

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

COMMONWEALTH OF
PENNSYLVANIA,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 2:17-CV-04540-WB

Hon. Wendy Beetlestone

**BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN;
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES
(AFL-CIO); SERVICE EMPLOYEES INTERNATIONAL UNION; AND 11
ADDITIONAL PROFESSIONAL, LABOR, AND STUDENT ASSOCIATIONS, IN
SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Janie F. Schulman
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, California 90017-3543
Telephone: (213) 892-5200

Jamie A. Levitt
Rhiannon N. Batchelder
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019-9601
Telephone: (212) 468-8000

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
ARGUMENT	2
I. SUMMARY OF ARGUMENT	2
II. IMPLEMENTATION OF THE EXEMPTION RULES THREATENS IMMEDIATE AND IRREPARABLE HARM TO WOMEN IN EVERY STATE ACROSS THE COUNTRY	5
A. Nearly One Half Million Women Working for Hospitals Could Lose Coverage	8
B. Tens of Thousands of Female Students at Religiously-Affiliated Colleges and Universities Could Lose Coverage	10
C. Thousands of Women Working for Other Religiously-Affiliated Non- Profits Could Lose Coverage	12
D. Hundreds of Thousands of Additional Women Working for Private, Non Religiously-Affiliated Employers Could Lose Coverage	13
III. SEAMLESS NO-COST CONTRACEPTIVE COVERAGE IS ESSENTIAL TO WOMEN'S EQUALITY AND ADVANCEMENT	17
A. The Benefits of No-Cost Contraceptive Coverage Are Substantial	17
B. Women Have Greatly Benefited from Increased Access to Contraception Since Implementation of the No-Cost Contraceptive Coverage Benefit	19
C. There Are No Comparable Alternatives to the Contraceptive Coverage Benefit	20
1. State Laws Will Not Fill the Gap Left by the Exemption Rules	20
2. Other Programs Are No Substitute for Seamless No-Cost Contraceptive Coverage	22
D. The Potential Harms from Losing Contraceptive Coverage, Even Temporarily, Are Irreversible for Women	23
IV. CONCLUSION	25

TABLE OF AUTHORITIES

	Page
Cases	
<i>Autocam Corp. v. Sebelius</i> , 730 F.3d 618 (6th Cir. 2013)	14
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S. Ct. 2751 (2014).....	4
<i>Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.</i> , 724 F.3d 377 (3d Cir. 2013).....	14
<i>Eden Foods, Inc. v. Sebelius</i> , 733 F.3d 626 (6th Cir. 2013)	15
<i>Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.</i> , 756 F.3d 1339 (11th Cir. 2014)	14
<i>Geneva College v. Sebelius</i> , 988 F. Supp. 2d 511 (W.D. Pa. 2013).....	11
<i>Gilardi v. U.S. Dep't of Health & Human Servs.</i> , No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013).....	14
<i>Grote v. Sebelius</i> , 708 F.3d 850 (7th Cir. 2013)	14
<i>Holland v. Sebelius</i> , No. 2:13-cv-11111 (S.D.W.Va. 2013).....	15
<i>Korte v. Sebelius</i> , 735 F.3d 654 (7th Cir. 2013)	15
<i>M & N Plastics, Inc. v. Sebelius</i> , 997 F. Supp. 2d 19 (D.D.C. 2013).....	15
<i>Zubik v. Burwell</i> , 136 S. Ct. 1557 (2016).....	11, 13
Statutes	
Employer Retirement Income Security Act of 1974, Pub.L. 93-406, 88 Stat. 829 (1974)	21

TABLE OF AUTHORITIES

	Page
Patient Protection and Affordable Care Act, 42 U.S.C. § 18001, <i>et seq.</i> (2010).....	2, 18, 19, 31
Regulations	
Accomodations in Connection With Coverage of Certain Preventive Health Services, 45 C.F.R. § 147.131 (2013)	3
Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (Feb. 6, 2013)	3
Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012)	18
Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011), 76 Fed. Reg. 46,621 (Aug. 3, 2011).....	3
Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017).....	2
Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).....	2

INTEREST OF AMICI CURIAE¹

The Amici Curiae (“Amici”) are organizations that work on behalf of female employees and students throughout the United States.² These associations represent professional women, women in organized labor,³ women employed in various industries, social workers, teachers, students, and more. Amici have a strong interest in protecting no-cost contraceptive coverage so that women can strive for equal opportunities in education and in the American workforce.

Amici have a particular interest in the outcome of this litigation because they know that no-cost coverage of safe and reliable contraception is critical for women’s educational and professional success, as well as for women’s health and well-being. Amici include higher education associations for women that have an interest in this litigation because no-cost contraceptive coverage helps women reach their aspirations in higher education.⁴ Amici also include labor and professional organizations representing well over a million members in hundreds of occupations—from health workers to teachers to lawyers—in nearly every state. These organizations have an interest in this litigation because no-cost contraceptive coverage increases women’s ability to participate and succeed in the workplace.⁵

¹ No party’s counsel authored this brief in whole or in part. No party, party’s counsel, or other person contributed any money to fund the preparation or submission of this brief other than Amici Curiae and its counsel. All parties have consented to the filing of this brief.

² For a full list of Amici and their statements of interest, see Appendix.

³ Workers represented by labor unions who are covered by collective bargaining agreements that require the employer to provide no-cost contraceptive coverage should not be at risk of losing this bargained-for benefit immediately. However, they will be at increased risk of losing it in the future if their employers decide to bargain to change their health benefits in reaction to the Exemption Rules. Amici labor unions represent some workers who are at risk of losing contraceptive coverage immediately, including those whose collective bargaining agreements do not include no-cost contraceptive coverage and members who are working to form their union and are not yet covered by collective bargaining agreements.

⁴ See Appendix, including Statement of Interest for Amicus Curiae the American Association of University Women (“AAUW”).

⁵ See Appendix, including Statements of Interest for Amici Curiae the American Federation of State, County and Municipal Employees (AFL-CIO) (“AFSCME”) and Service Employees International Union (“SEIU”).

ARGUMENT

I. SUMMARY OF ARGUMENT

Amici support the motion of the Commonwealth of Pennsylvania for a preliminary injunction to protect women and their families from the irreparable harm that will occur if the rules issued by Defendants on October 6, 2017 (the “Exemption Rules”)⁶ are not enjoined nationwide prior to a trial on the merits.

Consistent and uninterrupted coverage of safe, reliable, no-cost contraception allows women to strive for professional and educational equality. It allows them to better care for themselves and their families by facilitating their education and career. No-cost contraceptive coverage is also an essential component of women’s health care, as more than 99% of sexually-active women of reproductive age have, at some point, used contraception to prevent pregnancy.⁷ For these reasons, the Patient Protection and Affordable Care Act (the “ACA”)⁸ requires employer-sponsored health insurance plans to cover all FDA-approved methods of contraception without burdening insured women with out-of-pocket costs (the “Contraceptive Coverage Benefit”).

Because of the breadth of the new Exemption Rules, it is reasonable to expect that hundreds of thousands—if not millions—of women will face a loss of contraceptive coverage, with all the resulting harms that flow from that loss, if the Exemption Rules are not blocked. Surveying the industries, individual employers, and universities that have already expressed strong opposition to providing contraceptive coverage to employees, students, and their

⁶ See Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017); Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017).

⁷ ADAM SONFIELD ET AL., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN’S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 3 (Haley Ball ed., 2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

⁸ 42 U.S.C. § 18001, *et seq.* (2010).

dependents reveals that the estimates contained in the Exemption Rules are drastically under-inclusive. Approximately one half million women across the country work for religiously-affiliated hospitals; approximately 600,000 women attend religiously-affiliated colleges and universities; and over 17,000 women work for privately held, for-profit companies that have already opposed the Contraceptive Coverage Benefit and its accompanying accommodation system. These figures provide a baseline estimate of the number of women—including Amici, their members, and additional women across the nation—expected to be immediately affected by the Exemption Rules. These estimates do not, however, include the many thousands of dependents of male and female employees and students; nor do they include the tens of thousands of non-profits and privately owned for-profit entities, as well as large, publicly held corporations that can now drop coverage under the Exemption Rules.

Before the Exemption Rules were issued, the Contraceptive Coverage Benefit regulations exempted houses of worship with religious objections and their related auxiliary, conventions, and church associations from offering contraceptive coverage.⁹ For religiously-affiliated employers and universities with objections to providing contraceptive coverage, the federal government created an accommodation, which allowed the entity to opt out of providing coverage with a requirement that a health insurance provider or another third party provide employees and students seamless contraceptive coverage instead.¹⁰ After *Burwell v. Hobby*

⁹ See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8458 (Feb. 6, 2013).

¹⁰ 45 C.F.R. § 147.131 (b) & (c)(2); see also Pl.’s Compl. ¶¶ 75, 76, 81.

Lobby Stores, Inc.,¹¹ closely-held corporations owned or controlled by persons with sincerely-held religious beliefs could also seek the accommodation.¹²

The Exemption Rules significantly expand the prior exemption from the Contraceptive Coverage Benefit. First, the Exemption Rules exponentially increase the number of employers and universities that can deny coverage. The Religious Exemption Rule—no longer limited to houses of worship and their auxiliaries—now allows virtually *all* employers and universities, including large, publicly traded, for-profit companies, to claim the exemption and refuse to provide no-cost contraceptive coverage to their employees and students.¹³ The Moral Exemption Rule, which adds an entirely new basis for denying coverage, applies to non-profit organizations and for-profit, privately held entities with “sincerely held moral convictions.”¹⁴ Second, the Exemption Rules allow employers and universities to claim exemptions under either rule without any meaningful oversight, as entities are no longer required to certify their objection or notify the federal government before dropping coverage.¹⁵ Finally, because the Exemption Rules are exemptions, rather than accommodations, women who receive their insurance coverage through an objecting entity are no longer guaranteed that their plans will provide seamless contraceptive coverage.¹⁶ Employees and students of entities claiming an exemption—including many of the members of Amici—and their dependents are at grave risk of losing this critical coverage altogether.

¹¹ 134 S. Ct. 2751 (2014).

¹² Pl.’s Compl. ¶¶ 87-89.

¹³ Pl.’s Compl. ¶ 104.

¹⁴ *Id.* ¶¶ 109-110.

¹⁵ Moral Exemption 48-49; Religious Exemption 61. *See also* Pl.’s Compl. ¶ 111.

¹⁶ *Id.* ¶¶ 111-112.

By providing virtually any employer and university in the country the ability to drop the Contraceptive Coverage Benefit based upon an undisclosed, “sincerely held” belief, the Exemption Rules will thwart the Contraceptive Coverage Benefit and its purposes. The Exemption Rules threaten significant and immediate negative repercussions for the hundreds of thousands of women and families across the United States, including those represented by Amici, who are employed by or attend entities that object to providing contraceptive coverage.

II. IMPLEMENTATION OF THE EXEMPTION RULES THREATENS IMMEDIATE AND IRREPARABLE HARM TO WOMEN IN EVERY STATE ACROSS THE COUNTRY

The potential impact of the Exemption Rules is vast and far-reaching. Previously, several for-profit companies filed lawsuits challenging the Contraceptive Coverage Benefit and seeking exemptions from providing the Benefit.¹⁷ Several non-profits that were eligible for the accommodation, including colleges and universities, challenged the accommodation’s notice requirement.¹⁸ These reactions to the Contraceptive Coverage Benefit and the initial accommodation process suggest that many non-profit and for-profit entities across the country will take advantage of the new Exemption Rules. Employers and universities that have already voiced their opposition to the Contraceptive Coverage Benefit and its corresponding accommodation process are, however, just the tip of the iceberg. The vagueness and breadth of the Exemption Rules and the uncertainty of what it means for an organization, including for-profit businesses, to have “religious beliefs” or “moral beliefs” mean that any employer,

¹⁷ See, e.g., Samantha Cooney, *46 Secular Companies That Don’t Want to Cover Employees’ Birth Control*, TIME INC., May 31, 2017, <http://motto.time.com/4797792/donald-trump-birth-control-companies/>; Abby Haglage, *After Hobby Lobby, These 82 Corporations Could Drop Birth Control Coverage*, THE DAILY BEAST, June 30, 2014, <https://www.thedailybeast.com/after-hobby-lobby-these-82-corporations-could-drop-birth-control-coverage>.

¹⁸ Haglage, *supra* note 17.

¹⁸ United States Conference of Catholic Bishops, *Love and Sexuality*, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/index.cfm#language> (last visited Nov. 21, 2017).

including one with no religious mission whatsoever, could decide to claim the exemption for virtually any reason.

Religious denominations that oppose all forms of contraception have been some of the most vocal opponents of the Contraceptive Coverage Benefit.¹⁹ Women who work for entities affiliated with these religions, including women who are themselves devoutly religious, continue to need and use various forms of contraception. For example, 98% of sexually-active Catholic women have used a method of contraception other than natural family planning,²⁰ and 87% of Catholic women currently at risk of unintended pregnancy use a method other than natural family planning.²¹ Among Evangelical women currently at risk of unintended pregnancy, 74% use a “highly effective contraceptive method” (including male or female sterilization, an IUD, the pill, and other hormonal methods).²² The loss of coverage for women who work for religiously-affiliated employers and for students of religiously-affiliated universities will have devastating effects, as shown below, as their employers or universities will no longer be required to comply with the accommodation process that would ensure seamless coverage through their insurers.

¹⁹ See, e.g., *id*; Brief of the Catholic Benefits Assoc. and The Catholic Ins. Co. as *Amici Curiae* in Support of Petitioners, *Zubik v. Burwell*, Nos. 14-1418, *et al.* (Jan. 11, 2016). See also *Zubik Amici*. Catholic-affiliated entities that have affirmatively indicated that they will continue to provide contraception coverage to employees or students are the exception, and often the product of circumstance. For instance, Notre Dame’s recent announcement that it would continue to provide contraception coverage to its employees and students is the result of the position taken by its current insurance carrier. If that carrier were to change its policy, or Notre Dame to change its carrier, students and employees of Notre Dame would be vulnerable to losing coverage. Claire Hansen, *Notre Dame Reverses Birth Control Coverage Decision*, U.S. NEWS & WORLD REPORT, Nov. 7, 2017, <https://www.usnews.com/news/national-news/articles/2017-11-07/notre-dame-reverses-birth-control-coverage-decision>

²⁰ Guttmacher Institute, *Guttmacher Statistic on Catholic Women’s Contraceptive Use*, Feb. 15, 2012, <http://www.guttmacher.org/media/inthenews/2012/02/15/>; see also Kimberly Daniels et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT’L HEALTH STATISTICS REP. 8 (2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>.

²¹ Guttmacher Institute, *supra* note 20.

²² Rachel K. Jones & Jeorg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST., April 2011, at 5, https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf.

Not only will religiously-affiliated hospitals, universities, and other non-profits be able to deny coverage to the thousands of women who currently have coverage through the accommodation, but many public, for-profit companies will be able to deny coverage as well.²³ Employers and universities will no longer be required to provide notice of their exemptions, as was required under the prior accommodation system; and women nationwide, including members of Amici, will no longer be guaranteed seamless contraceptive coverage through the accommodation.²⁴ The breadth of and lack of accountability established by the Exemption Rules means that now potentially *any* employer or university in the United States can drop contraceptive coverage for its employees, students, and their dependents simply by stating that the entity opposes contraception on religious or moral grounds.²⁵ Indeed, what makes the Exemption Rules so devastating is the fact that their impact is boundless. As a result, potentially hundreds of thousands, if not millions, of women across the country will be stripped of this critical health coverage.

Several categories of employers and universities can be expected to take advantage of the Exemption Rules. First, religiously-affiliated hospitals and universities will now be able to claim full exemptions, rather than accommodations, and female employees and students will no longer be guaranteed seamless access to contraceptive coverage through their regular insurance plans.²⁶ It is reasonable to conclude that hundreds of hospitals and universities, many of which

²³ Michael Nedelman et al., *Trump Administration Deals Major Blow to Obamacare Birth Control Mandate*, CNN, Oct. 6, 2017, <http://www.cnn.com/2017/10/06/health/trump-birth-control-mandate/index.html> (“Policy experts, however, argue that this could open the door to hundreds of employers dropping coverage.”).

²⁴ Pl.’s Compl. ¶¶ 111-112.

²⁵ See the Exemption Rules; *see also* Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES, Oct. 6, 2017, <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> (“Under the new rules, exemptions to the contraceptive coverage mandate would be available to many kinds of employers, including publicly traded companies that said they had religious objections to covering some or all types of contraception.”).

²⁶ See the Exemption Rules.

begrudgingly accepted the accommodation because they were not eligible for an exemption, will take advantage of the Exemption Rules.²⁷ Second, a wide range of secular for-profit corporations—both privately and publicly held—will be able to claim religious or moral exemptions. Hundreds of thousands of women, many of whom are members of Amici, that are insured by these newly-exempted companies and universities, as well as their dependents, will lose coverage under the Exemption Rules.

The immediate and irreparable impact of the Exemption Rules on female employees and students nationwide will be severe if the Exemption Rules are not enjoined pending trial. In addition to health risks, young women pursuing higher education and career advancement will face increased rates of unintended pregnancies. Women who have children in their teens or early 20s are significantly less likely to obtain any formal education after high school than are women who are able to wait to have children until their late 20s or 30s.²⁸ The Exemption Rules threaten the many educational and professional gains women have made in the past decades.

A. Nearly One Half Million Women Working for Hospitals Could Lose Coverage.

Members of Amici, and many other women, work for hospitals that are now free to take advantage of the Exemption Rules. At least 649 hospitals in the United States are associated with religious denominations whose theological doctrines prohibit many or all forms of contraception.²⁹ These hospitals are major employers throughout the country, with at least

²⁷ See, e.g. Joe Carlson, *N.Y. Catholic Health System Wins Ruling Against Contraception Mandate*, MODERN HEALTHCARE, Dec. 16, 2013, <http://www.modernhealthcare.com/article/20131216/NEWS/312169935>.

²⁸ SONFIELD ET AL., *supra* note 7 at 9.

²⁹ See Catholic Health Assoc. of the U.S., *Catholic Health Care in the U.S.*, Jan. 2017, at 1, https://www.chausa.org/docs/default-source/default-document-library/cha_2017_miniprofile.pdf?sfvrsn=0.

523,040 full-time and 216,487 part-time employees,³⁰ more than 76% of whom are women.³¹

These hospitals comprise 14.5% of all acute-care hospitals in the U.S.³² Forty-six of these religiously-affiliated hospitals are the sole community providers of short-term acute hospital care in their regions, meaning that medical professionals and health workers who lose coverage will have few opportunities for alternative employment where coverage may be provided.³³ The number of religiously-affiliated hospitals in the U.S. has increased by 22% since 2001.³⁴ If this trend continues, it is expected that even a larger proportion of hospitals will adhere to religious directives in the future, and even more women will be affected by these hospitals' unwillingness to provide contraceptive coverage and ability to take advantage of the Exemption Rules.

The large market share of hospitals and other healthcare entities that follow religious directives prohibiting all forms of contraception has far-reaching implications for the majority-women employees who work in these facilities, as well as their female dependents, all of whom rely on employer-provided health insurance. It is entirely possible that many of these healthcare providers will seek to eliminate contraceptive coverage for their employees and dependents under the Exemption Rules,³⁵ which will have a devastating impact on hundreds of thousands of women throughout the nation, including those represented by Amici.

³⁰ *Id.*

³¹ U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, Feb. 8, 2017, <https://www.bls.gov/cps/cpsaat18.htm>.

³² Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report*, MERGERWATCH, 2016, at 1, http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=UxHKcNPcSKjkw0MAq8v8aEdM83w%3D.

³³ *Id.*

³⁴ *Id.*

³⁵ See, e.g., Pl.'s Compl. ¶¶ 111-112. Although the Catholic Health Association itself was not opposed to the Obama-era exemption process, it has steadfastly opposed any requirement by which its member hospitals would have to directly pay for birth control coverage. See Catholic Health Assoc. of the U.S., *Women's Preventive Health Services Final Rule*, <https://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule> (last visited Nov. 21, 2017). Additionally, numerous state- and regional-Catholic healthcare umbrella organizations have

B. Tens of Thousands of Female Students at Religiously-Affiliated Colleges and Universities Could Lose Coverage.

Amici students are also at risk of losing contraceptive coverage because of the Exemption Rules. Hundreds of religiously-affiliated colleges and universities throughout the United States are affiliated with denominations that actively oppose some or all forms of contraception. Amici who receive insurance through these colleges or universities are at great risk of losing coverage.³⁶

For example, there are over 260 members of the Association of Catholic Colleges and Universities (ACCU) in the United States that, in total, boast more than 875,000 enrolled students, many of whom are members of *amicus curiae* AAUW.³⁷ Based on statistics reported by the ACCU, many of these schools have student enrollment numbers in the thousands or even tens of thousands, as well as a large community of faculty and staff.³⁸ The largest of these is DePaul University in Illinois, which has nearly 28,000 students³⁹ and approximately 1,500 faculty members, as well as a large staff roster.⁴⁰ Other large Catholic universities, as reported by ACCU include: St. Leo University in Florida, which has over 27,000 students;⁴¹ St. John's

strongly opposed the Benefit. *See, e.g.*, Joe Carlson, *N.Y. Catholic Health System Wins Ruling Against Contraception Mandate*, MODERN HEALTHCARE, Dec. 16, 2013, <http://www.modernhealthcare.com/article/20131216/NEWS/312169935>.

³⁶ Jeanine Santucci, *Students at Religious Universities Are Worried About Access to Birth Control. Here's Why.*, USA TODAY COLLEGE, Jul. 17, 2017, <http://college.usatoday.com/2017/07/17/students-at-religious-universities-are-worried-about-access-to-birth-control-heres-why/>.

³⁷ ACCU, *Catholic Higher Education FAQs*, <http://www.accunet.org/About-Catholic-Higher-Ed/Catholic-Higher-Ed-FAQs> (last visited Nov. 21, 2017).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ DePaul Univ., *Key Facts & Rankings*, <https://www.depaul.edu/about/Pages/rankings.aspx> (last visited Nov. 21, 2017).

⁴¹ ACCU, *Catholic Higher Education FAQs*, <http://www.accunet.org/About-Catholic-Higher-Ed/Catholic-Higher-Ed-FAQs> (last visited Nov. 21, 2017).

University in New York, which has over 23,000 students;⁴² and Georgetown University in Washington D.C., which has over 21,000 students⁴³ and more than 2,500 full-time and part-time faculty.⁴⁴ During the 2015-16 academic year, *nearly two-thirds* of the students enrolled in Catholic colleges and universities were female.⁴⁵

Many Protestant or nondenominational Christian colleges and universities have also challenged the Contraceptive Coverage Benefit through lawsuits and public comments, and are free to drop contraceptive coverage altogether under the Exemption Rules.⁴⁶ For example, the Council for Christian Colleges and Universities (the “CCCU”), which represents 118 regionally-accredited colleges and universities and 61 affiliate member institutions with Christian missions, spanning 33 states and over 400,000 members, has vigorously opposed the Contraceptive Coverage Benefit.⁴⁷ Many Christian colleges and universities—some of which are CCCU members—have independently challenged and sought exemptions from the Contraceptive Coverage Benefit. For example, Geneva College, a Protestant Christian college in Pennsylvania with 350 employees, has actively opposed the Contraceptive Coverage Benefit.⁴⁸ Wheaton College in Illinois; College of the Ozarks in Missouri; Colorado Christian University in Colorado; East Texas Baptist University in Texas; Union University in Tennessee; Dordt College

⁴² *Id.*; see also U.S. NEWS & WORLD REPORT, *St. John’s University: Overview*, <https://www.usnews.com/best-colleges/st-johns-university-new-york-2823> (last visited Nov. 21, 2017).

⁴³ ACCU, *Catholic Higher Education FAQs*, <http://www.accunet.org/About-Catholic-Higher-Ed/Catholic-Higher-Ed-FAQs> (last visited Nov. 21, 2017).

⁴⁴ Georgetown University, *Georgetown Key Facts*, <https://www.georgetown.edu/about/key-facts> (last visited Nov. 21, 2017).

⁴⁵ ACCU, *Catholic Higher Education FAQs*, <http://www.accunet.org/About-Catholic-Higher-Ed/Catholic-Higher-Ed-FAQs> (last visited Nov. 21, 2017).

⁴⁶ See generally, Brief of the Council for Christian Colleges and Universities as *Amicus Curiae* Supporting the Petitioner, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁴⁷ Brief of the Council for Christian Colleges and Universities as *Amicus Curiae* Supporting the Petitioner, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁴⁸ *Geneva College v. Sebelius*, 988 F. Supp. 2d 511 (W.D. Pa. 2013).

in Iowa; and Heartland Christian College in Missouri are among the other non-Catholic religious colleges that have actively expressed their opposition to providing insurance coverage for students' and employees' contraceptives, either by challenging the Contraceptive Coverage Benefit or by seeking exemptions through lawsuits and *amicus* briefs.⁴⁹ These colleges alone boast a total enrollment of over 20,000 students.⁵⁰

C. Thousands of Women Working for Other Religiously-Affiliated Non-Profits Could Lose Coverage.

In addition to hospitals and colleges, thousands of the 1.4 million non-profit organizations throughout the United States are affiliated with denominations that actively oppose all forms of contraception. As of 2015, approximately 3% of all non-profits and 10% of the largest non-profits in the U.S. had already been using accommodations under the Contraceptive Coverage Benefit.⁵¹ Of the 45 entities that requested an accommodation from the Contraceptive Coverage Benefit between 2014 and 2016, 27% were religiously-affiliated non-profits.⁵² These

⁴⁹ Cooney, *supra* note 17 ; Haglage, *supra* note 17; Pl.'s Compl. ¶¶ 111-112.

⁵⁰ Geneva College, *Fast Facts: Geneva College*, <http://www.geneva.edu/about-geneva/fast-facts> (last visited Nov. 21, 2017); Wheaton College, *Wheaton by the Numbers*, <https://www.wheaton.edu/about-wheaton/why-wheaton/college-profile/wheaton-by-the-numbers/> (last visited Nov. 21, 2017); U.S. News & World Report, *College of the Ozarks: Overview*, <https://www.usnews.com/best-colleges/college-ozarks-2500> (last visited Nov. 21, 2017); Colorado Christian University, *CCU Facts and Stats*, <http://www.ccu.edu/about/factsandstats/> (last visited Nov. 21, 2017); East Texas Baptist University, *At a Glance*, <https://www.etbu.edu/about/glance/> (last visited Nov. 21, 2017); U.S. News & World Report, *Union University: Overview*, <https://www.usnews.com/best-colleges/union-university-3528> (last visited Nov. 21, 2017); Dordt College, *About Dordt: Fast-Facts*, <https://www.dordt.edu/about-dordt/fast-facts> (last visited Nov. 21, 2017).

⁵¹ Laurie Sobel, Matthew Rae & Alina Salganicoff, *Data Note: Are Nonprofits Requesting an Accommodation for Contraceptive Coverage?*, THE HENRY J. KAISER FAMILY FOUNDATION, Dec. 2015, <http://files.kff.org/attachment/data-note-data-note-are-nonprofits-requesting-an-accommodation-for-contraceptive-coverage>. The authors of the Kaiser study were unable to estimate how many non-profits or enrollees that included. However, the "largest" non-profits include those with 1,000-4,999 employees as well as those with over 5,000 employees.

⁵² Laura E. Dorso et al., *Who Seeks Religious Accommodations to Providing Contraceptive Coverage?*, CENTER FOR AMERICAN PROGRESS, Aug. 11, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/08/11/437265/seeks-religious-accommodations-providing-contraceptive-coverage/>.

employers, and many more like them, will be able to drop contraceptive coverage under the Exemption Rules and their employees will not be guaranteed alternate coverage.

Additionally, more than 83 *amicus curiae* briefs supporting religious exemptions from the Contraceptive Coverage Benefit were filed in *Zubik v. Burwell*,⁵³ representing dozens of religiously-affiliated parishes, advocacy groups, professional organizations, think tanks, and umbrella organizations.⁵⁴ These *amici curiae* and the organizations they represent are now free to drop coverage under the Exemption Rules.

D. Hundreds of Thousands of Additional Women Working for Private, Non Religiously-Affiliated Employers Could Lose Coverage.

The Exemption Rules go far beyond religiously-affiliated hospitals, colleges, universities, and non-profits. Now any employer can take advantage of the exemptions based on loosely defined religious or moral reasons. Consequently, employees of any number of for-profit companies and their dependents could be adversely affected by the Exemption Rules. The expansion of the Religious Exemption alone would allow innumerable large corporations to refuse to cover contraceptive care for their employees and dependents, whether because of a religious CEO, a religious board of directors, or any number of other influences. It is thus reasonable to conclude that many thousands of women across the country, including members of Amici, will face a total loss of contraceptive coverage, at any moment and without notice, if the Exemption Rules are not blocked.

Indeed, many companies have previously stated their intention to deny their employees contraceptive coverage. Reports have identified more than 80 distinct businesses that have

⁵³ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

⁵⁴ See Briefs of *Amici Curiae* Supporting the Petitioner, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

explicitly indicated their desire to drop contraceptive coverage.⁵⁵ These include several companies that alone employ well over 17,000 women in at least 47 states:

- Hobby Lobby, an Oklahoma-based national craft supply chain with over 13,000 employees;⁵⁶
- Grote Industries, LLC, an Indiana vehicle safety systems manufacturer with 1,147 full-time U.S. employees;⁵⁷
- Conestoga Wood Specialties Corporation, a Pennsylvania-based wood cabinet and specialty products manufacturer with 950 employees;⁵⁸
- Autocam Corporation and Autocam Medical, LLC, a Michigan transportation and medical equipment parts company with at least 661 U.S. employees;⁵⁹
- Freshway Foods and Freshway Logistics, an Ohio-based produce processing and packaging company with 400 employees;⁶⁰
- Sioux Chief Manufacturing, a Missouri plumbing products company with 370 employees;⁶¹
- Eternal Word Television Network, a religious television station with 350 full-time employees;⁶²
- Hercules Industries, Inc., a Colorado heating, ventilation, and air conditioning products manufacturer with 303 employees;⁶³
- Tyndale House, an Illinois publishing company with 260 employees;⁶⁴
- Weingartz Supply Company, a Michigan outdoor power equipment company with 170 employees;⁶⁵

⁵⁵ Cooney, *supra* note 17; Haglage, *supra* note 17.

⁵⁶ *Id.*

⁵⁷ *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *see also* Jodi Jacobson, *Eighteen For-Profit Companies Fighting to Eliminate the Birth Control Benefit*, REWIRE, Mar. 7, 2013, <https://rewire.news/article/2013/03/07/the-18-for-profit-companies-fighting-to-eliminate-the-birth-control-benefit/>.

⁵⁸ *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

⁵⁹ *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013); Jacobson, *supra* note 57.

⁶⁰ *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1, 2013).

⁶¹ Jacobson, *supra* note 57.

⁶² *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014).

⁶³ Jacobson, *supra* note 57.

⁶⁴ *Id.*

⁶⁵ *Id.*

- American Pulverizer Company, a Missouri wholesale scrap metal recycling company with 150 employees;⁶⁶
- Eden Foods, a Michigan natural foods company that employed 128 individuals in 2013, more than 50 of whom worked full time;⁶⁷
- Sharpe Holdings, Inc., a Missouri farming, dairy, creamery, and cheese-making corporation with over 100 employees;⁶⁸
- Triune Health Group, an Illinois corporation that facilitates the re-entry of injured workers in the workforce, with 95 employees;⁶⁹
- Korte & Luitjohan Contractors, Inc., an Illinois construction firm with approximately 90 full-time employees, 20 of whom are on its health plan;⁷⁰
- O’Brien Industrial Holdings, a Missouri ceramic materials processing company with 87 employees;⁷¹
- And many more.⁷²

Because many facially secular companies are run by executives with strong ties to religious communities, many more companies could refuse to provide contraceptive coverage to their employees under the Exemption Rules. For example, two of the largest Catholic business leadership organizations in the United States represent over 4,000 and 400 member companies, respectively.⁷³ Any of these member organizations could drop contraceptive coverage under the Exemption Rules. Given the breadth and lack of oversight or accountability built into the Exemption Rules, it is entirely conceivable that many—or even all—of the businesses run by

⁶⁶ *Id.*

⁶⁷ *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013).

⁶⁸ Jacobson, *supra* note 57.

⁶⁹ *Id.*

⁷⁰ *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); Jacobson, *supra* note 57.

⁷¹ Jacobson, *supra* note 57.

⁷² See Jacobson, *supra* note 57; *Holland v. Sebelius*, No. 2:13-cv-11111 (S.D.W.Va. 2013); Joe Holland Chevrolet, *Why Choose Joe Holland Chevrolet: Our Staff*, <http://www.joehollandchevrolet.com/MeetOurDepartments> (last visited Nov. 21, 2017); *M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19 (D.D.C. 2013).

⁷³ Legatus: Ambassadors for Christ in the Marketplace, *What We Offer*, <http://legatus.org/legatus/> (last visited Nov. 21, 2017) (Over 4,000 Catholic business leaders and spouses are members of this organization); Catholic Business Journal, *Catholic Business Directory*, <https://catholicbusinessjournal.biz/business-directory?page=8> (last visited Nov. 21, 2017) (449 Catholic businesses listed).

religious individuals—including large, multi-state corporations that have no religious mission, but are run by leaders who have professed devout religious beliefs who have sought to incorporate these beliefs into their corporations' cultures—might take advantage of the Exemption Rules.

These businesses could include major employers in nearly every industry, including retail fashion,⁷⁴ fast food,⁷⁵ commercial agriculture,⁷⁶ insurance,⁷⁷ hospitality,⁷⁸ airline travel,⁷⁹ online dating,⁸⁰ and general retail merchandise⁸¹—to name only a few. These major companies employ nearly two million employees, and if they denied their employees contraceptive coverage, a staggering number of women nationwide would be affected.⁸²

⁷⁴ Laura Leonard, *Faith, Fashion, and Forever 21*, CHRISTIANITY TODAY, March 2009, <http://www.christianitytoday.com/women/2009/march/faith-fashion-and-forever-21.html>.

⁷⁵ Emma Green, *Chick-Fil-A: Selling Chicken with a Side of God*, THEATLANTIC.COM, Sept. 8, 2014, <https://www.theatlantic.com/business/archive/2014/09/chick-fil-a-selling-chicken-with-a-side-of-god/379776/>; Rob Wile, *This 35-Year-Old Woman Just Inherited In-N-Out Burger. She's Now a Billionaire*, TIME INC., May 8, 2017, <http://time.com/money/4770527/in-n-out-lynsi-snyder-fortune-ownership/>; Kevin Porter, *In-N-Out Burger Owner Lynsi Snyder on Searching for a Father Figure and Finding God in "I am Second."*, THE CHRISTIAN POST, INC., Jan. 16, 2017, <https://www.christianpost.com/news/in-n-out-burger-owner-lynsi-snyder-talks-faith-journey-in-i-am-second-video-172909/>.

⁷⁶ Holly Lebowitz Rossi, *7 CEOs with Notably Devout Religious Beliefs*, FORTUNE.COM, Nov. 11, 2014, <http://fortune.com/2014/11/11/7-ceos-with-notably-devout-religious-beliefs/>; Steve Kay, *Of Faith and Food*, SOSLAND PUBLISHING COMPANY, Aug. 11, 2015, <http://www.meatpoultry.com/Writers/Other-Contributors/Of-faith-and-food.aspx?cck=1>.

⁷⁷ Faith & Leadership, *Paul S. Amos: This is Not Who We Are*, Nov. 21, 2011, <https://www.faithandleadership.com/paul-s-amos-not-who-we-are>.

⁷⁸ Michael S. Rosenwald, *Marriot's Family Guy*, THE WASHINGTON POST, Mar. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031501715.html>.

⁷⁹ Ann Schrader, *Republic Air CEO Puts His Faith to Work*, THE DENVER POST, May 6, 2016, <http://www.denverpost.com/2009/11/13/public-air-ceo-puts-his-faith-to-work/>; Republic Airlines Inc., *Our Vision, Mission, Culture Statement and Guiding Principles*, http://www.rjet.com/Who_We_Are/Mission_Vision.aspx (last visited Nov. 21, 2017).

⁸⁰ Maggie Lake, *eHarmony CEO Meets Controversial Success*, CNN, July 11, 2008, <http://www.cnn.com/2008/BUSINESS/07/11/eharmony.maggie/?iid=EL>.

⁸¹ Colleen Walsh, *God and Walmart*, HARVARD GAZETTE, Nov. 19, 2009, <https://news.harvard.edu/gazette/story/2009/11/god-and-walmart/>.

⁸² Forbes, *America's Largest Private Companies: #103 Forever 21*, <https://www.forbes.com/companies/forever-21/> (last visited Nov. 21, 2017); Encyclopedia.com, *Chik-Fil-A Inc.*, <http://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/businesses-and-occupations/chick-fil-inc> (last visited Nov. 21, 2017); Forbes, *America's Best Employers: #54 In-N-Out Burger*, <https://www.forbes.com/companies/in-n-out-burger/> (last visited

It is even possible that non-religious employers will seek to take advantage of the Exemption Rules, citing “moral concerns,” because they believe—falsely—that this will save money or for political reasons. Virtually any large, privately held corporate employer could take advantage of the Moral Exemption with very little oversight or control by the government. For-profit companies account for nearly 90% of private-sector employment across America.⁸³ If even a fraction of for-profit employers throughout the country—both privately and publicly held—were to take advantage of the Exemption Rules, it is reasonable to expect that millions of women—including members of Amici—could be immediately denied contraceptive coverage with all of the health, educational, and employment effects that follow.⁸⁴

III. SEAMLESS NO-COST CONTRACEPTIVE COVERAGE IS ESSENTIAL TO WOMEN’S EQUALITY AND ADVANCEMENT

A. The Benefits of No-Cost Contraceptive Coverage Are Substantial.

The availability and use of contraceptives have had a profound impact on the lives of women in the United States.⁸⁵ In one study, a majority of women reported that contraceptives allowed them “to better care for themselves and their families, either directly or indirectly through facilitating their education and career.”⁸⁶ Contraceptive coverage has the ability to

Nov. 21, 2017); Tyson Foods, *Our Story*, <http://www.tysonfoods.com/our-story> (last visited Nov. 21, 2017); Forbes, *The World’s Biggest Public Companies: #199 Aflac*, <https://www.forbes.com/companies/aflac/> (last visited Nov. 21, 2017); Marriott Form 10-K 2016, <http://investor.shareholder.com/MAR/secfiling.cfm?filngID=1628280-17-1506&CIK=1048286> (last visited Nov. 21, 2017); Republic Airlines Inc., *Who We Are*, http://www.rjet.com/Who_We_Are.aspx (last visited Nov. 17, 2017); Andrea Chang & Peter Jamison, *EHarmony is Moving from Santa Monica to Westwood*, LOS ANGELES TIMES, Feb. 4, 2015, <http://www.latimes.com/business/la-fi-0205-eharmony-santa-monica-20150205-story.html>; Walmart Stores, Inc., *Our Locations*, <https://corporate.walmart.com/our-story/locations/united-states> (last visited Nov. 21, 2017).

⁸³ Bureau of Labor Statistics, *Nonprofits account for 11.4 million jobs, 10.3 percent of all private sector employment on the Internet*, U.S. DEP’T. OF LABOR, Oct. 21, 2014, https://www.bls.gov/opub/ted/2014/ted_20141021.htm (showing that non-profits account for 10.3% of private-sector employment in the United States).

⁸⁴ See Section III, *infra*.

⁸⁵ Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION JOURNAL 465 (2013).

⁸⁶ *Id.*

transform a woman's personal and professional life and education and to help her take control of her health and success. These are the very benefits that Amici's members rely on to achieve their own personal, professional, and educational advancement throughout America.

No-cost contraceptive coverage allows women to participate in the workforce with equal opportunity to men. In crafting the Contraceptive Coverage Benefit through the ACA, various government agencies acknowledged that the disparity in health coverage offered to men and women "places women in the workforce at a disadvantage compared to their male co-workers."⁸⁷ Access to contraceptives has enabled women to attend institutes of higher education at greater rates than ever before.⁸⁸ The development of and greater access to the oral contraceptive pill in particular have tremendously increased the rates at which women enroll in college, while decreasing the rates at which they drop out of college.⁸⁹ In addition, many women who attain a level of achievement and stability in their careers before having children ultimately advance further in the workplace and earn more money over their lifetimes.⁹⁰ The ability to control one's reproduction is critical to women's ultimate career and financial success, as women's participation in the labor force often decreases significantly after childbirth.⁹¹

Contraception has allowed women to time their pregnancies so that they may invest in higher education and their careers prior to starting or expanding their families.⁹² The temporary absences from work that necessarily occur when women give birth and, frequently, provide the

⁸⁷ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012).

⁸⁸ Heinrich Hock, *The Pill and the College Attainment of American Women and Men* 19 (Fla. State Univ., Working Paper, 2007); David S. Loughran & Julie M. Zissimopoulos, *Why Wait? The Effect of Marriage and Childbearing on the Wages of Men and Women*, 44 J. HUM. RES. 326, 346 (2009).

⁸⁹ Hock, *supra* note 88.

⁹⁰ Loughran & Zissimopoulos, *supra* note 88 at 346.

⁹¹ Hock, *supra* note 88; Loughran & Zissimopoulos, *supra* note 88 at 346.

⁹² Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 226-27 (Nat'l Bur. of Econ. Research, Working Paper 17922, May 13, 2012).

bulk of care for young children delay women's ability to gain crucial work experience and can result in fewer opportunities for professional development and promotions.⁹³ Further, studies consistently find a negative relationship between childbearing and female wages, due to child care responsibilities and discrimination, while men who become fathers see a positive effect on their wages.⁹⁴ In fact, a woman's first child is associated with a two to three percent decline in wages,⁹⁵ and the average hourly wage of women with two or more children is 28 percent less than the average hourly wage of women with no children.⁹⁶ Accordingly, without the ability to control and time their pregnancies, women will face tremendous personal, professional, social, and economic adverse effects. By contrast, women who can control the timing of their pregnancies and undertake childbearing when they are personally and professionally ready "are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community."⁹⁷

B. Women Have Greatly Benefited from Increased Access to Contraception Since Implementation of the No-Cost Contraceptive Coverage Benefit.

The Contraceptive Coverage Benefit has afforded women significant economic and health gains. It is estimated that at least 62.4 million women have benefited from no-cost contraceptive insurance coverage since the implementation of the ACA.⁹⁸ Due to the

⁹³ Loughran & Zissimopoulos, *supra* note 88 at 346.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 GUTTMACHER REPORT ON PUB. POLICY 5, 6 (2004), https://www.guttmacher.org/sites/default/files/article_files/gr070105.pdf.

⁹⁸ See Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *The Affordable Care Act Is Improving Access to Preventive Services for Millions of Americans*, May 14, 2015, <https://aspe.hhs.gov/system/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf>; see also, NWLC, *New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs*,

Contraceptive Coverage Benefit, women across the country have benefited from decreased costs for almost all reversible contraceptives on the market.⁹⁹ Two-thirds of women using oral contraceptives have benefited from no-cost contraceptive coverage, and almost three-quarters of women using the contraceptive ring no longer pay copays for them.¹⁰⁰ American women have collectively saved nearly \$1.4 billion *annually* in out-of-pocket costs for oral contraceptives alone due to the Contraceptive Coverage Benefit.¹⁰¹ The impact of the Contraceptive Coverage Benefit has been enormous, and the negative impact of the Exemption Rules on American women will be correspondingly extreme.

C. There Are No Comparable Alternatives to the Contraceptive Coverage Benefit.

1. State Laws Will Not Fill the Gap Left by the Exemption Rules.

Twenty-six states currently require private insurers to cover contraceptives if the insurers offer coverage for other prescription drugs, and two more states require coverage based on nondiscrimination laws.¹⁰² These coverage requirements have proven to be effective for women enrolled in private insurance plans that are covered by the state coverage requirements; one study found that women living in states with comprehensive coverage requirements had 70% increased

<https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/> (estimating that 62.4 million women gained access to no-cost contraceptives).

⁹⁹ Nora V. Becker & Daniel Polksky, *Women Saw Large Decrease in Out-Of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFFAIRS 1204 (2015); Lydia E. Pace, Stacie B. Dusetzina & Nancy L. Keating, *Early Impact of the Affordable Care Act on Oral Contraceptive Cost Sharing, Discontinuation, and Nonadherence*, 35 HEALTH AFFAIRS 1616 (2016).

¹⁰⁰ Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 CONTRACEPTION 44, 46 (2015).

¹⁰¹ Becker & Polksky, *supra* note 99.

¹⁰² Adam Sonfield, *States Must Act to Shore Up the Federal Contraceptive Coverage Guarantee*, GUTTMACHER INST., Feb. 16, 2017, <https://www.guttmacher.org/gpr/2017/02/states-must-act-shore-federal-contraceptive-coverage-guarantee>.

odds of consistent contraceptive use.¹⁰³ However, there are four major deficiencies that leave this patchwork of state laws unable to fill the gap left by the Exemption Rules.

First, while 28 states have some form of requirement that private employers cover contraceptives, 22 have no such requirement at all.¹⁰⁴

Second, only four states currently require that contraceptives must be provided with *no* cost to the insured.¹⁰⁵ As shown above and below, increases in cost-sharing can decrease both access to and effective use of contraceptives to the detriment of women across the country. Despite this fact, 46 states have yet to explicitly ensure no-cost coverage for contraceptives.

Third, state laws regulating insurers cannot affect plans written in other states or plans offered by employers that self-insure their employees.¹⁰⁶ Around 60% of all employees are insured by self-funded insurance plans and are therefore not covered by state coverage requirements.¹⁰⁷ When an employer self-insures, these plans are overseen by the United States Department of Labor under the Employer Retirement Income Security Act of 1974 (ERISA) and are only subject to federally established regulations.¹⁰⁸ Therefore, state laws requiring contraceptive coverage will not reach many of the potentially affected women.

¹⁰³ Brianna M. Magnusson et al., *Contraceptive Insurance Mandates and Consistent Contraceptive Use Among Privately Insured Women*, 50 MED. CARE 562, 565 (2012)

¹⁰⁴ Sonfield, *supra* note 102.

¹⁰⁵ Guttmacher Institute, *State Laws and Policies as of October 1, 2017: Insurance Coverage of Contraceptives*, Oct. 1, 2017, <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

¹⁰⁶ Sonfield, *supra* note 102.

¹⁰⁷ Laurie Sobel, Alina Salganicoff & Caroline Rosenzweig, *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*, THE HENRY J. KAISER FAMILY FOUNDATION, Oct. 6, 2017, <http://files.kff.org/attachment/Issue-Brief-New-Regulations-Broadening-Employer-Exemptions-to-Contraceptive-Coverage-Impact-on-Women>; Magnusson et al., *supra* note 103 at 565.

¹⁰⁸ Sobel, Salganicoff & Rosenzweig, *supra* note 107; Magnusson et al., *supra* note 103 at 565.

Finally, 20 of the 28 states that require some form of contraceptive coverage allow certain employers and insurers to opt out of the coverage requirement.¹⁰⁹ Even in the 28 states that do require contraceptive coverage, a significant portion of employers will be able to escape such coverage requirements. State laws simply cannot cure the negative impact the Exemption Rules will have on access to no-cost contraceptive coverage across the country.

2. Other Programs Are No Substitute for Seamless No-Cost Contraceptive Coverage.

For women who depend on employer coverage for contraception, alternative arrangements—such as safety net providers—are either not feasible or not as accessible as employer-provided coverage. It is impractical to suggest that these women obtain coverage through Medicaid and Title X programs; there are significant obstacles and burdens to obtaining these alternate forms of coverage, and some women will not qualify for them at all. Notably, safety net family planning providers have already been severely defunded in at least 11 states, leaving the 42 million women in those states¹¹⁰ without the option of publicly-funded safety net services.¹¹¹

¹⁰⁹ Guttmacher Institute, *supra* note 105

¹¹⁰ United States Census Bureau, *Quick Facts Regarding Arizona, Arkansas, Iowa, Kansas, Kentucky, Michigan, Mississippi, North Carolina, South Carolina, Wisconsin and Texas*, July 1, 2016, <https://www.census.gov/quickfacts/fact/table/AZ/SEX255216>; <https://www.census.gov/quickfacts/fact/table/AR/SEX255216>; <https://www.census.gov/quickfacts/fact/table/IA/SEX255216>; <https://www.census.gov/quickfacts/fact/table/KS/SEX255216>; <https://www.census.gov/quickfacts/fact/table/KY/SEX255216>; <https://www.census.gov/quickfacts/fact/table/MI/SEX255216>; <https://www.census.gov/quickfacts/fact/table/MS/SEX255216>; <https://www.census.gov/quickfacts/fact/table/NC/SEX255216>; <https://www.census.gov/quickfacts/fact/table/SC/SEX255216>; <https://www.census.gov/quickfacts/fact/table/WI/SEX255216>; <https://www.census.gov/quickfacts/fact/table/TX/SEX255216>.

¹¹¹ Rachel Benson Gold & Kinsey Hasstedt, *Publicly Funded Family Planning Under Unprecedented Attack*, 107 AJPH Editorial 1895 (2017), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304124>.

D. The Potential Harms from Losing Contraceptive Coverage, Even Temporarily, Are Irreversible for Women.

Contraceptives are one of the most widely used medications in the country.¹¹² Ninety-nine percent of sexually-active women have used at least one method of contraception throughout their lifetime.¹¹³ The no-cost Contraceptive Coverage Benefit has boosted the consistent and proper use of contraceptives and enabled more women to choose long-term contraceptives.¹¹⁴ Loss of no-cost contraceptive coverage will, by contrast, cause many women to use contraceptives less consistently, to use less effective methods, or to forego contraception altogether, as cost is a significant factor in many women's selection and use of contraception.¹¹⁵ Women cite cost as a reason not to switch to a more effective or preferred form of contraception, or for not using an effective form at all.¹¹⁶ Amici support Plaintiff's motion for a preliminary injunction because they know that losing coverage for even one month will result in irreparable harm for many women nationwide. It is estimated that 41 percent of unintended pregnancies in America are caused by the inconsistent use of contraceptives.¹¹⁷ Additionally, lack of no-cost birth control is cited as a factor in approximately one-quarter of abortions.¹¹⁸

¹¹² Becker & Polksy, *supra* note 99.

¹¹³ *Id.*; Guttmacher Institute, *September 2016 Fact Sheet: Contraceptive Use in the United States*, Sept. 2016, <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states>.

¹¹⁴ Pace, Dusetzina, & Keating, *supra* note 99; Becker & Polksy, *supra* note 99.

¹¹⁵ Adam Sonfield, *What Is at Stake with the Federal Contraceptive Coverage Guarantee?*, 20 GUTTMACHER POLICY REVIEW 8, 9 (2017), https://www.guttmacher.org/sites/default/files/article_files/gpr2000816_0.pdf.

¹¹⁶ *Id.*

¹¹⁷ Pace, Dusetzina & Keating, *supra* note 99; Guttmacher Institute, *supra* note 113. Gaps in contraception use are more common for women who are minorities and those with lower incomes and lower education levels. Magnusson et al., *supra* note 103 at 565.

¹¹⁸ See Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, Sept. 2009, https://www.guttmacher.org/sites/default/files/report_pdf/recessionfp_1.pdf (finding that in a survey of women's contraceptive usage during the recession, many report using birth control less consistently as a way to save money); Juell B. Homco et al, *Reasons for Ineffective Pre-pregnancy Contraception Use in Patients Seeking Abortion Services*, 80 CONTRACEPTION 569 (2009), <http://pubmedcentralcanada.ca/pmcc/articles/PMC3152747/>.

As of 2016, approximately 43 million women in the United States were in their childbearing years, did not want to become pregnant, and were at risk of an unintended pregnancy if they did not have access to reliable contraceptive methods. This means that, across America, at least 43 million women currently need consistent coverage of reliable forms of contraception to effectively prevent unintended pregnancies. Women who receive no-cost contraceptive coverage are more likely to use contraception consistently and correctly. If employers and insurers drop contraceptive coverage, women will be less likely to have access to long-term and effective contraceptives, will be less likely to regularly continue contraceptive use, and will thus be at risk for unintended pregnancies, which increase threats to health and economic security.¹¹⁹

Today, the oral contraceptive pill is the most common contraceptive among women in the United States.¹²⁰ The Contraceptive Coverage Benefit has decreased rates of discontinuation and increased effective use with respect to generic oral contraceptives.¹²¹ In addition, because of the Contraceptive Coverage Benefit, more women have no-cost coverage of longer-term and more

¹¹⁹ *Id.* As discussed in the Plaintiff's Motion for Preliminary Injunction, contraceptives are used as essential medicine for women. *See Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction* filed by the Attorney General for the Commonwealth of Pennsylvania at 2; Guttmacher Institute, *supra* note 113 (finding that 1.5 million women relied on the oral contraceptive pill between 2006 and 2008 for medical reasons other than preventing pregnancy). Contraceptive use decreases pregnancy-related illness and mortality, and prevents potential negative health consequences that stem from unintended pregnancies. *See* Megan L. Kavanaugh & Ragnar M. Anderson, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers*, GUTTMACHER INST., July 2013, <https://www.guttmacher.org/pubs/health-benefits.pdf>; Hal C. Lawrence, III, Vice President for Practice Activities, Am. Congress of Obstetricians and Gynecologists, *Testimony Before the Institute of Medicine Committee on Preventive Services for Women* (Jan. 12, 2011), at 11, <http://tinyurl.com/ztyclx4>. Unintended pregnancies can also have significant impacts on a woman's mental health and are a risk factor for depression. *See* Albert L. Siu & U.S. Preventive Services Task Force, *Screening for Depression in Adults: US Preventive Services Task Force Recommendation Statement*, 315 JAMA 380, 382 (2016), <http://tinyurl.com/hhbnqe9>.

¹²⁰ Pace, Dusetzina, & Keating, *supra* note 99; Guttmacher Institute, *Contraceptive Use in the United States*, Sept. 2016, <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states#2a>.

¹²¹ Pace, Dusetzina, & Keating, *supra* note 99.

effective contraceptives.¹²² For example, privately-insured women interested in an IUD were significantly more likely to receive one when a lower out-of-pocket price for the device and insertion procedure was offered.¹²³ Women who choose long-term contraceptives and receive them at no cost—or low shared costs—continue using birth control at higher rates and with greater success in preventing unintended pregnancies.¹²⁴ Further, long-term contraceptive methods, such as the IUD, are the most effective at preventing unintended pregnancies, with only a 1% failure rate.¹²⁵ No-cost contraceptive coverage can greatly reduce a woman’s risk of unintended pregnancy. Women should not be denied this care.

IV. CONCLUSION

If the Exemption Rules are allowed to remain in effect, a minimum of hundreds of thousands of women—and very possibly millions, including those represented by Amici—across the United States are at risk of being adversely and irreparably harmed. The approximately one half million female employees of religiously-affiliated hospital employees; nearly 600,000 female students of religiously-affiliated colleges and universities; and over 17,000 female employees of privately held, for-profit companies that have already stated their intent to deny contraceptive coverage comprise a conservative estimation of the number of women affected by the Exemption Rules. The estimates do not take into account dependents of these entities’ employees and students, nor do they take into account the employees and dependents of large, publicly held companies that may now choose to drop coverage.

¹²² Guttmacher Institute, *supra* note 113; Becker & Polksky, *supra* note 99; Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION e39 (2011), <http://escholarship.org/uc/item/1dz6d3cx>.

¹²³ Becker & Polksky, *supra* note 99; Gariepy et al., *supra* note 122..

¹²⁴ Gariepy et al., *supra* note 122; Natalie E. Birgisson et al., *Preventing Unintended Pregnancy: The Contraceptive CHOICE Project in Review*, 24 J. WOMEN’S HEALTH 349 (2015); Guttmacher Institute, *supra* note 113.

¹²⁵ Gariepy et al., *supra* note 122.

The repercussions of losing coverage of safe, reliable, no-cost contraception are not just monetary. Women's physical and emotional health, educational opportunities, and professional advancement all depend upon consistent, uninterrupted coverage for prescription contraceptives. Loss of no-cost contraceptive coverage—even for only a few months—will have immediate, irreparable consequences for women across the country. The disruptions in coverage caused by the Exemption Rules will have far-reaching, grave, and irreparable consequences for American women's professional and education advancement as well as their and their families' well-being. Accordingly, on behalf of female employees and students throughout the country, Amici support Plaintiff's motion for a preliminary injunction to enjoin implementation of these harmful Exemption Rules pending a trial on the merits.

Dated: November 27, 2017

Respectfully submitted,

By: /s/ Jamie A. Levitt
Jamie A. Levitt

Jamie A. Levitt
Rhiannon N. Batchelder
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019-9601
Telephone: (212) 468-8000

Janie F. Schulman
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, California 90017-3543
Telephone: (213) 892-5200

Attorneys for Amici Curiae, American Association of University Women (“AAUW”); American Federation of State, County, and Municipal Employees (AFL-CIO) (“AFSCME”); Service Employees International Union (“SEIU”) and 11 Additional Professional, Labor, and Student Associations

APPENDIX

Interests and Descriptions of *Amici Curiae*

- **The American Association of University Women (“AAUW”)** was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW’s priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports choice in the determination of one’s reproductive life and increased access to health care and family planning services.

- **The American Federation of State, County, and Municipal Employees (AFL-CIO) (“AFSCME”)** is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico. Over 100,000 of its members work in the private sector. With well over half its members being women, AFSCME has a long history of advocating for gender equality.

- **The Service Employees International Union (“SEIU”)** is a union of two million women and men who work in health care, property services, and public services throughout the United States. More than half of SEIU’s members are women and more than half its members work in health care. SEIU is deeply committed to ensuring that all working people, men and women alike, have access to affordable health care, including contraceptive coverage as intended by the Affordable Care Act. SEIU has a particular interest in this Rule because its members know, both personally and in their capacity as health care workers, how vital it is for women to

have seamless contraceptive coverage in order to be able to protect their health and their ability to work, which in turn are necessary for the economic security of families across America.

- **The American Federation of Teachers (“AFT”)**, an affiliate of the AFL-CIO, represents 1.7 million members in more than 3,000 local affiliates nationwide and overseas in K-12 and high education, public employment and healthcare. AFT has a strong interest in supporting the rights of women in the area of reproductive choice. AFT considers reproductive healthcare, including contraception, as basic healthcare for women. Therefore, AFT believes it must be covered as a preventive health service in order to provide quality healthcare for all women. Furthermore, the fair and equal treatment of a woman’s right to make her own personal healthcare decisions regarding reproduction and other health issues is an important part of AFT’s mission to advance the workplace rights of all its members. AFT has members in all 50 states, plus Guam, Puerto Rico and the Virgin Islands.

- **The National Association of Women Lawyers (“NAWL”)** provides leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success. As part of its mission, NAWL promotes the interests of women and families by participation as amicus curiae in cases impacting their rights. NAWL recognizes that when women have secure control over planning whether and how to have a family, they are also able to invest in their own careers and take risks in the labor market that lead to better economic outcomes for women, their families, and the country.

- **Girls Inc.** is a nonprofit, nonpartisan organization that inspires all girls to be strong, smart, and bold, through direct service and advocacy. Over 80 local Girls Inc. affiliates provide

primarily after-school and summer programming to approximately 150,000 girls ages 5-18 in 31 U.S. states and in Canada. Girls Inc.’s comprehensive approach to whole girl development equips girls to navigate gender, economic, and social barriers and grow up healthy, educated, and independent. These positive outcomes are achieved through three core elements: people-trained staff and volunteers who build lasting, mentoring relationships; an environment that is girls-only, physically and emotionally safe, and where there is a sisterhood of support, high expectations, and mutual respect; and programming that is research-based, hands-on and minds-on, age-appropriate, meeting the needs of today’s girls. Informed by girls and their families, Girls Inc. also advocates for legislation, policies, and practices to advance the rights and opportunities of girls and young women. Girls Inc. supports protecting and expanding access to affordable reproductive health care, so all women can decide what is best for their own health, education, and careers.

- **The National Association of Social Workers (“NASW”)** was founded in 1955, and is the largest association of professional social workers in the United States with over 120,000 members in 55 chapters. The Pennsylvania Chapter has 4,700 members. NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW advocates that every individual, within the context of her or his value system, must have access to family planning, abortion, and other reproductive health services.
- **If/When/How: Lawyering for Reproductive Justice (“If/When/How”)** trains, networks, and mobilizes law students and legal professionals to work within and beyond the legal system to champion reproductive justice. If/When/How believes that reproductive justice will exist when all people have the ability to decide if, when, and how to create and sustain families with dignity, free from discrimination, coercion, or violence. Achieving reproductive

justice requires a critical transformation of the legal system, from an institution that often perpetuates oppression to one that realizes justice. If/When/How currently has approximately 90 active chapters at law schools across the country: 9% in Mid-Atlantic; 26% in Midwest; 18% in Northeast; 27% in South; and 20% in West. If/When/How has approximately 1,500 student members overall, with 95% of its members identifying as women.

- **California Women Lawyers (“CWL”)** is a non-profit organization chartered in 1974.

CWL is the only statewide bar association for women in California and maintains a primary focus on advancing women in the legal profession. Since its founding, CWL has worked to improve the administration of justice, to better the position of women in society, to eliminate all inequities based on sex, and to provide an organization for collective action and expression germane to the aforesaid purposes. CWL has also participated as *amicus curiae* in a wide range of cases to secure the equal treatment of women and other classes of persons under the law.

- **The Women’s Bar Association of Massachusetts (“WBA”)** is a professional association comprised of over 1,500 members, including judges, attorneys, and policy makers dedicated to advancing and protecting the interests of women. In particular, the WBA advocates for public policy that improves the lives of women and their children. The WBA has filed and joined many *amicus* briefs in state and federal courts on legal issues that have a unique impact on women, including cases involving sexual discrimination, family law, domestic violence, and employment discrimination. The WBA is comprised of over 1,500 members, 99% of which are female. The WBA operates solely in Massachusetts.

- **Lawyers Club of San Diego (“Lawyers Club”)** is a 1,300+ member legal association established in 1972 with the mission “to advance the status of women in the law and society.” In addition to presenting educational programs and engaging in advocacy, Lawyers Club

participates in litigation as *amicus curiae* where the issues concern the advancement of status of women in the law and society. Lawyers Club is committed to gender equality and reproductive justice. Reproductive justice gives women the freedom and flexibility to plan their families in ways that work best not only for each woman and her professional advancement, but for society as a whole. Lawyers Club joins this amicus brief because access to no-cost contraception directly impacts women's reproductive justice and gender equality efforts.

- **The Colorado Women's Bar Association ("CWBA")** is an organization of over 1,200 Colorado attorneys, judges, legal professionals, and law students founded in 1978 and dedicated to promoting women in the legal profession and the interests of women generally. The CWBA has an interest in this case because its members, their clients, and other women in Colorado are committed to protecting women's health.
- **The Women Lawyers Association of Los Angeles ("WLALA")** is a nonprofit organization comprised primarily of lawyers and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women in our society. WLALA has participated as an *amicus* in cases involving discrimination before many federal district courts and Courts of Appeals. WLALA believes that bar associations have a special obligation to protect the core guarantees of our Constitution to secure equal opportunity for women and girls through the full enforcement of laws prohibiting discrimination.
- **The Women's Bar Association of the District of Columbia ("WBA")**, founded in 1917, is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, WBA continues to pursue its mission of maintaining the honor and integrity

of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among its members. WBA believes that the administration of justice includes women's access to healthcare services, with a particular interest in ensuring that women receive full access to contraceptive coverage. Lack of access can affect women's financial well-being, job security, educational attainment, and future opportunity.