Nos. 18-15144, 18-15166, 18-15255

United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellees,

– v. –

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; R. ALEXANDER ACOSTA, in his official capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; STEVEN TERNER MNUCHIN, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTHERN CALIFORNIA, OAKLAND IN CASE NO. 4:17-CV-05783-HSG, HAYWOOD S. GILLIAM, DISTRICT JUDGE

BRIEF OF THE CENTER FOR REPRODUCTIVE RIGHTS, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND SEVEN CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

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

Dated: May 29, 2018

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INTEREST OF AMICI CURIAE[1]

Amici are leading national and regional civil rights and equal justice organizations that litigate in state and federal courts to protect constitutional rights for all. *See* Appendix A describing all amici.

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

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

SUMMARY OF ARGUMENT

At issue are Defendants' procedurally-deficient regulations that also violate the Constitution's guarantees of liberty and equal protection under the law. On October 6, 2017, the Departments of Health and Human Services, Labor, and Treasury announced two interim final rules that will deprive thousands of women of meaningful access to contraceptive health care services.[2] The Religious Exemption Rule, 82 Fed. Reg. 47,807, and the Moral Exemption Rule, 82 Fed. Reg. 47,849 (collectively, the "Rules") broadly exempt nearly every employer or university with a religious or moral objection from complying with the Affordable Care Act's ("ACA") requirement to provide coverage for comprehensive preventive health services, including no-cost coverage for contraception services. *See* 42 U.S.C. § 300gg–13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv). Under the Religious Exemption Rule, the government authorizes any for-profit or non-profit entity of any size with a religious objection to exclude coverage for contraception in its health benefit or insurance plans. Under the Moral Exemption Rule, any non-profit or closely-held for-profit entity can refuse this coverage based on a moral objection. The Rules took

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

effect immediately, with no notice to the public nor any opportunity to submit comments prior to implementation, nor any regard for other procedural safeguards prescribed by Congress in the Administrative Procedure Act, 5 U.S.C. § 500 *et seq* ("APA").

The Rules were preliminarily enjoined nationwide by two district courts; each found that Defendants likely violated the APA. *California et al. v. Health and Human Services et al.*, 281 F. Supp. 3d 806 (N.D. Cal. Dec. 21, 2017); *Pennsylvania v. Trump et al.*, 281 F. Supp. 3d 553 (E.D. Pa. Dec. 15, 2017). For reasons fully articulated by Appellees State of California, et al., the District Court reached the correct decision, consistent with the well-reasoned decision in *Pennsylvania v. Trump*, and the Rules should remain enjoined on these grounds alone.

Even aside from these APA violations, the rules *still* cannot stand. The Rules also unlawfully impede upon the rights to liberty and equal protection guaranteed by the Fifth Amendment.

The Rules violate the Equal Protection guarantee of the Fifth Amendment by imposing discriminatory burdens against those who exercise the fundamental constitutional right to procreative choice and against women. First, they discriminate against employees and students who exercise their fundamental right to reproductive decision-making by using contraception – a right recognized by the Supreme Court for over fifty years as a liberty protected under the Constitution. *See Griswold v.*

Connecticut, 381 U.S. 479 (1965). Second, the Rules discriminate against women by singling out health care services predominantly used by women as a lesser form of care that employers and universities are free to exclude from comprehensive coverage. By interfering with women's reproductive autonomy and their ability to prevent or delay pregnancy, the Rules entrench the stereotype that a woman's reproductive capacity determines her role in society.

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

Because the Rules implicate two intersecting and heightened constitutional concerns – penalizing individuals who seek to exercise their fundamental rights *and* authorizing discriminatory treatment of women's health care coverage – they

warrant exacting judicial scrutiny. Amici urge this Court to consider longstanding Supreme Court precedent establishing that, where a discriminatory law or regulation simultaneously implicates the Constitution's Equal Protection guarantee *and* a fundamental right, it should be reviewed under strict scrutiny. At a minimum, the invidious discrimination against women caused by the Rules requires heightened scrutiny. Under either level of review, the Rules cannot survive because they are not sufficiently tailored to advance a compelling or important government interest. To the contrary, they undermine the government's compelling interest – recognized by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) – in ensuring that all women have equal access to health care coverage.

These constitutional violations loom in the background of Defendants' blatant procedural violations. Whether on procedural grounds or constitutional ones, the Rules should be enjoined, and the district court's decision affirmed.

ARGUMENT

I. The Rules Demand Exacting Judicial Scrutiny

The Fifth Amendment to the Constitution guarantees equal protection under the law and prohibits both infringement of fundamental rights and unjustified discrimination based on a suspect classification. *See United States v. Virginia*, 518 U.S. 515, 531 (1996); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942). The Rules violate both of these protections: they discriminate against employees and students who exercise their fundamental right to contraception, and they discriminate based on gender by imposing burdens specifically upon women – who have historically faced discrimination in obtaining healthcare and insurance coverage. The Rules therefore require the most exacting judicial scrutiny.

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

The Constitution protects an individual's right to reproductive autonomy – including the use of contraception – as a fundamental right. The Supreme Court first recognized a constitutional right to make certain personal, intimate choices about whether and when to have children over fifty years ago. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court has repeatedly reaffirmed that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." *Carey. v. Pop. Servs. Int'l*, 431 U.S. 678, 687 (1977); *see also Eisenstadt*

v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

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

The Rules implicate the fundamental right to reproductive decision-making by burdening access to contraception. In *Carey v. Pop. Servs. Int'l*, the Supreme Court invalidated part of a state law that prohibited the distribution of contraception by anyone other than licensed pharmacists. The Court recognized that, even though the challenged statute did not ban contraception directly, it nonetheless "clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to" by limiting distribution to licensed pharmacists. 431 U.S. at

689. The restriction made contraceptives less accessible, diminished price competition, and reduced the opportunity for privacy for selection and purpose. *Id*.

Under *Carey*, even indirect interference with an individual's ability to access contraception is constitutionally suspect. *See id*. Here, by empowering employers and universities to exclude contraceptive coverage from their otherwise comprehensive health plans, the Rules burden the fundamental right to reproductive decision-making. Indeed, these Rules penalize individuals who choose to use contraception by making it simultaneously more expensive and less accessible.

This penalty on an individual's fundamental right to access contraception is particularly burdensome because there are few, if any, realistic alternatives to employer-sponsored insurance for employees or to university-provided plans for students who are not covered under a parent's plan. An individual's employer often subsidizes the cost of her health insurance. *See 2017 Employer Health Benefits Survey*, Kaiser Family Found. (Sept. 19, 2017), https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/. The federal government also subsidizes her employer-sponsored insurance by exempting it from taxation. *See How Does the Tax Exclusion for Employer-Sponsored Health Insurance Work?*, Tax Policy Ctr., http://www.taxpolicycenter.org/briefing-book/how-does-tax-exclusion-employer-sponsored-health-insurance-work. If her employer excludes contraceptive coverage, a woman would be forced either to pay out of pocket for contraception or

to forgo these valuable subsidies in order to purchase an insurance policy on the individual market that includes contraceptive coverage[3] – essentially leaving a significant part of her compensation on the table.

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

The financial inducements that follow from the Rules drive individuals toward accepting whatever incomplete insurance package their employers or universities offer. At the same time, these inducements steer them away from obtaining health insurance coverage that gives them control of their reproductive health and autonomy, including decisions to avoid or postpone pregnancy. By authorizing

[3] "Contraception-only" insurance plans do not exist on the health insurance marketplaces and are not sold by insurers.

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

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

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

The Rules are also unconstitutional because they target women for discriminatory treatment and perpetuate purposeful gender-based discrimination. *See generally Caban v. Mohammed*, 441 U.S. 380 (1979); *see also Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991); *Arce v. Douglas*, 793 F.3d

968, 977 (9th Cir. 2015). The Rules apply explicitly and exclusively to the section of the ACA addressing women's preventive care, 42 U.S.C. § 300gg-13(a)(4), and authorize insurers and employers to deny a critical element of preventive health care that millions of women depend upon. This singling out of health care relied on by women is intentional and purposeful. The Rules thereby create an explicit and constitutionally impermissible gender-based classification.

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

university-provided coverage and try to purchase out of pocket a comprehensive insurance package that includes coverage for contraception. *See* Section I.a *supra*.

Second, the Rules stigmatize women's reproductive choices in a manner that perpetuates sex stereotypes and antiquated notions of women's role in society. *See Johnson Controls*, 499 U.S. at 211 ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."). Contraceptive coverage is a necessary component of equality between men and women because it allows women to make decisions about their health, reproductive lives, education and livelihoods. *Cf. Casey*, 505 U.S. at 856. Denying women access to this coverage denies them equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capabilities.

Third, and intertwined with the Rules' negative impact on women's ability to control their own reproductive lives, the Rules deny women the ability to preserve and protect their health and well-being to the same extent as men. Allowing employers and universities to exclude coverage for contraception impedes women's ability to treat a variety of other medical conditions, including endometriosis, acne, pelvic inflammatory disease, and irregular menstrual bleeding. *See* Kristina D. Chadwick et al., *Fifty Years of "the Pill": Risk Reduction and Discovery of Benefits*

Beyond Contraception, Reflections, and Forecast, 125 Toxicological Sci. 2, 4 (2012).

In these ways, authorizing and enabling employers and universities to exclude coverage for contraception makes it more difficult for women to obtain needed health care and to avoid unintended pregnancy, which in turn interferes with women's ability to participate fully in the "marketplace and the world of ideas." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 n.11 (1982). The Rules therefore purposefully discriminate against women by imposing significant burdens on their ability to obtain comprehensive preventive health care.

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

The imperative for exacting judicial scrutiny here is not a close call. The rules both burden a fundamental right and single out a constitutionally protected suspect class for differential treatment. The right to access contraception is a recognized component of the fundamental right of reproductive decision-making. *See Carey*, 431 U.S. at 687; *see also Casey*, 505 U.S. at 851 (recognizing the Constitution's liberty guarantee encompasses "marriage, procreation, contraception, family relationships, child rearing, and education"). Because the Rules discriminate against

individuals exercising their fundamental right to access contraception, strict scrutiny applies.

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

These Rules are particularly ripe for strict scrutiny because they both burden the fundamental right to reproductive decision-making *and* discriminate against

women. Constitutional liberties warrant greater protection in cases where fundamental rights and equal protection intersect. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (holding that "[t]his interrelation of the two principles [of equal protection and liberty] furthers our understanding of what freedom is and must become[,]" and invalidating state laws that prohibit same-sex marriage); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *Harper v. Virginia State Bd. Of Ed.*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (explaining constitutional "legal 'tests' do not have the precision of mathematical formulas . . . the statute will be closely scrutinized in light of its asserted purposes" and invalidating state durational residency law that implicated both the right to vote and right to travel, under "strict equal protection test"). *See also* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473, 474 (2002) ("[T]he ideas of equality and liberty expressed in the equal protection and due

process clauses each emerge from and reinforce the other."); Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1117 (2016) ("Two rights combined . . . yield *more* in the way of individual liberty than does each right on its own.").

Additionally, when applying the equal protection doctrine, the Court has been particularly sensitive in contexts where, as here, people who face economic or other structural barriers suffer the brunt of constitutional deprivations. For instance, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court invalidated a state law that burdened both low-income persons' procedural due process interests and their liberty interests in child-rearing, holding that under "the Due Process and Equal Protection Clauses of the Fourteenth Amendment," a state "may not deny [plaintiff], because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent." *Id.* at 107. Similarly, in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court held that a sentencing court cannot revoke a defendant's probation based on failure to pay a fine, observing that "[d]ue process and equal protection principles converge in the Court's analysis." *Id.* at 665 (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that states that grant appellate review of criminal proceedings cannot do so "in a way that discriminates against some convicted Defendants on account of their poverty").

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

For reasons discussed below and in Section III, the Rules cannot survive any form of heightened scrutiny,[4] let alone the strict scrutiny that applies given the dual burdening of a fundamental right and a suspect class.

II. Equal Protection Review Must Also Consider How the Rules Will Increase Structural Barriers that Women of Color and Low-Income Women Experience

Exacting judicial scrutiny of the Rules is also appropriate and necessary given the particularly harmful impact of the Rules on women of color and low-

[4] At a minimum, the discriminatory treatment of female employees and students requires heightened scrutiny. Laws that treat men and women differently on the basis of sex or gender must be justified by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 531; *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). Moreover, "the discriminatory means employed [must be] substantially related to the achievement of those objectives.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017).

income women. As discussed below, the Rules intersect with, and perpetuate, existing disparities that heighten the barriers for low-income women and women of color in exercising their reproductive rights and accessing health care. Equal justice requires the recognition that people living at the intersection of multiple forms of oppression face such cumulative and distinct harms and demands that the law address that reality. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 146 (1989); *see also supra* Part I.c. discussing *M.L.B. v. S.L.G.*, *Bearden v. Georgia*, and *Plyler v. Doe*.

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

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

Women of color are entering the workforce at increased rates. From 2016 to 2026, it is projected the number of Latina, Asian and Black women in the workforce will increase by 33.2 percent, 28.1 percent, and 10.8 percent, respectively. *Table 3.4 Civilian Labor Force by Age, Sex, Race, and Ethnicity, 1994, 2004, 2014 and Projected 2024*, Bureau of Labor Statistics (2015) https://www.bls.gov/emp/ep_table_304.htm. However, Black, Latina, and Asian women are over-represented in low-wage jobs.[5] Low wages perpetuate poverty[6] and low rates of healthcare coverage among women of color.[7]

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

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

[7] Women with incomes below the federal poverty level do not automatically qualify for Medicaid. Because each state sets eligibility requirements to receive Medicaid, coverage varies. Only 31 states and the District of Columbia have eliminated the categorical requirements for Medicaid coverage. Other states have implemented stringent income requirements for coverage. Therefore, women who live in states that have not expanded Medicaid coverage or in states with burdensome coverage requirements may not have access to Medicaid despite having low incomes. *See Women's Health Insurance Coverage Fact Sheet*, Kaiser Family Found. (Oct. 31, 2017), http://files.kff.org/attachment/fact-sheet-womens-health-insurance-coverage.

Women in low-wage jobs also face additional economic penalties when they have children. Childbearing and motherhood place unique constraints on economic stability, wages, labor-force participation, and occupational status. *See* Katherine Richard, *The Wealth Gap for Women of Color*, Ctr. for Global Policy Solutions (Oct. 2014), https://globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf. Research shows that women incur financial penalties for having children, seeing a four percent decrease in earnings for having one child and a 12 percent decrease for having two or more children.[8] Because Black and Latina women already experience significant wage gaps,[9] any time spent out of the employment market exacerbates preexisting pay disparities in relation to men.

[8] A number of factors may contribute to these differences, including women dropping out of the labor force, relying on part-time work, selecting family-friendly occupations, or passing up promotions. Women may feel forced into one of these options because, as research shows, low-income women and women of color in particular have "limited access to alternative sources of income when taking care of children or paying for childcare." *See* Katherine Richard, *The Wealth Gap for Women of Color*, Ctr. for Global Policy Solutions 7 (Oct. 2014), https://globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf. In addition, there is evidence that employers offer mothers lower salaries than fathers and women without children. In one study, it was found that "mothers were recommended a 7.9% lower starting salary than non-mothers ($139,000 compared to $151,000, respectively), which is 8.6% lower than the recommended starting salary for fathers." *See* Shelley Correll & Stephen Benard, *Getting a Job: Is There a Motherhood Penalty?*, Am. Jour. of Sociology (2007), http://gap.hks.harvard.edu/getting-job-there-motherhood-penalty.

[9] Black and Latina women are paid only 65 cents and 59 cents on the white male dollar, respectively. *See* Elise Gould and Jessica Schieder, *Black and Hispanic women are paid substantially less than white men*, Econ. Policy Inst. (March

On top of these existing wage disparities, for low-income women, including low-income women of color, the cost of contraception can pose a substantial, in some cases prohibitive, financial burden. The average costs of oral contraceptives (the most popular form of birth control) without insurance is $850 per year. Jamila Taylor and Nikita Mhatre, Ctr. for Am. Progress (Oct. 6, 2017), https://www.americanprogress.org/issues/women/news/2017/10/06/440492/contraceptive-coverage-affordable-care-act/. For highly effective long-term reversible contraceptive methods, such as an IUDs and contraceptive implants, out-of-pocket costs can exceed $1,000. Adam Sonfield, *Despite Leaving Key Questions Unanswered, New Contraceptive Coverage Exemptions Will Do Clear Harm*, Guttmacher Inst., (Oct. 17, 2017); *see also IUD*, Planned Parenthood, https://www.plannedparenthood.org/learn/birth-control/iud (stating an IUD "[c]osts up to $1,300").

These high up-front costs are disproportionately unaffordable for many women of color. A 2017 survey found that 39 percent of African American women between 18 and 44 are unable to afford more than $10 per month for birth control. *The Lives and Voices of Black America on the Intersections of Politics, Race, and Public Policy*, Perryundem (Sep. 25, 2017) https://view.publitas.com/perryundem-

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2017), https://www.epi.org/publication/black-and-hispanic-women-are-hit-particularly-hard-by-the-gender-wage-gap/.

research-communication/black-american-survey-report_final/page/34. A recent survey found that 57 percent of Latinas ages 18 to 34 have struggled to afford birth control before the ACA. *Survey: Nearly Three in Four Voters in America Support Fully Covering Prescription Birth Control*, Planned Parenthood (Jan. 30, 2014) https://www.plannedparenthood.org/about-us/newsroom/press-releases/survey-nearly-three-four-voters-america-support-fully-covering-prescription-birth-control?_ga=2.205576272.237972994.1524487394-1975206004.1524487394.[10]

Compounding these structural economic inequities, women of color and low-income women also face disparities in reproductive health outcomes. These groups face the highest rates of unintended pregnancies. *Unintended Pregnancy in the United States*, Guttmacher Inst. (Sep. 2016) https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states. Moreover, the health risks of pregnancy are elevated for women of color and African American women in particular. The pregnancy-related mortality ratio for African American women is 43.5 per 100,000 live births, compared to 12.7 for white women and 14.4 for women of other races. *Pregnancy Mortality Surveillance Sys.*, Ctrs. For Disease Control and Prev.,

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

https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html.

Although the root causes of comparatively higher rates of unintended pregnancy and maternal mortality among women of color are complex, a lack of insurance coverage, along with systemic barriers to accessing quality and unbiased reproductive health services are contributors. *See Our Bodies, Our Lives, Our Voices: The State of Black Women & Reproductive Justice*, Nat'l Black Women's Reprod. Justice Agenda, 48, 52 (June 27, 2017), http://blackrj.org/wp-content/uploads/2017/06/FINAL-InOurVoices_Report_final.pdf; *see also Committee Opinion No. 649, Racial and Ethnic Disparities in Obstetrics and Gynecology,* Am. College Obstetricians & Gynecologists, 3 (Dec. 2015) (identifying socioeconomic status, lack of insurance, and implicit bias on part of practitioners among factors contributing to racial and ethnic disparities in women's health and health care).

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

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

The Institute of Medicine's (IOM) 2011 report notes that access to health care is a "particular challenge to women, who typically earn less than men and

who disproportionately have low incomes." *Clinical Preventive Services for Women: Closing the Gaps*, Inst. of Medicine, 19 (July 2011). The purpose of the no-cost contraceptive benefit is to ensure that women are able to access health insurance coverage on par with men by obtaining insurance coverage for the full-range of services they seek, including contraception. *See* 155 Cong. Rec. 29302 (Senator Feinstein explaining that "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men").

More specifically, in recommending coverage for the full range of FDA-approved contraceptive devices, the IOM noted that poor and low-income women, as well as women of color, are at an increased risk of unintended pregnancy, and emphasized that eliminating cost-sharing would greatly increase access to contraception. *See* IOM at 109. And it has. For example, because of the gains achieved by the ACA, over 15 million women of color now have private insurance coverage for preventive services, including contraceptives, without cost sharing.[11] With 83 percent of Black women, 91 percent of Latina women and 90 percent of Asian women of reproductive age using contraception,[12] this significant coverage

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

[12] *See Contraceptive Use in the United States*, Guttmacher Inst. (Oct. 2015).

gain represents remarkable progress for the millions of women of color seeking to plan their reproductive lives and gain greater financial stability for themselves and their families.

However, if the Rules were to stand, it would clear the way for myriad employers to invoke the exemption, and low-income women and women of color will disproportionately struggle to pay the high costs of contraception, likely decreasing access to contraceptives and making it more difficult to effectuate continued, uninterrupted use. *See Committee Opinion*, The American College of Obstetricians and Gynecologists (Jan. 2015) https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co615.pdf?dmc=1&ts=20180516T1434518348; Shilpa Phadke, Jamila Taylor, and Nikita Mhatre, *Rhetoric vs. Reality: Why Access to Contraception Matters to Women*, Ctr. For Am. Progress (Nov. 15, 2017), https://www.americanprogress.org/issues/women/reports/2017/11/15/442808/rhetoric-vs-reality-access-contraception-matters-women/. This would be a step backward and one that reinforces the very structural barriers the Women's Health Amendment sought to counter. Such impacts are ones that a meaningful guarantee of Equal Protection must address.

III. The Rules are Not Sufficiently Tailored to Advance a Compelling or Substantial Government Interest

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

Defendants' asserted justifications – that the exemptions created by the Rules are required under the ACA and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA") – are spurious. As described above, they undermine the essential purpose of the ACA and the Women's Health Amendment, 42 U.S.C. § 300gg-13(a), by denying women coverage for essential health care they need and are otherwise entitled to, thereby making it *more* difficult for women to access that care.[13] And seven courts of appeal found that the narrower *accommodation* process

[13] In contrast to the Rules, there is no question that the essential purpose of the Women's Health Amendment itself is constitutionally compelling. The government has a compelling interest in ensuring women have access to health care coverage that is equal to that of as their male colleagues. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785-2786 (2014) (Kennedy, J., concurring). This derives from the Court's established jurisprudence recognizing a substantial governmental interest in remedying sex discrimination in all aspects of public, social, and economic life. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (A state's "commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is a "goal . . . [that] plainly serves compelling state interests of the highest order.").

for religiously-affiliated organizations was all that was needed to comply with RFRA without burdening such organizations' religious exercise. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Priests For Life v. U.S. Dep't of Health & Human Servs*., 772 F.3d 229, 249 (D.C. Cir. 2014), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557, 194 L. Ed. 2d 696 (2016); *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1173 (10th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557, 194 L. Ed. 2d 696 (2016); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1151 (11th Cir. 2016), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 219 (2d Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Grace Sch. v. Burwell*, 801 F.3d 788, 806 (7th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Moreover, by (*i*) offering exemptions to virtually all employers and universities, and (*ii*) eliminating the accommodation that ensured women at

objecting institutions could still access seamless no-cost contraception, the Rules are much broader than necessary to achieve any purported goal with respect to reasonably accommodating sincere religious objections. The Rules make no attempt to distinguish between large corporations and small, closely-held businesses, as previous rulemaking has done. And the Rules dispose of the accommodation process, even though it maintained contraceptive access for female employees without imposing any substantial burden on an employer with a religious objection. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

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

CONCLUSION

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

Dated: May 29, 2018

Respectfully submitted,

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APPENDIX A

The **California Women's Law Center** is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy, and education. A vital part of CWLC's mission is fighting for reproductive health, rights, and justice by ensuring women have access to the health care opportunities they need to lead healthy and productive lives.

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

The **Lawyers' Committee for Civil Rights and Economic Justice** fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCCR engages in creative and courageous legal action, education, and advocacy. LCCR has for many years run a Medical-Legal partnership, which recognizes access to healthcare is intertwined with civil rights and economic justice. LCCR has a strong interest in ensuring that women of color, immigrant women, and low-income women have full access to healthcare, including contraceptive care, as a means of ensuring gender equality and economic stability.

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

Legal Momentum, the Women's Legal Defense and Education Fund, is a national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum works to secure and protect reproductive rights and access to reproductive health services, including the right to contraception and has been involved in dozens of cases protecting reproductive freedom and health in state and federal courts.

Legal Voice, founded in 1978, is a public interest organization that works to advance the legal rights of all women and LGBTQ people through litigation, legislation, and legal rights education. Legal Voice works to protect and advance reproductive rights, access to health care, and elimination of barriers to economic security and access to education. Legal Voice has participated in cases throughout the Northwest and the country, including to defend the rights of patients to access contraceptives and other medications at their pharmacies.

The **Mississippi Center for Justice**, the Deep South Affiliate of the Lawyers Committee, is a public interest law organization founded in 2003 in Jackson, Mississippi and committed to advancing racial and economic justice. The Center pursues strategies to combat discrimination and poverty statewide. MCJ is concerned about access to healthcare for all, and particularly low-income women whose access to reproductive health choices will be limited by the government's action.

The **National Center for Lesbian Rights** is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in *Obergefell v. Hodges*, which struck down state laws selectively excluding same-sex couples from the fundamental right to marry and participated as amicus in other cases challenging restrictions on procreative autonomy.

The **Women's Law Project** is a nonprofit women's legal advocacy organization founded in Pennsylvania in 1974. A state-based organization with national reach, the mission of the Women's Law Project is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. A central focus of the Women's Law Project's work has been to improve access to safe and affordable reproductive health care, including access to contraception, in Pennsylvania and nationally.

CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 6,995 words, based on the "Word Count" feature of Microsoft Word. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Ninth Circuit Rule 32-1, this word count is under 7,000 words and does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Signature Block, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on May 29, 2018. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5.

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