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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF DELAWARE; THE STATE OF MARYLAND; THE STATE OF NEW YORK; THE COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

ALEX M. AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE; MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Defendant-Intervenors.

4:17-cv-05783-HSG

DECLARATION OF LISA IKEMOTO

I, Lisa Ikemoto, declare:

1. I am a Professor at UC Davis School of Law, and specialize in health care law and reproductive health and rights. I earned a J.D. at UC Davis School of Law (1987), and an LL.M. from Columbia Law School (1989). I am now a Martin Luther King, Jr. Professor at UC Davis School of Law, with faculty affiliate status in the Health Systems Bioethics Program, the Masters in Public Health Program, and the Feminist Research Institute. I have taught and researched health care law, bioethics, and reproductive rights since 1989. My work focuses on women's reproductive health and rights, including the effects of religious doctrine on women's health; health care disparities; and reproductive technology use.

2. I serve and have served as board member or advisor for a number of women's rights and health organizations, including the California Women's Law Center, National Asian Pacific American Women's Forum, and Forward Together. I currently serve as a member of the Guttmacher Institute Board of Directors (2014 - present) and as an Advisory Committee member for If/When/How (2011 - present).

3. Since 2010, I have closely followed the promulgation of the rules addressing contraceptive coverage under the ACA. I have read and am familiar with the final rules on religious and moral exemptions to contraception coverage (Final Rules), published in the *Federal Register* on November 15, 2018.

4. Upon reviewing the Final Rules and the interim final rules which preceded them, I gathered data to determine their impacts on California women. Specifically, I reviewed and assessed the impact of the Final Rules on employees and their dependents receiving coverage from self-insured plans in California.

The Final Rules authorize private employers to use the broadly expanded religious and moral exemptions for any or all of the FDA approved methods of contraception, including sterilization procedures and patient education and counseling for women with reproductive capacity. The California Women's Contraception Equity Act recognizes that access to these services are part of comprehensive health care for women and will preserve access to these essential services for women in insured plans. Cal. Health & Saf. Code § 1367.25. Because the

state benefit mandate does not apply to self-funded plans, the Final Rules place women participants and dependents in self-funded employer health benefit plans at risk of losing coverage for contraceptive, sterilization, and education and counseling services.

The scope of the risk is significant. Nationally, the majority – 61% of health plans are self-insured. KAISER FAMILY FOUND., *2016 Employer Health Benefits Survey* at 8 (Sept. 14, 2016), http://files.kff.org/attachment/Report-Employer-Health-Benefits-2016-Annual-Survey. In California, between 3.7 million and 6.6 million employees and dependents were enrolled in self-insured plans. CAL. HEALTH BENEFITS REV. PROGRAM, ESTIMATES OF SOURCES OF HEALTH INSURANCE IN CALIFORNIA FOR 2018 at 4 (2017), http://chbrp.com/Estimates%20of%20Sources%202018%20Final%2003142017.pdf; CALIFORNIA HEALTH CARE FOUND., *The Private Insurance Market in California* (2015), http://www.chcf.org/publications/2015/02/data-viz-health-plans. The majority of women have health benefits through employment-based plans. Laurie Sobel, Adara Beamesderfer, & Alina Salganicoff, *Issue Brief: Private Insurance Coverage of Contraception*, p. 2, KAISER FAMILY FOUND.:WOMEN'S HEALTH POL'Y 2 (Dec. 7, 2016), http://files.kff.org/attachment/issue-brief-private-insurance-coverage-of-contraception. That suggests that a substantial proportion, if not a majority, of the millions of Californians enrolled in self-insured plans are women. In addition, self-funded plans are more commonly used by large employers. The percentage of workers covered by self-funded plans increases with the size of the employer. For example, in 2016, 50% of employees of firms with 200-999 workers were enrolled in self-funded plans, while 94% of employees of firms with 5,000 or more workers were enrolled in self-funded plans. KAISER FAMILY FOUND., 2016 *Health Benefits Survey*, *supra*. If only a few large employers with self-funded plans use the religious and moral exemptions, the number of employees affected may still be in thousands, if not 10,000s. It is that group of Californians who are at risk of losing access to comprehensive health care if employers are able to use the Final Rules' exemptions. Working class women will be most vulnerable because they are least likely to have the disposable income necessary to pay out of pocket.

While many choose jobs with health benefits over those that do not, employees do not expect employers' religious beliefs to affect the scope of health benefits. Nor do most employees choose jobs based on employers' religious beliefs. Civil rights laws, including Title VII, which prohibits an employer from discriminating against employees who have different religious beliefs than the employer's, have established a norm that employer religious beliefs are not supposed to affect the workplace. The Final Rules will allow employers to impose their beliefs on employees through the exemptions.

5. I also reviewed research, including quantitative and qualitative data, and analysis, on barriers to contraceptive access, the effects of disruption and other barriers to contraceptive use. The research shows that the Final Rules will create barriers to access that harm women.

Loss of coverage will create an access barrier to the contraceptive methods most women use. The pill, female sterilization, the condom, and the IUD, a form of long acting reversible contraception (LARC), are the four most commonly used methods of contraception. *Id*. at 1; Megan L. Kavanaugh & Jenna Jerman, *Contraceptive Method Use in the United States: Trends and Characteristics Between 2008, 2012 and 2014*, CONTRACEPTION at 7 (2017). The pill, sterilization, the IUD and implantable rods are also among the most effective forms of birth control. U.S. FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE, (last visited Oct. 19, 2017), https://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM517406.pdf. A recent study shows that while the proportion of women who used a contraceptive method did not significantly change between 2008 and 2014, the types of contraceptive methods that women used during that period changed significantly. Notably, women's use of LARCs more than doubled by 2014, while female and male sterilization use declined the most, compared to other methods. Kavanaugh & Jerman, *Contraceptive Method Use in the United States, supra*, at 6. These results are consistent with those in a study conducted before implementation of the ACA's contraceptive coverage requirement. A 2007 study showed that "women who were uninsured were 30% less likely than women with some form of health insurance to use prescription contraceptives." Kelly R. Culwell & Joe Feinglass, *The Association of Health Insurance with Use of Prescription Contraceptives*, 39 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 226,

227 (2007). These studies show that insurance coverage enables women to choose methods that are more effective.

The Final Rules will create barriers to access to the most common and preferred methods of contraception. The Final Rules authorize employers to claim an exemption for some or all of the contraception methods and surgical procedures. As *Burwell v. Hobby Lobby* showed, some employers object to methods they believe interfere with conception, including IUDs. Catholic doctrine prohibits use of all eighteen FDA-approved contraceptive methods. If employers are able to use the Final Rules, the methods most women use will be excluded from coverage.

A self-funded employer's decision to exempt contraceptive services will impact all women who have been obtaining contraception through the plan. Exemptions disrupt the seamless provision of care that is necessary for effective family planning. As noted, cost is a substantial barrier to contraceptive use, as well as to effective contraceptive use. A recent Guttmacher Policy Review points to a well-powered study based on claims data that found, "women were less likely to stop using the pill once costs were removed in the wake of the federal contraceptive coverage guarantee." Adam Sonfield, *What is at Stake with the Federal Contraceptive Coverage Guarantee?*, 20 GUTTMACHER POLICY REVIEW 8, 10 (2017), citing 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). Loss of coverage adds barriers to access to education and counseling about family planning, and to contraceptives in a number of ways. The American College of Obstetricians and Gynecologists has identified knowledge deficits, exclusions in contraceptive equity laws, high out of pocket costs, deductibles, and co-payments for contraception (especially for LARCs), insurance limits on refills that prevent timely use of contraception, and medical practices that require women to go through additional steps as barriers to contraceptive access. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, COMMITTEE OPINION: ACCESS TO CONTRACEPTION, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (2015), https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Access-to-Contraception (reaff'd 2017). Women who lose contraceptive coverage will face many of these

barriers. Loss of coverage will impose the need to obtain funding, change providers, decide whether to switch to a less expensive contraceptive method, switch from a pharmacy to a family planning clinic, etc. Disruption of services, even if temporary, constitutes a barrier to access.

6. I reviewed legal and health research to determine the effects of contraceptive access on women's ability to participate in and contribute to society. The research shows that contraceptive access has empowered women and alleviated the burden of family planning placed on women.

Access to contraception is part of comprehensive health care. In fact, the American Public Health Association (APHA) "supports the universal right to contraception access in the United States and internationally." In 2015, the APHA adopted a policy that "urges all governments, health providers, and health funding systems to ensure the right to contraception without exceptions, through services including comprehensive evidence-based counseling, language translation, and referrals as needed." AM. PUB. HEALTH ASSOC., *Universal Access to Contraception* (Nov. 3, 2015), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/12/17/09/14/universal-access-to-contraception (Policy Number 20153).

Failure to cover some or all prescription contraceptives discriminates on the basis of gender. The Final Rules authorize employers to claim exemption from coverage of eighteen FDA approved contraceptives. All eighteen are contraceptive methods that only women use. In 2000, the U.S. Equal Employment Opportunity Commission determined that an employer providing coverage for prescription drugs except prescription contraceptives violated Title VII of the Civil Rights Act of 1964. The resulting order stated not only that the employer must cover the expenses of prescription contraceptives to the same extent it covered other prescription drugs, devices, and preventive care, but also that the employer must cover the full range of prescription contraceptives. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, DECISION ON COVERAGE OF CONTRACEPTION (Dec. 14, 2000), https://www.eeoc.gov/policy/docs/decision-contraception.html. Twenty-eight states have addressed the concerns about gender equality and access to comprehensive health care with state benefit mandates, including the California Women's

Contraception Equity Act. GUTTMACHER INST., STATE LAWS AND POLICIES: INSURANCE COVERAGE OF CONTRACEPTIVES (as of October 1, 2017), https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives.

Access to contraceptives and other family planning services is key to women's participation in society and to gender equality. In 2013, the Guttmacher Institute published a major report that carefully reviewed and synthesized research documenting the ways and extent to which women's contraceptive access and use has enabled greater participation in postsecondary education and employment, increased earning power, and economic stability. Studies focusing on young women in the 1960s and 1970s showed the effects of the advent of the pill. Several studies showed that access to effective contraception was a "significant factor behind greater numbers of women investing in higher education." A study on young women's college enrollment in the 1970s revealed a 12% increase in the likelihood of college enrollment among young women with access to the pill, compared to those without, and a 35% lower dropout rate among women with access to the pill, compared to those without. Adam Sonfield et al., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN, GUTTMACHER INST. 7 (March 2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf. Studies on workforce participation have produced strong evidence that access to the pill "was a driving force behind the societal shift to significantly more young women participating in the paid labor force, including professional occupations." *Id*. at 12. More recent studies show that contraceptive access has "significantly contributed to increasing women's earning power and to decreasing the gender gap in pay," which persists. *Id*. at 17.

Access to contraceptives alleviates the burden placed on women for family planning. Women bear burden of preventing pregnancy and controlling the timing of bearing children. Social norms that allocate the responsibility for implementing family planning decisions make the unequal allocation of responsibility seem natural. Katrina Kimport, *More Than a Physical Burden: Women's Mental and Emotional Work in Preventing Pregnancy*, J. SEX RESEARCH 1 (2017). Contraceptive access alleviates the burden of implementing pregnancy prevention or

timing. For the women affected by the Final Rules, that burden will increase. A recent study has found that family planning counseling can address the ways in which the burdens of family planning disproportionately affect women. *Id*. at 8. The elimination of coverage for counseling services will prevent the equalization of the responsibilities for family planning.

7. Based on over twenty-years of research on women's health and rights, my review of the Final Rules, and a review of data and other research conducted for this Declaration, I conclude that the Final Rules will have significant impact on women in California by imposing barriers to contraceptive access for women enrolled in self-insured plans sponsored by employers the Final Rules authorize to exclude contraceptive and family planning services coverage; by exposing women to risks and attendant effects of unintended pregnancy; and by increasing risks to participation in higher education, career attainment, and economic stability. The Final Rules authorize employers to impose reproductive control over women enrolled in self-funded plans.

I declare under penalty of perjury that the foregoing is true and correct and of my own personal knowledge.

Executed on December 3, 2018, in Davis, California.

Lisa Ikemoto
Martin Luther King, Jr. Professor
UC Davis School of Law