No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, *et al.*,

Respondents.

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

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND 35 ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights and opportunities of women and girls, and all who are harmed by sex discrimination. Since its founding in 1972, NWLC has focused on issues of importance to women and girls in aspects including income security, employment, education, and reproductive rights and health, with an emphasis on the needs of low-income women, women of color, and others who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or *amicus curiae* in a range of cases before this Court to secure the rights of women and others facing discrimination.

This brief is submitted on behalf of NWLC and the 35 additional organizations listed in the Appendix in support of Respondent, City of Philadelphia, and Intervenor-Respondents, Support Center for Child Advocates and Philadelphia Family Pride. NWLC and additional *amici curiae* are organizations committed to gender justice. *Amici* have a particular interest in this case because the arguments advanced by Petitioners are similar to arguments that have been made in attempts to justify discrimination against women, and if imported into the First Amendment could have significantly harmful

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief.

consequences in education, the workplace, health care, and public accommodations. *Amici* respectfully submit that their perspectives as organizations that address sex discrimination, and the examples of potential harms described herein, may assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Petitioners argue that a taxpayer-funded agency that provides foster care services should not have to adhere to its contractual agreements to comply with anti-discrimination provisions if it has religious objections to providing services to same-sex families. If this Court accepts the position that those who object to non-discrimination requirements are shielded from compliance by the First Amendment's free exercise or free speech clauses, it will expose women and girls to the risk of greater discrimination in all aspects of their lives, as detailed herein, particularly because sex discrimination is often rooted in religious beliefs.

There are more than 5,000 children under the care of the City of Philadelphia ("City"). For many years, the contracts the City entered into with private agencies to assist with foster care services have incorporated the Philadelphia Fair Practices Ordinance[2] ("Ordinance"), which prohibits discrimination based on certain characteristics. These characteristics currently include sex, sexual orientation, and gender identity. Accordingly, the City has not allowed and does not allow contractors to turn away potential foster parents based

2. Philadelphia, Pa., Code Ch. 9-1100.

on a prohibited classification. These terms are neutral on their face and generally applicable to all taxpayer-funded foster-care agencies, regardless of any religious tenets an agency may hold. Even though this policy applies to *all* City contractors, Petitioner Catholic Social Services ("CSS"), challenges the City's decision to require compliance with the nondiscrimination requirement.[3] As a taxpayer-funded foster care agency, CSS seeks to both receive City funds to provide services for potential foster care families, and reject same-sex couples in defiance of the anti-discrimination terms of the agency contracts.

CSS is asking for an exception from a neutral and generally applicable law, and arguing that the Court should reverse its long-standing precedent in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) ("*Smith*"). In *Smith*, this Court held that the First Amendment does not require strict scrutiny when weighing the burden placed on the free exercise of religion by neutral and generally applicable laws. Advocating for a reversal of *Smith*, and applying a strict scrutiny standard, CSS argues that the City does not have a compelling interest in applying the anti-discrimination provision or, alternatively, any such interest is outweighed by the claimed burden on CSS's religious beliefs. The Court should reject this request and uphold the sound logic of *Smith* to ensure the myriad civil

3. Many of the other 30 agencies with whom the City contracts are also religiously affiliated and yet comply with the term prohibiting discrimination against same-sex families. There is no shortage of potential service-providers; the City's concern is harm posed to children by the shortage of foster parents with whom they can be placed, reinforcing its interest in not permitting discrimination by its contracted providers.

rights protections, including the ones at issue here, remain in place. Reversing *Smith* could invite entities to bring legal challenges seeking an evisceration of otherwise neutral and generally applicable anti-discrimination laws, potentially resulting in a host of pervasive harms to women.

While *amici* strongly urge against overturning *Smith*, *amici* also note that even under a strict scrutiny standard, the City has a compelling interest in addressing discrimination, thus justifying burdens on the free exercise of religion.[4] Indeed, as set forth herein, one way this is demonstrated is through the range of civil rights laws that seek to address sex discrimination. This interest is further heightened when it comes to actors performing a public function, such as promoting the care of children in the foster care system, under the City's responsibility, using public funds. The City's ability to impose general conditions on the receipt of public funds for City services is well established under this Court's jurisprudence. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013). The City's generally applicable terms for voluntary contracts—involving City funds and City programs, not to mention core governmental functions—must prevail against Petitioners' claims.

Amici submit this brief to highlight some of the ways in which a ruling in favor of Petitioners could broadly undermine the City's interest by threatening further sex discrimination against women. By detailing

4. *Amici* join Intervenor-Respondents' request that if this Court were to reverse *Smith*, it remand the matter so the record could be more fully developed in line with those new standards.

examples of sex discrimination in a variety of contexts, this brief shows: (1) that reversing *Smith* could threaten further sex discrimination, and (2) that prohibiting sex discrimination is a compelling state interest and thus the anti-discrimination provision survives even strict scrutiny. *Amici* provide an overview of how religion has been invoked to attempt to justify discrimination against women in education, in the workplace, in health care, and in access to public spaces, underscoring how a license to discriminate by government contractors could risk harming women on the basis of sex (including sexual orientation and gender identity), as well as based on other identities. As such, *amici* also join the arguments in other amicus briefs in this matter highlighting the increased threats to discrimination including based on race, national origin, age, disability, gender identity, and sexual orientation.[5] The painful history of discrimination women faced, and the ongoing threats of this discrimination, cause significant concern about the ruling Petitioners seek—a purported Constitutional right to opt out of non-discrimination requirements based on religious objections.

5. This includes the amicus brief focusing on race discrimination, including as faced by LGBTQ+ people of color, led by the Leadership Conference on Civil and Human Rights and the Lawyers' Committee for Civil Rights Under Law.

ARGUMENT

I. The First Amendment Does Not Shield Contractors Hired By The Government From Compliance With Neutral And Generally Applicable Laws That Protect Equal Access To Services.

This Court's longstanding precedent in *Smith* correctly holds that the First Amendment does not permit religious actors to defy neutral, generally applicable laws. Prior to *Smith*, when determining whether neutral and generally applicable government actions violated the Free Exercise Clause of the First Amendment, this Court looked at whether the action imposed a substantial burden on the practice of religion, and if so, whether there was a compelling government interest for the action. *Sherbert v. Verner*, 374 U.S. 398, 408–09 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 210–11 (1972). In *Smith*, this balancing test was rejected when the Court concluded that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. 494 U.S. at 888. To hold otherwise would, according to the late Justice Scalia, "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 888. Indeed, the very rule of law would be at stake if the government's ability to enforce generally applicable prohibitions of socially harmful conduct depended on measuring the effects of a government action on a religious objector's beliefs. *Id.* at 885. Justice Scalia warned that to "make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling – permitting him, by virtue of his beliefs, *to become a law*

unto himself, contradicts both constitutional tradition and common sense." *Id.* (internal citations and quotations omitted) (emphasis added).

Petitioners nevertheless argue that the Court should overturn *Smith* and import a strict scrutiny standard into the First Amendment's Free Exercise Clause.[6] To the extent that Petitioners seek to adopt the standard used in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, context, that requires "a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest"—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Not only would adopting this standard to be constitutionally mandated threaten the rule of law itself, but as this Court previously noted, the least-restrictive means requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Id.* at 535. Moreover, because the First Amendment, unlike RFRA, governs state action, *see id.*, injecting RFRA's strict scrutiny standard into the Constitution would jeopardize the efforts of state and local governments to prohibit discrimination and protect the public health and welfare. For the reasons set forth below, importing this standard into the Free Exercise Clause could have severely harmful consequences for women and girls. Petitioners' invitation to do so must be rejected by this Court.

This Court's ruling in *Smith* ensures that otherwise neutral and generally applicable anti-discrimination laws

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6. Brief of Petitioners, *Fulton v. City of Philadelphia*, No. 19-123 at 50.

and contractual terms are not threatened by an onslaught of claims under the First Amendment. Here, Philadelphia requires that all City contracts contain a provision that prohibits contractors from discriminating (or permitting discrimination) against, *inter alia*, "any person because of . . . sex, gender identity, [or] sexual orientation" in the performance of the contract. Philadelphia Home Rule Charter § 8-200(2)(d). This provision was added to protect against invidious discrimination in government-funded programs. It is similar to ordinances and policies adopted by other local governments[7] and consistent with federal nondiscrimination laws. It also embodies the spirit of Article I, § 28 of the Pennsylvania Constitution, which states "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Our nation has provided such protections at the local, state, and federal level—both statutory and constitutional—because these rights are fundamental to the ability of all people to live and work free from discrimination.

Overruling *Smith* would invite a flood of challenges to anti-discrimination protections. While prohibiting sex discrimination is a compelling interest, discussed *infra*, the risk of inconsistent balancing by courts throughout the country could have a significant detrimental impact on anti-discrimination protections that have long been part of the social and legal fabric of this country, including the Equal Pay Act of 1963, which requires equal pay

7. *See, e.g.*, Austin, Tex., Code Ch. 5-4 (2020); Seattle, Wash., Code Ch. 14.10 & 20.42 (2004); *see also* Tampa, Fla., Code Ch. 12, §10.03 (2018); San Francisco, Cal., Admin. Code Ch. 12B; Ann Arbor, Mich., Code §§9:150, 158; Little Rock, Ark., Code §2-2; Dayton, Ohio, Code §35.36.

for equal work, Title VII of the 1964 Civil Rights Act, which forbids sex and other forms of discrimination in employment, Title VIII of the 1964 Civil Rights Act and the Fair Housing Act, and the Equal Credit Opportunity Act of 1974. Reversing *Smith* could have a significant impact on antidiscrimination protections that apply to federally funded programs, including Title IX of the Education Amendments Act of 1972, which forbids sex discrimination in any educational program or activity that receives federal funds, and Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of sex in federally funded health programs and activities (42 U.S.C. §§ 295m, 296g, & 18116).

Additionally, even if this Court overturned *Smith*, Petitioners would not be entitled to the sought relief because preventing sex discrimination, including sexual orientation discrimination, is a compelling interest outweighing any burden they might allege. *See Bd. Of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing the "State's compelling interest in eliminating discrimination against women"); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (state law forbidding gender discrimination in public accommodations did not unconstitutionally burden First Amendment right of expressive association because it forwarded a compelling state interest); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741, 1747 (2020) (discrimination based on sexual orientation or gender identity necessarily involves discrimination because of sex). Enacting protections against sex discrimination through contractual and other anti-discrimination provisions is the least restrictive

means of meeting this goal.[8] This Court recognized in *Jaycees* that removing the barriers to economic advancement and political and social integration that have "historically plagued certain disadvantaged groups, including women," and assuring "women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Roberts*, 468 U.S. at 626; *U.S. v. Virginia*, 518 U.S. 515, 532 (1996) (noting fundamental principles are violated when "women, simply because they are women" are denied the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities").

This interest is all the more important in the context of the stewardship of public funds. Forty-five states and D.C. have enacted laws that prohibit sex discrimination in the provision of publicly available goods and services, many of which cover taxpayer-funded foster care agencies.[9] Twenty-five of those states and D.C. also explicitly prohibit discrimination based on sexual orientation in the provision

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8. *See Fulton v. City of Philadelphia*, 922 F.3d 140, 163 (3d Cir. 2019); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 594 (6th Cir. 2018).

9. *See Jaycees*, 468 U.S. at 624 (many states "progressively broadened the scope of . . . public accommodations law . . . both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden."); *see generally* Nat'l Conf. of State Legislatures, State Pub. Accommodation Laws, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws ("NCSL Chart"); *see* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Pub. Places: A Survey of State and Fed. Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 238–72 (1978) ("NYU Survey").

of publicly available goods and services.[10] Numerous local governments, like the Philadelphia City Council, have adopted similar ordinances to protect women and others facing discrimination, including LGBTQ+ people.[11] CSS is a voluntary government contractor and is engaged in services to support the City's foster care program. This public function cannot be a context where invidious discrimination is permitted, especially since CSS agreed to and executed a contract whose terms incorporated non-discrimination provisions as a condition of being granted millions of dollars in public funds.

This Court recently reaffirmed its North Star—the importance of *stare decisis*. *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2134-35 (2020) (Roberts, J., concurring). As noted above and catalogued below, reversing *Smith* would come at a great cost, subjecting non-discrimination civil rights protections to multiple challenges across the country, sowing uncertainty, and creating harm and burden both on the courts and all those seeking anti-discrimination protections. But even if *Smith* were to be reversed, the contract that CSS entered into with the City should still be enforced, because preventing sex discrimination is a compelling state interest.

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10. *See* NCSL Chart, *supra* note 9.

11. *See, e.g.*, Pittsburgh, Pa., Code Ch. 651 (2020); Borough of West Chester, Pa., Code Ch. 37A (2006); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 765–66 (8th Cir. 2019) (Kelly, J., concurring) ("Approximately half the states in the Union, along with the District of Columbia provide similar protections [in places of public accommodation]. In the remaining states, more than 100 local jurisdictions have adopted laws or ordinances prohibiting discrimination on the basis of sexual orientation in places of public accommodation.").

II. Widening The Availability Of Non-Compliance With Neutral And Generally Applicable Laws, Including By Entities Claiming Religious Objections, Could Threaten Non-Discrimination Laws And The Rights And Well-Being Of Women And Girls.

Women and girls face sex discrimination in all areas of life, including in education, employment, accessing health care, and public accommodations. The examples of discrimination below highlight why reversing *Smith* could be dangerous for women, and that the City has a compelling interest in preventing discrimination, even where said discrimination is based on an entity's stated religious belief.

Religious beliefs about the roles of women in society, or the morality of a woman's decisions about her private life—including decisions about how to dress, look, and behave; whether and whom to marry; and whether, when, and how to have children and related caregiving decisions—have frequently been invoked to defend sex discrimination. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). As this Court recognized, this country's "long and unfortunate history of sex discrimination" "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* This discriminatory attitude was often defended by religious beliefs; even a justice of this Court wrote:

> Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family

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

Id. at 684–85 (quoting *Bradwell v. Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) (emphasis added)).[12]

While this nation has enacted laws at the federal, state, and local levels to address sex discrimination—reflecting that creating schools, workplaces, healthcare, and public accommodations free from sex discrimination is a compelling state interest and would thus survive strict scrutiny—these kinds of attitudes, often tied to religious views, continue to inflict harm in all these arenas.

12. *See, e.g.*, Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. Pa. J. Const. L. 587, 607 (2011) (sex stereotypes and traditional gender roles in public school sex education curricula are "likely due in large part to the religious beliefs that motivate many of the curricula").

A. Women and Girls Face Discrimination In Access To Education.

Discrimination against women and girls in education has a long history, often couched in religious arguments about the proper place of women. Such views about women are exemplified by the following quote from an influential physician of his time: "'[I]dentical education of the two sexes is a crime before God and humanity...'" *U.S. v. Virginia*, 518 U.S. 515, 536–37 n.9 (1996) (quoting E. Clarke, Sex in Education 127 (1873)). As shown below, attitudes about gender roles, often entwined with religious beliefs, have been used to enforce harmful limitations on women's and girls' access to education.

Women and girls have faced open and notorious discrimination in accessing education. In the 1960s, many academic programs had quotas on the number of women admitted, with some reputable professional programs capping the number of women at one or two.[13] Up until 1970, the University of Virginia at Charlottesville barred nearly all women from attending. *See Kirstein v. Rector and Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (concluding it violates the Equal Protection Clause to restrict women from the university). In some colleges, women were barred from certain majors and departments.[14] Women's education was considered appropriate in only limited areas. As late as 1982, this Court struck down an admissions policy at a public nursing college where the original charter justified limiting the breadth of women's

13. *See* Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 Clev. St. L. Rev. 473 (2007).

14. *Id.* at 474.

study in furtherance of the "moral and intellectual advancement" of women. *See Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 720 n.1 (1982). Discrimination against women in college athletics was particularly rampant, with schools providing very few opportunities for women to play sports and almost no resources to women's teams.[15] The historical discrimination against women and girls in education reflected societal beliefs that higher education "was considered dangerous for women" reflecting sexist views about the inferiority and subordination of women. *Virginia*, 518 U.S. at 536–37 n.9 (describing view that higher education was unhealthy for women and contrary to nature).

Much of the discrimination against women and girls in education is rooted in narrow views of the roles of women, and is often defended on religious grounds. These discriminatory religious views persist in some educational institutions. Research indicates that:

> Fundamentalist schools deliberately and systematically inculcate in their students the belief that females are inferior to males, that a woman's only purpose in life is to serve a husband and raise children, and that only men should pursue careers outside the home, become active in public affairs and leaders of their community, or even assert opinions about matters beyond home life. To think otherwise is sinful: sexual equality denies God's word.[16]

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15. *Id.* at 480–81.

16. Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10

Schools continue to invoke religious beliefs in attempts to justify disciplining female students, including pregnant and parenting students. A student at a Christian school in Maryland was banned from her graduation ceremony and removed from student leadership positions after the school learned she was pregnant.[17] Even when religion is not invoked directly, girls face discrimination in education based on "traditional values." For example, a charter school in North Carolina recently tried to require girls to wear skirts while allowing boys to wear shorts and pants, arguing that the requirement "helps the students to act more appropriately toward the opposite sex." *Peltier v. Charter Day Sch., Inc.,* 384 F. Supp. 3d 579, 586, 596 (E.D.N.C. 2009) (internal citations omitted).

Congress began to address sex discrimination in schools with the passage of Title IX of the Education Amendments of 1972. Title IX provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity

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Wm. & Mary J. Women & L. 459, 526 (2004) (quoting James G. Dwyer, *Religious Schools v. Children's Rights* 39 (1998)).

17. Madeline Runkles, *I Got Pregnant. I Chose to Keep My Baby. And My Christian School Humiliated Me*, Washington Post (June 1, 2017), *available at* https://www.washingtonpost.com/posteverything/wp/2017/06/01/i-got-pregnant-i-chose-to-keep-my-baby-and-my-christian-school-humiliated-me; Joe Heim, *Christian School: Teen Banned From Graduation 'Not Because She is Pregnant but Because She Was Immoral'*, Washington Post (May 24, 2017), *available at* https://www.washingtonpost.com/local/education/a-christian-school-rejects-calls-to-let-pregnant-senior-attend-graduation/2017/05/24/5b798cbc-4090-11e7-9869-bac8b446820a_story.html.

receiving Federal financial assistance." 20 U.S.C. § 1681. Similar laws have been enacted in various states.[18] Title IX was passed with the intent to remedy "discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes." *See N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 525 (1982) (quoting statement of Title IX sponsor, Senator Birch Bayh, from the Congressional Record). Title IX and similar state laws make clear that women and girls face ongoing discrimination in access to education and eliminating sex discrimination in this context is a compelling state interest.[19]

A ruling for Petitioners in this case could invite challenges by entities claiming religious objections to these hard-won protections against discrimination in education for women and girls under Title IX and other such federal, state, and local laws.

B. Women Face Discrimination In Employment And The Broader Economic Marketplace.

Women have been, and continue to be, subjected to sex discrimination in employment, often in the name of religious beliefs. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (upholding legislation limiting women's work hours because "woman has always been dependent

18. *See, e.g.*, Cal. Educ. Code §66270; N.Y. Exec Law §296(4).

19. Title IX already contains an exception for religious educational organizations where "the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. §1681(3).

upon man . . . [and] in the struggle for subsistence, . . . is not an equal competitor with her brother"); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (relying on beliefs about a woman's proper role in society to uphold employment laws discriminating against women). In the workplace, religious views about a woman's decisions about her private life have frequently been put forward to defend discrimination.

Employers have cited religion in attempting to justify discriminatory treatment in pay and benefits. In *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), a religious school provided health insurance only to employees who were the "head of household," defined to be married men and single persons, due to its religious belief that a woman cannot be the "head of household." *Id.* at 1364 (affirming ruling in favor of the EEOC "[b]ecause of the existence of a strong compelling state interest in eradicating discrimination"). In addition, in *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982), a non-profit religious publishing house paid its employees in accordance with written wage scales under which married men received a higher rental allowance than single men, who in turn, received more than female employees regardless of their marital status. *Id.* at 1275. The Ninth Circuit affirmed the district court, finding the employer had discriminated against the employee and noted "the government's compelling interest in assuring equal employment opportunities." *Id*. at 1279–80.[20] These

20. *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990) (religious school's failure to provide female teachers with "head-of-household" salary supplements received by their married male counterparts violated the Fair Labor Standards Act ("FLSA") and application of the FLSA did not violate the First or Fifth Amendments).

detrimental beliefs about women and their entitlement to equal pay continue to permeate throughout society. Women working full-time year-round are typically paid only 82 cents for every dollar paid to their male counterparts.[21] Returning to a pre-*Smith* legal landscape in which entities could raise religious objections in their attempts to justify further discrimination against women would threaten to increase these forms of sex discrimination.

Women also continue to face discrimination in the workplace based on their decisions about whether, when, and how to start a family, often motivated by explicit and implicit religiously influenced stereotypes about pregnancy, working women,[22] and mothers. For example, employers who fail to provide reasonable accommodations for pregnant workers or force employees take leave while pregnant may be driven by "traditional" or religious views on the role of mothers. Not only are the policies discriminatory, women face the compounded harm of losing out on promotional or advancement opportunities when they are temporarily pushed out of the workforce.[23]

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21. Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why, and What To Do* (Sept. 27, 2019), *available at* https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/.

22. *See Torres v. Carter et al.*, No. 5:19-cv-00327-FL (E.D.N.C. July 31, 2019) at ECF No. 1, Complaint (male police deputy brought a discrimination lawsuit after he was fired for refusing to train a female deputy, claiming being alone with a female who is not his wife was against his religious values invoking the so-called "Bill Graham Rule").

23. *See* Cynthia Thomas Calvert, *The Center for WorkLife Law, Family Responsibilities Discrimination: Litigation Update 2010*, *available at* https://worklifelaw.org/publications/FRDupdate.pdf.

Some employers have cited religious beliefs to justify their discrimination against female employees who become pregnant when they are not married. *See, e.g.*, *Avery v. Homewood City Bd. of Ed.*, 674 F.2d 337, 342 (5th Cir. 1982) (defendant's discharge of a teacher for "immorality" by becoming pregnant out of wedlock violated the Equal Protection clause of the Fourteenth Amendment); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998).[24]

Employers also cite to religion when discriminating against employees for obtaining fertility treatment. *See Hall v. Nalco Co.*, 534 F.3d 644, 648–49 (7th Cir. 2008) (plaintiff who was terminated for taking time off to undergo in vitro fertilization (IVF) stated cognizable claim of sex discrimination under Title VII); *Ciocca v. Heidrick & Struggles, Inc.*, No. CV 17-5222, 2018 WL 2298498, at *3-4 (E.D. Pa. May 21, 2018) (holding that plaintiff adequately pleaded sex discrimination and hostile work environment claims under Title VII due to adverse treatment after receiving IVF). Women also face discrimination for having an abortion, even though courts have repeatedly held that "the plain language of [Title VII], the legislative history and the EEOC guidelines clearly indicate that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion." *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (internal quotation marks omitted); *see Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d

24. The rule Petitioners argue for would sweep far more broadly than the ministerial exemption as recently addressed by the Court and reach organizations not affiliated with religious entities and treatment of employees who lack any religious duties.

358, 364 (3d Cir. 2008), *order clarified*, 543 F.3d 178 (3d Cir. 2008); *Ducharme v. Crescent City Deja Vu, L.L.C.*, 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (holding that "Title VII as amended by the Pregnancy Discrimination Act extends to abortions"; dismissing on other grounds).

Women with children suffer widespread discrimination in the workplace, including based on employers' views concerning motherhood. *See, e.g.*, *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (affirming verdict in favor of an employee when the decision maker admitted he did not promote plaintiff "because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that"); *Chadwick v. WellPoint*, 561 F.3d 38, 47–8 (1st Cir. 2009) (finding that a woman with four children presented evidence of sex discrimination when she was denied a promotion because her supervisors assumed that she had "a lot on [her] plate").

These same discriminatory attitudes, often cloaked in religious beliefs, limit women's economic opportunities outside the workplace. Women, for example, historically have been unable to obtain equal access to credit, including mortgage financing, because married women often lacked an independent economic identity separate from their husbands.[25] As a result of these types of engrained

25. *Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 569 (D.C. Cir. 1979) ("purpose of the act was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit"); *Obergefell v. Hodges*, 576 U.S. 644, 660 (2015) ("[U]nder the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.").

attitudes about women's "unsuitability" for participation in the public sphere, women have historically experienced exclusion in employment and a range of economic activity.

Women must have the right to participate in the workplace and broader economy free of sex discrimination, and with the benefit of civil rights laws and other employment protections, without fear of employers using religious beliefs to try to deny those protections. These legal protections for women in the workplace, and the ongoing need for them, clearly demonstrate that eradicating workplace sex discrimination is a compelling state interest; a ruling for Petitioners could, however, threaten to undermine these laws.

C. Women Face Discrimination In Access To Health Care.

Women have a long history of facing discrimination in accessing health insurance and health care in this country, including reproductive health care. This discrimination, often religiously motivated, manifests in a number of ways, including through denials of critical health services or provision of substandard care.

Health insurance practices have long discriminated against women. For example, the practice of charging women more than men for the same insurance coverage was rampant in the individual health insurance market, with a 2009 nationwide study of the best-selling plans in state capitals documenting that 95% practiced gender rating.[26] Insurers in the individual market also excluded

26. Nat'l Women's Law Ctr., *Still Nowhere to Turn* 3 (2009), *available at* https://nwlc.org/wp-content/uploads/2015/08/stillnowheretoturn.pdf ("NWLC, *Still Nowhere*").

coverage, or required substantial out-of-pocket payments, for essential women's health services such as maternity care.[27] And insurers deemed aspects of a person's history that disproportionately affect women, such as prior pregnancy, cesarean delivery, or medical treatment for sexual violence, to be pre-existing conditions and a reason to deny coverage.[28] Similarly, women in this country have long confronted discrimination in health care, including due to healthcare providers' dismissal of women's pain, not prescribing needed pain medication, or insisting women's symptoms are influenced by "emotional distress."[29]

Against this backdrop of sex discrimination, religious beliefs have been cited as a primary justification for denying women health care, particularly reproductive health care, which also has a disproportionate effect on women of color.[30] Women of color, particularly Black women, are at a higher risk for religious refusals of care than white women, as they are more likely to seek

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27. Nat'l Women's Law Ctr., *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* 4-5 (2008), *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/NWLCReport-NowhereToTurn-81309w.pdf.

28. *Id.* at 5, 7.

29. *See* Diane E. Hoffman & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain*, 29 J. Law, Med. & Ethics 13, 17–18 (2001).

30. *See* Kira Shepherd *et al.*, *Bearing Faith: The Limits of Catholic Health Care for Women of Color*, Public Rights/Private Conscience Project 8-9, 36 (Nov. 9, 2019), *available at* https://lawrightsreligion.law.columbia.edu/sites/default/files/content/BearingFaith.pdf.

reproductive and pregnancy-related health care at religiously-affiliated medical institutions.[31]

Entities have invoked religious beliefs while creating obstacles for women experiencing pregnancy complications. Particularly in emergencies, these denials may be life threatening.[32] For example, at one religiously affiliated hospital, a patient experiencing a miscarriage was forced to undergo treatment to save the nonviable pregnancy, causing her to become septic and experience severe bleeding. The physician recalled that the "woman [wa]s dying before our eyes" and defied hospital policy in order to provide the life-saving care the woman needed.[33] In another case, a labor and delivery nurse invoked religious beliefs to deny vital emergency care for pregnancy complications, including leaving a patient "standing in a pool of blood." *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000).[34]

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31. *Id.*

32. *See generally* Brief of *Amici Curiae* Rachael Lorenzo *et al.* (Individuals Denied Reproductive Health Services), *New York v. U.S. Dep't Health & Human Servs.*, No. 19-4254 (2d Cir. Aug. 3, 2020).

33. Lori R. Freedman *et al.*, *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 Am J. Pub. Health 1774, 1777 (2008).

34. Although the hospital discharged the nurse only after she declined multiple reasonable accommodations, *id*. at 226-28, the nurse sued the hospital for religious discrimination under Title VII and the Free Exercise Clause of the First Amendment. The nurse was unsuccessful because Title VII does not require health care employers to accommodate employees' religious objections if doing so would pose an "undue hardship" to the employer and

Women have also experienced discriminatory denials of sterilization procedures from entities claiming religious objections. For example, a religiously affiliated hospital refused to provide a tubal ligation procedure to a pregnant patient who requested one at the time of her scheduled cesarean delivery. Although tubal ligation would prevent a recurrence of the life-threatening conditions she faced while pregnant and the safest time to undergo the procedure is at the time of delivery, the hospital refused to provide the procedure because of its policy prohibiting sterilization.[35]

Religious beliefs have also been used to justify discrimination against those seeking to become pregnant through fertility treatments. In one case, an infertility practice group accepted Guadalupe Benitez as a patient, and subjected her to 11 months of invasive tests and treatments. *See N. Coast Women's Care Med. Grp., Inc. v. San Diego Cty. Superior Ct.*, 44 Cal. 4th 1145 (2008). When the treatment plan they put her on continued to be unsuccessful and she reiterated her desire to try intrauterine insemination ("IUI"), the providers refused because they "did not feel comfortable with [her] sexual

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its patients, *id.* at 224, and because the hospital was "neutral" with respect to religion, *id.* at 229. If this Court imports strict scrutiny into the Free Exercise Clause, it could subject Title VII's reasonable accommodation / undue hardship framework to constitutional challenge and threaten the ability of hospitals and other health care providers to protect patients.

35. Am. Civil Liberties Union, *Health Care Denied* 19-20 (May 2016), *available at* https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

orientation."[36] Ms. Benitez sued her doctors under state anti-discrimination law, alleging that they refused to perform IUI because she is a lesbian. 44 Cal. 4th at 1152-53. The doctors responded that their religious beliefs precluded them from participating in IUI on any unmarried woman—another form of unlawful sex discrimination. *Id.* at 1161.

A host of federal, state, and local laws prohibit sex discrimination in health care and protect patient access to care, including in emergency situations. These non-discrimination and public health laws work in tandem to combat discrimination and protect women's access to essential, and at times life-saving medical care.

The Affordable Care Act was passed in large part to address entrenched health insurance practices that systematically discriminated against women and left many—particularly women of color—without access to necessary care and treatment.[37] The ACA ended many insurance practices that discriminated against women. The ACA also includes Section 1557, the nation's first federal law to broadly prohibit sex discrimination in health care. 42 U.S.C. § 18116.[38] Section 1557 prohibits

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36. *Benitez v. N. Coast Women's Care et al.*, No. GIC 770165 (Cal. Super. Ct., San Diego County), Declaration of Guadalupe T. Benitez at ¶ 32 (March 25, 2004).

37. *See* Brief of Nat'l Women's Law Ctr. *et al.*, *California v. Texas*, Nos. 19-840 and 19-1019 (U.S. May 13, 2020); *see also* NWLC, *Still Nowhere*, *supra* note 26, at 3-4.

38. *See* U.S. Dep't Health & Human Servs., *Fact Sheet: Nondiscrimination in Health Programs and Activities Proposed Rule* (last updated Nov. 12, 2015), *available at* https://www.hhs.

discrimination based on sex, race, national origin, disability, or age in health programs or activities receiving federal financial assistance, as well as the health insurance marketplaces. 42 U.S.C. § 18116(a).

Section 1557 has addressed sex discrimination in health care programs receiving taxpayer funding, including by individuals seeking pregnancy-related care. For example, the Department of Health and Human Services investigated and addressed discriminatory policies that barred insurance coverage for maternity care for employees' dependents.[39] Section 1557 also provided critical protections against discrimination based upon gender identity and sex stereotyping.[40] Yet, Section 1557's

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gov/civil-rights/for-individuals/section-1557/summary/index.html#:~:text=Section%201557%20is%20the%20first,certain%20other%20health%20coverage%20plans.

39. *See* Nat'l Women's Law Ctr., *Press Release: Victory in Sex Discrimination Complaints Brought by NWLC: After Investigation by HHS, Employers Change Policies* (Jan. 26, 2017), *available at* https://nwlc.org/press-releases/victory-in-sex-discrimination-complaints-brought-by-nwlc-after-investigation-by-hhs-employers-change-policies/ (discussing complaints filed with HHS in 2013).

40. *See* U.S. Dep't Health & Human Servs., *OCR Enforcement Under Section 1557 of the Affordable Care Act Sex Discrimination Cases* (last updated May 16, 2016), *available at* https://web.archive.org/web/20170514174530/https://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html; *see, e.g.*, *Kadel v. Folwell*, No. 1:19-cv-272-LCB-LPA, 2020 WL 1169271, at *7, *9 (M.D.N.C. Mar. 11, 2020); *Flack v. Wis. Dep't of Health Servs.,* 395 F. Supp. 3d 1001, 1015–19 (W.D. Wis. 2019); *Boyden v. Conlin,* 341 F. Supp. 3d 979, 997 (W.D. Wisc. 2018); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018).

protections have been subject to religious objections. Specifically, a group of states and hospitals challenged the 2016 regulations implementing Section 1557 in part under RFRA.[41]

Another law that protects patients, the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, requires hospitals that receive Medicare funding and operate an emergency department to provide patients with a medical screening examination and, if the patient has an "emergency medical condition," provide stabilizing treatment or execute an appropriate transfer. Several state laws supplement EMTALA to require the provision of emergency care,[42] or to prohibit medical professionals from abandoning a patient in need.[43]

The ability of these and future laws to prevent sex discrimination in health care and protect women against

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41. *See Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 946 (N.D. Tex. 2019).

42. *See, e.g.*, Cal. Health & Safety Code §1317(a) & (e); 16 Del. Code §2508(e)-(g); D.C. Mun. Regs. tit. 22-B, §2024; Haw. Admin. R. §11-93-10; 210 ILCS 70/1; Mass. Gen. Laws ch. 111, §70E; Nev. Rev. Stat. §§439B.410, 632.475(3); N.Y. Pub. Health Law §2805-b; R.I. Gen. Laws §23-17-26(a); Wash. Rev. Code. 70.170.060; Wis. Stat. §256.30(2).

43. *See, e.g.*, D.C. Code §3-1205.14(a)(30); 225 ILCS 60/22(A)(16); Md. Code Ann., Health Occ. §14-404(a)(6); N.M. Stat. Ann. §61-6-15(D)(24); 8 NYCRR §29.2(a)(1); 35 Pa. Cons. Stat. §8121(a)(4); R.I. Gen. Laws §§5-37-5.1(4), 5-37-6.3; Vt. Stat. Ann. tit. 26, §1354(a)(4); 18 Va. Admin. Code 85-20-28; Wash. Admin. Code 246-840-710(5)(c); Wis. Stat. §448.02(3)(c); *see also Gray v. Davidson*, 15 Wash. 2d 257, 266–267 (1942); *Fortner v. Koch*, 272 Mich. 273, 280 (1936).

denials of care and coverage, including those that are life threatening, could be undermined if this Court upends the principle that sustains compliance with neutral and general laws, including prohibitions on discrimination, and invites demands for exceptions by entities claiming religious objections.

D. Women Face Discrimination In Access To Public Accommodations.

As a result of stereotypes about women's "unsuitability" for participation in the public sphere, women have been excluded from public places, programs, and activities, including stores, restaurants, hotels, bars, and athletic facilities.[44] Hotels, bars, and restaurants ostensibly held open to the public for commercial business refused to serve women. *See, e.g.*, *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 531 (N.D.N.Y. 1968) (addressing a hotel that refused to serve unescorted women). In holding that this type of refusal denied women equal protection, one court explained that "[o]utdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism." *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

Discrimination against women in public accommodations persists today. For example, women seeking birth control have been turned away at pharmacies in at least 25 states

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44. *See* NYU Survey, *supra* note 9, at 245-252 (cited in *Jaycees*, 468 U.S. at 624).

and D.C.[45] due not to legitimate medical or professional concerns but religious beliefs. The same pharmacies that refuse to dispense contraceptives often refuse to transfer a woman's prescription or refer her to another pharmacy. Several states have laws requiring pharmacies to dispense contraception—including emergency contraception, yet religious challenges to those laws have been brought. For example, in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the court upheld two Washington statutes requiring pharmacies to dispense all prescription medications even if there is a religious objection to emergency contraception.

State and local governments have recognized that protecting women from sex discrimination in public accommodations is a compelling interest and have enacted numerous protections to that effect. A ruling for Petitioners could threaten these laws' ability to address sex discrimination in public accommodations.

III. The First Amendment's Guarantee Of Free Speech Does Not Provide A Shield Against Compliance With Non-Discrimination Terms of A Government Contract.

In addition to arguing that complying with the contract CSS signed to perform public functions using government funds violates its First Amendment free exercise right, Petitioners argue that doing so would violate their First

45. Nat'l Women's Law Ctr., *Refusals to Provide Health Care Threaten The Health and Lives of Patients Nationwide* (Aug. 2017), *available at* https://nwlc.org/resources/refusals-to-provide-health-care-threaten-the-health-and-lives-of-patients-nationwide/.

Amendment right to free speech. This contention, too, is without merit.

This Court has rejected attempts to turn the First Amendment into a shield for noncompliance with laws prohibiting sex discrimination. For example, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, a newspaper violated a municipal nondiscrimination ordinance by advertising employment opportunities based on sex—i.e. "Jobs—Male Interest" and "Jobs—Female Interest." 413 U.S. 376, 392 (1973). The Court held there is no First Amendment free speech right to engage in illegal activity—in this case, sex discrimination. *Id.* at 389. Similarly, in *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), the Court rejected a law firm's argument that the First Amendment entitled it to restrict partnership to men, noting "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (internal quotations and citation omitted).

Ultimately, allowing exceptions under the First Amendment's free speech clause for entities claiming religious objections would put the rights of women and girls at risk, as described in Section II and also threaten discrimination based on other protected identities. As such, *amici* urge this Court to find that the First Amendment's speech provision is also not a basis for noncompliance with contractual agreements prohibiting sex discrimination including, as here, sexual orientation discrimination.

CONCLUSION

Women and girls must have the right to pursue educational opportunities, participate in the workforce, access health care, seek public accommodations, and receive services under government contracts without sex discrimination. Discrimination limits women's ability to shape and care for their families, their education, and their careers and thus also interferes with our nation's economy and larger society—and it is too often inflicted by entities claiming religious objections.

This Court should follow its precedent in *Smith,* as delineated by Justice Scalia, so as not to threaten hard-won protections for women and girls and risk further sex discrimination in all the areas detailed herein. Petitioners' arguments cannot be limited to sex discrimination, including against LGBTQ+ women, and could also harm women based on race, national origin, age, disability, and other protected identities, as described in additional amicus briefs in this matter. Even though the City's enforcement of its non-discrimination requirement satisfies strict scrutiny, a ruling for Petitioners would risk making each entity "a law unto itself," and would invite new torrents of litigation, burdening the courts and threatening harmful consequences for women's equality, opportunity, and well-being. The very rule of law would be at stake. For these, and the foregoing reasons, *amici* respectfully urge this Court to affirm the Third Circuit's decision finding that if CSS wishes to be a taxpayer funded agency that provides foster care services, it must do so without turning away same-sex families.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

A Better Balance

American Sexual Health Association

Bold Futures

Center for Reproductive Rights

Columbia Law School Sexuality and Gender Law Clinic

Desiree Alliance

Equal Rights Advocates

Equality California

Gender Justice

Girls for Gender Equity

Girls Inc.

Healthy Teen Network

International Action Network for Gender Equity & Law

KWH Law Center for Social Justice and Change

Legal Voice

Lift Louisiana

Appendix

Medical Students for Choice

NARAL Pro-Choice America

National Education Association

National Institute for Reproductive Health

National Partnership for Women & Families

Partnership for Working Families

Planned Parenthood Federation of America

Religious Coalition for Reproductive Choice

Shriver Center on Poverty Law

SisterLove, Inc.

SisterReach

SPARK Reproductive Justice NOW!

The Women's Law Center of Maryland

Transformative Justice Coalition

Women Lawyers On Guard Inc.

Women's Bar Association of the District of Columbia

Appendix

Women's Bar Association of the State of New York

Women's Institute for Freedom of the Press

Women's Law Project