

In The  
**Supreme Court of the United States**

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THE LITTLE SISTERS OF THE POOR  
SAINTS PETER AND PAUL HOME, PETITIONER,

*v.*

THE COMMONWEALTH OF PENNSYLVANIA  
AND THE STATE OF NEW JERSEY, ET AL.

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DONALD J. TRUMP, PRESIDENT OF THE  
UNITED STATES, ET AL., PETITIONERS,

*v.*

COMMONWEALTH OF PENNSYLVANIA, ET AL.

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

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**BRIEF FOR AMICI CURIAE  
AMERICAN ASSOCIATION OF  
UNIVERSITY WOMEN; THE AMERICAN  
FEDERATION OF STATE, COUNTY, AND  
MUNICIPAL EMPLOYEES; AND 14 ADDITIONAL  
PROFESSIONAL, LABOR, AND STUDENT  
ASSOCIATIONS SUPPORTING RESPONDENTS**

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## **INTERESTS OF AMICI CURIAE<sup>1</sup>**

Amici are organizations working on behalf of female employees and students throughout the United States. Amici represent well over a million members in hundreds of occupations in nearly every state, including women in organized labor,<sup>2</sup> social workers, teachers, lawyers, students, and more.

Amici have an interest in the outcome of this litigation because contraceptive coverage without cost sharing is critical for women to participate and succeed both in the workplace and in higher education.

**American Association of University Women (“AAUW”)** was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education and equal employment opportunities. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide.

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

<sup>2</sup> Workers represented by labor unions who are covered by collective bargaining agreements that require the employer to provide contraceptive coverage should not be at immediate risk of losing this bargained-for benefit. They will, however, be at increased risk of losing this coverage in the future if their employers react to the Final Exemption Rules by bargaining to change health benefits.

AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Priorities, AAUW supports choice in the determination of one's reproductive life and increased access to healthcare and family planning services.

**The American Federation of State, County, and Municipal Employees ("AFSCME")** is a labor organization with 1.4 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico. Over 100,000 of its members work in the private sector. With well over half its members being women, AFSCME has a long history of advocating for gender equality and reproductive rights.

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

in all 50 states, plus Guam, Puerto Rico, and the Virgin Islands.

**Girls Inc.** is a non-profit, nonpartisan organization that inspires all girls to be strong, smart, and bold through direct service and advocacy. Seventy-nine local Girls Inc. affiliates provide primarily after-school and summer programming to girls ages 5-18 in 31 U.S. states and Canada. Girls Inc.'s comprehensive approach to whole girl development equips girls to navigate gender, economic, and social barriers and grow up healthy, educated, and independent. Informed by girls and their families, Girls Inc. also advocates for policies and practices to advance the rights and opportunities of girls and young women. Girls Inc. supports protecting and expanding access to affordable reproductive healthcare so all women can decide what is best for their own health, education, and careers.

**National Association of Social Workers** (“NASW”) was established in 1955 and is the largest association of professional social workers in the United States with over 110,000 members in 55 chapters. NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW advocates for reproductive freedom and justice which includes safe access to the full range of reproductive health services for all women, including access to abortion and family planning services.<sup>3</sup>

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<sup>3</sup> NASW Policy Statements: Women's Issues in Social Works Speaks (2018) 355, 358 (11th ed. 2018).

**If/When/How: Lawyering for Reproductive Justice (“If/When/How”)** envisions a transformation of the legal systems and institutions that perpetuate oppression into structures that realize justice, and a future when all people can self-determine their reproductive lives free from discrimination, coercion, or violence. It transforms the law and policy landscape through advocacy, support, and organizing so all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms. If/When/How currently has approximately 90 active chapters at law schools across the country: 9% in the Mid-Atlantic; 26% in the Midwest; 18% in the Northeast; 27% in the South; and 20% in the West. If/When/How has approximately 1,500 student members overall, with 95% of its members identifying as women.

**California Women Lawyers (“CWL”)** is a non-profit organization chartered in 1974. CWL is the only statewide bar association for women in California and maintains a primary focus on advancing women in the legal profession. Since its founding, CWL has worked to improve the administration of justice, to better the position of women in society, to eliminate all inequities based on sex, and to provide an organization for collective action and expression germane to the aforesaid purposes. CWL has also participated as amicus curiae in a wide range of cases to secure the equal treatment of women and other classes of persons under the law.

**Women’s Bar Association of the State of New York (“WBASNY”)** is the second largest statewide bar association in New York and one of the largest women’s bar associations in the United States. Its more than 4,200 members in its twenty chapters across New York State<sup>4</sup> include esteemed jurists, academics, and attorneys who practice in every area of the law, including employment, ERISA, health law,

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<sup>4</sup> WBASNY’s affiliated organizations consist of twenty regional chapters, some of which are separately incorporated, plus nine IRC 501(c)(3) charitable corporations that are foundations and/or legal clinics. The affiliates are: *Chapters*—Adirondack Women’s Bar Association; The Bronx Women’s Bar Association, Inc.; Brooklyn Women’s Bar Association, Inc.; Capital District Women’s Bar Association; Central New York Women’s Bar Association; Del-Chen-O Women’s Bar Association; Finger Lakes Women’s Bar Association; Greater Rochester Association for Women Attorneys; Mid-Hudson Women’s Bar Association; Mid-York Women’s Bar Association; Nassau County Women’s Bar Association; New York Women’s Bar Association; Queens County Women’s Bar Association; Rockland County Women’s Bar Association; Staten Island Women’s Bar Association; The Suffolk County Women’s Bar Association; Thousand Islands Women’s Bar Association; Westchester Women’s Bar Association; Western New York Women’s Bar Association; and Women’s Bar Association of Orange and Sullivan Counties. *Charitable Foundations & Legal Clinic*—Women’s Bar Association of the State of New York Foundation, Inc.; Brooklyn Women’s Bar Foundation, Inc.; Capital District Women’s Bar Association Legal Project Inc.; Nassau County Women’s Bar Association Foundation, Inc.; New York Women’s Bar Association Foundation, Inc.; Queens County Women’s Bar Foundation; Westchester Women’s Bar Association Foundation, Inc.; and The Women’s Bar Association of Orange and Sullivan Counties Foundation, Inc. (No members of WBASNY or its affiliates who are judges or court personnel participated in WBASNY’s amicus curiae vote in this matter.)

reproductive rights, commercial, criminal, appellate, constitutional, and civil rights. WBASNY is dedicated to fair and equal administration of justice, and it has participated as an amicus curiae in many cases, including those involving reproductive rights, and as a vanguard for the rights of women, minorities, LGBT persons, and others.

**Colorado Women’s Bar Association (“CWBA”)** is an organization of more than 1,200 Colorado attorneys, judges, legal professionals, and law students founded in 1978 and dedicated to promoting women in the legal profession and the interests of women generally. The CWBA has an interest in this case because its members, their clients, and other women in Colorado are committed to protecting women’s health.

**Women Lawyers’ Association of Los Angeles (“WLALA”)** is a non-profit organization comprised primarily of lawyers and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation in the legal profession of women lawyers and judges from diverse perspectives and racial and ethnic backgrounds, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women by supporting their exercise of equal rights, equal representation, and reproductive choice. WLALA has participated as an amicus curiae in cases involving discrimination before many federal district courts, Courts of Appeals, and the Supreme Court. WLALA believes that bar associations have a special obligation to protect the core guarantees of our Constitution to

secure equal opportunity for women and girls through the full enforcement of laws prohibiting discrimination.

**Women Lawyers On Guard Inc. (“WLG”)** is a national, non-partisan, non-profit organization harnessing the power of lawyers and the law in coordination with other organizations to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all.

**Women’s Bar Association of the District of Columbia (“WBA”)**: Founded in 1917, the WBA is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, the WBA continues to pursue its mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among its members. The WBA believes that when women have the means to plan whether and how to have a family, they can better invest in their own careers and their country.

**Georgia Association for Women Lawyers (“GAWL”)** is a statewide bar association with more than 740 members. Founded in 1928, GAWL has proudly served the diverse interests of women lawyers in Georgia for over 90 years. This matter affects the 98% of GAWL members who are women. GAWL joins this brief in service of its mission “to enhance the



welfare and development of women lawyers and to support their interests.”

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

**Lawyers Club of San Diego (“Lawyers Club”)** is a 1,300+ member legal association established in 1972 with the mission “to advance the status of women in the law and society.” In addition to presenting educational programs and engaging in advocacy, Lawyers Club participates in litigation as amicus curiae where the issues concern the advancement of status of women in the law and society. Lawyers Club is committed to gender equality and reproductive justice. Reproductive justice gives women the freedom and flexibility to plan their families in ways that work best not only for each woman and her professional advancement, but for society as a whole. Lawyers Club joins this amicus brief because access to contraception

without cost sharing directly impacts women's reproductive justice and gender equality efforts.

**Hispanic Lawyers' Association of Illinois ("HLAI")** is a not-for-profit organization founded in 1995. It is the largest statewide bar association for Latinos in Illinois and has a robust and active Latina Lawyers Committee. HLAI is committed to addressing social, economic, and other issues that affect the Hispanic community. HLAI advocates for public policy that eliminates inequities based on sex, and improves and empowers women's lives. HLAI has participated as amicus curiae on a variety of issues including cases involving securing the equal treatment of women and other classes of persons under the law. HLAI joins this amicus brief because access to contraception directly impacts women's reproductive justice and gender equality, which are important to all of HLAI's members.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The preliminary injunction protects women and their families from the irreparable harm they would suffer if Defendants were permitted to enforce the rules issued on November 7, 2018 (the "Final Exemption Rules").<sup>5</sup> The injunction should be upheld.

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<sup>5</sup> See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (the "Religious Exemption Rule"); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable

Uninterrupted, cost-sharing-free coverage of reliable contraception allows women to strive for professional and educational equality. Facilitating women's educations and careers, in turn, allows women to better care for themselves and their families. For these reasons, the Patient Protection and Affordable Care Act (the "ACA")<sup>6</sup> requires employer-sponsored health insurance plans to cover all FDA-approved methods of contraception without burdening insured women with out-of-pocket costs (the "Contraceptive Coverage Benefit").

Yet the Final Exemption Rules effectively eliminate that requirement for hundreds of thousands—if not millions—of women. These women will lose critical contraceptive coverage if the preliminary injunction is overturned, and they will experience irreparable harm as a result.

Before issuance of the Final Exemption Rules, the Contraceptive Coverage Benefit exempted from its scope houses of worship with religious objections, along with their related auxiliaries, conventions, and church associations.<sup>7</sup> For religiously-affiliated employers and universities, the federal government created

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Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the "Moral Exemption Rule").

<sup>6</sup> 42 U.S.C. § 18001, *et seq.*

<sup>7</sup> *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,458 (Feb. 6, 2013).

an accommodation: it allowed the objecting employers and universities to opt out, but required health insurance providers or other third parties to provide affected employees and students with seamless contraceptive coverage.<sup>8</sup> After *Burwell v. Hobby Lobby Stores, Inc.*,<sup>9</sup> closely-held corporations owned or controlled by persons with sincerely-held religious beliefs could also seek accommodations.<sup>10</sup>

The Final Exemption Rules significantly expand the prior exemptions in three key ways. *First*, the Rules exponentially increase the number of employers and universities that could deny coverage. The Religious Exemption Rule would allow employers and universities (including large, for-profit companies) to deny contraceptive coverage to their employees and students.<sup>11</sup> And the Moral Exemption Rule—which creates an entirely new exception—would allow non-profit organizations and for-profit, privately-held entities with “sincerely held moral convictions” to deny coverage.<sup>12</sup> Virtually *all* employers or universities could seek one or both exemptions.

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<sup>8</sup> Accommodations in Connection with Coverage of Certain Preventive Health Services, 45 C.F.R. §§ 147.131(b), (c)(2).

<sup>9</sup> 573 U.S. 682 (2014).

<sup>10</sup> Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,323-28 (July 14, 2015).

<sup>11</sup> Religious Exemption Rule, 83 Fed. Reg. at 57,558-66, 57,590.

<sup>12</sup> Moral Exemption Rule, 83 Fed. Reg at 57,614-21, 57,630-31.

*Second*, the Final Exemption Rules would allow employers and universities to claim these exemptions without meaningful oversight. Entities could now simply drop coverage without certifying their objections or even notifying the federal government.

*Third*, because the Final Exemption Rules provide exemptions and not accommodations, women who receive insurance coverage through objecting entities would no longer be guaranteed seamless contraceptive coverage. The employees and students of entities claiming exemptions (and the dependents of those employees and students) are at risk of losing this critical coverage altogether.

By allowing nearly any employer or university in the country to drop the Contraceptive Coverage Benefit without showing that the existing accommodation would substantially burden a sincere religious belief, the Final Exemption Rules would thwart the Contraceptive Coverage Benefit's purpose. Hundreds of thousands of women and families across the United States will experience the negative repercussions that result.

Indeed, the numbers are staggering. Approximately half a million women work for religiously-affiliated hospitals. Approximately 600,000 women attend religiously-affiliated colleges and universities. And more than 41,500 women work for privately-held, for-profit companies that have already opposed the Contraceptive Coverage Benefit.

These figures provide only a baseline estimate of the number of women who will be immediately affected by the Final Exemption Rules. They do not include the thousands of female dependents of these employees and students. Nor do they account for employees of other types of non-profit and for-profit entities that may opt to be exempted rather than use the accommodation process. They further omit those women whose insurance companies or corporate employers could drop coverage altogether under the Final Exemption Rules. Accounting for all of the women who may lose coverage is no simple task, but there should be little question that the figure is daunting.<sup>13</sup>

The judgment should be affirmed.

## **ARGUMENT**

### **I. IMPLEMENTATION OF THE FINAL EXEMPTION RULES THREATENS IMMEDIATE AND IRREPARABLE HARM TO WOMEN IN EVERY STATE ACROSS THE COUNTRY**

The potential impact of the Final Exemption Rules is vast. Before issuance of the Rules, many for-profit companies filed lawsuits challenging the Contraceptive Coverage Benefit and sought exemptions from it.<sup>14</sup> Several non-profits that were eligible for

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<sup>13</sup> HHS has increased its estimate of women potentially affected by the Final Exemption Rules to between 70,515 and 126,400. See Religious Exemption Rule, 83 Fed. Reg. at 57,578, 57,780-81. Amici believe this estimate remains drastically underinclusive.

<sup>14</sup> See, e.g., Samantha Cooney, *46 Secular Companies That Don't Want to Cover Employees' Birth Control*, TIME INC. (May 31,

accommodations, including colleges and universities, challenged the accompanying notice requirement.<sup>15</sup> These same for-profit and non-profit entities will undoubtedly seek to utilize the Final Exemption Rules.

But employers and universities that have already opposed the Contraceptive Coverage Benefit are just the tip of the iceberg. Given the breadth of the Final Exemption Rules, virtually any employer—including ones with no religious mission—could be exempted.

Several categories of employers and universities could immediately take advantage of the Final Exemption Rules if the preliminary injunction is overturned. To start, religiously affiliated non-profits, such as hospitals and universities, would be able to claim full exemptions. The female employees and students of these entities would therefore no longer be guaranteed seamless access to contraceptive coverage through their regular insurance plans. Hundreds of these hospitals and universities, many of which had previously accepted the accommodation because they were not eligible for an exemption, would likely take advantage of the Final Exemption Rules.<sup>16</sup>

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2017), <http://motto.time.com/4797792/donald-trump-birth-control-companies/>; Abby Haglage, *After Hobby Lobby, These 82 Corporations Could Drop Birth Control Coverage*, THE DAILY BEAST (June 30, 2014), <https://www.thedailybeast.com/after-hobby-lobby-these-82-corporations-could-drop-birth-control-coverage>.

<sup>15</sup> Haglage, *supra* note 14.

<sup>16</sup> See, e.g., Joe Carlson, *N.Y. Catholic Health System Wins Ruling Against Contraception Mandate*, MODERN HEALTHCARE

In addition, a potentially boundless range of secular, for-profit corporations would be able to claim religious or moral exemptions.<sup>17</sup> Hundreds of thousands of women and their dependents are insured by these newly-exempted companies and universities.

It should not be assumed, of course, that these many thousands of women all share the religious or moral objections of their employers or universities. To the contrary, while religious denominations that oppose some or all forms of contraception have vocally opposed the Contraceptive Coverage Benefit,<sup>18</sup> women who work for employers or attend universities affiliated with these religions continue to need and use contraception. Ninety-eight percent of sexually active Catholic women have used a contraception method other than natural family planning,<sup>19</sup> and 87%

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(Dec. 16, 2013), <http://www.modernhealthcare.com/article/20131216/NEWS/312169935>.

<sup>17</sup> See Michael Nedelman, et al., *Trump Administration Deals Major Blow to Obamacare Birth Control Mandate*, CNN (Oct. 6, 2017), <http://www.cnn.com/2017/10/06/health/trump-birth-control-mandate/index.html> (“Policy experts \* \* \* argue that this could open the door to hundreds of employers dropping coverage.”).

<sup>18</sup> See, e.g., *ibid.*; Amicus Brief of the Catholic Benefits Assoc. and The Catholic Ins. Co. in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

<sup>19</sup> *Guttmacher Statistic on Catholic Women’s Contraceptive Use*, GUTTMACHER INST. (Feb. 15, 2012), <http://www.guttmacher.org/media/inthenews/2012/02/15/>; see also Kimberly Daniels, et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT’L HEALTH STATISTICS REP. 1, 8 (2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>.



of Catholic women currently at risk of unintended pregnancy use a method other than natural family planning.<sup>20</sup> Among evangelical women currently at risk of unintended pregnancy, 74% use a “highly effective contraceptive method,” including sterilization, an IUD, the pill, and other hormonal methods.<sup>21</sup>

All told, more than 99% of all sexually active women of reproductive age across the United States have, at some point, used contraception to prevent pregnancy.<sup>22</sup> Contraceptives are one of the most widely used medications in the country,<sup>23</sup> with the oral contraceptive pill being the most commonly used form of contraception.<sup>24</sup> Many thousands of these women would be left without coverage if and when their

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<sup>20</sup> GUTTMACHER INST., *supra* note 19.

<sup>21</sup> Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, GUTTMACHER INST. 5 (Apr. 2011), [https://www.guttmacher.org/sites/default/files/report\\_pdf/religion-and-contraceptive-use.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/religion-and-contraceptive-use.pdf).

<sup>22</sup> Adam Sonfield, et al., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children*, GUTTMACHER INST. 3 (Mar. 2013), [https://www.guttmacher.org/sites/default/files/report\\_pdf/social-economic-benefits.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf).

<sup>23</sup> Nora V. Becker & Daniel Polsky, *Women Saw Large Decrease in Out-Of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 HEALTH AFFAIRS 1204 (2015).

<sup>24</sup> Lydia E. Pace, Stacie B. Dusetzina & Nancy L. Keating, *Early Impact of the Affordable Care Act on Oral Contraceptive Cost Sharing, Discontinuation, and Nonadherence*, 35 HEALTH AFFAIRS 1616 (2016); *Contraceptive Use in the United States*, GUTTMACHER INST. (Sept. 2016), <https://www.guttmacher.org/factsheet/contraceptive-use-united-states#2a>.

employers and universities invoke the Final Exemption Rules.

### **A. Nearly Half A Million Women Working For Hospitals Could Lose Coverage**

Members of amici and many other women work for hospitals that could take advantage of the Final Exemption Rules. Nearly 670 hospitals in the United States are associated with religious denominations prohibiting many or all forms of contraception.<sup>25</sup> These hospitals are major employers, with at least 536,396 full-time and 214,936 part-time employees,<sup>26</sup> approximately 75% of whom are women.<sup>27</sup> As of 2016, these hospitals comprised 14.5% of all acute care hospitals in the United States.<sup>28</sup> Forty-six of these hospitals are the sole community providers of short-term acute hospital care in their regions, meaning that health workers who lose coverage will have few

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<sup>25</sup> See Catholic Health Assoc. of the U.S., *U.S. Catholic Health Care in the U.S.* 1 (2019), [https://www.chausa.org/docs/default-source/default-document-library/the-strategic-profile-of-catholic-health-care-in-the-united-states\\_2020.pdf?sfvrsn=0](https://www.chausa.org/docs/default-source/default-document-library/the-strategic-profile-of-catholic-health-care-in-the-united-states_2020.pdf?sfvrsn=0) (last visited April 2, 2020).

<sup>26</sup> *Ibid.*

<sup>27</sup> U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/cpsaat18.htm> (last modified Jan. 22, 2020).

<sup>28</sup> Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report 1*, MERGERWATCH (2016), [http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW\\_Update-2016-MiscarrOfMedicinereport.pdf?token=UxHKcNPcSKjkw0MAq8v8aEdM83w%3D](http://static1.1.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicinereport.pdf?token=UxHKcNPcSKjkw0MAq8v8aEdM83w%3D).

opportunities for alternative employment.<sup>29</sup> The number of religiously-affiliated hospitals in the United States increased by 22% between 2001 and 2016.<sup>30</sup> If this trend continues, even more women would be affected by these hospitals' ability to take advantage of the Final Exemption Rules.

The large market share of the hospitals and other healthcare entities that follow religious directives prohibiting some or all forms of contraception has far-reaching implications for the majority-women employees who work in these facilities (not to mention their female dependents). To take one prominent example, although the Catholic Health Association itself was not opposed to the Obama-era accommodation process, it has steadfastly opposed any requirement by which its member hospitals would have to directly pay for birth control coverage.<sup>31</sup> Additionally, numerous state and regional Catholic healthcare umbrella organizations have strongly opposed the Contraceptive Coverage Benefit.<sup>32</sup> Under the Final Exemption Rules, many healthcare providers could now eliminate contraceptive coverage for their employees and their employees' dependents, obstructing contraception

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> See Catholic Health Assoc. of the U.S., *Women's Preventive Health Services Final Rule*, <https://www.chausa.org/newsroom/women%27s-preventive-health-services-final-rule> (last visited April 2, 2020).

<sup>32</sup> See, e.g., Carlson, *supra* note 16.

access for hundreds of thousands of women throughout the nation.

**B. Tens Of Thousands Of Female Students At Religiously-Affiliated Colleges And Universities Could Lose Coverage**

The Final Exemption Rules may also deprive many students of contraceptive coverage. Hundreds of colleges and universities throughout America are affiliated with religious denominations that actively oppose some or all forms of contraception. Students who receive insurance through these colleges or universities are at great risk of losing coverage.<sup>33</sup>

For example, there are more than 260 members of the Association of Catholic Colleges and Universities (the “ACCU”) in the United States. ACCU members collectively enroll more than 891,000 students<sup>34</sup> and employ large numbers of faculty and staff.<sup>35</sup> During the 2016-17 academic year, *nearly two-thirds* of students enrolled in Catholic colleges and universities were female.<sup>36</sup>

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<sup>33</sup> See Jeanine Santucci, *Students at Religious Universities Are Worried About Access to Birth Control. Here’s Why.*, USA TODAY (July 17, 2017), <http://college.usatoday.com/2017/07/17/students-at-religious-universities-are-worried-about-access-to-birth-control-heres-why/>.

<sup>34</sup> ACCU, *Catholic Higher Education FAQs*, <http://www.accunet.org/Catholic-Higher-Ed-FAQs> (last visited April 2, 2020).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

Many Protestant or nondenominational Christian colleges and universities have also challenged the Contraceptive Coverage Benefit through lawsuits and public comments.<sup>37</sup> In particular, the Council for Christian Colleges and Universities (the “CCCU”), representing 118 colleges and universities, 61 affiliate member institutions, and 400,000 members in 33 states, has vigorously opposed the Contraceptive Coverage Benefit.<sup>38</sup> Many Christian colleges and universities have independently challenged and sought exemptions from the Contraceptive Coverage Benefit. For example, Geneva College in Pennsylvania, with approximately 350 employees, has actively opposed the Contraceptive Coverage Benefit.<sup>39</sup> Wheaton College in Illinois, College of the Ozarks in Missouri, Colorado Christian University in Colorado, East Texas Baptist University in Texas, Union University in Tennessee, Dordt College in Iowa, and Heartland Christian College in Missouri are among the other non-Catholic colleges that have challenged the accommodation process or sought exemptions through lawsuits and amicus briefs.<sup>40</sup> These colleges collectively boast an

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<sup>37</sup> See generally Amicus Brief of the Council for Christian Colleges and Universities in Support of Petitioners at 2-3, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Geneva Coll. v. Sebelius*, 988 F. Supp. 2d 511 (W.D. Pa. 2013).

<sup>40</sup> Cooney, *supra* note 14; Haglage, *supra* note 14; Nicole Fisher, *Battle Between HHS and Christian College Comes To Dramatic End*, FORBES (Mar. 5, 2018), <https://www.forbes.com/>

enrollment of more than 20,000 students.<sup>41</sup> Under the Final Exemption Rules, they are now free to drop contraceptive coverage altogether, thus undermining the effectiveness of the Contraceptive Coverage Benefit in eliminating barriers to women’s educational and professional advancement.

### **C. Thousands Of Women Working For Other Religiously-Affiliated Non-Profits Could Lose Coverage**

In addition to hospitals and colleges, thousands of non-profit organizations throughout the United States are affiliated with religious denominations actively opposing some or all forms of contraception. As of 2015, approximately 3% of the 1.4 million non-profits in the United States, and 10% of the largest non-profits, had secured accommodations under the Contraceptive

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sites/nicolefisher/2018/03/05/battle-between-hhs-christian-college-comes-to-dramatic-end/#72d789044641.

<sup>41</sup> Geneva College, *Fast Facts: Geneva College*, <http://www.geneva.edu/about-geneva/fast-facts> (last visited April 2, 2020); Wheaton College, *Wheaton by the Numbers*, <https://www.wheaton.edu/about-wheaton/why-wheaton/college-profile/wheaton-by-the-numbers/> (last visited April 2, 2020); *College of the Ozarks: Overview*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/college-ozarks-2500> (last visited April 2, 2020); Colorado Christian University, *CCU Facts and Stats*, <http://www.ccu.edu/about/factsandstats/> (last visited April 2, 2020); *East Texas Baptist University*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/east-texas-baptist-university-3564> (last visited April 2, 2020); *Union University: Overview*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/union-university-3528> (last visited April 2, 2020); Dordt College, *About Dordt: Fast Facts*, <https://www.dordt.edu/about-dordt/fast-facts> (last visited April 2, 2020).

Coverage Benefit.<sup>42</sup> Under the Final Exemption Rules, these employers (and many more like them) could drop contraceptive coverage without guaranteeing alternate coverage for their employees.

Additionally, more than 83 amicus briefs supporting religious exemptions from the Contraceptive Coverage Benefit were filed in *Zubik v. Burwell*.<sup>43</sup> These briefs represented dozens of religiously-affiliated advocacy groups, professional organizations, think tanks, and umbrella organizations.<sup>44</sup> In this case, similarly, there are 35 signatories on amicus briefs opposing the Contraceptive Coverage Benefit. These amici and the organizations they represent could also drop coverage under the Final Exemption Rules.

#### **D. Thousands Of Women Working For Private, Non-Religiously-Affiliated Employers Could Lose Coverage**

The Final Exemption Rules apply far beyond religiously-affiliated hospitals, colleges, universities, and non-profits. If the Rules were effective, any

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<sup>42</sup> Laurie Sobel, Matthew Rae & Alina Salganicoff, *Data Note: Are Nonprofits Requesting an Accommodation for Contraceptive Coverage?* 2, THE HENRY J. KAISER FAMILY FOUND. (Dec. 2015), <http://files.kff.org/attachment/data-note-data-note-are-nonprofits-requesting-an-accommodation-for-contraceptive-coverage>. The “largest” non-profits include those with 1,000-4,999 employees, as well as those with more than 5,000 employees. *Ibid.*

<sup>43</sup> 136 S. Ct. 1557 (2016).

<sup>44</sup> See Amicus Briefs Supporting the Petitioner, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

employer could take advantage of the exemptions based on loosely defined religious or moral reasons.<sup>45</sup> Innumerable large corporations might deny contraceptive care to their employees and dependents, perhaps because of the religious beliefs of their CEOs, boards of directors, or any number of other influences. Consequently, employees of any for-profit company, and those employees' dependents, could lose contraceptive coverage if the preliminary injunction is overturned.

Indeed, reports have identified over 80 private, for-profit businesses that have expressly indicated their desire to drop contraceptive coverage.<sup>46</sup> This list includes several companies that collectively employ well over 41,500 women in at least 47 states:

- Hobby Lobby, a national craft supply chain (37,500 employees);<sup>47</sup>
- Grote Industries, LLC, an Indiana vehicle safety systems manufacturer (1,148 full-time employees);<sup>48</sup>
- Conestoga Wood Specialties Corporation, a Pennsylvania-based cabinet manufacturer (950 employees);<sup>49</sup>

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<sup>45</sup> See 45 C.F.R. §§ 147.132(a), 147.133(a).

<sup>46</sup> Cooney, *supra* note 14; Haglage, *supra* note 14.

<sup>47</sup> *Ibid.*; *Hobby Lobby Stores*, FORBES, <https://www.forbes.com/companies/hobby-lobby-stores/#4daa9db16cee> (last visited April 2, 2020).

<sup>48</sup> *Grote v. Sebelius*, 708 F.3d 850, 852 (7th Cir. 2013).

<sup>49</sup> *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013).



- Autocam Corporation and Autocam Medical, LLC, a Michigan transportation and medical equipment parts company (over 661 employees);<sup>50</sup>
- Freshway Foods and Freshway Logistics, an Ohio-based produce processing company (400 employees);<sup>51</sup>
- Sioux Chief Manufacturing, a Missouri plumbing products company (370 employees);<sup>52</sup>
- Hercules Industries, Inc., a Colorado products manufacturer (303 employees);<sup>53</sup>
- Tyndale House, an Illinois publishing company (260 employees);<sup>54</sup>
- Weingartz Supply Company, a Michigan power equipment company (170 employees);<sup>55</sup>
- American Pulverizer Company, a Missouri metal recycling company (150 employees);<sup>56</sup>

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<sup>50</sup> *Autocam Corp. v. Sebelius*, 730 F.3d 618, 620 (6th Cir. 2013); Jodi Jacobson, *Eighteen For-Profit Companies Fighting to Eliminate the Birth Control Benefit*, REWIRE (Mar. 7, 2013), <https://rewire.news/article/2013/03/07/the-18-for-profit-companies-fighting-to-eliminate-the-birth-control-benefit/>.

<sup>51</sup> *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1210 (D.C. Cir. 2013).

<sup>52</sup> Jacobson, *supra* note 50.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

- Sharpe Holdings, Inc., a Missouri dairy farming corporation (over 100 employees);<sup>57</sup>
- Triune Health Group, an Illinois corporation that facilitates the re-entry of injured workers in the workforce (95 employees);<sup>58</sup>
- O'Brien Industrial Holdings, a Missouri ceramics processing company (87 employees);<sup>59</sup>
- and many more.<sup>60</sup>

Moreover, given the Final Exemption Rules' breadth and the lack of oversight, many businesses with no religious mission—including large, multi-state corporations—could refuse to provide contraceptive coverage.<sup>61</sup> Major employers in nearly every industry could claim exemptions, including fast food,<sup>62</sup>

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*; *Holland v. Sebelius*, No. 2:13-cv-15487 (S.D. W. Va. 2013); *M&N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19 (D.D.C. 2013); *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626 (6th Cir. 2013).

<sup>61</sup> *See, e.g.*, Legatus: Ambassadors for Christ in the Marketplace, *Why Legatus: What We Offer*, <http://legatus.org/legatus/> (last visited April 2, 2020) (More than 5,000 Catholic business leaders and spouses are members of this organization).

<sup>62</sup> Emma Green, *Chick-Fil-A: Selling Chicken with a Side of God*, THEATLANTIC.COM (Sept. 8, 2014), <https://www.theatlantic.com/business/archive/2014/09/chick-fil-a-selling-chicken-with-a-side-of-god/379776/>; Rob Wile, *This 35-Year-Old Woman Just Inherited In-N-Out Burger. She's Now a Billionaire*, TIME INC. (May 8, 2017), <http://time.com/money/4770527/in-n-out-lynsi-snyder-fortune-ownership/>; Kevin Porter, *In-N-Out Burger Owner Lynsi Snyder on Searching for a Father Figure and Finding God in "I am Second,"* CHRISTIAN POST, INC. (Jan. 16, 2017), <https://>

commercial agriculture,<sup>63</sup> insurance,<sup>64</sup> hospitality,<sup>65</sup> airline travel,<sup>66</sup> online dating,<sup>67</sup> and general retail merchandise,<sup>68</sup> to name only a few. These major companies collectively employ nearly two million people.<sup>69</sup> If they

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[www.christianpost.com/news/in-n-out-burger-owner-lynsi-snyder-talks-faith-journey-in-i-am-second-video-172909/](http://www.christianpost.com/news/in-n-out-burger-owner-lynsi-snyder-talks-faith-journey-in-i-am-second-video-172909/).

<sup>63</sup> Holly Lebowitz Rossi, *7 CEOs with Notably Devout Religious Beliefs*, FORTUNE.COM (Nov. 11, 2014), <http://fortune.com/2014/11/11/7-ceos-with-notably-devout-religious-beliefs/>; Steve Kay, *Of Faith and Food*, SOSLAND PUBLISHING CO. (Aug. 11, 2015), <https://www.meatpoultry.com/articles/18994-of-faith-and-food>.

<sup>64</sup> Paul S. Amos: *This is Not Who We Are*, FAITH & LEADERSHIP (Nov. 21, 2011), <https://www.faithandleadership.com/paul-s-amos-not-who-we-are>.

<sup>65</sup> Michael S. Rosenwald, *Marriot's Family Guy*, WASH. POST (Mar. 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031501715.html>.

<sup>66</sup> Ann Schrader, *Republic Air CEO Puts His Faith to Work*, DENVER POST (last updated May 6, 2016), <http://www.denverpost.com/2009/11/13/republic-air-ceo-puts-his-faith-to-work/>; Republic Airlines Inc., *Our Values: Vision, Mission & Culture*, <http://rjet.com/about-republic-airline/our-values/> (last visited April 2, 2020).

<sup>67</sup> Maggie Lake, *eHarmony CEO Meets Controversial Success*, CNN (July 11, 2008), <http://www.cnn.com/2008/BUSINESS/07/11/eharmony.maggie/?iid=EL>.

<sup>68</sup> Colleen Walsh, *God and Walmart*, HARVARD GAZETTE (Nov. 19, 2009), <https://news.harvard.edu/gazette/story/2009/11/god-and-walmart/>.

<sup>69</sup> *Chick-Fil-A*, FORBES, <https://www.forbes.com/companies/chick-fil-a/#7f43c99119ac> (last visited April 2, 2020); *In-N-Out Burger*, FORBES, <https://www.forbes.com/companies/in-n-out-burger/> (last visited April 2, 2020); Tyson Foods, *Our Story*, <https://www.statista.com/statistics/375741/number-of-employees-of-tyson-foods-world-wide-region/> (last visited April 2, 2020); *Aflac*, FORBES, <https://www.forbes.com/companies/aflac/> (last visited April 2, 2020); *Marriott International*, FORBES, <https://www.forbes.com/companies/>

deny their employees contraceptive coverage, a staggering number of women nationwide will be affected.

Non-religious employers could also take advantage of the Final Exemption Rules by citing moral concerns. They might do so simply to serve political purposes, or because they believe—falsely—that this will save money. With no government oversight, virtually any large, privately-held corporate employer could take advantage of the Moral Exemption. For-profit companies account for nearly 90% of private-sector employment across America.<sup>70</sup> If even a fraction of these for-profit employers were to take advantage of the Final Exemption Rules, millions of women could immediately be denied contraceptive coverage. They would suffer all of the health, educational, and employment effects that follow.<sup>71</sup>

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marriott-international/#3fc10f154fa0 (last visited April 2, 2020); *About Republic Airline*, Republic Airlines Inc., <http://rjet.com/about-republic-airline/> (last visited April 2, 2020); Andrea Chang & Peter Jamison, *EHarmony is Moving from Santa Monica to Westwood*, L.A. TIMES (Feb. 4, 2015), <http://www.latimes.com/business/la-fi-0205-eharmony-santa-monica-20150205-story.html>; Walmart Stores, Inc., *Our Locations*, <https://corporate.walmart.com/our-story/locations/united-states> (last visited April 2, 2020).

<sup>70</sup> Bureau of Labor Statistics, U.S. Dep't of Labor, *Nonprofits account for 12.3 million jobs, 10.2 percent of private sector employment, in 2016* (Aug 31, 2018), <https://www.bls.gov/opub/ted/2018/nonprofits-account-for-12-3-million-jobs-10-2-percent-of-private-sector-employment-in-2016.htm> (showing that non-profits account for 10.2% of private-sector employment in the United States in 2016).

<sup>71</sup> See Section II, *infra*.

## II. SEAMLESS CONTRACEPTIVE COVERAGE IS ESSENTIAL TO WOMEN'S EQUALITY AND ADVANCEMENT

### A. The Benefits Of Contraceptive Coverage Without Cost Sharing Are Substantial

Contraceptives have had a profound impact on the lives of women in the United States.<sup>72</sup> In one study, a majority of women reported that contraceptives allowed them “to better care for themselves and their families, either directly or indirectly through facilitating their education and career.”<sup>73</sup> Access to contraceptives through cost-sharing-free coverage can thus transform a woman’s personal and professional life and education. Throughout America, tens of millions of women rely on this coverage to achieve personal, professional, and educational advancement.<sup>74</sup>

Contraceptive access has enabled women to achieve higher education at greater rates than ever before.<sup>75</sup> The availability of the oral contraceptive pill,

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<sup>72</sup> Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *CONTRACEPTION JOURNAL* 465 (2013).

<sup>73</sup> *Id.* at 470.

<sup>74</sup> Martha J. Bailey, Brad Hershbein & Amalia R. Miller, *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 6-7 (Nat’l Bureau of Econ. Research, Working Paper No. 17922, Mar. 2012), <http://www.nber.org/papers/w17922.pdf>.

<sup>75</sup> Heinrich Hock, *The Pill and the College Attainment of American Women and Men* 19 (Fla. State Univ., Working Paper, Oct. 9, 2007); David S. Loughran & Julie M. Zissimopoulos, *Why*

in particular, has significantly increased the rates at which women enroll in college, while decreasing the rates at which they drop out.<sup>76</sup> Two-thirds of women using oral contraceptives gained coverage through the Contraceptive Coverage Benefit.<sup>77</sup> Without such coverage, young women will face increased rates of unintended pregnancies, hindering their pursuit of higher education and career advancement.<sup>78</sup>

Likewise, contraceptive coverage allows women to participate in the workforce on a more equal basis with men. Indeed, in crafting the Contraceptive Coverage Benefit, various government agencies acknowledged that the disparity in health coverage offered to men and women “places women in the workforce at a disadvantage compared to their male co-workers.”<sup>79</sup>

Contraception also permits women to time their pregnancies so that they can invest in higher education and careers prior to starting or expanding their

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*Wait? The Effect of Marriage and Childbearing on the Wages of Men and Women*, 44 J. HUM. RES. 326, 346 (2009).

<sup>76</sup> Hock, *supra* note 75.

<sup>77</sup> Adam Sonfield, et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 CONTRACEPTION 44, 46 (2015).

<sup>78</sup> Sonfield, et al., *supra* note 22, at 9 (women who have children in their teens or early 20s are significantly less likely to obtain formal education after high school as compared to women who are able to wait to have children until their late 20s or 30s).

<sup>79</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012).

families.<sup>80</sup> The ability to control one’s reproduction is critical to women’s career success, as women’s participation in the labor force often decreases significantly after childbirth.<sup>81</sup> Women who can control the timing of their pregnancies tend to have “more opportunities for employment and for full social or political participation in their community.”<sup>82</sup> They ultimately advance further in the workplace and earn more money over their lifetimes.<sup>83</sup> Without the ability to control and time their pregnancies, women will face tremendous adverse personal, professional, social, and economic effects.<sup>84</sup>

**B. There Are No Comparable Alternatives To The Contraceptive Coverage Benefit**

***1. State laws will not fill the gap left by the Final Exemption Rules***

Some (but not all) states require private insurers to cover contraceptives if they offer coverage for other

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<sup>80</sup> Bailey, *et al.*, *supra* note 74.

<sup>81</sup> Hock, *supra* note 75; Loughran & Zissimopoulos, *supra* note 75, at 346.

<sup>82</sup> Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 GUTTMACHER REPORT ON PUB. POLICY 5, 6 (Mar. 2004), [https://www.guttmacher.org/sites/default/files/article\\_files/gr070105.pdf](https://www.guttmacher.org/sites/default/files/article_files/gr070105.pdf).

<sup>83</sup> Loughran & Zissimopoulos, *supra* note 75, at 346.

<sup>84</sup> That is not to mention the monetary costs that the Final Exemption Rules will impose on many women. American women have, for example, collectively saved nearly \$1.4 billion annually in out-of-pocket costs for oral contraceptives due to the Contraceptive Coverage Benefit. *See* Becker & Polsky, *supra* note 23, at 1209.

prescription drugs.<sup>85</sup> These coverage requirements have been effective for women enrolled in certain private insurance plans.<sup>86</sup> But there are four deficiencies that leave this patchwork of state laws unable to fill the gap the Final Exemption Rules would create.

*First*, while 29 states impose some requirement that private employers cover contraceptives, 21 have no such requirement at all.<sup>87</sup>

*Second*, only 14 states require contraceptives to be provided with *no* cost to the insured.<sup>88</sup> Although increases in cost-sharing can decrease women's access to and effective use of contraceptives, 36 states have yet to ensure that such contraceptive coverage is provided.

*Third*, state laws regulating insurers are inapplicable to plans written in other states or, more importantly, to plans from employers that self-insure.<sup>89</sup> Around 60% of all employees are insured through self-funded insurance plans.<sup>90</sup> When employers

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<sup>85</sup> *Insurance Coverage of Contraceptives, State Laws and Policies as of April 1, 2020*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

<sup>86</sup> Brianna M. Magnusson, et al., *Contraceptive Insurance Mandates and Consistent Contraceptive Use Among Privately Insured Women*, 50 MED. CARE 562, 565 (2012).

<sup>87</sup> GUTTMACHER INST., *supra* note 85.

<sup>88</sup> *Ibid.*

<sup>89</sup> Sonfield, *supra* note 77.

<sup>90</sup> Laurie Sobel, Alina Salganicoff & Caroline Rosenzweig, *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*, THE HENRY J. KAISER FAMILY



self-insure, their plans are overseen by the U.S. Department of Labor and are subject only to federal regulations.<sup>91</sup> State laws requiring contraceptive coverage thus do not shield many of the women potentially affected by the Final Exemption Rules.

*Finally*, 21 of the 29 states that require some form of contraceptive coverage allow certain employers and insurers to opt out of those requirements.<sup>92</sup> Many employees even in the states that do generally require such coverage may therefore be left without protection.<sup>93</sup>

State laws thus cannot fully mitigate the negative impact the Final Exemption Rules will have on women's access to contraceptive coverage.

## ***2. Other programs are no substitute for seamless contraceptive coverage***

For women who depend on employer coverage for contraception, alternative arrangements—such as safety net health programs and providers—are either infeasible or inaccessible. It is often impractical for women to obtain coverage through Medicaid or Title X

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FOUND. (Oct. 6, 2017), <http://files.kff.org/attachment/Issue-Brief-New-Regulations-Broadening-Employer-Exemptions-to-Contraceptive-Coverage-Impact-on-Women>; Magnusson, et al., *supra* note 86, at 565.

<sup>91</sup> Employer Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974); *see also* Magnusson, et al., *supra* note 86, at 565.

<sup>92</sup> GUTTMACHER INST., *supra* note 85.

<sup>93</sup> *Ibid.*

providers, and doing so will not be seamless. Many women will not qualify for these programs at all.<sup>94</sup> Notably, safety net family planning providers are already under considerable political attack, threatening their ability to serve their current populations, let alone women who currently rely on employer coverage.<sup>95</sup>

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<sup>94</sup> Title X is a federally funded program focused solely on providing individuals with reproductive health services. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (1970). Title X-funded clinics serve millions of young and low-income women in the United States. Mia R. Zolna, Megan L. Kavanaugh, & Kinsey Hasstedt, *Insurance-Related Practices at Title X-Funded Family Planning Centers under the Affordable Care Act: Survey and Interview Findings*, WOMEN'S HEALTH ISSUES 1 (2017). Yet these clinics already have limited capacity, and their funding is currently under political attack. Kiersten Gillette-Pierce & Jamila Taylor, *The Threat to Title X Family Planning: Why It Matters and What's at Stake for Women*, CTR. FOR AMERICAN PROGRESS (Feb. 9, 2017), <https://www.americanprogress.org/issues/women/reports/2017/02/09/414773/the-threat-to-title-x-family-planning/>. In early 2019, the Trump Administration introduced a rule that further drastically reduced Title X funding, cutting the program's family planning capacity in half. Ruth Dawson, *Trump Administration's Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half*, GUTTMACHER INST. (last updated Feb. 26, 2020), <https://www.guttmacher.org/article/2020/02/trump-administrations-domestic-gag-rule-has-slashed-title-x-networks-capacity-half>. This change reduced by an estimated 1.6 million the number of female patients for whom the program can provide contraceptive-related care. *Ibid.*

<sup>95</sup> Rachel Benson Gold & Kinsey Hasstedt, *Publicly Funded Family Planning Under Unprecedented Attack*, 107 AJPH EDITORIAL 1895 (Dec. 2017), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304124>; see also Dawson, *supra*, note 94.

### **C. The Potential Harms From Losing Contraceptive Coverage, Even Temporarily, Are Irreversible**

Loss of contraceptive coverage will cause many women to use contraceptives less consistently, use less effective methods, or forgo contraception altogether. That is because cost is a significant factor in many women's selection and use of contraception.<sup>96</sup> Without the current preliminary injunction ensuring their continued coverage, many women nationwide will thus suffer irreparable harm.

This irreparable harm arises largely because the Final Exemption Rules threaten to undo much of the good that the Contraceptive Coverage Benefit has achieved. The Contraceptive Coverage Benefit has boosted the consistent and proper use of contraceptives.<sup>97</sup> It has decreased rates of discontinuation and increased effective use with respect to generic oral contraceptives specifically.<sup>98</sup> Because of the Contraceptive Coverage Benefit, more women also have coverage of longer-term and more effective contraceptives.<sup>99</sup>

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<sup>96</sup> Adam Sonfield, *What Is at Stake with the Federal Contraceptive Coverage Guarantee?*, 20 GUTTMACHER POLICY REVIEW 8, 9 (2017), [https://www.guttmacher.org/sites/default/files/article\\_files/gpr2000816\\_0.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr2000816_0.pdf).

<sup>97</sup> Pace, et al., *supra* note 24, at 1623; Becker & Polsky, *supra* note 23, at 1204.

<sup>98</sup> Pace, et al., *supra* note 24.

<sup>99</sup> Becker & Polsky, *supra* note 23; Aileen M. Gariepy, et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 CONTRACEPTION 39 (2011), <http://escholarship.org/uc/item/1dz6d3cx>.

Privately-insured women were, for example, significantly more likely to choose an IUD when the out-of-pocket price was lower.<sup>100</sup> Women who choose long-term contraceptives and receive them at no cost or low shared costs continue using birth control at higher rates.<sup>101</sup>

These increases in the proper use of contraception, and particularly of long-term contraception, have very real benefits. Long-term contraceptive methods, such as an IUD, are the most effective at preventing unintended pregnancies, with only a 1% failure rate.<sup>102</sup> By contrast, an estimated 41% of unintended pregnancies in America are caused by the inconsistent use of contraceptives.<sup>103</sup> Lack of birth control without cost sharing is cited as a factor in approximately one-quarter of abortions.<sup>104</sup>

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<sup>100</sup> Becker & Polsky, *supra* note 23; Gariepy, et al., *supra* note 99.

<sup>101</sup> Gariepy, et al., *supra* note 99; Natalie E. Birgisson, et al., *Preventing Unintended Pregnancy: The Contraceptive CHOICE Project in Review*, 24 JOURNAL OF WOMEN'S HEALTH 349 (2015).

<sup>102</sup> Birgisson, et al., *supra* note 101.

<sup>103</sup> Pace, et al., *supra* note 24. Gaps in contraception use are more common for women who are minorities and those with lower incomes and education levels. Magnusson, et al., *supra* note 86, at 565.

<sup>104</sup> See *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, GUTTMACHER INST. 5 (Sept. 2009), [https://www.guttmacher.org/sites/default/files/report\\_pdf/recessionfp\\_1.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/recessionfp_1.pdf) (finding that in a survey of women's contraceptive usage during the recession, many reported using birth control less consistently as a way to save money); Juell B. Homco, et al., *Reasons for Ineffective Pre-pregnancy*

Millions of women nationwide thus benefit from improvements in contraceptive use and effectiveness. As of 2016, approximately 43 million women in the United States were in their childbearing years, did not want to become pregnant, and were at risk of an unintended pregnancy if they lost access to reliable contraceptive methods.<sup>105</sup> All of these women currently need consistent coverage of reliable contraceptives to effectively prevent unintended pregnancies.

Under the Final Exemption Rules, thousands or even millions of women will be deprived of such reliable coverage if and when their employers and insurers elect to drop it. Women will be less likely to have access to long-term and effective contraceptives, and less likely to continue regular contraceptive use. They will thus be at risk for unintended pregnancies, which threaten their health and economic security.<sup>106</sup>

These women also will be deprived of necessary medical care: contraceptives are used as essential medicine for women.<sup>107</sup> Contraceptive use decreases

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*Contraception Use in Patients Seeking Abortion Services*, 80 *CONTRACEPTION* 569 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3152747/pdf/nihms299833.pdf>.

<sup>105</sup> See GUTTMACHER INST., *supra* note 24.

<sup>106</sup> See *ibid.*

<sup>107</sup> Megan L. Kavanaugh & Ragnar Anderson, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers*, GUTTMACHER INST. (July 2013), <https://www.guttmacher.org/pubs/health-benefits.pdf> (finding that 1.5 million women in the U.S. relied on the oral contraceptive pill between 2006 and 2008 for medical reasons other than preventing pregnancy).

pregnancy-related illness and mortality and prevents potential negative health consequences that stem from unintended pregnancies.<sup>108</sup> Unintended pregnancies can also have significant impacts on a woman's mental health and are a risk factor for depression.<sup>109</sup> Women cannot be denied this critical care.

### CONCLUSION

If the preliminary injunction is overturned, at least hundreds of thousands—and likely millions—of women across the United States are at risk of being irreparably harmed. That includes approximately half a million female employees of religiously-affiliated hospitals, nearly 600,000 female students of religiously-affiliated colleges and universities, and more than 41,500 female employees of for-profit companies that have already stated their intent to deny contraceptive coverage. Additional affected women include dependents of these entities' employees and students, along with the employees and dependents of the many other companies that may drop coverage if the preliminary injunction is overturned.

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<sup>108</sup> See Kavanaugh & Anderson, *supra*, note 107; Hal C. Lawrence, III, Vice President for Practice Activities, Am. Congress of Obstetricians and Gynecologists, *Testimony Before the Institute of Medicine Committee on Preventive Services for Women* 11 (Jan. 12, 2011).

<sup>109</sup> See Albert L. Siu & U.S. Preventive Services Task Force, *Screening for Depression in Adults: U.S. Preventive Services Task Force Recommendation Statement*, 315 JAMA 380, 382 (2016), <https://jamanetwork.com/journals/jama/fullarticle/2484345>

The repercussions of losing cost-sharing-free coverage of safe, reliable contraceptives are not just monetary. Women’s physical and emotional health, educational opportunities, and professional advancement all depend upon consistent, uninterrupted access to prescription contraceptives. Loss of coverage—even for only a few months—will have immediate and oftentimes irreparable consequences for American women’s professional and educational advancement, as well as for their personal well-being and that of their families. On behalf of female employees and students throughout the country, Amici thus support the current preliminary injunction enjoining implementation of the Final Exemption Rules.

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