

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

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF CALIFORNIA, ET AL.,

Plaintiffs-Appellees,

v.

HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:17-cv-05783-HSG
Hon. Haywood S. Gilliam, Jr.

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

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CORPORATE DISCLOSURE STATEMENTS

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

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici curiae comprise national organizations focused on the advancement of women in business and companies that value gender diversity and inclusion and are committed to the well-being of women and families. *Amicus* U.S. Women's Chamber of Commerce is a national organization with more than 500,000 members that seeks to increase economic growth opportunities for women. *Amicus* National Association for Female Executives is a national organization with more than 60,000 members that works to empower women to achieve career and personal success and to recognize corporations and organizations that expand opportunities for women in business. *Amici* companies are dedicated to helping women thrive because it is good for their employees, customers, and communities, as well as for businesses and the national economy. While all *amici* strive to advance these goals, the regulations at issue turn the clock backwards.

The regulations in this case would allow nearly any employer, university, or health insurer to invoke religion or morality as a basis for stopping providing contraceptive coverage under the Affordable Care Act. The district court correctly

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* represents that none of the parties or their counsel authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(2) counsel for *amici* represents that all parties have consented to the filing of this brief.

observed that the regulations reflect a “dramatic[]” and “highly consequential” change and “transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit” and threaten “potentially dire public health and fiscal consequences.” *Amici* are committed to gender equality, which includes supporting women’s healthcare that allows women to make choices about how to shape and care for their families. *Amici* offer this brief to assist the Court in understanding the importance to the national economy and business community of providing contraceptive coverage to all women.

SUMMARY OF ARGUMENT

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

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

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

The new regulations at issue in this case (the Interim Final Regulations or "IFRs") threaten these vital advancements and will harm American women, families, and the economy. The IFRs represent a major step backwards for the millions of women who rely upon contraceptive care while pursuing their educations and careers during their childbearing years and for businesses that value gender equality and diversity and the contributions of female employees, executives, and customers. By establishing roadblocks to meaningful access to

contraception, the IFRs will negatively affect women's ability to direct their personal lives and their educational and professional advancement.

While this nation has made tremendous strides towards gender equality, women remain underrepresented in parts of the workforce and in leadership positions. Regulations that limit or restrict access to contraception exacerbate this underrepresentation. Unintended pregnancy can derail women's efforts to obtain education and advance professionally, and women unable to afford effective contraception may be limited in their life choices. Loss of meaningful access to contraception can increase levels of stress, distraction, absenteeism, and turnover, decrease overall productivity, and stall career opportunities – all of which are detrimental to businesses and the national economy. Businesses and the national economy benefit when working women know they have meaningful access to preventative healthcare, including contraception. Then women can decide how many children to have, and when, and make plans about their work and life responsibilities. The ACA's contraception guarantee gives women the confidence of knowing they will have coverage for contraception if they change jobs or insurance companies. The ACA's contraception guarantee thus provides an essential health benefit that promotes three important and connected goals: (1) it provides women control over their lives, (2) it contributes to gender equality and

inclusion, and (3) it facilitates economic growth. The IFRs undermine all three of these goals.

The IFRs' inevitable reduction in the number of women obtaining no-cost contraceptive coverage will limit the ability of the affected women to advance professionally. This will have a negative impact on the national economy as a whole and will directly affect businesses by reducing the number of qualified women available to work at their companies.

For these and the reasons set forth more fully below, *amici* urge this Court to affirm the December 21, 2017 order of the United States District Court for the Northern District of California preliminarily enjoining the enforcement of the IFRs.

ARGUMENT

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

The increased number of women in the workforce has added trillions of dollars to the nation's annual gross domestic product.² In 2009, women-owned small businesses contributed \$2.8 trillion to the American economy each year, accounting for over 15% of gross domestic product.³ American women contribute to economic innovation, productivity, and growth. These outcomes would not be possible without women's ability to control their own reproductive health, including access to contraception. That access was meaningfully expanded through the ACA and its implementing regulations, which eliminated cost-sharing obligations for an array of essential preventative medicine and health services,

² Eileen Appelbaum et al., Ctr. for Am. Progress & Ctr. for Econ. & Policy Research, *The Economic Importance of Women's Rising Hours of Work: Time to Update Employment Standards* 1 (Apr. 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/04/WomensRisingWorkv2.pdf> (explaining that if women's employment patterns had remained as they were before the Supreme Court recognized a constitutional right to access contraception, the gross domestic product of the United States would have been roughly \$1.7 trillion lower in 2012); see also U.S. Women's Chamber of Commerce, *Women's Economic Priorities: Fundamental budget and policy priorities that support women's economic opportunities, security and family well-being* 16 (July 2014), available at <https://www.swipe.to/0814q> ("USWCC, *Women's Economic Priorities*") ("If no additional women had joined the paid economy since 1970, U.S. Gross Domestic Product (GDP) would be 75% of its current size.").

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

including contraceptive services. At least 55 million women gained access to no-cost contraceptive coverage under the ACA.⁴ The IFRs will march this progress backwards. The IFRs will decrease access to contraception and in so doing make it harder for women to make life choices and pursue educational and professional goals.

I. THE CONTRACEPTION GUARANTEE PROVIDES AN ESSENTIAL HEALTH BENEFIT THAT ALLOWS WOMEN CONTROL OVER THEIR LIVES, THEIR EDUCATION, AND THEIR CAREERS.

Contraception allows women to make significant decisions in their personal, educational, and professional lives without fear of unintended pregnancy.⁵

Women's ability to effectuate these decisions has had a profound effect on their own economic well-being as well as that of their families.⁶ Indeed, "[f]ive decades

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

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

⁶ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 29 ("Planning, delaying and spacing one's children generally appear to help women achieve their career goals"); Martha J. Bailey, et al., *Recent Evidence on the Broad Benefits of*

after the pill was introduced, it is clear that consistent access to effective and affordable contraception has served as a catalyst of opportunity” and revolutionized expectations about women’s “educational and career prospects and their roles in the home and workplace.”⁷ The “weight of the evidence across numerous studies shows significant employment and educational gains have followed directly from women’s ability to better time their entry into parenthood[.]”⁸

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

Meaningful access to contraception ensures that women can exercise autonomy and control over their reproductive health, and decisions about when and whether to have children.⁹ In a recent survey, women reported that using birth

Reproductive Health Policy, J. Policy Analysis & Mgmt. 888, 894 (July 2013) (“[I]ncreasing access to contraception and legal abortion has had large and enduring effects on the material resources of families and children and has promoted the economic equality of women.”).

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

⁸ Kelleen Kaye et al., The Nat’l Campaign to Prevent Teen and Unplanned Pregnancy, *The Benefits of Birth Control in America: Getting the Facts Straight* 29 (2014), available at <https://powertodecide.org/sites/default/files/resources/primary-download/benefits-of-birth-control-in-america.pdf> (“Kaye”); *see also* Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women’s Life Cycle Labor Supply*, Quarterly J. of Econ. 289, 318 (Feb. 2006) (discussing how “greater fertility control contributed to the boom in young women’s market work from 1970 to 1990”).

⁹ Heinrich Hock, *The Pill and the College Attainment of American Women and Men*, Dep’t of Econ., Florida State University Working Papers 1 (2007), available

control allows them to pursue personal goals, better control their lives and future, and “better care for themselves and their families, either directly or indirectly through facilitating their education and career.”¹⁰

When women lack meaningful access to contraception, their ability to prevent unintended pregnancies and births decreases substantially.¹¹ A 2015 study found that among women at risk for an unintended pregnancy in the United States, the 14% who did not use contraceptives account for 54% of all unintended pregnancies. By contrast, the 68% of women at risk for an unintended pregnancy

at <http://paa2006.princeton.edu/papers/61745> (“Hock”) (noting that what made oral contraception “so remarkable, and what drove its rapid diffusion, was the degree of autonomy and control it offered women over their reproductive lives, especially with respect to the timing of their fertility”).

¹⁰ Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *Contraception* 465, 469, 471 (2013) (noting the importance of contraception “for women and couples who are motivated to consciously and carefully plan for their and their families’ futures”).

¹¹ Guttmacher Inst., *Fact Sheet: Unintended Pregnancy in the United States 2* (July 2015), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf> (“Guttmacher, *Unintended Pregnancy*”) (noting an 18% decline in unintended pregnancies between 2008 and 2011 likely due “to an overall increase in contraceptive use and the use of highly effective methods”); Inst. of Med. of the Nat’l Academies, *Clinical Preventive Services for Women: Closing the Gaps* 104-05, 109 (2011) (“IOM, *Closing the Gaps*”) (citing reports finding that progress in reducing unintended pregnancies would be possible by “making contraceptives more available, accessible, and acceptable through improved services” and that “contraception and contraceptive counseling are effective at reducing unintended pregnancies”).

who use contraceptives consistently and correctly account for only 5% of all unintended pregnancies.¹²

Access to contraception enhances women’s ability to pursue education and increases women’s participation and advancement in the workforce, as it provides women with the ability to direct their future by controlling their reproductive lives. As several economic studies have confirmed, access to contraception has “altered [women’s] expectations about childbearing during a period critical to career investment, and reduced the cost of increasing their early career investments.”¹³ Indeed, “[i]t is commonly accepted that reducing the number of unintended pregnancies would further women’s health, advance women’s personal and professional opportunities, . . . and help break a cycle of poverty that persists when women who cannot afford or obtain contraception become pregnant

¹² Guttmacher, *Unintended Pregnancy*, *supra* note 11, at 3.

¹³ See, e.g., Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 4(3) *Am. Econ. J. of Applied Econ.* 225, 2 (Jul. 2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3684076/> (“Bailey, *The Opt-In Revolution*”); Elizabeth Oltmans Ananat & Daniel M. Hungerman, *The Power of the Pill for the Next Generation: Oral Contraception’s Effects on Fertility, Abortion, and Material and Child Characteristics*, 94 *The Review of Economics and Statistics* 37, 18 (Feb. 2012), available at https://www.mitpressjournals.org/doi/abs/10.1162/REST_a_00230?journalCode=rest (noting the effects of access to contraception “are compatible with a story in which ‘upwardly mobile’ young women are especially likely to use the pill to postpone births, and in the meantime pursue better marital and educational outcomes”); Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110(4) *J. Pol. Econ.* 730, 762 (2002) (“Goldin & Katz”).

unintentionally at a young age.” *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 22-23 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of reh’g en banc).

The ability to avoid unintended pregnancy assists women at all stages of their career paths, beginning with the bedrock of education. Women who avoid unintended pregnancy on average obtain more education.¹⁴ One study concluded that access to oral contraceptives accounted for more than 400,000 of the college degrees completed by women born between 1939 and 1959.¹⁵ Another study found that having a child as a teenager caused a reduction in women’s high school graduation and college entrance rates of 22% to 24% per child.¹⁶ From 1970 through 2003, the share of first-time mothers with more than 12 years of education increased from 26% to 52%.¹⁷ As access to contraception has become more widespread, women have been able to achieve significant educational milestones. When women are affected by unintended pregnancy, their educational goals may

¹⁴ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 9 (finding that “women who experience teen births complete approximately two fewer years of formal schooling as compared with women who wait to have children until age 30 or older”).

¹⁵ Hock, *supra* note 9, at 26.

¹⁶ Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, Nat’l Bureau of Econ. Research Working Paper Series, Working Paper 5406, 25 (1996).

¹⁷ Kaye, *supra* note 8, at 30.

not only be delayed – which can have lasting impacts on their overall career advancement and professional achievements – they may be derailed altogether.¹⁸

Likewise, the availability of contraception has had a statistically significant impact on the number of women obtaining the education necessary to enter professional occupations.¹⁹ “Access to the pill was linked to the increased numbers of college-educated women pursuing advanced professional degrees and making up increased proportions of such degree programs.”²⁰ Today, women earn 57% of bachelor’s degrees, 60% of master’s degrees and just over half of all Ph.Ds.²¹ In the 1960s, women made up less than 10% of students in JD, MBA, and MD programs, while women now account for almost half of students in those

¹⁸ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 7 (explaining that the ability of young, single women to “obtain highly effective contraception was a significant factor behind greater numbers of women investing in higher education” and that access to contraceptives “improved women’s capacity to successfully delay childbearing and thus minimized the economic and opportunity costs of pursuing higher education”).

¹⁹ Goldin & Katz, *supra* note 13, at 762.

²⁰ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 9.

²¹ The White House Council on Women and Girls, *Keeping America’s Women Moving Forward: The Key to an Economy Built to Last* 47 (Apr. 2012), available at https://obamawhitehouse.archives.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.

programs.²² Absent access to contraception, these numbers would be much lower, as unintended pregnancy impedes women's ability to invest in higher education.

Women who have more control over their reproductive lives are also better able to enhance their earning potential, allowing them to provide for themselves and their families. "Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 (1975) (Powell, J., concurring). Mothers are now the sole or primary income-earners in 40% of households with minor children.²³ This represents a major shift in the U.S. economy, with the number of households where the wife earns as much as her husband nearly doubling since 1975.²⁴ This shift is due in part to women's increased control over the number and timing of children. A study has found that "the Pill-induced effects on wages amount to roughly one-third of the total wage

²² Executive Office of the President, Council of Economic Advisers, *Women's Participation in Education and the Workforce* 9 (Oct. 14, 2014), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/womens_slides_final.pdf ("EOP, *Women's Participation*") (showing that women make up 47.9 percent of the national workforce).

²³ USWCC, *Women's Economic Priorities*, *supra* note 2, at 8, 18 ("Working mothers now account for 63.3% of U.S. household earnings").

²⁴ Sarah Jane Glynn, Ctr. for Am. Progress, *The New Breadwinners: 2010 Update - Rates of Women Supporting Their Families Economically Increased Since 2007* 3 (Apr. 2012), available at <https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf>.

gains for women in their forties born from the mid-1940s to early 1950s.”²⁵ That same study concluded that approximately 10% of the narrowing of the wage gap between men and women during the 1980s and 31% during the 1990s can be attributed to women’s ability to access oral contraceptives prior to age 21.²⁶

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

Beyond allowing women greater control over their educational and work lives, access to contraception has a positive impact on families, especially children. Access to contraception is associated with significant reductions in both child and adult poverty rates.²⁷ By enhancing parents’ ability to invest time, energy, and resources in their children,²⁸ access to contraception also has been linked to

²⁵ Bailey, *The Opt-In Revolution*, *supra* note 13, at 17.

²⁶ *Id.*; see also Amalia R. Miller, *The Effects of Motherhood Timing on Career Path*, 24 J. Population Econ. 1071, 1073 (2011) (explaining “deferred motherhood may be a means of reducing [the economic] inequality” between men and women).

²⁷ Martha J. Bailey, et al., *Do Family Planning Programs Decrease Poverty? Evidence from Public Census Data*, 60 CESifo Econ. Studies 312, 6 (June 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4206087/pdf/nihms602597.pdf> (noting “by increasing adults’ pre-childbearing human capital and by benefitting lower income families, family planning programs [including access to contraception] may increase children’s economic resources and decrease child poverty rates,” such access also “increase[s] parental investment in children [and] may improve their lifetime opportunities and labor market outcomes as adults”).

²⁸ Sonfield, *Social and Economic Benefits*, *supra* note 5, at 24.

improved outcomes for children’s mental and behavioral development. Children of teenage mothers – often unintended pregnancies – “have long been known to be at increased risk for poor developmental outcomes.”²⁹ And studies show that differences in a mother’s access to birth control predict differences in the extent and intensity of her children’s labor force participation, wage earnings, and household incomes.³⁰ Contraception use also allows women and their families to avoid the many negative health consequences that are associated with having babies too close together.³¹

When women lack access to contraceptives, their ability to manage and obtain positive outcomes in other aspects of their lives also erodes. Unintended pregnancies are linked to conflict and decreased satisfaction in relationships, family instability, decreased child well-being, and depression, anxiety, and overall lower levels of happiness.³² Unintended pregnancies are also linked to increased pregnancy-related morbidity and mortality, which contribute to the United States

²⁹ *Id.*

³⁰ Martha J. Bailey, *Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception*, Brookings Papers on Econ. Activities 341 (2013).

³¹ Meghan L. Kavanaugh & Ragnar M. Anderson, Guttmacher Inst., *Contraception and Beyond 8* (2013), available at <https://www.guttmacher.org/pubs/health-benefits.pdf> (“Kavanaugh & Anderson”).

³² See generally Sonfield, *Social and Economic Benefits*, *supra* note 5; see also Kavanaugh & Anderson, *supra* note 31, at 7-8.

having one of the highest maternal mortality rates in the developed world, with approximately 700 women in the United States dying each year from pregnancy or childbirth-related causes.³³

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

Access to contraceptives has yielded significant gains. But for many women actual, meaningful access requires the elimination of cost-sharing burdens.³⁴

Studies have concluded that “[e]ven small increments in cost sharing have been shown to reduce the use of preventive services” such as contraception.³⁵ And recent studies confirm that the ACA’s Women’s Health Amendment – which requires insurers to provide coverage for the full range of contraceptive methods approved by the Food and Drug Administration without imposing cost-sharing

³³ See Nicholas J. Kassebaum, et al., *Global, Regional, and National Levels of Maternal Mortality, 1990-2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 *The Lancet* 1775, 1784-93 (2016), available at [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(16\)31470-2.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(16)31470-2.pdf); Ctr. for Disease Ctrl. & Prev., *Pregnancy-Related Deaths*, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>.

³⁴ USWCC, *Women’s Economic Priorities*, *supra* note 2, at 25 (“In 2013, 26% of women had to delay or forgo health care in the past year due to costs.”).

³⁵ IOM, *Closing the Gaps*, *supra* note 11, at 109 (noting “cost-sharing requirements . . . can pose barriers to care and result in reduced use of preventive and primary care services” and “when out-of-pocket costs for contraceptives are eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods”).

obligations – has significantly increased women’s ability to access essential contraceptive services. For example, the teen birth rate fell to its lowest rate ever in 2016, a sharp decline attributed in part to the contraception guarantee.³⁶ The effectiveness of the ACA’s Women’s Health Amendment in providing access to contraceptives is further evidenced by the substantial decrease in the number of women incurring out-of-pocket costs for contraception. Before the Women’s Health Amendment took effect, only 15% of privately insured women had coverage for contraception without out-of-pocket costs.³⁷ That number rose to 67% by March 2014, slightly more than a year after the Women’s Health Amendment took effect.³⁸ The ACA’s contraception benefit saved women \$1.4 billion in out-of-pocket costs in 2013 alone.³⁹ A study of more than 600,000 women nationwide

³⁶ Carly Sitrin, *Teen Birth Rates Just Hit An All-Time Low*, Vox (June 30, 2017), available at <https://www.vox.com/science-and-health/2017/6/30/15894750/teen-birth-rates-hit-all-time-low> (citing Brady E. Hamilton, et al., *Births: Provision Data for 2016*, U.S. Dep’t of Health & Human Servs., National Vital Statistics System (June 2017)).

³⁷ Adam Sonfield, et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *Contraception* 44, 45 (2015), available at [https://www.contraceptionjournal.org/article/S0010-7824\(14\)00687-8/pdf](https://www.contraceptionjournal.org/article/S0010-7824(14)00687-8/pdf) (“Sonfield, *Impact*”).

³⁸ *Id.*

³⁹ Nora V. Becker & Daniel Polsky, *Women Saw Large Decreases in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 *Health Affairs* 104, 1208-09 (July 2015).

concluded that women were less likely to stop using oral contraceptives once the contraception guarantee removed cost-sharing obligations.⁴⁰

In addition to increasing overall access to contraceptives, the Women's Health Amendment also eliminated cost as a reason for women to choose one method of contraception over another. As a result, more women have been able to choose more appropriate and more effective forms of contraception.⁴¹ For example, intrauterine devices ("IUDs") are one of the most effective forms of reversible birth control, with fewer than 1% of women who use them becoming pregnant within a year (in contrast to 18% of women who use condoms to prevent pregnancy and 9% of women who use oral contraceptives).⁴² IUDs, however, have

⁴⁰ Lydia E. Pace, et al., *Early Impact of the Affordable Care Act on Oral Contraceptive Cost Sharing, Discontinuation, and Nonadherence*, 35(9) Health Affairs 1616 (2016).

⁴¹ See, e.g., Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 Contraception 360, 363 (2007) (noting when Kaiser Permanente Northern California eliminated patient cost-sharing requirements for IUDs, IUD use more than doubled); Sue Ricketts et al., *Game Change in Colorado: Widespread Use of Long-Acting Reversible Contraceptives and Rapid Decline in Births Among Young, Low-Income Women*, 46 Perspective on Sexual & Reproductive Health 125, 129-130 (Sept. 2014), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1363/46e1714> (reporting results of study finding that use of long-acting reversible contraceptives quadrupled when, among other efforts, out-of-pocket costs were eliminated); Caroline S. Carlin, et al., *Affordable Care Act's Mandate Eliminating Contraceptive Cost Sharing Influenced Choices of Women with Employer Coverage*, 35 Health Affairs 1608 (2016).

⁴² Jonathan M. Bearak, et al., *Changes in Out-of-Pocket Costs for Hormonal IUDs After Implementation of the Affordable Care Act: An Analysis of Insurance Benefit*

high upfront costs, which can exceed a thousand dollars.⁴³ Prior to the contraception guarantee, these one-time, up-front costs often deterred women from using this highly effective form of contraception.⁴⁴ In January 2012 (before implementation of the Women’s Health Amendment), 58% of women were paying out-of-pocket costs for an IUD, compared to 13% by March 2014.⁴⁵ As all this data demonstrates, access to the most effective and appropriate forms of contraception without cost restraints is a key component of a woman’s ability to effectively control whether and when she has children.

The Women’s Health Amendment has ensured access to the most effective and appropriate contraceptives for more women than ever before. The IFRs restrict that access and thereby jeopardize the substantial opportunities the contraception guarantee has provided to so many women.

Inquiries, 93 *Contraception* 139, 1-2 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4780678/pdf/nihms-756929.pdf> (“Bearak”).

⁴³ *Id.*

⁴⁴ IOM, *Closing the Gaps*, *supra* note 11, at 108 (noting “greater use of long-acting, reversible contraceptive methods—including intrauterine devices . . . might help further reduce unintended pregnancy rates” and noting that “[c]ost barriers to use of the most effective contraceptive methods are important because long-acting, reversible contraceptive methods and sterilization have high up-front costs”).

⁴⁵ Bearak, *supra* note 42, at 1.

II. THE CONTRACEPTION GUARANTEE FACILITATES BUSINESS GROWTH BY ALLOWING WOMEN TO PLAY A CRITICAL ROLE IN THE NATIONAL ECONOMY.

Barriers to women’s participation in the workforce – such as hampering access to contraception – “do[] more than hold back [women’s] careers and aspirations for a better life,” they also “act as brakes on the national economy, stifling the economy’s ability to grow.”⁴⁶

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

For generations of women, access to contraception has allowed them to gain a stronger foothold in the workforce and national economy.⁴⁷ Women now comprise nearly 50% of the national workforce.⁴⁸ In fact, one study estimates that the United States economy is \$2.0 trillion (or 13.5%) larger than it would be without women’s increased participation in the labor force since 1970.⁴⁹ And

⁴⁶ Diane Whitmore Schanzenbach & Ryan Nunn, The Hamilton Project, *The 51%: Driving Growth Through Women’s Economic Participation* 1 (Oct. 2017), available at https://www.brookings.edu/wp-content/uploads/2017/10/es_121917_the51percent_ebook.pdf.

⁴⁷ See Matthias Doepke et al., Nat’l Bureau of Econ. Research Working Paper 17672, *The Economics and Politics of Women’s Rights* 21 (Dec. 2011) (“Doepke”) (noting “[I]legal access to oral contraceptives gave women control over the timing of childbearing, and thus their labor market participation”).

⁴⁸ EOP, *Women’s Participation*, *supra* note 22, at 9 (showing that women make up 47.9 percent of the national workforce).

⁴⁹ Executive Office of the President, Council of Economic Advisers, *The Annual Report* 158 (2015), available at

companies that have committed to hiring and promoting women have higher annualized returns on average than those that have not implemented policies to ensure the hiring and advancement of women.⁵⁰

Women also own approximately 9 million privately-held businesses.⁵¹ Those businesses generate about \$1.4 trillion in sales, and employ about 7.8 million people with a payroll of approximately \$249 million.⁵² Businesses owned or majority-owned by women also have a significant indirect economic impact by increasing jobs, spending, and manufacturing at other entities with whom they deal. On a combined direct and indirect basis, businesses owned and majority-

https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp_complete.pdf; *see also* Joanna Barsh & Lareina Yee, McKinsey & Company, *Unlocking the Full Potential of Women in the US Economy* (Apr. 2011), *available at* <https://www.mckinsey.com/business-functions/organization/our-insights/unlocking-the-full-potential-of-women> (“Barsh & Yee”) (the increase of women in the workforce since 1970 has accounted for 25 percent of current gross domestic product).

⁵⁰ Fed. Glass Ceiling Comm’n, *Good for Business: Making Full Use of the Nation’s Human Capital* 14 (1995), *available at* <https://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf> (concluding based on a study of the Standard and Poors 500 companies that averaged annualized returns for businesses committed to affirmative action were 18.3%, compared to 7.9% for businesses where glass ceilings for female advancement remained intact).

⁵¹ Nat’l Women’s Bus. Council, *Reasons to Invest in Women Entrepreneurs* 1 (“*NWBC Reasons to Invest*”).

⁵² *Id.*; USWCC, *Women’s Economic Priorities*, *supra* note 2, at 19 (including businesses owned fifty percent by women, that number rises to 15.9 million people.)

owned by women are estimated to add \$2.8 trillion to the economy and generate 23 million jobs.⁵³

Businesses from small companies to Fortune 500 companies also benefit from women serving on their boards of directors and in management roles. For instance, companies with at least three female board directors for at least five years “outperformed those with zero [women board directors] by 84% on return on sales (ROS), 60% on return on invested capital (ROIC) and 46% on return on equity (ROE).”⁵⁴ Companies with a high number of women board directors “outperformed industry median firms in percent of revenues, assets and stockholder’s equity by 1.6 percent.”⁵⁵ Having just one female director on a board cuts the risk of bankruptcy by 20%.⁵⁶ Other studies have shown that companies see numerous and diverse benefits when women serve as directors, including that boards adopt new governance practices more quickly, become more civilized and sensitive to different perspectives, and ask more questions before making

⁵³ CWBR, *Economic Impact*, *supra* note 3, at 1, 10.

⁵⁴ NWBC, *Reasons to Invest*, *supra* note 51, at 2.

⁵⁵ *Id.*

⁵⁶ Chris Bart, *Why Women Make Better Directors*, 8 Int’l J. Bus. Governance & Ethics 93, 95 (2013), *available at* <https://pdfs.semanticscholar.org/a7db/04f990334daf8f0c47e587f61055b16518d0.pdf>.

decisions.⁵⁷ Similarly, studies have concluded that Fortune 500 companies with a high number of women executives outperform peer companies in their industries on measures of profitability, including profits as a percent of revenue, assets, stockholders' equity, and competitiveness, vis-à-vis industry median counterparts.⁵⁸

Even though businesses thrive with women's active participation and leadership, women still face an uphill climb in the workforce and are underrepresented at many levels within corporate hierarchies.⁵⁹ Adding barriers like the IFRs that disproportionately affect women will only exacerbate the very real challenges women in business continue to face. If women are deprived of the tools they need to effectively support their reproductive decisions, many people,

⁵⁷ *Id.*; Vicki Kramer, et al., *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, 37 *Organizational Dynamics* 145, 145-64 (2008).

⁵⁸ Roy Adler, *Women in the Executive Suite Correlate to High Profits*, European Project on Equal Pay (1998).

⁵⁹ McKinsey & Company, *Women in the Workplace 2015* 5, 13, available at <https://womenintheworkplace.com/2015> (noting women “are almost three times more likely than men to say they have personally missed out on an assignment, promotion, or raise because of their gender”); see also Barsh & Yee, *supra* note 49 (explaining that “[d]espite the sincere efforts of major corporations, the proportion of women falls quickly as you look higher in the corporate hierarchy” and women's participation at senior levels still lags significantly behind men); Justin Wolfers, *Fewer Women Run Big Companies Than Men Named John*, N.Y. Times (Mar. 2, 2015), available at <https://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html>.

including women themselves,⁶⁰ may decide it is too risky for women to undertake high-achieving career paths or start businesses. Businesses will lose if the IFRs are allowed to undermine the ACA's contraceptive coverage guarantee to women in the workplace.

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

The IFRs undermine women's ability to consistently access contraception throughout their careers and inject uncertainty into the availability of meaningful access to contraception. As a result, women may opt out of certain professions or industries due to an increased risk of decreased access to contraception. Women may also forgo opportunities for professional growth and development, making career choices based on access to contraception instead of what is best for them, their careers, and their families. All businesses suffer when women are forced to make such choices.

Research shows that lack of access to contraception contributes to negative health outcomes which can have a direct effect on businesses that employ women.

It is well documented that “[m]others are healthier when they are able to control

⁶⁰ Barsh & Yee, *supra* note 49 (embedded institutional mindsets and embedded individual mindsets serve to hold women back in their career advancement); *see also* Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 *Am. Econ. J. Applied Econ.* 228, 230 (July 2010) (finding “MBA mothers seem to actively choose jobs that are family friendly, and avoid jobs with long hours and greater career advancement possibilities”).

when they become pregnant through the use of family planning, and their infants benefit as well.”⁶¹ For example, postpartum depression is nearly twice as high among women whose pregnancy was unplanned.⁶² Women whose pregnancies were unplanned are significantly more likely to be hospitalized during pregnancy for conditions such as kidney infections, vaginal bleeding, high blood pressure, premature labor, and premature rupture of membranes.⁶³ Further, unintended pregnancies may “present an unacceptably high health risk for women who have underlying medical conditions, some of which are exacerbated by pregnancy.”⁶⁴ Without access to contraceptives, women with underlying medical conditions such as diabetes, seizure disorders, and breast cancer face great risk due to unintended pregnancies, and lose the ability to plan ahead for how to manage their conditions

⁶¹ Kaye, *supra* note 8, at 4-5 (2014) (noting “babies were two-thirds more likely to be of low birthweight if they followed an unwanted pregnancy, as compared to a planned pregnancy”); *see also* Adam Sonfield, *Beyond Preventing Unplanned Pregnancy: The Broader Benefits of Publicly Funded Family Planning Services* 17 Policy Rev. 2 (2014), available at https://www.gutmacher.org/sites/default/files/article_files/gpr170402.pdf (noting “[p]regnancy planning . . . has well-documented health benefits for women and children”).

⁶² Kaye, *supra* note 8, at 4-5; *see also* Doepke, *supra* note 48, at 21 (discussing study of European women indicating that access to “oral contraceptives increased women’s self-reported life satisfaction”).

⁶³ *Id.* at 18.

⁶⁴ Kavanaugh & Anderson, *supra* note 31, at 7.

during pregnancy.⁶⁵ Unintended pregnancies are thus more likely to lead to health issues for women, which in turn interferes with education- and work-related goals.

When employees' well-being is compromised, businesses suffer concrete economic losses related to, among other things: (1) reduced productivity and presenteeism;⁶⁶ (2) absenteeism; and (3) high rates of employee turnover.⁶⁷ Such factors can cost businesses up to \$300 billion annually.⁶⁸ Calculated another way, a single employee who faces health issues can cause a business to incur "an estimated cost of 16 days of [incidental] sick leave and [loss of] \$8,000 . . . per year."⁶⁹ In particular, health-related loss of productive time results in annual losses to businesses of approximately \$226 billion.⁷⁰

⁶⁵ *Id.*

⁶⁶ Presenteeism refers to employees who are physically present at work, but too stressed or ill to be effective. Amy Richman et al., *Corporate Voices for Working Families, Business Impacts of Flexibility: An Imperative for Expansion* 13 (Feb. 2011), available at https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf.

⁶⁷ *Id.* (finding that stress is responsible for 40 percent of turnover).

⁶⁸ *Id.* (estimating stress-related costs to be around \$300 billion per year); David Lee, *Managing Employee Stress and Safety: A Guide to Minimizing Stress-Related Cost While Maximizing Employee Productivity* 3 (2000) (estimating stress-related costs to be between \$50 billion and \$150 billion each year).

⁶⁹ *Id.*

⁷⁰ Sean Nicholson et al., *How to Present the Business Case for Healthcare Quality to Employers* 12 (Nov. 2005), available at <http://knowledge.wharton.upenn.edu/wp-content/uploads/2013/09/1303.pdf> ("Nicholson") ("[C]osts of impaired on-the-job productivity are larger than the costs associated with absences."); Lindsay E. Sears et al., *Overall Well-Being as a*

In addition to health-related losses of productivity, stress associated with lack of control over reproductive health also damages businesses. Stress is a leading cause of employee turnover, which costs employers between 12 and 40% of their companies' net earnings each year.⁷¹ To replace a departing worker, businesses expend 21% of the departing worker's salary.⁷² It is "costly to replace workers because of the productivity losses when someone leaves a job, the costs of hiring and training a new employee, and the slower productivity until the new employee gets up to speed in their new job."⁷³

Businesses like *amici* recognize that reducing employee stress and increasing overall well-being can result in positive financial gains. For example, "79% of CFOs [Chief Financial Officers] believe that workforce productivity [caused by improved health] has a great or critical effect on their financial

Predictor of Health Care, Productivity and Retention Outcomes in a Large Employer, 16(6) *Population Health Management* 397, 397 (2013).

⁷¹ *Id.*

⁷² Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There Are Significant Business Costs to Replacing Employees* 1 (Nov. 16, 2012), available at <https://cdn.americanprogress.org/wp-content/uploads/2012/11/16084443/CostofTurnover0815.pdf> (calculating the cost of turnover for all positions except executives and physicians) ("Boushey & Glynn"); Nicholson, *supra* note 70, at 9 (finding that a "program that improves workers' health could lower the turnover rate by creating a stronger attachment between the employees and the company").

⁷³ Boushey & Glynn, *supra* note 72, at 1.

performance drivers.” Simply, “CFOs recognize a strong link between health, productivity and corporate financial success.”

To capitalize on the relationship between employees’ well-being and businesses’ financial interests, many companies have implemented various work-life initiatives. But one example is the recent trend of providing on-site healthcare clinics. By providing employees with convenient access to healthcare services, companies benefit overall because their employees incur between 15 and 22 fewer incidental missed workdays than the employees of companies that lack on-site healthcare providers. There are numerous ways in which businesses that value gender equality and inclusion support women. The IFRs, however, do the opposite. When women suffer negative health consequences associated with unintended pregnancies or stress occasioned by lack of control over their reproductive health, they see their own net earnings decline, and the economy sees overall growth and productivity decline, too.

Women have been able to contribute to the national economy in large part because access to contraception has empowered them to make life choices without fear of unintended pregnancy. Indeed, access to contraception implicates a woman’s “basic control over her life.” *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part). Recognizing that women’s ability to participate “equally in the economic and social life of the Nation” is “facilitated by

their ability to control their reproductive lives,” this Court should not reverse course on the substantial economic progress women have made. *Casey*, 505 U.S. at 856 (citations omitted).

CONCLUSION

The nation’s economy is robust and best served when women can participate fully in education, the workforce, and the marketplace without the uncertainty of unintended pregnancy. The IFRs threaten businesses and the national economy by decreasing women’s ability to access contraception. This loss of control limits women’s ability to shape and care for their families, their education, and their careers. The IFRs will have adverse consequences for women’s economic security, equality, opportunity, and well-being. They will harm American women, families, and the economy. For these, and the foregoing reasons, *amici* respectfully urge this Court to affirm the district court’s order enjoining the enforcement of the IFRs.

Respectfully submitted,

Dated: May 29, 2018

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Appendix A

U.S. Women's Chamber of Commerce

National Association for Female Executives

Accrued Equities, Inc.

Amalgamated Bank

Capital Consulting Services

CREDO Mobile, Inc.

General Assembly Space, Inc.

Interflote USA, LLC

Levi Strauss & Co.

Marsh & McLennan Companies, Inc.

Newground Social Investment, SPC

NorthStar Asset Management, Inc.

Principled Investing LLC

Trillium Asset Management, LLC

Veris Wealth Partners

Zendrive Inc.

Zevin Asset Management, LLC

CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certify that this brief complies with the length limitations provided by Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B), and Ninth Circuit Rule 32-1. The brief is 6,930 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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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 as allowed under Fed. R. App. P. 25(c)(2) and Ninth Circuit Rule 25-5.

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