United States Court of Appeals

for the

Third Circuit

Case Nos. 19-1189, 19-1129, 18-1253, 17-3752

COMMONWEALTH OF PENNSYLVANIA; STATE OF NEW JERSEY

– v. –

PRESIDENT UNITED STATES OF AMERICA; SECRETARY UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF TREASURY; UNITED STATES DEPARTMENT OF TREASURY; SECRETARY UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR;

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM AN ORDER ENTERED FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF THE CENTER FOR REPRODUCTIVE RIGHTS, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE CALIFORNIA WOMEN'S LAW CENTER, GLBTQ LEGAL ADVOCATES & DEFENDERS, LATINOJUSTICE PRLDEF, LAWYERS FOR CIVIL RIGHTS, LEGAL MOMENTUM, LEGAL VOICE, THE MISSISSIPPI CENTER FOR JUSTICE, THE NATIONAL CENTER FOR LESBIAN RIGHTS, AND THE WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES OF AMERICA LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME (Intervenor in D.C.) Secretary United States of Department of Health and Human Services, United States Department of Health and Human Services, Secretary United States Department of Treasury, United States Department of Treasury, Secretary United States Department of Labor, United States Department of Labor,

Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certifies that *amici* are not publicly held corporations, do not have a parent corporation, and that no publicly held corporation owns 10 percent or more of *amici*'s respective stock.

Dated: March 22, 2019

By: /s/ Dariely Rodriguez

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INTEREST OF AMICI CURIAE[1]

Amici are leading national and regional civil rights and equal justice organizations that litigate in state and federal courts to protect constitutional rights for all. *See* interest and descriptions of amici curiae attached.

Collectively amici have a shared interest in ensuring that our federal government is held accountable to two basic constitutional obligations: It must afford all people equal treatment under the law and it cannot impose laws that disfavor individuals who seek to exercise their fundamental constitutional rights. Amici submit this brief to urge the Court to consider how the rules challenged in this case violate both of these core constitutional guarantees, and, in so doing, further entrench the systemic and structural barriers to individual self-determination and equal participation in social, political, and economic life experienced by women, including women of color who are disproportionately low-income, and others who face multiple forms of discrimination.

[1] Amici hereby certify that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than amici and their counsel contributed money intended to fund preparation or submission of the brief. All parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

At issue are a pair of unlawful regulations issued by Defendants, which violate the Constitution's guarantees of liberty and equal protection under the law. On November 15, 2018, the Departments of Health and Human Services, Labor, and Treasury published two final rules that will deprive thousands of women of meaningful access to contraceptive health care services.[2] The Religious Exemption Rule, 83 Fed. Reg. 57,536, and the Moral Exemption Rule, 83 Fed. Reg. 57,592 (collectively, "the Rules") broadly exempt nearly every employer or university with a religious or moral objection from complying with the Affordable Care Act's ("ACA") requirement to provide coverage for comprehensive preventive health services, including no-cost coverage for contraception services. *See* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). Under the Religious Exemption Rule, the government authorizes any for-profit or non-profit entity of any size with a religious objection to exclude coverage for contraception in its health benefit or insurance plans. Under the Moral Exemption Rule, any non-profit or closely-held for-profit entity can refuse this coverage based on a moral objection.

[2] Because the Rules intentionally and explicitly target women's health benefits, this brief frequently uses female pronouns as well as the term "woman," in discussing the impact of the Rules. However, amici recognize that all persons who may become pregnant – including people who do not identify as women – need access to a full range of reproductive health care services, including access to contraception and full protection of their constitutional right to access such services.

The Rules were preliminarily enjoined nationwide by two district courts; each found that the Rules are likely inconsistent with the ACA's contraceptive coverage guarantee, and therefore violate the APA. *See California et al. v. Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019), *appeal filed*, No. 19-15150 (9th Cir. Jan. 28, 2019); *Pennsylvania v. Trump et al.*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), *appeal filed*, No. 19-1189 (3d Cir. Jan. 23, 2019). The Pennsylvania district court further found that the Final Rules were irreparably tainted by the administration's failure to conduct notice and comment prior to publication of the interim final rules. *See Pennsylvania v. Trump*, 351 F. Supp. 3d at 812-13.[3]

For reasons fully articulated by Appellees Commonwealth of Pennsylvania and State of New Jersey, the District Court reached the correct decision, consistent with the well-reasoned decision in *California et al. v. Health & Human Services*, and the Rules should remain enjoined. Additionally, the Rules unlawfully impede upon the rights to liberty and equal protection guaranteed by the Fifth Amendment.

The Rules violate the Equal Protection guarantee of the Fifth Amendment by imposing discriminatory burdens on those who exercise the fundamental constitutional right to procreative choice and on women. First, they discriminate

[3] The interim final rules themselves were preliminarily enjoined by both district courts based on likely violations of the APA. *California et al. v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff'd in part*, 911 F.3d 558 (9th Cir. 2018); *Pennsylvania v. Trump et al.*, 281 F. Supp. 3d 553 (E.D. Pa. 2017), *appeal filed*, No. 17-3752 (3d Cir. Dec. 21, 2017).

against employees and students who exercise their fundamental right to reproductive decision-making by using contraception – a right recognized by the Supreme Court for over fifty years as a liberty protected under the Constitution. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). Second, the Rules discriminate against women by singling out health care services predominantly used by women as a lesser form of care that employers and universities are free to exclude from comprehensive coverage. By interfering with women's reproductive autonomy and their ability to prevent or delay pregnancy, the Rules entrench the stereotype that a woman's reproductive capacity determines her role in society.

The brunt of these constitutional violations will be borne by women of color, who are disproportionately low-income, and their families. People living at the intersection of multiple forms of oppression face cumulative and distinct harms. These communities already face heightened structural barriers to accessing and navigating the health care system, and in exercising their right to access reproductive health care. This real-world context matters: The Rules perpetuate a longstanding history of systemic burdens and infringement on the reproductive rights of women of color and low-income women. Given existing disparities and the context in which the Rules will operate, the Court should take seriously the degree to which the burdens and inequities already faced by women of color and low-income women will be exacerbated by the hurdles imposed by the Rules.

Because the Rules implicate two intersecting and heightened constitutional concerns – penalizing individuals who seek to exercise their fundamental rights *and* authorizing discriminatory treatment of women's health care coverage – they warrant exacting judicial scrutiny. Amici urge this Court to consider longstanding Supreme Court precedent establishing that, where a discriminatory law or regulation simultaneously implicates the Constitution's equal protection guarantee *and* a fundamental right, it should be reviewed under strict scrutiny. At a minimum, the invidious discrimination against women caused by the Rules requires heightened scrutiny. Under either level of review, the Rules cannot survive because they are not sufficiently tailored to advance a compelling or important government interest. To the contrary, they undermine the government's compelling interest in ensuring that all women have equal access to health care coverage. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring).

With multiple constitutional rights on the line, amici urge the Court to affirm the District Court decision enjoining these unlawful Rules.

ARGUMENT

I. THE RULES DEMAND EXACTING JUDICIAL SCRUTINY

The Fifth Amendment to the Constitution guarantees equal protection under the law and prohibits both infringement of fundamental rights and unjustified discrimination based on a suspect classification. *See United States v. Virginia*, 518

U.S. 515, 531 (1996); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942). The Rules violate both of these protections: they discriminate against employees and students who exercise their fundamental right to contraception; and they discriminate based on gender by imposing burdens specifically upon women who have historically faced discrimination in obtaining health care and insurance coverage. The Rules therefore require the most exacting judicial scrutiny.

A. The Rules Discriminate Against Employees and Students Who Choose to Exercise Their Fundamental Right to Contraception

The Constitution protects an individual's right to reproductive autonomy – including the use of contraception – as a fundamental right. The Supreme Court first recognized a constitutional right to make certain personal, intimate choices about whether and when to have children over fifty years ago. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court has repeatedly reaffirmed that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." *Carey v. Pop. Servs. Int'l*, 431 U.S. 678, 687 (1977); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

Access to contraception is a core aspect of bodily integrity and personal decision-making and of sexual, marital, and familial privacy. As explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. 833, 856 (1992); *see also id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (writing that laws regulating a woman's reproductive choices implicate her "basic control over her life").

The Rules implicate the fundamental right to reproductive decision-making by burdening access to contraception. In *Carey v. Population Services*, the Supreme Court invalidated part of a state law that prohibited the distribution of contraception by anyone other than licensed pharmacists. The Court recognized that, even though the challenged statute did not ban contraception directly, it nonetheless "clearly impose[d] a significant burden on the right of the individuals to use contraceptives if they cho[se] to" by limiting distribution privileges to licensed pharmacists. 431 U.S. at 689. The restriction made contraceptives less accessible, diminished price competition, and "reduce[d] the opportunity for privacy of selection and purchase." *Id*.

Under *Carey*, even indirect interference with an individual's ability to access contraception is constitutionally suspect. *See id*. Here, by empowering employers

and universities to exclude contraceptive coverage from their otherwise comprehensive health plans, the Rules burden the fundamental right to reproductive decision-making. Indeed, these Rules penalize individuals who choose to use contraception by making it simultaneously more expensive and less accessible.

This penalty on an individual's fundamental right to access contraception is particularly burdensome because there are few, if any, realistic alternatives to employer-sponsored insurance for employees or to university-provided plans for students who are not covered under a parent's plan. An individual's employer often subsidizes the cost of her health insurance. *See 2018 Employer Health Benefits Survey*, Kaiser Family Found. (2018), http://files.kff.org/attachment/Summary-of-Findings-Employer-Health-Benefits-2018. The federal government also subsidizes her employer-sponsored insurance by exempting it from taxation. *See How Does the Tax Exclusion for Employer-Sponsored Health Insurance Work?*, Tax Policy Ctr., http://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work. If her employer excludes contraceptive coverage, a woman would be forced either to pay out of pocket for contraception or to forgo these valuable subsidies in order to purchase an insurance policy on the individual

market that includes contraceptive coverage[4] – essentially leaving a significant part of her compensation on the table.

What's more, under the ACA, persons are eligible for tax credit subsidies to purchase individual insurance policies only if their employers do not already offer them affordable coverage. *See* 26 U.S.C. 36B(c)(2)(B). Accordingly, someone who turns down the plan offered by her employer or university in order to obtain an individual plan that includes contraceptive coverage cannot receive federal financial assistance on the individual marketplace, regardless of how low her income may be. Given these strong government-imposed financial incentives to accept employer- or university-provided insurance, she may have no real choice but to purchase that plan, even if it excludes coverage for contraception.

The financial inducements that follow from the Rules drive individuals toward accepting whatever incomplete insurance package their employers or universities offer. At the same time, these inducements steer them away from obtaining health insurance coverage that gives them control of their reproductive health and autonomy, including decisions to avoid or postpone pregnancy. By authorizing entities to exclude contraceptive coverage – and *only* contraceptive coverage – in their benefit packages, this regulatory environment hollows out the fundamental

[4] Because "contraception-only" insurance plans do not exist on the health insurance marketplaces and are not sold by insurers, people would be forced to buy a comprehensive health insurance policy.

right to reproductive decision-making. As the Court has recognized in other contexts, "[c]onstitutional rights would be of little value if they could be thus indirectly denied." *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (holding the government cannot nullify the constitutional right to vote indirectly by doing so "in a form which permits a private organization to practice racial discrimination in the election"); *see also* Rachel Suppe, *A Right in Theory But Not in Practice: Voter Discrimination and TRAP Laws as Barriers to Exercising a Constitutional Right*, 23 J. Gender, Soc. Pol'y & L. 107, 132 (2014) (discussing how reproductive rights "like the right to vote, can be denied by a debasement or dilution of the weight of the citizen's right just as effectively as an outright prohibition on that right").

The Rules therefore discriminate against people who wish to exercise their fundamental right to access contraception, impose severe burdens on that right, and harm women.

B. The Rules Discriminate Against Women Who Seek Access to Preventive Health Care

The Rules are also unconstitutional because they target women for discriminatory treatment and perpetuate purposeful gender-based discrimination. *See generally Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991); *Caban v. Mohammed*, 441 U.S. 380 (1979). The Rules apply explicitly and exclusively to the section of the ACA addressing women's preventive care, 42 U.S.C. § 300gg-13(a)(4), and authorize insurers and employers to deny a critical

element of preventive health care that millions of women depend upon. This singling out of health care relied on by women is intentional and purposeful. The Rules thereby create an explicit and constitutionally impermissible gender-based classification.

First, the Rules do not create generally-applicable religious or moral exemptions, but rather *specifically target* preventive health care essential for women's reproductive health and decision-making for special burdens. As previously articulated by the Equal Employment Opportunity Commission in the context of Title VII of the Civil Rights Act of 1964, "prescription contraceptives are available *only* for women. As a result, [the] explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. . . . [A] policy need not specifically refer to that group in order to be facially discriminatory." *Commission Decision on Coverage of Contraception*, Equal Emp't Opportunity Comm'n, 2000 WL 33407187 (Dec. 14, 2000). Moreover, the Rules force female employees and students to pay more out-of-pocket costs for their health care than their male peers or to forego contraceptive care altogether. Women insured by entities that drop contraceptive coverage are faced with a Hobson's choice: accept incomplete medical coverage unequal to that received by their male colleagues or forgo employer or university-provided coverage and try to purchase out of pocket a comprehensive insurance package that includes coverage for contraception. *See* Section I.A *supra*.

Second, the Rules stigmatize women's reproductive choices in a manner that perpetuates sex stereotypes and antiquated notions of women's role in society. *See Johnson Controls*, 499 U.S. at 211 ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."). Contraceptive coverage is a necessary component of equality between men and women because it allows women to make decisions about their health, reproductive lives, education, and livelihoods. *Cf. Casey*, 505 U.S. at 856. Denying women access to this coverage denies them equal opportunity to aspire, achieve, participate in, and contribute to society based on their individual talents and capabilities. As the Supreme Court recognized in *Nevada Dept. of Human Resources v. Hibbs*, state benefits schemes which operate based on stereotypes about women's reproductive role may "force[] women to continue to assume the role of primary family caregiver, and foster[] employers' stereotypical views about women's commitment to work and their value as employees," ultimately "exclud[ing] . . . women . . . from the workplace." 538 U.S. 721, 736 (2003).

Third, and intertwined with the Rules' negative impact on women's ability to control their own reproductive lives, the Rules deny women the ability to preserve and protect their health and well-being to the same extent as men. Allowing employers and universities to exclude coverage for contraception impedes women's

ability to treat a variety of other medical conditions for which contraceptives may be prescribed, including endometriosis, acne, pelvic inflammatory disease, and irregular menstrual bleeding. *See* Kristina D. Chadwick et al., *Fifty Years of "the Pill": Risk Reduction and Discovery of Benefits Beyond Contraception, Reflections, and Forecast*, 125 Toxicological Sci. 2, 4 (2012).

In these ways, authorizing and enabling employers and universities to exclude coverage for contraception makes it more difficult for women to obtain needed health care and to avoid unintended pregnancy, which in turn interferes with women's ability to participate fully in the "marketplace and the world of ideas," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 n.11 (1982) (quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)), and drastically compromises their ability to make "choices central to personal dignity and autonomy." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851). The Rules therefore purposefully discriminate against women by imposing significant burdens on their ability to obtain comprehensive preventive health care.

C. Under the Constitution's Guarantee of Equal Protection, the Rules are Subject to Strict Scrutiny

The imperative for exacting judicial scrutiny here is not a close call. The Rules both burden a fundamental right and single out a constitutionally protected suspect class for differential treatment. The right to access contraception is a recognized component of the fundamental right of reproductive decision-making. *See Carey*,

431 U.S. at 687; *see also Casey*, 505 U.S. at 851 (recognizing the Constitution's liberty guarantee encompasses "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"). Because the Rules discriminate against individuals exercising their fundamental right to access contraception, strict scrutiny applies.

Strict scrutiny is also warranted because the Rules burden that fundamental right based on gender, a classification that itself independently warrants heightened equal protection review. *See United States v. Virginia*, 518 U.S. 515, 531 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Laws that selectively burden a fundamental constitutional right based on a suspect classification are subject to strict scrutiny under the guarantee of equal protection. *See Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding a coercive sterilization law that drew classifications among criminals failed strict scrutiny under equal protection because the law deprived individuals of "a basic liberty," the right to procreate); *see also, e.g., Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986) (striking down under strict scrutiny a state policy favoring in-state veterans as a deprivation of the right to travel and to equal protection); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-185 (1979) (striking down a restrictive

ballot access law, under strict scrutiny, as burdening the "two distinct and fundamental rights" of association and voting).

These Rules are particularly ripe for strict scrutiny because they both burden the fundamental right to reproductive decision-making *and* discriminate against women. Constitutional liberties warrant greater protection in cases where fundamental rights and equal protection intersect. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (holding that "[t]his interrelation of the two principles [of equal protection and liberty] furthers our understanding of what freedom is and must become[,]" and invalidating state laws that prohibited same-sex couples from marrying); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *Harper v. Virginia State Bd. of Ed.*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *see also Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (explaining that constitutional "legal 'tests' do not have the precision of mathematical formulas . . . [so] the statute will be closely scrutinized in light of its asserted purposes" and

invalidating a state durational residency law that implicated both the right to vote and right to travel, under a "strict equal protection test"); Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1117 (2016) ("Two rights combined . . . yield *more* in the way of individual liberty than does each right on its own."); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473, 474 (2002) ("[T]he ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other.").

Additionally, when applying the equal protection doctrine, the Court has been particularly sensitive in contexts where, as here, people who face economic or other structural barriers suffer the brunt of constitutional deprivations. For instance, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court invalidated a state law that burdened both low-income persons' procedural due process interests and their liberty interests in child-rearing, holding that under "the Due Process and Equal Protection Clauses of the Fourteenth Amendment," a state "may not deny [a plaintiff], because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent." *Id.* at 107. Similarly, in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court held that a sentencing court cannot revoke a defendant's probation based on failure to pay a fine, observing that "[d]ue process and equal protection principles converge in the Court's analysis." *Id.* at 665 (citing *Griffin v.*

Illinois, 351 U.S. 12 (1956)); *see also Griffin*, 351 U.S. at 18 (holding that states that grant appellate review of criminal proceedings cannot do so "in a way that discriminates against some convicted defendants on account of their poverty"); Cary Franklin, *The New Class Blindness*, 128 Yale L.J. 1, 40 (2018) (observing that the Supreme Court has "frequently protected the Fourteenth Amendment rights of the financially disadvantaged in decisions that blended due process and equal protection values").

Indeed, the Court has applied heightened scrutiny even when government action restricts access to rights that have not been recognized as "fundamental" under the Constitution and affects a group that has not been held to constitute a "suspect class," but nonetheless faces a common set of systemic barriers to advancement in society. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that a Texas law that denied public education to undocumented immigrant children was unconstitutional because it failed to serve a "substantial state interest").

For reasons discussed below and in Section III, the Rules cannot survive any form of heightened scrutiny,[5] let alone the strict scrutiny that applies given the dual burdening of a fundamental right and a suspect class.

[5] At a minimum, the discriminatory treatment of female employees and students requires heightened scrutiny. Laws that treat men and women differently on the basis of sex or gender must be justified by an "exceedingly persuasive justification." *U.S. v. Virginia*, 518 U.S. at 531; *see also Craig v. Boren*, 429 U.S.

II. EQUAL PROTECTION REVIEW MUST ALSO CONSIDER HOW THE RULES WILL INCREASE STRUCTURAL BARRIERS THAT WOMEN OF COLOR AND LOW-INCOME WOMEN EXPERIENCE

Exacting judicial scrutiny of the Rules is also appropriate and necessary given the particularly harmful impact of the Rules on women of color and low-income women. As discussed below, the Rules intersect with, and perpetuate, existing disparities that heighten the barriers for women of color and low-income women in exercising their reproductive rights and accessing health care. Equal justice requires the recognition that people living at the intersection of multiple forms of oppression face such cumulative and distinct harms and demands that the law address that reality. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 146; Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 Yale L.J. 1270, 1324 (2018) ("The overlapping effects of sexism, racism, and paternalism . . . severely undermine the dignity and privacy of poor women."); *see also supra* Section I.C. discussing *M.L.B. v. S.L.G.*, *Bearden v. Georgia*, and *Plyler v. Doe.*

190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). Moreover, "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *U.S. v. Virginia*, 518 U.S. at 533).

A. The Rules Reinforce Systemic Obstacles to Equal Economic Opportunities and Health Disparities for Women of Color and Low-Income Women

Undermining the right of all women to have equal opportunity in securing health and economic stability for themselves and their families, the Rules will disproportionately harm women of color, including Black, Latina, Asian, and Pacific Islander women. Because women of color are more likely to earn lower wages, and less likely to have access to health coverage, or be able to afford out-of-pocket health care costs, coverage gains under the ACA have played an important role in combatting these structural barriers.

Women of color are entering the workforce at increased rates. From 2016 to 2026, it is projected the number of Latina, Asian and Black women in the workforce will increase by 33.2 percent, 28.1 percent, and 10.8 percent, respectively. *Table 3.4 Civilian Labor Force by Age, Sex, Race, and Ethnicity, 1996, 2006, 2016 and Projected 2026*, Bureau of Lab. Stat. (Oct. 24, 2017) https://www.bls.gov/emp/ep_table_304.htm. However, Black, Latina, and Asian

women are over-represented in low-wage jobs.[6] Low wages perpetuate both poverty[7] and low rates of health care coverage among women of color.[8]

Women in low-wage jobs face additional economic burdens when they have children. Childbearing and motherhood place unique constraints on economic stability, wages, labor-force participation, and occupational status. *See* Katherine Richard, *The Wealth Gap for Women of Color*, Ctr. Glob. Policy Solutions 7 (Oct. 2014), https://globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf. Research shows that women incur financial penalties for having children, seeing a four percent decrease in earnings for having one child and

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[6] African-American, Latina, and Asian women comprise 3.7 percent, 3.2 percent, and 2.9 percent of workers paid at or below minimum wage compared with 1.8 percent of white men. *See Characteristics of Minimum Wage Workers, 2016,* Bureau of Lab. Stat. 4 tbl.1 (Apr. 2017), https://www.bls.gov/opub/reports/minimum-wage/2016/pdf/home.pdf.

[7] In 2016, 21.4 percent of Black women, 22.8 percent of Native women, 18.7 percent of Latina women, and 10.7 percent of Asian women lived in poverty. *See National Snapshot: Poverty Among Women & Families, 2016*, Nat'l. Women's Law Ctr. 1 (Sept. 2017), https://nwlc.org/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf.

[8] Women with incomes below the federal poverty level do not automatically qualify for Medicaid. Because each state sets eligibility requirements to receive Medicaid, coverage varies. Only 36 states and the District of Columbia have eliminated the categorical requirements for Medicaid coverage. Other states have implemented stringent income requirements for coverage. Therefore, women who live in states that have not expanded Medicaid coverage or in states with burdensome coverage requirements may not have access to Medicaid despite having low incomes. *See Women's Health Insurance Coverage Fact Sheet*, Kaiser Family Found. (Dec. 2018), http://files.kff.org/attachment/fact-sheet-womens-health-insurance-coverage.

a twelve percent decrease for having two or more children.[9] *Id.* Because Black and Latina women already experience significant wage gaps,[10] any time spent out of the employment market exacerbates preexisting pay disparities in relation to men.

On top of these existing wage disparities, for low-income women, including low-income women of color, the cost of contraception can pose a substantial, in some cases prohibitive, financial burden. The average costs of oral contraceptives (the most popular form of birth control) without insurance is $850 per year. Jamila Taylor & Nikita Mhatre, *Contraceptive Coverage Under the Affordable Care Act*, Ctr. Am. Progress tbl.1 (Oct. 6, 2017), https://www.americanprogress.org/issues/women/news/2017/10/06/440492/

[9] A number of factors may contribute to these differences, including women dropping out of the labor force, relying on part-time work, selecting family-friendly occupations, or passing up promotions. Women may feel forced into one of these options because, as research shows, low-income women and women of color in particular have "limited access to alternative sources of income when taking care of children or paying for childcare." *See* Richard, *supra* p. 27, at 7. In addition, there is evidence that employers offer mothers lower salaries than fathers and women without children. In one study, it was found that "[m]others were recommended a 7.9% lower starting salary than non-mothers . . . which is 8.6% lower than the recommended starting salary for fathers." *See* Shelley Correll & Stephen Benard, *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. of Soc. 1297 (2007), http://gap.hks.harvard.edu/getting-job-there-motherhood-penalty.

[10] Black and Latina women are paid only 65 cents and 59 cents on the white male dollar, respectively. *See* Elise Gould & Jessica Schieder, *Black and Hispanic Women Are Paid Substantially Less than White Men*, Econ. Policy Inst. (Mar. 2017), https://www.epi.org/publication/black-and-hispanic-women-are-hit-particularly-hard-by-the-gender-wage-gap/.

contraceptive-coverage-affordable-care-act/. For highly effective long-term reversible contraceptive methods, such as an IUDs and contraceptive implants, out-of-pocket costs can exceed $1,000. Adam Sonfield, *Despite Leaving Key Questions Unanswered, New Contraceptive Coverage Exemptions Will Do Clear Harm*, Guttmacher Inst. (Oct. 17, 2017), https://www.guttmacher.org/article/2017/10/despite-leaving-key-questions-unanswered-new-contraceptive-coverage-exemptions-will; *see also IUD*, Planned Parenthood, https://www.plannedparenthood.org/learn/birth-control/iud (stating that an IUD "[c]osts up to $1,300").

These high up-front costs are disproportionately unaffordable for many women of color. A 2017 survey found that 39 percent of African-American women between 18 and 44 are unable to afford more than $10 per month for birth control. *The Lives and Voices of Black America on the Intersections of Politics, Race, and Public Policy*, PerryUndem 34 (Sept. 25, 2017) https://view.publitas.com/perryundem-research-communication/black-american-survey-report_final/page/34. A recent survey found that 57 percent of Latinas ages 18 to 34 had struggled to afford birth control before the ACA. *Survey: Nearly Three in Four Voters in America Support Fully Covering Prescription Birth Control*, Planned Parenthood (Jan. 30, 2014), https://www.plannedparenthood.org/about-

us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control.[11]

Compounding these structural economic inequities, women of color and low-income women also face disparities in reproductive health outcomes. These groups face the highest rates of unintended pregnancies. *Unintended Pregnancy in the United States*, Guttmacher Inst. (Jan. 2019), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states. Moreover, the health risks of pregnancy are elevated for women of color and African-American women in particular. The pregnancy-related mortality ratio for African-American women is 40 per 100,000 live births, compared to 12.4 for white women and 17.8 for women of other races. *Pregnancy Mortality Surveillance System*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html.

Although the root causes of comparatively higher rates of unintended pregnancy and maternal mortality among women of color are complex, a lack of insurance coverage, along with systemic barriers to accessing quality and unbiased reproductive health services are contributors. *See Our Bodies, Our Lives, Our*

[11] This is consistent with research by the National Latina Institute for Reproductive Health finding "50% of women aged 18 to 34, including Latinas, said there had been a time when the cost of a prescription contraceptive prevented consistent use." *Just the Facts: Latinas & Contraception*, Nat'l Latina Inst. for Reprod. Health, http://www.latinainstitute.org/sites/default/files/NLIRH-Fact-Sheet-Latinas-and-Contraception-July-2012.pdf.

Voices: The State of Black Women & Reproductive Justice, Nat'l Black Women's Reprod. Justice Agenda 48, 52 (June 27, 2017), http://blackrj.org/wp-content/uploads/2017/06/FINAL-InOurVoices_Report_final.pdf; *see also Committee Opinion No. 649, Racial and Ethnic Disparities in Obstetrics and Gynecology*, Am. Coll. Obstetricians & Gynecologists 3 (Dec. 2015) (identifying socioeconomic status, lack of insurance, and implicit bias on the part of practitioners among factors contributing to racial and ethnic disparities in women's health and health care); Goodwin & Chemerinsky, *supra* p. 25, at 1330 (discussing threats to "the status of reproductive health care rights for poor women in the United States, especially for women of color," including because "racial disparities infect many aspects of society (including health care delivery)").

B. Reinforcing Burdens on Women of Color and Low-Income Women is Contrary to the Goal of the Women's Health Amendment

These multiple systemic barriers to economic stability and health care services are among the very burdens the ACA and Women's Health Amendment sought to ameliorate.

The Institute of Medicine's (IOM) 2011 report notes that access to health care is a "particular challenge to women, who typically earn less than men and who disproportionately have low incomes." *Clinical Preventive Services for Women: Closing the Gaps*, Inst. of Medicine 19 (July 2011) (hereinafter "IOM Report"). The purpose of the no-cost contraceptive benefit is to ensure that women are able

to access health insurance coverage on par with men by obtaining insurance coverage for the full range of services they seek, including contraception. *See* 155 Cong. Rec. 29302 (2009) (statement of Sen. Feinstein) (explaining that "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men").

More specifically, in recommending coverage for the full range of FDA-approved contraceptive devices, the IOM noted that poor and low-income women, as well as women of color, are at an increased risk of unintended pregnancy, and emphasized that eliminating cost-sharing would greatly increase access to contraception. *See* IOM Report, *supra*, at 109. And it has. For example, because of the ACA, many of the over 15 million women of color with private insurance now have coverage for preventive services, including contraceptives, without cost sharing.[12] With 83 percent of Black women, 91 percent of Latina women and 90 percent of Asian women of reproductive age using contraception,[13] this significant coverage gain represents remarkable progress for the millions of women of color

[12] *See* Marcela Howell & Ann M. Starrs, *For Women of Color, Access to Vital Health Services Is Threatened*, Guttmacher Inst. (July 27, 2017), https://www.guttmacher.org/article/2017/07/women-color-access-vital-health-services-threatened.

[13] *See Contraceptive Use in the United States*, Guttmacher Inst. (July 2018), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

seeking to plan their reproductive lives and gain greater financial stability for themselves and their families.

However, if the Rules were to stand, it would clear the way for myriad employers to invoke the exemption. Low-income women and women of color, who disproportionately struggle to pay the high costs of contraception, will bear the brunt of the consequences from these expanded exemptions, likely facing decreased access to contraceptives and increased difficulty in effectuating continued, uninterrupted use. *See Committee Opinion No. 615, Access to Contraception*, Am. Coll. Obstetricians & Gynecologists 5 (Jan. 2015) https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co615.pdf?dmc=1&ts=20180516T1434518348; Shilpa Phadke, Jamila Taylor, & Nikita Mhatre, *Rhetoric vs. Reality: Why Access to Contraception Matters to Women*, Ctr. Am. Progress (Nov. 15, 2017), https://www.americanprogress.org/issues/women/reports/2017/11/15/442808/rhetoric-vs-reality-access-contraception-matters-women/. This would be a step backward and one that reinforces the very structural barriers the Women's Health Amendment sought to counter. Such impacts are ones that a meaningful guarantee of Equal Protection must address.

III. THE RULES ARE NOT SUFFICIENTLY TAILORED TO ADVANCE A COMPELLING OR SUBSTANTIAL GOVERNMENT INTEREST

As an initial matter, the government has not shown that important or compelling interests justify the Rules. But even assuming the government could satisfy that threshold inquiry, the Rules fail to pass constitutional muster because the means employed are not substantially related to and necessary to advance the purported government objectives, let alone narrowly tailored to do so.

Defendants' asserted justifications – that the exemptions created by the Rules are required under the ACA and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") – are spurious. As described above, they undermine the essential purpose of the ACA and the Women's Health Amendment, 42 U.S.C. § 300gg-13(a), by denying women coverage for essential health care they need and are otherwise entitled to, thereby making it *more* difficult for women to access that care, and harming women by depriving them of the ability to control choices central to their personal dignity and autonomy. And this Court and six other federal appellate courts found that the narrower accommodation process for religiously-affiliated organizations was all that was needed to comply with RFRA without burdening such organizations' religious exercise. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *see*

also Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1151 (11th Cir. 2016), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 219 (2d Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Grace Sch. v. Burwell*, 801 F.3d 788, 806 (7th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1173 (10th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Moreover, by (*i*) offering exemptions to virtually all employers and universities, and (*ii*) eliminating the accommodation that ensured women at objecting institutions could still access seamless no-cost contraception, the Rules are much broader than necessary to achieve any purported goal with respect to reasonably accommodating sincere religious objections. The Rules make no attempt to distinguish between large corporations and small, closely-held businesses,

as previous rulemaking has done. And problematically, the Rules dispose of the accommodation process, even though it was crafted to maintain contraceptive access without cost-sharing for female employees who work for employers with religious objections. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

The means employed by the government – namely, forcing women to bear the cost of their employers' or universities' objections, and perpetuating the systemic barriers that fall hardest on people of color and low-income individuals – fail to account for (let alone overcome) the compelling interest in providing equitable health care access to women. Therefore, the Rules are not sufficiently tailored to survive any level of scrutiny under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be AFFIRMED.

Dated: March 22, 2019

Respectfully submitted,

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Interest and Descriptions of Amici Curiae

The **California Women's Law Center ("CWLC")** is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy, and education. A vital part of CWLC's mission is fighting for reproductive health, rights, and justice by ensuring women have access to the health care opportunities they need to lead healthy and productive lives. CWLC believes that women and adolescent girls deserve the right to make choices about their bodies and it is vital to ensure that the full range of reproductive health options are accessible to all women and adolescent girls regardless of their income levels or residence.

The **Center for Reproductive Rights** is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, the Center's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). As a rights-based organization, the Center has a vital interest in ensuring that all individuals have equal access to reproductive health care services.

Through litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** seeks to eradicate discrimination based on gender identity and expression, HIV status, and sexual orientation in New England and nationally. GLAD has litigated widely and authored or joined amici briefs in both state and federal courts concerning the equal liberty to make foundational personal decisions without selective burden, including in *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *Barber v. Bryant*, 872 F.3d 671 (5th Cir. 2017); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Massachusetts v. United States Dep't of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

The **Lawyers for Civil Rights ("LCR")** fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. As part of that advocacy, LCR has for

many years run a Medical-Legal partnership, which recognizes the critical ways in which access to health care is intertwined with civil rights and economic justice. As an organization dedicated to equal justice, LCR thus has a strong interest in ensuring that women of color, immigrant women, and low-income women have full access to health care, including contraceptive care, as a means of ensuring gender equality and economic stability.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and economic justice. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that women of color have access to contraceptive care as a matter of reproductive autonomy, and as a means of ensuring gender equality and economic stability.

LatinoJustice PRLDEF champions an equitable society by using the power of the law together with advocacy and education. Since being founded in 1972 as *the Puerto Rican Legal Defense and Education Fund*, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. *LatinoJustice* has engaged in and supported law reform civil rights litigation across the country combatting discriminatory policies in numerous areas including gender-based discrimination, sexual harassment of Latina immigrants, and those which purport to limit a woman's right to reproductive freedom of choice including abortion.

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to secure and protect reproductive rights and access to reproductive health services, including the right to contraception. Legal Momentum has been involved in dozens of cases protecting reproductive freedom and health in state and federal courts throughout the country. Legal Momentum has also authored and submitted several amicus briefs to the U.S. Supreme Court

challenging the constitutionality of policies and statutes that infringe on women's right to reproductive health.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a non-profit public interest organization that works to advance the legal rights of all women and LGBTQ people through litigation, legislation, and legal rights education. Since its founding, Legal Voice has worked to protect and advance reproductive rights, access to health care, and elimination of barriers to economic security and access to education. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including defending the rights of patients to access contraceptives and other medications at their pharmacies.

The **Mississippi Center for Justice**, the Deep South Affiliate of the Lawyers Committee for Civil Rights Under Law, is a 501(c)(3) nonprofit public interest law organization founded in 2003 in Jackson, Mississippi and committed to advancing racial and economic justice. Supported and staffed by attorneys and other professionals, the Center develops and pursues strategies to combat discrimination and poverty statewide. One of amicus' main campaign areas is access to healthcare for all, and MCJ is concerned about low income women whose access to reproductive health choices will be limited by the government's action. MCJ is currently co-counsel in a Mississippi case challenging Mississippi laws restricting women's access to reproductive health.

The **National Center for Lesbian Rights ("NCLR")** is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which struck down state laws selectively excluding same-sex couples from the fundamental right to marry, and has participated as amicus in other cases challenging restrictions on procreative autonomy, including *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The **Women's Law Project** is a nonprofit women's legal advocacy organization founded in 1974 with offices in Philadelphia and Pittsburgh, Pennsylvania. As a state-based organization with national reach, the mission of the Women's Law Project is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. A central focus of the Women's Law

Project's work has been to improve access to safe and affordable reproductive health care in Pennsylvania and nationally, including a full range of contraceptive services. The Law Project advocated for adoption of a Pennsylvania rule requiring hospitals to make emergency contraception available to survivors of sexual assault; audited the availability of over-the-counter emergency contraception at hundreds of pharmacies in Pennsylvania participated; and participated as amicus curiae in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), in support of the Affordable Care Act's no-cost contraceptive coverage requirement, which has been critical for enabling women to control their reproductive lives, participate equally in society, and achieve their educational, career, and family goals.

CERTIFICATE OF BAR MEMBERSHIP

Under Local Rule 28.3(d), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: March 22, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Local Rule 31.1, counsel for *amici curiae* certifies that:

1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,462 words, based on the "Word Count" feature of Microsoft Word. Pursuant to Fed. R. of App. P. 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Signature Block, and Certificates of Counsel.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and Local Rule 32.1 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

3. This brief complies with the electronic filing requirements of Local Rule 31.1(c), because the text of the electronic brief filed with the Court is identical to the text of the paper copies of the brief, and Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Third Circuit by using the CM/ECF system on March 22, 2019. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Third Circuit Rule 25.0.

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