and would have a particularly harmful impact on religious minorities and LGBTQ people. It therefore would thwart the federal government's "compelling interest in providing an equal opportunity to participate in the workforce. . ." *See Burwell v. Hobby Lobby*, 573 U.S. 682, 733 (2014). Indeed, Part 60-1 contradicts the very Title VII case law cited in support of it. Furthermore, the Proposed Rule raises serious constitutional issues under the Establishment Clause to the First Amendment. The Proposed Rule should be recalled for modification because it is fundamentally unfair, unlawful, and unconstitutional.

The Proposed Rule Vastly Expands the Existing Federal Contractor Exemption

The Proposed Rule adds five definitions to the current federal contractor exemption. *See* 41 CFR § 60-1.5. The Proposed Rule would amend 41 CFR § 60-1.3 by adding definitions of: (1) "Exercise of religion"; (2) "Particular religion"; (3) "Religion"; (4) "Religious corporation, association, educational institution, or society"; and (5) "Sincere." The fourth definition would result in an overly broad religious exemption that is far beyond the scope and purpose of Title VII's. This definition is also incorporated by reference into the definition of "Particular religion."

To fall within the fourth definition, the government explains, a contractor must have a sincere religious belief and must: (1) be organized for "a self-identified religious purpose"; (2) "hold itself out to the public as carrying out a religious purpose"; and (3) "exercise religion consistent with, and in furtherance of, a religious purpose." (emphasis added).

These three elements are not intended to be a guide in determining whether a contractor is "primarily religious" or "secular as a whole." Rather, demonstration of each factor is stand-alone because according to the Proposed Rule's analysis, making such a balancing determination cannot be done "in any consistent way." Furthermore, to meet this standard a religious purpose "need not be the contractor's only purpose." Therefore, a contractor could have one religious purpose and multiple secular ones, but nonetheless be exempted.

Conversely, under the Proposed Rule, the Office of Federal Contract Compliance Programs (OFCCP) would make such a balancing determination in assessing whether an entity holds a sincere religious belief. As to that assessment, it would "take[] into account all relevant facts," including a contractor's "acting 'in a manner inconsistent with'" its religious beliefs, or a contractor's using religion to veil secular interests. Thus, Part 60-1 permits OFCCP to determine whether a belief is sincerely religious or secular, but it prohibits a determination that considers all relevant circumstances on the question of whether a contractor itself is religious or secular. The later should apply to both.

Moreover, relying on the U.S. Supreme Court's decision in *Hobby Lobby*, Part 60-1 specifically rejects non-profit status, or engaging primarily or substantially in the exchange of goods or services for beyond nominal amounts, as factors in determining whether a contractor has a religious purpose. As a result, virtually any for-profit contractor could avail itself of the exemption. Furthermore, virtually any separately incorporated religiously affiliated organization could fall within the exemption.

Federal and other statistics reflect the magnitude of the prospective detrimental impact of the Proposed Rule. Based on a search of the System for Award Management web-site, there are 378,896 companies and organizations registered as federal contractors. Of this number, 35 are the nation's largest private companies, which alone employ close to one and a half-million people.[1] Under the Proposed Rule, the for-profit nature of these companies would not be a barrier to invoking the exemption. Thus, under Part 60-1 the employees of these companies and many more millions at others could be newly subjected to government-funded discrimination.

The Proposed Rule Contradicts the Title VII & Other Caselaw It Cites

The Proposed Rule's standard for determining whether a religious corporation, association, educational institution, or society falls within the exemption heavily relies on the *per curium* decision in *Spencer v. World Vision, Inc.*, which set forth a new Ninth Circuit standard for the Title VII religious

[1] *See* "America's Largest Private Companies ... 2018 Ranking," Forbes, https://www.forbes.com/largest-private-companies/list/ (last visited August 28, 2019).

employer exemption. *See* 633 F.3d 723 (9th Cir. 2011).[2] Yet, Part 60-1 rejects a fourth factor set forth in the concurrences by Judges O'Scannlain and Kleinfeld, which formed the court's opinion, as well as a criterion found in Judge Kleinfeld's concurrence and Judge Berzon's dissent.

As to the later, Judge Kleinfeld's concurrence states:

> *Accordingly, I would reformulate Judge O'Scannlain's test as this: To determine whether an entity is a "religious corporation, association, or society," determine whether it is organized for a religious purpose,* ***is engaged primarily in carrying out that religious purpose,*** *holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts. Id.* at 748 (emphasis added).

Similarly, the standard set forth by Judge Berzon would require a finding of "whether an organization is 'primarily religious.'" *Id.* at 752. Thus, a majority of the Ninth Circuit would have found that for an employer to be covered by the Title VII exemption, there must be a determination that the employer is primarily religious. Additionally, in 2007 the U.S. Court of Appeals for the Third Circuit ruled that there must be a finding of an organization's being primarily religious to fall within the Title VII exemption. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229 (3rd Cir. 2007). However, the Proposed Rule explicitly rejects this criterion. Indeed, it prohibits the three factors for determining whether a "religious corporation, association, educational institution, or society" is religious from being taken together to make a such a finding.

Judge O'Scannlain's concurrence in *World Vision* found that an entity's being non-profit "is especially significant" in determining whether the Title VII exemption applies because it is a neutral factor bolstering a claim that the employer's purpose is "non-pecuniary." 633 F.3d at 734. While Judge Kleinfeld agreed that considering non-profit status "would facilitate free exercise of religion," he expressed a concern that relying on it "would also allow people to advance discriminatory objectives outside the context of religious exercise by means of mere corporate paperwork." *Id.* at 742. According to his concurrence, a focus on non-profit corporate status is incorrect because there are some religious assemblies without corporate status, and "[a]bsence of corporate papers" should not defeat the purpose of the exemption. *Id.* at 745. Emphasizing this factor "would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." *Id.* To Judge Kleinfeld, charitable motive should be the focus. He distinguished between a religious motive and a monetary motive for work that serves others. *Id.* at 747. For example, he drew a distinction between a religious hospital that receives money for valuable services at the market rate and the Salvation Army which gives away or provides services at a nominal rate. *Id.* at 746-47. As a result, the factor which Judge Kleinfeld adopted was providing services at no-cost or for a nominal fee. *Id.* at 748. The Proposed Rule rejects both factors.

The Proposed Rule erroneously ignores this binding precedent by relying on the *Hobby Lobby* decision, a case in totally different context. *Hobby Lobby* involved a challenge to the Affordable Care Act's contraception mandate under the federal Religious Freedom Restoration Act (RFRA), which is distinct and operates far differently than the Title VII exemption. Significantly, the Supreme Court held only that RFRA could apply to for-profit closely held corporations. *See* 573 U.S. at 683. Moreover, in the context of government health insurance mandates, the Court also held that the protections of RFRA may not apply to closely held, for-profit corporations in all circumstances. *Id* at.

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[2] "[A]n entity is eligible for the [Title VII] section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Id.* at 724.

730. Yet, as discussed *supra*, the Proposed Rule's exemption could apply to virtually any for-profit private or public corporation.

Critically, the Court in *Hobby Lobby* explicitly distinguished the challenge to the contraception mandate from "discrimination in hiring, for example on the basis of race, [being] cloaked as religious practice to escape legal sanction." *Id.* at 733 (emphasis added). According to the Court: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* The decision's use of the phrase "for example" does not limit this *dicta* to employment discrimination based on race. Moreover, in the context of employment discrimination, the Court indicated that even a for-profit closely held corporation could not invoke RFRA's free exercise protections.

The Proposed Rule also points to the U.S. Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), for support. That case also did not involve the Title VII exemption. Rather, it held that the First Amendment provides houses of worship and other religious institutions with a "ministerial exception" to discrimination claims. *Id.* at 172-75. The Court further held that the exception applied to the employee in question. *Id.* In reaching this holding, the Court weighed the religious and secular functions of the employee to determine whether she had a ministerial role at the church. It found that the exception covered the employee "given all the circumstances of her employment." *Id.* at 190. In doing so, the Court reviewed the employee's religious and secular functions. *Id.* at 190-93. This analysis is analogous to that conducted in *LeBoon, see* 503 F.3d at 226-229, and both cases undermine the Proposed Rule's representation that OFCCP could not engage in a similar type of balancing to determine whether a contractor is religious or secular.

The Proposed Rule Is Contrary to the Purpose of the Title VII Exemption

Title VII's Section 702 exemption was never intended to provide the basis for government-funded discrimination. Rather, it was enacted to prevent entanglement between government and religious institutions. In 1987, the U.S. Supreme Court upheld the right of religious organizations under Section 702 to discriminate on the basis of religion in hiring staff with their own funds because doing so is intrinsic to their ability to define and carry out their religious mission. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The exemption most certainly was not intended to encompass secular or for-profit employers. Yet, as discussed *supra*, the Proposed Rule's overly broad exemption would do exactly that. Assessing the scope of a far narrower construction of the Title VII exemption, Judge Kleinfeld's concurrence in *World Vision* warned that an overbroad interpretation "would allow non-profit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment." 633 F.3d at 745. The same warning must also apply to for-profit employers. And the Judge's admonition was made in the context of private employment. Given that in *Hobby Lobby* the Court found that anti-discrimination prohibitions are the least restrictive means of achieving the government's compelling interest in providing equality in the workplace, it is axiomatic that for publicly-funded employment that interest is amplified. Thus, applying the Title VII exemption in the public employment context undermines the statute's goal and its anti-discrimination prohibitions.

Certainly, the Proposed Rule's exemption also encompasses actual houses of worship and religious institutions. ADL supports the right of a church, synagogue, mosque or other religious organization to use its own private funds to hire only co-religionists for positions that advance its religious mission. However, religious discrimination in hiring for government-funded programs is a wholly

different circumstance. No one should be barred from a taxpayer-funded job based on their faith. Such discrimination violates the American principles of equality and meritocracy.

Furthermore, the Proposed Rule is unconstitutional on two distinct grounds. First, this discrimination constitutes government support for particular religious missions in violation of the Establishment Clause to the First Amendment. *See* U.S. Const. amend. I. Second, it runs afoul of the "no-religious-tests clause" of the U.S. Constitution. *See* U.S. Const., art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

Notwithstanding that an Establishment Clause violation would preempt an application of RFRA, the Proposed Rule's reliance on that statute is misplaced. Citing the U.S. Supreme Court decisions in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Senate Committee Report on RFRA stated: "pre-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." *See* S. REP. 103-111, 1892, 1998 (1993). Moreover, in construing the scope of internal government affairs, the U.S. Supreme Court found in 2011 that "the Government's interest in as 'proprietor' in managing its operations does not turn on" the formality of whether an individual is a civil servant or a contract employee. *NASA v. Nelson*, 562 U.S. 134, 150 (2011) (internal citations omitted). Even if strict scrutiny did apply, as discussed *supra* the interest in public workplace equality achieved through anti-discrimination prohibitions would meet that standard.

Additionally, the Proposed Rule's reliance on the U.S. Supreme Court's recent Free Exercise Clause decisions in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) is misplaced.

Masterpiece Cakeshop did not involve discrimination in publicly-funded employment. Rather, it involved a challenge by a privately-owned business to a local human rights ordinance that *inter alia* prohibited discrimination on the basis of sexual orientation. The Court ruled in favor of the petitioner on the narrow grounds that respondent's finding of discrimination was tainted with religious hostility. *See Masterpiece Cakeshop*,138 S. Ct. at 1732.

In reaching its decision in *Masterpiece Cakeshop*, the Court recognized "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." *Id.* at 1723. It further found that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at 1723-24. In addition to this case's addressing the context of a private public accommodation, there is no evidence that the Proposed Rule is necessitated by the federal government's hostility toward religion. Additionally, although for these reasons *Masterpiece Cakeshop* is readily distinguishable from the context of the Proposed Rule, this case actually could lend support to the application of a neutral anti-discrimination law to a religious institution in the context of publicly-funded employment.

At issue in *Trinity Lutheran* was a Missouri program that provides grants to private and public schools as well as other non-profit institutions to purchase rubber playground surfaces made from recycled tires. *See* 137 S. Ct. at 2017. Based on Missouri's No-Aid Clause, the program prohibited houses of worship and other religious entities from participating in the program. *Id.*

In an unprecedented ruling, the Supreme Court held that the Free Exercise Clause required the State to provide a direct grant to a house of worship. *Id.* at 2024-25. Specifically, the Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.*

at 2019 (internal citations omitted). In reaching this conclusion, the Court distinguished its decision in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a denial of public funding for "'degrees in devotional theology'" based on the State of Washington's No-Aid Clause, stating that the petitioner in that case "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." 137 S. Ct. at 2023 (emphasis in original). The Court further found that Missouri failed to justify the program's exclusion of religious institutions based on "religious establishment concerns." *Id.* at 2024.

Critically, the six justices who joined the *Trinity Lutheran* majority evenly split on footnote 3, which states:

> *This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.* Id. at 2024, n.3.

As with *Masterpiece Cakeshop*, the *Trinity Lutheran* decision was made in a completely different context than the Proposed Rule. It did not answer the question of whether a religious institution can discriminate with public funds, and thus the decision has no bearing on the question of whether a religious institution can discriminate in publicly-funded employment. Furthermore, given the government's compelling state interest in workplace equality within the public sector, prohibiting discrimination in all taxpayer-funded jobs would be a state interest of the highest order.

We urge you to recall the Proposed Rule for modifications in light of these serious policy, statutory and constitutional arguments.

Sincerely,

Steven M. Freeman
Vice President

David L. Barkey
Senior & Southeastern Area Counsel
National Religious Freedom Counsel

Michael Lieberman
Washington Counsel

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August 13, 2019

U.S. Department of Health and Human Services, Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Re: Docket ID: HHS-OCR-2019-0007, RIN 0945-AA11, Comments in Response to Proposed Rulemaking: Nondiscrimination in Health and Health Education Programs or Activities

On behalf of ADL (the "Anti-Defamation League"), we are writing to express our **strong opposition** to the above-referenced proposed rule change and to urge that it be immediately withdrawn. By removing much needed non-discrimination protections from Section 1557 of the Affordable Care Act ("ACA"), and by giving health care providers blanket permission to refuse to provide services based on religious or moral objections, this proposed rule stands to put the health and well-being of millions of vulnerable people at risk without any reasonable justification.

ADL is a leading anti-hate organization founded in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. In furtherance of this mission, ADL advocates for comprehensive laws and policies that prohibit discrimination on the basis of immutable characteristics, such as sex, sexual orientation, and gender identity. We also firmly believe that freedom of religion enshrined in the First Amendment is meant to be a shield to protect individual religious exercise, rather than a sword that can be used to impose one's beliefs on others. Because the above-referenced proposed rule change will undermine both of these core values, we strongly urge the Department of Health and Human Services ("HHS") and the Center for Medicare and Medicaid Services ("CMS") to withdraw the proposed rule in its entirety, and instead allow existing regulations implementing Section 1557 to remain in place.

Background

Since 2012, HHS has correctly interpreted "discrimination on the basis of sex," as reflected in Section 1557 of the Affordable Care Act ("ACA"), to include discrimination against the LGBTQ community. This interpretation was formalized in 2016, when HHS issued final regulations making clear that sex discrimination in health care includes discrimination on the basis of pregnancy, sex stereotyping, and gender identity.[1]

Because Section 1557 was the first federal civil rights law to broadly prohibit sex discrimination in federally funded health care programs and activities, these regulations were helpful in educating

[1] *Nondiscrimination in Health Programs and Activities*, 81 FR 31375 (May 18, 2016).

consumers and covered entities about how this insidious type of discrimination can manifest. The regulations, for example, helped clarify that if an insurance company provides coverage for a particular type of treatment, that carrier cannot refuse coverage for the same treatment simply because it is requested by someone who is transgender. The regulations also made clear that providers must treat individuals in a manner consistent with their gender identity under the ACA, including in access to health care facilities. Notably, these regulations did not change the underlying text or meaning of Section 1557. They simply clarified the protections that the ACA otherwise guaranteed.

The Proposed Rule Change Will Have a Devastating Impact on the LGBTQ Community

Section 1557 and accompanying regulations have been critical to closing the healthcare gap faced by members of the LGBTQ community, particularly transgender people, since the ACA was first enacted. Unfortunately, the above-referenced proposed rule change seeks to take these critical protections away, including by entirely eliminating Section 1557's regulatory definition of sex discrimination.

By proposing to eliminate protections against discrimination based on gender identity and sex stereotyping, HHS is contradicting over 20 years of federal case law and Supreme Court precedent. While this change will not (and indeed, cannot) impact the longstanding court precedent interpreting gender identity and sex stereotyping discrimination as sex discrimination for purposes of civil rights laws, it will severely weaken the ACA's anti-discrimination protections by sending a confusing and contradictory message to health care providers – that, as a result of the rule change, it is now legally permissible to refuse to care for individuals who are transgender or who do not conform to traditional sex stereotypes. This will result in immediate and devastating health care consequences for a community that already faces startlingly high levels of discrimination when seeking care.

These fears are not speculative. According to a recent survey by the National Center for Transgender Equality ("NCTE"), 33% of transgender respondents reported having negative health care experiences, including 24% who were required to educate their health care provider as to proper standards of care, 8% who were refused transition-related care, 6% who were verbally harassed, and 1% who were sexually assaulted.[2] This pervasive discrimination has deterred many transgender and gender nonconforming patients from seeking the health care they need. That same survey by NCTE, for example, found that 23% of transgender respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person. Similarly, a 2018 survey by the Center for American Progress found that 14% of LGBTQ respondents who had

[2] NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 97 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

previously experienced discrimination in health care avoided seeking necessary medical care, and 17% avoided seeking preventive care in the past year.[3]

By eliminating the inclusive definition of "sex discrimination" from Section 1557's implementing regulations, HHS will only exacerbate these already disturbing trends. This is not only contrary to the intent of the ACA, but also to our core values as a nation.

The Proposed Rule Change Goes Too Far to Protect Religious Liberty at the Expense of Nondiscrimination Protections

In addition to the foregoing, the proposed rule change seeks to impermissibly adopt blanket abortion and religious freedom exemptions for health care providers, which would enable these providers to deny, delay or discourage patients from seeking necessary care due to the provider's own religious beliefs. Not only does this violate the plain language and express purpose of Section 1557, but if implemented, this could allow for religiously-affiliated hospitals and other health care entities to discriminate against patients based on sex, disproportionately harming LGBTQ people, people seeking reproductive health services, including abortion care, and those living at the intersection of these identities. This will place patients further at risk of life-threatening harm, particularly where an individual's access to health care providers is already limited, for example in rural areas, in locations where hospitals are run by religious institutions, or in cases of an emergency. At a time when there is already a proliferation in the number of religiously-affiliated entities that provide health care and related services, yet refuse to provide care based on religious beliefs,[4] the anticipated impact of the proposed rule change on illegal discrimination is particularly concerning.

The Proposed Rule Change Impermissibly Attempts to Eliminate Language Access Protections

The proposed rule change would also remove language access protections for the 25 million people in the U.S. with Limited English proficiency ("LEP")[5] by proposing to roll back requirements for

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[3] CENTER FOR AMERICAN PROGRESS, DISCRIMINATION PREVENTS LGBTQ PEOPLE FROM ACCESSING HEALTH CARE (Jan. 18, 2018), *available at* https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

[4] *See, e.g.*, Lois Uttley, et al., *Miscarriage of Medicine: the Growth of Catholic Hospitals and the Threat to Reproductive Health Care*, Am. Civil Liberties Union & Merger Watch (2013), https://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf.

[5] U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates: Table S1603 Characteristics of People by Language Spoken at Home*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1603&prodType=table (last visited Aug. 12, 2019); U.S. Census Bureau, *2017 American Community Survey 1-Year Estimates: Table S1601 Language Spoken at Home*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S1601&prodType=table (last visited Aug. 12, 2019).

the inclusion of taglines on significant documents and remote interpreting standards, and by proposing to eliminate recommendations that entities develop language access plans.

For LEP individuals, language differences often compound existing barriers to access and receiving appropriate care. LEP often makes it difficult for many to navigate an already complicated health care system, especially when it comes to medical or insurance terminology. Moreover, these barriers are often compounded by discrimination based on national origin, immigration status, race, ethnicity, sexual orientation, and gender/gender identity.

Without the regulatory requirements outlined in the current regulations, people with LEP could face additional challenges in access to culturally and linguistically appropriate care, including information about accessing services and health insurance. In particular, discussions about sexual and reproductive care can be sensitive and raise issues of privacy and confidentiality. It is critical that individuals have access to adequate language services, in a private and confidential setting, allowing for information about and access to sexual and reproductive health care to be available in a culturally and linguistically competent manner.

The Proposed Rule Change is Contrary to Existing Legal Precedent Regarding the Meaning of Sex Discrimination in Civil Rights Laws

HHS has stated that its proposed rule change is necessary to "address legal concerns" following the issuance of a preliminary injunction in *Franciscan Alliance v. Azar*. That injunction, however, only prevents HHS from enforcing existing regulations with respect to gender identity and sex stereotyping discrimination; it does not prevent private individuals from bringing claims alleging Section 1557 violations, nor does it require HHS to make any regulatory changes, like the changes proposed here. It also has yet to be challenged on appeal.

Apart from the injunction issued in *Franciscan Alliance*, private litigation to enforce Section 1557 has continued, and federal courts have consistently concluded that the ACA protects against discrimination based on gender identity.[6] These decisions have relied on the language of Section 1557 itself, not merely the implementing regulations. As a result, and contrary to HHS's suggestion, existing precedent overwhelmingly supports an interpretation of the ACA that prohibits discrimination on the basis of pregnancy, sex stereotyping, and gender identity, and HHS's proposed rule change will not alter this existing precedent.

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[6] *See, e.g., Flack v. Wis. Dep't of Health Servs.*, Civ. No. 18-309, 2018 WL 3574875, at *12-13 (W.D. Wis. July 25, 2018); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (S.D. Cal. 2017); *Rumble v. Fairview Health Servs.*, Civ. No. 14-2037, 2017 WL 401940, at *3 (D. Minn. Jan. 30, 2017).

HHS's proposed rule change will not alter existing law that prohibits discrimination on the basis of gender identity and sex stereotyping under the ACA. Instead, it will simply cause widespread confusion and limit access to justice to those plaintiffs who have the financial resources to fight back.[7] This is ultimately a loss for patients, health care providers, and our legal system at large.

We urge HHS to immediately withdraw its proposed rule change, and instead dedicate its efforts to advancing policies that reflect our nation's core values and treat members of the LGBTQ community, as well as those whose health care needs have historically been ignored, neglected, and dismissed, with the dignity and respect they deserve.

Sincerely,

Erika Moritsugu
Vice President, Government Relations and Community Engagement
Anti-Defamation League

[7] The proposed rule change would have an even greater impact on people who live in the 28 states that lack legal protections from gender identity discrimination in public accommodations, such as health care facilities. Based on Williams Institute research, more than 780,000 transgender people—705,000 transgender adults and 78,000 transgender youth—live in those states. *See, e.g.*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, LGBT PEOPLE IN THE U.S. NOT PROTECTED BY STATE NONDISCRIMINATION STATUTES (Mar. 2019), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Equality-Act-April-2019.pdf; UCLA School of Law Williams Institute, *HHS Aims to Roll Back Non-Discrimination Protections for More than 1.5 Million Transgender People* (Apr. 28, 2019), https://williamsinstitute.law.ucla.edu/press/hhs-rules-conscience-and-1557/.

June 25, 2019

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
Washington. D.C. 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
Washington. D.C. 20515

Dear Chairman Scott and Ranking Member Foxx,

We write to provide the views of ADL (Anti-Defamation League) in advance of the House Education and Labor Committee hearing on "Do No Harm: The Misapplication of the Religious Freedom Restoration Act" and ask that this statement be included as part of the official hearings record.

ADL and Religious Freedom

For more than a century, ADL has been an ardent advocate for religious freedom for all Americans – whether in the majority or minority. We have been a leading national organization promoting interfaith cooperation and intergroup understanding. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. As an organization with deep roots in the Jewish community, we do not come to this position out of hostility towards religion. Rather, our position reflects a profound respect for religious freedom and a deep appreciation for America's extraordinary diversity of religious communities. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when all individuals are able to practice their faith or choose not to observe any faith; when government neutrally accommodates religion but does not favor any particular religion; and when religious belief is not used to harm or infringe on the rights of others through government action or others in the public marketplace.

The United States government should not sanction discrimination in the name of religion – and it should not fund it. The right to individual religious belief and practice is fundamental. But there should be no license to discriminate with government authority or funds. Religion should not be used as a sword to restrict someone else's rights or to thwart federal or state civil rights or anti-discrimination laws.

Background on and Misinterpretation of the 1993 Religious Freedom Restoration Act

The U.S. Supreme Court's unexpected and troubling decision in *Employment Division v. Smith* minimized constitutional religious liberty protections in the context of general and neutral laws that apply

across the board without exception.[1] Prior to 1990, when a general and neutral law or government rule substantially burdened religious exercise, the Court applied the stringent strict scrutiny standard under which government rarely prevails. Post-*Smith*, however, the Court applied the minimal rational basis standard under which government most frequently prevails. Thus, the *Smith* decision left individuals and religious institutions with very limited legal recourse to challenge general and neutral laws burdening religious exercise.

In response to this decision, ADL and a broad coalition of religious freedom advocates from across the political spectrum actively supported the 1993 Religious Freedom Restoration Act ("RFRA") that was designed to reinstate the Pre-*Smith* legal standard by requiring the government to demonstrate the strict scrutiny standard when a general and neutral federal, state, or local law or rule "substantially burdened" the religious exercise of individuals or faith-based institutions.[2] However, RFRA was never intended as a vehicle to discriminate or infringe on the rights of others. Furthermore, it was not meant to apply to for-profit entities or be raised as a legal defense in private lawsuits or disputes to which the government is not a party.

In the decade after RFRA's enactment, ADL became concerned by misinterpretations of the law, which impose religious beliefs on others. In 2007, the Department of Justice, Office of Legal Counsel issued a deeply disturbing opinion authorizing use of RFRA to override anti-discrimination protections in government contracts.[3]

The U.S. Supreme Court further misinterpreted RFRA in its 2014 decision in *Burwell v. Hobby Lobby*.[4] That decision is highly problematic for two reasons. First, the Court ruled that for-profit, closely-held corporations could invoke RFRA's powerful protections. Second, the Court held that RFRA could be used to infringe on the rights of others – e.g. permitting businesses to refuse provision of comprehensive employee health insurance, inclusive of prescription contraception coverage, as required by the Affordable Care Act. Furthermore, the decision left the door open to RFRA being used by for-profit business to discriminate except on the basis of race.

Misinterpretation of RFRA culminated with then-Attorney General Jeff Sessions issuing an October 6, 2017 memorandum to all federal agencies on "Federal Law Protections for Religious Liberty."[5] It misconstrues RFRA as vehicle permitting discrimination based on sincerely-held religious beliefs. The memo carves out unprecedented legal exemptions that would allow for-profit businesses to turn away customers based on religion and discriminate against employees in hiring or provision of benefits, including by federal contractors.

As outlined below, this memo has been used as the basis for executive and agency action that sanctions discrimination and other forms of harm. Indeed, the Trump administration has established a track record of subordinating civil rights laws in the name of excessively broad and unsound notions of "religious liberty." Such discrimination is in direct conflict with longstanding U.S. Supreme Court precedent. Over

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[1] 494 U.S. 872 (1990).

[2] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court invalidated RFRA with respect to its application to the states.

[3] "Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, June 29, 2007, https://www.justice.gov/file/451561/download (web-page last visited June 21, 2019).

[4] 134 S. Ct. 2751 (U.S. 2014).

[5] "Federal Law Protections for Religious Liberty," Office of the Attorney General, October 6, 2017, https://www.justice.gov/opa/press-release/file/1001891/download (web-page last visited June 19, 2019).

30 years ago the Court ruled that religious exemptions which detrimentally affect nonbeneficiaries would violate the First Amendment's Establishment Clause.[6] Even in *Burwell v. Hobby Lobby Stores*, every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for religious accommodations under RFRA.[7]

HHS Waiver to South Carolina Foster Care Agencies That Permits Discrimination against Jews, LGBTQ People and Others

Earlier this year, the U.S. Department of Health and Human Services (HHS) invoked RFRA to grant a waiver to South Carolina from federal regulations prohibiting religious discrimination by federally funded, faith-based foster care agencies.[8] The State filed the waiver application because Miracle Hill Ministries, a South Carolina, taxpayer-funded foster care agency, sought to to discriminate against prospective foster parents on the basis of its religious beliefs.

Miracle Hill has a record of discrimination. Indeed, last year it rejected a woman, who had been a foster parent in Florida, as a volunteer mentor for foster children under its care simply because she is Jewish.[9] More recently, another Jewish woman[10] and a Catholic[11] woman alleged that Miracle Hill rejected them as foster parents because of their faith.

The discrimination allowed by the waiver is not limited to Jews and Catholics. Indeed, according Miracle Hill's foster parent policy:

> *A foster parent for Miracle Hill must: 1) be a born-again believer in the Lord Jesus Christ as expressed by a personal testimony and Christian conduct; 2) be in agreement without reservation with the doctrinal statement of Miracle Hill Ministries; 3) be an active participant in, and in good standing with, a Protestant church; 4) have a genuine concern for the spiritual welfare of children entrusted to their care; 5) have a lifestyle that is free of sexual sin (to include pornographic materials, homosexuality, and extramarital relationships) …* (emphasis added).[12] [13]

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[6] *See Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985); *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

[7] *See* 134 S. Ct. at 2760.

[8] "Re: Request for Deviation or Exception from HHS Regulations 45 CFR 75.300(c)," U.S. Department of Health and Human Services, Administration for Children & Families, Jan. 23, 2019, https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf (web-page last visited June 19, 2019).

[9] "Scrutiny of Miracle Hill's faith-based approach reaches new level," Angelia Davis, Greenvilleonline.com, March 1, 2018, https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/ (web-page last visited June 19, 2019).

[10] "I was barred from becoming a foster parent because I am Jewish," Lydia Currie, JTA, Feb. 5, 2019, https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish (web-page last visited June 19, 2019).

[11] "AP Exclusive: Lawsuit claims discrimination by foster agency," Meg Kinnard, AP, Feb. 15, 2019, https://apnews.com/ed3ae578ebdb4218a2ed042a90b091c1 (web-page last visited June 19, 2019).

[12] "Miracle Hill Foster Home," https://miraclehill.org/wp-content/uploads/2016/11/Foster-Care-MHM-req.pdf (web-page last visited Feb. Jan. 30, 2019).

[13] *See Maddonna v. U.S. Department of Health and Human Services, et al.*, Complaint, U.S. District Court, District of South Carolina, https://www.au.org/sites/default/files/2019-02/Maddonna%20v.%20HHS%20Complaint%202.15.19.pdf (web-page last visited June 19, 2019).

Thus, under the purview of RFRA, Miracle Hill is permitted to broadly discriminate against otherwise qualified, prospective foster parents because a person follows a non-Christian faith; is LGBTQ, is Mormon; is mainline Protestant, including Episcopalian, Lutheran or Presbyterian; in an interreligious marriage; or a Born-again Christian, but inactive in a Protestant church, not in good standing with such a church, not in full agreement with Miracle Hill's doctrinal statement, or in an extramarital relationship. Furthermore, under the waiver any South Carolina faith-based, foster care agency could similarly engage in such discrimination.

Ultimately, it is vulnerable children who are most harmed by this waiver. According to a May 2018 news report, "[i]n South Carolina, officials with DSS said there are over 4,600 kids in foster care, and the state needs an additional 1,500 foster homes for them.[14] No child should be denied a loving foster home simply because a prospective parent is Jewish, another faith, LGBTQ or otherwise deemed religiously unfit.

DOL Directive Sanctions Discrimination by Taxpayer-Funded Federal Contractors

Federal laws and regulations prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Yet, invoking RFRA, the U.S. Department of Labor, Office of Federal Contract Compliance Programs issued a directive, effective as of August 10, 2019, that at a minimum sanctions discrimination by federally-funded contractors or subcontractors that are for-profit, closely held corporations or separately incorporated, religiously affiliated organizations.[15]

Specifically, the directive allows such contractors and subcontractors to deny employment on the basis of their religious beliefs. As a result, a person could be denied a livelihood simply because they are LGBTQ, Jewish, or another religious minority, a single parent or divorced, or even infrequently attend religious services. Thus, federal contractors or subcontractors could literally post a help wanted sign for a taxpayer-funded job stating, for example, "Gays, Jews and Muslims Need Not Apply" for a taxpayer-funded job.

IRS, EBSA and HHS Harm Women's Health by Issuing Excessively Broad Religious and Moral Exemption Rules to the ACA Contraception Mandate

In November 2018, the Internal Revenue Service, Employee Benefits Security Administration and Health and Human Services Department ("Departments") invoked RFRA to issue expansive religious and moral exemptions to the Patient Protection and Affordable Care Act's contraception mandate ("ACA Mandate").[16] [17] The new rules effectively eviscerate the ACA's Mandate by grossly expanding the

[14] *South Carolina in critical need of foster parents*, Kolbie Satterfield, WCSC, May 2, 2018, http://www.live5news.com/story/38089846/south-carolina-in-critical-need-of-foster-parents/ (web-page last visited June 19, 2019).

[15] Directive (DIR) 2018-03, U.S. Department of Labor, Office of Federal Contract Compliance Programs, https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html#ftn.id2 (web-page last visited June 19, 2019).

[16] *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department, November 15, 2018, https://www.federalregister.gov/documents/2018/11/15/2018-24512/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the (web-page last visited June 19, 2019).

[17] *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services

existing religious exemption – well beyond reason or need – and creating an exceedingly broad moral exemption. The rules are a paradigmatic example of an exception swallowing a rule. Under it, even a publicly-held Fortune 500 corporation could opt out of the mandate on religious grounds. Ultimately, these rules will harm women, particularly impoverished women and women of color.

The previous rules fully exempted houses of worship from the ACA Mandate and accommodated nonprofit, religiously-affiliated employers with a sensible opt-out provision that required their insurance carriers or third-party providers to cover all costs for contraception coverage and to administer the coverage. The U.S. Supreme Court's decision in *Hobby Lobby* made this accommodation available to closely held, for-profit corporations that have religious objections to the ACA Mandate.

The new rules expand eligibility for both the accommodation and the exemption to all nonprofit and closely held for-profit employers with religious or moral objections to coverage. Under the religious rule, all publicly traded for-profit companies with objections based on religious beliefs can also qualify for an exemption. It also provides limited religious exemptions for individuals and insurance companies. As a result, there is no guaranteed right of contraceptive coverage for the employees, dependents, and students of these organizations. By claiming to relieve the alleged burden on employers' religious or moral beliefs imposed by the original ACA Mandate, these rules completely defer to employers' religious or moral rights without any concern for the burden placed on innocent third parties and women's access to health care.

According to a study conducted before the ACA Mandate went into effect, African-American women were 60 percent less likely, and Latina women 40 percent less likely, to receive oral contraception as compared to white women.[18] African-American women were also 50 percent less likely to receive IUD contraception, and 30 percent less likely to receive the contraceptive ring, compared with white women of the same age.[19] The lack of insurance coverage for contraception significantly contributes to disparities among racial and ethnic groups regarding unintended pregnancies.[20]

Health care disparities decreased after the ACA Mandate became effective. Undoubtedly, the new rules harm women's health, particularly women of color, by limiting access to contraceptive care without cost sharing. Even the Departments estimated that 120,000 women will lose access to contraception through the combined rules. And they concede that they do not know and therefore did not include in their estimate, the number of women who will lose access to contraceptive coverage because: (1) an employer or insurer that did not cover contraceptive coverage on the basis of religious beliefs before the ACA Mandate now would be exempt from providing coverage under the new regulation; or (2) employers that qualify for an exemption under the religious exemptions will no longer make use of the accommodations provided under the previous rule.

Department, November 15, 2018, https://www.federalregister.gov/documents/2018/11/15/2018-24514/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable (web-page last visited June 19, 2019).

[18] Race, Ethnicity and Differences in Contraception Among Low-Income Women: Methods Received by Family PACT Clients, California, 2001–2007.

[19] *Id.*

[20] CHRISTINE DEHLENDORF ET AL, *Disparities in Family Planning*, Am J Obstet Gynecol. 2010 Mar; 202(3): 214–220. doi: 10.1016/j.ajog.2009.08.022; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835625/ (web-pages last visited June 19, 2019).

By limiting women's access to contraceptive coverage, the Departments have hindered women's ability to plan their family, including making choices regarding what type of contraception, if any. These decisions are critical to gender equality in all aspects of society and reducing socio-economic disparities.[21]

Congressional Action is Imperative

ADL firmly believes that the "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. In a pluralistic society, religious accommodation cannot be used to trample the rights of others. Yet, that is exactly what the Administration has done and likely will try to continue to do in its misapplication of RFRA.

Congress must therefore act by moving forward H.R. 1450, the "Do No Harm Act." This legislation would make several critical amendments to RFRA that would invalidate and preempt the types of harm outlined above.

First, the Act bars RFRA from being used to evade any law or implementation of a law that:

- Prohibits discrimination, including the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family Medical Leave Act, Executive Order 11246, the Violence Against Women Act, and Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity (77 FR 5662);
- Provides "… wages, other compensation, or benefits including leave, or standards protecting collective activity in the workplace …;"
- Protects against child labor, abuse, or exploitation; or
- Requires "… access to, information about, referrals for, provision of, or coverage for, any health care item or service …"

Second, the legislation would prohibit RFRA from being used to avoid "… any term requiring goods, services, functions, or activities to be performed or provided to beneficiaries of a government contract, grant, cooperative agreement, or other award …" or applied in a way that would deny "… a person the full and equal enjoyment of a good, service, benefit, facility, privilege, advantage, or accommodation, provided by the government."

Third, the Act would restrict RFRA from being raised as a defense or otherwise in any lawsuit or judicial proceeding except where the government is a party and the relief sought is against that government.

The Do No Harm Act would therefore ensure that application of RFRA reverts to that law's original intent, thereby making it a shield for faith and not a sword to thwart anti-discrimination laws, women's equality, or to discriminate against or harm others.

Conclusion

Safeguarding religious freedom requires constant vigilance, and it is especially important to guard against one group or sect seeking to impose its religious doctrine or views on others. As George Washington wrote in his famous letter to the Touro Synagogue in 1790, in this country "all possess alike liberty of conscience." He concluded: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights. For happily the

[21] United Nations Population Fund, Family Planning Overview, http://www.unfpa.org/family-planning (web-page last visited June 19, 2019).

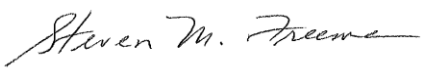
Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support."

We appreciate the opportunity to provide our views on this issue of high priority to our organization. Please do not hesitate to contact us if we can provide additional information or if we can be of assistance to you in any way.

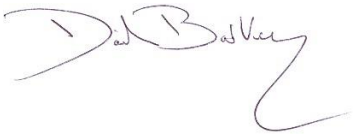
Sincerely,

Eileen B. Hershenov
Senior Vice President, Policy

Erika L. Moritsugu
Vice President, Government Relations, Advocacy, and Community Engagement



Steven M. Freeman
Vice President, Civil Rights



David L. Barkey
Senior & Southeastern Area Counsel,
National Religious Freedom Counsel

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ADL
Anti-Defamation League®

BY E-MAIL

March 26, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, D.C. 20201

Re: Docket HHS-OCR-2018-0002

On behalf of the Anti-Defamation League, we are writing to offer our comments on the proposed 45 CFR Part 88, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," as outlined at 83FR 3880 ("Proposed Rule" or "Part 88").

For more than a century, the Anti-Defamation League (ADL) has been an active advocate for religious freedom for all Americans – whether in the majority or minority. Among ADL's core beliefs is strict adherence to the separation of church and state effectuated through both the Establishment Clause and the Free Exercise Clause of the First Amendment. We believe a high wall of separation between government and religion is essential to the continued flourishing of religious practice and belief in America, and to the protection of all religions and their adherents.

ADL believes that true religious freedom is best achieved when all individuals are able to practice their faith or choose not to observe any faith; when government neutrally accommodates religion, but does not favor any particular religion; and when religious belief is not used to harm or infringe on the rights of others by government action or others in the public marketplace.

The "play in the joints" between the Establishment Clause and Free Exercise Clause allows and, in many instances, mandates government to accommodate the religious beliefs and observances of citizens. Religious accommodation, however, has its limitations. The United States government should not sanction discrimination or harm in the name of religion. The right to individual religious belief and practice is fundamental. But there should be no license to discriminate or to do harm with government authority.

As noted in the background for this Proposed Rule, healthcare providers – whether individuals or entities – already have robust statutory religious or moral exemptions from performing abortions or sterilization procedures, or complying with advanced directives, and in certain international programs, they have even broader exemptions ("Statutory Exemptions").[1] Provided that the health and safety of patients are safeguarded, such

[1] *See* The Church Amendments, 42 U.S.C. 300a-7; The Coats-Snowe Amendment, 42 U.S.C. 238n; Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. H, Tit. V, sec. 507(d) (the Weldon Amendment) and at Div. H, Tit. II, sec. 209; Patient Protection and Affordable Care Act related to assisted suicide 42 U.S.C. 18113; 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406; 22 U.S.C. 7631(d); Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. J, Tit. VII, sec. 7018 (Helms Amendment).

accommodations are appropriate for doctors, nurses, and others, who actually may be called on to perform these medical procedures or services.

The Proposed Rule, however, crosses the line from providing appropriate accommodations to allowing individuals or entities with incidental or tangential relationships to such procedures or services to detrimentally impose their religious or moral beliefs on patients and other third parties. It does so in two ways. First, Part 88 provides excessively broad and vague definitions of persons, entities, and activities covered by Statutory Exemptions. Second, it includes an excessively broad interpretation of Statutory Exemptions the enforcement of which is delegated to the Office of Civil Rights ("OCR").

As a result, Part 88 would impede access to federally-supported healthcare and in particular have a disparate impact on women, LGBTQ people and religious minorities. It thereby would undermine the mission of OCR, which is to "... enforce laws against discrimination based on race, color, national origin, disability, age, sex, and religion by certain health care and human services." Moreover, the Proposed Rule and the accompanying creation of a new OCR division to implement it convey the distinct message that enforcement of civil rights protections for such groups is secondary.

The Proposed Rule Provides Excessively Broad Definitions of Persons and Entities Covered by Statutory Exemptions

The "Descriptions of the Proposed Rule" ("Rule Descriptions") advise that the term "Entity" means a person or any legal entity whether private or public, and the definition of "Health Care Entity" is not definitive. Rather, it includes examples of covered persons or entities such as "...an individual physician or other health care professional, health care personnel, ... a hospital, a laboratory, an entity engaging in biomedical or behavioral research, ... a or health insurance plan ... , or any other kind of health care organization." However, these examples are "... an illustrative, not an exhaustive list." Additionally, while Part 88 contains a definition of "Health Program or Activity," which will be discussed, *infra*, it does not appear to contain a definition of "health care."

With respect to employees of or other persons associated with Entities or Health Care Entities, the Rule Descriptions provide the following definitions for the terms "Workforce" and "Individual." Workforce means:

> *employees, volunteers, trainees, contractors, and other persons whose conduct in the performance of work for an entity or health care entity is under the direct control of such entity or health care entity, whether or not they are paid by the entity or health care entity, as well as health care providers holding privileges with the entity or health care entity.*

The term "Individual" means "a member of the workforce of an entity or health care entity," including "... volunteers, trainees, or other members or agents of a covered entity, broadly defined, when the conduct of the person is under the control of such entity" (emphasis added).

The Statutory Exemptions are intended to cover persons, who actually may be called on to perform medical procedures. Yet, based on these definitions, virtually any person, including volunteers, who work, for example, at a federally-funded or supported hospital, pharmacy, medical or nursing school, nursing home, or "any other kind of health care organization" would be covered by Statutory Exemptions. Simply put, any person performing work for such a facility

– whether paid or unpaid – would be encompassed by the Proposed Rule irrespective of their non-medical job description or role. That unnecessarily-inclusive definition would compromise and harm the rights of third parties.

The Proposed Rule Provides Excessively Broad Definitions of Activities Covered by Statutory Exemptions

The Rule Descriptions advise that term "Healthcare Program or Activity … include the provision or administration of any health-related services, health service programs and research activities, health-related insurance coverage, health studies, or any other service related to health or wellness whether directly, through payments, grants, contracts, or other instruments, through insurance, or otherwise" (emphasis added). Part 88 does not define the meaning of "health-related services" or "service related to health or wellness."

These terms must be read in conjunction with two other definitions: "Assist in the Performance" and "Referral or Refer for." The Rule Descriptions advise that the Department of Health and Human Services ("HHS") intends Assist in the Performance to "… to provide broad protection for individuals, consistent with the plain meaning of the statutes …" because "[t]he Department believes that a more narrow definition of the statutory term 'assist in the performance,' such as a definition restricted to those activities that constitute direct involvement with a procedure, health service, or research activity, would fall short of implementing the protections Congress provided (emphasis added). To this end, the term applies "… to activities with an articulable connection to the procedure, health service, health service program, or research activity in question."

Furthermore, "Referral or Refer for" includes

> *… the provision of any information (including but not limited to name, address, phone number, email, or website) by any method (including but not limited to notices, books, disclaimers, or pamphlets online or in print) pertaining to a service, activity, or procedure, including related to availability, location, training, information resources, private or public funding or financing, or direction that could provide any assistance in a person obtaining, assisting, training in, funding, financing, or performing a particular health care service, activity, or procedure, when the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral.*

Based on these definitions a person who performs work for a federally-supported healthcare facility could refuse, without penalty, to perform their responsibilities for any service related to health or wellness that has an indirect or possible articulable connection to a statutorily-covered procedure, including providing any information about or how to obtain a procedure.

Application of the Proposed Rule's Definitions to 45 CFR Part 88's Interpretation of Statutory Exemptions Will Impede Access to Healthcare

The Proposed Rule's definitions operating in conjunction with its interpretation of substantive Statutory Exemptions could impede access to or deny federally-funded or supported healthcare. And the harm caused by enforcement of the Proposed Rule would disparately impact women, LGBT people, and religious minorities.

For example, with respect to federally supported healthcare within the United States, here are some examples of the harms that could result:

- An administrator at the only healthcare provider in a rural area could refuse to perform intake or process paperwork for a woman who must terminate her pregnancy due to an ectopic pregnancy or who is getting a tubal ligation. Similarly, the administrator could refuse to do the same for a transgender person, who is undergoing gender reassignment surgery because the surgery requires a hysterectomy. At the same provider, the only administrator or receptionist on shift could refuse to provide a referral to or any information about a health clinic that provides abortions.
- An administrator at a healthcare provider, even one that does not provide abortions or sterilization procedures, could refuse to disclose the provider's policy on these procedures based on the sincerely-held belief that the person seeking the information will either obtain the procedure at the contacted provider or at an alternative provider, which offers these procedures.
- A lab technician could refuse to perform any tests for a patient who will undergo an abortion, sterilization procedure, hysterectomy, or gender reassignment surgery.
- A hospital maintenance worker or contractor directed by the healthcare provider could refuse to perform any upkeep or construction work on an operating room or other facility that is used for abortions, sterilization procedures or hysterectomies.
- A hospital orderly could refuse to provide wheelchair service to a patient who is getting a hysterectomy or gender reassignment surgery.
- An administrator or employee of an insurance company that provides federally funded Medicare or Medicaid insurance policies could refuse to disclose to a prospective purchaser of insurance whether policies cover sterilization, gender reassignment surgery or services related to advance directives.
- At a federally supported medical school, an administrator could refuse to register students based on the sincerely-held belief that they will obtain medical training on abortion, sterilization, gender reassignment surgery, or advance directives, and will perform or assist with such procedures or services during or after their training. Or an employee of such a school's bookstore could refuse to sell medical books to students that provide information on abortion, sterilization or advance directives based on the sincerely-held belief that providing these books will train students to prospectively perform such procedures or services.

In the international arena, Part 88 could have an even wider detrimental impact. Pursuant to the Proposed Rule "[a]ny entity" that receives federal financial assistance for HIV/AIDS prevention, treatment or care under section 104A of the Foreign Assistance Act of 1961 shall not "endorse, utilize, make a referral to, become integrated with, or otherwise participate in <u>any program or activity</u> to which the applicant has a religious or moral objection, as a condition of assistance" (emphasis added).

Thus, with respect to programs funded under section 104A, a health care organization, doctor, nurse or administrator, for example, could not be penalized for refusing, based on religious or moral objection, to treat or offer services to LGBT people, Muslims or other religious minorities, or sex workers.

<u>The Proposed Rule Raises Significant Constitutional Issues</u>

The U.S. Supreme Court "'has long recognized that government may (and sometimes must) accommodate religious practices.'" *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334. (1987) (citations omitted). However, it cautioned that "[a]t some point, accommodation may devolve into "an unlawful fostering of religion.'" *Id* at 334-35.

Indeed, religious accommodations that unduly burden third parties violate the Establishment Clause. *See Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 710 (1985). More recently, the Court has found that for statutory exemptions under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq., to comport with the Establishment Clause, reviewing courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

Furthermore, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. *See Hobby Lobby*, 134 S. Ct. at 2760 ("Nor do we hold * * * that * * * corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public to pick up the tab.'" (brackets omitted)); *id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons * * * in protecting their own interests"); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances * * * must not significantly impinge on the interests of third parties."); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (Court's recognition of right to accommodation under RLUIPA was constitutionally permissible because "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

The Proposed Rule goes well beyond a religious accommodation that safeguards the health and safety of patients while exempting doctors, nurses, and medical professionals, who actually may be called on to perform abortions, sterilization, or other medical procedures, or to comply with advance directives. Rather, as detailed above, Part 88 broadly allows a wide swath of non-medical personnel far removed from these procedures or services to detrimentally impose their particular religious beliefs about them on innocent third parties. The Proposed Rule therefore raises serious constitutional issues because the broad exemptions provide a license to discriminate and would unduly burden – or, in some instances – deny patient access to federally-supported healthcare services.

We urge you to recall the Proposed Rule for modifications in light of these serious policy and constitutional arguments.

Sincerely,

Jonathan A. Greenblatt
CEO

David L. Barkey
Southeastern & National
Religious Freedom Counsel

Michael Lieberman
Washington Counsel

ADL
FIGHTING HATE FOR GOOD™

October 23, 2018

Mr. Roger Severino
Director of the Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington D.C. 20201

Dear Mr. Severino,

We write in reference to deeply disturbing press reports that South Carolina has requested a waiver from Department of Health and Human Services ("HHS") to allow federally funded, faith-based foster agencies within the State to deny applications of prospective Jewish and other foster parents on the basis of religion. ADL urges HHS to reject any such request as it is both immoral and unconstitutional.

It is our understanding that the requested waiver is based on a concern that a government-funded faith-based foster care agency, Miracle Hill Ministries, will lose its federal funding because of the agency's religious requirements for foster parents,[1] which prohibit foster placement with non-Christian families. Indeed, news reports reflect that Miracle Hill rejected a local Jewish woman as a voluntary mentor for children in its care simply because of her faith.

According to a May 2018 news report, "[i]n South Carolina, officials with DSS said there are over 4,600 kids in foster care, and the state needs an additional 1,500 foster homes for them.[2] Furthermore, the Department of Social Services ("DSS") web-site states that there are "… more than 500 children looking for forever homes in SC,"[3] and a search of the DSS web-page today reflects that 229 children are eligible for adoption.[4]

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[1] *See* "South Carolina is Lobbying to Allow Discrimination Against Jewish Parents," The Intercept, October 19, 2018 https://theintercept.com/2018/10/19/south-carolina-foster-parent-discrimination-miracle-hill-ministries/ (web-page last visited October 23, 2018).
[2] *See* "South Carolina in critical need of foster parents," WCSC, May 2, 2018, http://www.live5news.com/story/38089846/south-carolina-in-critical-need-of-foster-parents/ (web-page last visited October 23, 2018).
[3] *See* https://dss.sc.gov/adoption/ (web-page last visited October 23, 2018).
[4] *See* https://portal.dss.sc.gov/adoptioninquiry/Search.aspx (web-page last visited October 23, 2018).

When it comes to children in need, we can think of a no more compelling interest than placing them in loving and stable homes free of abuse, deprivations and predation. No child should be denied a loving foster or adoptive home simply because a prospective parent is Jewish, another faith, a different race or LGBTQ. Granting the requested waiver is immoral because it would only serve to harm the most vulnerable in our society.

Furthermore, neither HHS nor federal taxpayers should be supporting discrimination. The prospective, publicly-funded discrimination sought by the waiver is not only grossly unfair, but it raises serious legal issues. For example, a child placement agency refusing, based on its religious beliefs, to place a child with an otherwise qualified Jewish, Muslim, African-American, or Hispanic family could violate 42 U.S.C. 1981.

It appears that the waiver request is based on the Religious Freedom Restoration Act ("RFRA"). However, that law should not be interpreted to sanction discrimination. Indeed, the U.S. Supreme Court in its *Burrell v. Hobby Lobby* decision rejected the possibility of using RFRA as a vehicle to discriminate, stating:

> *The principal dissent raises the possibility that discrimination … for example on the basis of race, might be cloaked as religious practice to escape legal sanction. … Our decision today provides no such shield. The Government has a compelling interest in providing … equal opportunity … without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal. See* 134 S. Ct. 2751, 2783 (U.S. 2014).

Furthermore, the taxpayer-funded discrimination sought by the waiver could violate the Establishment Clause of the First Amendment under the third-party harm doctrine, as well as by unconstitutionally advancing or endorsing the religious missions of faith-based foster care agencies.

Our nation's religious liberty protections such as RFRA are intended as a shield for exercise of religion, and not a sword to harm or discriminate against others. In light of the detrimental impact granting the requested waiver would have on the neediest children and the serious legal issues raised by the waiver request, we urge its rejection in the strongest terms.

Sincerely,

Jonathan Greenblatt
CEO and National Director

cc: The Honorable Alex M. Azar II Secretary,
U.S. Department of Health and Human Services

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff, vs. ALEX M. AZAR, II, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES; and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Civil Action No. 1:19-cv-01672-GLR

BRIEF OF THE ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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Amici curiae submit this brief in support of Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, seeking an order declaring as unlawful and vacating or in the alternative preliminarily enjoining the Department of Health and Human Services' ("HHS" or the "Department") final rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (the "Rule").

INTEREST OF *AMICI CURIAE*

Amici are a coalition of civil rights and religious organizations who are committed to building a society in which mutual respect for different religious practices and beliefs is the norm in everyday life, including ADL (Anti-Defamation League). Individual descriptions of *amici* and their interests is included in the ADL's Motion for Leave to File this Brief on behalf of *Amici Curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions, but share a commitment to religious freedom in America through separation of church and state effectuated by both the Establishment and Free Exercise Clauses of the First Amendment. By providing unfettered protections favoring certain religious beliefs, the Rule unlawfully fosters religion in violation of the Establishment Clause.

A clear lens to demonstrate the detrimental impact of the Rule on religious liberty is its harmful impact on abortion health care services. There is no dispute that there are doctors and nurses who have strongly held religious objections to providing such services and that those beliefs are entitled to reasonable accommodation. But there are others in the health care profession who have equally strong religious beliefs that compel them to abide by a woman's choices about reproductive health, including the decision to have an abortion.

As applied to reproductive health care, the Rule improperly favors those who oppose abortion by broadly granting them a near absolute right to refuse to perform any and all services which have an "articulable connection" to the procedure. These services could range from actual medical procedures to talking to patients, filling out paperwork, and cleaning or preparing facilities necessary to perform safe abortions. Not only are the rights to refuse broad, the Rule further prohibits health care providers from limiting the scope of an accommodation to reasonably consider the availability of alternate staff, the willingness of a doctor to perform the procedure, or even the safety and life of the patient in emergency situations.

Under this Rule, HHS has created a virtual "veto power" over abortion services that can be exercised by religious objectors to abortion in derogation of the beliefs and the needs of the patient, physician, or provider. The overly broad religious exemption created by the Rule thus violates the Establishment Clause because it harms third parties, as well as constitutes a preference for one specific religious viewpoint above all others.

ARGUMENT

I. AMERICANS HOLD A WIDE VARIETY OF RELIGIOUS, MORAL, AND SPIRTUAL VIEWS REGARDING ABORTION.

Americans have long held a wide variety of religious beliefs concerning a woman's right to terminate her pregnancy.[1] In the majority opinion in *Roe v. Wade*, Justice Blackmun acknowledged the complexity of the subject, noting "the vigorous opposing views, even among physicians" that it inspires, and the "wide divergence of thinking on this most sensitive and difficult question." 410 U.S. 113, 116, 160 (1973). Close to fifty years after that decision, Americans continue to hold diverse viewpoints on abortion. According to a 2018 Pew Research

[1] *See, e.g.*, *Religious Perspectives on the Abortion Decision*, 35 N.Y.U. Rev. L. & Soc. Change 281 (2011).

Center survey, 58% of United States adults believe that it should be legal in all or most cases, whereas 37% say that it should be illegal in all or most cases.[2] These beliefs often correspond to a person's religious affiliation. When surveyed on the topic of abortion, 90% of self-identified Unitarian Universalists responded that abortion should be legal in all or most cases, though only 18% of Jehovah's Witnesses answered the same.[3]

Denominations' stated positions on abortion also vary greatly. The official positions of some religions strongly oppose abortion with few or no exceptions, such as the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints.[4] By contrast, the Presbyterian Church,[5] Reform[6] and Conservative Judaism[7], and the United Church of Christ[8] have taken the position that a woman has the right to choose whether to terminate her

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[2] *Public Opinion on Abortion*, Pew Research Center (Oct. 15, 2018), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/.

[3] David Masci, *American religious groups vary widely in their views of abortion*, Pew Research Center (Jan. 22, 2018), https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/.

[4] David Masci, *Where major religious groups stand on abortion*," Pew Research Center (June 21, 2016), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/.

[5] Presbyterian Church (U.S.A.) Office Of The General Assembly, *Report of the Special Committee on Problem Pregnancies and Abortion* 11 (1992) at 11, http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities").

[6] Central Conference Of American Rabbis, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, (1984) https://www.ccarnet.org/ccar-resolutions/abortion1984/ (stating that "the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy."); UNION FOR REFORM JUDAISM, *Reproductive Rights* (last visited Mar. 13, 2018) https://urj.org/what-we-believe/resolutions/reproductive-rights.

[7] The Rabbinical Assembly, *Resolution on Reproductive Freedom*, (June 15, 2011), https://www.rabbinicalassembly.org/resolution-reproductive-freedom ("the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.").

[8] United Church Of Christ, *General Synod Statements and Resolutions Regarding Freedom of Choice* (last visited Mar. 13, 2018),

pregnancy in most or all circumstances. Many leaders from religious organizations have been active proponents of abortion rights for decades. The Clergy Consultation Service on Abortion, for example, was founded in 1967 by twenty-one ministers and one rabbi. It offers women seeking abortions counseling and referrals to safe practitioners.[9]

Even within religious denominations officially opposed to the provision of abortion in most cases, there are numerous followers whose beliefs differ from official religious doctrine. According to recent polling, U.S. Catholics are considerably divided on the issue, with a narrow plurality supportive of legal abortion – 48% to 47%.[10] In 1973, Catholics for Choice was founded to serve as a voice for Catholics who believe that the core traditions and teachings of their faith support women's reproductive autonomy.[11] The same polling also shows that 30% of Southern Baptists and 27% of Mormons in the United States believe that abortion should be legal in all or most cases.[12] There can be little doubt that Americans hold a diverse range of sincere religious beliefs regarding abortion and its morality.

Consistent with this diversity of viewpoints, U.S. medical providers have a wide variety of positions as to whether they are willing to provide abortion care to their patients. A recent survey of American Obstetrician-Gynecologists ("OBGYNs") indicated that one in three doctors had personal, moral, or religious objections to performing abortion services.[13] By contrast, the faith-

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http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 ("for 20 years, Synods of the United Church of Christ have affirmed a woman's right to choose with respect to abortion.").

[9] David P. Cline, *Creating Choice: A Community Responds to the Need for Abortion and Birth Control, 1961-1973*, 6-7 (1st ed. 2006).

[10] Masci, *supra* n.3

[11] *See About Us,* Catholics for Choice, http://www.catholicsforchoice.org/about-us/.

[12] Masci, *supra* n.3.

[13] Melissa Healy, *OB-GYNs Remain Conflicted About Abortion, Survey Shows, But Pills May Be Changing Attitudes* Los Angeles Times (Feb. 8, 2019),

based views of other doctors lead them to believe in providing and to actually provide the procedure for patients. One Jewish doctor's study of the Torah, Talmud, and other religious texts led her to devote the latter part of her career to providing abortion care to patients,[14] while a Christian physician in the American South started performing the procedure as part of his belief that the Bible compels him to help people in need.[15] Doctors whose faiths lead them to make abortion care available have described their work as "a ministry," or a "mitzvah" (which is a commandment in Jewish teaching).[16]

II. THE HHS RULE GRANTS ABSOLUTE PROTECTION TO RELIGIOUS OBJECTORS TO ABORTION AND OTHER PROCEDURES, WHO REFUSE TO PERFORM THEIR WORK REQUIREMENTS.

The Rule purports to enforce provisions of the Church Amendments which accommodate health care workers who may have religious objections to performing abortions or other procedures such as sterilization. The Church Amendments prohibit providers receiving federal funding from requiring any "***individual*** to ***perform*** or ***assist in the performance*** of" any sterilization procedure, abortion, or other "health service program or research activity" when the individual's "performance or assistance in the performance" of the abortion, sterilization or other program or research activity "would be contrary to his religious beliefs or moral convictions." 42 U.S.C. §

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https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html.

[14] Hannah Natanson, *This retired doctor spends her time performing abortions and circumcisions. She says her Jewish faith leads her to do both*, Washington Post (Aug. 6, 2019), https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortions-circumcisions-she-says-her-jewish-faith-leads-her-do-both/.

[15] Nicholas Kristof, *Meet Dr. Willie Parker, a Southern Christian Abortion Provider*, New York Times (May 6, 2017), https://www.nytimes.com/2017/05/06/opinion/sunday/meet-dr-willie-parker-a-southern-christian-abortion-provider.html.

[16] Elizabeth Reiner Platt, *Many doctors are motivated by their moral and religious beliefs to provide abortions. Why doesn't HHS care about their consciences?* Medium (Mar. 27, 2018) https://medium.com/@PRPCP_Columbia/many-doctors-are-motivated-by-their-moral-and-religious-beliefs-to-provide-abortions-aede31418bed.

300a-7(b)(1),(2)(B),(d) (emphasis added); 45 C.F.R. § 88.3(a)(2)(iii), (vi). Those Amendments prohibit providers from "***discriminat[ing]***…against any physician or other health care personnel" when that individual refuses to "perform or assist in the performance" of any lawful sterilization procedure, abortion, or other lawful health service or research activity "on the grounds that his performance or assistance in the performance of such service would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(c)(1)-(2); 45 C.F.R. § 88.3(a)(2)(v).

The definitions imposed by the HHS Rule go far beyond the statute, expanding the statutory protections to create an absolute right for workers to refuse to do their jobs based on their religious beliefs. "**Discrimination**" prohibited by the Rule is far broader than in the statute. It is defined to include virtually any negative action to "withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny," any "position," "status, "benefit," or "privilege" in employment. 45 C.F.R. § 88.2(1),(2). Providers may offer accommodation to objecting employees, but the employee must "voluntarily" accept the accommodation. *Id.* There are no exceptions requiring objecting employees to do their job in emergencies, including when the life of the patient may be at stake. Nor is there any carve-out that allows a health care institution or provider to balance an employee's religious objection against the financial or logistical burdens of honoring the request, such as the schedules of other employees or lack of available staff.

The Rule also expands the scope of the statutory protections to apply to any person or activity even tangentially connected to health care. "**Individual**" may cover any member of an entity's "workforce," 84 Fed. Reg. at 23,199, which includes any "employee[], "volunteer," "trainee[]," or "contractor" subject to the control of that entity, or "holding privileges" with that entity. 45 C.F.R. § 88.2. "**Assist in the performance**" means ***any*** action that "has a specific reasonable, and articulable connection to furthering a procedure or a part of a health service

program," including "counseling, **referral[s]**, and training." *Id.* (Emphasis added.) "**Referral[s]**" is defined to include "the provision of information' in any form "where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving" a particular health service or procedure. *Id.* (2).

Read together, the Rule's provisions give any person whose duties have some "articulable connection" to abortion, sterilization, or other lawful health care procedure the ability to materially burden and inhibit a provider's capacity to provide those services. For example, a social worker may refuse to provide a pregnant woman with the name of an obstetrician who provides abortions; a receptionist may refuse to schedule the procedure; an administrator may refuse to process a patient's insurance claim for the procedure; and a janitor may refuse to clean an operating room he thinks will be used for the procedure.

The Rule imposes harsh and coercive penalties for providers that do not completely comply with these religious objections. Providers must submit an assurance and certification of full compliance with the Rule and are subject to losing all HHS funding if they fail to comply in any aspect. 45 C.F.R. §§ 88.4(a),(b), 88.7.

In the world created by the Rule, abortion providers are presented with an impossible choice when an employee whose job is necessary to the procedure invokes the Rule to refuse to do their job on the basis of a religious objection: either the provider can comply with the objection (which may mean not providing the abortion, including under emergency circumstances, if no other staff is reasonably available) or, in an emergency situation when no other staff is available, the provider can perform the procedure and risk losing the entirety of their HHS funding. Under this scheme, the ultimate consideration as to whether a facility provides health care turns on whether its employees raise religious objections.

III. THE ABSOLUTE IMMUNITY GRANTED BY THE RULE TO RELIGIOUS OBJECTIONS IS AN UNLAWFUL FOSTERING OF RELIGION THAT MUST BE INVALIDATED UNDER THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment prohibits the government from promoting or affiliating itself with any particular set of religious beliefs. *Cty. Of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 590 (1989) *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565 (2014). The Supreme Court has consistently given the Establishment Clause "broad meaning," and invalidated laws that aid one particular religion or specific religious belief. *Everson v. Bd. Of Educ. of Ewing Twp.*, 330 U.S. 1, 14-16 (1947). The Clause "'gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)). The state ***must*** "treat[] religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech or activity." *American Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

At the same time, the Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Consistent with the Free Exercise Clause, the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quotation marks and citation omitted). But the "principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 578 (1992). The Supreme Court has

warned that "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Cutter*, 544 U.S. at 714 (quotation marks and citation omitted).

As explained below, the Rule violates the Establishment Clause for two related reasons. First, it creates an absolute right of health care workers to refuse to perform their duties, which imposes substantial burdens on third parties including on doctors and institutions attempting to provide and patients attempting to receive lawful abortion care. Second, it establishes a clear preference for religious beliefs opposed to abortion and other health care procedures at the expense of other faith-based views with different perspectives on such procedures.

A. The HHS Rule Amounts To An Unlawful Fostering Of Religion In That It Sanctions Harm To Third Parties.

The Establishment Clause prohibits granting religious accommodations that would have a "detrimental effect on any third party." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014); *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722; *see also Holt v. Hobbs*, 574 U.S. 853, 867 (2015) (Ginsburg, J. concurring). This is precisely what the Rule does, however, because it grants workers, contractors, and even volunteers an absolute right to refuse to perform their duties based on a religious objection, irrespective of the detrimental effect their refusal might have on the autonomy, health and life of a patient or hospitals' ability to provide timely and effective abortion care.

Such a law was invalidated by the U.S. Supreme Court in *Caldor*. In that case, a Connecticut state statute granted employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." 472 U.S. at 709. Like the HHS Rule, the Connecticut law allowed Sabbath-observing workers from many different religious traditions to prevail over any other consideration, including the burden imposed on the employer forced to find alternative staff, and non-Sabbatarian employees who would be forced to work the days selected

by their religious colleagues. *Id.* at 709-10. The Court held that the statute had "a primary effect that impermissibly advance[d] a religious practice" because it created an "unyielding weight[] in favor of Sabbath observers over all other interests." *Id.* at 710.

By contrast, the Court has consistently upheld government action that balances an individual's exercise of their religious beliefs against any detrimental effect that accommodation of that belief might impose on third parties. In *Cutter*, for example, the Court held that provisions of the Religious Land Use and Institutionalized Persons Act allowing for prisoners to practice their religion were valid under the Establishment Clause because there was room for consideration of the "urgency of discipline, order, safety, and security in penal institutions.…" 544 U.S. at 723; *see also Holt*, 574 U.S. at 867 (Ginsburg, J., concurring) (noting that allowing a prisoner to grow a beard consistent with his Muslim faith was required under RLUIPA because it "would not detrimentally affect others who do not share" that belief). In *Hobby Lobby*, the Court recognized that exempting employers with religious objections from HHS regulations requiring them to provide health insurance covering prescription contraception "need not result in any detrimental effect on third parties," since there were alternative methods of providing the coverage to employees without cost sharing. 573 U.S. at 729 n.37.

In this case, the Rule vests employees opposed to abortion on religious grounds with an unqualified right to refuse to perform any aspect of their job duties having an articulable connection to the procedure but fails to give ***any*** consideration of the substantial burden imposed on health care institutions and doctors wishing to provide and patients wishing to receive lawful abortion care. The Rule allows no room for considering a religious worker's objection against other concerns, such as the availability of other staff or the urgency of the situation. The Rule also allows religious objections to certain types of health care like abortion to override other faith-based

and spiritual views, such as the views of a patient that a procedure is religiously appropriate, or the beliefs of the doctor or facility that an abortion should be performed consistent with their faith-based views regarding a mother's autonomy in making reproductive health care decisions, or because their faith prioritizes the responsibility to save the mother's life. The burden on third parties created by the Rule is especially significant given the wide swath of workers and contractors whose job duties may have an articulable connection to abortion care (and thus are entitled to protection under the Rule's expansive definitions), such that the Rule may effectively bar many hospitals from providing otherwise lawful abortion care in the first place.

The Rule utterly ignores these significant, detrimental effects on third parties in the name of protecting and accommodating religious workers' exercise of their beliefs, and allows those workers to determine whether and how abortion care is provided to patients. Because the Establishment Clause "'gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities,'" the Rule must be invalidated as an unlawful fostering of religion. *Caldor*, 472 U.S. at 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953).

HHS raises several arguments to downplay the significant burden the Rule imposes on patients, health care providers, and doctors, none of which are persuasive. HHS argues that *Caldor* is distinguishable because "any adverse effects . . . result from the conscience decisions of health care entities, not the government." (Defs.' Mot. for SJ at 57-58 (citing *Corp. of Presiding Bishop of Church v. Amos*, 483 U.S. 327, 338 (1987).) In *Amos* the Supreme Court held that exempting religious organizations from Title VII's prohibition against employment discrimination on the basis of religion did not violate the Establishment Clause. 483 U.S. at 338. The Court noted that the exemption from Title VII ***furthered*** the separation of church and state because it "allieviate[d]

significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. Though allowing a religious organization to fire an employee on the basis of religion impinged upon the employee's freedom of choice in religious matters, "it was the Church . . . and not the government, who put him to the choice of changing his religious practices or losing his job." *Id.* at 338 n.15. By contrast, the absolute right of refusal created by the Rule's expansive definitions undermines the separation of church and state by "giv[ing] the force of law to the employee's" religious refusal to perform their duties and requires "accommodation by the employer regardless of the burden which that constitute[s]" for health care providers, doctors, patients, or other employees. *See id.*

HHS also argues that the Rule creates no burden at all because providers may choose to either comply with the Rule or not receive federal funding from HHS. (Defs' Mot. for SJ at 58.) HHS cites no authority for this proposition and ignores that the Rule is unduly coercive: providers who do not come in full compliance with the Rule risk losing the entirety of their HHS funding as opposed to an insubstantial sum. *See* 45 C.F.R. § 88.7(i)(3). That consequence would be catastrophic for providers such as the Baltimore City Health Department, which receives nearly 50% of its budget from HHS. (*See* Baltimore Mot. for Prelim. Inj. at 33.) The Supreme Court has rejected such conditioning of federal funds because they are "much more than 'relatively mild encouragement, [but rather] a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 581-82 (2012) (condition that would impact 10% of States' budgets was unduly coercive and violated Spending Clause).

B. The Rule Is Not Neutral To Religious Views As Required By The Establishment Clause Because It Confers Special Protections To Particular Faith-Based Beliefs.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The

Clause "compels the state to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (citation omitted). A constitutional accommodation of religion must "confer[] no privileged status on any particular religious sect" and must be "administered neutrally among different faiths." *Cutter*, 544 U.S. at 720, 724. As an illustration, in *Larson*, the Court invalidated a Minnesota law that imposed certain reporting and registration requirements on religious organizations receiving fifty per cent of their funds from non-members, because it granted clear sectarian preferences to "well-established churches," at the expense of "churches which are new and lacking in constituency . . . which, as a matter of policy, may favor public solicitation …." 456 U.S. at 246 n.23 (quotation marks and citation omitted). And in *Kiryas Joel*, the Court held that New York school district lines violated the Establishment Clause because those lines created a special district for a highly religious community that excluded all but the members of that community. 512 U.S. at 704-05. Because the state's creation of the special school district effectively delegated civic authority to one specific religious group without extending a similar benefit to other religious and non-religious groups, it violated the Clause's "requirement of government neutrality." *Id.* at 705.

In this case, HHS has provided a special benefit of refusing to participate in and effectively blocking certain abortion-related and other health care activities without conferring a similar benefit to those who have a different religious perspective, including doctors who believe that in making abortions available to women, they are performing a "ministry" or a "mitzvah." To illustrate the disparate treatment of religious viewpoints regarding abortion, consider a Jewish hospital with a policy of making abortions available consistent with the Reform or Conservative Jewish viewpoint that a woman has the right to terminate her pregnancy, including when necessary

to save the woman's life. The Rule authorizes virtually any Catholic employee or contractor at that hospital with a religious opposition to abortion to refuse to do any part of their duties that has "a specific reasonable, and articulable connection" to the procedure. The Rule prohibits the hospital from disciplining these employees or moving them to a different position where they would have no duties involving abortions, unless the employees voluntarily agreed to that arrangement. By contrast, a Catholic hospital with a policy of not providing any abortions or abortion-related services, such as referrals, has no obligation to accommodate the religious views of Jewish employees whose religious beliefs conflict with that policy, such as an OBGYN whose faith requires her to perform the procedure in order to save the woman's life. The Rule requires ***no*** accommodation of the Jewish doctor's religious objection to the hospital's anti-abortion policy. The only protection to the doctor's religious beliefs is that the Catholic hospital cannot fire or otherwise take adverse action towards the Jewish OBGYN if she provided an abortion at a different facility.

There is no doubt that in either of these instances, honoring the Catholic or Jewish employees' religious objections to their employers' abortion policies impose a substantial burden on the facility that otherwise would provide or not provide the procedure. But the Rule grants the ability to commandeer whether and how their employer provides abortions ***only*** to workers with anti-abortion religious views without according similar protections to workers whose views require them to make the procedure available to women.

CONCLUSION

For these reasons, *amici* respectfully submit that this Court should grant Plaintiff's Opposition to Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment.

DATED: September 26, 2019.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; ROGER SEVERINO, Director, Office for Civil Rights, Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and DOES 1-25,

Defendants.

Case No. 3:19-cv-02405-WHA

BRIEF OF THE ANTI-DEFAMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Hearing Date: October 30, 2019
Time: 8:00 a.m.
Judge: Hon. William H. Alsup

STATE OF CALIFORNIA, by and through XAVIER BECERRA, Attorney General, Plaintiff, vs. ALEX M. AZAR, in his OFFICIAL CAPACITY as SECRETARY of the U.S. DEPARTMENT of HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; DOES 1-100, Defendants.	Case No. 3:19-cv-02769-WHA
COUNTY OF SANTA CLARA, TRUST WOMEN SEATTLE, LOS ANGELES LGBT CENTER, WHITMAN-WALKER CLINIC, INC., d/b/a WHITMAN-WALKER HEALTH, BRADBURY-SULLIVAN LGBT COMMUNITY CENTER, CENTER ON HALSTED, HARTFORD GYN CENTER, MAZZONI CENTER, MEDICAL STUDENTS FOR CHOICE, AGLP: THE ASSOCIATION OF LGBTQ+ PSYCHIATRISTS, AMERICAN ASSOCIATION OF PHYSICIANS FOR HUMAN RIGHTS d/b/a GLMA: HEALTH PROFESSIONALS ADVANCING LGBTQ EQUALITY, COLLEEN McNICHOLAS, ROBERT BOLAN, WARD CARPENTER, SARAH HENN, and RANDY PUMPHREY, Plaintiffs, vs. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES and ALEX M. AZAR, II. in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, Defendants.	Case No. 3:19-cv-02916-WHA

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Amici curiae submit this brief in support of Plaintiffs' cross-motion for summary judgment seeking an order setting aside or in the alternative preliminarily enjoining the Department of Health and Human Services' ("HHS" or the "Department") final rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) (the "Rule").

INTEREST OF *AMICI CURIAE*

Amici are a coalition of civil rights and religious organizations who are committed to building a society in which mutual respect for different religious practices and beliefs is the norm in everyday life: ADL (Anti-Defamation League); Tanenbaum Center for Interreligious Understanding; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Women of Reform Judaism; Men of Reform Judaism; Union for Reform Judaism; Interfaith Alliance; Jewish Women International; Keshet; T'ruah: The Rabbinic Call for Human Rights; National Council of Jewish Women; OCA - Asian Pacific American Advocates; Reconstructing Judaism; Reconstructionist Rabbinical Association; and The Sikh Coalition. Individual descriptions of *amici* and their interests is included in the ADL's Motion for Leave to File this Brief on behalf of *Amici Curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions, but share a commitment to religious freedom in America through separation of church and state effectuated by both the Establishment and Free Exercise Clauses of the First Amendment. That freedom, however, does not sanction overbroad and preferential religious exemptions such as the United States Department of Health and Human Services ("HHS") "Conscience" Rule at issue in this case. By providing unfettered protections favoring certain religious beliefs, the Rule unlawfully fosters religion in violation of the Establishment Clause.

A clear lens to demonstrate the detrimental impact of the Rule on religious liberty is its harmful impact on abortion health care services. There is no dispute that there are doctors and nurses who have strongly held religious objections to providing such services and that those beliefs are entitled to reasonable accommodation. But there are others in the health care profession who have equally strong religious beliefs that compel them to abide by a woman's choices about reproductive

health, including the decision to have an abortion.

As applied to reproductive health care, the Rule improperly favors those who oppose abortion by broadly granting them a near absolute right to refuse to perform any and all services which have an "articulable connection" to the procedure. These services could range from actual medical procedures to talking to patients, filling out paperwork, and cleaning or preparing facilities necessary to perform safe abortions. Not only are the rights to refuse broad, the Rule further prohibits health care providers from limiting the scope of an accommodation to reasonably consider the availability of alternate staff, the willingness of a doctor to perform the procedure, or even the safety and life of the patient in emergency situations.

Under this Rule, HHS has created a virtual "veto power" over abortion services that can be exercised by religious objectors to abortion in derogation of the beliefs and the needs of the patient, physician, or provider. The overly broad religious exemption created by the Rule thus violates the Establishment Clause because it harms third parties, as well as constitutes a preference for one specific religious viewpoint above all others.

ARGUMENT

I. AMERICANS HOLD A WIDE VARIETY OF RELIGIOUS, MORAL, AND SPIRITUAL VIEWS REGARDING ABORTION.

Americans have long held a wide variety of religious beliefs concerning a woman's right to terminate her pregnancy.[1] In the majority opinion in *Roe v. Wade*, Justice Blackmun acknowledged the complexity of the subject, noting "the vigorous opposing views, even among physicians" that it inspires, and the "wide divergence of thinking on this most sensitive and difficult question." 410 U.S. 113, 116, 160 (1973). Close to fifty years after that decision, Americans continue to hold diverse viewpoints on abortion. According to a 2018 Pew Research Center survey, 58% of United States adults believe that it should be legal in all or most cases, whereas 37% say that it should be illegal in

[1] *See, e.g.*, *Religious Perspectives on the Abortion Decision*, 35 N.Y.U. Rev. L. & Soc. Change 281 (2011).

all or most cases.[2] These beliefs often correspond to a person's religious affiliation. When surveyed on the topic of abortion, 90% of self-identified Unitarian Universalists responded that abortion should be legal in all or most cases, though only 18% of Jehovah's Witnesses answered the same.[3]

Denominations' stated positions on abortion also vary greatly. The official positions of some religions strongly oppose abortion with few or no exceptions, such as the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints.[4] By contrast, the Presbyterian Church,[5] Reform[6] and Conservative Judaism[7], and the United Church of Christ[8] have taken the position that a woman has the right to choose whether to terminate her pregnancy in most or all circumstances. Many leaders from religious organizations have been active proponents of abortion rights for decades. The Clergy Consultation Service on Abortion, for example, was founded

[2] *Public Opinion on Abortion*, Pew Research Center (Oct. 15, 2018), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/.

[3] David Masci, *American religious groups vary widely in their views of abortion*, Pew Research Center (Jan. 22, 2018), https://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/.

[4] David Masci, *Where major religious groups stand on abortion*," Pew Research Center (June 21, 2016), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/.

[5] Presbyterian Church (U.S.A.) Office Of The General Assembly, *Report of the Special Committee on Problem Pregnancies and Abortion* 11 (1992) at 11, http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities").

[6] Central Conference Of American Rabbis, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, (1984) https://www.ccarnet.org/ccar-resolutions/abortion1984/ (stating that "the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy."); UNION FOR REFORM JUDAISM, *Reproductive Rights* (last visited Mar. 13, 2018) https://urj.org/what-we-believe/resolutions/reproductive-rights.

[7] The Rabbinical Assembly, *Resolution on Reproductive Freedom*, (June 15, 2011), https://www.rabbinicalassembly.org/resolution-reproductive-freedom ("the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.").

[8] United Church Of Christ, *General Synod Statements and Resolutions Regarding Freedom of Choice* (last visited Mar. 13, 2018), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 ("for 20 years, Synods of the United Church of Christ have affirmed a woman's right to choose with respect to abortion.").

in 1967 by twenty-one ministers and one rabbi. It offers women seeking abortions counseling and referrals to safe practitioners.[9]

Even within religious denominations officially opposed to the provision of abortion in most cases, there are numerous followers whose beliefs differ from official religious doctrine. According to recent polling, U.S. Catholics are considerably divided on the issue, with a narrow plurality supportive of legal abortion – 48% to 47%.[10] In 1973, Catholics for Choice was founded to serve as a voice for Catholics who believe that the core traditions and teachings of their faith support women's reproductive autonomy.[11] The same polling also shows that 30% of Southern Baptists and 27% of Mormons in the United States believe that abortion should be legal in all or most cases.[12] There can be little doubt that Americans hold a diverse range of sincere religious beliefs regarding abortion and its morality.

Consistent with this diversity of viewpoints, U.S. medical providers have a wide variety of positions as to whether they are willing to provide abortion care to their patients. A recent survey of American Obstetrician-Gynecologists ("OBGYNs") indicated that one in three doctors had personal, moral, or religious objections to performing abortion services.[13] By contrast, the faith-based views of other doctors lead them to believe in providing and to actually provide the procedure for patients. One Jewish doctor's study of the Torah, Talmud, and other religious texts led her to devote the latter part of her career to providing abortion care to patients,[14] while a Christian physician in the American South started performing the procedure as part of his belief that the Bible compels him to help people

[9] David P. Cline, *Creating Choice: A Community Responds to the Need for Abortion and Birth Control, 1961-1973*, 6-7 (1st ed. 2006).

[10] Masci, *supra* n.3

[11] *See About Us,* Catholics for Choice, http://www.catholicsforchoice.org/about-us/.

[12] Masci, *supra* n.3.

[13] Melissa Healy, *OB-GYNs Remain Conflicted About Abortion, Survey Shows, But Pills May Be Changing Attitudes* Los Angeles Times (Feb. 8, 2019), https://www.latimes.com/science/sciencenow/la-sci-sn-doctors-medical-abortion-20190208-story.html.

[14] Hannah Natanson, *This retired doctor spends her time performing abortions and circumcisions. She says her Jewish faith leads her to do both*, Washington Post (Aug. 6, 2019), https://www.washingtonpost.com/religion/2019/08/06/this-retired-doctor-spends-her-time-performing-abortions-circumcisions-she-says-her-jewish-faith-leads-her-do-both/.

in need.[15] Doctors whose faiths lead them to make abortion care available have described their work as "a ministry," or a "mitzvah" (which is a commandment in Jewish teaching).[16]

II. THE HHS RULE GRANTS ABSOLUTE PROTECTION TO RELIGIOUS OBJECTORS TO ABORTION AND OTHER PROCEDURES, WHO REFUSE TO PERFORM THEIR WORK REQUIREMENTS.

The Rule purports to enforce provisions of the Church Amendments which accommodate health care workers who may have religious objections to performing abortions or other procedures such as sterilization. The Church Amendments prohibit providers receiving federal funding from requiring any "***individual*** to ***perform*** or ***assist in the performance*** of" any sterilization procedure, abortion, or other "health service program or research activity" when the individual's "performance or assistance in the performance" of the abortion, sterilization or other program or research activity "would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(b)(1),(2)(B),(d) (emphasis added); 45 C.F.R. § 88.3(a)(2)(iii), (vi). Those Amendments prohibit providers from "***discriminat[ing]***…against any physician or other health care personnel" when that individual refuses to "perform or assist in the performance" of any lawful sterilization procedure, abortion, or other lawful health service or research activity "on the grounds that his performance or assistance in the performance of such service would be contrary to his religious beliefs or moral convictions." 42 U.S.C. § 300a-7(c)(1)-(2); 45 C.F.R. § 88.3(a)(2)(v).

The definitions imposed by the HHS Rule go far beyond the statute, expanding the statutory protections to create an absolute right for workers to refuse to do their jobs based on their religious beliefs. "**Discrimination**" prohibited by the Rule is far broader than in the statute. It is defined to include virtually any negative action to "withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny," any "position," "status, "benefit," or "privilege" in employment. 45 C.F.R. § 88.2(1),(2). Providers may offer accommodation to objecting employees, but the employee must

[15] Nicholas Kristof, *Meet Dr. Willie Parker, a Southern Christian Abortion Provider*, New York Times (May 6, 2017), https://www.nytimes.com/2017/05/06/opinion/sunday/meet-dr-willie-parker-a-southern-christian-abortion-provider.html.

[16] Elizabeth Reiner Platt, *Many doctors are motivated by their moral and religious beliefs to provide abortions. Why doesn't HHS care about their consciences?* Medium (Mar. 27, 2018) https://medium.com/@PRPCP_Columbia/many-doctors-are-motivated-by-their-moral-and-religious-beliefs-to-provide-abortions-aede31418bed.

"voluntarily" accept the accommodation. *Id.* There are no exceptions requiring objecting employees to do their job in emergencies, including when the life of the patient may be at stake. Nor is there any carve-out that allows a health care institution or provider to balance an employee's religious objection against the financial or logistical burdens of honoring the request, such as the schedules of other employees or lack of available staff.

The Rule also expands the scope of the statutory protections to apply to any person or activity even tangentially connected to health care. "**Individual**" may cover any member of an entity's "workforce," 84 Fed. Reg. at 23,199, which includes any "employee[], "volunteer," "trainee[]," or "contractor" subject to the control of that entity, or "holding privileges" with that entity. 45 C.F.R. § 88.2. "**Assist in the performance**" means ***any*** action that "has a specific reasonable, and articulable connection to furthering a procedure or a part of a health service program," including "counseling, **referral[s]**, and training." *Id.* (Emphasis added.) "**Referral[s]**" is defined to include "the provision of information' in any form "where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving" a particular health service or procedure. *Id.* (2).

Read together, the Rule's provisions give any person whose duties have some "articulable connection" to abortion, sterilization, or other lawful health care procedure the ability to materially burden and inhibit a provider's capacity to provide those services. For example, a social worker may refuse to provide a pregnant woman with the name of an obstetrician who provides abortions; a receptionist may refuse to schedule the procedure; an administrator may refuse to process a patient's insurance claim for the procedure; and a janitor may refuse to clean an operating room he thinks will be used for the procedure.

The Rule imposes harsh and coercive penalties for providers that do not completely comply with these religious objections. Providers must submit an assurance and certification of full compliance with the Rule and are subject to losing all HHS funding if they fail to comply in any aspect. 45 C.F.R. §§ 88.4(a),(b), 88.7.

In the world created by the Rule, abortion providers are presented with an impossible choice when an employee whose job is necessary to the procedure invokes the Rule to refuse to do their job

on the basis of a religious objection: either the provider can comply with the objection (which may mean not providing the abortion, including under emergency circumstances, if no other staff is reasonably available) or, in an emergency situation when no other staff is available, the provider can perform the procedure and risk losing the entirety of their HHS funding. Under this scheme, the ultimate consideration as to whether a facility provides health care turns on whether its employees raise religious objections.

III. THE ABSOLUTE IMMUNITY GRANTED BY THE RULE TO RELIGIOUS OBJECTIONS IS AN UNLAWFUL FOSTERING OF RELIGION THAT MUST BE INVALIDATED UNDER THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment prohibits the government from promoting or affiliating itself with any particular set of religious beliefs. *Lions Club of Albany, California v. City of Albany*, 323 F. Supp. 3d 1104, 1113 (N.D. Cal. 2018) (citing *Cty. Of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573. 590 (1989) *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565 (2014)). In *Engel v. Vitale*, Justice Black detailed the history of the fundamental American value of the separation of church and state reflected in the Establishment Clause:

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.
>
> 370 U.S. 421, 429 (1962).

The Supreme Court has consistently given the Establishment Clause "broad meaning," and invalidated laws that aid one particular religion or specific religious belief. *Everson v. Bd. Of Educ. of Ewing Twp.*, 330 U.S. 1, 14-16 (1947). The Clause "'gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'" *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)). The state ***must*** "treat[] religious people, organizations, speech, or

activity equally to comparable secular people, organizations, speech or activity." *American Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring).

At the same time, the Free Exercise Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Consistent with the Free Exercise Clause, the Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quotation marks and citation omitted). But the "principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 578 (1992). The Supreme Court has warned that "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Cutter*, 544 U.S. at 714 (quotation marks and citation omitted).

As explained below, the Rule violates the Establishment Clause for two related reasons. First, it creates an absolute right of health care workers to refuse to perform their duties, which imposes substantial burdens on third parties including on doctors and institutions attempting to provide and patients attempting to receive lawful abortion care. Second, it establishes a clear preference for religious beliefs opposed to abortion and other health care procedures at the expense of other faith-based views with different perspectives on such procedures.

A. The HHS Rule Amounts To An Unlawful Fostering Of Religion In That It Sanctions Harm To Third Parties.

The Establishment Clause prohibits granting religious accommodations that would have a "detrimental effect on any third party." *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014); *Caldor*, 472 U.S. at 709; *Cutter*, 544 U.S. at 722; *see also Holt v. Hobbs*, 574 U.S. 853, 867 (2015) (Ginsburg, J. concurring). This is precisely what the Rule does, however, because it grants workers, contractors, and even volunteers an absolute right to refuse to perform their duties based on a religious objection, irrespective of the detrimental effect their refusal might have on the autonomy,

health and life of a patient or hospitals' ability to provide timely and effective abortion care.

Such a law was invalidated by the U.S. Supreme Court in *Caldor*. In that case, a Connecticut state statute granted employees "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." 472 U.S. at 709. Like the HHS Rule, the Connecticut law allowed Sabbath-observing workers from many different religious traditions to prevail over any other consideration, including the burden imposed on the employer forced to find alternative staff, and non-Sabbatarian employees who would be forced to work the days selected by their religious colleagues. *Id.* at 709-10. The Court held that the statute had "a primary effect that impermissibly advance[d] a religious practice" because it created an "unyielding weight[] in favor of Sabbath observers over all other interests." *Id.* at 710.

By contrast, the Court has consistently upheld government action that balances an individual's exercise of their religious beliefs against any detrimental effect that accommodation of that belief might impose on third parties. In *Cutter*, for example, the Court held that provisions of the Religious Land Use and Institutionalized Persons Act allowing for prisoners to practice their religion were valid under the Establishment Clause because there was room for consideration of the "urgency of discipline, order, safety, and security in penal institutions.…" 544 U.S. at 723; *see also Holt*, 574 U.S. at 867 (Ginsburg, J., concurring) (noting that allowing a prisoner to grow a beard consistent with his Muslim faith was required under RLUIPA because it "would not detrimentally affect others who do not share" that belief). In *Hobby Lobby*, the Court recognized that exempting employers with religious objections from HHS regulations requiring them to provide health insurance covering prescription contraception "need not result in any detrimental effect on third parties," since there were alternative methods of providing the coverage to employees without cost sharing. 573 U.S. at 729 n.37.

In this case, the Rule vests employees opposed to abortion on religious grounds with an unqualified right to refuse to perform any aspect of their job duties having an articulable connection to the procedure but fails to give ***any*** consideration of the substantial burden imposed on health care institutions and doctors wishing to provide and patients wishing to receive lawful abortion care. The

Rule allows no room for considering a religious worker's objection against other concerns, such as the availability of other staff or the urgency of the situation. The Rule also allows religious objections to certain types of health care like abortion to override other faith-based and spiritual views, such as the views of a patient that a procedure is religiously appropriate, or the beliefs of the doctor or facility that an abortion should be performed consistent with their faith-based views regarding a mother's autonomy in making reproductive health care decisions, or because their faith prioritizes the responsibility to save the mother's life. The burden on third parties created by the Rule is especially significant given the wide swath of workers and contractors whose job duties may have an articulable connection to abortion care (and thus are entitled to protection under the Rule's expansive definitions), such that the Rule may effectively bar many hospitals from providing otherwise lawful abortion care in the first place.

The Rule utterly ignores these significant, detrimental effects on third parties in the name of protecting and accommodating religious workers' exercise of their beliefs, and allows those workers to determine whether and how abortion care is provided to patients. Because the Establishment Clause "'gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities,'" the Rule must be invalidated as an unlawful fostering of religion. *Caldor*, 472 U.S. at 710 (quoting *Otten v. Baltimore Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953).

HHS and its *amici* raise several arguments to downplay the significant burden the Rule imposes on patients, health care providers, and doctors, none of which are persuasive. HHS argues that *Caldor* is distinguishable because "any adverse effects . . . result from the conscience decisions of health care entities, not the government." (Defs.' Mot. for SJ at 34-35 (citing *Corp of Presiding Bishop of Church v. Amos*, 483 U.S. 327, 338 (1987).) In *Amos* the Supreme Court held that exempting religious organizations from Title VII's prohibition against employment discrimination on the basis of religion did not violate the Establishment Clause. 483 U.S. at 338. The Court noted that the exemption from Title VII ***furthered*** the separation of church and state because it "allieviate[d] significant governmental interference with the ability of religious organizations to define and carry

out their religious missions." *Id.* at 335. Though allowing a religious organization to fire an employee on the basis of religion impinged upon the employee's freedom of choice in religious matters, "it was the Church . . . and not the government, who put him to the choice of changing his religious practices or losing his job." *Id.* at 338 n.15. By contrast, the absolute right of refusal created by the Rule's expansive definitions undermines the separation of church and state by "giv[ing] the force of law to the employee's" religious refusal to perform their duties and requires "accommodation by the employer regardless of the burden which that constitute[s]" for health care providers, doctors, patients, or other employees. *See id.*

HHS and the *amicus* brief of the American Center for Law & Justice ("ACLJ") also argue that the Rule creates no burden at all because providers may choose to either comply with the Rule or not receive federal funding from HHS. (Defs' Mot. for SJ at 35; ACLJ *Amicus* Br. at 9.) HHS cites no authority for this proposition, and the cases cited by the ACLJ are inapposite. In one, the Court actually ***invalidated*** a condition for receiving federal funds as unduly coercive and because it infringed upon grant recipients' First Amendment rights. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 208 (2013) (federal government could not require NGO recipients of HIV/AIDS funding to adopt a policy expressly opposing abortion). In *Maher v. Roe*, the Court held that Connecticut did not violate the Equal Protection Clause of the 14th Amendment by choosing to fund expenses incident to childbirth, but not certain, discrete abortion-related expenses. 432 U.S. 464, 472 (1977).

In this case, the Rule is unduly coercive because providers who do not come in full compliance with the Rule risk losing the entirety of their HHS funding as opposed to an insubstantial sum. *See* 45 C.F.R. § 88.7(i)(3). That consequence would be catastrophic for providers such as Zuckerberg San Francisco General Hospital, which receives nearly 40% of its budget from HHS. (*See* San Francisco Mot. for Prelim. Inj. at 23-24.) The Supreme Court has rejected such conditioning of federal funds because they are "much more than 'relatively mild encouragement, [but rather] a gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 581-82 (2012) (condition that would impact 10% of States' budgets was unduly coercive and violated Spending Clause).

Finally, the ACLJ argues in its *amicus* brief that any burden imposed under the Rule on patients' ability to receive and doctors' ability to provide lawful abortion care is irrelevant because the Rule protects objections based on both "[s]ecular moral convictions" and religious beliefs. (ACLJ *Amicus* Brief at 8 (citing *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 673 (1970) and *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988).) The cases cited by the ACLJ involve the propriety of extending federal funding or tax exemptions to religious organizations, which is an issue completely inapposite to whether the absolute right of refusal created by the Rule is permissible under the Establishment Clause. In *Walz*, the Supreme Court held that a New York property tax exemption extended to religious organizations did not violate the Establishment Clause because the exemption also applied to "a broad class of property" owned by various other non-profit groups. 397 U.S. at 672-73. And in *Bowen*, the Court held that granting federal funds to religious organizations for teenage sexuality services did not run afoul of the Clause because funds were also allocated to non-sectarian organizations and the funded activities were not specifically religious. 487 U.S. at 608-13.[17]

None of the cases cited by the ACLJ support the proposition that the fostering of religion created by the Rule's absolute right of refusal is somehow neutralized merely because individual secular, moral views are also included. Here, the Rule requires hospitals, patients, and doctors to "conform their conduct" to individual workers' religious objections. *See Caldor*, 472 U.S. at 710. It must be invalidated as an unlawful fostering of religion.

[17] The ACLJ brief also cites to a line of cases standing for the proposition that a regulation does not violate the Establishment Clause because "it happens to coincide or harmonize with the tenants of some or all religions." (ACLJ Amicus Brief at 10 (citing *Harris v. McCrae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Newdow v. Rio Linda Union Sch. Dist..*, 597 F.3d 1007, 1034 (9th Cir 2010).) But each of those cases involved government action involving a specific secular purpose that also happened to coincide with views of certain religions. *Harris*, 448 U.S. at 319 (restrictions on allocation of certain federal funds for abortion care did not violate Establishment Clause merely because restrictions coincided with Catholic teachings on abortion); *McGowan*, 366 U.S. at 442, 445 (law prohibiting retailers from operating on Sundays permissible to "provide a uniform day of rest for all citizens"); *Newdow*, 597 F.3d at 1034 (public school inclusion of "under God" in voluntary pledge of allegiance permissible under Establishment Clause because of secular purpose of reflecting history of the nation's founding). None of these cases stand for the proposition that doctors and health care institutions must conform how and whether they provide abortions and other procedures based on individual workers' religious or moral views without regard to the burdens placed on them.

B. The Rule Is Not Neutral To Religious Views As Required By The Establishment Clause Because It Confers Special Protections To Particular Faith-Based Beliefs.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Clause "compels the state to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (citation omitted). A constitutional accommodation of religion must "confer[] no privileged status on any particular religious sect" and must be "administered neutrally among different faiths." *Cutter*, 544 U.S. at 720, 724. As an illustration, in *Larson*, the Court invalidated a Minnesota law that imposed certain reporting and registration requirements on religious organizations receiving fifty per cent of their funds from non-members, because it granted clear sectarian preferences to "well-established churches," at the expense of "churches which are new and lacking in constituency . . . which, as a matter of policy, may favor public solicitation …." 456 U.S. at 246 n.23 (quotation marks and citation omitted). And in *Kiryas Joel*, the Court held that New York school district lines violated the Establishment Clause because those lines created a special district for a highly religious community that excluded all but the members of that community. 512 U.S. at 704-05. Because the state's creation of the special school district effectively delegated civic authority to one specific religious group without extending a similar benefit to other religious and non-religious groups, it violated the Clause's "requirement of government neutrality." *Id.* at 705.

In this case, HHS has provided a special benefit of refusing to participate in and effectively blocking certain abortion-related and other health care activities without conferring a similar benefit to those who have a different religious perspective, including doctors who believe that in making abortions available to women, they are performing a "ministry" or a "mitzvah." To illustrate the disparate treatment of religious viewpoints regarding abortion, consider a Jewish hospital with a policy of making abortions available consistent with the Reform or Conservative Jewish viewpoint that a woman has the right to terminate her pregnancy, including when necessary to save the woman's

life. The Rule authorizes virtually any Catholic employee or contractor at that hospital with a religious opposition to abortion to refuse to do any part of their duties that has "a specific reasonable, and articulable connection" to the procedure. The Rule prohibits the hospital from disciplining these employees or moving them to a different position where they would have no duties involving abortions, unless the employees voluntarily agreed to that arrangement. By contrast, a Catholic hospital with a policy of not providing any abortions or abortion-related services, such as referrals, has no obligation to accommodate the religious views of Jewish employees whose religious beliefs conflict with that policy, such as an OBGYN whose faith requires her to perform the procedure in order to save the woman's life. The Rule requires ***no*** accommodation of the Jewish doctor's religious objection to the hospital's anti-abortion policy. The only protection to the doctor's religious beliefs is that the Catholic hospital cannot fire or otherwise take adverse action towards the Jewish OBGYN if she provided an abortion at a different facility.

There is no doubt that in either of these instances, honoring the Catholic or Jewish employees' religious objections to their employers' abortion policies impose a substantial burden on the facility that otherwise would provide or not provide the procedure. But the Rule grants the ability to commandeer whether and how their employer provides abortions ***only*** to workers with anti-abortion religious views without according similar protections to workers whose views require them to make the procedure available to women.

CONCLUSION

For these reasons, *amici* respectfully submit that this Court should grant Plaintiffs' Cross-Motion for Summary Judgment.

DATED: September 12, 2019.

Respectfully submitted,

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ATTESTATION OF FILER

I, Gilbert R. Serota, am the ECF user whose identification and password are being used to file **BRIEF OF THE ANTI-DEFEMATION LEAGUE AND OTHER CIVIL RIGHTS & RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that all other signatories to this document concurred in its filing.

DATED: September 12, 2019

/s/ *Gilbert R. Serota*
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Case No. 18-15144; 18-15166; 18-15255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services, *et al.*,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF NORTHERN CALIFORNIA, ACLU OF SOUTHERN CALIFORNIA, ACLU OF SAN DIEGO AND IMPERIAL COUNTIES, THE ANTI-DEFAMATION LEAGUE, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND THE NATIONAL URBAN LEAGUE

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Civil Liberties Union, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, the Anti-Defamation League, the Leadership Conference on Civil and Human Rights, and the National Urban League are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

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STATEMENT OF INTEREST

Proposed *amici* are nonprofit civil rights organizations. A list with descriptions of proposed *amici* is attached as Appendix A.

STATEMENT PURSUANT TO FRAP 29

Pursuant to Rule 29(a)(2), all parties have consented to the filing of this *amicus* brief.

Pursuant to Rule 29(a)(4)(E), no counsel for any party has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund preparing or submitting this brief; no person−other than *Amici Curiae*, or its members, or its counsel−contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Amici submit this brief to highlight an important lesson of history: As our society has moved toward greater equality for racial minorities and women, it has increasingly and properly rejected the idea that religion can be used as a justification for discrimination in the marketplace.

At stake in this case are two interim final rules (IFRs) promulgated by the Trump administration that would broadly allow employers and universities to invoke religion or morality to block their employees' and students' access to contraceptive coverage that is otherwise guaranteed by the Patient Protection and Affordable Care Act (ACA). The ACA already includes an "accommodation" for religiously affiliated nonprofit organizations that have religious objections to covering contraception, which was extended to "closely-held" for-profit companies by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), as well as an exemption for the group health plan of a "religious employer." 45 C.F.R. § 147.131(a).

Amici agree with Appellees that the District Court properly enjoined the IFRs. Contrary to Appellants' argument, the public interest—which is weighed both in determining whether there was a good cause for the agencies to issue the IFRs without notice and comment and in balancing the equities for preliminary injunctive relief—strongly lies with Appellees, their residents, and all other people in the nation negatively affected and discriminated against as a result of these rules.

SUMMARY OF ARGUMENT

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 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, and a full range of statutes and regulations reinforce our collective commitment to religious acceptance, diversity, and pluralism. The Supreme Court in *Hobby Lobby* understood the accommodation to the contraceptive coverage requirement of the ACA (the contraceptive rule) as a reflection of that commitment. Critically, however, the accommodation also recognizes that access to contraceptive care is an important means of ending discrimination against women in the workplace, and that the elimination of such discrimination in the marketplace is a compelling state interest.

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

objections to anti-discrimination laws are often "based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." 135 S. Ct. 2594, 2602 (2016).

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

From the early years of the Republic, religious beliefs were used to justify racial subordination, including the forced enslavement of Africans. Far too often, those views found support in judicial decisions upholding racial segregation and anti-miscegenation laws. Even as the nation's standards evolved to prohibit racial discrimination in employment, education, marriage, and public accommodations, religious arguments continued to be used to fuel resistance to progress. In particular, Congress and the courts faced repeated calls for religious exemptions to non-discrimination standards. But, by the middle of the twentieth century, those calls were rejected by both the courts and Congress. Instead, the country came to recognize the vital state interest in ending racial discrimination in public arenas and in embracing a vision of equality that does not sanction piecemeal application of the law.

[1] This brief focuses on efforts to justify discrimination against racial minorities and women on religious grounds, but other disadvantaged and marginalized groups have shared similar experiences. *See* 16 n.8, *infra*.

The story of women's emerging equality follows a similar pattern. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access to birth control. Later, religion inspired legislation purportedly designed to "protect" women, including their reproductive capacities. As attitudes changed, laws were enacted prohibiting discrimination and protecting women's ability to control their reproductive capacity. These measures, like those designed to promote racial equality, were met with resistance, including religiously motivated requests to avoid compliance with evolving legal standards. And, as with race, Congress and the courts have held firm to the vision embodied in newly passed anti-discrimination measures.

The contraception rule addresses a remaining vestige of sex discrimination. As the Supreme Court has recognized, women's ability to control their reproductive capacities is essential to their participation in society. Contraception is not simply a pill or a device; it is a tool, like education, essential to women's equality. Without access to contraception, women's ability to complete an education, to hold a job, to advance in a career, to care for children, or to aspire to a higher place, whatever that may be, may be significantly compromised. By establishing meaningful access to contraception for many women, the contraception rule takes a giant and long overdue step to level the playing field.

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

ARGUMENT

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

A. Racial Discrimination

There was a time in our nation's history when religion was used to justify slavery, Jim Crow laws, and bans on interracial marriage. God and "Divine Providence" were invoked to validate segregation, and, for decades, these arguments trumped secular and religious calls for equality and humanity. Eventually, due to evolving societal attitudes and the steadfast efforts of civil rights advocates, systems of enslavement and segregation were dismantled, and those who clung to religious justifications for racial discrimination were nonetheless required to obey the nation's anti-discrimination laws. Although the history of religious justification for slavery, racial discrimination, and racial segregation are different in many ways from the instant request for a religious exemption, the lessons derived from that experience are instructive.

Early in our country's history, religious beliefs were invoked to justify the most fundamental of inequalities: slavery. Indeed, courts, politicians, and clergy often invoked faith to defend slavery. The Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, suggested that slavery was "the providence of God" to rescue an "unhappy race" from Africa and place them in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852). Jefferson Davis, President of the Confederate States of America, proclaimed that slavery was sanctioned by "the Bible, in both Testaments, from Genesis to Revelation." R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433,

437 (2011) (citation and quotations omitted). Christian pastors and leaders declared: "We regard abolitionism as an interference with the plans of Divine Providence." Convention of Ministers, *An Address to Christians Throughout the World* 8 (1863), https://archive.org/details/addresstochristi00phil (last visited Feb. 9, 2016).

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.

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 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 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).[2]

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

The resistance to the movement for racial equality, both religiously based and other, was particularly intense in the context of education. Members of the

[2] 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.").

Florida Supreme Court invoked religion to justify resistance to integration in the schools, noting that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20, 28 (Fla. 1955) (concurring opinion). Indeed, they went so far as to characterize *Brown* as advising "that God's plan was in error and must be reversed." *Id*.

In the years following the Supreme Court's enforcement of *Brown*, the number of private, often Christian, segregated schools expanded exponentially and white students left the public schools in droves. *See* Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436, 1437-40 (1973). *See also* U.S. Comm'n on Civil Rights, *Discriminatory Religious Schs. and Tax Exempt Status* 1, 4-5 (1982) (recounting the massive withdrawal of white students from public schools after *Brown* and a proliferation of private schools, many associated with churches). The schools were often open about their motives. 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.[3] Attempts by the

[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*

IRS to enforce the Treasury Department's rule were challenged in the courts. Most notably, Bob Jones University brought suit after the IRS revoked the University's tax exempt status based first on its policy of refusing to admit African-American students, and subsequently on its policy of refusing to admit students engaged in or advocating interracial relationships. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The sponsors of Bob Jones University "genuinely believe[d] that the Bible forbids interracial dating and marriage." *Id*. at 580. Bob Jones's lesser-known co-plaintiff, Goldsboro Christian Schools, operated a school from kindergarten through high school, which refused to admit African-American students. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id*. at 583 n.6. Both schools sued under the Free Exercise Clause, arguing that the rule could not constitutionally apply to schools engaged in racial discrimination based on sincerely held religious beliefs. The Supreme Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on religious beliefs. *Id.* at 602-04.

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

Subcomm. on Taxation & Debt Mgmt. Generally of the Comm. on Fin., 96th Cong. 18, 21 (1979) (statement by Sen. Laxalt).

(quoting trial court). But the Supreme Court expressly rejected the trial court's reasoning and declared Virginia's anti-miscegenation law unconstitutional. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, all of which were ultimately rejected. Most notably, the House exempted religious employers entirely from the proscriptions of the Act. *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964). However, the law, as enacted, permitted no employment discrimination based on race; it only authorized religious employers to discriminate on the basis of religion. *Id.* Later efforts to pass a blanket exemption for religious employers again failed. *Id.* at 1277.[4]

Religious resistance to the 1964 Civil Rights Act did not stop with its passage. The owner of a barbeque chain who was sued in 1964 for refusing to serve blacks responded by claiming that serving black people violated his religious beliefs. The court rejected the restaurant owner's defense, holding that the owner

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

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

Since the middle of the twentieth century, the argument that religious beliefs trump measures designed to eradicate racial discrimination—whether in toto or

[4] The Act, while barring race discrimination by religious organizations, 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 & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception).

piecemeal—has slowly lost its force. As courts shifted to a wholesale rejection of religious justifications for racial discrimination and societal attitudes evolved, religious arguments were no longer offered in mainstream society to defend racial segregation and subordination. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." R. Randall Kelso, Modern Moral Reasoning, *supra*, at 439. Reflecting this evolution, Bob Jones University has apologized for its prior discriminatory policies, stating that by previously subscribing to a

> segregationist ethos . . . we failed to accurately represent the Lord and to fulfill the commandment to love others as ourselves. For these failures we are profoundly sorry. Though no known antagonism toward minorities or expressions of racism on a personal level have ever been tolerated on our campus, we allowed institutional policies to remain in place that were racially hurtful.

See Statement about Race at BJU, Bob Jones Univ., http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Feb. 9, 2016). Although there are many differences in the discrimination described above and the contraception rule, this history highlights the hazards of recognizing a religious exemption to a federal anti-discrimination measure that promotes a compelling governmental interest in equality and opportunity.

B. Gender Discrimination

The path to achieving women's equality has followed a course similar to the struggle for racial equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (chronicling the long history of sex discrimination in the United States).[5]

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

Efforts to advance women's equality, like those furthering other civil rights, were supported—and thwarted—in the name of religion. Those who invoked God and faith as justification for slavery and segregation also invoked God and faith to limit women's roles. One champion of slavery in the antebellum South, George Fitzhugh, plainly stated that God gave white men dominion over "slaves, wives, and children." Armantine M. Smith, *The History of the Woman's Suffrage Movement in Louisiana*, 62 La. L. Rev. 509, 511 (2002).

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

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

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

This vision of women—as divinely destined for the role of wife and mother—was a prominent argument against suffrage. A leading antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.'" Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981 n.96 (2002) (quoting Rev. Justin D. Fulton, *Women vs. Ballot*, *in* The True Woman: A Series of Discourses: To Which Is Added Woman vs. Ballot 3, 5

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women traditionally could not own property or even be legal guardians of their children. 411 U.S. at 685.

(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). It was in this same time period that the first laws against contraception were enacted to address what was characterized as "physiological sin." Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 292 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888); *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 the Supreme Court recognized in *Frontiero*, "[a]s a result of notions such as [those articulated in Justice Bradley's concurrence in *Bradwell*], our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.[6] Those statutes were often upheld by the Supreme Court. For example, in *Muller v. Oregon*, the Court upheld workday limitations for women because "healthy mothers are essential to vigorous offspring, [and therefore] the physical well-being of woman becomes an object of

[6] 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, 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.

public interest and care in order to preserve the strength and vigor of the race." 208 U.S. 412, 421 (1908); *see also Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (holding women should be exempt from mandatory jury duty service because they are "still regarded as the center of home and family life").

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

Slowly the courts, too, began dismantling the notion that divine ordinance and the law of the Creator require women to be confined to roles as wives and mothers. For example, the Supreme Court held a state law that treated girls' and boys' age of majority differently for the purposes of calculating child support unconstitutional, rejecting the state's argument that girls do not need support for as long as boys because they will marry quickly and will not need a secondary education. *Stanton v. Stanton*, 421 U.S. 7 (1975). The Court reasoned:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women

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

> in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

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

Additionally, when striking a ban on the admission of women to the Virginia Military Institute, the Court noted:

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

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

The Supreme Court has also dismantled notions that women could be barred from certain jobs because of their reproductive capacity, *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and has affirmed legislation that addresses "the fault-line between work and family—precisely where sex-based overgeneralization has been and remains strongest," *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003). The courts and Congress have thus recognized that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second." *Id.* at 736 (internal citations and quotations omitted).

As with race, this progress has been tested by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted the notion that women and men must receive equal compensation by invoking the belief that the "Bible clearly teaches that the husband is the head of the house, head

of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). The courts rejected this claim, emphasizing a state interest of the "highest order" in remedying the outmoded belief that men should be paid more than women because of their role in society. *Id.* at 1398 (citations and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (same); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).

Even today, laws and policies designed to protect against gender discrimination continue to face challenges in the name of religious belief, but courts have limited such arguments. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage, holding that the school seemed "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (holding that a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, noting that "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (same).[8]

[8] Attempts to use religion to discriminate are not limited to race and sex. *See, e.g.*, The Leadership Conference Education Fund, *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty* (Jan. 2016), http://civilrightsdocs.info/pdf/reports/2016/religious-liberty-report-WEB.pdf. For example, religion has been invoked in an attempt to justify discrimination based on marital status, *see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), and discrimination based on sexual orientation, *see, e.g.*, *Peterson*

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

The contraception rule, like Title VII and other anti-discrimination measures, is a purposeful effort to address the vestiges of gender discrimination. And like those other anti-discrimination laws, this rule is being resisted in the name of religion. Appellants defend the IFRs—both in the way they were issued and their substance—on the ground that employers and universities should be entitled to evade the mandates of the law based on their religious beliefs. As discussed *supra*, the argument that religious belief justifies discrimination, the denial of rights, or the relinquishment of benefits is an old, discredited theory that should, once again, be rejected.

The contraception rule has, and will continue to, transform women's lives, by enabling women to decide if and when to become a parent and allowing women to make educational and employment choices that benefit themselves and their families.[9] As attested by Appellee's expert: "By enabling [women] to reliably time and space wanted pregnancies, women's ability to obtain and effectively use contraception promotes their continued education and professional advancement, contributing to the enhanced economic stability of women and their families." ER

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v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004); *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011). It is also a concern for people with disabilities, who have historically faced limitations from religiously affiliated group homes, including the refusal to allow them to live with romantic partners, even if married. *See Forziano v. Indep. Grp. Home Living Program*, No. 13-cv-0370, 2014 WL 1277912 (E.D.N.Y. Mar. 26, 2014).

[9] Moreover, the rule is also important to protect women's health. This is particularly true for women of color who disproportionately suffer from health conditions that can be aggravated by pregnancy. *See* Br. of *Amici Curiae* Nat'l Women's Law Ctr. in Supp. of Appellee.

162. In a recent study, 63% of women reported that access to contraception allowed them to take better care of themselves and their family, 56% reported it allowed them to support themselves financially, 51% reported that it allowed them to stay in school or complete their education, and 50% reported that it allowed them to get or keep a job or pursue a career. ER 163. As the Supreme Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

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

First, the IFRs target and single out care that women need for unique and discriminatory treatment, authorizing employers and universities to reinstate the very discrimination that Congress intended the contraception rule to address. As Senator Kirsten Gillibrand emphasized in her support of the Women's Health Amendment (WHA),[10] which authorized the contraceptive rule, "in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men . . . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act . . ." 155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009); *see also* 155 Cong. Rec. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("[O]ften those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles"). The IFRs sanction employers and universities to harm women by cutting their benefit

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

packages, and convey the distinct message that women are second class citizens, who can have inferior benefit packages to their male peers.

Second, the IFRs put a government stamp of approval on gender stereotypes that have been used to hold women in a place of inequality, particularly the notion, long endorsed by society, that "a woman is, and should remain the 'center of home and family life.'" *Hibbs*, 538 U.S. at 729 (quoting *Hoyt*, 368 U.S. at 62). The rules attack a fundamental premise underlying access to contraception, namely that society no longer demands that women either accept pregnancy or refrain from nonprocreative sex. As so eloquently stated in *Casey*, "these sacrifices [to become a mother] have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others . . . [but they] cannot alone be grounds for the State to insist she make the sacrifice." *Casey*, 505 U.S. at 852.

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

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

Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted); *see also supra* note 9. The IFRs will make it harder for women to access and consistently use the most effective methods of contraception. ER 145. Greater access to contraceptives means fewer unintended pregnancies. ER146-150. With greater control over their fertility, women have greater and more equal access to education, careers, career advancement, and higher wages. Susan A. Cohen, The Broad Benefits of Investing

in Sexual and Reproductive Health, 7 Guttmacher Rep. on Pub. Policy 5, 6 (2004); Martha J. Bailey et al., The Opt-in Revolution? Contraception and the Gender Gap in Wages, 19, 26 (Nat'l Bureau of Econ. Research Working Paper o. 17922, 2012), http://www.nber.org/papers/wl 7922; Claudia Goldin & Lawrence F. Katz, The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions, 110 J. of Pol. Econ. 730, 749 (2002), https://dash.harvard.edu/handle/1 /2624453.

Indeed, approximately half of pregnancies are unintended. Guttmacher Institute, *Unintended Pregnancy in the United States* (July 2015), *available at* http://www.guttmacher.org/ pubs/FB-Unintended-Pregnancy-US.html (last visited Jan 24, 2014). Several facts underlie this statistic: Many women are unable to afford contraception—even with insurance—because of high co-pays or deductibles, *see generally* Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2011); others cannot afford to use contraception consistently, *see* Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions* 5 (Sept. 2009), http://www.guttmacher.org/pubs/RecessionFP.pdf (last visited Jan 24, 2014); and costs drive women to less expensive and less effective methods, *see* ER 152-53 (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost).

The contraception rule lifted these barriers, with the promise of increased opportunity for women. A study in St. Louis, which essentially simulated the conditions of the rule, illustrates its impact: Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost*

Contraception, 120 Obstetrics & Gynecology 1291 (2012). In this setting, 75% of the participants opted for a long-acting reversible contraceptive method, with 58% choosing an IUD. *Compare id*. at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Oct. 2015), http://www.guttmacher.org/pubs/fb_contr_use.html (showing approximately 10% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted, and the abortion rate was less than half the regional and national rates. Colleen McNicholas et al., *The Contraceptive CHOICE Project Round Up*, 57 Clinical Obstetrics & Gynecology 635 (Dec. 2014).

For these reasons, contraception is more than a service, device, or type of healthcare. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that sodomy laws do not simply regulate sex but infringe on the liberty rights of gays and lesbians). An exemption countenancing a religious objection to contraception suggests that religious objections are more important than women's equality in our society. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial step forward.

CONCLUSION

The Court should affirm the judgment below.

Respectfully Submitted,

Dated: May 29, 2018

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STATEMENT OF RELATED CASES

This case, 18-15144, has been consolidated with cases 18-15255 and 18-15166. I certify that I know of no other related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,497 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

Dated: May 29, 2018

/s/ Elizabeth O. Gill
Elizabeth O. Gill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2018, the foregoing Amici Curiae Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

Dated: May 29, 2018

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APPENDIX A

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 2 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The American Civil Liberties Unions of Northern California, Southern California, and San Diego and Imperial Counties are the ACLU's California affiliates. 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 Anti-Defamation League ("ADL") was organized in 1913 with a mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. To this end, ADL is a staunch supporter of the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL vigorously supported the Religious Freedom Restoration Act (RFRA) as a means to protect individual religious exercise, but not as a vehicle to discriminate by enabling some Americans to impose their religious beliefs on others. ADL views reproductive choice as an issue of personal and religious freedom. Accordingly, it has opposed efforts to curtail access to abortion and contraception by participating as *amicus curiae* in every major reproductive rights case before the U.S. Supreme Court since *Roe v. Wade*, 410 U.S. 113 (1973).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is the nation's oldest, largest, and most diverse coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States. The Leadership Conference was founded in 1950 by

leaders of the civil rights and labor rights movements, grounded in the belief that civil rights would be won not by one group alone but through coalition. The Leadership Conference works to build an America that is inclusive and as good as its ideals by promoting laws and policies that promote the civil and human rights for all individuals in the United States.

The National Urban League is a historic civil rights organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League improves the lives of more than two million people annually through direct service programs, including education, employment training and placement, housing, and health, which are implemented locally by more than 90 National Urban League affiliates in 300 communities across 36 states and the District of Columbia. The National Urban League works to provide the guarantee of civil rights for the underserved in America. Recognizing that economic empowerment in underserved communities is inextricably linked to the reduction of racial health disparities in America, the organization has established the goal that by 2025 every American has access to quality and affordable health care solutions.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 18-2574

SHARONELL FULTON, ET AL.,
APPELLANTS,

V.

CITY OF PHILADELPHIA, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
NO. 2:18-cv-02075-PBT (HONORABLE PETRESE B. TUCKER)

BRIEF OF AMICUS CURIAE COALITION OF RELIGIOUS AND RELIGIOUSLY AFFILIATED ORGANIZATIONS IN SUPPORT OF APPELLEES CITY OF PHILADELPHIA, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26, *Amici Curiae* the Anti-Defamation League, OCA – Asian Pacific American Advocates, Bend the Arc: A Jewish Partnership for Justice, Hindu American Foundation, Interfaith Alliance Foundation, the Japanese American Citizens League, Jewish Social Policy Action Network, Jewish Women International, Keshet, Muslim Advocates, National Council of Jewish Women, People for the American Way Foundation, Sikh Coalition, South Asian Americans Leading Together, and T'ruah: The Rabbinic Call for Human Rights have no parent corporations. No publicly held corporation owns 10% or more of the stock of any of the *Amici Curiae*.

CERTIFICATE PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* certify that no party or their counsel authored this brief, either in whole or in part, or contributed money that was intended to fund the preparation or submission of this brief, and that no person other than the *Amici Curiae*, their members, and counsel contributed money that was intended to fund the preparation or submission of this brief.

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INTERESTS OF THE AMICI CURIAE

Amici Curiae are religious and religiously affiliated organizations that are committed to fighting religiously motivated discrimination, including overly broad requests for religious exemptions from generally applicable and neutral anti-discrimination laws. Anti-discrimination laws have long played a crucial role in protecting the rights of all, and particularly religious minorities. Appellants' requested faith-based exemption to such laws would severely limit these anti-discrimination protections and would undermine one of our nation's core values—that no one should suffer discrimination because of their religious identity or beliefs. *Amici* and their members therefore urge the court to reaffirm the equality-enhancing values that underlay the First Amendment and affirm the District Court's ruling.

The Anti-Defamation League was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast supporter of anti-discrimination laws as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free Exercise Clause is a critical means to protect

individual religious exercise, but it must not be used as vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

The Hindu American Foundation ("HAF") is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF's work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Since its inception, the Hindu American Foundation has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of

such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation is a nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Interfaith Alliance Foundation's members belong to 75 faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom safeguards the rights of all Americans and is not misused to favor the rights of some over others.

The Japanese American Citizens League ("JACL") is a national organization whose ongoing mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. Aware of our responsibilities as the oldest and largest Asian Pacific American civil rights organization, JACL strives to promote a world that honors diversity by respecting values of fairness, equality and social justice.

Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional Liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, whether they lived in Christian or Muslim societies, Jews were a small religious minority victimized by prejudice and lacking

sufficient political power to protect their rights. In America, the Jewish community found a society dedicated to providing religious liberty to all and to protecting the equal rights of all of its citizens. Perhaps more than any other minority religious group, the Jewish community has been vigilant in asking the courts to ensure that organizations receiving government financial assistance use those funds in a manner consistent with protecting the equal rights of all minority communities and the religious liberties of all the people that they serve.

Jewish Women International ("JWI") is a Washington, D.C. not-for-profit organization founded in 1897 and incorporated in 1995 (www.jwi.org). JWI is the leading Jewish organization empowering women and girls through healthy relationship training, financial literacy education, and the proliferation of women's leadership. JWI's innovative programs, policy advocacy, and philanthropic initiatives protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength.

Keshet is a national organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender (LGBT) Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish

life—synagogues, Hebrew schools, day schools, youth groups, summer camps, social-service organizations, and other communal agencies. Through training, community organizing, and resource development, it partners with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civil education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. As part of its mission, Muslim Advocates is committed to fighting discrimination on all fronts, including against members of the LGBTQ community. The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil rights protections for American Muslim communities and for an understanding of religious liberty that truly protects the rights of religious and other minorities.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving

the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition." Consistent with our Principles and Resolutions, NCJW joins this brief.

OCA – Asian Pacific American Advocates ("OCA") is a national Asian American and Pacific Islander ("AAPI") civil rights organization with chapters across the country, including in the greater Philadelphia area. OCA advocates for policies that enhance the social, economic, and political well-being of the AAPI community, some of whom identify as lesbian, gay, bisexual, transgender, or queer. As such, cases that impact the ability of AAPI LGBTQ communities to fully engage in American society are of extreme concern to the organization.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty and reproductive choice. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values.

PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to excuse violations of anti-discrimination legislation, which is important to protect religious and other minorities.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. The Sikh Coalition joins this brief out of the belief that anti-discrimination safeguards are essential for religious, ethnic, and other minority communities.

South Asian Americans Leading Together ("SAALT") is a national, nonpartisan, non-profit organization that fights for racial justice and advocates for the civil rights of all South Asians in the United States. As an organization that is committed to dignity and full inclusion for all, SAALT joins this brief in an effort to ensure government funds are not used to discriminate in the name of religious

liberty and sanction discrimination against not only LGBTQ parents, but religious minorities as well.

T'ruah: The Rabbinic Call for Human Rights ("T'ruah") brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As members of a religious minority, T'ruah supports this brief because it believes Appellants' position, rather than protecting religious freedom, will only serve to restrict it.

SUMMARY OF ARGUMENT

Freedom of religion, enshrined in the Free Exercise Clause of the First Amendment to the United States Constitution, as well as numerous federal, state, and local anti-discrimination laws, is a shield intended to protect the free exercise of religion for all, not a sword that can be used to impose religious beliefs on or discriminate against others. By seeking a broad, faith-based exemption from anti-discrimination laws that protect religious liberty, among other categories,

Appellants Catholic Social Services and others (hereinafter "CSS")[1] would turn these laws on their head, and in the process, undermine religious freedom for all.

In the present case, CSS is attempting to take taxpayer money and act as an agent of the City of Philadelphia to provide a government service, while refusing to comply with the neutral anti-discrimination requirements and child welfare policies in its contract with the City, as well as with Philadelphia's Fair Practices Ordinance, which prohibits "discrimination against any individual because of race, color, religion, . . . national origin[,] . . . marital status [or] sexual orientation." Phila. Code. § 9-1106; Appellants' Br. (Doc. 003113019061), at 12-13.

CSS's position, if adopted by this court, would allow any faith-based organization, on the basis of its religious beliefs, to be exempt from such non-discrimination requirements in the provision of government services. Not only would such an outcome permit widespread discrimination against LGBTQ people, but it would also allow for disparate treatment of any person holding different religious beliefs, including religious minorities in particular, when attempting to participate in a government program.

This threat is not merely hypothetical, other faith-based organizations and individuals have already discriminated against religious minorities in the provision

[1] "CSS" refers collectively to Appellants Sharonell Fulton, Cecelia Paul, Toni-Lynn Simms-Busch, and Catholic Social Services.

of government child welfare services. Indeed, the very people who most depend on the protections of civil rights laws will suffer the full brunt of such exemptions, with a loss of equal protection, equal opportunity, and personal dignity.

ARGUMENT

I. Anti-Discrimination Laws Are Essential to Protecting Against Religiously Motivated Discrimination.

Far from offending religious freedom, public-accommodations laws, such as Philadelphia's Fair Practices Ordinance,[2] explicitly serve and advance that fundamental value by protecting against religiously motivated discrimination, which has long plagued our nation.[3]

Indeed, the scourge of religiously motivated discrimination and oppression dates back as least as early as the first meeting of Europeans in present-day

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[2] Philadelphia's Fair Practices Ordinance prohibits discrimination on the basis of "race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence victim status" in the delivery of city services or the provision of public accommodations. Phila. Code § 9-1106. In the context of the present case, this Ordinance requires that all potential foster parents—including atheist couples, interfaith couples, interracial couples, cohabitating couples, formerly divorced couples, and same-sex couples—must be served on equal terms and conditions that do not take prohibited aspects of their identity into account.

[3] Title II of the Civil Rights Act, the public accommodations laws of 45 states and the District of Columbia, and countless local ordinances such as Philadelphia's, prohibit discrimination in the provision of goods or services on the basis of religion, as well as forbid various other categories of invidious discrimination. *See, e.g.*, Nat'l Conference of State Legislatures, *State Public Accommodation Laws* (July 13, 2016), available at http://www.ncsl.org/research/civil-and-criminal-justice/state- public-accommodation-laws.aspx.

America, more than fifty years before the voyage of the Mayflower, when a group of Spanish citizens massacred a colony of French Protestants seeking religious freedom because the colonists were "scattering the odious Lutheran doctrine in these Provinces." Kenneth C. Davis, *America's True History of Religious Tolerance*, Smithsonian Mag. (2010). Soon after, the Puritans who arrived in Massachusetts Bay to escape their own religious persecution founded "a theocracy that brooked no dissent, religious or political." *Id.* Catholics and other non-Puritans were banned from the colonies, and between 1659 and 1661, four Quakers were hanged in Boston because they stood up for their beliefs. *Id.* In New York, Catholics were constitutionally barred from public office. *Id.* Maryland granted Catholics full civil rights, but did not extend those same rights to Jews. *Id.*

State and federal anti-discrimination laws, like Philadelphia' Fair Practices Ordinance, seek to outlaw such religiously motivated discrimination. By way of example only, when Congress enacted Title II of the Civil Rights Act in 1964 to bar discrimination in public accommodations, it specifically included religion as a protected category in order to remedy the longstanding systematic refusals of service that it recognized to be occurring on the basis of religion as well as race.[4]

[4] *See* 42 U.S.C. § 2000a(a); *see also* 110 CONG. REC. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were "not allowed in certain hotels"); A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce, 88th Cong. 735 (1963)

Indeed, Senate committee hearings included specific references to a hotel in New Hampshire, which rented exclusively to Christians during some weeks, and exclusively to Jews during others, providing "equal but separate facilities" which Congress recognized as a substantial barrier to full participation in civil society that warranted an equally serious and substantial federal remedy.[5]

Today, the United States is more religiously and racially diverse than at any point in our history. *See America's Changing Religious Landscape*, Pew Research Ctr. (2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/. Prohibitions against religiously motivated discrimination are therefore more important than ever and play a key role in the protection of twin bedrock values that underlie both the U.S. Constitution and American democracy: that the government has a responsibility to avoid promoting or entangling itself in religion, while also protecting the value of pluralism, particularly religious pluralism, in American civil society.

Against this backdrop, secular public rules are safeguarded by the First Amendment's Establishment Clause, and the independent value of religious pluralism is safeguarded by the First Amendment's Free Exercise Clause. Non-

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(statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that in New York, "it has been traditional, among some of our resort places, to refuse to take members of the Jewish faith").

[5] *Id.* at 780 (statement of Sen. Cotton).

discrimination principles advance both values: they assure that the state does not takes sides when it comes to religion, favoring one religious tradition over another, and they promote religious pluralism by prohibiting religiously motivated discrimination by private actors in significant sectors of civil society such as employment, housing, public accommodations, and the provision of taxpayer-funded government services.

II. Permitting Broad Faith-Based Exemptions to Generally Applicable Civil Rights Laws Would Harm Religious Liberty.

A. The Protection of Religious Liberty Should Not Be Undermined in the Name of Religious Exercise.

The United States' constitutional commitment to religious liberty has always entailed a corollary commitment to non-discrimination. Indeed, the integrity of the former has always relied upon the enforcement of the latter. This is in large part because liberty and equality are mutually reinforcing norms, each weakened if we unnecessarily place them at odds and are forced to choose between them. The values of religious liberty and equality can and must be harmonized, and religious liberty should be interpreted in equality-enhancing, not equality-denying, ways.

By claiming that its religious beliefs entitle it to refuse service to certain individuals based on aspects of their identity, however, CSS inherently asserts that its religious beliefs and free exercise rights should override the equality rights of others. Yet in the marketplace, the Free Exercise Clause does not sanction the

invocation of religious belief to thwart generally applicable anti-discrimination laws. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2018) (quotation omitted) (reaffirming that, as "a general rule, [religious and philosophical objections] . . . do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.");[6] *United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (hospital's free exercise rights were "not implicated" by federal prohibitions on age discrimination); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37, 39 (D.C. 1987) (en banc) (Georgetown University's free exercise rights did not excuse it from violating the D.C. Human Rights Act when it denied tangible benefits to student groups on basis of sexual

[6] In *Masterpiece*, the Court invalidated the Colorado Civil Rights Commission's adjudication of unlawful discrimination by a business because it deemed the adjudicative process to be tainted by the adjudicatory body's hostility toward the business owner's religious beliefs. This conclusion was based on statements made by members of the Commission, as well as the Commission's differential treatment of other conscience-based objections to providing a service. *Masterpiece*, 138 S.Ct. at 1729-30.

orientation); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (Free Exercise Clause does not permit private health clubs to apply membership criteria based on marital status and religious affiliation in violation of Minnesota Human Rights Law).

Courts aiming to protect both religious liberty and equality have instead struck a balance that does not subjugate one right to the absolute claim of the other. There is a basic reason to continue to adhere to this balance: protections for religious liberty depend on the rigorous enforcement of non-discrimination policies. Stated another way: "Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others." U.S. Comm'n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, at 29 (2016).

B. The Prospective Harm That Would Result from Appellants' Interpretation of Religious Liberty is Not Hypothetical.

Although this appeal arose in the context of discrimination against members of the LGBTQ community, the relief CSS seeks would have a substantial and disproportionate impact on religious minorities. This is because CSS effectively seeks to discriminate against prospective clients who do not adhere to their religious requirements.

Such discrimination in the context of foster care or adoption is not merely hypothetical. In fact, foster agencies in Philadelphia and across the country have

already discriminated against same sex couples and others based on religious eligibility criteria. In Philadelphia, for example, Bethany Christian Services recently turned away a same-sex couple seeking to become foster parents due to its religious criteria.[7] Multiple foster care agencies turned away a same-sex couple in Michigan for these same reasons.[8]

Discrimination by foster care agencies goes beyond refusing to work with same-sex couples; other agencies use certain religious criteria in deciding with whom they work. In one recent example a Jewish woman in South Carolina sought to mentor local children in foster care through the Miracle Hill organization, after having been a foster parent for ten years in Florida.[9] Yet Miracle Hill refused to even provide her with an application, for the sole reason

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[7] *See* Julia Terruso, *City Resumes Foster-Care Work with Bethany Christian Services After It Agrees To Work With Same-Sex Couples*, Phila. Inquirer, June 28, 2008, available at www2.philly.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html. Bethany Christian Services subsequently changed its policy and is not seeking an exemption to Philadelphia's Fair Practices Ordinance.

[8] *See* Isabel Dobrin, *ACLU Sues Michigan After Same-Sex Couples Seeking to Adopt Are Rejected*, NPR, Sept. 23, 2017, available at www.npr.org/2017/09/23/552873416/aclu-sues-michigan-after-same-sex-couples-seeking-to-adopt-are-rejected.

[9] *See* Angelia Davis, *Scrutiny of Miracle Hill's Faith-Based Approach Reaches New Level*, Greenville News, Mar. 1, 2018, available at www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/.

that, as a Jewish woman, she "didn't share the organization's Christian beliefs."[10] Miracle Hill's website still states that it will place foster children only with "Christian foster families."[11]

Similar to Miracle Hill, other organizations providing foster and adoption placement services actively advertise that their foster parents must meet certain religious criteria. *See, e.g.*, Georgia Agape Foster Care, www.georgiaagape.org/foster-care/ (last visited Oct. 4, 2018) ("Georgia Agape has faith requirements as criteria for who can serve with us in our foster care program."); Alabama Baptist Children's Homes & Family Ministries Foster Parenting, www.alabamachild.org/foster-parenting (last visited Oct. 4, 2018) (advertising the "best, most complete program in the entire state of Alabama for Christian parents looking to service children in foster care"); Adoption Association of Kansas Catholic Charities Preliminary Eligibility, www.adoptionassociationks.org/elibility.html (last visited Oct. 4, 2018) (requiring adoptive parents to be affiliated with a church and provide "a reference from [a] pastor"); Special Delivery Infant Adoption Agency Eligibility Requirements www.specialdeliveryadoptions.org/index.php?page=requirements-to-adopt (last visited Oct. 4, 2018) ("**Special Delivery is a Christian agency and our main**

[10] *Id.*

[11] Miracle Hill Ministries Foster Care, https://miraclehill.org/how-we-help/childrens-home/foster-care/ (last visited Oct. 4, 2018).

criterion is to place children into Christian families. *This requirement WILL NOT be waived.*") (emphasis in original).

Discrimination against religious minorities seeking to foster children is therefore not a mere possibility, but instead is happening on a daily basis. If this court were to accept CSS's extraordinary position that it can discriminate in its government-funded services on the basis of religious criteria, this would set a dangerous precedent for religious liberty for all in America.

C. Civil Rights Laws Ensure Religious Liberty for Religious Minorities.

CSS's claim—that its religious beliefs entitle it to avoid compliance with the City's anti-discrimination law—amounts to a partial repeal of the Philadelphia Ordinance. Recognizing a religious exemption that would otherwise be treated unequivocally as discrimination would drastically undermine the protections of civil rights laws. The resulting harm to religious freedom—particularly for members of minority faiths—would be severe.

While constitutional and statutory protections against religious discrimination apply to all faiths equally, religious minorities experience a disproportionately high level of discrimination. Indeed, disfavor toward, unequal treatment of, and denials of service to members of minority faiths, persons

adhering to a different faith, and atheists are all too common.[12] And discrimination against others because of their religious beliefs, like other forms of discrimination, may be, and often is, premised on religious views or motivations. Thus, there is no question that the same arguments for a religious exemption permitting denials of service to same-sex couples could be advanced to support denials of service to people of minority faiths. In other words, if CCS's position is accepted by this court, religious minorities would undoubtedly suffer more denials of services, employment and housing within the marketplace. Indeed, numerous court decisions reflect that "but for" civil rights laws, members of minority faiths would suffer such discrimination without recourse.

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[12] One recent report from the U.S. Department of Justice sampled cases involving religious discrimination in employment, and of the six cases profiled, each involved a member of a minority religion. *See* U.S. Dep't of Justice, Civil Rights Div., *Combating Religious Discrimination and Protecting Religious Freedom* (Aug. 6, 2015), available at www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-16. The Department of Justice also consistently reports a disproportionately high number of discriminatory incidents against Muslims and Jews in particular. *See* U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016), available at www.justice.gov/crt/file/877931/download ("[M]inority groups have faced a disproportionate level of discrimination in zoning matters, reflected in the disproportionate number of suits and investigations involving minority groups undertaken by the Department. In particular, the percentage of Department RLUIPA investigations involving mosques or Islamic schools has risen dramatically in the time since the Tenth Anniversary Report was issued—from 15% in the 2000 to August 2010 period to 38% during the period from September 2010 to the present. Investigations involving Jewish institutions remain disproportionate to the percentage of the overall U.S. population that is Jewish.").

In *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, for example, a health club: allowed "only born-again Christians . . . to be managers or assistant managers"; "question[ed] prospective employees about marital status and religion"; "terminat[ed] employees because of a difference in religious beliefs"; "refus[ed] to promote employees because of differing religious beliefs"; and "fail[ed] to provide 'open' public accommodations." 370 N.W.2d 844, 846-47 (Minn. 1985). Job "applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell, and other questions of a religious nature," in keeping with the gym owners' "fundamentalist religious convictions [that] require[d] them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives." *Id.* "[B]ased on an interpretation of the Bible, [the gym] w[ould] not hire, and w[ould] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to Galatians 5:19-21 includes fornicators and homosexuals." *Id.* at 847. The gym "justifie[d its] rigid policy by relying on [the owners'] religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.'" *Id.* The

Minnesota Supreme Court denied the gym a free exercise exemption from state anti-discrimination laws and affirmed findings of substantial evidence of the statutory violations. *Id.* at 854.

Similarly, in *Paletz v. Adaya*, a hotel owner in Santa Monica, California, ordered the closing of a poolside event hosted by a Jewish group. No. B247184, 2014 WL 7402324 (Cal. Ct. App. 2014). After looking at a pamphlet describing the group and seeing attendees at the event wearing T-shirts bearing the group's name, the hotel owner told an employee that "I don't want any [f—ing] Jews in the pool," said that her family members would cut off her financing if they learned of the gathering, and directed hotel staff forcibly to remove the Jewish guests from the property. *Id.* at *2-4. A jury found that the hotel owner violated the California public-accommodations law and awarded damages. *See* Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. Times, Aug. 15, 2012.

In *Khedr v. IHOP Restaurants, LLC*, a family was refused service at an International House of Pancakes ("IHOP") in Connecticut for being Muslim: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." 197 F. Supp. 3d 384, 385 (D. Conn. 2016). In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.* The family sued under the Connecticut public-accommodations law, and the court

denied IHOP's motion to dismiss, concluding that the incident was, at the very least, "suggestive of discriminatory motive." *Id.* at 388.

In *Nappi v. Holland Christian Home Association*, a Catholic maintenance worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. No. 11-cv-2832, 2015 WL 5023007 (D.N.J. Aug. 21, 2015). They called Catholicism a "'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor terminated the plaintiff's employment, explaining that "he was being fired because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'" *Id.* at *3. The district court denied summary judgment to the business, concluding that the record evidence "clearly [gave] rise to an inference of discrimination" under Title VII. *Id.* at *8.

In *E.E.O.C. v. Townley Engineering & Manufacturing Co.*, an atheist was constructively discharged from his job at a mining-equipment manufacturer in California that held mandatory weekly meetings involving "prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters." 859 F.2d 610, 612 (9th Cir. 1988). The Ninth Circuit rejected the free-exercise defense of the company's owners "that the Bible and their covenant with God require[d] them to share the Gospel with all of their employees,"

concluding that "[p]rotecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination." *Id.* at 620–21.

Finally, in *Huri v. Office of the Chief Judge of the Circuit Court*, a Muslim child care attendant who wore a hijab was harassed by her Christian supervisor in a county court in Illinois. 804 F.3d 826 (7th Cir. 2015). The supervisor called the employee "evil," described herself, the chief judge, and another court employee as "good Christian[s]," denied the employee time off for an Islamic religious holiday, and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of" the employee and her daughter. *Id.* at 830, 834. The Seventh Circuit reversed the district court's dismissal of the employee's hostile-work-environment claims under Title VII and the Equal Protection Clause.

As these examples show, religious minorities still face significant discrimination, and courts have not hesitated to enforce anti-discrimination laws even when a business's discriminatory practices are premised on the religious beliefs of the business owners. Rather, courts have both protected religious minorities and preserved their religious free exercise rights.

CSS, however, seeks to be the sole arbiter of whom to serve and whom to turn away based upon its religious criteria. Accepting CSS's argument would only undercut the discrimination protections previously enforced by courts, open the

door to religious minorities being turned away from services because of their religion, and undermine the free exercise rights of us all.[13]

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Pennsylvania should be affirmed.

Dated: October 4, 2018

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[13] As the Supreme Court has made clear, an accommodation for religious purposes, as CSS requests here, violates the Establishment Clause when it imposes "significant burdens" on third parties, which would clearly occur in this case. *Estate of Thornton v. Caldor*, 472 U.S. 708, 710 (1985); *accord Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 16 (1989).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(g), I certify that this brief contains 5,343 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it is in 14-point Times New Roman font.

Pursuant to Local Appellate Rule 31.1(c), I certify that the text of this electronic brief is identical to the text in the hard, paper copies of the brief.

Pursuant to Local Appellate Rule 31.1(c), I certify that a virus check was performed on the .pdf version of this brief using Symantec Endpoint Protection Version 14.0 and that no virus was detected.

Pursuant to Local Appellate Rule 28.8(d), I certify that I am a member of the bar of this Court.

/s/ M. Duncan Grant

M. Duncan Grant

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; FAIRNESS WEST VIRGINIA; INTERFAITH ALLIANCE FOUNDATION; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; FAIRNESS WEST VIRGINIA; INTERFAITH ALLIANCE FOUNDATION; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that LGBTQ people, and all Americans, remain free from officially sanctioned discrimination.

The constitutional protections for religious freedom and equal protection work hand in hand to safeguard equal treatment, equal dignity, and equal respect for all persons. *Amici* have a strong interest in ensuring that our Nation's fundamental commitment to these values is never eroded or tainted by misusing the language of religious freedom to afford official imprimatur to maltreatment of people based on their religion, race, sex, sexual orientation, or other protected classifications.

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The *amici* are:

- Americans United for Separation of Church and State.
- Anti-Defamation League.
- Bend the Arc: A Jewish Partnership for Justice.
- Fairness West Virginia.
- Interfaith Alliance Foundation.
- National Council of Jewish Women, Inc.
- People For the American Way Foundation.

More detailed descriptions of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Religious freedom is a constitutionally protected value of the highest order. The Free Exercise and Establishment Clauses work in tandem to secure the rights to believe, or not, and to worship, or not, according to the dictates of conscience. The guarantee of free exercise of religion is not, and never has been, a license to discriminate. "The First Amendment * * * gives no one the right to insist that in pursuit of [one's] own interests others must conform their conduct to [one's] own religious necessities." *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 710 (1985).

Yet petitioners ask this Court to grant them just such an impermissible license to discriminate. They claim entitlement to a constitutionally mandated exemption from a neutral, generally applicable law intended to protect minority and marginalized groups, so that they may legally refuse service to and exclude

customers who do not conform to their religious views. The Free Exercise Clause grants no such right. And no assertion of any 'hybrid' claim changes that rule.

The Establishment Clause compels the same conclusion: It bars the granting of religious exemptions when the effect would be to impose undue costs, burdens, or harms on innocent third parties. Yet petitioners' requested exemption from the Colorado Anti-Discrimination Act would do just that: It would confer on petitioners, and all commercial establishments, official permission to deny statutorily mandated equal service to anyone who does not live according to a business's or its owner's religious views. Such an exemption cannot be required by the Free Exercise Clause because granting it would violate the Establishment Clause.

Petitioners' assertion of a free-exercise right to violate antidiscrimination laws also reflects a basic misunderstanding of the fundamental protections for religious freedom embodied in the First Amendment. Antidiscrimination laws protect religious freedom; they do not interfere with, impede, or frustrate the enjoyment of it.

Federal, state, and local public-accommodations laws like Colorado's extend essential protections against discrimination to religious groups just as to other protected classes. They thus advance the aims of the Religion Clauses by ensuring that our Nation's vibrant diversity of religion and belief does not divide and roil society. The laws ensure that a Muslim cannot be refused a meal by a Protestant restauranteur, a Catholic cannot be evicted by a Jewish landlord, and a Sikh cannot be fired by a Baptist supervisor for adhering to the 'wrong' faith.

If petitioners' argument for a religious exemption from public-accommodations law were accepted, all those discriminatory acts might receive constitutional protection—not to mention imprimatur from, and hence encouragement by, this Court. The predictable consequence would be that persons of minority faiths, LGBTQ people, and other historically marginalized groups would have to choose between hiding their identity to conform to others' religiously based expectations, on the one hand, and getting turned away from businesses open to the public, on the other. If religious freedom and equal justice under law mean anything, they surely mean that no one should be put to that choice.

ARGUMENT

I. THE RELIGION CLAUSES NEITHER AUTHORIZE NOR ALLOW THE EXEMPTION THAT PETITIONERS SEEK.

A. The Free Exercise Clause does not authorize petitioners' requested religious exemption from public-accommodations law.

Even if petitioners' denial of service to same-sex couples may be considered an exercise of religion for First Amendment purposes—a question that this Court need not decide—the Free Exercise Clause does not confer a right to petitioners' requested exemption from the Colorado Anti-Discrimination Act's regulation of that conduct.

1. This Court's free-exercise jurisprudence does not confer a right to violate antidiscrimination laws.

a. When a law is religiously neutral on its face, is generally applicable without regard to religion, and does not constitute a religious gerrymander (*i.e.*, it is not deceptively drafted either so that "almost the only conduct subject to" it is religious exercise or so that it "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends"), this Court has held that the law is subject to rational-basis review. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533–535, 538 (1993); see also *Emp't Div. Dep't Human Res.* v. *Smith*, 494 U.S. 872, 878 (1990). It is thus presumptively valid and must be upheld as long as it serves a legitimate governmental interest and is rationally related to serving that interest. See generally, *e.g.*, *Armour* v. *City of Indianapolis*, 566 U.S. 673, 680 (2012).

Like all public-accommodations laws of which *amici* are aware, the Colorado Anti-Discrimination Act easily satisfies these requirements. It does not target religious exercise either on its face or by subterfuge—there is not a hint of either[2]—and it applies

[2] Petitioners contend to the contrary (at Br. 39–46) that in applying the Act the Colorado Civil Rights Commission has allowed other bakeries to "discriminate" on the basis of religion by allowing them to refuse to sell cakes bearing messages condemning marriages of same-sex couples while requiring petitioners to sell cakes that support the marriages. But the Commission determined that the other bakeries' refusals were general ones—*i.e.*, limitations on the goods that would be sold to any customer, without regard to religious affiliation, sexual orientation, or any other protected characteristic. See J.A. 240, 249, 257. Petitioners, by contrast, refuse to sell to same-sex couples even a cake

to all similarly situated businesses without regard to religion.[3] See COLO. REV. STAT. § 24-34-601. And the Act easily satisfies rational-basis review: The aim to prevent denials of service to historically marginalized groups—both generally and with respect to sexual orientation—is not merely a legitimate governmental interest; it is a critical "protection[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996); accord, *e.g.*, *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2600 (2015). And it cannot be gainsaid that barring discriminatory refusals of service in places of public accommodation is rationally related to the goal of ending discrimination. Indeed, it is essential to accomplishing that goal.

b. Under this Court's pre-*Smith* free-exercise jurisprudence, petitioners' claim here also fails as a matter of law. For the Free Exercise Clause has never been held to afford religious exemptions that would shift undue costs and burdens of the claimant's religious exercise onto innocent third parties.

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identical to ones that they have already sold and would again sell to different-sex couples. It is that action—the refusal to sell the same item on the same terms to members of a statutorily protected class—that the Commission and the court below (at Pet. App. 16a–17a, 57a) determined was a violation of the Colorado Anti-Discrimination Act.

[3] The statutory exemption for houses of worship (see COLO. REV. STAT. § 24-34-601(1)) merely recognizes that those entities are not public accommodations—*i.e.*, they are not similarly situated businesses. It does not disfavor them either as a class or based on denomination, so it does not intrude on any free-exercise interest.

In *United States* v. *Lee*, 455 U.S. 252 (1982), for example, this Court held that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261. Accordingly, the Court rejected an employer's request for an exemption from paying social-security taxes because the exemption would have "operate[d] to impose the employer's religious faith on the employees." *Ibid.*; see also *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (state's authority to enforce child-labor law was "not nullified merely because" seller of religious magazines "ground[ed] his claim [for an exemption] * * * on religion").

c. This rule against unduly harming nonbeneficiaries of a requested religious exemption is especially important, moreover, when antidiscrimination laws are at issue. Because these laws are themselves designed to prevent injuries to innocent third parties, their whole purpose would be upended by exemptions that license and authorize the injuries to occur.

Thus, in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), this Court upheld the denial of tax-exempt status to universities with racially discriminatory admissions policies (*id.* at 603–604), notwithstanding that the policies were premised on sincere religious beliefs (see *id.* at 602 n.28). The Court held that the government's interest in preventing the harm caused by race discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604. And in *Newman* v. *Piggie*

Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam), the Court rejected as "patently frivolous" (*id.* at 402 n.5) the claim of a business owner whose religious beliefs "compel[led] him to oppose any integration of the races" (*Newman* v. *Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), aff'd, 390 U.S. 400 (1968) (per curiam)) that the Free Exercise Clause conferred on him a right to violate Title II of the Civil Rights Act, 42 U.S.C. § 2000a *et seq.* (the principal federal public-accommodations law).[4]

Antidiscrimination laws have, in fact, given way to religious exemptions only when the autonomy of religious institutions or the selection of clergy was at issue. See *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 188–192 (2012) (ministerial exception exempted from Americans with Disabilities Act a church's employment of called teachers); *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987) (upholding Title VII's exemption for religious organizations, which Congress enacted to "minimize governmental 'interference with the decision-making process in religions'" (quoting district court) (brackets omitted)). For ordinary businesses like the bakery here, constitutional concerns for the integrity of religious denominations and houses of worship have no bearing. The principle that constitutionally authorized exemptions must not de-

[4] See also, *e.g.*, *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1397–1399 (4th Cir. 1990) (Fair Labor Standards Act's requirement of equal pay for women did not violate employer's free-exercise rights); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1367–1369 (9th Cir. 1986) (employer's religious beliefs about proper gender roles did not support free-exercise exemption from Equal Pay Act and Title VII).

trimentally affect nonbeneficiaries is therefore controlling.

d. A bedrock principle of the First Amendment is that the guarantee of free exercise of religion is a shield to protect religious exercise, not a sword to impose one's own beliefs—or the costs and burdens of those beliefs—on nonadherents. That principle is what allows us to live together in relative harmony in a religiously pluralistic society, rather than either segregating into closed religious communities with only those who share and are willing to live under precisely the same code of beliefs and practices, or devolving into religiously based social strife that would imperil the religious freedom of all. Hence, though petitioners' religious views here are undoubtedly sincere, recognition of an entitlement to a constitutional exemption from general laws—and most particularly from laws that protect historically marginalized groups against exclusion from ordinary, day-to-day consumer transactions—would undermine the rule of law and "court anarchy" (*Smith*, 494 U.S. at 888). The Free Exercise Clause has never required that result. Nor should it here.

2. Petitioners' assertion of a hybrid claim does not change the analysis or result.

Petitioners' assertion (at Br. 46–48) of a so-called hybrid right does not transform an insubstantial free-exercise claim into something more. Although petitioners argue that the claim should receive strict scrutiny, this Court has never adopted that approach; the lower-court decisions to which petitioners point have declined to apply it; and legal scholars have roundly rejected it. And even if it *were* a valid legal doctrine, it would not change the outcome here.

In *Smith*, this Court explained that it had previously recognized religious accommodations with respect to neutral, generally applicable laws in only a few instances, which the Court described as "hybrid situation[s]" involving violations of the Free Speech Clause or the fundamental parental right to direct the upbringing of one's children. See 494 U.S. at 881–882. The Court did not, either then or at any time since, actually employ a hybrid-rights approach to ratchet up the level of scrutiny on a free-exercise challenge to a general law. Cf. *id.* at 882 ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.").

Petitioners rely on *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), to try to demonstrate a doctrinal commitment by this Court to a hybrid-rights approach. But in neither case did the decision of the Court even mention the Free Exercise Clause. Both cases were instead decided solely under the Free Speech Clause. See *Wooley*, 430 U.S. at 713 (State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public"); *Barnette*, 319 U.S. at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind").

And in *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002), to which petitioners also vaguely point, this Court noted without comment that the Sixth Circuit had "rejected petitioners' reliance on the discussion of laws affecting both the free exercise of religion and free speech in [*Smith*] because that 'language was dicta and therefore not binding.'" *Id.* at 159. If the Sixth Circuit's refusal to entertain a hybrid-rights claim had flouted *Smith*, this Court surely would have said so—and presumably would itself have evaluated that claim on review. The Court did neither.

More generally, most of the "hybrid situations" that the Court identified in *Smith* involved no assertion of a free-exercise claim at all. And while most also predated the formal recognition of tripartite levels of constitutional scrutiny, so the terminology that they used varied, in all instances the violations of *other* constitutional provisions alone would, in modern parlance, have triggered heightened scrutiny.[5] Free-exercise claims, when there were any, did nothing either to dictate or to explain the Court's mode of analysis.

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[5] See *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) ("This case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943) (distribution of religious tracts "has the same claim as [other forms of evangelism] to the guarantees of freedom of speech and freedom of the press"); *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940) ("[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible."); *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–535 (1925) ("[W]e think it entirely plain that the Act * * * unreasonably interferes

Nor do any of the lower-court opinions that petitioners cite actually recognize and grant relief on a hybrid-rights claim. See *Cornerstone Christian Sch.* v. *Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (declining to decide "whether any potential overlap of the asserted rights requires a heightened level of scrutiny"); *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1301 (10th Cir. 2004) (recognizing qualified immunity from "controversial 'hybrid-rights' exception" without adopting theory itself, because law is not clearly established, and remanding for determination whether challenged conduct was not neutral and generally applicable and therefore triggered strict scrutiny purely under Free Exercise Clause); *Miller* v. *Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) ("We hold that a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim."); see also, *e.g.*, *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 101 & n.18 (1st Cir. 2013) (concluding that strict scrutiny applied to free-exercise claim alone, and therefore not determining whether hybrid-rights approach is valid).

Not only is a hybrid-rights theory unnecessary to explain the cases, but its logic is also questionable: "How can claimants be entitled to greater relief under

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with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

As for *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944), the decision did not even hint at heightened scrutiny. Rather, the Court quoted *Murdock* for the proposition that "'[f]reedom of press, freedom of speech, freedom of religion are in a preferred position'"—*i.e.*, they are constitutionally protected—so the selling of religious literature, like the selling of newspapers, cannot be suppressed by use of the tax laws. *Id.* at 574–578.

a 'hybrid' claim than they could attain under either of the components of the hybrid?" Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990).

A weak, insubstantial, or legally invalid free-exercise claim, or one that otherwise warrants rational-basis review and a strong presumption of constitutionality, does not become something more merely because it is repackaged and re-presented also under a second constitutional clause. And free-exercise claims can almost always be redescribed as implicating, in the claimant's eyes, free speech or some other interest. See, *e.g.*, *id.* at 1122 (explaining that *Smith* itself was as much a hybrid of speech and religious exercise as any of the cases that the Court described as "hybrid situations"). If the invocation of multiple rights were alone enough to trigger strict scrutiny, the choice of level of review would devolve into a pleading formality. When, as here, the Free Exercise Clause dictates rational-basis review, any parallel claim under another clause either triggers strict scrutiny, or it does not. If it does not, the mere fact that more than one legal claim has been alleged should not call for a level of scrutiny that neither claim alone is sufficient to trigger. The hybrid-rights approach would therefore appear to be doctrinally empty.

But even if the approach had doctrinal validity, it still would be of no help to petitioners here, for two independent reasons.

First, even if multiple weak claims that are subject to rational-basis review could somehow add up to strict scrutiny, a legally insupportable claim surely cannot contribute to that equation. Cf. *Miller*, 176 F.3d at 1208. The argument that religious views confer a constitutional basis for infringing the rights of

others does not comport with the Free Exercise, Due Process, or Equal Protection Clauses. See, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003) (due process); *id.* at 582 (O'Connor, J., concurring in the judgment) (equal protection); *Smith*, 494 U.S. at 878–882 (free exercise). So even if petitioners' free-speech argument had any merit—which, for the reasons explained by respondents, it does not—the meritless free-exercise claim would lend not a feather's weight to it.

And second, even if strict scrutiny of the free-exercise claim *were* somehow triggered here, whether on a hybrid-rights approach or otherwise, the Establishment Clause would forbid the requested exemption, for the reasons explained in the next section.

B. The Establishment Clause forbids petitioners' requested religious exemption because the exemption would unduly harm third parties.

Even if petitioners' free-exercise claim could be reconciled with this Court's long-standing free-exercise jurisprudence and were also somehow entitled to strict scrutiny, that claim still would not prevail here because the Establishment Clause forbids exemptions that harm third parties.

1. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992). Religious exemptions that would detrimentally affect nonbeneficiaries would impermissibly prefer the favored religious beliefs over the rights and differing beliefs of the individuals or groups being burdened. See *Caldor*, 472 U.S. at 710 ("[U]nyielding weighting in favor of Sabbath observers over all other

interests contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice.").

Thus, this Court has held that religious accommodations under general laws are consistent with the Establishment Clause only if, among other requirements, no third parties are unduly burdened. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), for example the Court concluded that the Establishment Clause did not forbid—and therefore that the Free Exercise Clause could (and did) require—a judicially created religious accommodation under a state unemployment-benefits law for an employee who was fired for refusing to work on her Sabbath. The Court based that conclusion in part on the fact that the requested accommodation would not "abridge any other person's religious liberties." *Id.* at 409. Similarly, in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court held that for statutory accommodations under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, to comport with the Establishment Clause, reviewing courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 544 U.S. at 720.[6]

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[6] Whether the Court applies this principle straightforwardly as an Establishment Clause limitation on the Free Exercise Clause, as *Weisman* specifies (see 505 U.S. at 587), or instead considers it in the application of strict scrutiny under petitioners' proffered alternative to the Court's free-exercise jurisprudence, the result here is the same: Because government has a compelling interest in avoiding Establishment Clause violations (*Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981)), and the narrowest and only practicable way to avoid the Establishment Clause violation in this case would be to deny the requested exemption outright (because even

2. By contrast, this Court has flatly refused to grant or uphold religious exemptions from general laws when those exemptions would have unduly burdened third parties. In *Caldor*, *supra*, the Court invalidated a law requiring employers to accommodate Sabbatarians in all instances, because "the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." 472 U.S. at 709. And in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), the Court held that a statutory sales-tax exemption for religious periodicals violated the Establishment Clause by shifting a greater tax burden onto other taxpayers. The Court explained that the exemption would have "burden[ed] nonbeneficiaries markedly" by "provid[ing] unjustifiable awards of assistance to religious organizations and [therefore could not] but convey a message of endorsement to slighted members of the community." *Id.* at 15 (internal quotation marks and brackets by Court omitted) (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the judgment)).

More recently, in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* See *Hobby Lobby*, 134 S. Ct. at 2760 ("Nor do we hold * * * that * * * corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general

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limiting the scope of the exemption to 'expressive' goods and services would violate the Establishment Clause by unduly burdening third parties), petitioners' claim fails on their own theory.

public to pick up the tab.'" (brackets omitted)); *id.* at 2781 n.37 ("It is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not "unduly restrict other persons * * * in protecting their own interests"); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) ("Accommodations to religious beliefs or observances * * * must not significantly impinge on the interests of third parties."); see also *Holt* v. *Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (Court's recognition of right to accommodation under RLUIPA was constitutionally permissible because "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

3. Eliding these Establishment Clause limitations, petitioners and many of their *amici* contend that bakers, florists, caterers, and presumably all other businesses that open their doors to the public should have a constitutional free-exercise right to refuse to serve same-sex couples on the same terms as other couples and individuals—regardless of whether the items being sold or the businesses in general have anything to do with weddings or the provision of wedding-related services. See, *e.g.*, Br. 38; Br. *Amici Curiae* C12 Group et al. 11–12.[7] That is discrimination, both in fact and as defined by Colorado law.

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[7] Petitioners do not present 'artistry' as a consideration in the free-exercise analysis, presumably because whether something is or isn't a religious exercise does not turn on whether it is artistic. Thus, on petitioners' view, *any* public accommodation

"Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (internal quotation marks omitted). Under the legal regime that petitioners posit, people like Charlie Craig and David Mullins would wake up each day knowing that, wherever they go, they may be turned away from public accommodations that deem them unfit to be served, and they would have no legal recourse as long as the denials were explained in religious terms. They "might be forced to pick their merchants carefully, like black families driving across the South half a century ago." Robin Fretwell Wilson &

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could deny *any* good or service to *anyone* on the basis of a religious belief or motivation.

Amici agree with respondents that the assertion of artistry also does not and cannot convert selling cakes into protected speech. If creativity or artistry in a commercial enterprise were sufficient to provide free-speech protections, nearly any business could claim the right to discriminate. A mechanic could describe himself as an automotive-repair artist; a landlord, a shelter-management artist; and a fast-food cook, a "sandwich artist." See, *e.g.*, Job Descriptions: Sandwich Artist, Subway, http://tinyurl.com/SubwayCareers ("The Sandwich Artist greets and serves guests, prepares food, maintains food safety and sanitation standards, and handles or processes light paperwork."). The legal regime proposed by petitioners would therefore license nearly boundless discrimination. At best, it would create a two-tiered system of rights and obligations, under which sellers of generic goods would have to comply with antidiscrimination laws while purveyors of specialty or custom products could discriminate at will—replacing modern antidiscrimination protections with a rule of 'separate and unequal.' Far from being required by the First Amendment, that scheme would stand constitutional protections on their head.

Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, ENGAGE, FEDERALIST SOCIETY PRACTICE GROUPS, Sept 2011, at 12, 16–17, https://tinyurl.com/y76yg4zr.

In *Lawrence*, *supra*, this Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral"; that "[t]he condemnation has been shaped by religious beliefs"; and that "[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." 539 U.S. at 571. Yet the Court flatly rejected the view that "the majority may use the power of the State [or the courts] to enforce these views on the whole society," because "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code.'" *Ibid.* (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 850 (1992)).

Here, petitioners request a constitutional permission slip to do under the Free Exercise Clause what this Court held in *Lawrence* is prohibited by the Due Process Clause. Their claim thus raises the same question as in *Lawrence*—and it warrants the same answer: Those who oppose marriage of same-sex couples are undeniably entitled to their beliefs, but they "may [not] use the power of the State to enforce these views on the whole society." 539 U.S. at 571. The right to believe, or not, and to practice one's faith, or not, is sacrosanct. But it does not extend to rewriting the laws to impose the burden of one's beliefs on innocent third parties. Government should not, and as a matter of law cannot, favor the particular religious beliefs of some at the expense of the rights, beliefs, and dignity of others. The Establishment Clause, like the Due

Process and Equal Protection Clauses, simply does not allow it.

II. PUBLIC-ACCOMMODATIONS LAWS SAFEGUARD RATHER THAN ERODE RELIGIOUS FREEDOM.

Far from offending religious freedom, public-accommodations laws like the Colorado Anti-Discrimination Act explicitly serve and advance that fundamental value. Title II of the Civil Rights Act, the public-accommodations laws of forty-five states and the District of Columbia, and countless local ordinances prohibit discrimination in the provision of goods or services on the basis of religion as well as forbidding various other categories of invidious discrimination. See, *e.g.*, *State Public Accommodation Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 13, 2016), http://tinyurl.com/ycy9eugt. These essential protections for religious freedom are threatened, not served, by petitioners' free-exercise claim.

A. Antidiscrimination laws protect religious freedom.

1. When Congress enacted Title II to bar discrimination in public accommodations, it included religion as a protected category. See 42 U.S.C. § 2000a(a). It did so to remedy the systematic refusals of service that it recognized to be occurring on the basis of religion as well as race. See, *e.g.*, 110 CONG. REC. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were "not allowed in certain hotels"); *A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 735 (1963) statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that in New

York "it has been traditional, among some of our resort places, to refuse to take members of the Jewish faith"). For example, Senate committee hearings included references to a hotel in New Hampshire that set aside specific weeks when it rented to Christians exclusively, and other weeks when it rented only to Jews. *Id.* at 780 (statement of Sen. Cotton). In other words, the hotel engaged in time-sharing to provide "equal but separate facilities" (*id.* at 1045), which Congress recognized to be a serious harm and a substantial barrier to full participation in civil society that warranted an equally serious and substantial federal remedy.

Title II, however, is limited both in the classifications for which it affords protections—race, color, religion, and national origin—and in the entities that it covers—hotels, rooming houses, restaurants, gas stations, and entertainment venues whose "operations affect [interstate] commerce." 42 U.S.C. § 2000a(b). To varying degrees, state and local public-accommodations laws fill the gaps in both respects. The Colorado Anti-Discrimination Act, for example, applies to *all* businesses in the state that sell goods or services to the public (COLO. REV. STAT. § 24-34-601(1)), and it bars discrimination on the basis of "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry" (*id.* § 24-34-602(2)(a)).

2. The "fundamental object of" all these laws is "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta*, 379 U.S. at 250; see also, *e.g.*, *Romer*, 517 U.S. at 631 (antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society"); *Gay*

Rights Coal. of Georgetown Univ. Law Ctr. v. *Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987) (D.C. Human Rights Act advances fundamental value "embodied in our Bill of Rights—the respect for individual dignity in a diverse population").

Hence, if businesses are granted a constitutional license to violate antidiscrimination laws whenever they have a religious motivation, not only will LGBTQ people suffer harm, but, as other *amici* explain in more detail (see generally, *e.g.*, Br. *Amicus Curiae* NAACP Legal Defense and Education Fund, Inc.; Br. *Amici Curiae* National Women's Law Center et al.; Br. *Amici Curiae* Muslim Advocates et al.; Br. *Amici Curiae* Former Representative Tony Coelho et al.), the religiously based animus that some people harbor toward racial minorities, women, unwed mothers, people with disabilities, and a wide array of other groups[8] would likewise receive legal sanction.

3. What is more, the case law shows, and *amici*'s organizational experience and the experiences of our members confirm, that disfavor toward, unequal treatment of, and denials of service to members of minority faiths, persons adhering to a different faith, and atheists are all too common. And religious discrimination, like other forms of discrimination, may

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[8] Cf., *e.g.*, *Smith* v. *Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 919 (Cal. 1996) (rejecting landlord's free-exercise defense and upholding enforcement of law barring discrimination against unmarried couples in rental housing); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279 (Alaska 1994) (same); *Lukaszewski* v. *Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (rejecting religiously affiliated hospital's free-exercise defense and upholding enforcement of federal Age Discrimination in Employment Act).

be, and often is, premised on religious views or motivations. Hence, petitioners' arguments for a religious exemption permitting denials of service to same-sex couples could also be advanced to support denials of service to people of marginalized faiths.

In *Paletz* v. *Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. 2014), for example, a Muslim hotel owner in Santa Monica, California, ordered the closing of a poolside event hosted by a Jewish group. After looking at a pamphlet describing the group and seeing attendees at the event wearing T-shirts bearing the group's name, the hotelier told an employee that "I don't want any [f—ing] Jews in the pool" (*id* at *2 (alteration in original)), said that "her family members would cut off her financing if they learned of the gathering" (Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. TIMES (Aug. 15, 2012), http://tinyurl.com/9myoenc), and directed hotel staff forcibly to remove the Jewish guests from the property (2014 WL 7402324 at *4). A jury found that the hotelier violated the California public-accommodations law and awarded damages. See Cieply, *supra*.

In *Khedr* v. *IHOP Restaurants, LLC*, 197 F. Supp. 3d 384, 385 (D. Conn. 2016), a family was refused service at an International House of Pancakes in Connecticut for being Muslim: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Ibid.* In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Ibid.* The family sued under the Connecticut public-accommodations law, and the court denied IHOP's motion to dismiss, concluding that the incident was, at the very

least, "suggestive of discriminatory motive." *Id.* at 388.

In Arkansas, a shooting range declared itself a "Muslim-free zone." Abby Ohlheiser, *Justice Department Will 'Monitor' the 'Muslim-Free' Gun Range in Arkansas*, WASH. POST (Apr. 24, 2015), http://tinyurl.com/yc4fdjzu. And it refused to allow a Hindu father and son of South Asian descent to use the range, erroneously assuming that they were Muslims. *Id.*; see also Complaint ¶¶ 24, 32, 34, *Fatihah* v. *Neal*, No. 6:16-cv-00058-KEW (E.D. Okla. Feb. 17, 2016), http://tinyurl.com/ycgey87l (alleging that range owners posted sign declaring facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the facility, and accused him of wanting to murder them because "[his] Sharia law required" it); see also Steven Cook, *Gun Shop Says it Won't Sell to Muslims*, DAILY GAZETTE (July 31, 2015), http://tinyurl.com/y7m6nywk (sporting-goods retailer in New York adopted policy of not selling guns to Muslims, "since I cannot tell a radical Muslim * * * from the 6 non radical Muslims left in the world").

And petitioners themselves choose whom to serve and whom to turn away based on their religious objections to the religious beliefs and practices of would-be customers: Petitioners state (at Br. 9) that they will not sell cakes that "promote atheism" or "celebrate events at odds with [their] religious beliefs." To the extent that petitioners thus refuse to sell to people of other faiths or of no faith the items that they would sell to coreligionists (*e.g.*, a cake for a Hindu or atheist couple's wedding), this conduct, too, violates the Colorado Anti-Discrimination Act.

4. In the related area of employment law, incidents of religious discrimination premised on employers' or fellow employees' religious beliefs are legion.

In *Nappi* v. *Holland Christian Home Ass'n.*, No. 11-cv-2832, 2015 WL 5023007 (D.N.J. Aug. 21, 2015), for example, a Catholic maintenance worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. They called Catholicism a "'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor terminated the plaintiff's employment, explaining that "he was being fired because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'" *Id.* at *3. The district court denied summary judgment to the business, concluding that the record evidence "clearly [gave] rise to an inference of discrimination" under Title VII. *Id.* at *8.

In *E.E.O.C.* v. *Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), an atheist was constructively discharged from his job at a mining-equipment manufacturer in California that held mandatory weekly meetings involving "prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters." *Id.* at 612. The court of appeals rejected the free-exercise defense of the company's owners "that the Bible and their covenant with God require[d] them to share the Gospel with all of their employees" (*id.* at 620), concluding that "[p]rotecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination" (*id.* at 620–621).

In *Huri* v. *Office of the Chief Judge of the Circuit Court*, 804 F.3d 826 (7th Cir. 2015), a Muslim child-care attendant who wore a hijab was harassed by her Christian supervisor in a county court in Illinois. The supervisor called the employee "evil," while describing herself, the chief judge, and another court employee as "good Christian[s]" (*id.* at 830); denied the employee time off for an Islamic religious holiday (*ibid.*); and engaged in "social shunning, implicit criticism of non-Christians, and uniquely bad treatment of" the employee and her daughter (*id.* at 834). The court of appeals reversed the district court's dismissal of the employee's hostile-work-environment claims under Title VII and the Equal Protection Clause.

And in *Minnesota ex rel. McClure* v. *Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), a health club allowed "only born-again Christians * * * to be managers or assistant managers"; "question[ed] prospective employees about marital status and religion; terminat[ed] employees because of a difference in religious beliefs; refus[ed] to promote employees because of differing religious beliefs; and fail[ed] to provide 'open' public accommodations." *Id.* at 846–847. Job "applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell, and other questions of a religious nature," in keeping with the gym owners' "fundamentalist religious convictions [that] require[d] them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives." *Ibid.* "[B]ased on an interpretation of the Bible, [the gym] w[ould] not hire, and w[ould] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or

a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to *Galations* 5:19-21 includes fornicators and homosexuals." *Id.* at 847. The gym "justifie[d its] rigid policy by relying on [the owners'] religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.'" *Ibid.* The Minnesota Supreme Court denied the gym a free-exercise exemption from state antidiscrimination laws and affirmed findings of substantial evidence of the statutory violations. *Id.* at 854.

5. Incidents like these of discrimination on the basis of religion are often open and notorious. In Colorado, where petitioners are located, for example, employers—including law firms, accounting firms, and cleaning companies—post job descriptions specifically advertising for Christian employees, in violation of Title VII and EEOC guidelines. See Matthew J. Cron et al., *Religious Minorities Need Not Apply: Legal Implications of Faith-Based Employment Advertising*, COLO. LAWYER, Apr. 2014, at 27, 27–28, http://tinyurl.com/yd2wv5m6. And the incidence of discrimination appears to be on the rise: "Religion-based discrimination charges filed with the EEOC have more than doubled in the past fifteen years." *Id.* at 29.

That religious discrimination against customers and employees may be premised on the religious beliefs of business owners has not deterred the lower courts from concluding that antidiscrimination laws ought to be enforced. Neither should it deter this Court.

B. Recognizing petitioners' requested exemption would undermine religious freedom.

"Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment). Yet that would be the precise effect of recognizing constitutionally mandated exemptions from laws requiring equal treatment in the provision of goods and services, based on religiously motivated objections to other people or their faith. The exemptions would thus compromise the integrity of the public-accommodations laws, which embody and advance the government's keen interests not only in stamping out discrimination but also in avoiding "put[ting] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied" (*Obergefell*, 135 S. Ct. at 2602).[9]

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[9] When government has forsaken this latter interest and instead adopted policies approving of or supporting the underlying discrimination, it has compounded the stigmatic harm. And when courts have done so in the name of religion, the effect has, if anything, been even more pronounced. For example, the Missouri Supreme Court once proclaimed that "the introduction of slavery amongst us was, in the providence of God, * * * a means of placing that unhappy race within the pale of civilized nations." *Scott* v. *Emerson*, 15 Mo. 576, 587 (1852). The Pennsylvania Supreme Court similarly upheld segregation, believing that it was bound to "follow the law of races established by the Creator himself." *W. Chester & Phila. R.R. Co.* v. *Miles*, 55 Pa. 209, 213 (1867). So did the Supreme Courts of Kentucky, Alabama, and Indiana. See *Berea Coll.* v. *Kentucky*, 94 S.W. 623, 627–628 (Ky. 1906); *Bowie* v. *Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1019–1020 (Ala. 1900); *Indiana* v. *Gibson*, 36 Ind. 389, 405 (1871). And

Though petitioners seek to downplay or deny the harms to LGBTQ individuals and same-sex couples and do not acknowledge the parallel risks to members of minority faiths and other historically disadvantaged groups, there is no logical limit to the exemption that petitioners seek. The basic structure of their argument is that, because they disapprove of Craig, Mullins, and the couple's marriage based on petitioners' own religious views, they have the absolute right under the Free Exercise Clause to refuse service, all antidiscrimination laws to the contrary notwithstanding.

That argument is as expansive as it is troubling. For even if petitioners might limit their religiously based denials of service solely to the weddings of same-sex couples—though their opening brief (at 9) says otherwise—their argument, if accepted, would also apply to other religiously motivated denials of service, including discrimination against people of a particular race, religion, national origin, sex, or any other protected characteristic. For on petitioners' view, any business may refuse to serve anyone who "celebrate[s] events at odds with [the merchant's] religious beliefs." Br. 9. The "danger of stigma and

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not so long ago, a Virginia court upheld the State's criminalization of interracial marriages because "'[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents[, a]nd but for the interference with his arrangement there would be no cause for such marriages.'" *Loving* v. *Virginia*, 388 U.S. 1, 3 (1967) (quoting trial judge) (reversing state-court rulings and invalidating antimiscegenation law as violation of equal protection). Those decisions did not just passively allow for discrimination to continue; they justified and thereby encouraged it.

stirred animosities" (*Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment)) is profound.

And petitioners' justification (at Br. 52–53) of their disparate treatment toward Craig and Mullins as based on the couple's conduct in marrying rather than their status as gay men should also fail. For when "the conduct targeted * * * is conduct that is closely correlated with being" a member of a marginalized group, the object of the discrimination is not just the conduct but the "persons as a class." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment).

In the wedding context, suppose that an interfaith couple wishes to marry, and in keeping with the religion of one, the couple plans to serve kosher (or halal) food. But the only kosher (or halal) caterers in town refuse to prepare food for interfaith weddings based on their religious beliefs. Should the caterers have the right, even in the face of public-accommodations protections against religious discrimination, to force the couple to choose between forgoing their wedding reception altogether, on the one hand, or violating the sincere beliefs of one of them in the celebration of their wedding, on the other?

And what of the children who are part of a family that, in the opinion of any number of business owners, should not exist because the parents are of different faiths or were married within a faith that the merchants find offensive or contrary to their own religious beliefs? Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah?

More broadly, may the local movie theater refuse to sell a ticket to a boy in a yarmulke because his faith

is "at odds with" that of the manager? May a restaurant deny service to a Muslim woman who wears a Hijab or a Sikh man who wears a Turban? May the only grocer in town refuse to sell fruit to an unmarried mother and her child? And what about the recently widowed Catholic whose Protestant spouse wanted a Protestant funeral. May she be barred from all the nearby funeral homes on account of *her* faith, so that she is unable to find a place to honor and say goodbye to her spouse in accordance with the dictates of her beloved's faith?

* * *

If the Free Exercise Clause licensed religiously motivated denials of service to same-sex couples, as petitioners contend, then it would appear to sanction and authorize all other religiously motivated denials, including exclusions based on the customers' faith, in just the same way. One could be refused employment, thrown out of a hotel, or barred from purchasing a cup of coffee just for being of the 'wrong' religion (or race, or sex, or sexual orientation), and no federal, state, or local authority or law could do anything to remedy the situation. Not only would that outcome be the antithesis of religious freedom, but it would also foment civic "divisiveness based upon religion that promotes social conflict"—the very evil that the Religion Clauses of the First Amendment were designed to forestall. *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment). The fundamental principle of equal treatment under law—which is as central to the prohibitions against discrimination of the Religion Clauses as it is to those of the Due Process and Equal Protection Clauses—should not be so easily overthrown.

CONCLUSION

The judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by this Court and by the lower federal and state courts throughout the country. Americans United has long fought to uphold the guarantees of the First Amendment and equal protection that government must not favor, disfavor, or punish based on religion or belief, and therefore that religious accommodations must not license maltreatment of, or otherwise detrimentally affect, innocent third parties.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast supporter of antidiscrimination laws as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free

Exercise Clause is a critical means to protect individual religious exercise, but it must not be used as vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice

Bend the Arc is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Fairness West Virginia

Fairness West Virginia, founded in 2009, is a statewide civil-rights advocacy organization dedicated to fair treatment and civil rights for lesbian, gay, bisexual and transgender West Virginians. Our mission is to ensure that LGBTQ people can be open, honest, and safe at home, at work, and in the community. Our organization of more than 14,000 supporters and volunteers is open to everyone who believes in fundamental fairness. Discrimination of any kind runs counter to our principles. We believe that the constitutional protections for religious freedom serve to safeguard against discrimination, not to facilitate it. We join this brief because the petitioners seek a broad-based license to discriminate against the LGBTQ community, thus threatening to undermine the record number of municipal nondiscrimination ordinances recently adopted in West Virginia.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc., is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition." Consistent with our Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that the Free Exercise Clause of the First Amendment is a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to obtain accommodations that unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to obtain exemptions based on religion from antidiscrimination laws, which protect against discrimination based on race, gender, sexual orientation, and other grounds, and which are also an important protection for religious free exercise.