

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff-Appellee,

v.

PRESIDENT, UNITED STATES OF AMERICA ET AL.,
Defendants-Appellants.

and

LITTLE SISTERS OF THE POOR, SAINTS PETER AND PAUL HOME,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:17-cv-4540

**BRIEF OF *AMICI CURIAE* U.S. WOMEN'S CHAMBER OF
COMMERCE AND NATIONAL ASSOCIATION FOR FEMALE
EXECUTIVES IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* submit the following corporate disclosure statement with respect to those *amici* that are corporations:

The U.S. Women’s Chamber of Commerce has no parent corporation. The U.S. Women’s Chamber of Commerce has no stock and therefore no publicly held corporation owns 10% or more of its stock.

The National Association for Female Executives has no parent corporation. The National Association for Female Executives has no stock and therefore no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici curiae comprise national organizations focused on the advancement of women in business and are committed to the well-being of women and families. *Amicus* U.S. Women’s Chamber of Commerce is a national organization with more than 500,000 members that seeks to increase economic growth opportunities for women. *Amicus* National Association for Female Executives is a national organization with more than 60,000 members that works to empower women to achieve career and personal success and to recognize corporations and organizations that expand opportunities for women in business. *Amici* have a strong interest in this case as the regulations at issue operate to defeat the goals of these organizations.

The final regulations in this case would allow nearly any private employer, university, or health insurer to invoke religion or morality as a basis for stopping contraceptive coverage under the Affordable Care Act (“ACA”). *Amici* are committed to gender equality, which includes

¹ Counsel for *amici* represent that none of the parties or their counsel authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* represent that all parties have consented to the filing of this brief.

supporting women’s access to healthcare that allows women to make choices about how to plan and care for their families. *Amici* offer this brief to assist the Court in understanding the importance to the national economy and business community of providing contraceptive coverage to all women. As recognized by the District Court, “[t]he negative effects of even a short period of decreased access to no-cost contraceptive services are irreversible.” *Amici* offer this brief to ensure the Third Circuit also recognizes the vital interests at stake in this case.

SUMMARY OF ARGUMENT

“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (citation omitted).

As employees, managers, executives, and customers, women are essential to building thriving businesses and sustaining a modern economy. Supporting women in business includes supporting access to contraception – a crucial health benefit that provides women greater control over their education, their careers, and their lives. By helping women avoid unintended pregnancy, contraception facilitates women’s

participation and advancement in the workforce, which in turn supports business and economic growth.

The ACA's contraceptive coverage benefit provides women with meaningful access to a full array of contraceptive services. Since the contraception guarantee was instituted, women's health has improved, rates of unintended pregnancies have decreased, and women are more consistently obtaining the most effective and appropriate forms of contraception for their needs. The contraception guarantee is important throughout women's reproductive lives; contraception is used by young women, by mothers, and by women at various life and career stages. As set forth below, contraception has a positive impact not only on women, but also on their children and families. Yet contraception, and in particular the most effective forms of contraception, can be expensive. The ACA's contraception guarantee has allowed women to save billions of dollars in out-of-pocket costs for contraception, while helping them to more effectively avoid unintended pregnancy.

The final rules at issue in this case (the "Rules") threaten these vital advancements and will harm American women, families, and the economy. The Rules represent a major step backward for the millions of

women who rely upon contraceptive care while pursuing their educations and careers during their childbearing years and for businesses that value gender equality and diversity and the contributions of female employees, executives, and customers. By establishing roadblocks to meaningful access to contraception, the Rules will negatively affect women's ability to balance their personal lives and their educational and professional advancement.

While this nation has made tremendous strides toward gender equality, women remain underrepresented in parts of the workforce and in leadership positions. Regulations that limit or restrict access to contraception exacerbate this underrepresentation. Unintended pregnancy can derail women's efforts to obtain education and advance professionally, and women unable to afford effective contraception may be limited in their career choices. Loss of meaningful access to contraception can increase levels of stress, distraction, absenteeism, and turnover, decrease overall productivity, and stall career opportunities – all of which are detrimental to businesses and the national economy. Businesses and the national economy benefit when working women know they have meaningful access to preventative

healthcare, including contraception; only then can women decide how many children to have, and when, and make plans about their work and life responsibilities. The ACA's contraception guarantee gives women the confidence of knowing they will have coverage for contraception if they change jobs or insurance companies. The ACA's contraception guarantee thus provides an essential health benefit that promotes three important and connected goals: (1) it provides women control over their lives, (2) it contributes to gender equality and inclusion, and (3) it facilitates economic growth. The Rules undermine each of these goals.

The Rules' inevitable reduction in the number of women obtaining no-cost contraceptive coverage will limit the ability of the affected women to advance professionally. This will directly affect businesses nationwide by reducing the number of qualified women available to work at their companies, and will have a negative impact on the national economy. Indeed, the District Court already found that it is in the public interest to enjoin the enforcement of the Rules.

For these and the reasons set forth more fully below, *amici* urge this Court to affirm the District Court's January 14, 2019 Order enjoining the Rules from taking effect nationwide.

ARGUMENT

Women's pursuit of educational and professional goals is intrinsically tied to their ability to determine whether and when to have children. Since the Supreme Court recognized in *Griswold v. Connecticut*, 410 U.S. 113 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the constitutionally protected right to privacy encompasses the right to access contraception, the number of working women in the U.S. has grown considerably and women have increasingly advanced into senior business roles.

The increased number of women in the workforce has added trillions of dollars to the nation's annual gross domestic product.² In 2009, women-owned small businesses contributed \$2.8 trillion to the American economy each year, accounting for over 15% of gross domestic

² U.S. Women's Chamber of Commerce, *Women's Economic Priorities: Fundamental budget and policy priorities that support women's economic opportunities, security and family well-being* 17 (July 2014), available at <https://www.swipe.to/0814q> ("USWCC, *Women's Economic Priorities*") ("Without the addition of women's increased working hours, the Gross Domestic Production of the United States would be \$1.66 Trillion / 10.6% lower."); see also *id.* at 16 ("If no additional women had joined the paid economy since 1970, U.S. Gross Domestic Product (GDP) would be 75% of its current size.")

product.³ American women’s contributions to economic innovation, productivity, and growth would not be possible without women’s ability to control their own reproductive health, including access to contraception. That access was meaningfully expanded through the ACA and its implementing regulations, which eliminated cost-sharing obligations for an array of essential preventative medicine and health services, including contraceptive services. At least 55 million women gained access to no-cost contraceptive coverage under the ACA.⁴ The Rules will reverse this progress by decreasing access to contraception and thus making it harder for women to balance life choices with educational and professional goals.

³ Ctr. for Women’s Bus. Research, *The Economic Impact of Women-Owned Businesses In the United States* 1, 10 (Oct. 2009), available at <https://s3.amazonaws.com/nwbc-prod.sba.fun/wpcontent/uploads/2018/02/27193655/The-Economic-Impact-of-Women-Owned-Businesses-in-the-United-States.pdf> (“CWBR, *Economic Impact*”) (“[W]omen-owned firms are not a small, niche market but are a major contributor and player in the overall economy.”).

⁴ See Office of the Assistant Sec’y for Planning & Evaluation, U.S. Dep’t of Health & Human Servs., *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* (May 14, 2015).

I. The Contraception Guarantee Provides an Essential Health Benefit that Allows Women Control over Their Lives, Their Education, and Their Careers.

Contraception allows women to make significant decisions in their personal, educational, and professional lives without fear of unintended pregnancy.⁵ Women’s ability to effectuate these decisions has had a profound effect on their own economic well-being as well as that of their families.⁶ Indeed, “[f]ive decades after the pill was introduced, it is clear that consistent access to effective and affordable contraception has served as a catalyst of opportunity” and revolutionized expectations

⁵ Adam Sonfield et al., Guttmacher Inst., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children* (Mar. 2013), available at <https://www.guttmacher.org/pubs/social-economic-benefits.pdf> (“Sonfield, *Social and Economic Benefits*”) (summarizing studies on the social and economic benefits of women’s ability to plan whether and when to have children through the use of contraception); Nat’l Women’s Law Ctr., *Fact Sheet: Reproductive Health is Part of the Economic Health of Women and Their Families* (Feb. 2016), available at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/02/Reproductive-Health-is-Part-of-the-Economic-Health-of-Women-2.19.166.pdf>.

⁶ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 29 (“Planning, delaying and spacing one’s children generally appear to help women achieve their career goals”); Martha J. Bailey et al., *Recent Evidence on the Broad Benefits of Reproductive Health Policy*, *J. Policy Analysis & Mgmt.* 888, 894 (July 2013) (“[I]ncreasing access to contraception and legal abortion has had large and enduring effects on the material resources of families and children and has promoted the economic equality of women.”).

about women’s “educational and career prospects and their roles in the home and workplace.”⁷ The “weight of the evidence across numerous studies shows significant employment and educational gains have followed directly from women’s ability to better time their entry into parenthood[.]”⁸

A. Contraception Enhances Women’s Education and Workforce Participation and the Well-Being of Women and Families.

Meaningful access to contraception ensures that women can exercise autonomy and control over their reproductive health, including decisions about when and whether to have children.⁹ Unintended

⁷ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 4.

⁸ Kelleen Kaye et al., The Nat’l Campaign to Prevent Teen and Unplanned Pregnancy, *The Benefits of Birth Control in America: Getting the Facts Straight* 29, 30 (2014), available at <https://powertodecide.org/sites/default/files/resources/primary-download/benefits-of-birth-control-in-america.pdf> (“Kaye”) (“Birth control helps women time when they become parents, complete their education, and improve the financial and employment prospects of themselves and their families.”).

⁹ Heinrich Hock, *The Pill and the College Attainment of American Women and Men*, Dep’t of Econ., Florida State University Working Papers 1 (2007), available at <http://paa2006.princeton.edu/papers/61745> (“Hock”) (noting that what made oral contraception “so remarkable, and what drove its rapid diffusion, was the degree of autonomy and control it offered women over their reproductive lives, especially with respect to the timing of their fertility”).

pregnancy is a nationwide issue.¹⁰ In a 2011 survey, women reported that using birth control allows them to pursue personal goals, better control their lives and futures, and “better care for themselves and their families, either directly or indirectly through facilitating their education and career.”¹¹

When women lack meaningful access to contraception, their ability to prevent unintended pregnancies and births decreases substantially.¹² A 2015 study found that among women at risk for an

¹⁰ Guttmacher Inst., *Fact Sheet: Unintended Pregnancy in the United States* 1 (Sept. 2016), available at https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf (“Guttmacher, *Unintended Pregnancy*”) (“In 2010, at least 36% of pregnancies in every U.S. state were unintended. In 28 states and the District of Columbia, more than half of pregnancies were unintended.”).

¹¹ Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *Contraception* 465, 469, 471 (2013) (noting the importance of contraception “for women and couples who are motivated to consciously and carefully plan for their and their families’ futures”).

¹² Guttmacher, *Unintended Pregnancy*, *supra* note 10, at 2 (noting an 18% decline in unintended pregnancies between 2008 and 2011 likely due “to an overall increase in contraceptive use and the use of highly effective methods”); Inst. of Med. of the Nat’l Academies, *Clinical Preventive Services for Women: Closing the Gaps* 104-05, 109 (2011) (“IOM, *Closing the Gaps*”) (citing reports finding that progress in reducing unintended pregnancies would be possible by “making

unintended pregnancy in the United States, the 14% who did not use contraceptives account for 54% of all unintended pregnancies. By contrast, the 68% of women at risk for an unintended pregnancy who use contraceptives consistently and correctly account for only 5% of all unintended pregnancies.¹³

Access to contraception enhances women's ability to pursue education and increases women's participation and advancement in the workforce by providing women with the ability to control their reproductive lives and thus direct their futures. As several economic studies have confirmed, access to contraception has "altered [women's] expectations about childbearing during a period critical to career investment, and reduced the cost of increasing their early career investments."¹⁴

contraceptives more available, accessible, and acceptable through improved services").

¹³ Guttmacher, *Unintended Pregnancy*, *supra* note 10, at 3.

¹⁴ See, e.g., Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4(3) *Am. Econ. J. of Applied Econ.* 225, 2 (Jul. 2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684076/> ("Bailey, *The Opt-In Revolution*"); Elizabeth Oltmans Ananat & Daniel M. Hungerman, *The Power of the Pill for the Next Generation: Oral Contraception's Effects on Fertility, Abortion, and Material and Child*

The ability to avoid unintended pregnancy assists women at all stages of their career paths, beginning with the bedrock of education. As access to contraception has increased, women have been able to achieve significant educational milestones. Women who avoid unintended pregnancy on average obtain more education.¹⁵ One study concluded that access to oral contraceptives accounted for more than 400,000 of the college degrees completed by women born between 1939 and 1959.¹⁶ Another study found that having a child as a teenager reduced women's high school graduation and college entrance rates 22% to 24% per child.¹⁷ From 1970 through 2003, the share of first-time mothers with

Characteristics, 94 *The Review of Economics and Statistics* 37, 18 (Feb. 2012), available at

https://www.mitpressjournals.org/doi/abs/10.1162/REST_a_00230?journalCode=rest (noting the effects of access to contraception “are compatible with a story in which ‘upwardly mobile’ young women are especially likely to use the pill to postpone births, and in the meantime pursue better marital and educational outcomes”).

¹⁵ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 9 (finding that “women who experience teen births complete approximately two fewer years of formal schooling as compared with women who wait to have children until age 30 or older”).

¹⁶ Hock, *supra* note 9, at 26.

¹⁷ Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, Nat'l Bureau of Econ. Research Working Paper Series, Working Paper 5406, 25 (1996).

more than 12 years of education increased from 26% to 52%.¹⁸ When women are affected by unintended pregnancy, their educational goals may not only be delayed, which can have lasting impacts on their overall career advancement, they may be derailed altogether.¹⁹

Likewise, the availability of contraception has had a statistically significant impact on the number of women obtaining the education necessary to enter professional occupations.²⁰ “Access to the pill was linked to the increased numbers of college-educated women pursuing advanced professional degrees and making up increased proportions of such degree programs.”²¹ Today, women earn 57% of bachelor’s degrees, 60% of master’s degrees and just over half of all Ph.Ds.²² In the 1960s,

¹⁸ Kaye, *supra* note 8, at 30.

¹⁹ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 7 (explaining that the ability of young, single women to “obtain highly effective contraception was a significant factor behind greater numbers of women investing in higher education”).

²⁰ Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110(4) J. Pol. Econ. 730, 762 (2002) (“Goldin & Katz”).

²¹ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 9.

²² The White House Council on Women and Girls, *Keeping America’s Women Moving Forward: The Key to an Economy Built to Last* 47 (Apr. 2012), available at https://obamawhitehouse.archives.gov/sites/default/files/emailfiles/womens_report_final_for_print.pdf.

women made up less than 10% of students in JD, MBA, and MD programs, while women now account for almost half the students in those programs.²³ Absent access to contraception, these numbers would be much lower.

Women who have more control over their reproductive lives are better able to enhance their earning potential, allowing them to provide for themselves and their families. “Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men.” *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 (1975) (Powell, J., concurring). Mothers are now the sole or primary income-earners in 40% of households with minor children.²⁴ This represents a major shift in the U.S. economy, with the number of households where the wife earns as much as her husband

²³ Executive Office of the President, Council of Economic Advisers, *Women’s Participation in Education and the Workforce* 9 (Oct. 14, 2014), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/womens_slides_final.pdf (“EOP, *Women’s Participation*”) (showing that women make up 47.9% of the national workforce).

²⁴ USWCC, *Women’s Economic Priorities*, *supra* note 2, at 8, 18 (“Working mothers now account for 63.3% of U.S. household earnings”).

nearly doubling since 1975.²⁵ This trend is seen nationwide, with women serving as the primary breadwinner in at least 25% of households in every state.²⁶ This shift is due in part to women's increased control over the number and timing of children. A study has found that "the Pill-induced effects on wages amount to roughly one-third of the total wage gains for women in their forties born from the mid-1940s to early 1950s."²⁷ That study concluded that approximately 10% of the narrowing of the wage gap between men and women during the 1980s and 31% during the 1990s can be attributed to women's ability to access oral contraceptives prior to age 21.²⁸

²⁵ Sarah Jane Glynn, Ctr. for Am. Progress, *The New Breadwinners: 2010 Update - Rates of Women Supporting Their Families Economically Increased Since 2007* 3 (Apr. 2012), available at <https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf>.

²⁶ Sarah Jane Glynn, Ctr. for Am. Progress, *Breadwinning Mothers Are Increasingly the U.S. Norm* 10-11 (Dec. 19, 2016), available at <https://cdn.americanprogress.org/content/uploads/2016/12/19065819/Breadwinners-report.pdf> (Utah has the lowest share of women serving as the primary breadwinners at 26.3%, while Mississippi has the highest share at 53.5%).

²⁷ Bailey, *The Opt-In Revolution*, *supra* note 14, at 17.

²⁸ *Id.*; see also Amalia R. Miller, *The Effects of Motherhood Timing on Career Path*, 24 J. Population Econ. 1071, 1073 (2011) (explaining "deferred motherhood may be a means of reducing [the economic] inequality" between men and women).

Simply put, women who have meaningful access to contraception can better control their reproductive health and the timing of pregnancy, improving their ability to shape and reap the rewards of their family lives and careers.

Beyond allowing women greater control over their education and careers, access to contraception has a positive impact on families, especially children. Access to contraception is associated with significant reductions in both child and adult poverty rates.²⁹ By enhancing parents' ability to invest time, energy, and resources in their children,³⁰ access to contraception also has been linked to improved outcomes for children's mental and behavioral development. Children of teenage mothers, whose pregnancies are often unintended, "have long

²⁹ Martha J. Bailey et al., *Do Family Planning Programs Decrease Poverty? Evidence from Public Census Data*, 60 CESifo Econ. Studies 312, 6 (June 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4206087/pdf/nihms602597.pdf> (noting "by increasing adults' pre-childbearing human capital . . . family planning programs [including access to contraception] may increase children's economic resources and decrease child poverty rates," such access also "increase[s] parental investment in children [and] may improve their lifetime opportunities and labor market outcomes as adults").

³⁰ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 24.

been known to be at increased risk for poor developmental outcomes.”³¹ Studies show that differences in a mother’s access to birth control predict differences in the extent and intensity of her children’s labor force participation, wage earnings, and household incomes.³² Contraception use also allows women and their families to avoid the many negative health consequences that are associated with having babies too close together.³³

Women’s lack of access to contraceptives erodes other aspects of their lives.³⁴ Unintended pregnancies are linked to conflict and decreased satisfaction in relationships, decreased child well-being, and

³¹ *Id.*

³² Martha J. Bailey, *Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception*, Brookings Papers on Econ. Activities 341 (2013).

³³ Meghan L. Kavanaugh & Ragnar M. Anderson, Guttmacher Inst., *Contraception and Beyond* 8 (2013), available at <https://www.guttmacher.org/pubs/health-benefits.pdf> (“Kavanaugh & Anderson”).

³⁴ Matthias Doepke et al., Nat’l Bureau of Econ. Research Working Paper 17672, *The Economics and Politics of Women’s Rights* 21 (Dec. 2011) (“Doepke”) (discussing study of European women indicating that access to “oral contraceptives increased women’s self-reported life satisfaction”).

depression, anxiety, and overall lower levels of happiness.³⁵ Unintended pregnancies are also linked to increased pregnancy-related morbidity and mortality, which contribute to the United States having one of the highest maternal mortality rates in the developed world, with approximately 700 American women dying each year from pregnancy or childbirth-related causes.³⁶ Importantly, the District Court properly found, “[d]isruptions in contraceptive coverage will lead to women suffering unintended pregnancies and other medical consequences.” *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 828 (E.D. Pa. 2019).

B. The Contraception Guarantee Enhances the Proven Benefits of Access to Contraceptives.

Access to contraceptives has yielded significant gains. But for many women actual, meaningful access requires the elimination of cost-

³⁵ See generally Sonfield, *Social and Economic Benefits*, *supra* note 5; see also Kavanaugh & Anderson, *supra* note 33, at 7-8.

³⁶ See Nicholas J. Kassebaum et al., *Global, Regional, and National Levels of Maternal Mortality, 1990-2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 *The Lancet* 1775, 1784-93 (2016), available at [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(16\)31470-2.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(16)31470-2.pdf); Ctr. for Disease Ctrl. & Prev., *Pregnancy-Related Deaths*, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>.

sharing burdens.³⁷ Studies have concluded that “[e]ven small increments in cost sharing have been shown to reduce the use of preventive services” such as contraception.³⁸ And recent studies confirm that the ACA’s Women’s Health Amendment, which requires insurers to provide coverage for the full range of contraceptive methods approved by the Food and Drug Administration without imposing cost-sharing obligations, significantly increased women’s ability to access essential contraceptive services. For example, the teen birth rate fell to its lowest ever in 2016, a sharp decline attributed in part to the contraception guarantee.³⁹ The effectiveness of the ACA’s Women’s Health Amendment in providing access to contraceptives is further evidenced by the substantial decrease in the number of women incurring out-of-

³⁷ USWCC, *Women’s Economic Priorities*, *supra* note 2, at 25 (“In 2013, 26% of women had to delay or forgo health care in the past year due to costs.”).

³⁸ IOM, *Closing the Gaps*, *supra* note 12, at 109 (noting “cost-sharing requirements . . . can pose barriers to care and result in reduced use of preventive and primary care services” and “when out-of-pocket costs for contraceptives are eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods”).

³⁹ Carly Sitrin, *Teen Birth Rates Just Hit An All-Time Low*, Vox (June 30, 2017), available at <https://www.vox.com/science-and-health/2017/6/30/15894750/teen-birth-rates-hit-all-time-low> (citing Brady E. Hamilton et al., *Births: Provision Data for 2016*, U.S. Dep’t of Health & Human Servs., National Vital Statistics System (June 2017)).

pocket costs for contraception. Before the Women's Health Amendment took effect, only 15% of privately insured women had coverage for contraception without out-of-pocket costs.⁴⁰ That number rose to 67% about a year after the Women's Health Amendment took effect.⁴¹ The ACA's contraception benefit saved women \$1.4 billion in out-of-pocket costs in 2013 alone.⁴² A study of more than 600,000 women nationwide concluded that women were more likely to use oral contraceptives consistently once the contraception guarantee removed cost-sharing obligations.⁴³

In addition to increasing overall access to contraceptives, the Women's Health Amendment also eliminated cost as a reason for women to choose one method of contraception over another. As a result,

⁴⁰ Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *Contraception* 44, 45 (2015), available at [https://www.contraceptionjournal.org/article/S0010-7824\(14\)00687-8/pdf](https://www.contraceptionjournal.org/article/S0010-7824(14)00687-8/pdf).

⁴¹ *Id.*

⁴² Nora V. Becker & Daniel Polsky, *Women Saw Large Decreases in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 *Health Affairs* 104, 1208-09 (July 2015).

⁴³ Lydia E. Pace et al., *Early Impact of the Affordable Care Act on Oral Contraceptive Cost Sharing, Discontinuation, and Nonadherence*, 35(9) *Health Affairs* 1616 (2016).

more women have been able to choose more appropriate and more effective forms of contraception.⁴⁴ For example, intrauterine devices (“IUDs”) are one of the most effective forms of reversible birth control, with fewer than 1% of women who use them becoming pregnant within a year (compared to 18% of women who use condoms to prevent pregnancy and 9% of women who use oral contraceptives).⁴⁵ IUDs,

⁴⁴ See, e.g., Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 *Contraception* 360, 363 (2007) (noting when health plan eliminated patient cost-sharing for IUDs, IUD use more than doubled); Sue Ricketts et al., *Game Change in Colorado: Widespread Use of Long-Acting Reversible Contraceptives and Rapid Decline in Births Among Young, Low-Income Women*, 46 *Perspective on Sexual & Reproductive Health* 125, 129-130 (Sept. 2014), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1363/46e1714> (reporting results of study finding that use of long-acting reversible contraceptives quadrupled when, among other efforts, out-of-pocket costs were eliminated); Caroline S. Carlin, et al., *Affordable Care Act’s Mandate Eliminating Contraceptive Cost Sharing Influenced Choices of Women with Employer Coverage*, 35 *Health Affairs* 1608 (2016) (study finding that “when cost sharing for contraceptives fell to zero for women . . . their rate of choosing prescription contraceptives rose much more” than women subject to cost-sharing and “compliance with the [ACA’s] mandate significantly increased the probability that a woman would chose a long-term contraceptive method[.]”).

⁴⁵ Jonathan M. Bearak et al., *Changes in Out-of-Pocket Costs for Hormonal IUDs After Implementation of the Affordable Care Act: An Analysis of Insurance Benefit Inquiries*, 93 *Contraception* 139, 1-2 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4780678/pdf/nihms-756929.pdf> (“Bearak”).

however, have high upfront costs, which can exceed \$1,000.⁴⁶ Prior to the contraception guarantee, these one-time, up-front costs often deterred women from using this highly effective form of contraception.⁴⁷ In January 2012 (before implementation of the Women’s Health Amendment), 58% of women were paying out-of-pocket costs for an IUD, compared to 13% by March 2014.⁴⁸

The Women’s Health Amendment has ensured access to the most effective and appropriate contraceptives for more women than ever before. The Rules restrict that access and thereby jeopardize the substantial opportunities the contraception guarantee has provided to so many women. As a result, “more women will likely forgo contraceptive services or seek out less expensive and less effective types of contraceptive services in the absence of no-cost insurance coverage.” *Pennsylvania*, 351 F. Supp. 3d at 828.

⁴⁶ *Id.*

⁴⁷ IOM, *Closing the Gaps*, *supra* note 12, at 108 (noting “greater use of long-acting, reversible contraceptive methods—including intrauterine devices . . . might help further reduce unintended pregnancy rates” and noting that “[c]ost barriers to use of the most effective contraceptive methods are important because long-acting, reversible contraceptive methods and sterilization have high up-front costs”).

⁴⁸ Bearak, *supra* note 45, at 1.

II. The Contraception Guarantee Facilitates Business Growth by Allowing Women to Play a Critical Role in the National Economy.

Barriers to women’s participation in the workforce – such as hampering access to contraception – “do[] more than hold back [women’s] careers and aspirations for a better life,” they also “act as brakes on the national economy, stifling the economy’s ability to grow.”⁴⁹

A. When Women are Empowered to Control Their Own Reproductive Lives, Businesses and the National Economy Benefit Too.

For generations of women, access to contraception has allowed them to gain a stronger foothold in the workforce and national economy.⁵⁰ Women now comprise nearly 50% of the national workforce.⁵¹ In fact, one study estimates that the United States

⁴⁹ Diane Whitmore Schanzenbach & Ryan Nunn, *The Hamilton Project, The 51%: Driving Growth Through Women’s Economic Participation 1* (Oct. 2017), available at https://www.brookings.edu/wp-content/uploads/2017/10/es_121917_the51percent_ebook.pdf.

⁵⁰ Doepke, *supra* note 34, at 21 (noting “[l]egal access to oral contraceptives gave women control over the timing of childbearing, and thus their labor market participation”).

⁵¹ EOP, *Women’s Participation*, *supra* note 23, at 9 (showing women make up 47.9% of the national workforce); see also Institute for Women’s Policy Research, *Women’s Labor Force Participation*, available at <https://statusofwomendata.org/earnings-and-the-gender-wage->

economy is \$2.0 trillion (or 13.5%) larger than it would be without women's increased participation in the labor force since 1970.⁵² And companies that have committed to hiring and promoting women have higher annualized returns on average than those that have not implemented such policies.⁵³

gap/womens-labor-force-participation/ (in every state nearly half of women aged 16 or older work; West Virginia has the lowest female labor force participation at 49.3%, while Alaska has the highest at 68.3% percent).

⁵² Executive Office of the President, Council of Economic Advisers, *The Annual Report* 158 (2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp_complete.pdf; see also Joanna Barsh & Lareina Yee, McKinsey & Company, *Unlocking the Full Potential of Women in the US Economy* (Apr. 2011), available at <https://www.mckinsey.com/business-functions/organization/our-insights/unlocking-the-full-potential-of-women> ("Barsh & Yee") (the expansion of women in the workforce since 1970 has accounted for 25% of current gross domestic product).

⁵³ Fed. Glass Ceiling Comm'n, *Good for Business: Making Full Use of the Nation's Human Capital* 14 (1995), available at <https://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf> (based on a study concluding that averaged annualized returns for businesses committed to advancement of women and minorities were 18.3%, compared to 7.9% for businesses where glass ceilings for female and minority advancement remained intact).

As of 2012, women also own approximately 9 million privately-held businesses.⁵⁴ Those businesses generate about \$1.4 trillion in sales, and employ about 7.8 million people with a payroll of approximately \$249 million.⁵⁵ Businesses owned or majority-owned by women also have a significant indirect economic impact by increasing jobs, spending, and manufacturing at other entities with whom they deal. On a combined direct and indirect basis, businesses owned and majority-owned by women are estimated to add \$2.8 trillion to the economy and generate 23 million jobs.⁵⁶

Businesses also benefit from women serving on their boards of directors and in management roles. For instance, companies with at least three female board directors for at least five years “outperformed those with zero [women board directors] by 84% on return on sales (ROS), 60% on return on invested capital (ROIC) and 46% on return on

⁵⁴ Nat’l Women’s Bus. Council, *Reasons to Invest in Women Entrepreneurs* 1, available at <https://www.nawrb.com/reasons-to-invest-in-women-entrepreneurs/> (“NWBC, *Reasons to Invest*”).

⁵⁵ *Id.*; USWCC, *Women’s Economic Priorities*, *supra* note 2, at 19 (including businesses owned 50% by women, that number rises to 15.9 million people).

⁵⁶ CWBR, *Economic Impact*, *supra* note 3, at 1, 10.

equity (ROE).”⁵⁷ Companies with a high number of women board directors “outperformed industry median firms in percent of revenues, assets and stockholder’s equity by 1.6 percent.”⁵⁸ One study found that having just one female director on a board cuts the risk of bankruptcy by 20%.⁵⁹ Other studies note numerous and diverse benefits for companies with women directors, including that boards adopt new governance practices more quickly, become more civil and sensitive to different perspectives, and ask more questions before making decisions.⁶⁰ Similarly, studies have concluded that Fortune 500 companies with a high number of women executives outperform peer companies in their industries on measures of profitability, including

⁵⁷ NWBC, *Reasons to Invest*, supra note 54, at 2.

⁵⁸ *Id.*

⁵⁹ Chris Bart, *Why Women Make Better Directors*, 8 Int’l J. Bus. Governance & Ethics 93, 95 (2013), available at <https://pdfs.semanticscholar.org/a7db/04f990334daf8f0c47e587f61055b16518d0.pdf>.

⁶⁰ *Id.*; Vicki Kramer et al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, 37 Organizational Dynamics 145, 145-64 (2008).

profits as a percent of revenue, assets, stockholders' equity, and competitiveness, vis-à-vis industry median benchmarks.⁶¹

Even though businesses thrive with women's active participation and leadership, women still face an uphill climb in the workforce and are underrepresented at many levels within corporate hierarchies.⁶² Adding barriers like the Rules that disproportionately affect women will only exacerbate the very real challenges women in business continue to face. If women are deprived of the tools they need to effectively support their reproductive decisions, many people, including women themselves,⁶³ may decide it is too risky for women to undertake high-

⁶¹ Roy Adler, *Women in the Executive Suite Correlate to High Profits*, European Project on Equal Pay (1998).

⁶² McKinsey & Company, *Women in the Workplace 2015* 5, 13, available at <https://womenintheworkplace.com/2015> (noting women “are almost three times more likely than men to say they have personally missed out on an assignment, promotion, or raise because of their gender”); see also Barsh & Yee, *supra* note 52 (explaining that “[d]espite the sincere efforts of major corporations, the proportion of women falls quickly as you look higher in the corporate hierarchy”); Justin Wolfers, *Fewer Women Run Big Companies Than Men Named John*, N.Y. Times (Mar. 2, 2015), available at <https://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html>.

⁶³ Barsh & Yee, *supra* note 52 (embedded institutional mindsets and embedded individual mindsets serve to hold women back in their careers); see also Marianne Bertrand et al., *Dynamics of the Gender Gap*

achieving career paths or start businesses. Businesses will lose if the Rules are allowed to undermine the ACA's contraceptive coverage guarantee to women in the workplace.

B. Decreased Access to Contraception Negatively Impacts Women's Well-Being, Businesses, and the Economy.

The Rules undermine women's ability to consistently access contraception throughout their careers and inject uncertainty into the availability of meaningful access to contraception. Women may opt out of certain professions or industries or forgo opportunities for professional growth and development, making career choices based on access to contraception instead of what is best for their lives. All businesses suffer when women are forced to make such choices.⁶⁴

for Young Professionals in the Financial and Corporate Sectors, 2 Am. Econ. J. Applied Econ. 228, 230 (July 2010) (finding "MBA mothers seem to actively choose jobs that are family friendly, and avoid jobs with long hours and greater career advancement possibilities").

⁶⁴ The 32% of U.S. adults with at least a bachelor's degree are spread throughout every state. In 2017, Massachusetts had the highest percentage of adults with at least a bachelor's degree with 43.4%, while West Virginia had the lowest with 20.2%. Cheyenne Buckingham et al, *America's Most and Least Educated States*, MSN (Sept. 24, 2018), available at <https://www.msn.com/en-us/money/personalfinance/america%E2%80%99s-most-and-least-educated-states/ar-BBNIBSS>; see also *Pennsylvania*, 351 F. Supp. 3d at

Research shows that lack of access to contraception contributes to negative health outcomes which can directly affect businesses that employ women. It is well documented that “[m]others are healthier when they are able to control when they become pregnant through the use of family planning, and their infants benefit as well.”⁶⁵ For example, postpartum depression is nearly twice as high among women whose pregnancies were unplanned.⁶⁶ Women whose pregnancies were unplanned are significantly more likely to be hospitalized during pregnancy.⁶⁷ Further, unintended pregnancies may “present an unacceptably high health risk for women who have underlying medical conditions, some of which are exacerbated by pregnancy.”⁶⁸ Without

833 (noting that “[h]undreds of thousands of the [plaintiff] States’ citizens travel across state lines . . . to work for out-of-state entities.”).

⁶⁵ Kaye, *supra* note 8, at 4-5 (2014) (noting “babies were two-thirds more likely to be of low birthweight if they followed an unwanted pregnancy, as compared to a planned pregnancy”); *see also* Adam Sonfield, *Beyond Preventing Unplanned Pregnancy: The Broader Benefits of Publicly Funded Family Planning Services* 17 Policy Rev. 2 (2014), available at https://www.guttmacher.org/sites/default/files/article_files/gpr170402.pdf (noting “[p]regnancy planning . . . has well-documented health benefits for women and children”).

⁶⁶ Kaye, *supra* note 8, at 4-5.

⁶⁷ *Id.* at 18.

⁶⁸ Kavanaugh & Anderson, *supra* note 33, at 7.

access to contraceptives, women with underlying medical conditions such as diabetes, seizure disorders, and breast cancer face great risk due to unintended pregnancies, and lose the ability to plan ahead for how to manage their conditions during pregnancy.⁶⁹ Unintended pregnancies are thus more likely to lead to health issues for women, which in turn interferes with education and work goals.

When employees' well-being is compromised, businesses suffer concrete economic losses related to, among other things: (1) reduced productivity and presenteeism;⁷⁰ (2) absenteeism; and (3) high rates of employee turnover.⁷¹ Such factors can cost businesses up to \$300 billion annually.⁷² Calculated another way, a single employee who faces health issues can cause a business to incur "an estimated cost of 16 days of

⁶⁹ *Id.*

⁷⁰ Presenteeism refers to employees who are physically present at work, but too stressed or ill to be effective. Amy Richman et al., Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for Expansion* 13 (Feb. 2011), available at https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf.

⁷¹ *Id.* (finding that stress is responsible for 40% of turnover).

⁷² *Id.* (estimating stress-related costs to be around \$300 billion per year); David Lee, *Managing Employee Stress and Safety: A Guide to Minimizing Stress-Related Cost While Maximizing Employee Productivity* 3 (2000) (estimating stress-related costs to be between \$50 billion and \$150 billion each year).

[incidental] sick leave and [loss of] \$8,000 . . . per year.”⁷³ In particular, health-related loss of productive time results in annual losses to businesses of approximately \$226 billion.⁷⁴

In addition to health-related losses of productivity, stress associated with lack of control over reproductive health also damages businesses. Stress is a leading cause of employee turnover, which costs employers between 12% and 40% of their companies’ net earnings each year.⁷⁵ To replace a departing worker, businesses expend 21% of the departing worker’s salary.⁷⁶ It is “costly to replace workers because of

⁷³ *Id.*

⁷⁴ Sean Nicholson et al., *How to Present the Business Case for Healthcare Quality to Employers* 12 (Nov. 2005), available at <http://knowledge.wharton.upenn.edu/wp-content/uploads/2013/09/1303.pdf> (“Nicholson”) (“[C]osts of impaired on-the-job productivity are larger than the costs associated with absences.”); Lindsay E. Sears et al., *Overall Well-Being as a Predictor of Health Care, Productivity and Retention Outcomes in a Large Employer*, 16(6) *Population Health Management* 397, 397 (2013).

⁷⁵ *Id.*

⁷⁶ Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There Are Significant Business Costs to Replacing Employees* 1 (Nov. 16, 2012), available at <https://cdn.americanprogress.org/wpcontent/uploads/2012/11/16084443/CostofTurnover0815.pdf> (calculating the cost of turnover for all positions except executives and physicians) (“Boushey & Glynn”); Nicholson, *supra* note 74, at 9 (finding that a “program that improves

the productivity losses when someone leaves a job, the costs of hiring and training a new employee, and the slower productivity until the new employee gets up to speed in their new job.”⁷⁷

Businesses recognize that reducing employee stress and increasing overall well-being can result in financial gains. For example, “79% of CFOs [Chief Financial Officers] believe that workforce productivity [caused by improved health] has a great or critical effect on their financial performance drivers.” Simply, “CFOs recognize a strong link between health, productivity and corporate financial success.”

To capitalize on the relationship between employees’ well-being and businesses’ financial interests, many companies have implemented various work-life initiatives. One example is the recent trend of providing on-site healthcare clinics to employees. By providing these services, companies benefit overall because their employees incur between 15 and 22 fewer incidental missed workdays than the employees of companies that lack on-site healthcare providers. These initiatives enhance the bottom line. The Rules however, do the opposite.

workers’ health could lower the turnover rate by creating a stronger attachment between the employees and the company”).

⁷⁷ Boushey & Glynn, *supra* note 76, at 1.

When women suffer negative health consequences associated with unintended pregnancies or stress occasioned by lack of control over their reproductive health, they see their net earnings decline, and the economy sees overall growth and productivity decline, too.

Women have been able to contribute to the national economy in large part because access to contraception has empowered them to make life choices without fear of unintended pregnancy. Indeed, access to contraception implicates a woman's "basic control over her life." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part). Recognizing that women's ability to participate "equally in the economic and social life of the Nation" is "facilitated by their ability to control their reproductive lives," this Court should not reverse course on the substantial economic progress women have made. *Casey*, 505 U.S. at 856 (citations omitted).

CONCLUSION

The nation's economy is best served when women can participate fully in education, the workforce, and the marketplace without the uncertainty of unintended pregnancy. The Rules threaten businesses and the national economy by decreasing women's ability to access

contraception. This loss of control limits women's ability to shape and care for their families, their education, and their careers. The Rules will have adverse consequences for women's economic security, equality, opportunity, and well-being. They will harm American women, families, and the national economy. For these, and the foregoing reasons, *amici* respectfully urge this Court to affirm the District Court's nationwide injunction.

Respectfully submitted,

Dated: March 25, 2019

s/ Leah R. Bruno

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CERTIFICATE OF BAR MEMBERSHIP

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 25, 2019

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(G) AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(a)(5) and 32(a)(7)(B). It contains 6,412 words, excluding the parts of the brief exempted by Federal Rule 32(f) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in proportionally-spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and the latest version of Sophos Anti-virus has been run on the file containing the electronic version of this brief and no virus has been detected.

Dated: March 25, 2019

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date indicated below, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

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