

Nos. 19-431 and 19-454

IN THE
Supreme Court of the United States

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

Petitioner,

v.

THE COMMONWEALTH OF PENNSYLVANIA
AND THE STATE OF NEW JERSEY, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, *et al.*,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA
AND THE STATE OF NEW JERSEY, *et al.*,

Respondents.

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

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

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici curiae comprise national organizations and businesses focused on the advancement of women in business and are committed to the well-being of women and families. *Amicus* U.S. Women’s Chamber of Commerce (“USWCC”) 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 (“NAFE”) 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. The 21 individual *amici* businesses range from small companies with a few employees to national household brands with thousands of employees. They are businesses that represent multiple industries and are located around the country. Uniting all of these varied businesses is the commitment to supporting and promoting women in the workplace. *Amici* have a strong interest in this case as the regulations at issue operate to defeat the goals of these organizations and businesses and harm women in business. A complete listing of *amici* is set forth in the Appendix, attached hereto.

The regulations in this case would allow nearly any private employer, university, or health insurer to invoke

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

religion or morality as a basis for stopping contraceptive coverage under the Affordable Care Act (“ACA”). *Amici* are committed to gender equality, which includes supporting women’s healthcare that allows women to make choices about how to plan and care for their families. *Amici* offer this brief to assist the Court in understanding the importance to the national economy and business community of providing contraceptive coverage to all women.

SUMMARY OF ARGUMENT

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

As employees, managers, executives, and customers, women are essential to building thriving businesses and sustaining a modern economy. Supporting women in business includes supporting access to contraception – a crucial health benefit that provides women greater control over their education, their careers, and their lives. By helping women² avoid unintended pregnancy, contraception facilitates women’s participation and advancement in the workforce, which in turn supports business and economic growth.

2. While this brief uses “woman” and “women” to describe those in need of contraceptive and abortion services, we note that not all those who can become pregnant, such as trans men, nonbinary, and gender nonconforming individuals, identify as women. Employers should implement policies that are sensitive to the needs of anyone who can become pregnant.

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

The rules at issue in this case (the "Rules") threaten these vital advancements and will harm American women, families, and the economy. The Rules represent a major step backward for the millions of women who rely upon contraceptive care while pursuing their educations and careers during their childbearing years and for businesses that value gender equality and diversity and the contributions of female employees, executives, and customers. By establishing obstructions to meaningful access to contraception, the Rules will negatively affect women's ability to balance their personal lives and their educational and professional advancement.

Providing women with the resources to make informed decisions regarding how many children to have, and when, and the ability to make plans about their work and

life responsibilities is essential to a thriving economy. Businesses and the national economy benefit when working women know they have meaningful access to preventive healthcare, including contraception. Unintended pregnancy can derail women's efforts to obtain education and advance professionally, and women unable to afford effective contraception may be limited in their career choices. Loss of meaningful access to contraception can increase levels of stress, distraction, absenteeism, and turnover, decrease overall productivity, and stall career opportunities – all of which are detrimental to businesses and the national economy. The ACA's contraceptive benefit gives women the confidence of knowing they will have coverage for contraception if they change jobs or insurance companies. The ACA's contraceptive benefit thus provides a crucial health benefit that promotes three important and connected goals: (1) it provides women control over their lives, (2) it contributes to gender equality and inclusion, and (3) it facilitates economic growth. The Rules undermine each of these goals.

The Rules' inevitable reduction in the number of women obtaining contraceptive coverage without cost-sharing will limit the ability of the affected women to advance professionally. This will directly affect businesses nationwide by reducing the number of qualified women available to work at their companies, and will have a negative impact on the national economy.

For these and the reasons set forth more fully below, *amici* urge this Court to affirm the Third Circuit's decision and uphold the nationwide injunction prohibiting the Rules from taking effect.

ARGUMENT

Women’s pursuit of educational and professional goals is intrinsically tied to their ability to determine whether and when to have children. Since the Supreme Court recognized in *Griswold v. Connecticut*, 410 U.S. 113 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the constitutionally protected right to privacy encompasses the right to access contraception, the number of working women in the U.S. has grown considerably, and the U.S. economy has grown alongside.³

Today, women comprise more than half of U.S. jobholders, with 76 million women working in full- or part-time roles, and their labor accounted for \$7.6 trillion—or 40% of annual U.S. gross domestic product in 2017.⁴ In

3. Eileen Appelbaum et al., Ctr. for Am. Progress and Ctr. for Econ. and Pol’y Res., *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.”).

4. Jess Huang et al., McKinsey & Co., *Women in the Workplace 2019* (Oct. 2019), available at https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2019.pdf (“McKinsey, *Women*

2019, women-owned businesses generated \$1.9 trillion in sales and employed 9.4 million people.⁵ 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. In fact, a study reviewing contraceptive methods in the U.S. from 1982-2010 reports that 99 percent of sexually active women have used contraception at least once in their lifetimes.⁶ That access was meaningfully expanded through the ACA, which eliminated cost-sharing obligations for an array of crucial preventative medicine and health services, including contraceptive services. As of December 2019, 61.4 million women now have insurance that covers contraception without having to pay out of pocket.⁷ The

in the Workplace”); Kate Bahn and Annie McGrew, Ctr. for Am. Progress, *A Day in the U.S. Economy Without Women* (Mar. 2017), available at <https://www.americanprogress.org/issues/economy/news/2017/03/07/427556/a-day-in-the-u-s-economy-without-women/>.

5. American Express, *The 2019 State of Women-Owned Businesses Report 3* (2019), available at [about.americanexpress.com/files/doc_library/file/2019-state-of-women-owned-businesses-report.pdf](https://www.americanexpress.com/files/doc_library/file/2019-state-of-women-owned-businesses-report.pdf) (“American Express”).

6. Kimberly Daniels et al., *Contraceptive methods women have ever used: United States, 1982–2010*, 62 *National Health Statistics Reports* 1 (Feb. 2013), available at <https://www.ncbi.nlm.nih.gov/pubmed/24988816>.

7. Nat’l Women’s Law Ctr., *New Data Estimates 61.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs* (Dec. 2019), available at <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/12/preventativeservices2019.pdf>.

Rules will reverse this progress by decreasing access to contraception and thus making it harder for women to balance life choices with educational and professional goals.

I. THE CONTRACEPTIVE BENEFIT PROVIDES A CRUCIAL 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.⁸ 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.⁹ Indeed, “[f]ive decades after the [birth

8. Anna Bernstein and Kelly M. Jones, Inst. for Women’s Pol’y Res., *The Economic Effects of Contraceptive Access: A Review of the Evidence* (Sept. 2019), available at <https://iwpr.org/publications/economic-contraceptive-access-review/> (“Bernstein & Jones, *Economic Effects*”) (summarizing the ways that contraception affected women’s economic outcomes); 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>.

9. Adam Sonfield et al., Guttmacher Inst., *The Social and Economic Benefits of Women’s Ability to Determine Whether and When to Have Children* at 29 (Mar. 2013), available at <https://www.guttmacher.org/pubs/social-economic-benefits.pdf> (“Sonfield, *Social and Economic Benefits*”) (“Planning, delaying and spacing one’s children generally appear to help women achieve their career goals”); Martha J. Bailey et al., *Recent Evidence on the Broad Benefits of Reproductive Health Policy*, *J. Pol’y Analysis & Mgmt.* 888, 894 (July 2013) (“[I]ncreasing access to contraception and

control] 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.”¹⁰ 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[.]”¹¹

legal abortion has had large and enduring effects on the material resources of families and children and has promoted the economic equality of women.”).

10. Sonfield, *Social and Economic Benefits*, *supra* note 9, at 4; *see also* Anna Bernstein and Lindsey Reichlin Cruse, Inst. for Women’s Pol’y Res., *Improving Success in Higher Education through Increased Access to Reproductive Health Services* 9 (Jan. 2020), *available at* <https://iwpr.org/publications/improving-higher-education-access-reproductive-health/> (Bernstein & Cruse, *Improving Success*) (“the ability to plan when and whether to have children has significant implications for young women’s abilities to persist in and complete college”).

11. 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”); Kate Bahn et al., Ctr. for Am. Progress, *Linking Reproductive Health Care Access to Labor Market Opportunities for Women* (Nov. 2017), *available at* <https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women/> (“Bahn, *Labor Market*”).

A. Contraception Enhances Women’s Education And Workforce Participation And The Well-Being Of Women And Families.

Meaningful access to contraception ensures that women can exercise autonomy and control over their reproductive health, including decisions about when and whether to have children.¹² In a 2019 survey, 86 percent of women agreed that controlling if and when to have children has been important to their careers.¹³ In another survey, women reported that using birth 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.”¹⁴

12. Heinrich Hock, *The Pill and the College Attainment of American Women and Men*, Dep’t of Econ., Florida State University Working Papers 1 (Sept. 2005), available at <http://paa2006.princeton.edu/papers/61745> (“Hock”) (noting that what made oral contraception “so remarkable, and what drove its rapid diffusion, was the degree of autonomy and control it offered women over their reproductive lives, especially with respect to the timing of their fertility”); see also Shelley Alpern et al., Rhia Ventures, *Hidden Value: The Business Case for Reproductive Health* 16 (Jan. 2020), available at https://rhiaventures.org/wp-content/uploads/2020/01/Hidden-Value_The-Business-Case-for-Reproductive-Health.pdf (“*Hidden Value*”) (“Recent polling reveals that 83% of women of reproductive age say they would want their employers’ insurance to cover the full range of reproductive health care, including abortion.”).

13. *Hidden Value*, *supra* note 12, at 6.

14. Jennifer J. Frost and Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *Contraception* 465, 469,

When women lack meaningful access to contraception, their ability to prevent unintended pregnancies and births decreases substantially.¹⁵ A recent study found that 85 percent of women who stopped using contraception became pregnant during the first year.¹⁶ In the United States, the 14 percent of women who do not use contraceptives account for 54 percent of all unintended pregnancies. By contrast, the 68 percent of women at risk for an unintended pregnancy who use contraceptives consistently and correctly account for only 5 percent of all unintended pregnancies.¹⁷

471 (Sept. 2012) (noting the importance of contraception “for women and couples who are motivated to consciously and carefully plan for their and their families’ futures”).

15. Guttmacher Inst., *Fact Sheet: Unintended Pregnancy in the United States 2* (Jan. 2019), available at <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (“Guttmacher, *Unintended Pregnancy*”) (noting an 18 percent 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”).

16. World Health Organization, *High rates of unintended pregnancies linked to gaps in family planning services: New WHO study* (Oct. 2019), available at <https://www.who.int/news-room/detail/25-10-2019-high-rates-of-unintended-pregnancies-linked-to-gaps-in-family-planning-services-new-who-study>.

17. Guttmacher Inst., *Fact Sheet: Contraceptive Use in the United States* (July 2018), available at <https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states> (“Guttmacher, *Contraceptive Use*”).

Access to contraception enhances women’s ability to pursue education and increases their participation and advancement in the workforce by providing them with the ability to control their reproductive lives and thus direct their future. 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.”¹⁸ One study found that “women living in states with requirements on insurers to cover contraception are more likely to transition from unemployment or out of the labor force into employment” than women living in states without this requirement.¹⁹

The ability to avoid unintended pregnancy is vital for women at all stages of their career paths, beginning with the bedrock of education. As access to contraception has increased, women have been able to achieve significant educational milestones. Women who do not have children when they are teenagers on average obtain more education.²⁰ A recent study found that “just one-third of

18. 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*”); *Hidden Value*, *supra* note 12, at 15 (“women in states with better access to contraception have higher rates of labor force participation, more frequently pursue full-time positions, more frequently take roles in traditionally male-dominated industries, and have higher median wages”).

19. Kate Bahn et al., *Feminist Economics, Do US TRAP Laws Trap Women Into Bad Jobs?* 3 (Aug. 2019).

20. Sonfield, *Social and Economic Benefits*, *supra* note 9, at 9 (finding that “women who experience teen births complete

made up less than 10 percent of students in JD, MBA, and MD programs, while women now account for just over half the students in those programs.²⁶ Absent access to contraception, these numbers would be much lower.

Women who have more control over their reproductive lives are better able to enhance their earning potential, allowing them to provide for themselves and their families. “Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men.” *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654 (1975) (Powell, J., concurring). In 2017, the latest year with available data, 41 percent of mothers were the sole or primary breadwinners for their families, earning at least half of their total household income.²⁷ This figure has more than doubled since 1967.²⁸ This shift is due in part to women’s increased control over the number and timing of children. A study

nces.ed.gov/programs/digest/d18/tables/dt18_318.30.asp (“NCES Statistics”).

26. 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 less than 10 percent of these degrees in the 1960s); NCES Statistics, *supra* note 25.

27. Sarah Jane Glynn, Ctr. for Am. Progress, *Breadwinning Mothers Continue To Be the U.S. Norm* (May 2019), available at <https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/> (“Glynn, *Breadwinning Mothers*”).

28. *Id.*

has found that “the Pill-induced effects on wages amount to roughly one-third of the total wage gains for women in their forties born from the mid-1940s to early 1950s.”²⁹ That study concluded that approximately 10 percent of the narrowing of the wage gap between men and women during the 1980s and 31 percent during the 1990s can be attributed to women’s ability to access oral contraceptives prior to age 21.³⁰

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

Beyond allowing women greater control over their education and careers, access to contraception has a positive impact on families, especially children. Access to contraception is associated with significant reductions in both child and adult poverty rates.³¹ By enhancing

29. Bailey, *The Opt-In Revolution*, *supra* note 18, at 17.

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

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

parents' ability to invest time, energy, and resources in their children,³² access to contraception also has been linked to improved outcomes for children's mental and behavioral development. 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.³³ Contraception use also allows women and their families to avoid the many negative health consequences that are associated with having pregnancies without optimal time between them.³⁴

Unintended pregnancies, which are directly linked to a lack of access to contraceptives, can erode other aspects of women's lives.³⁵ Unintended pregnancies are linked

in children [and] may improve their lifetime opportunities and labor market outcomes as adults"); *see also* Martha J. Bailey et al., Nat'l Bureau of Econ. Res., *Does Parents' Access to Family Planning Increase Children's Opportunities? Evidence From the War on Poverty and Early Years of Title X* 23 (2018) ("children born after a federal family planning program began were 7 percent less likely to live in poverty and 12 percent less likely to live in households receiving public assistance").

32. Sonfield, *Social and Economic Benefits*, *supra* note 9, at 24.

33. 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).

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

35. Matthias Doepke et al., Nat'l Bureau of Econ. Res. Working Paper 17672, *The Economics and Politics of Women's*

to conflict and decreased satisfaction in relationships, decreased child well-being, and depression, anxiety, and overall lower levels of happiness.³⁶ Unintended pregnancies are also linked to increased pregnancy-related morbidity and mortality, which contribute to the United States having one of the highest maternal mortality rates in the developed world, with approximately 700 women in the United States dying each year from pregnancy or childbirth-related causes.³⁷ Indeed, the district court in this case found that “[d]isruptions in contraceptive coverage will lead to women suffering unintended pregnancies and other medical consequences.” *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 828 (E.D. Pa. 2019).

B. The Contraceptive Benefit Enhances The Proven Benefits Of Access To Contraceptives.

Access to contraceptives has yielded significant gains. But for many women actual, meaningful access requires

Rights 21 (Dec. 2011) (“Doepke”) (discussing study of European women indicating that access to “oral contraceptives increased women’s self-reported life satisfaction”).

36. See generally Sonfield, *Social and Economic Benefits*, *supra* note 9; see also Kavanaugh & Anderson, *supra* note 34, at 7-8.

37. Ctr. For Disease Ctrl. & Prev., *Pregnancy Related Deaths* (Feb. 2019), available at <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>; See also 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 (Oct. 2016), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)31470-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)31470-2/fulltext).

the elimination of cost-sharing burdens.³⁸ Studies have concluded that “[e]ven seemingly small out-of-pocket costs can reduce use of services and medication.”³⁹ And recent studies confirm that the ACA’s contraceptive benefit, significantly increased women’s ability to access essential contraceptive services. For example, the teen birth rate fell to its lowest ever in 2016, a sharp decline attributed in part to the contraceptive benefit.⁴⁰ 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 percent of privately insured women had coverage for contraception without out-of-pocket costs.⁴¹ That number rose to 67 percent about a year after the Women’s Health Amendment took effect.⁴² The ACA’s contraception benefit saved women

38. USWCC, *Women’s Economic Priorities*, *supra* note 3, at 25 (“In 2013, 26% of women had to delay or forgo health care in the past year due to costs.”).

39. Bernstein & Jones, *Economic Effects*, *supra* note 8, at 23.

40. 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)).

41. Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *Contraception* 44, 45 (Sept. 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).

42. *Id.*

\$1.4 billion in out-of-pocket costs in 2013 alone.⁴³ A study of more than 600,000 women nationwide concluded that women were more likely to use oral contraceptives consistently once the contraceptive benefit removed cost-sharing obligations.⁴⁴

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 effective forms of contraception.⁴⁵ For example,

43. Nora V. Becker and 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).

44. 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 (Sept. 2016).

45. See, e.g., 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), available at <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.1457> (finding that “when cost sharing for contraceptives fell to zero for women . . . their rate of choosing prescription contraceptives rose much more” than women subject to cost-sharing and “compliance with the [ACA’s] mandate significantly increased the probability that a woman would chose a long-term contraceptive method”); 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).

intrauterine devices (“IUDs”) are one of the most effective forms of reversible birth control, with fewer than 1 percent of women who use them becoming pregnant within a year (compared to 34 percent of women who use condoms to prevent pregnancy and 7 percent of women who use oral contraceptives).⁴⁶ IUDs, however, have high upfront costs, which can exceed \$1,000.⁴⁷ Prior to the contraceptive benefit, these one-time, up-front costs often deterred women from using this highly effective form of contraception.⁴⁸ In January 2012 (before implementation of the Women’s Health Amendment), 58 percent of women were paying out-of-pocket costs for an IUD, compared to 13 percent by March 2014.⁴⁹ As a result of these decreased costs for women, there was a statistically significant increase in IUD insertions within the first year after the passage of the ACA.⁵⁰

46. Guttmacher, *Contraceptive Use supra* note 17; *see also* Jonathan M. Bearak et al., *Changes in Out-of-Pocket Costs for Hormonal IUDs After Implementation of the Affordable Care Act: An Analysis of Insurance Benefit Inquiries*, 93 *Contraception* 139, 1-2 (Feb. 2016), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4780678/pdf/nihms-756929.pdf> (“Bearak”).

47. *Id.*, at 1-2.

48. IOM, *Closing the Gaps, supra* note 15, 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”).

49. Bearak, *supra* note 46, at 1.

50. Ashley M. Snyder et al., *The Impact of the Affordable Care Act on Contraceptive Use and Costs among Privately Insured Women*, 28(3) *Women’s Health Issues* 219, 222 (March

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

II. THE CONTRACEPTIVE BENEFIT 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.”⁵¹ Highlighting how important contraception has been for women’s economic advancement, *Bloomberg Businessweek* recently listed contraception as the ninth “most disruptive innovation” in history, higher on the list than Amazon, McDonalds, email, and venture capital in terms of its impact on American businesses.⁵²

2018), available at [https://www.whijournal.com/article/S1049-3867\(17\)30527-3/pdf](https://www.whijournal.com/article/S1049-3867(17)30527-3/pdf).

51. Diane Whitmore Schanzenbach and 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.

52. *The 85 Most Disruptive Ideas in Our History*, Bloomberg Businessweek, available at <https://www.bloomberg.com/businessweek/85ideas/>.

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.⁵³ Women now comprise more than 50 percent of the national workforce.⁵⁴ The evidence shows that businesses and the economy benefit when women play a large role in the workforce.⁵⁵ In fact, one study estimates that the United States economy is \$2 trillion (or 13.5 percent) larger than it otherwise would be due to women's increased participation in the labor force since 1970.⁵⁶

As of 2019, women also own approximately 13 million privately-held businesses.⁵⁷ Those businesses generate about \$1.9 trillion in revenue, and employ about 9.4 million

53. See Doepke, *supra* note 35, at 21 (noting “[l]egal access to oral contraceptives gave women control over the timing of childbearing, and thus their labor market participation”).

54. Rachel Siegel, *Women outnumber men in the American workforce for only the second time*, The Washington Post (Jan. 10, 2020), available at <https://www.washingtonpost.com/business/2020/01/10/january-2020-jobs-report/>.

55. Christine Lagarde and Jonathan D. Ostry, World Econ. Forum, *When more women join the workforce, everyone benefits. Here's why* (Dec. 2018), available at <https://www.weforum.org/agenda/2018/12/economic-gains-from-gender-inclusion-even-greater-than-you-thought/>.

56. Executive Office of the President, Council of Economic Advisers, *The Annual Report* 158 (Feb. 2015), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp_complete.pdf.

57. American Express, *supra* note 5, at 3.

people.⁵⁸ Combined with firms that are equally owned by men and women, these businesses employ nearly 16.5 million people and generate \$3.2 trillion in revenue.⁵⁹

Businesses also benefit from women serving on their boards of directors and in management roles. For instance, companies in the top quartile for gender diversity on executive teams are 21 percent more likely to experience above-average profitability than companies in the bottom quartile.⁶⁰ One study found that having just one female director on a board cuts the risk of bankruptcy by 20 percent.⁶¹ Having a higher percentage of female employees also benefits companies in other ways. One study found that employees who work in organizations with higher percentages of women have more job satisfaction, more organizational dedication, more meaningful work and less burnout.⁶²

58. *Id.*

59. *Id.*

60. Vivian Hunt et al., McKinsey & Co., *Delivering through Diversity* 13 (2018), available at https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx (finding “a strong correlation between the presence of women in company top management and better financial results”).

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

62. Cathleen Clerkin, Center for Creative Leadership, *What Women Want—And Why You Want Women—In The Workplace*, available at https://www.ccl.org/wp-content/uploads/2017/07/WhatWomenWant.FINAL_.pdf.

Even though businesses thrive with women's active participation and leadership, women are still underrepresented at every level of the corporate hierarchy.⁶³ Adding barriers like the Rules that disproportionately affect women will only exacerbate the very real challenges women in business continue to face. If women are deprived of the tools they need to effectively support their reproductive decisions, many people, including women themselves,⁶⁴ may decide it is too risky for women to undertake high-achieving career paths or start businesses. Businesses will lose if the Rules are allowed to undermine the ACA's contraceptive coverage benefit to women in the workplace.

63. McKinsey, *Women in the Workplace*, *supra* note 4, at 8-9; *see also* Joanna Barsh and 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> (explaining that “[d]espite the sincere efforts of major corporations, the proportion of women falls quickly as you look higher in the corporate hierarchy”).

64. *Id.* (embedded institutional mindsets and embedded individual mindsets serve to hold women back in their careers); *see also* Marianne Bertrand et al., *Dynamics of the Gender Gap 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”).

B. Decreased Access To Contraception Negatively Impacts Women’s Well-Being, Businesses, And The Economy.

The Rules undermine women’s ability to consistently access contraception throughout their careers and inject uncertainty into the availability of meaningful access to contraception. 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 their lives. 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 directly affect businesses that employ women. It is well documented that “[m]others are healthier when they are able to control when they become pregnant through the use of family planning, and their infants benefit as well.”⁶⁵ For example, postpartum depression is nearly twice as high among women whose pregnancies were unplanned.⁶⁶ Women whose pregnancies were unplanned

65. Kaye, *supra* note 11, at 4-5 (2014) (noting “babies were two-thirds more likely to be of low birthweight if they followed an unwanted pregnancy, as compared to a planned pregnancy”); see also Adam Sonfield, *Beyond Preventing Unplanned Pregnancy: The Broader Benefits of Publicly Funded Family Planning Services* 17 Policy Rev. 2 (2014), available at https://www.guttmacher.org/sites/default/files/article_files/gpr170402.pdf (noting “[p]regnancy planning . . . has well-documented health benefits for women and children”).

66. Kaye, *supra* note 11, at 4-5.

are significantly more likely to be hospitalized during pregnancy.⁶⁷ Further, unintended pregnancies may “present an unacceptably high health risk for women who have underlying medical conditions, some of which are exacerbated by pregnancy.”⁶⁸ Without access to contraceptives, women with underlying medical conditions such as diabetes, seizure disorders, and breast cancer face great risk due to unintended pregnancies, and lose the ability to plan ahead for how to manage their conditions during pregnancy.⁶⁹ Unintended pregnancies are thus more likely to lead to health issues for women, which in turn interferes with education and work goals.

In the same way that access to contraception affects women’s health outcomes, women’s ability to access contraception also affects the health of businesses and the economy. When employees’ well-being is compromised, businesses suffer concrete economic losses related to, among other things: (1) reduced productivity and presenteeism;⁷⁰ (2) absenteeism; and (3) high rates of employee turnover.⁷¹ Such factors can cost businesses up

67. *Id.* at 18.

68. Kavanaugh & Anderson, *supra* note 34, at 7.

69. *Id.*

70. Presenteeism refers to “a person who is physically present at work but performs at reduced capacity with ‘decreased productivity and below-normal work quality’ for a variety of reasons.” Donna Allen et al., *Four-year review of presenteeism data among employees of a large United States health care system: a retrospective prevalence study*, Human Resources for Health 16:59 at 2 (2018) (“Allen, *Presenteeism*”).

71. Amy Richman et al., Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for*

to \$300 billion annually.⁷² Calculated another way, a single employee who faces health issues can cause a business to incur “an estimated cost of 16 days of [incidental] sick leave and [loss of] \$8,000 . . . per year.”⁷³ Mental illness and general anxiety are two of the top three conditions for highest daily productivity loss per person and highest annual cost per person.⁷⁴ Further, one in three employees admit to being less productive at work because of financial stress, and two-thirds of employees say they are stressed about having money to cover out-of-pocket medical costs.⁷⁵

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 percent and 40 percent of their companies’ net earnings each year.⁷⁶ Businesses spend an average of \$15,000 to

Expansion 13 (Feb. 2011), available at https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf. (finding that stress is responsible for 40 percent of turnover).

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

73. *Id.*

74. Allen, *Presenteesim*, *supra* note 70, at 5.

75. MetLife, *Thriving in the New Work-Life World: MetLife’s 17th Annual U.S. Employee Benefit Trends Study 2019* at 11, 40.

76. Lindsay E. Sears et al., *Overall Well-Being as a Predictor of Health Care, Productivity and Retention Outcomes in a Large Employer*, 16(6) *Population Health Management* 397, 397 (Dec.

replace each departing worker.⁷⁷ Preventable turnover costs companies \$475 billion per year.⁷⁸ In 2018, 8.4 percent of departing employees cited well-being as the reason for their departure.⁷⁹ Another 9.6 percent cited compensation and benefits as their reason for leaving, with the percentage citing benefits as their reason for leaving having increased by 100 percent since 2010.⁸⁰ Businesses recognize that reducing employee stress and increasing overall well-being can result in financial gains. One study found that “[m]ore than two-thirds of the 313 CFOs [Chief Financial Officers] surveyed agreed that health is a cultural or financial priority in their organizations.”⁸¹ The CFOs viewed “health as having an impact on financial performance in both conventional (e.g., healthcare expenses and sick-day

2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3870481/pdf/pop.2012.0114.pdf>.

77. Thomas F. Mahan et al., *2019 Retention Report*, Work Institute at 10; (“*Retention Report*”); Sean Nicholson et al., *How to Present the Business Case for Healthcare Quality to Employers* 9 (Nov. 2005), available at <http://knowledge.wharton.upenn.edu/wp-content/uploads/2013/09/1303.pdf> (finding that a “program that improves workers’ health could lower the turnover rate by creating a stronger attachment between the employees and the company”).

78. *Retention Report*, *supra* note 77, at 10.

79. *Id.* at 14. “Well-being” is defined to include general personal, personal health, caregiver issues, pregnancy and family issues. *Id.* at 19.

80. *Id.* at 14, 18.

81. Integrated Benefits Institute, *Making Health the CFO’s Business: Findings From the Integrated Benefits Institute’s 2011 CFO Survey 2* (Feb. 2012), available at https://www.ibiweb.org/wp-content/uploads/2018/01/2011_CFO_Survey_Full.pdf.

absences) and less conventional ways (e.g., opportunity costs and requirements for larger-than-optimal staffs).”⁸²

In recognition of the important relationship between employees’ well-being and businesses’ financial interests, many companies have implemented various work-life initiatives. One example is the recent trend of providing on-site healthcare clinics to employees. By providing these services, workers experience between 15 and 22 fewer incidental missed workdays than the employees of companies that lack on-site healthcare providers. These initiatives enhance the bottom line. The Rules however, do the opposite. When women suffer negative health consequences associated with unintended pregnancies or stress occasioned by lack of control over their reproductive health, they see their net earnings decline, and the economy sees overall growth and productivity decline, too.

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

82. *Id.*

CONCLUSION

The nation's economy is best served when women can participate fully in education, the workforce, and the marketplace without the uncertainty of unintended pregnancy. The Rules threaten businesses and the national economy by decreasing women's ability to access contraception. This loss of control limits women's ability to shape and care for their families, their education, and their careers. The Rules will have adverse consequences for women's economic security, equality, opportunity, and well-being. They will harm women, families, and the national economy. For these, and the foregoing reasons, *amici* respectfully urge this Court to affirm the Third Circuit's decision and uphold the nationwide injunction prohibiting the Rules from taking effect.

Respectfully, submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

U.S. Women’s Chamber of Commerce, <https://uswcc.org/>

National Association for Female Executives, <https://www.nafe.com/>

Amalgamated Bank, <https://www.amalgamatedbank.com/>

Argent, <https://argentwork.com/>

Atlassian, <https://www.atlassian.com/>

Bad Robot Productions, <https://www.badrobot.com/>

Ben & Jerry’s Homemade, Inc., <https://www.benjerry.com/>

Benevity, <https://www.benevity.com/>

Bloomberg LP, <https://www.bloomberg.com/>

The Body Shop US, <https://www.thebodyshop.com/en-us/>

Box, <https://www.box.com/home>

Hims, Inc., <https://www.forhims.com/> and <https://www.forhers.com/>

Jaya Apparel Group, <http://www.jayaapparelgroup.com/>

Juniper Networks, <https://www.juniper.net/us/en/>

Lush, <https://www.lushusa.com/>

Medicines360, <https://www.medicines360.org/>

Appendix

Outdoor Voices, <https://www.outdoorvoices.com/>

Postmates, <https://postmates.com/>

Refinery29, <https://www.refinery29.com/en-us>

Seventh Generation, <https://www.seventhgeneration.com/home>

The Lede Company, <https://ledecompany.com/>

The Riveter, <https://theriveter.co/>

Trillium Asset Management, <https://trilliuminvest.com/>