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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY,

Plaintiffs-Appellees,

v.

PRESIDENT, UNITED STATES OF AMERICA; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; SECRETARY, U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF LABOR,

Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

JOINT APPENDIX
Vol. 2 (pp. 126-803)

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TABLE OF CONTENTS

Volume 1

Volume 2

Volume 3

* "Public inspection" copies of the interim final rules were attached to the complaint. For ease of reference and citation, we have included in the appendix the interim rules as published in the Federal Register.

This case was appealed to
03rd Circuit: 17-3679, 17-3752, 18-1253, 19-1129, 19-1189

US District Court Civil Docket

U.S. District - Pennsylvania Eastern (Philadelphia)

2:17cv4540

Commonwealth of Pennsylvania v. Trump et al

This case was retrieved from the court on Tuesday, January 29, 2019

Date Filed: 10/11/2017
Assigned To: Honorable WENDY BEETLESTONE
Referred To:
Nature of suit: Other Civil Rights (440)
Cause: Federal Question: Other Civil Rights
Lead Docket: None
Other Docket: USCA, 17-03679
USCA, 17-03752
USCA, 18-01253
USCA, 19-01129
USCA, 19-01189
Jurisdiction: Federal Question

Class Code: OPEN
Closed:
Statute: 28:1331
Jury Demand: None
Demand Amount: $0
NOS Description: Other Civil Rights

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American Academy of Pediatrics
Movant

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Date	#	Proceeding Text	Source
10/11/2017	1	COMPLAINT against RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (Filing fee $ 400 receipt number 167178.), filed by COMMONWEALTH OF PENNSYLVANIA.(Attachments: # 1 Civil Cover Sheet, # 2 Designation Form, # 3 Case Management Track Form, # 4 Exhibit A, # 5 Exhibit B, # 6 Exhibit C)(ahf) (Entered: 10/12/2017)	
10/11/2017		Summons Issued as to RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT, U.S. Attorney and U.S. Attorney General. Eight Forwarded To: Counsel and One Given to AUSA on 10/12/2017.(ahf) (Entered: 10/12/2017)	
10/20/2017	2	Acceptance of Service by U.S. Attorney Re: accepted summons and complaint on behalf of the United States Attorney (only). (aeg) (Entered: 10/23/2017)	
10/23/2017	3	NOTICE of Appearance by MICHAEL J. FISCHER on behalf of COMMONWEALTH OF PENNSYLVANIA (FISCHER, MICHAEL) (Entered: 10/23/2017)	
10/23/2017	4	NOTICE of Appearance by NICOLE J. BOLAND on behalf of COMMONWEALTH OF PENNSYLVANIA (BOLAND, NICOLE) (Entered: 10/23/2017)	
10/25/2017	5	Praecipe to Re-Issue Summons by COMMONWEALTH OF PENNSYLVANIA. (BOLAND, NICOLE) (Entered: 10/25/2017)	
10/25/2017		Alias Summons Issued as to RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. 8 Given To: Counsel on 10/25/2017. (ahf) (Entered: 10/25/2017)	

10/27/2017	6	NOTICE of Appearance by ELIZABETH L. KADE on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (KADE, ELIZABETH) (Entered: 10/27/2017)
11/01/2017	7	NOTICE of Appearance by SCOTT WEBSTER REID on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT with Certificate of Service(REID, SCOTT) (Entered: 11/01/2017)
11/02/2017	8	Consent MOTION for Leave to File Excess Pages in Support of Motion for a Preliminary Injunction filed by COMMONWEALTH OF PENNSYLVANIA.Certificate of Service. (Attachments: # 1 Text of Proposed Order, # 2 Memorandum Proposed Memorandum of Law)(FISCHER, MICHAEL) (Entered: 11/02/2017)
11/02/2017	9	MOTION for Preliminary Injunction filed by COMMONWEALTH OF PENNSYLVANIA.Certificate of Service. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O)(FISCHER, MICHAEL) (Entered: 11/02/2017)
11/03/2017	10	PAPERLESS ORDER GRANTING 8 MOTION FOR LEAVE TO FILE EXCESS PAGES BY HONORABLE WENDY BEETLESTONE ON 11/03/2017.11/03/2017 ENTERED AND COPIES MAILED, E-MAILED AND FAXED.(amw,) (Entered: 11/03/2017)
11/07/2017	11	ORDER THAT DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION IS DUE NO LATER THAN 11/16/2017. PLAINTIFF'S REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION IS DUE NO LATER THAN 11/27/2017. A HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION SHALL COMMENCE ON 12/14/2017, AT 8:30 AM, IN COURTROOM 3B. FURTHER INFORMATION OUTLINED HEREIN. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/7/2017. 11/7/2017 ENTERED AND COPIES E-MAILED.(amas) (Entered: 11/07/2017)
11/14/2017	12	MOTION for Leave to File Excess Pages and for Leave to File Reply in Support of Their Motion to Dismiss filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT.Certificate of Service. (Attachments: # 1 Text of Proposed Order) (KADE, ELIZABETH) (Entered: 11/14/2017)
11/15/2017	13	RESPONSE to Motion re 12 MOTION for Leave to File Excess Pages and for Leave to File Reply in Support of Their Motion to Dismiss filed by COMMONWEALTH OF PENNSYLVANIA. (Attachments: # 1 Text of Proposed Order)(FISCHER, MICHAEL) (Entered: 11/15/2017)
11/16/2017	14	ORDER THAT DEFENDANTS MAY FILE A MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OF UP TO 55 PAGES. DEFENDANTS MAY ALSO FILE A SEPARATE MOTION TO DISMISS. DEFENDANTS REQUEST FOR LEAVE TO FILE A REPLY TO ANY AMICUS CURIAE BRIEFS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION IS DENIED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/15/17.11/16/17 ENTERED AND COPIES E-MAILED.(ti,) (Entered: 11/16/2017)
11/16/2017	15	RESPONSE in Opposition re 9 MOTION for Preliminary Injunction filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

		UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(KADE, ELIZABETH) (Entered: 11/16/2017)
11/16/2017	16	MOTION to Dismiss filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT.Certificate of Service. (Attachments: # 1 Memorandum, # 2 Text of Proposed Order, # 3 Exhibit A, # 4 Exhibit B)(KADE, ELIZABETH) (Entered: 11/16/2017)
11/20/2017	17	ORDER THAT DEFENDANTS' LETTER REQUEST TO FILE THE GOVERNMENTS' PRELIMINARY PARTIAL ADMINISTRATIVE RECORD BY CD RATHER THAN HARD COPIES WHICH IS IN EXCESS OF 500,000 PAGES IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/17/17. 11/20/17 ENTERED & E-MAILED.(fdc) (Entered: 11/20/2017)
11/21/2017	18	Preliminary Partial Administrative Record by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (Attachments: # 1 Appendix Index to the Preliminary Partial Administrative Record)(KADE, ELIZABETH) (Entered: 11/21/2017)
11/22/2017	19	EMERGENCY MOTION TO INTERVENE FILED BY LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, MEMORANDUM, DECLARATION, CERTIFICATE OF SERVICE.(Attachments: # 1 Memorandum, # 2 Declaration, # 3 Certificate of Service, # 4 Text of Proposed Order)(fdc) (Entered: 11/22/2017)
11/22/2017	20	Proposed Answer of Proposed Defendant-Intervenor LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.(fdc) (Entered: 11/22/2017)
11/22/2017	21	MOTION for Pro Hac Vice of Lori Windham (Filing fee $ 40 receipt number 0313-12472728.) filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.Certificate of Service.(CENTRELLA, NICHOLAS) (Entered: 11/22/2017)
11/22/2017	22	MOTION for Pro Hac Vice Admission for Mark Rienzi (Filing fee $ 40 receipt number 0313-12472808.) filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.Certificate of Service.(CENTRELLA, NICHOLAS) (Entered: 11/22/2017)
11/22/2017	23	Administrative Record. (nd) (Additional attachment(s) added on 11/22/2017: # 2 II. A. Studies and Articles Part 1, # 3 II. A Studies and Articles Part 2, # 4 II. A Studies and Articles Part 3, # 5 II. A Studies and Articles Part 4, # 6 II B. Regulatory Analysis Part 1, # 7 II B. Regulatory Analysis Part 2, # 8 II B. Regulatory Analysis Part 3, # 9 II B. Regulatory Analysis Part 4, # 10 II B. Regulatory Analysis Part 5) (nd,). (Additional attachment(s) added on 11/22/2017: # 11 III Congressional Correspondence) (nd,). (Additional attachment(s) added on 11/22/2017: # 12 IV. Public Comments Part 1) (nd,). (Additional attachment(s) added on 11/22/2017: # 13 IV Public Comments Part 2) (nd,). (Additional attachment(s) added on 11/22/2017: # 14 IV. Public Comments Part 3, # 15 IV. Public Comments Part 4, # 16 IV. Public Comments Part 5, # 17 IV. Public Comments Part 6, # 18 IV. Public Comments Part 7) (nd,). (Additional attachment(s) added on 11/22/2017: # 19 HHS-OS-2011-0023-0001 - 2814_Part1, # 20 HHS-OS-2011-0023-0001 - 2814_Part2, # 21 HHS-OS-2011-0023-0001 - 2814_Part3, # 22 HHS-OS-2011-0023-0001 - 2814_Part4, # 23 HHS-OS-2011-0023-0001 - 2814_Part5, # 24 HHS-OS-2011-0023-0001 - 2814_Part6, # 25 HHS-OS-2011-0023-2814 Dft0003 - Dft84603_Part1, # 26 HHS-OS-2011-0023-2814 Dft0003 - Dft84603_Part2, # 27 HHS-OS-2011-0023-2814 Dft0003 - Dft84603_Part3, # 28 HHS-OS-2011-0023-2814 Dft0003 - Dft84603_Part4) (nd,). (Additional attachment(s) added on 11/22/2017:

		# 29 HHS-OS-2011-0023-2815 - 3899_Part1, # 30 HHS-OS-2011-0023-2815 - 3899_Part2, # 31 HHS-OS-2011-0023-2815 - 3899_Part3, # 32 HHS-OS-2011-0023-3900 - 4999_Part1, # 33 HHS-OS-2011-0023-3900 - 4999_Part2, # 34 HHS-OS-2011-0023-5000 - 5999_Part1, # 35 HHS-OS-2011-0023-5000 - 5999_Part2) (nd,). (Additional attachment(s) added on 11/22/2017: # 36 HHS-OS-2011-0023-7816 - 8999_Part1, # 37 HHS-OS-2011-0023-7816 - 8999_Part2, # 38 HHS-OS-2011-0023-7816 - 8999_Part3, # 39 HHS-OS-2011-0023-7816 - 8999_Part4, # 40 HHS-OS-2011-0023-7816 - 8999_Part5, # 41 HHS-OS-2011-0023-7816 - 8999_Part6, # 42 HHS-OS-2011-0023-7816 - 8999_Part7, # 43 HHS-OS-2011-0023-7816 - 8999_Part8, # 44 HHS-OS-2011-0023-7816 - 8999_Part9, # 45 HHS-OS-2011-0023-7816 - 8999_Part10, # 46 HHS-OS-2011-0023-7816 - 8999_Part11, # 47 HHS-OS-2011-0023-7816 - 8999_Part12, # 48 HHS-OS-2011-0023-7816 - 8999_Part13, # 49 HHS-OS-2011-0023-7816 - 8999_Part14, # 50 HHS-OS-2011-0023-7816 - 8999_Part15, # 51 HHS-OS-2011-0023-7816 - 8999_Part16, # 52 HHS-OS-2011-0023-7816 - 8999_Part17, # 53 HHS-OS-2011-0023-7816 - 8999_Part18, # 54 HHS-OS-2011-0023-7816 - 8999_Part19, # 55 HHS-OS-2011-0023-7816 - 8999_Part20, # 56 HHS-OS-2011-0023-7816 - 8999_Part21, # 57 HHS-OS-2011-0023-7816 - 8999_Part22, # 58 HHS-OS-2011-0023-7816 - 8999_Part23, # 59 HHS-OS-2011-0023-7816 - 8999_Part24, # 60 HHS-OS-2011-0023-7816 - 8999_Part25, # 61 HHS-OS-2011-0023-7816 - 8999_Part26) (nd,). (Additional attachment(s) added on 11/22/2017: # 62 HHS-OS-2011-0023-9000 - 9999, # 63 HHS-OS-2011-0023-10000 - 10999, # 64 HHS-OS-2011-0023-11000 - 11999, # 65 HHS-OS-2011-0023-12000 - 12816, # 66 HHS-OS-2011-0023-12817 - 13999) (nd,). (Additional attachment(s) added on 11/22/2017: # 67 HHS-OS-2011-0023-14000 - 14999_Part1, # 68 HHS-OS-2011-0023-14000 - 14999_Part2) (nd,). (Additional attachment(s) added on 11/22/2017: # 69 HHS-OS-2011-0023-15000 - 15999, # 70 HHS-OS-2011-0023-16000 - 16999, # 71 HHS-OS-2011-0023-17000 - 17817) (nd,). (Additional attachment(s) added on 11/22/2017: # 72 HHS-OS-2011-0023-17818 - 18999_Part1, # 73 HHS-OS-2011-0023-17818 - 18999_Part2, # 74 HHS-OS-2011-0023-19000 - 19999_Part1, # 75 HHS-OS-2011-0023-19000 - 19999_Part2, # 76 HHS-OS-2011-0023-20000 - 20999, # 77 HHS-OS-2011-0023-21000 - 21999., # 78 HHS-OS-2011-0023-22000 - 22818) (nd,). (Additional attachment(s) added on 11/24/2017: # 79 HHS-OS-2011-0023-22819 - 27819_Part1, # 80 HHS-OS-2011-0023-22819 - 27819_Part2, # 81 HHS-OS-2011-0023-22819 - 27819_Part3, # 82 HHS-OS-2011-0023-22819
11/22/2017	24	ORDER THAT THE APPLICATION OF LORI H. WINDHAM, ESQ. TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(B) IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/22/17. 11/22/17 ENTERED AND COPIES MAILED, E-MAILED.(fdc) (Entered: 11/22/2017)
11/22/2017	25	ORDER THAT THE APPLICATION OF MARK L. RIENZI, ESQ. TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(B) IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/22/17. 11/22/17 ENTERED AND COPIES MAILED, E-MAILED.(fdc) (Entered: 11/22/2017)
11/27/2017	26	MOTION to File Amicus Brief filed by AMERICAN CENTER FOR LAW AND JUSTICE.Brief. (Attachments: # 1 Brief of Amicus Curiae American Center for Law & Justice in Support of Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction, # 2 Text of Proposed Order, # 3 Disclosure Statement Form)(MANION, FRANCIS) (Entered: 11/27/2017)
11/27/2017	27	MOTION to File Amicus Brief filed by GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF

		WOMEN LAWYERS, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTS, CALIFORNIA WOMEN LAWYERS, LAWYERS CLUB OF SAN DIEGO, THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES,THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA .Brief, Certificate of Service. (Attachments: # 1 Brief, # 2 Exhibit A: Amicus Brief, # 3 Text of Proposed Order, # 4 Certificate of Service)(LEVITT, JAMIE) Modified on 11/28/2017 (nd,). (Entered: 11/27/2017)
11/27/2017	28	NOTICE of Appearance by JANIE F. SCHULMAN on behalf of GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTS, CALIFORNIA WOMEN LAWYERS, LAWYERS CLUB OF SAN DIEGO, THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES,THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA with Certificate of Service(SCHULMAN, JANIE) Modified on 11/28/2017 (nd,). (Entered: 11/27/2017)
11/27/2017	29	NOTICE of Appearance by RHIANNON N. BATCHELDER on behalf of GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTSM, CALIFORNIA WOMEN LAWYERS, LAWYERS CLUB OF SAN DIEGO, THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES,THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA with Certificate of Service(BATCHELDER, RHIANNON) Modified on 11/28/2017 (nd,). (Entered: 11/27/2017)
11/27/2017	30	REPLY to Response to Motion re 9 MOTION for Preliminary Injunction filed by COMMONWEALTH OF PENNSYLVANIA. (FISCHER, MICHAEL) (Entered: 11/27/2017)
11/28/2017	31	NOTICE of Appearance by JONATHAN B. MILLER on behalf of COMMONWEALTH OF MASSACHUSETTS (MILLER, JONATHAN) (Entered: 11/28/2017)
11/28/2017	32	MOTION to File Amicus Brief on behalf of Amici States Massachusetts, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington filed by COMMONWEALTH OF MASSACHUSETTS.Brief. (Attachments: # 1 Brief, # 2 Text of Proposed Order)(MILLER, JONATHAN) (Entered: 11/28/2017)
11/28/2017	33	ORDER THAT THE MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS [ECF NOS. 26, 27, AND 32] ARE GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 11/28/17.11/28/17 ENTERED AND COPIES MAILED, E-MAILED.(fdc) (Entered: 11/28/2017)
11/28/2017	34	Brief of Amicus Curiae, AMERICAN CENTER FOR LAW AND JUSTICE, in Support of Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction. (fdc) (Entered: 11/28/2017)
11/28/2017	35	Brief of Amicus Curiae filed by CALIFORNIA WOMEN LAWYERS, GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, LAWYERS CLUB OF SAN DIEGO, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO

		WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTS in Support of Plaintiff's Motion 9 for a Preliminary Injunction. (fdc) (Entered: 11/28/2017)
11/28/2017	36	Amicus Curiae Brief of COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA, DISTRICT OF COLUMBIA, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF MAINE, STATE OF MARYLAND, STATE OF MINNESOTA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON in Support of 9 Motion for Preliminary Injunction, Certificate of Service. (fdc) (Entered: 11/28/2017)
11/30/2017	37	RESPONSE in Opposition re 16 MOTION to Dismiss filed by COMMONWEALTH OF PENNSYLVANIA. (Attachments: # 1 Text of Proposed Order)(FISCHER, MICHAEL) (Entered: 11/30/2017)
12/06/2017	38	RESPONSE in Opposition re 19 MOTION to Intervene by Little Sisters of the Poor filed by COMMONWEALTH OF PENNSYLVANIA. (Attachments: # 1 Exhibit Press Release from Little Sisters' Counsel Becket Fund for Religious Liberty, # 2 Text of Proposed Order)(GOLDMAN, JONATHAN) (Entered: 12/06/2017)
12/07/2017	39	REPLY to Response to Motion re 16 MOTION to Dismiss filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (KADE, ELIZABETH) (Entered: 12/07/2017)
12/07/2017	40	REPLY to Response to Motion re 19 MOTION to Intervene filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. (RIENZI, MARK) (Entered: 12/07/2017)
12/08/2017	41	MEMORANDUM AND OPINION. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/8/17. 12/8/17 ENTERED & E-MAILED.(fdc) (VACATED PURSUANT TO JUDGE BEETLESTONE'S ORDER OF 5/10/18 77) Modified 5/10/18 (fdc). (Entered: 12/08/2017)
12/08/2017	42	MEMORANDUM AND ORDER THAT THE LITTLE SISTERS' MOTION TO INTERVENE IS DENIED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/8/17. 12/8/17 ENTERED & E-MAILED.(fdc) (VACATED PURSUANT TO JUDGE BEETLESTONE'S ORDER OF 5/10/18 77) Modified 5/10/18 (fdc). (Entered: 12/08/2017)
12/08/2017	43	NOTICE OF APPEAL as to 42 Order (Memorandum and/or Opinion) by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. Filing fee $ 505, receipt number 0313-12506386. Copies to Judge, Clerk USCA, Appeals Clerk and (RIENZI, MARK) (Entered: 12/08/2017)
12/11/2017	44	NOTICE of Appearance by JUSTIN MICHAEL SANDBERG on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (SANDBERG, JUSTIN) (Entered: 12/11/2017)
12/11/2017	45	NOTICE of Appearance by ETHAN PRICE DAVIS on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (DAVIS, ETHAN) (Entered: 12/11/2017)
12/11/2017	46	

		NOTICE of Appearance by REBECCA M. KOPPLIN on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT with Certificate of Service(KOPPLIN, REBECCA) (Entered: 12/11/2017)
12/11/2017	47	Praecipe to file Additional Attachments to Administrative Record ECF 23 by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (Attachments: # 1 Certification, # 2 Index)(KADE, ELIZABETH) Modified on 12/12/2017 (lvj,). Modified on 12/14/2017 (nd,). (Entered: 12/11/2017)
12/11/2017	48	MOTION in Limine TO LIMIT EVIDENCE AT PI HEARING filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT.Brief. (Attachments: # 1 Text of Proposed Order)(KADE, ELIZABETH) (Entered: 12/11/2017)
12/12/2017	49	NOTICE of Appearance by CHRISTOPHER HEALY on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (HEALY, CHRISTOPHER) (Entered: 12/12/2017)
12/13/2017	50	RESPONSE in Opposition re 48 MOTION in Limine TO LIMIT EVIDENCE AT PI HEARING filed by COMMONWEALTH OF PENNSYLVANIA. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(FISCHER, MICHAEL) (Entered: 12/13/2017)
12/13/2017	51	NOTICE of Appearance by JOEL L. MCELVAIN on behalf of RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT (MCELVAIN, JOEL) (Entered: 12/13/2017)
12/13/2017	52	NOTICE of Appearance by LAUREN E. SULCOVE on behalf of COMMONWEALTH OF PENNSYLVANIA (SULCOVE, LAUREN) (Entered: 12/13/2017)
12/13/2017	53	NOTICE of Appearance by NIKOLE BROCK on behalf of COMMONWEALTH OF PENNSYLVANIA (BROCK, NIKOLE) (Entered: 12/13/2017)
12/13/2017	54	RESPONSE in Support re 48 MOTION in Limine TO LIMIT EVIDENCE AT PI HEARING filed by DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (HEALY, CHRISTOPHER) (Entered: 12/13/2017)
12/13/2017	55	Minute Entry for proceedings held before HONORABLE WENDY BEETLESTONE. A Conference Call was held on 12/12/17. (fdc) (Entered: 12/13/2017)
12/13/2017	56	ORDER THAT DEFENDANT'S 48 MOTION IN LIMINE IS DENIED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/13/17.12/13/17 ENTERED & E-MAILED.(fdc) (Entered: 12/13/2017)
12/14/2017	57	NOTICE of Docketing Record on Appeal from USCA re 43 Notice of Appeal (Credit Card Payment) filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. USCA Case Number 17-3679 (dmc,) (Entered: 12/14/2017)
12/15/2017	58	

		Minute Entry for proceedings held before HONORABLE WENDY BEETLESTONE. Preliminary Injunction Hearing held on 12/14/17. Court Reporter: S. White. (fdc) (Entered: 12/15/2017)
12/15/2017	59	MEMORANDUM AND OPINION. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/15/17. 12/15/17 ENTERED & E-MAILED.(fdc) (Entered: 12/15/2017)
12/15/2017	60	MEMORANDUM AND ORDER THAT THE COMMONWEALTH OF PENNSYLVANIA'S MOTION FOR A PRELIMINARY INJUNCTION 9 IS GRANTED. IT IS FURTHER ORDERED THAT DEFENDANTS ERIC D. HARGAN, AS ACTING SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES (SUBSTITUTED PURSUANT TO RULE 25(D) OF THE FRCP); THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, AS SECRETARY OF THE U.S. DEPARTMENT OF TREASURY; THE U.S. DEPARTMENT OF TREASURY, RENE ALEXANDER ACOSTA, AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; AND THE U.S. DEPARTMENT OF LABOR; AND THEIR OFFICERS, AGENTS, SERVANTS, EMPLOYEES, ATTORNEYS, DESIGNEES, AND SUBORDINATES, AS WELL AS ANY PERSON ACTING IN CONCERT OR PARTICIPATION WITH THEM, ARE HEREBY ENJOINED FROM ENFORCING THE FOLLOWING INTERIM FINAL RULES PENDING FURTHER ORDER OF THIS COURT: 1. RELIGIOUS EXEMPTIONS AND ACCOMODATIONS FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT DESCRIBED AT 82 FED. REG. 47792; AND 2. MORAL EXEMPTIONS AND ACCOMODATIONS FOR COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT DESCRIBED AT 82 FED. REG. 47838. THE COURT HAS CONSIDERED THE ISSUE OF SECURITY PURSUANT TO RULE 65(C) OF THE FRCP AND DETERMINES THAT DEFENDANTS WILL NOT SUFFER ANY FINANCIAL LOSS THAT WARRANTS THE NEED FOR THE PLAINTIFF TO POST SECURITY. AFTER CONSIDERING THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE COURT FINDS THAT SECURITY IS UNNECESSARY AND EXERCISES ITS DISCRETION NOT TO REQUIRE THE POSTING OF SECURITY IN THIS SITUATION. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/15/17. 12/15/17 ENTERED & E-MAILED.(fdc) (Entered: 12/15/2017)
12/15/2017	61	NOTICE OF APPEAL as to 60 Order (Memorandum and/or Opinion), 59 Memorandum and/or Opinion by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. Filing fee $ 505, receipt number 0313-12521339. Copies to Judge, Clerk USCA, and Appeals Clerk. Certificate of Service. (RIENZI, MARK) Modified on 12/15/2017 (tjd). (Entered: 12/15/2017)
12/21/2017	62	NOTICE of Docketing Record on Appeal from USCA re 61 Notice of Appeal (Credit Card Payment), filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. USCA Case Number 17-3752 (dmc,) (Entered: 12/21/2017)
01/04/2018	63	NOTICE by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME [TRANSCRIPT ORDER FORM]. (FILED IN ERROR; ATTORNEY MUST RE-FILE ORIGINAL HARD COPY WITH CLERK'S OFFICE). (RIENZI, MARK) Modified on 1/9/2018 (fb). (Entered: 01/04/2018)
01/09/2018	64	NOTICE OF CONFERENCE: PRETRIAL CONFERENCE SET FOR 2/15/2018 04:30 PM IN JUDGE'S CHAMBERS 3809 BEFORE HONORABLE WENDY BEETLESTONE. (Attachments: # 1 Electronic Discovery Order, # 2 Joint Report of Rule 26(f) Meeting and Proposed Discovery Plan)(amw,) (Entered: 01/09/2018)
01/11/2018	65	Copy of TPO Form re 61 Notice of Appeal (Credit Card Payment), : (fdc,) (Entered: 01/11/2018)
01/22/2018	66	NOTICE of Withdrawal of Appearance by ELIZABETH L. KADE on behalf of All Defendants (KADE, ELIZABETH) (Entered: 01/22/2018)
02/05/2018	67	

		NOTICE by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME of Transcript Order for 12/14/2017 proceedings (RIENZI, MARK) (Entered: 02/05/2018)
02/06/2018	68	NOTICE OF APPEAL as to 60 Order (Memorandum and/or Opinion),,,,,, 59 Memorandum and/or Opinion by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. Filing fee $ 505. Copies to Judge, Clerk USCA, Appeals Clerk and (SANDBERG, JUSTIN) (Entered: 02/06/2018)
02/06/2018	69	TRANSCRIPT of Preliminary Injunction Hearing held on 12/14/17, before Judge Beetlestone. Court Reporter/Transcriber Suzanne R. White, RPR, FCRR, CM. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 2/27/2018. Redacted Transcript Deadline set for 3/9/2018. Release of Transcript Restriction set for 5/7/2018. (fdc) (Entered: 02/07/2018)
02/06/2018	70	Notice of Filing of Official Transcript with Certificate of Service re 69 Transcript - PDF,, 2/7/18 Entered and Copies Emailed and Mailed. (fdc) (Entered: 02/07/2018)
02/07/2018	71	NOTICE - AT THE REQUEST OF COUNSEL FOR BOTH PARTIES IN CORRESPONDENCE DATED FEBRUARY 7, 2018 AND UPON REPRESENTATION THAT DEFENDANTS INTEND TO FILE SHORTLY A MOTION TO STAY DISTRICT COURT PROCEEDINGS IN THIS CASE, PENDING RESOLUTION OF THEIR APPEAL OF THE PRELIMINARY INJUNCTION IN THE THIRD CIRCUIT COURT OF APPEALS, THE RULE 16 CONFERENCE ON FEBRUARY 15, 2018 IS HEREBY CANCELLED AND THE JOINT RULE 26 (F) REPORT DEADLINE IS VACATED.(amw,) (Entered: 02/07/2018)
02/08/2018	72	MOTION to Stay filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT.Brief. (Attachments: # 1 Text of Proposed Order)(SANDBERG, JUSTIN) (Entered: 02/08/2018)
02/09/2018	73	ORDER THAT DEFENDANTS' 72 MOTION TO STAY IS GRANTED. THIS CIVIL ACTION SHALL BE MARKED STAYED PENDING DEFENDANT'S APPEAL OF THIS COURT'S ORDER ON PENNSYLVANIA'S MOTION FOR PRELIMINARY INJUNCTION (ECF NO. 59 & 60) TO THE THIRD CIRCUIT COURT OF APPEALS. IT IS FURTHER ORDERED THAT THE CLERK OF COURT SHALL MARK THIS ACTION CLOSED FOR STATISTICAL PURPOSES AND PLACE THE MATTER IN THE CIVIL SUSPENSE FILE. SIGNED BY HONORABLE WENDY BEETLESTONE ON 2/8/18.2/9/18 ENTERED & E-MAILED.(fdc) (Entered: 02/09/2018)
02/15/2018	74	NOTICE of Docketing Record on Appeal from USCA re 68 Notice of Appeal, filed by DONALD J. TRUMP, RENE ALEXANDER ACOSTA, UNITED STATES DEPARTMENT OF LABOR, STEVEN T. MNUCHIN, DONALD J. WRIGHT, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. USCA Case Number 18-1253 (dmc,) (Entered: 02/15/2018)
03/12/2018	75	Request to File Supplemented Administrative Record by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (Attachments: # 1 Exhibit, # 2 Exhibit) (SANDBERG, JUSTIN) (Additional attachment(s) added on 3/28/2018: # 3 Rulemaking Notices and Guidance., # 4 attachment, # 5 attachment, # 6

attachment, # 7 attachment, # 8 attachment, # 9 attachment, # 10 attachment, # 11 attachment, # 12 attachment, # 13 attachment, # 14 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 15 attachment, # 16 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 17 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 18 attachment, # 19 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 20 attachment, # 21 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 22 attachment, # 23 attachment, # 24 attachment, # 25 attachment, # 26 attachment, # 27 attachment, # 28 attachment, # 29 attachment, # 30 attachment, # 31 attachment, # 32 attachment, # 33 attachment, # 34 attachment, # 35 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 36 attachment, # 37 attachment, # 38 attachment, # 39 attachment, # 40 attachment, # 41 attachment, # 42 attachment, # 43 attachment, # 44 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 45 attachment, # 46 attachment, # 47 attachment, # 48 attachment, # 49 attachment, # 50 attachment, # 51 attachment, # 52 attachment, # 53 attachment, # 54 attachment, # 55 attachment, # 56 attachment, # 57 attachment, # 58 attachment, # 59 attachment, # 60 attachment, # 61 attachment, # 62 attachment, # 63 attachment, # 64 attachment, # 65 attachment, # 66 attachment, # 67 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 68 attachment, # 69 attachment, # 70 attachment, # 71 attachment, # 72 attachment, # 73 attachment, # 74 attachment, # 75 attachment, # 76 attachment, # 77 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 78 attachment, # 79 attachment, # 80 attachment, # 81 attachment, # 82 attachment, # 83 attachment, # 84 attachment, # 85 attachment, # 86 attachment, # 87 attachment, # 88 attachment, # 89 attachment, # 90 attachment, # 91 attachment, # 92 attachment, # 93 attachment, # 94 attachment, # 95 attachment, # 96 attachment, # 97 attachment, # 98 attachment, # 99 attachment, # 100 attachment, # 101 attachment, # 102 attachment, # 103 attachment, # 104 attachment, # 105 attachment, # 106 attachment, # 107 attachment, # 108 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 109 attachment, # 110 attachment, # 111 attachment, # 112 attachment, # 113 attachment, # 114 attachment, # 115 attachment, # 116 attachment, # 117 attachment, # 118 attachment, # 119 attachment, # 120 attachment, # 121 attachment, # 122 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 123 attachment, # 124 attachment, # 125 attachment, # 126 attachment, # 127 attachment, # 128 attachment, # 129 attachment, # 130 attachment, # 131 attachment, # 132 attachment, # 133 attachment, # 134 attachment, # 135 attachment, # 136 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 137 attachment, # 138 attachment, # 139 attachment, # 140 attachment, # 141 attachment, # 142 attachment, # 143 attachment, # 144 attachment, # 145 attachment, # 146 attachment, # 147 attachment, # 148 attachment, # 149 attachment, # 150 attachment, # 151 attachment, # 152 attachment, # 153 attachment, # 154 attachment, # 155 attachment, # 156 attachment, # 157 attachment, # 158 attachment, # 159 attachment, # 160 attachment, # 161 attachment, # 162 attachment, # 163 attachment) (nd,). (Additional attachment(s) added on 3/28/2018: # 164 attachment, # 165 attachment, # 166 attachment, # 167 attachment, # 168 attachment, # 169 attachment, # 170

04/24/2018	76	MANDATE of USCA as to 43 Notice of Appeal (Credit Card Payment) filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. RE: ORDERED THAT THE ORDER OF THE DISTRICT COURT IS HEREBY REVERSED AND REMANDED. (fdc) (Entered: 04/24/2018)
05/10/2018	77	ORDER THAT THIS COURT'S MEMORANDUM AND ORDER (ECF NOS. 41 42) ARE VACATED, AND THE LITTLE SISTERS' MOTION TO INTERVENE (ECF

		NO. 19) IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 5/9/18. 5/10/18 ENTERED & E-MAILED.(fdc) (Entered: 05/10/2018)
07/02/2018	78	NOTICE of Withdrawal of Appearance by JOEL L. MCELVAIN on behalf of All Defendants (MCELVAIN, JOEL) (Entered: 07/02/2018)
07/11/2018	79	NOTICE of Withdrawal of Appearance by ETHAN PRICE DAVIS on behalf of All Defendants (Attachments: # 1 Certificate of Service)(DAVIS, ETHAN) (Entered: 07/11/2018)
11/26/2018	80	NOTICE of Appearance by AIMEE D. THOMSON on behalf of COMMONWEALTH OF PENNSYLVANIA (THOMSON, AIMEE) (Entered: 11/26/2018)
11/26/2018	81	MOTION Lift Stay of Proceedings filed by COMMONWEALTH OF PENNSYLVANIA.Certificate of Service. (Attachments: # 1 Text of Proposed Order)(THOMSON, AIMEE) (Entered: 11/26/2018)
12/07/2018	82	RESPONSE to Motion re 81 MOTION Lift Stay of Proceedings filed by RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT. (SANDBERG, JUSTIN) (Entered: 12/07/2018)
12/07/2018	83	NOTICE OF STATUS CONFERENCE: STATUS CONFERENCE SET FOR 12/13/2018 03:30 PM IN COURTROOM 3B BEFORE THE HONORABLE WENDY BEETLESTONE.(amw,) (Entered: 12/07/2018)
12/10/2018	84	MOTION Appear by Telephone filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.Motion. (Attachments: # 1 Text of Proposed Order)(RIENZI, MARK) (Entered: 12/10/2018)
12/10/2018	85	RESPONSE in Opposition re 81 MOTION Lift Stay of Proceedings filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. (Attachments: # 1 Exhibit Order, # 2 Exhibit Motion)(RIENZI, MARK) (Entered: 12/10/2018)
12/12/2018	86	PAPERLESS ORDER DENYING 84 MOTION TO APPEAR BY TELEPHONE BY HONORABLE WENDY BEETLESTONE ON 12/12/2018.12/12/2018 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 12/12/2018)
12/14/2018	87	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/14/18. 12/14/18 ENTERED AND COPIES E-MAILED. (mbh,) (Entered: 12/14/2018)
12/14/2018	88	ORDER THAT PLAINTIFF'S MOTION TO LIFE STAY OF DISTRICT COURT PROCEEDINGS IS GRANTED AND THE CLERK SHALL TRANFER THIS CASE TO THE COURT'S ACTIVE DOCKET. IT IS FURTHER ORDERED THAT PLAINTIFF SHALL SUPPLEMENT OR AMEND ITS COMPLAINT AND FILE A MOTION FOR PRELIMINARY INJUNCTION NO LATER THAN 12/17/18. A HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION SHALL COMMENCE ON JANUARY 10, 2019 at 9:00 AM. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/14/18. 12/14/18 ENTERED AND COPIES E-MAILED.(mbh,) . (Entered: 12/14/2018)
12/14/2018	89	AMENDED COMPLAINT for Declaratory and Injunctive Relief against RENE ALEXANDER ACOSTA, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, DONALD J. WRIGHT, ALEX M. AZAR, II, UNITED STATES OF AMERICA, filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY. (Attachments: # 1 Ex.A, # 2 Ex.B)(fdc) (Entered: 12/17/2018)
12/14/2018		Three Summons Issued as to ALEX M. AZAR, II, UNITED STATES OF AMERICA, U.S. Attorney's Office. Forwarded To: Michael J. Fischer, PA Atty. General, U.S. Attorney's Office on 12/17/18. (fdc) (Entered: 12/17/2018)

12/14/2018		MOTION HEARING SET FOR 1/10/2019 09:00 AM IN COURTROOM BEFORE HONORABLE WENDY BEETLESTONE. (mbh,) (Entered: 12/18/2018)
12/17/2018	90	Second MOTION for Preliminary Injunction filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY.. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit Index, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H, # 11 Exhibit I, # 12 Exhibit J, # 13 Exhibit K, # 14 Exhibit L, # 15 Exhibit M, # 16 Exhibit N, # 17 Exhibit O, # 18 Exhibit P, # 19 Exhibit Q, # 20 Exhibit R, # 21 Exhibit S, # 22 Exhibit T, # 23 Exhibit U, # 24 Exhibit V, # 25 Exhibit W, # 26 Exhibit X)(FISCHER, MICHAEL) (Entered: 12/17/2018)
12/17/2018	91	MOTION for Leave to File Excess Pages filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY.Memorandum. (Attachments: # 1 Text of Proposed Order, # 2 Memorandum)(FISCHER, MICHAEL) (Entered: 12/17/2018)
12/18/2018	92	APPLICATION for Admission Pro Hac Vice of Elspeth L.F. Hans by STATE OF NEW JERSEY. (Filing fee $ 40 receipt number 0313-13234262.). (Attachments: # 1 Affidavit, # 2 Certificate of Service, # 3 Text of Proposed Order)(KREFETZ, MARC) (Entered: 12/18/2018)
12/18/2018	93	PAPERLESS ORDER GRANTING 91 MOTION FOR LEAVE TO FILE EXCESS PAGES BY HONORABLE WENDY BEETLESTONE ON 12/18/2018.12/18/2018 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 12/18/2018)
12/19/2018	94	Minute Entry for proceedings held before HONORABLE WENDY BEETLESTONEin Courtroom 3B. A Status Conference was held on 12/13/18. Court Reporter: Suzanne White/ESR. (fdc) (Entered: 12/19/2018)
12/20/2018	95	ORDER THAT ATTORNEY ELSPETH L.F. HANS APPLICATION FOR PRO HAC VICE FOR STATE OF NEW JERSEY IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 12/20/2018. 12/21/2018 ENTERED AND COPIES MAILED AND E-MAILED. ECF APP MAILED.(sg,) (Entered: 12/21/2018)
12/26/2018	96	MOTION to Stay , MOTION for Extension of Time to File Answer filed by RENE ALEXANDER ACOSTA, ALEX M. AZAR, II, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA, DONALD J. WRIGHT.Certificate of Service.(SANDBERG, JUSTIN) (Entered: 12/26/2018)
12/26/2018	97	MOTION for Extension of Time to File Answer filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.Brief. (Attachments: # 1 Brief, # 2 Text of Proposed Order)(RIENZI, MARK) (Entered: 12/26/2018)
12/27/2018	98	APPLICATION for Admission Pro Hac Vice of Glenn J Moramarco by STATE OF NEW JERSEY. (Filing fee $ 40 receipt number 0313-13250752.). (KREFETZ, MARC) (Entered: 12/27/2018)
12/27/2018	99	RESPONSE in Opposition re 96 MOTION to Stay MOTION for Extension of Time to File Answer filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY. (FISCHER, MICHAEL) (Entered: 12/27/2018)
12/27/2018	103	ORDER THAT DEFTS' MOTION FOR STAY OF PROCEEDINGS OR IN THE ALTERNATIVE FOR EXTENSION OF THE ANSWER DEADLINE (ECF #96) IS GRANTED IN PART & DENIED IN PART. DEFTS' MOTION FOR EXTENSION OF THE ANSWER DEADLINE IS GRANTED. IT IS ORDERED THAT DEFTS HAVE UNTIL 2/28/2019 TO ANSWER OR OTHERWISE RESPOND TO THE COMPLAINT. DEFTS' MOTION TO STAY IS DENIED. IT IS FURTHER ORDERED THAT INTERVENOR-DEFT'S MOTION TO EXTEND TIME TO RESPOND TO AMENDED COMPLAINT (ECF #97) IS GRANTED. INTERVENOR-DEFT HAS UNTIL 2/28/2019 TO ANSWER OR OTHERWISE RESPOND TO THE COMPLAINT, ETC. SIGNED BY HONORABLE WENDY

		BEETLESTONE ON 12/27/18. 12/28/18 ENTERED AND COPIES E-MAILED. (kw,) (Entered: 12/28/2018)
12/28/2018	100	REPLY to Response to Motion re 96 MOTION to Stay MOTION for Extension of Time to File Answer filed by RENE ALEXANDER ACOSTA, ALEX M. AZAR, II, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA, DONALD J. WRIGHT. (SANDBERG, JUSTIN) (Entered: 12/28/2018)
12/28/2018	101	CERTIFICATE of Counsel certifying motion as unopposed by MARK L. RIENZI on behalf of LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME(RIENZI, MARK) (Entered: 12/28/2018)
12/28/2018	102	CERTIFICATE of Counsel re 97 MOTION for Extension of Time to File Answer certifying motion as unopposed by MARK L. RIENZI on behalf of LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME(RIENZI, MARK) (FILED IN ERROR BY ATTY; DUPLICATE ENTRY) Modified on 1/2/2019 (md). (Entered: 12/28/2018)
12/31/2018	104	MOTION for Leave to File Excess Pages filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.. (Attachments: # 1 Text of Proposed Order)(RIENZI, MARK) (Entered: 12/31/2018)
01/02/2019	105	PAPERLESS ORDER GRANTING 104 MOTION FOR LEAVE TO FILE EXCESS PAGES BY HONORABLE WENDY BEETLESTONE ON 01/02/2018.01/02/2018 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/02/2019)
01/03/2019	106	Acceptance of Service by U.S. Attorney Re: accepted summons and complaint on behalf of the United States Attorney (only). (fdc,) (Entered: 01/03/2019)
01/03/2019	107	MOTION for Leave to File Excess Pages filed by RENE ALEXANDER ACOSTA, ALEX M. AZAR, II, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA, DONALD J. WRIGHT.Certificate of Service. (Attachments: # 1 Exhibit, # 2 Text of Proposed Order)(SANDBERG, JUSTIN) (Entered: 01/03/2019)
01/03/2019	108	RESPONSE in Opposition re 90 Second MOTION for Preliminary Injunction filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(RIENZI, MARK) (Entered: 01/03/2019)
01/04/2019	109	PAPERLESS ORDER GRANTING 107 MOTION FOR LEAVE TO FILE EXCESS PAGES BY HONORABLE WENDY BEETLESTONE ON 01/04/2019.01/04/2019 ENTERED AND COPIES MAILED AND E-MAILED. (amw,) (Entered: 01/04/2019)
01/07/2019	110	Consent MOTION to File Amicus Brief and to Appear Amici Curiae filed by PHYSICIANS FOR REPRODUCTIVE HEALTH, AMERICAN ACADEMY OF NURSING, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, AMERICAN NURSES ASSOCIATION, Certificate of Service. (Attachments: # 1 Memorandum in Support of Motion for Leave, # 2 Exhibit A, Brief Amici Curiae, # 3 Text of Proposed Order)(MATHEWSON, LISA) Modified on 1/8/2019 (md). (Entered: 01/07/2019)
01/07/2019	111	MOTION for Pro Hac Vice of Leah R. Bruno filed by NATIONAL ASSOCIATION FOR FEMALE EXECUTIVES, U.S. WOMEN'S CHAMBER OF COMMERCE.Certificate of Service. (Attachments: # 1 Text of Proposed Order, # 2 Certificate of Service)(FELDMAN, JEFFREY) (Filing Fee Paid) Modified 1/8/19 (fdc). (Entered: 01/07/2019)
01/07/2019	112	

		Consent MOTION to File Amicus Brief and to Appear as Amici Curiae filed by NATIONAL ASSOCIATION FOR FEMALE EXECUTIVES, U.S. WOMEN'S CHAMBER OF COMMERCE.Certificate of Service. (Attachments: # 1 Memorandum in Support of Motion for Leave, # 2 Exhibit A to Memorandum (Brief of Amici Curiae), # 3 Text of Proposed Order) (FELDMAN, JEFFREY) (Entered: 01/07/2019)
01/07/2019	113	Consent MOTION to File Amicus Brief filed by COMMONWEALTH OF MASSACHUSETTS, COMMONWEALTH OF VIRGINIA, DISTRICT OF COLUMBIA, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF IOWA, STATE OF MAINE, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON.Brief. (Attachments: # 1 Brief Amici Curiae Brief of Massachusetts et al., # 2 Text of Proposed Order)(MILLER, JONATHAN) (Entered: 01/07/2019)
01/07/2019	114	Request to Manually File Supplemented Admin. Record by RENE ALEXANDER ACOSTA, ALEX M. AZAR, II, STEVEN T. MNUCHIN, DONALD J. TRUMP, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES OF AMERICA, DONALD J. WRIGHT. (Attachments: # 1 Exhibit, # 2 Exhibit)(SANDBERG, JUSTIN) (Entered: 01/07/2019)
01/07/2019	115	MOTION to File Amicus Brief on behalf of Amici Curiae the National Women's Law Center, the National Latina Institute for Reproductive Health, SisterLove, Inc., and the National Asian Pacific American Women's Forum in support of Plaintiffs' Motion for a Preliminary Injunction filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY.Brief, Certificate of Service. (Attachments: # 1 Brief, # 2 Text of Proposed Order, # 3 Corporate Disclosure Statement)(KAPLAN, MICHAEL) (Entered: 01/07/2019)
01/07/2019	116	NOTICE of Appearance by MICHAEL A. KAPLAN on behalf of COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY with Certificate of Service (Attachments: # 1 Certificate of Service)(KAPLAN, MICHAEL) (Entered: 01/07/2019)
01/07/2019	117	Consent MOTION to File Amicus Brief filed by CALIFORNIA WOMEN LAWYERS, GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, LAWYERS CLUB OF SAN DIEGO, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTS.Memorandum, Proposed Brief, Certificate of Service. (Attachments: # 1 Memorandum, # 2 Brief [Proposed] Brief of Amici Curiae, # 3 Text of Proposed Order)(LEVITT, JAMIE) (Entered: 01/07/2019)
01/07/2019	118	MOTION for Leave to File Excess Pages filed by COMMONWEALTH OF PENNSYLVANIA, STATE OF NEW JERSEY.. (Attachments: # 1 Text of Proposed Order, # 2 Memorandum, # 3 Exhibit)(FISCHER, MICHAEL) (Entered: 01/07/2019)
01/07/2019	126	Supplemental Administrative Record. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit)(fdc,) (Additional attachment(s) added on 1/9/2019: # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25

Exhibit, # 26 Exhibit, # 27 Exhibit, # 28 Exhibit, # 29 Exhibit, # 30 Exhibit, # 31 Exhibit, # 32 Exhibit, # 33 Exhibit, # 34 Exhibit, # 35 Exhibit, # 36 Exhibit, # 37 Exhibit, # 38 Exhibit, # 39 Exhibit, # 40 Exhibit, # 41 Exhibit, # 42 Exhibit, # 43 Exhibit, # 44 Exhibit, # 45 Exhibit, # 46 Exhibit, # 47 Exhibit, # 48 Exhibit, # 49 Exhibit, # 50 Exhibit, # 51 Exhibit, # 52 Exhibit, # 53 Exhibit, # 54 Exhibit, # 55 Exhibit, # 56 Exhibit, # 57 Exhibit, # 58 Exhibit, # 59 Exhibit, # 60 Exhibit, # 61 Exhibit, # 62 Exhibit, # 63 Exhibit, # 64 Exhibit, # 65 Exhibit, # 66 Exhibit, # 67 Exhibit, # 68 Exhibit, # 69 Exhibit, # 70 Exhibit, # 71 Exhibit, # 72 Exhibit, # 73 Exhibit, # 74 Exhibit, # 75 Exhibit, # 76 Exhibit, # 77 Exhibit, # 78 Exhibit, # 79 Exhibit, # 80 Exhibit, # 81 Exhibit, # 82 Exhibit, # 83 Exhibit, # 84 Exhibit, # 85 Exhibit, # 86 Exhibit, # 87 Exhibit, # 88 Exhibit) (fdc,). (Additional attachment(s) added on 1/9/2019: # 89 Exhibit, # 90 Exhibit, # 91 Exhibit, # 92 Exhibit) (fdc,). (Additional attachment(s) added on 1/10/2019: # 93 Exhibit, # 94 Exhibit) (fdc,). (Additional attachment(s) added on 1/10/2019: # 95 Exhibit, # 96 Exhibit, # 97 Exhibit, # 98 Exhibit, # 99 Exhibit, # 100 Exhibit, # 101 Exhibit, # 102 Exhibit, # 103 Exhibit, # 104 Exhibit) (fdc,). (Additional attachment(s) added on 1/10/2019: # 105 Exhibit, # 106 Exhibit, # 107 Exhibit, # 108 Exhibit, # 109 Exhibit, # 110 Exhibit, # 111 Exhibit) (fdc,). (Additional attachment (s) added on 1/10/2019: # 112 Exhibit, # 113 Exhibit, # 114 Exhibit, # 115 Exhibit, # 116 Exhibit, # 117 Exhibit, # 118 Exhibit, # 119 Exhibit, # 120 Exhibit, # 121 Exhibit, # 122 Exhibit, # 123 Exhibit, # 124 Exhibit, # 125 Exhibit, # 126 Exhibit, # 127 Exhibit, # 128 Exhibit, # 129 Exhibit, # 130 Exhibit, # 131 Exhibit, # 132 Exhibit, # 133 Exhibit, # 134 Exhibit, # 135 Exhibit, # 136 Exhibit, # 137 Exhibit, # 138 Exhibit, # 139 Exhibit, # 140 Exhibit, # 141 Exhibit, # 142 Exhibit, # 143 Exhibit, # 144 Exhibit, # 145 Exhibit, # 146 Exhibit, # 147 Exhibit, # 148 Exhibit, # 149 Exhibit, # 150 Exhibit, # 151 Exhibit, # 152 Exhibit, # 153 Exhibit, # 154 Exhibit, # 155 Exhibit, # 156 Exhibit, # 157 Exhibit, # 158 Exhibit, # 159 Exhibit, # 160 Exhibit, # 161 Exhibit, # 162 Exhibit, # 163 Exhibit, # 164 Exhibit, # 165 Exhibit, # 166 Exhibit, # 167 Exhibit, # 168 Exhibit) (fdc,). (Additional attachment(s) added on 1/15/2019: # 169 Exhibit, # 170 Exhibit, # 171 Exhibit, # 172 Exhibit, # 173 Exhibit, # 174 Exhibit, # 175 Exhibit, # 176 Exhibit, # 177 Exhibit, # 178 Exhibit, # 179 Exhibit, # 180 Exhibit, # 181 Exhibit, # 182 Exhibit, # 183 Exhibit, # 184 Exhibit, # 185 Exhibit, # 186 Exhibit, # 187 Exhibit, # 188 Exhibit, # 189 Exhibit, # 190 Exhibit, # 191 Exhibit, # 192 Exhibit, # 193 Exhibit, # 194 Exhibit, # 195 Exhibit, # 196 Exhibit, # 197 Exhibit, # 198 Exhibit, # 199 Exhibit, # 200 Exhibit, # 201 Exhibit, # 202 Exhibit, # 203 Exhibit, # 204 Exhibit, # 205 Exhibit, # 206 Exhibit, # 207 Exhibit, # 208 Exhibit, # 209 Exhibit, # 210 Exhibit, # 211 Exhibit, # 212 Exhibit, # 213 Exhibit, # 214 Exhibit, # 215 Exhibit, # 216 Exhibit, # 217 Exhibit, # 218 Exhibit, # 219 Exhibit, # 220 Exhibit, # 221 Exhibit, # 222 Exhibit, # 223 Exhibit, # 224 Exhibit, # 225 Exhibit, # 226 Exhibit, # 227 Exhibit) (fdc,). (Additional attachment(s) added on 1/16/2019: # 228 Exhibit, # 229 Exhibit, # 230 Exhibit, # 231 Exhibit, # 232 Exhibit, # 233 Exhibit, # 234 Exhibit, # 235 Exhibit, # 236 Exhibit, # 237 Exhibit, # 238 Exhibit, # 239 Exhibit, # 240 Exhibit, # 241 Exhibit, # 242 E

01/08/2019 119 ORDER THAT THE CONSENT 117 MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION BY AMERICAN NURSES ASSOCIATION, AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, AMERICAN ACADEMY OF NURSING, AMERICAN ACADEMY OF PEDIATRICS, AND PHYSICIANS FOR REPRODUCTIVE HEALTH IS GRANTED. THE BRIEF AMICI CURIAE ATTACHED AS EXHIBIT A TO THE MEMORANDUM IN SUPPORT OF THE MOTION IS HEREBY ACCEPTED FOR FILING. SIGNED BY HONORABLE WENDY BEETLESTONE ON 1/7/19.1/8/19 ENTERED & E-MAILED.(fdc) (Entered: 01/08/2019)

01/08/2019 120

		PAPERLESS ORDER GRANTING 110 MOTION TO FILE AMICUS BRIEF BY HONORABLE WENDY BEETLESTONE ON 01/08/2019.01/08/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/08/2019)
01/08/2019	121	PAPERLESS ORDER GRANTING 112 MOTION TO FILE AMICUS BRIEF BY HONORABLE WENDY BEETLESTONE ON 01/08/2019.01/08/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/08/2019)
01/08/2019	122	PAPERLESS ORDER GRANTING 113 MOTION TO FILE AMICUS BRIEF BY HONORABLE WENDY BEETLESTONE ON 01/08/2019.01/08/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/08/2019)
01/08/2019	123	PAPERLESS ORDER GRANTING 115 MOTION TO FILE AMICUS BRIEF BY HONORABLE WENDY BEETLESTONE ON 01/08/2019.01/08/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/08/2019)
01/08/2019	124	PAPERLESS ORDER granting 118 MOTION FOR LEAVE TO FILE EXCESS PAGES BY HONORABLE WENDY BEETLESTONE ON 01/08/2019.01/08/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/08/2019)
01/08/2019	125	ORDER THAT THE APPLICATION OF LEAH R. BRUNO, ESQ. TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(b) IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 1/8/19.1/8/19 ENTERED AND COPIES MAILED & E-MAILED. ECF APPLICATION MAILED TO BRUNO. (fdc) (Entered: 01/08/2019)
01/09/2019	127	Consent MOTION to File Amicus Brief (Corrected Version of ECF No. 117) filed by CALIFORNIA WOMEN LAWYERS, GIRLS INC., IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE, LAWYERS CLUB OF SAN DIEGO, SERVICE EMPLOYEES INTERNATIONAL UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFL-CIO), THE AMERICAN FEDERATION OF TEACHERS, THE COLORADO WOMENS BAR ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL ASSOCIATION OF WOMEN LAWYERS, THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, THE WOMENS BAR ASSOCIATION OF MASSACHUSETTS.Memorandum, Amicus Brief, Certificate of Service. (Attachments: # 1 Memorandum (Corrected Memorandum in Support of Motion for Leave to Appear as Amici Curiae and to File an Amicus Brief), # 2 Brief (Corrected Brief of Amici Curiae), # 3 Text of Proposed Order)(LEVITT, JAMIE) (Entered: 01/09/2019)
01/09/2019	128	PAPERLESS ORDER granting 127 MOTION TO FILE AMICUS BRIEF BY HONORABLE WENDY BEETLESTONE ON 01/09/2019.01/09/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/09/2019)
01/10/2019	129	ORDER THAT THE APPLICATION OF GLENN J. MORAMARCO, ESQ. TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(B) IS GRANTED. SIGNED BY HONORABLE WENDY BEETLESTONE ON 1/10/19. 1/10/19 ENTERED AND COPIES MAILED AND E-MAILED.(fdc) (Entered: 01/10/2019)
01/10/2019	130	Entry of Appearance by GLENN J. MORAMARCO on behalf of STATE OF NEW JERSEY. (fdc) (Entered: 01/10/2019)
01/10/2019	131	Minute Entry for proceedings held before HONORABLE WENDY BEETLESTONE. Preliminary Injunction Hearing held on 1/10/19. Court Reporter: K. Feldman/ESR. (fdc) (Entered: 01/10/2019)
01/10/2019	132	Consent MOTION to Amend/Correct 108 Response in Opposition to Motion Exhibit A filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME.. (Attachments: # 1 Errata Exhibit A, # 2 Text of Proposed Order) (RIENZI, MARK) (Entered: 01/10/2019)
01/14/2019	133	NOTICE by COMMONWEALTH OF PENNSYLVANIA of decision in California, et al. v. HHS, et al. (No. 17-5783) (N.D.Cal.) (Attachments: # 1 Exhibit

		Memorandum and Order (No. 17-5783) (N.D.Cal. Jan. 13, 2019)) (THOMSON, AIMEE) (Entered: 01/14/2019)
01/14/2019	134	NOTICE of Withdrawal of Appearance by LAUREN E. SULCOVE on behalf of COMMONWEALTH OF PENNSYLVANIA(SULCOVE, LAUREN) (Entered: 01/14/2019)
01/14/2019	135	ORDER THAT PLAINTIFFS' SECOND MOTION FOR A PRELIMINARY INJUNCTION (ECF NO. 90) IS GRANTED AS OUTLINED HEREIN. SIGNED BY HONORABLE WENDY BEETLESTONE ON 01/14/2019. 01/14/2019 ENTERED AND COPIES MAILED AND E-MAILED.(nd,) (Entered: 01/14/2019)
01/14/2019	136	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE WENDY BEETLESTONE ON 01/14/2019. 01/14/2019 ENTERED AND COPIES MAILED AND E-MAILED.(nd,) (Entered: 01/14/2019)
01/14/2019	137	PAPERLESS ORDER GRANTING 132 MOTION TO AMEND/CORRECT BY HONORABLE WENDY BEETLESTONE ON 01/14/2019.01/14/2019 ENTERED AND COPIES E-MAILED.(amw,) (Entered: 01/14/2019)
01/14/2019	138	NOTICE OF APPEAL as to 135 Order (Memorandum and/or Opinion), 136 Memorandum and/or Opinion by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. . (No ifp or filing fee paid) Copies to Judge, Clerk USCA, Appeals Clerk (RIENZI, MARK) Modified on 1/16/2019 (lvj,). (Entered: 01/14/2019)
01/22/2019		USCA Appeal Fees received $ 505 receipt number 191199 re 138 Notice of Appeal, filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME (fdc,) (Entered: 01/22/2019)
01/23/2019	139	NOTICE OF APPEAL as to 135 Order (Memorandum and/or Opinion), 136 Memorandum and/or Opinion by RENE ALEXANDER ACOSTA, ALEX M. AZAR, II, STEVEN T. MNUCHIN, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, Copies to Judge, Clerk USCA, Appeals Clerk and (SANDBERG, JUSTIN) Modified on 1/23/2019 (lvj,). Modified on 1/24/2019 (nd,). (Entered: 01/23/2019)
01/23/2019	140	NOTICE of Docketing Record on Appeal from USCA re 138 Notice of Appeal, filed by LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME. USCA Case Number 19-1129 (dmc,) (Entered: 01/23/2019)
01/24/2019	141	NOTICE of Docketing Record on Appeal from USCA re 139 Notice of Appeal, filed by RENE ALEXANDER ACOSTA, UNITED STATES DEPARTMENT OF LABOR, STEVEN T. MNUCHIN, ALEX M. AZAR, II, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. USCA Case Number 19-1189 (dmc,) (Entered: 01/24/2019)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP, *in his official capacity as President of the United States*; DONALD J. WRIGHT, *in his official capacity as Acting Secretary of Health and Human Services*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, *in his official capacity as Secretary of the Treasury*; UNITED STATES DEPARTMENT OF THE TREASURY; RENE ALEXANDER ACOSTA, *in his official capacity as Secretary of Labor*; and UNITED STATES DEPARTMENT OF LABOR, Defendants.	**CIVIL ACTION NO: _____** **COMPLAINT**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Commonwealth of Pennsylvania, by and through Attorney General Josh Shapiro, hereby files this Complaint against Defendants Donald J. Trump, in his official capacity as President of the United States; Donald J. Wright, in his official capacity as Acting Secretary of Health and Human Services; the United States Department of Health and Human Services; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; the United States Department of the Treasury; Rene Alexander Acosta, in his official capacity as Secretary of Labor; and the United States Department of Labor (collectively, the "Defendants") and, in support thereof, states the following:

PRELIMINARY STATEMENT

1. This lawsuit challenges the Defendants' illegal and unjustified attempt to deny millions of women in Pennsylvania and across this country access to necessary preventive health care through their employer-sponsored insurance plans. As set forth more fully below, Defendants' actions violate, among other provisions of law, the Administrative Procedure Act, the Affordable Care Act, the guarantee of equal protection enshrined in the Due Process Clause of the Fifth Amendment to the United States Constitution, Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, and the Establishment Clause of the First Amendment. If Defendants are not blocked from implementing their unlawful rules, direct harm will result to the Commonwealth of Pennsylvania and the medical and economic health of its residents. Because these rules will cause irreparable harm and were issued in violation of law, the Commonwealth of Pennsylvania seeks declaratory and injunctive relief holding the new rules unlawful and preventing their further implementation.

INTRODUCTION

2. The Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq.* (2010) (the "Affordable Care Act" or "ACA"), together with its implementing regulations, requires employer-sponsored health plans to cover all FDA-approved methods of contraception without imposing cost-sharing requirements on the insured.

3. Because of this requirement (the "Contraceptive Mandate") over 55 million women have access to birth control without paying out-of-pocket costs, including 2.5 million Pennsylvanians. *See* Women's Preventive Services Initiative, *Recommendations for Preventive Services for Women: Final Report to the U.S. Department of Health and Human Services, Health Resources & Services Administration* 84 (2016) ("WPSI Report"). American women and their

families covered by private insurance have saved an estimated 70% on contraceptive costs as a result. WPSI Report at 84.

4. Contraception is medicine, and its use has been shown to reduce the rates of unintended pregnancies and abortions. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 105 (2011) (the "Report"), attached hereto as Exhibit C.

5. But Doctors prescribe contraception to their patients for any number of reasons, some not having to do with birth control at all. For example, doctors frequently prescribe contraception for treatment of various menstrual disorders, acne, abnormal growth of bodily hair, and pelvic pain. According to a 2011 report, more than 1.5 million women rely on oral "birth control" pills for medical reasons unrelated to preventing pregnancy, and 58% of *all* users of birth control pills – *more than half* – use them, at least in part, for purposes other than pregnancy prevention. *See* Guttmacher Institute, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* (2011), available at https://www.guttmacher.org/sites/default/files/ report_pdf/beyond-birth-control.pdf.

6. For these and other reasons, "access to contraception improves the social and economic status of women." Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (citations omitted).

7. As a result of the Affordable Care Act, millions of American women enjoy a greater degree of control over their own medical health and have the ability to more fully participate in the workforce.

8. Defendants, however, threaten to deny many of these women the contraceptive health coverage on which they have come to rely by, in effect, making the Contraceptive Mandate optional.

9. They have issued regulations, targeted solely at women, that create broad exemptions from the ACA's Contraceptive Mandate, and they have done so in violation of the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706 ("APA").

10. These regulations allow *individual employers* to decide whether women who are insured under their company's health insurance – specifically the company's female employees and the employees' female family members – may have access to contraception without out-of-pocket charges.

11. Defendants have issued two separate rules that dramatically expand the ability of employers to opt out of their obligation under the ACA to ensure that women covered by employer-sponsored health insurance plans have access to contraception without copays or deductibles. *See* "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" (filed Oct. 6, 2017) (the "Moral Exemption") and "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" (filed Oct. 6, 2017) (the "Religious Exemption") (collectively, the "Exemption Rules"), which are attached hereto, respectively, as Exhibits A and B.

12. Because the Exemption Rules were styled as "Interim Final Rules" or "IFRs" under the APA, they went into effect *immediately*.

13. The Exemption Rules were issued in direct violation of the substantive and procedural requirements of the APA.

14. Specifically, the Defendants failed to engage in notice-and-comment rulemaking, as required by the APA, and failed to offer an adequate justification for not doing so.

15. In addition, the Exemption Rules themselves violate the requirements of the Affordable Care Act.

16. They are also arbitrary and capricious, and their promulgation constitutes an abuse of discretion.

17. Furthermore, the Exemption Rules apply only to one category of health services: *contraception*. And contraception is used only by women.

18. By singling out women for such negative, differential treatment, the Defendants have violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

19. The Commonwealth will suffer direct, proprietary harm as a result of the Exemption Rules. Where employers refuse to allow their health insurance plans to cover access to contraception, the Commonwealth will be forced to bear additional health care costs, in part, due to an increase in unintended pregnancies. Unintended pregnancies already cost the Commonwealth over $248 million per year and will surely cost more if contraception access and use decline. *See* Guttmacher Institute, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy*-Related Care National and State Estimates for 2010 at 13 (Feb. 2015).

20. In addition, the Commonwealth possesses strong interests in protecting the medical and economic health of its residents, minimizing unintended pregnancies and abortions, and ensuring that all of its residents – both men and women – are free and able to fully

participate in the workforce, maximize their social and economic status, and contribute to Pennsylvania's economy without facing discrimination on the basis of sex.

21. These interested are enshrined in the Pennsylvania Constitution, which declares, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

22. Defendants' actions directly undermine these vital state interests.

23. Because the Defendants have engaged in illegal conduct that will harm the Commonwealth and its citizens in these and other ways, this Court should hold that the Exemption Rules are unlawful and set them aside. The Commonwealth also seeks a preliminary injunction to maintain the status quo throughout all future proceedings in this matter.

JURISDICTION AND VENUE

24. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 553, 701-706, and the United States Constitution. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

25. In addition, this Court has the authority to issue the declaratory relief sought pursuant to 28 U.S.C. § 2201.

26. Venue is proper in this Court because Plaintiff the Commonwealth of Pennsylvania resides in this district and because a substantial part of the events giving rise to this action occurred in this judicial district. *See* 28 U.S.C. §§ 1391(e)(1)(B) & (C).

THE PARTIES

27. Plaintiff, the Commonwealth of Pennsylvania, is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." PA. CONST. art. IV, § 4.1.

28. In filing this action, the Attorney General seeks to protect the citizens and agencies of the Commonwealth from harm caused by Defendants' illegal conduct, prevent further harm, and seek redress for the injuries caused to the Commonwealth by Defendants' actions. Those injuries include harm to the Commonwealth's sovereign, quasi-sovereign, and proprietary interests.

29. Defendant Donald J. Trump is the President of the United States of America and is sued in his official capacity. His principal address is 1600 Pennsylvania Avenue NW, Washington, D.C. 20201.

30. Defendant Donald J. Wright is the Acting Secretary of the United States Department of Health and Human Services and is sued in his official capacity. His principal address is 200 Independence Avenue, SW, Washington, D.C. 20201

31. Defendant the United States Department of Health and Humans Services is an executive agency of the United States of America. Its principal address is 200 Independence Avenue, SW, Washington, D.C. 20201

32. Defendant Steven T. Mnuchin is the Secretary of the United States Department of the Treasury and is sued in his official capacity. His principal address is 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

33. Defendant the United States Department of the Treasury is an executive agency of the United States of America. Its principal address is 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

34. Defendant Rene Alexander Acosta is the Secretary of the United States Department of Labor and is sued in his official capacity. His principal address is 200 Constitution Avenue, NW, Washington DC 20210.

35. Defendant the United States Department of Labor is an executive agency of the United States of America. Its principal address is 200 Constitution Avenue, NW, Washington DC 20210.

36. Defendants the Department of Health and Humans Services, the Department of the Treasury, and the Department of Labor (collectively the "Departments") are each responsible for implementing various provisions of the ACA. The Departments jointly issued the Exemption Rules, which gave rise to this action.

37. Defendants Wright, Mnuchin, and Acosta are each responsible for carrying out the duties of their respective agencies under the Constitution of the United States of America and relevant statutes, including the Affordable Care Act.

38. Defendant Trump is responsible for faithfully enforcing the laws of the United States of America pursuant to and in accordance with the Constitution of the United States of America.

BACKGROUND

Congress Passes the Affordable Care Act and Women's Health Amendment

39. Access to preventive health services, including contraception, is essential for women to exercise control over their own health care and fully participate as members of society.

40. Access to contraception, in particular, allows women greater control over their reproductive health choices so they can better pursue educational, career, and personal goals.

41. Indeed, the expansion of preventive health services for women was a specific goal of the health care reform efforts that led to the passage of the Affordable Care Act.

42. Recognizing this need to expand women's access to preventive health services and reduce gender disparities in out-of-pocket costs, the U.S. Senate passed the "Women's

Health Amendment" during debate over the ACA. *See* S. Amdt. 2791, 111th Congress (2009-2010).

43. This Amendment was included in the final version of the ACA, which was signed into law on March 23, 2010. *See* ACA § 1001; Public Health Service Act (as amended by the ACA) § 2713, 42 U.S.C. § 300gg–13(a)(4).

44. During Senate debate on the Women's Health Amendment, lead sponsor Senator Barbara Mikulski set forth that Amendment's key feature: it "leaves the decision of which preventive services a patient will use between the doctor and the patient." 155 Cong. Rec. S11988 (Nov. 30, 2009) (statement of Sen. Barbara Mikulski). Senator Mikulski explained that this is essential because the "decision about what is medically appropriate and medically necessary is between a woman and her doctor." *Id.*

45. Another sponsor of the Amendment, Senator Al Franken, stressed that insurance coverage for contraceptive care allows "women and families to make informed decisions about when and how they become parents." He described access to contraception as "a fundamental right of every adult American" that also "reduce[s] the number of unintended pregnancies." 155 Cong. Rec. S12052 (Dec. 1, 2009) (statement of Sen. Al Franken) ("It is also a top priority for me that health reform includes another crucial women's health service, which is access to affordable family planning services. These services enable women and families to make informed decisions about when and how they become parents. Access to contraception is fundamental, a fundamental right of every adult American, and when we fulfill this right, we are able to accomplish a goal we all share—all of us on both sides of the aisle to reduce the number of unintended pregnancies.").

46. The Women's Health Amendment *mandated* that group health plans and health insurance issuers offering group or individual health insurance coverage cover preventive health services and screenings for women – and do so with no cost-sharing responsibilities. *See* 42 U.S.C.A. § 300gg-13(a)(3). Some employer-sponsored plans that were in existence prior to passage, were exempt from this requirement and most of the other requirements imposed by the ACA. *See* 29 C.F.R. § 2590.715-1251 (2010).

47. The specific services insurers were required to cover without charge were to be determined by guidelines issued by the Health Resources and Services Administration (the "HRSA"), an agency of Defendant the United States Department of Health and Human Services ("HHS"). *Id.*

The Institute of Medicine Report on Clinical Preventive Services for Women

48. Following passage of the Affordable Care Act, the HRSA complied with its legal responsibility to determine coverage guidelines by commissioning the Institute of Medicine (the "Institute"), a widely respected organization of medical professionals, to issue recommendations identifying what specific preventive women's health services should be covered under the ACA's mandate.

49. The Institute, in turn, convened a committee of sixteen members, including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines, to formulate specific recommendations. *See* Report.

50. After conducting an extensive study, that committee issued a comprehensive report, which identified several evidence-based preventive health services, unique to women, that it recommended be included as part of the HRSA's comprehensive guidelines under the ACA. *See* Report.

51. As set forth in their Report, the Institute found that contraceptives are a preventive service that should be covered under the ACA's mandate. *See* Report at 109-10. In making this finding, the Institute cited evidence that "contraception and contraceptive counseling" are "effective at reducing unintended pregnancies" and observed that "[n]umerous health professional associations recommend" that such family planning services be included as part of mandated preventive care for women. *See id.* at 109.

52. Relying, in part, on recommendations from the American Academy of Pediatrics, the Society of Adolescent Medicine, the American Medical Association, the American Public Health Association, and the Association of Women's Health, Obstetric and Neonatal Nurses, the Institute recommended that all employer sponsored health plans cover the "the *full range* of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." Report at 109-10 (emphasis added).

53. The Institute based its recommendation on several important factors, including the prevalence of unintended pregnancy in the United States. As stated in their Report, in 2001, an estimated "49 percent of all pregnancies in the United States were unintended—defined as unwanted or mistimed at the time of conception." Report at 102 (internal citations omitted).

54. The Institute found that these unintended pregnancies disproportionately impact the most vulnerable: Although one in every 20 American women has an unintended pregnancy each year, unintended pregnancy is "more likely among women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." *Id.*

55. And unintended pregnancies are more likely to result in abortions: "In 2001, 42 percent of [] unintended pregnancies [in the United States] ended in abortion." *Id.*

56. Moreover, women carrying babies to term are less likely to follow best health practices where those pregnancies are *unintended*. According to the Institute Committee on Unintended Pregnancy, "women with unintended pregnancies are more likely than those with intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy." Report at 103.

57. Women facing unintended pregnancies are also more likely to be "depressed during pregnancy, and to experience domestic violence during pregnancy." *Id.*

58. The Institute also found "significantly increased odds of preterm birth and low birth weight among unintended pregnancies ending in live births compared with pregnancies that were intended." *Id.*

59. While all pregnancies carry inherent health risks, some women have serious medical conditions for which pregnancy is strictly contraindicated. The Institute specifically found that "women with serious medical conditions such as pulmonary hypertension (etiologies can include idiopathic pulmonary arterial hypertension and others) and cyanotic heart disease, and … Marfan Syndrome," are advised against becoming pregnant. Report at 103. For these women, contraception can be necessary, lifesaving medical care.

60. Use of contraceptives also promotes medically recommended "spacing" between pregnancies. The Institute found that such pregnancy spacing is important because of the "increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced (within 18 months of a prior pregnancy)" and that "[s]hort interpregnancy intervals in particular

have been associated with low birth weight, prematurity, and small for gestational age births." Report at 103.

61. The Institute also found that contraceptives are effective in preventing unintended pregnancies. As stated in the Report, "greater use of contraception within the population produces lower unintended pregnancy and abortion rates nationally." Report at 105.

62. The Committee specifically highlighted a study showing that, as the rate of contraceptive use by unmarried women increased in the United States between 1982 and 2002, their rates of unintended pregnancy and abortion declined. *Id.*

63. The Committee reported other studies that showed increased rates of contraceptive use by adolescents from the early 1990s to the early 2000s was associated with a "decline in teen pregnancies" and, conversely, that "periodic increases in the teen pregnancy rate are associated with lower rates of contraceptive use." Report at 105.

64. The Institute also found that contraception, as a method of preventing unintended pregnancy, is highly cost-effective, citing, *inter alia*, savings in medical costs alone. It reported that "the direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002, with the cost savings due to contraceptive use estimated to be $19.3 billion." Report at 107.

65. In addition to preventing unintended pregnancies, the Institute recognized that contraceptives have other significant health benefits unrelated to preventing unintended pregnancy. The Institute stated in its Report that these "non-contraceptive benefits of hormonal contraception include treatment of menstrual disorders, acne or hirsutism, and pelvic pain." Report at 104. Long-term use of oral contraceptives has also been shown to "reduce a woman's

risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases." *Id.*

66. Indeed, a leading research and policy organization committed to advancing sexual and reproductive health and rights in the United States and globally, found in a 2011 report that more than 1.5 million women rely on oral contraceptive "birth control" pills for medical reasons *unrelated to preventing pregnancy* and that that 58% of *all* users of birth control pills – more than half – use them, at least in part, for purposes other than pregnancy prevention. *See* Guttmacher Report.

67. As of 2008, there were still "approximately 36 million U.S. women of reproductive age (usually defined as ages 15 to 44 years)" who were "estimated to be in need of family planning services because they were sexually active, able to get pregnant, and not trying to get pregnant." Report at 103.

68. Importantly, the Institute noted that *cost* is a meaningful barrier to contraceptive access, stating that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years" and citing to a Kaiser Permanente study that found "when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods." Report at 109.

The Health Resources and Services Administration Adopts the IOM Report and Promulgates Guidelines

69. The HRSA agreed with and adopted the Institute's recommendation that contraceptive services be covered under the Women's Health Amendment to the Affordable Care Act.

70. In August 2011, pursuant to its responsibility under the ACA, the HRSA promulgated the Women's Preventive Service Guidelines (the "Guidelines"). *See* HRSA, Women's Preventive Service Guidelines (2011), available at https://www.hrsa.gov/womens-guidelines/index.html#2.

71. These Guidelines required that, as part of their group health plans, employers must cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," without any cost-sharing or payment by the insureds. *Id.*

72. As recently as December 2016, HRSA updated the Guidelines, following yet another review of evidence-based facts, determining that full coverage for contraceptive care and services must continue to be required. *See* https://www.hrsa.gov/womens-guidelines-2016/index.html.

The Departments Grant Limited Exemptions and Accommodations to Religious Objectors

73. The Affordable Care Act does not contain a "conscience clause" that would allow employers to opt out of providing those preventive services required by the statute.

74. Nevertheless, in 2011, the Departments undertook regulatory action to accommodate religious objectors.

75. The Departments issued regulations in 2011 that exempt "churches, their integrated auxiliaries, and conventions or associations of churches" from the ACA's requirement that employers cover contraceptive services, without cost-sharing requirements, under employee group health care plans – provided these conscientious objectors satisfied certain criteria (the "Original Religious Exemption"). *See* Group Health Plans and Health Insurance Issuers Relating

to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (Aug. 3, 2011).

76. To qualify, the purpose of the organization had to be "[t]he inculcation of religious values," the organization had to primarily employ and serve, "persons who share the religious tenets of the organization," and the organization had to be a certified non-profit. 76 Fed. Reg. 46621.

77. Following the issuance of the HRSA guidelines, several Senators proposed amending the Affordable Care Act to allow health plans to refuse to provide coverage for certain services if doing so was "contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan." S. Amdt. 1520, 112th Congress (2011-2012).

78. The proposed amendment was necessary, as its signors specifically acknowledged, because the ACA "does ***not*** allow purchasers, plan sponsors, and other stakeholders with religious or moral objections to specific items or services to decline providing or obtaining coverage of such items or services, or allow health care providers with such objections to decline to provide them." *Id.* (emphasis added).

79. That proposed amendment was rejected; it did not become law. 158 Cong. Rec. S1172-S1172 (Mar. 1, 2012).

80. The following year, the Departments issued regulations to accommodate *additional* religious nonprofit organizations that had not been exempted from the ACA's Contraceptive Mandate under the Departments' 2011 regulations but still wanted to avoid the ACA's mandate of having to provide contraceptive services to their employees (the "Religious Non-Profit Accommodation"). *See* 80 FR 41318-01.

81. Under the Religious Non-Profit Accommodation, an objecting employer could notify its health insurance provider of religious objections and the insurer – not the objecting employer – would then have to provide the necessary and required contraceptive services directly to women covered under the employer's plan. *See* 80 FR 41318-01. In this way, women whose employers refused to pay for the legally mandated contraceptive coverage under the Religious Non-Profit Accommodation still had access to contraceptive care.

82. This was different from those women who were insured under coverage from "churches, their integrated auxiliaries, and conventions or associations of churches" that were wholly exempt from the ACA's Contraceptive Mandate under the Original Religious Exemption.

83. At that time, the Defendant Departments declined to create any broader exceptions to the Contraceptive Mandate. Instead, they struck a balance by adhering to the evidence-based approach to women's preventive health needs intended by Congress and allowing only the Original Religious Exemption and the Religious Non-Profit Accommodation, two reasonable exceptions under which religious organizations and nonprofit employers with religious objections, could opt out of the ACA's Contraceptive Mandate.

84. Indeed, throughout this process, the government continued to focus on the evidence-based medical conclusion that guaranteeing women's access to contraceptives is an essential healthcare component to allowing women to participate as full members of society.

85. For example, even while trying to accommodate the views of religious objectors, the Defendant Departments firmly articulated their evidence-based conclusion that barriers to contraceptive access "place[] women in the workforce at a disadvantage compared to their male co-workers" and observed that, "by reducing the number of unintended and potentially unhealthy pregnancies, [contraceptive coverage] furthers the goal of eliminating this disparity by allowing

women to achieve equal status as healthy and productive members of the job force." 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

Litigation Challenging the ACA's Contraceptive Mandate

86. Following enactment of the ACA and the relevant implementing regulations, several employers filed lawsuits to challenge the scope of the Contraceptive Mandate, the Original Religious Exemption and the Religious Non-Profit Accommodation.

87. In *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014), the Supreme Court concluded that applying the ACA's Contraceptive Mandate to closely held corporations that objected on the basis of sincerely held religious beliefs violated the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–1.

88. That statute provides that the government may not "substantially burden a person's exercise of religion" unless it did so "in furtherance of a compelling governmental interest" and adopted "the least restrictive means of furthering that compelling governmental interest." *Id.*

89. As a result of the ruling in *Hobby Lobby*, the Defendant Departments began allowing such employers to take advantage of the Religious Non-Profit Accommodation process previously available only to nonprofit employers.

90. Two years later, in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the Supreme Court considered several consolidated challenges to the accommodation process itself. Following oral argument, the Court sought clarification from the parties as to whether a modified accommodation process that did not require the employer to formally notify its insurance company of its objection – but would still ensure that the employer's employees received

contraceptive coverage – would accommodate both the government's interests and the objections of certain religious employers.

91. After receiving clarification from the parties, the Supreme Court remanded to provide them with "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560 (citation omitted).

92. On January 9, 2017, however, the Department of Labor announced that "no feasible approach has been identified … that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." FAQs about Affordable Care Act Implementation Part 36 (Jan. 9, 2017).

President Trump's Executive Order "Promoting Free Speech and Religious Liberty"

93. On May 4, 2017, President Donald Trump issued an Executive Order entitled "Promoting Free Speech and Religious Liberty." President Donald Trump, "Presidential Executive Order Promoting Free Speech and Religious Liberty," (May 4, 2017).

94. Among other provisions, this Executive Order directed the Defendant Departments to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of Title 42, United States Code." *Id.* § 3.

95. This Executive Order did not specifically mention the Contraceptive Mandate. Rather, the President directed the Defendant Departments to consider issuing amended

regulations to address conscience-based objections to services provided under the *Women's Health Amendment* to the Affordable Care Act ***only***.

96. The President did not, for example, direct the Departments to consider regulations addressing objections to any other preventive services.

97. President Trump's Executive Order did not identify any deficiencies with the existing regulations that addressed conscience-based objections (the Original Religious Exemption and the Religious Non-Profit Accommodation) or provide any guidance whatsoever as to the amended regulations that the President had directed the Departments to consider issuing.

98. The Executive Order stated only that any amended regulations issued must be "consistent with applicable law." *Id.* § 6(b).

The Departments Issue New Exemption Rules Without Engaging in Required Notice-and-Comment Rulemaking

99. In May and June 2017, several news organizations obtained and published an otherwise unreleased draft regulation entitled "Coverage of Certain Preventive Services under the Affordable Care Act." *See, e.g.*, Vox.com, "Leaked regulation: Trump plans to roll back Obamacare birth control mandate" (May 31, 2017), available at https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation.This draft regulation was dated May 23, 2017.

100. Last Friday on October 6, 2017, the Defendant Departments simultaneously issued both the Religious Exemption Rule and the Moral Exemption Rule.

101. These new Exemption Rules significantly expanded exemptions to the Contraceptive Mandate – they are the proverbial exceptions that swallowed the rule.

102. Though more than four months had passed since the draft regulation had leaked, the Departments issued the Exemption Rules without any advance public notice and without inviting or providing opportunity for comment.

The Religious Exemption Rule

103. The Religious Exemption Rule significantly expands the scope of the existing Original Religious Exemption for certain religious employers.

104. Specifically, it allows *all* employers – including large, publicly traded corporations – to opt out of providing no-cost contraceptive coverage to their employees on the basis of "sincerely held religious beliefs." Religious Exemption at 74.

105. In the context of publicly traded corporations, the Religious Exemption Rule suggests that, if owners of a majority of a company's shares possess a religious objection to contraceptive coverage, the company can simply refuse to provide such coverage.

106. The Religious Exemption Rule states that "in a country as large as America comprised of a supermajority of religious persons … the majority of shares (or voting shares) of some publicly traded companies might be controlled by a small group of religiously devout persons so as to set forth such a religious character." Religious Exemption at 68-69.

107. In other words, the rule is speculative, on its face, concerned with the possibility that a "religious publicly traded company *might* have objections to contraceptive coverage…" Religious Exemption at 69 (emphasis added).

108. The Religious Exemption Rule is not based on any identifiable injury to any group of people.

The Moral Exemption Rule

109. The Moral Exemption Rule creates a brand new exemption allowing employers to refuse to provide their employees with contraceptive coverage solely "based on sincerely held moral convictions." IFR 2017-21852.

110. This exemption applies to nonprofit entities *and* for-profit entities whose shares are not publicly traded. Unlike the Religious Exemption Rule, the Moral Exemption Rule does not allow publicly traded companies to opt out of the Mandate.

111. Taken together, however, the Exemption Rules eliminate the accommodation process entirely because objecting entities "do not need to file notices or certifications of their exemption." *See* Moral Exemption 48-49; Religious Exemption 61.

112. Employees of companies that object under either Exemption Rule will lose access to the contraceptive coverage required under the ACA's Contraceptive Mandate.

The Defendant Departments' Purported Justification for the New Exemption Rules

113. The Departments justify the Exemption Rules on the basis that *some **other** federal statutes* contain express provisions creating exemptions for individuals or organizations that object to certain conduct on religious or moral grounds. *See* Religious Exemption at 5 & n.1.

114. But the Affordable Care Act is *not* one of them – the ACA contains no exemption whatsoever for individuals or organizations that object to provisions of the law based on religious or moral grounds.

115. In fact, the Senate expressly rejected adding such an exemption to the ACA. *See supra* ¶¶ 74-76.

116. Despite Congress's specific choice *not to include* such a provision in the ACA, the Defendant Departments claim that "Congress has *consistently* sought to protect religious

beliefs in the context of health care and human services, including health insurance, even as it has sought to promote access to health services." Religious Exemption at 5 (emphasis added).

117. The Departments further suggest that the Religious Exemption was necessary to comply with the Religious Freedom Restoration Act, *id.* at 32 – but state that, "even if exemptions are not required" under that Act, they will "exercise their discretion to address the substantial burden identified in *Hobby Lobby* by expanding the exemptions from the [Contraceptive] Mandate instead of revising accommodations previously offered," *id.* at 53.

118. The Defendant Departments did not rely on the Religious Freedom Restoration Act in issuing the Moral Exemption; instead they claimed that the ACA granted them broad discretion to create exemptions from the Contraceptive Mandate. *See* IFR 2017-21852 at 9 ("The Departments have consistently interpreted section 2713(a)(4)'s of the PHS Act grant of authority to include broad discretion to decide the extent to which HRSA will provide for and support the coverage of additional women's preventive care and screenings in the Guidelines. In turn, the Departments have interpreted that discretion to include the ability to exempt entities from coverage requirements announced in HRSA's Guidelines.").

119. The Exemption Rules did *not* say, however, that HRSA had determined that contraception was no longer preventive medical care; nor did they assert any valid medical reasons for exempting certain employers from the mandate.

120. Because both of the Exemption Rules were issued as Interim Final Rules (IFRs), they did not go through the ordinary notice-and-comment process—they became effective immediately.

121. The Departments argued that it was necessary to take this extraordinary step of issuing the Exemption Rules as IFRs because several lawsuits challenging varying aspects of the

Contraceptive Mandate were ongoing and allowing the rules to go into effect immediately would "help settle or resolve cases, and … ensure, moving forward, that [the Departments'] regulations are consistent with any approach [they] have taken in resolving certain litigation matters." Religious Exemption at 81.

122. Among the supposed burdens imposed by the ongoing litigation, the Departments identified the fact that "Courts of Appeals have been asking the parties in those cases to submit status reports every 30 through 90 days" and that "several courts have issued orders setting more pressing deadlines." Religious Exemption at 80.

123. The Departments further asserted that they had been unable to comply with court orders directing them to set forth their position in specific lawsuits "because this interim final rule [the Religious Exemption] was not yet on public display." Religious Exemption at 81.

124. The Departments do not explain why this litigation precluded them from following the notice-and-comment requirements of the APA, nor do they explain why their own inability to articulate their position in individual cases justifies imposing sweeping rules with immediate effect.

125. The Exemption Rules undermine the balance struck under the prior regulatory scheme and run counter to the Affordable Care Act's mandate that evidence-based preventive services be provided.

126. As a result of these abuses, which replace evidence-based science and medical reasoning with political calculation, millions of women will be penalized and denied needed contraceptive care against the advice of science, public health and medical professionals.

Specific Harm to the Commonwealth of Pennsylvania Caused by the New Exemption Rules

127. The States are generally preempted from regulating self-insured plans. Such plans are, instead, governed by the Employee Retirement Income Security Act of 1974 ("ERISA") (Pub. L. 93–406, 88 Stat. 829, enacted September 2, 1974, codified in part at 29 U.S.C. ch. 18), a federal law that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans.

128. As of 2010, approximately 80% of "large employers" (with over 1000 employees), and 50% of "mid-sized employers" (with 200-1000 employees), offered self-insured plans. *See* Rand Corp., "Employer Self-Insurance Decisions," at 17-18 (Mar. 2011) (prepared for United States Department of Labor and HHS).

129. As a result of the Defendants' new Exemption Rules, it is estimated that many employers will claim newly expanded exemptions and will bar their own employees from receiving medical coverage that is otherwise required under the Contraceptive Mandate.

130. Upon information and belief, many of these newly-created Contraceptive Mandate-exempted employers are expected to be Pennsylvania companies.

131. This will result in numerous insureds – and their female dependents – losing medical coverage for contraceptive care under the Affordable Care Act.

132. Many of those losing this legally-mandated coverage will be Pennsylvania policy holders; all of the women affected will face an increased risk of medical harm or an increased economic burden if they choose to self-fund contraception

133. This broad loss of formerly-mandated contraceptive care will result in significant, direct and proprietary harm to the Commonwealth, which will bear increased costs as a result of the Exemption Rules.

134. Some women who lose their employer-sponsored health coverage for contraceptive care will seek coverage through Pennsylvania's subsidized family planning program, which provides preventive screenings and contraceptives for low-income women who are not eligible for Medicaid. This additional financial burden will be borne by the Commonwealth.

135. Other women will forgo contraceptive health services altogether, because the loss of their employer-sponsored coverage will make their formerly-mandated care unaffordable or inaccessible. But this will not help Pennsylvania's coffers.

136. Rather, as a result of the affected women no longer receiving coverage, Pennsylvania will see an increase in unintended pregnancies and other negative health outcomes which, in addition to other personal, social and societal burdens, will impose direct costs on the Commonwealth.

137. Indeed, to date – before the Defendants issued their new Exemption Rules – the Contraceptive Mandate has resulted in extraordinary savings for women that are also enjoyed by the Commonwealth of Pennsylvania.

138. A recent study conducted by the University of Pennsylvania found, for example, that the ACA's Contraceptive Mandate "is saving the average [contraceptive] pill user $255 per year" and "the average woman receiving an IUD is saving $248."*See* University of Pennsylvania School of Medicine, "Affordable Care Act results in dramatic drop in out-of-pocket prices for

prescription contraceptives," Press Release (July 7, 2015), https://www.eurekalert.org/pub_releases/2015-07/uops-aca070615.php.

139. Spread over an estimated 6.88 million privately insured oral contraceptive users in the United States, the University of Pennsylvania study estimates that, as a result of the ACA's Contraceptive Mandate, "consumer annual contribution to spending on the pill could be reduced by almost $1.5 billion annually." *Id*. It is believed that the Commonwealth has enjoyed increased tax revenue as a result of its female citizens enjoying increased savings borne from the contraceptive mandate.

140. In addition to the direct, proprietary harm set forth above, the new Exemption Rules impermissibly encroach on the Commonwealth's sovereign interest in protecting the health, safety, and well-being of its residents, and in ensuring that they enjoy equal access to federal programs. As such, in addition to proprietary standing, the Commonwealth has *parens patriae* standing to vindicate these interests.

CAUSES OF ACTION

COUNT I

Violation of Equal Protection of the Law

141. The Commonwealth incorporates by reference the foregoing paragraphs of this Complaint as if set forth at length.

142. Under the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the federal government may not deny any person equal protection of the law. US CONST. amend. V.

143. Discrimination on the basis of sex violates this constitutional guarantee.

144. The new Exemption Rules apply to one category of preventive medical care only – *contraception*.

145. And contraception is used solely by women.

146. Because the Exemption Rules allow employers to refuse previously-mandated preventive medical services for women only, they violate the Constitution's guarantee of equal protection under the law.

COUNT II

Violation of Title VII of the Civil Rights Act and the Pregnancy Discrimination Act

147. The Commonwealth incorporates by reference the foregoing paragraphs of this Complaint as if set forth at length.

148. The Exemption Rules violate Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, which prohibits discrimination based on sex. *See* 42 U.S.C. § 2000e et seq. (Title VII).

149. The Pregnancy Discrimination Act prohibits discrimination "on the basis of pregnancy, childbirth, or related medical conditions." *See* 42 U.S.C.A. § 2000e. That protects employees from discrimination based on their need for contraception.

150. Classifying employees on the basis of their childbearing capacity, regardless of whether they are, in fact, pregnant, is prohibited sex discrimination under Title VII.

151. Male and female employees have different health care needs, and only women can get pregnant, bear children, or use contraception.

152. The Exemption Rules violate Title VII because they discriminate against women on the basis of their capacity to get pregnant.

COUNT III

Violation of the Establishment Clause

153. The Commonwealth incorporates by reference the foregoing paragraphs of this Complaint as if set forth at length.

154. The IFRs violate the Establishment Clause of the First Amendment to the U.S. Constitution.

155. The Departments have used their rulemaking authority for the primary purpose, and with the actual effect, of advancing and endorsing religious interests.

156. The Departments have acted to promote employers' religious beliefs over the self-determination of women who do not share those beliefs, and over the ACA's mandate that preventive care be provided.

157. Through the IFRs, the government has endorsed employers' religious beliefs, over science, to the detriment and discrimination of women. The expanded exemptions grant employers executive authority over whether employees receive contraceptive coverage, whether needed to prevent unintended pregnancy, and/or to treat a medical condition, with no accommodation process.

158. The IFRs elevate employers' religious beliefs over the constitutional rights, and statutory guarantees, of women, in violation of the Establishment Clause to the United State Constitution.

COUNT IV

Failure to Engage in Notice and Comment Rulemaking

159. The Commonwealth incorporates by reference the foregoing paragraphs of this Complaint as if set forth at length.

160. Under the APA, a court shall "hold unlawful" and "set aside" any "agency action, findings, and conclusions found to be … without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

161. In issuing substantive rules, federal agencies are required to follow the notice and comment process set forth in the APA unless the agency "for good cause" finds that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B) .Any such findings must be incorporated into the rules along with "a brief statement of reasons therefor." *Id.*

162. Specifically, before issuing any rule, the agency must publish a "[g]eneral notice of proposed rule making" in the *Federal Register*. 5 U.S.C. § 553(b).

163. That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

164. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b)(c).

165. Here, in issuing the Exemption Rules, the Defendant Departments failed to follow these basic legal requirements of the APA.

166. Furthermore, the justifications offered by the Departments for their failure to engage in notice and comment rulemaking do not remotely satisfy the "good cause" standard required under section 553(b)(3)(B) of the APA; they are legally insufficient, contradictory, and inconsistent with the factual record.

167. Because the Departments failed to follow the procedural requirements of the APA, both Rules should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(D).

COUNT V

Violation of the Substantive Requirements of the Administrative Procedure Act

168. The Commonwealth incorporates by reference the foregoing paragraphs of this Complaint as if set forth at length.

169. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

170. Both the Moral Exemption Rule and the Religious Exemption Rule are inconsistent with the Affordable Care Act's requirement that group health plans and insurers provide women with preventive care as provided for in guidelines issued by the HRSA, without any cost-sharing requirements.

171. The Rules also violate the civil rights protections in the ACA prohibiting discrimination on the basis of sex and other protected categories in most health care programs and activities. These protections added to existing federal anti-discrimination provisions, including Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the provision of employer sponsored health care plans. See 42 U.S.C.A. § 18116.

172. They are also in derogation of the provisions of the ACA that prohibit the promulgation of any regulation that "[c]reates any unreasonable barrier to the ability of individuals to obtain appropriate medical care," "[i]mpedes timely access to health care services," or "[l]imits the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 1811.

173. In addition, neither Rule is required by the Religious Freedom Restoration Act or any other relevant statute.

174. Indeed, when it passed the Affordable Care Act, Congress elected *not* to include a "conscientious objector" or other exemption for individuals or organizations who object to any portion of the ACA on religious or moral grounds.

175. The Departments further abused their discretion and acted in a manner that was arbitrary and capricious in issuing the Rules.

176. Both Rules should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, the Commonwealth of Pennsylvania requests that this Court enter judgment in its favor and grant the following relief:

a. Declare the Moral Exemption Rule and the Religious Exemption Rule unlawful;

b. Vacate the Moral Exemption Rule and the Religious Exemption Rule;

c. Preliminarily and Permanently enjoin the application of the Moral Exemption Rule and the Religious Exemption Rule;

d. Award Plaintiff reasonable costs, including attorneys' fees; and

e. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY, Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*; ALEX M. AZAR II, *in his official capacity as Secretary of Health and Human Services*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, *in his official capacity as Secretary of the Treasury*; UNITED STATES DEPARTMENT OF THE TREASURY; RENE ALEXANDER ACOSTA, *in his official capacity as Secretary of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants.	**No. 2:17-cv-04540-WB**

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Commonwealth of Pennsylvania, by and through Attorney General Josh Shapiro, and the State of New Jersey, by and through Attorney General Gurbir S. Grewal, hereby file this Amended Complaint against Defendants Donald J. Trump, in his official capacity as President of the United States; Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services (HHS); Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; the United States Department of the Treasury; Rene Alexander Acosta, in his official capacity as Secretary of Labor; the United

States Department of Labor; and the United States of America (collectively, "Defendants") and, in support thereof, state the following:

1. This lawsuit challenges Defendants' illegal and unjustified attempts to deny millions of women in Pennsylvania, New Jersey, and across the country access to necessary preventive healthcare. As set forth more fully below, Defendants' actions violate, among other provisions of law, the Administrative Procedure Act, the Affordable Care Act, the guarantee of equal protection enshrined in the Due Process Clause of the Fifth Amendment to the United States Constitution, Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, and the Establishment Clause of the First Amendment. If Defendants are not blocked from implementing their unlawful rules, direct harm will result to the Commonwealth of Pennsylvania, the State of New Jersey, and the medical and economic health of their residents. Because these rules will cause irreparable harm and were issued in violation of law, the Commonwealth of Pennsylvania and the State of New Jersey seek declaratory and injunctive relief holding the rules unlawful and preventing their implementation.

INTRODUCTION

2. The Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001 et seq. (2010), together with its implementing regulations, requires certain health plans to cover all FDA-approved methods of contraception without imposing cost-sharing requirements on the insured. This requirement is known as the Contraceptive Care Mandate.

3. Because of the Contraceptive Care Mandate, over 55 million women have access to birth control without paying out-of-pocket costs, including 2.5 million women in Pennsylvania and 1.7 million in New Jersey. *See* Women's Preventive Services Initiative, *Recommendations for Preventive Services for Women: Final Report to the U.S. Department of Health and Human Services, Health Resources & Services Administration* 84 (2016) (the "WPSI Report"); HHS,

The Affordable Care Act is improving access to preventive services for millions of Americans (2015).[1] American women and their families covered by private insurance have saved an estimated 70 percent on contraceptive costs as a result. WPSI Report at 84.

4. Contraception approved by the U.S. Food and Drug Administration is medicine, and its use has been shown to reduce the rates of unintended pregnancies and abortions. *See* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 105 (2011) (the "IOM Report") (ECF No. 9-4).

5. Doctors prescribe contraception to their patients for many reasons, some not having to do with birth control at all. For example, doctors frequently prescribe contraception for treatment of various menstrual disorders, acne, abnormal growth of bodily hair, and pelvic pain. According to a 2011 report, more than 1.5 million women rely on oral "birth control" pills for medical reasons unrelated to preventing pregnancy, and 58 percent of all users of birth control pills—more than half—use them, at least in part, for purposes other than pregnancy prevention. *See* Rachel K. Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills*, Guttmacher Institute 3 (2011).[2]

6. For these and other reasons, "access to contraception improves the social and economic status of women." *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (citations omitted).

[1] https://aspe.hhs.gov/sites/default/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf.

[2] https://www.guttmacher.org/sites/default/files/report_pdf/beyond-birth-control.pdf.

7. As a result of the Affordable Care Act, millions of American women enjoy a greater degree of control over their own medical health and can more fully participate in the workforce.

8. Defendants, however, threaten to deny many of these women the contraceptive health coverage on which they have come to rely by making the Contraceptive Care Mandate effectively optional.

9. Defendants have issued regulations that create broad exemptions from the ACA's Contraceptive Care Mandate, and they have done so in violation of the Administrative Procedure Act (APA), the ACA, the U.S. Constitution, and federal law.

10. These regulations will allow individual employers, educational institutions, or other plan sponsors to decide whether women insured have access to contraception without out-of-pocket charges.

11. Defendants first issued these regulations as Interim Final Rules (IFRs). *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (the "Religious Exemption IFR"); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (the "Moral Exemption IFR") (together, "the IFRs") (ECF Nos. 9-2 & 9-3).

12. The IFRs went into effect immediately but were subsequently enjoined by this Court for violating the APA and the ACA (ECF Nos. 59 & 60).

13. After accepting public comment, Defendants subsequently issued rules that "finalize" the religious and moral exemptions created in the IFRs. *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*,

83 Fed. Reg. 57,536 (Nov. 15, 2018) (the "final Religious Exemption Rule"); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the "final Moral Exemption Rule") (together, the "final Exemption Rules"). The final Exemption Rules are attached respectively as Exhibits A and B.

14. The final Exemption Rules are scheduled to go into effect on January 14, 2019.

15. The final Exemption Rules were issued in direct violation of the substantive and procedural requirements of the APA.

16. In issuing the IFRs, Defendants failed to engage in notice and comment rulemaking as required by the APA and failed to show good cause for not doing so.

17. Because the final Exemption Rules "finalize" the IFRs, Defendants' subsequent acceptance of public comment does not cure the final rules of this procedural violation.

18. Defendants also failed to respond to significant comments and failed to provide adequate statements of the final rules' bases and purposes, as required by the APA.

19. The final Exemption Rules are also arbitrary and capricious, and their promulgation constitutes an abuse of discretion.

20. In addition, the final Exemption Rules themselves violate the requirements of the Affordable Care Act.

21. Furthermore, the final Exemption Rules apply only to one category of health services: contraception. And the preventative health benefits of contraception apply only to women.

22. By singling out women for such negative, differential treatment, Defendants have violated the equal protection guarantee of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

23. Pennsylvania and New Jersey will suffer direct, proprietary harm as a result of the final Exemption Rules. When employers refuse to allow their health insurance plans to cover access to contraception, women will be forced to turn to state-funded programs that provide contraceptive services. Pennsylvania and New Jersey will also be forced to bear additional healthcare costs due to an increase in unintended pregnancies.

24. In addition, Pennsylvania and New Jersey possess strong interests in protecting the medical and economic health of their residents, minimizing unintended pregnancies and abortions, and ensuring that all of their residents—both men and women—are free and able to fully participate in the workforce, maximize their social and economic status, and contribute to their economies without facing discrimination on the basis of sex.

25. These interested are enshrined in the Pennsylvania Constitution, which declares, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. I, § 28.

26. Likewise, Article I, Paragraph 1 of the New Jersey Constitution guarantees equal protection rights to New Jersey residents, and New Jersey's Law Against Discrimination, N.J.S.A. 10:5-12, makes it unlawful to subject people to differential treatment based on sex.

27. Defendants' actions directly undermine these vital state interests.

28. Because Defendants have engaged in illegal conduct that will harm Pennsylvania, New Jersey, and their citizens in these and other ways, this Court should hold that the final Exemption Rules, like the IFRs, are unlawful and set them aside. Pennsylvania and New Jersey

also seek a preliminary injunction to maintain the status quo throughout all future proceedings in this matter.

JURISDICTION AND VENUE

29. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 553, 701–06, and the United States Constitution. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

30. In addition, this Court has the authority to issue the declaratory relief sought pursuant to 28 U.S.C. § 2201.

31. Venue is proper in this Court because Plaintiff the Commonwealth of Pennsylvania resides in this district and because a substantial part of the events giving rise to this action occurred in this district. *See* 28 U.S.C. § 1391(e)(1).

THE PARTIES

32. Plaintiff, the Commonwealth of Pennsylvania, is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1.

33. Plaintiff, the State of New Jersey, is a sovereign state of the United States of America. This action is being brought on behalf of the State by Attorney General Gurbir S. Grewal, the State's chief legal officer. *See* N.J. Stat. Ann. § 52:17A-4(e), (g).

34. In filing this action, the Attorneys General seek to protect the citizens and agencies of Pennsylvania and New Jersey from harm caused by Defendants' illegal conduct, prevent further harm, and seek redress for the injuries caused to Pennsylvania and New Jersey by Defendants' actions. Those injuries include harm to Pennsylvania's and New Jersey's sovereign, quasi-sovereign, and proprietary interests.

35. Defendant Donald J. Trump is the President of the United States of America and is sued in his official capacity. His principal address is 1600 Pennsylvania Avenue NW, Washington, D.C. 20201.

36. Defendant Alex M. Azar II is the Secretary of the United States Department of Health and Human Services and is sued in his official capacity. His principal address is 200 Independence Avenue, SW, Washington, D.C. 20201

37. Defendant the United States Department of Health and Humans Services is an executive agency of the United States of America. Its principal address is 200 Independence Avenue, SW, Washington, D.C. 20201

38. Defendant Steven T. Mnuchin is the Secretary of the United States Department of the Treasury and is sued in his official capacity. His principal address is 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

39. Defendant the United States Department of the Treasury is an executive agency of the United States of America. Its principal address is 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

40. Defendant Rene Alexander Acosta is the Secretary of the United States Department of Labor and is sued in his official capacity. His principal address is 200 Constitution Avenue, NW, Washington DC 20210.

41. Defendant the United States Department of Labor is an executive agency of the United States of America. Its principal address is 200 Constitution Avenue, NW, Washington DC 20210.

42. Defendants the Department of Health and Humans Services, the Department of the Treasury, and the Department of Labor (together, the "Departments") are each responsible

for implementing various provisions of the ACA. The Departments jointly issued the IFRs and the final Exemption Rules, which gave rise to this action.

43. Defendant the United States of America encompasses the government agencies and departments responsible for the implementation of the Affordable Care Act under the Constitution of the United States.

44. Defendants Azar, Mnuchin, and Acosta are each responsible for carrying out the duties of their respective agencies under the Constitution of the United States of America and relevant statutes, including the Affordable Care Act.

45. Defendant Trump is responsible for faithfully enforcing the laws of the United States of America pursuant to and in accordance with the Constitution of the United States.

BACKGROUND

Congress Passes the Affordable Care Act and Women's Health Amendment

46. Access to preventive health services, including contraception, is essential for women to exercise control over their own healthcare and fully participate as members of society.

47. Access to contraception, in particular, allows women greater control over their reproductive health choices so they can better pursue educational, career, and personal goals.

48. Indeed, the expansion of preventive health services for women was a specific goal of the healthcare reform efforts that led to the passage of the Affordable Care Act.

49. Recognizing this need to expand women's access to preventive health services and reduce gender disparities in out-of-pocket costs, the U.S. Senate passed the "Women's Health Amendment" during debate over the ACA. *See* S. Amdt. 2791, 111th Congress (2009–2010).

50. This Amendment was included in the final version of the ACA, which was signed into law on March 23, 2010. *See* ACA § 1001; Public Health Service Act (as amended by the ACA) § 2713, 42 U.S.C. § 300gg-13(a)(4).

51. The Women's Health Amendment mandated that group health plans and health insurance issuers offering group or individual health insurance cover preventive health services and screenings for women—and do so with no cost-sharing responsibilities. 42 U.S.C. § 300gg-13(a)(4). Some employer-sponsored plans that were in existence prior to passage were exempt from this requirement and most of the other requirements imposed by the ACA. *See* 29 C.F.R. § 2590.715-1251 (2010).

52. During Senate debate on the Women's Health Amendment, lead sponsor Senator Barbara Mikulski explained that the amendment "leaves the decision of which preventive services a patient will use between the doctor and the patient." 155 Cong. Rec. S11988 (Nov. 30, 2009) (statement of Sen. Barbara Mikulski). She further emphasized that the "decision about what is medically appropriate and medically necessary is between a woman and her doctor." *Id.*

53. Senator Benjamin Cardin, who co-sponsored the Amendment, explained that it "extends the preventive services covered by the bill to those *evidence-based* services for women that are recommended by the Health Resources and Services Administration." 155 Cong. Rec. S12058–59 (Dec. 1, 2009) (statement of Sen. Benjamin Cardin) (emphasis added).

54. Congress did not dictate which specific preventive services were to be covered by the Amendment. Rather, they were to be determined by guidelines issued by experts at the Health Resources and Services Administration (HRSA), an agency of Defendant the United States Department of Health and Human Services (HHS). *Id.*

The Institute of Medicine Report on Clinical Preventive Services for Women

55. Following passage of the Affordable Care Act, HRSA complied with its legal responsibility to determine coverage guidelines by commissioning the then-named Institute of Medicine (IOM[3]) to issue recommendations identifying what specific preventive women's health services should be covered under the ACA's mandate. A private, nonprofit, and non-governmental institution, IOM is an "independent, evidence-based scientific advisor" operating under the 1863 congressional charter of the National Academy of Sciences. Nat'l Acad. Med., *About the National Academy of Medicine*.[4]

56. IOM, in turn, convened a committee of sixteen members, including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines, to formulate specific recommendations. *See* IOM Report.

57. After conducting an extensive study, that committee issued a comprehensive report, which identified several evidence-based preventive health services, unique to women, that it recommended be included as part of the HRSA's comprehensive guidelines under the ACA. *See* IOM Report.

58. As set forth in its Report, IOM found that contraceptives are a preventive service that should be covered under the ACA's mandate. *See* IOM Report at 109–10. In making this finding, IOM cited evidence that "contraception and contraceptive counseling" are "effective at reducing unintended pregnancies" and observed that "[n]umerous health professional

[3] IOM was renamed the National Academy of Medicine in 2015. Press Release, National Academies of Sciences, Engineering, and Medicine, Institute of Medicine to Become National Academy of Medicine (Apr. 28, 2015), http://www.nationalacademies.org/hmd/Global/News%20Announcements/IOM-to-become-NAM-Press-Release.aspx. Because the Report was issued in the name of IOM, this Complaint refers to IOM throughout.

[4] https://nam.edu/about-the-nam/.

associations recommend" that such family planning services be included as part of mandated preventive care for women. *See* IOM Report at 109.

59. Relying, in part, on recommendations from the American Academy of Pediatrics, the Society of Adolescent Medicine, the American Medical Association, the American Public Health Association, and the Association of Women's Health, Obstetric and Neonatal Nurses, IOM recommended that all employer sponsored health plans cover the "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." IOM Report at 109–10.

60. IOM based its recommendation on several important factors, including the prevalence of unintended pregnancy in the United States. As stated in its Report, in 2001, an estimated "49 percent of all pregnancies in the United States were unintended—defined as unwanted or mistimed at the time of conception." IOM Report at 102 (internal citations omitted).

61. IOM found that these unintended pregnancies disproportionately impact the most vulnerable: Although one in every 20 American women has an unintended pregnancy each year, unintended pregnancy is "more likely among women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." *Id.*

62. Unintended pregnancies are more likely to result in abortions: "In 2001, 42 percent of … unintended pregnancies [in the United States] ended in abortion." *Id.*

63. Moreover, women carrying babies to term are less likely to follow best health practices where those pregnancies are unintended. According to the IOM Committee on Unintended Pregnancy, "women with unintended pregnancies are more likely than those with

intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy." IOM Report at 103.

64. Women facing unintended pregnancies are also more likely to be "depressed during pregnancy, and to experience domestic violence during pregnancy." *Id.*

65. IOM also found "significantly increased odds of preterm birth and low birth weight among unintended pregnancies ending in live births compared with pregnancies that were intended." *Id.*

66. While all pregnancies carry inherent health risks, some women have serious medical conditions for which pregnancy is strictly contraindicated. IOM specifically found that "women with serious medical conditions such as pulmonary hypertension (etiologies can include idiopathic pulmonary arterial hypertension and others) and cyanotic heart disease, and . . . Marfan Syndrome," are advised against becoming pregnant. *Id.* For these women, contraception can be necessary, lifesaving medical care.

67. Use of contraceptives also promotes medically recommended "spacing" between pregnancies. IOM found that such pregnancy spacing is important because of the "increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced (within 18 months of a prior pregnancy)" and that "[s]hort interpregnancy intervals in particular have been associated with low birth weight, prematurity, and small for gestational age births." IOM Report at 103.

68. IOM also found that contraceptives are effective in preventing unintended pregnancies. As stated in the IOM Report, "greater use of contraception within the population produces lower unintended pregnancy and abortion rates nationally." IOM Report at 105.

69. IOM specifically highlighted a study showing that, as the rate of contraceptive use by unmarried women increased in the United States between 1982 and 2002, their rates of unintended pregnancy and abortion declined. *Id.*

70. IOM reported other studies that showed increased rates of contraceptive use by adolescents from the early 1990s to the early 2000s was associated with a "decline in teen pregnancies" and, conversely, that "periodic increases in the teen pregnancy rate are associated with lower rates of contraceptive use." IOM Report at 105.

71. IOM also found that contraception, as a method of preventing unintended pregnancy, is highly cost-effective, citing, among other things, savings in medical costs. It reported that "the direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002, with the cost savings due to contraceptive use estimated to be $19.3 billion." IOM Report at 107.

72. In addition to preventing unintended pregnancies, IOM recognized that contraceptives have other significant health benefits unrelated to preventing unintended pregnancy. IOM stated in its Report that these "non-contraceptive benefits of hormonal contraception include treatment of menstrual disorders, acne or hirsutism, and pelvic pain." IOM Report at 104. Long-term use of oral contraceptives has also been shown to "reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases." *Id.*

73. Indeed, a leading research and policy organization committed to advancing sexual and reproductive health and rights in the United States and globally found in a 2011 report that more than 1.5 million women rely on oral contraceptive "birth control" pills for medical reasons unrelated to preventing pregnancy and that that 58 percent of all users of birth control pills—

more than half—use them, at least in part, for purposes other than pregnancy prevention. *See* Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills*, at 3.

74. As of 2008, there were still "approximately 36 million U.S. women of reproductive age (usually defined as ages 15 to 44 years)" who were "estimated to be in need of family planning services because they were sexually active, able to get pregnant, and not trying to get pregnant." IOM Report at 103.

75. Importantly, IOM noted that cost is a meaningful barrier to contraceptive access, stating that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years" and citing to a Kaiser Permanente study that found "when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods." IOM Report at 109.

The Health Resources and Services Administration Adopts the IOM Report and Promulgates Guidelines

76. HRSA agreed with and adopted IOM's recommendation that contraceptive services be covered under the Women's Health Amendment to the Affordable Care Act.

77. In August 2011, pursuant to its responsibility under the ACA, HRSA promulgated the Women's Preventive Service Guidelines (the "Guidelines"). *See* HRSA, *Women's Preventive Services Guidelines* (2011).[5]

78. These Guidelines required that, as part of their group health plans, plan sponsors must cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization

[5] https://www.hrsa.gov/womens-guidelines/index.html#2.

procedures, and patient education and counseling for all women with reproductive capacity," without any cost-sharing or payment by the insureds. *Id.*

79. As recently as December 2016, HRSA updated the Guidelines, following yet another review of relevant evidence, and determined that contraceptive care and services should remain mandated preventive services. *See* HRSA, *Women's Preventative Services Guidelines* (2016).[6]

The Departments Grant Limited Exemptions and Accommodations to Religious Objectors

80. The Affordable Care Act does not contain a "conscience clause" that would allow employers to opt out of providing those preventive services required by the statute.

81. Nevertheless, in 2011, the Departments undertook regulatory action to accommodate religious objectors.

82. The Departments first issued regulations in 2011 that exempted "churches, their integrated auxiliaries, and conventions or associations of churches" from the ACA's requirement that employers cover contraceptive services, without cost-sharing requirements, under employee group healthcare plans—provided these conscientious objectors satisfied certain criteria.[7]

83. To qualify, the purpose of the organization had to be "[t]he inculcation of religious values"; the organization had to primarily employ and serve "persons who share the religious tenets of the organization"; and the organization had to operate as a non-profit. 76 Fed. Reg. at 46,623.

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[6] https://www.hrsa.gov/womens-guidelines-2016/index.html.

[7] *See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 76 Fed. Reg. 46,621 (Aug. 3, 2011); *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725 (Feb. 15, 2012).

84. In addition, several Senators proposed amending the Affordable Care Act to allow health plans to refuse to provide coverage for certain services if doing so was "contrary to the religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan." S. Amdt. 1520, 112th Congress (2011–2012).

85. The proposed amendment was necessary, its sponsors argued, because the ACA "does not allow purchasers, plan sponsors, and other stakeholders with religious or moral objections to specific items or services to decline providing or obtaining coverage of such items or services, or allow health care providers with such objections to decline to provide them." *Id.*

86. That proposed amendment was rejected and did not become law. 158 Cong. Rec. S1172-S1172 (Mar. 1, 2012).

87. The following year, the Departments amended the original religious exemption. *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870 (July 2, 2013) (the "Second Religious Exemption"). To claim the Second Religious Exemption, an organization must simply operate as a non-profit and be a church, its integrated auxiliary, or a convention or association of churches. *Id.* at 39,874.

88. At the same time, the Departments established an "accommodation" for religious nonprofit organizations that did not qualify for the Second Religious Exemption but still wanted to avoid the ACA's mandate of having to provide contraceptive services to their employees (the "Accommodation"). *Id.* at 39,874–82.

89. Under the Accommodation, an objecting employer could self-certify as an eligible organization. Once it self-certified, the health insurance issuer—not the objecting employer—would have to provide the necessary and required contraceptive services directly to women covered under the sponsor's plan. *Id.* In this way, women whose employers refused to pay for the

legally mandated contraceptive coverage under the Accommodation still had access to contraceptive care.

90. At that time, the Defendant Departments declined to create any broader exceptions to the Contraceptive Care Mandate. Instead, they struck a balance by adhering to the evidence-based approach to women's preventive health needs intended by Congress and allowing only the Second Religious Exemption and the Accommodation, two reasonable exceptions under which religious organizations and nonprofit employers with religious objections, could opt out of the ACA's Contraceptive Care Mandate.

91. Indeed, throughout this process, the government continued to recognize that guaranteeing women's access to contraceptive services is an essential healthcare component to allowing women to participate as full members of society.

92. For example, even while trying to accommodate the views of religious objectors, the Defendant Departments firmly articulated that barriers to contraceptive access "place[] women in the workforce at a disadvantage compared to their male co-workers" and observed that, "by reducing the number of unintended and potentially unhealthy pregnancies, [contraceptive coverage] furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force." 77 Fed. Reg. at 8728 (footnote omitted).

<u>Litigation Challenging the ACA's Contraceptive Care Mandate</u>

93. Following passage of the ACA and promulgation of the relevant implementing regulations, several employers filed lawsuits to challenge the scope of the Contraceptive Care Mandate, the Second Religious Exemption, and the Accommodation.

94. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court concluded that applying the ACA's Contraceptive Care Mandate to closely held

corporations that objected on the basis of sincerely held religious beliefs but that were not eligible for the Accommodation violated the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1.

95. That statute provides that the government may not "substantially burden a person's exercise of religion" unless it did so "in furtherance of a compelling governmental interest" and adopted "the least restrictive means of furthering that compelling governmental interest." *Id.*

96. As a result of the ruling in *Hobby Lobby*, the Defendant Departments began allowing closely held for-profit entities to take advantage of the Accommodation process previously available only to nonprofit employers. *Coverage of Certain Preventive Services Under the Affordable Care Act*, 80 Fed. Reg. 41,318 (July 14, 2015).

97. In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), the Supreme Court considered several consolidated challenges to the Accommodation itself. Following oral argument, the Court sought clarification from the parties as to whether a modified accommodation process that did not require the employer to formally notify its insurance company of its objection—but would still ensure that the employer's employees received contraceptive coverage—would accommodate both the government's interests and the objections of certain religious employers. *Id.* at 1559-60.

98. After receiving clarification from the parties, the Supreme Court remanded to provide them with "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560 (citation omitted).

99. On January 9, 2017, the Department of Labor announced that "no feasible approach has been identified . . . that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." Dep't of Labor, *FAQs about Affordable Care Act Implementation Part 36*, at 4 (Jan. 9, 2017).

100. As such, the Department reaffirmed that the Accommodation "does not substantially burden [objecting employers'] exercise of religion." *Id.* at 4–5. Even if it did, the Department also reaffirmed that "the accommodation is the least restrictive means of furthering the government's compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage." *Id.*

<u>President Trump's Executive Order "Promoting Free Speech and Religious Liberty"</u>

101. On May 4, 2017, President Donald Trump issued an Executive Order entitled "Promoting Free Speech and Religious Liberty." Exec. Order No. 13798, 82 Fed. Reg. 21,675 (May 4, 2017).

102. Among other provisions, this Executive Order directed the Defendant Departments to "consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of Title 42, United States Code." *Id.* § 3.

103. This Executive Order did not specifically mention the Contraceptive Care Mandate. Rather, the President directed the Defendant Departments to consider issuing amended regulations to address conscience-based objections to services provided under the Women's Health Amendment to the Affordable Care Act only.

104. The President did not, for example, direct the Departments to consider regulations addressing objections to similar requirements to provide other preventive services. *See* 42 U.S. Code § 300gg-13(a)(1)-(3).

105. President Trump's Executive Order did not identify any deficiencies with the existing regulations that addressed conscience-based objections (the Second Religious Exemption and the Accommodation) or provide any guidance whatsoever as to the amended regulations that the President had directed the Departments to consider issuing.

106. The Executive Order did not direct the agencies to comply with *Zubik*'s command that any exemptions to the Contraceptive Care Mandate "ensur[e] that women covered by … health plans 'receive full and equal health coverage, including contraceptive coverage.'" 136 S. Ct. at 1560. It stated only that any amended regulations issued must be "consistent with applicable law." *Id.* § 3.

<u>The Departments Issue the IFRs Without Engaging in Required Notice-and-Comment Rulemaking</u>

107. On October 6, 2017, the Defendant Departments issued the Moral Exemption and Religious Exemption IFRs without any advance public notice and without inviting or providing opportunity for comment.

108. The Religious Exemption IFR significantly expanded the scope of the existing religious exemption. Specifically, it allowed all employers—including non-profits, closely held for-profits companies, and publicly traded corporations—to opt out of providing no-cost contraceptive coverage to their employees on the basis of the employer's "sincerely held religious beliefs." 82 Fed. Reg. at 47,808–12. It also extended the exemption to institutions of higher education, insurance issuers, and individuals. *Id.*

109. The Religious Exemption IFR suggested that, if owners of a majority of a company's shares possess a religious objection to contraceptive coverage, the company can simply refuse to provide such coverage. The Religious Exemption IFR stated that "in a country as large as America comprised of a supermajority of religious persons . . . the majority of shares (or voting shares) of some publicly traded companies might be controlled by a small group of religiously devout persons so as to set forth such a religious character." *Id.* at 47,810.

110. The Moral Exemption IFR created a brand new exemption allowing employers to refuse to provide their employees with contraceptive coverage solely "based on sincerely held moral convictions" of the employer. 82 Fed. Reg. at 47,844.

111. The Moral Exemption IFR could be claimed by nonprofit entities, for-profit entities whose shares are not publicly traded, institutions of higher education, health insurance issuers, and individuals. 82 Fed. Reg. at 47,850. Unlike the Religious Exemption IFR, the Moral Exemption IFR did not allow publicly traded companies to opt out of the Mandate.

112. In the IFRs, the Departments admitted that employees of companies that objected under either IFR would lose access to the contraceptive coverage required under the ACA's Contraceptive Care Mandate. *See* 82 Fed. Reg. at 47,818-22.

113. Both IFRs allowed objecting entities to utilize the Accommodation, but eliminated any requirement that they do so. 82 Fed. Reg. at 47,812–13; 82 Fed. Reg. at 47,854.

114. Under the IFRs, objecting entities did "not need to file notices or certifications of their exemption." 82 Fed. Reg. at 47,808; 82 Fed. Reg. at 47,850.

115. The Departments estimated that between 31,700 and 120,000 women would lose access to federally mandated contraceptive services when their employers claimed the Religious Exemption. 82 Fed. Reg. at 47,816–24.

This Court Enjoins the IFRs

116. On October 11, 2017, the Commonwealth filed its original Complaint in this matter, alleging that the IFRs were unlawfully issued in violation of the APA and other statutory and constitutional provisions (ECF No. 1).

117. The Commonwealth further alleged that many Pennsylvania women who were denied contraceptive coverage as a result of the IFRs would be forced to rely on government-funded programs, causing the Commonwealth irreparable harm.

118. The Commonwealth moved for a preliminary injunction of the IFRs (ECF Nos. 8 & 9).

119. On December 15, 2017, this Court granted the Commonwealth's motion and enjoined the federal defendants (with the exception of the President) from enforcing the IFRs (ECF Nos. 59 & 60).

120. This Court found that Defendants had issued the IFRs without notice and comment in violation of the APA, and further found that the exemptions themselves were arbitrary, capricious, and contrary to the requirements of the ACA.

121. On December 21, 2017, the U.S. District Court for the Northern District of California also entered a preliminary injunction against the IFRs. *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017). This decision was recently affirmed. *California v. Azar*, No. 18-15155, Dkt. No. 136-1 (9th Cir. Dec. 13, 2018),

The Departments Issue the Final Exemption Rules

122. On November 15, 2018, the Departments issued the final Religious and Moral Exemption Rules. They are scheduled to go into effect on January 14, 2019. 83 Fed. Reg. at 57,536; 83 Fed. Reg. at 57,592.

123. The final Exemption Rules "finalize, with changes based on public comments," the broad exemptions originally created in the IFRs. 83 Fed. Reg. at 57,536; 83 Fed. Reg. at 57,592.

124. Like the Religious Exemption IFR, the final Religious Exemption Rule will allow all employers—including non-profits, closely held for-profits companies, and publicly traded corporations—to opt out of providing no-cost contraceptive coverage to their employees on the basis of the employer's "sincerely held religious beliefs." 83 Fed. Reg. at 57,537. It will also extend the exemption to institutions of higher education, insurance issuers, and individuals. *Id.*

125. Like the Moral Exemption IFR, the final Moral Exemption Rule will allow entities to avoid complying with the Contraceptive Care Mandate on the basis of the employer's "sincerely held moral convictions." 83 Fed. Reg. at 57,616. The final Moral Exemption can be claimed by nonprofit entities, for-profit entities whose shares are not publicly traded, institutions of higher education, health insurance issuers, and individuals.

126. Unlike the IFRs, however, the final Religious Exemption Rule will allow any employer—even one that does not have a sincerely held religious objection to contraception—to avoid complying with the Contraceptive Care Mandate if it adopts a group health plan "established or maintained" by an objecting organization. 83 Fed. Reg. at 57,560, 57,563–64.

127. The final Exemption Rules will also allow any covered entity to claim the exemption if they have a sincerely held religious or moral objection to "establishing, maintaining, providing, offering, or arranging for … a plan, issuer, or third party administrator that provides or arranges such coverage or payments [for some or all contraceptive services]." 83 Fed. Reg. at 57,537; 83 Fed. Reg. at 57,593.

128. As with the IFRs, the Departments admit that employees of companies that object under either final Exemption Rule would lose access to the contraceptive coverage required under the ACA's Contraceptive Care Mandate.

129. The Departments estimate that between 70,500 and 126,400 women will lose access to federally mandated contraceptive services when their employers claim the final Religious Exemption. 83 Fed. Reg. at 57,575–582.

130. To explain the more than doubled lower bound of impacted women, the Departments admit that the analysis they conducted in the IFR failed to properly account for the number of employees working for entities that had claimed the Accommodation. 83 Fed. Reg. at 57,576.

131. The final Exemption Rules undermine the balance struck under the prior regulatory scheme and run counter to the Affordable Care Act's mandate that evidence-based preventive services be provided.

132. As a result, millions of women potentially will be subjected to increased financial hardship and the loss of necessary contraceptive care.

Specific Harm to the Commonwealth of Pennsylvania and the State of New Jersey Caused by the final Exemption Rules

133. As a result of Defendants' final Exemption Rules, it is expected that many plan sponsors will claim the newly expanded exemptions and will deny their own employees and others medical coverage that is otherwise required under the Contraceptive Care Mandate.

134. As a result, numerous insureds—and their female dependents—will lose the medical coverage for contraceptive care required by the Affordable Care Act.

135. Upon information and belief, many of these employers operate in Pennsylvania and New Jersey.

136. During the course of litigation against the IFRs, Defendants revealed that they calculated their estimates of impacted women based on the assumption that many litigating and accommodated entities would use the religious and moral exemptions. A number of these entities are based in Pennsylvania and New Jersey: Bingaman and Son Lumber Inc., Kreamer, PA (number of employees unknown); Conestoga Wood Specialties Corporation, East Earl, PA (950 employees); Cummins Allison, Philadelphia, PA and Elmwood Park, NJ (number of employees unknown); DAS Companies, Inc., Palmyra, PA (number of employees unknown); Earth Sun Moon Trading Company, Inc., Grove City, PA (number of employees unknown); Geneva College, Beaver Falls, PA (1,850 students, 350 employees); Hobby Lobby (13,240 total employees, at least 25 stores in Pennsylvania and New Jersey); and Holy Ghost Preparatory School, Bensalem, PA (number of employees unknown).

137. Therefore, many of those losing legally-mandated coverage for contraceptive services will be Pennsylvania and New Jersey residents. All of the women affected will face an increased risk of medical harm or an increased economic burden if they choose to self-fund contraception

138. This broad loss of formerly-mandated contraceptive care will result in significant, direct and proprietary harm to Pennsylvania and New Jersey, which will bear increased costs as a result of the final Exemption Rules.

139. States are generally preempted from regulating self-insured plans. Such plans are, instead, governed by the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93–406, 88 Stat. 829 (codified in part at 29 U.S.C. ch. 18), a federal law that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans.

140. As of 2010, approximately 80 percent of "large employers" (with over 1000 employees), and 50 percent of "mid-sized employers" (with 200-1000 employees), offered self-insured plans. *See* Rand Corp., Employer Self-Insurance Decisions, at 17-18 (Mar. 2011) (prepared for United States Department of Labor and HHS).

141. New Jersey law requires employers who offer fully-insured plans to provide coverage for expenses incurred in the purchase of prescription female contraceptives to the same extent as any other outpatient prescription drug covered under the policy. *E.g.*, N.J. Stat. Ann. §§ 17B:26-2.1y, 17B:27:46.1ee, 17B:27A-19.15 (West 2018).

142. Unlike the Women's Health Amendment, New Jersey's contraceptive mandate does not require insurers to offer women contraceptive services with zero out-of-pocket costs. In addition, New Jersey's mandate only requires coverage for prescription female contraceptives, rather than all FDA-approved female contraceptive methods. As a result, female employees of objecting entities could lose coverage entirely for certain contraceptive methods and could be forced to pay significantly higher out-of-pocket costs for those methods that are covered.

143. These costs will impose an additional financial burden on women and will cause some women to forgo contraception entirely or to forgo their preferred method of contraception.

144. Approximately 3,434,000 New Jersey residents who have health insurance are covered by self-insured plans. Due to ERISA's preemption provision, self-insured plans offered by private employers are exempt from New Jersey's contraceptive mandate. As a result, New Jersey residents who are employed by organizations with self-insured plans that take advantage of the expanded exemption from the Contraceptive Care Mandate may lose all coverage for the medical costs associated with contraceptive care.

145. The complete loss of coverage (or partial loss of coverage and increased copays and deductibles for employees in non-ERISA plans) will be particularly problematic for women seeking to access long-acting reversible contraceptives, which are among the safest and most effective contraceptive methods available, but have very high initial costs, often in the range of $400 to $1,000 per person.

146. Some women who lose their contraceptive benefits because of the expanded exemptions granted will turn to state-funded programs for their contraceptives, which will force Pennsylvania and New Jersey to absorb additional financial costs presently borne by private-insurers.

147. In Pennsylvania, Medicaid (known as "Medical Assistance") provides contraceptive services to women in Pennsylvania with incomes up to 138 percent of the federal poverty level. The Commonwealth's Family Planning Services Program likewise provides contraceptive services to women with incomes up to 215 percent of the poverty level. The Commonwealth also funds Title X clinics, which have no income-based eligibility requirements. The additional financial burden from increased use of these programs will be borne by the Commonwealth.

148. New Jersey's state- and federally-funded Medicaid and Children's Health Insurance Programs (collectively, known as "NJ FamilyCare") similarly provide contraceptive coverage to New Jersey women with incomes up to 138 percent of the federal poverty limit. In addition, New Jersey's subsidized family planning clinics provide preventive screenings and contraceptives to all patients, regardless of income or insurance coverage, including financially vulnerable women who are not eligible for Medicaid. Increased use of these programs by women who lose coverage for contraceptive services under the final Exemption Rules will result in

additional costs to New Jersey, including the cost of providing services to low-income women who are eligible for free or reduced cost services, as well as the cost of expanding facilities to meet increased demand from all women, even those who due to their income level are required to pay fully or in part for the services they receive.

149. Other women will forgo contraceptive health services altogether, because the loss of their employer-sponsored coverage will make their formerly-mandated care unaffordable or inaccessible. As a result of the affected women no longer receiving coverage, Pennsylvania and New Jersey will see an increase in unintended pregnancies and other negative health outcomes which, in addition to other personal, social and societal burdens, are associated with significant additional costs to state-funded programs that protect the health of women and infants.

150. Nationally, a publicly funded birth in 2010 cost an average of $12,770 for prenatal and postnatal care, labor and delivery, and for the first year of infant care. In 2010, according to one study, New Jersey spent an estimated $186.1 million and Pennsylvania an estimated $248.2 million on unintended pregnancies. *See* Sonfield & Kathryn Kost, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care National and State Estimates for 2010*, at 13.

151. Indeed, to date—before Defendants issued the IFRs and the final Exemption Rules—the Contraceptive Care Mandate had resulted in extraordinary savings for women.

152. A recent study conducted by the University of Pennsylvania found, for example, that the ACA's Contraceptive Care Mandate "is saving the average [contraceptive] pill user $255 per year" and "the average woman receiving an IUD is saving $248." *See* Press Release, University of Pennsylvania School of Medicine, Affordable Care Act Results in Dramatic Drop

in Out-of-Pocket Prices for Prescription Contraceptives, Penn Medicine Study Finds (July 7, 2015).[8]

153. Spread over an estimated 6.88 million privately insured oral contraceptive users in the United States, the University of Pennsylvania study estimates that, as a result of the ACA's Contraceptive Care Mandate, "consumer annual contribution to spending on the pill could be reduced by almost $1.5 billion annually." *Id.*

154. In addition to the direct, proprietary harm set forth above, the final Exemption Rules impermissibly encroach on Pennsylvania's and New Jersey's quasi-sovereign interests in protecting the health, safety, and well-being of their residents, and in ensuring that they enjoy equal access to federal programs. As such, in addition to proprietary standing, Pennsylvania and New Jersey have *parens patriae* standing to vindicate these interests.

155. By failing to follow the procedures set forth in the APA, Defendants further harmed Pennsylvania and New Jersey by denying them the right to participate meaningfully in the rulemaking process.

CAUSES OF ACTION

COUNT I

Violation of Equal Protection of the Laws

156. Pennsylvania and New Jersey incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

[8] https://www.pennmedicine.org/news/news-releases/2015/july/affordable-care-act-results-in.

157. Under the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the federal government may not deny any person equal protection of the laws. U.S. Const. amend. V.

158. Discrimination on the basis of sex violates this constitutional guarantee.

159. The final Exemption Rules apply to only one category of preventive medical care, contraception, which is used predominantly by women.

160. Because the final Exemption Rules are targeted at women and deny them needed preventive medical services, the Rules violate the Constitution's guarantee of equal protection under the laws.

COUNT II

Violation of Title VII of the Civil Rights Act and the Pregnancy Discrimination Act

161. Pennsylvania and New Jersey incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

162. The Exemption Rules violate Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, which prohibits discrimination based on sex. *See* 42 U.S.C. § 2000e et seq. (Title VII).

163. The Pregnancy Discrimination Act prohibits discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e. It therefore prevents employees from discrimination based on need for contraception.

164. Classifying employees on the basis of their childbearing capacity, regardless of whether they are, in fact, pregnant, is prohibited sex discrimination under Title VII.

165. The Exemption Rules violate Title VII because they discriminate against women on the basis of their capacity to get pregnant.

COUNT III

Violation of the Procedural Requirements of the Administrative Procedure Act

166. Pennsylvania and New Jersey incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

167. Under the APA, a court shall "hold unlawful" and "set aside" any "agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

168. In issuing substantive rules, federal agencies are required to follow the notice and comment process set forth in the APA unless the agency "for good cause" finds that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Any such findings must be incorporated into the rules along with "a brief statement of reasons therefor." *Id.*

169. Specifically, before issuing any rule, the agency must publish a "[g]eneral notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b).

170. That notice must describe "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

171. The agency must further provide "interested persons" an "opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c).

172. In issuing the IFRs, the Defendant Departments failed to follow these basic requirements.

173. Furthermore, the justifications offered by the Departments for their failure to engage in notice and comment rulemaking did not satisfy the "good cause" standard required under section 553(b)(3)(B) of the APA.

174. In issuing the final Exemption Rules, Defendants similarly did not follow the notice and comment procedures as set forth in the APA. Rather, Defendants accepted comments after the IFRs had already gone into effect, and purported to consider those comments in issuing the final Exemption Rules.

175. The final Exemption Rules "finalize" the IFRs, and adopt without change most of the language in the IFRs.

176. As a result, the final Exemption Rules are impermissibly tainted with the same procedural defects as the IFRs.

177. In addition, when an agency does accept comments, it must respond to all significant comments and provide a statement of the "basis and purpose" of each final rule. 5 U.S.C. § 553(c).

178. The responses to comments offered by Defendants in the final Exemption Rules are insufficient, and the statements of basis and purpose fail to satisfy APA requirements.

179. Because the Departments failed to follow the procedural requirements of the APA, the final Exemption Rules should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(D).

COUNT IV

Violation of the Substantive Requirements of the Administrative Procedure Act

180. Pennsylvania and New Jersey incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

181. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

182. Both the final Moral Exemption Rule and the final Religious Exemption Rule are inconsistent with the Affordable Care Act's requirement that group health plans and insurers provide women with preventive care as provided for in guidelines issued by HRSA, without any cost-sharing requirements.

183. The Rules also violate the civil rights protections in the ACA prohibiting discrimination on the basis of sex and other protected categories in most healthcare programs and activities. *See* 42 U.S.C. § 18116.

184. They also violate the provisions of the ACA that prohibit the promulgation of any regulation that "[c]reates any unreasonable barrier to the ability of individuals to obtain appropriate medical care," "[i]mpedes timely access to health care services," or "[l]imits the availability of health care treatment for the full duration of a patient's medical needs." 42 U.S.C. § 18114.

185. In addition, the Departments abused their discretion and acted in a manner that was arbitrary and capricious in issuing the final Exemption Rules. 5 U.S.C. § 706(2)(A).

186. Specifically, the Departments fail to provide an adequate rationale for concluding that the Accommodation violates the Religious Freedom Restoration Act. They also fail to provide adequate reasons for why the final Religious Exemption is required or permissible under the Religious Freedom Restoration Act.

187. Indeed, when it passed the Affordable Care Act, Congress elected not to include a "conscientious objector" or other exemption for individuals or organizations who object to any portion of the ACA on religious or moral grounds.

188. The Departments further rely on arbitrary and capricious explanations to justify their decision to issue the Final Exemptions Rules.

189. Because the final Exemption Rules are arbitrary, capricious, an abuse of discretion, and contrary to law, they should be held unlawful and set aside pursuant to 5 U.S.C. § 706(2)(A).

COUNT V

Violation of the Establishment Clause

190. Pennsylvania and New Jersey incorporate by reference the foregoing paragraphs of this Complaint as if set forth at length.

191. The final Exemption Rules violate the Establishment Clause of the First Amendment to the U.S. Constitution.

192. The Departments have used their rulemaking authority for the primary purpose, and with the actual effect, of advancing and endorsing religious interests.

193. The Departments have acted to promote employers' religious beliefs over the self-determination of women who may not share those beliefs and over the ACA's mandate that preventive care be provided.

194. As a result, the final Exemption Rules violate the Establishment Clause.

PRAYER FOR RELIEF

WHEREFORE, the Commonwealth of Pennsylvania and the State of New Jersey request that this Court enter judgment in their favor and grant the following relief:

a. Declare the final Moral Exemption Rule and the final Religious Exemption Rule unlawful;

b. Vacate the final Moral Exemption Rule and the final Religious Exemption Rule;

c. Preliminarily and permanently enjoin the application of the final Moral Exemption Rule and the final Religious Exemption Rule;

d. Award Plaintiffs reasonable costs, including attorneys' fees; and

e. Grant such other and further relief as the Court deems just and proper.

December 14, 2018

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA et al., Plaintiffs, v. DONALD J. TRUMP et al., Defendants.	**No. 2:17-cv-04540-WB**

DECLARATION OF KATHRYN KOST

I, Kathryn Kost, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by Plaintiffs in the above-captioned matter and, in support thereof, state as follows:

1. I am the Acting Vice President for Domestic Research at the Guttmacher Institute. I have worked for the Guttmacher Institute in a full-time or consulting capacity for nearly 30 years since joining the Institute as a Senior Research Associate in 1989. I received my BA in sociology from Reed College and my PhD in sociology from Princeton University, where I specialized in demography at the Office of Population Research.

2. The Guttmacher Institute is a private, independent, nonprofit, nonpartisan corporation that advances sexual and reproductive health and rights through an interrelated program of research, policy analysis, and public education. The Institute's overarching goal is to ensure quality sexual and reproductive health for all people worldwide by conducting research according to the highest standards of methodological rigor and promoting evidence-based policies. It produces a wide range of resources on topics pertaining to sexual and reproductive health and publishes two peer-reviewed journals. The information and analysis it generates on

reproductive health and rights issues are widely used and cited by researchers, policymakers, the media and advocates across the ideological spectrum.

3. Over the course of more than 30 years, I have designed, executed, and analyzed numerous quantitative and qualitative research studies in the field of reproductive health care, including those on contraceptive use and failure, unintended pregnancy, maternal and child health, and the impact on public health and fisc associated with particular reproductive health care policies or trends. My peer-reviewed research has been published in dozens of articles, including first-authored work in *Demography*, *Perspectives on Sexual and Reproductive Health*, *Contraception*, *Studies in Family Planning* and other public health, medical and demographic journals. My education, training, responsibilities and publications are set forth in greater detail in my curriculum vitae, a true and correct copy of which is attached as Exhibit A. I submit this declaration as an expert on reproductive health care, family planning, and unintended pregnancy, and the impact on individuals, families, and the public health from access to contraception and related care, or interference with that care, in the United States.

4. I understand that this lawsuit involves a challenge to the federal government's Final Rules ("Final Rules") regarding the Affordable Care Act's ("ACA") contraceptive coverage mandate. In my expert opinion, the Final Rules would compromise women's ability to obtain contraceptive methods, services and counseling and, in particular, to consistently use the best methods for them, thus putting them at heightened risk of unintended pregnancy.

Contraception Is Widely Used and the Majority of Women Rely on Numerous Contraceptive Methods for Decades of Their Lives

5. More than 99% of women aged 15–44 who have ever had sexual intercourse have used at least one contraceptive method; this is true across a variety of religious affiliations.[1] Some 61% of all women of reproductive age are currently using a contraceptive method.[2] Among women at risk of an unintended pregnancy (i.e., women aged 15–44 who have had sexual intercourse in the past three months, are not pregnant or trying to conceive, and are not sterile for noncontraceptive reasons), 90% are currently using a contraceptive method.[3]

6. A typical woman in the United States wishing to have two children will, on average, spend three decades—roughly 90% of her reproductive life—avoiding unintended pregnancy.[4]

7. Women and couples rely on a wide range of contraceptive methods: In 2014, 25% of female contraceptive users relied on oral contraceptives and 15% on condoms as their most effective method. That means that six in 10 contraceptive users relied on other methods: female or male sterilization; hormonal or copper intrauterine devices (IUDs); other hormonal methods including the injectable, the ring, the patch and the implant; and behavioral methods, such as withdrawal and fertility awareness methods.[5]

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[1] Daniels K, Mosher WD and Jones J, Contraceptive methods women have ever used: United States, 1982–2010, *National Health Statistics Reports*, 2013, No. 62, https://www.cdc.gov/nchs/products/nhsr.htm.
[2] Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017, https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012.
[3] Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017, https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012.
[4] Sonfield A, Hasstedt K and Gold RB, *Moving Forward: Family Planning in the Era of Health Reform*, New York: Guttmacher Institute, 2014, https://www.guttmacher.org/report/moving-forward-family-planning-era-health-reform.
[5] Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017, https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012

8. Most women rely on multiple methods over the course of their reproductive lives, with 86% having used three or more methods by their early 40s.[6] Sometimes, women and couples may try out different methods to find one that they can use consistently or that minimizes side effects. Other times, they may switch from method to method—such as from condoms to oral contraceptives to sterilization—as their relationships, life circumstances and family goals evolve.

9. Many people use two or more methods at once: 17% of female contraceptive users did so the last time they had sex.[7] For example, they may use condoms to prevent STIs and an IUD for the most reliable prevention of pregnancy. Or they may use multiple methods simultaneously—for instance, condoms, withdrawal and oral contraceptives—to provide extra pregnancy protection.

Women Need Access to the Full Range of Contraceptive Options to Most Effectively Avoid Unintended Pregnancies

10. Using any method of contraception greatly reduces a woman's risk of unintended pregnancy. Sexually active couples using no method of contraception have a roughly 85% chance of experiencing a pregnancy in a one-year period, while the risk for those using a contraceptive method ranges from 0.05% to 28%.[8,9]

[6] Daniels K, Mosher WD and Jones J, Contraceptive methods women have ever used: United States, 1982–2010, *National Health Statistics Reports*, 2013, No. 62, https://www.cdc.gov/nchs/products/nhsr.htm.
[7] Kavanaugh ML and Jerman J, Concurrent multiple methods of contraception in the United States, poster presented at the North American Forum on Family Planning, Atlanta, Oct. 14–16, 2017.
[8] Sundaram A et al., Contraceptive failure in the United States: estimates from the 2006-2010 National Survey of Family Growth, *Perspectives on Sexual and Reproductive Health*, 2017, 49(1):7–16, https://www.guttmacher.org/journals/psrh/2017/02/contraceptive-failure-united-states-estimates-2006-2010-national-survey-family.
[9] Trussell J, Aiken A, "Contraceptive Efficacy" pp. 829–928. In Hatcher RA et al., eds., *Contraceptive Technology,* 21st ed., New York: Ayer Company Publishers, 2018.

11. All new contraceptive drugs and devices (just like other drugs and devices) must receive approval from the U.S. Food and Drug Administration (FDA) and must be shown to be safe and effective through rigorous scientific testing. Thus, the federal government itself provides the oversight to ensure that contraception is safe and effective in preventing pregnancy.

12. The government's effort to imply that there is doubt about whether contraception reduces the risk of unintended pregnancy is simply unfounded, as the data above illustrate. Though the Final Rules cite "conflicting evidence" for the effects of a contraceptive coverage requirement,[10] in the previous interim final rules, the government made positive arguments that contraceptive access did not reduce the risk of unintended pregnancy. This argument is flawed. For example, in the interim final rules the government argued, "In the longer term—from 1972 through 2002—while the percentage of sexually experienced women who had ever used some form of contraception rose to 98 percent, unintended pregnancy rates in the Unites States rose from 35.4 percent to 49 percent."[11]

13. However, the government's assertion in the interim final rules that unintended pregnancy rates rose between 1972 and 2002 was incorrect and based on faulty calculations and an inappropriate comparison. First, the numbers cited (35.4% and 49%) are the *percentage* of all pregnancies that were unintended, not the unintended pregnancy *rate*, which is the appropriate indicator for assessing trends in unintended pregnancy because it is not affected by changes in the incidence of *intended* pregnancy. Second, the 1972 figure includes only *births* (not all

[10] Department of the Treasury, Department of Labor and Department of Health and Human Services, Religious exemptions and accommodations for coverage of certain preventive services under the Affordable Care Act, *Federal Register*, 83(221):57536–57590, https://www.gpo.gov/fdsys/pkg/FR-2018-11-15/pdf/2018-24512.pdf
[11] Department of the Treasury, Department of Labor and Department of Health and Human Services, Religious exemptions and accommodations for coverage of certain preventive services under the Affordable Care Act, *Federal Register*, 82(197):47838–47862, https://www.gpo.gov/fdsys/pkg/FR-2017-10-13/pdf/2017-21852.pdf.

pregnancies), and then only those births that were to married women.[12] Births to unmarried women and all abortions are excluded; the proportion of both of these that were unintended were significantly higher, so excluding them results in an artificially low percentage. The 2002 figure, on the other hand, includes all pregnancies to all women. An appropriate comparison of rates based on pregnancies and on all women in the population shows a clear decline in the rate: In 1971, there were an estimated 2.041 million unintended pregnancies (including births and abortions, but excluding miscarriages),[13] and 43.6 million women of reproductive age (15–44),[14] for an unintended pregnancy rate (excluding miscarriages) of 47 per 1,000 women. By contrast, in 2011, the unintended pregnancy rate *including* miscarriages was 45 per 1,000.[15] Even when including miscarriages in the later rate, it is lower than the earlier rate; because miscarriages typically represent about 14% of all pregnancies,[16] excluding them from the 2011 figure for comparability would result in a rate of about 38 per 1,000, substantially lower than the 1971 rate.

14. Although using any method of contraception is more effective in preventing pregnancy than not using a method at all, having access to a *limited* set of methods is far different than being able to choose from among the full range of methods to find the *best* methods for a given point in a woman's life.

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[12] Weller RH and Heuser RL, Wanted and unwanted childbearing in the United States: 1968, 1969, and 1972 National Natality Surveys, *Vital and Health Statistics*, 1978, No. 32.
[13] Tietze C, Unintended pregnancies in the United States, 1970–1972, *Family Planning Perspectives,* 1979, 11(3):186–188.
[14] National Center for Health Statistics, Centers for Disease Control and Prevention, Population by age groups, race, and sex for 1960–1997, no date, https://www.cdc.gov/nchs/data/statab/pop6097.pdf.
[15] Finer LB and Zolna MR, Declines in unintended pregnancy in the United States, 2008–2011, *New England Journal of Medicine*, 2016, 374(9):843–852.
[16] Finer LB and Henshaw SK, Disparities in rates of unintended pregnancy in the United States, 1994 and 2001, *Perspectives on Sexual and Reproductive Health*, 2006, 38(2):90–96, https://www.guttmacher.org/journals/psrh/2006/disparities-rates-unintended-pregnancy-united-states-1994-and-2001.

15. One important consideration for most women in a choosing a contraceptive method is how well a method works for an individual woman to prevent pregnancy.[17] IUDs and implants, for example, are effective for years after they are inserted by a health care provider, and do not require women using them to think about contraception on a day-to-day basis.[18] By contrast, birth control pills must be taken every day, at approximately the same time. Nearly half of abortion patients who were users of birth control pills reported that they had forgotten to take their pills, and another quarter reported a lack of ready access to their pills (16% were away from their pills and 10% ran out).[19] Methods of contraception designed to be used during intercourse, such as condoms or spermicide, must be available, accessible, remembered, and used properly each time intercourse occurs.

16. Beyond effectiveness, there are many other features that people say are important to them when choosing a contraceptive method.[20] These include concerns about and past experience with side effects, drug interactions or hormones; affordability and accessibility; how frequently they expect to have sex; their perceived risk of HIV and other STIs; the ability to use the method confidentially or without needing to involve their partner; and potential effects on sexual enjoyment and spontaneity. For example, methods such as male condoms, fertility awareness and withdrawal require the active and effective participation of male partners. By contrast, methods

[17] Lessard LN et al., Contraceptive features preferred by women at high risk of unintended pregnancy, *Perspectives on Sexual and Reproductive Health*, 2012, 44(2):194–200.
[18] Winner B et al., Effectiveness of long-acting reversible contraception, *New England Journal of Medicine*, 366(21):1998–2007.
[19] Jones RK, Darroch JE and Henshaw SK, Contraceptive use among U.S. women having abortions in 2000–2001, *Perspectives on Sexual and Reproductive Health*, 2002, 34(6): 294–303, https://www.guttmacher.org/journals/psrh/2002/11/contraceptive-use-among-us-women-having-abortions-2000-2001.
[20] Lessard LN et al., Contraceptive features preferred by women at high risk of unintended pregnancy, *Perspectives on Sexual and Reproductive Health*, 2012, 44(2):194–200.

such as IUDs, implants, and oral contraceptives can be more reliably used by the woman alone in advance of intercourse.[21]

17. Being able to select the methods that best fulfill a woman's needs and priorities is an important way to ensure that she will be satisfied with her chosen methods. Women who are satisfied with their current contraceptive methods are more likely to use them consistently and correctly. For example, one study found that 30% of neutral or dissatisfied users had a temporal gap in use, compared with 12% of completely satisfied users.[22] Similarly, 35% of satisfied oral contraceptive users had skipped at least one pill in the past three months, compared with 48% of dissatisfied users.[23]

18. Consistent contraceptive in turn use helps women and couples prevent unwanted pregnancies and plan and space those they do want. The two-thirds of U.S. women (68%) at risk of unintended pregnancy who use contraceptives consistently and correctly throughout a year account for only 5% of all unintended pregnancies. In contrast, the 18% of women at risk who use contraceptives but do so inconsistently account for 41% of unintended pregnancies, and the 14% of women at risk who do not use contraceptives at all or have a gap in use of one month or longer account for 54% of unintended pregnancies.[24]

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[21] Bailey MJ, More power to the pill: the impact of contraceptive freedom on women's life cycle labor supply, *Quarterly Journal of Economics*, 2006, 121(1): 289–320, https://academic.oup.com/qje/article-abstract/121/1/289/1849021?redirectedFrom=fulltext.

[22] Guttmacher Institute, Improving contraceptive use in the United States, *In Brief*, New York: Guttmacher Institute, 2008, https://www.guttmacher.org/report/improving-contraceptive-use-united-states.

[23] Guttmacher Institute, Improving contraceptive use in the United States, *In Brief*, New York: Guttmacher Institute, 2008, https://www.guttmacher.org/report/improving-contraceptive-use-united-states.

[24] Sonfield A, Hasstedt K and Gold RB, *Moving Forward: Family Planning in the Era of Health Reform*, New York: Guttmacher Institute, 2014, https://www.guttmacher.org/report/moving-forward-family-planning-era-health-reform.

19. In summary, the ability to choose from among the full range of contraceptive methods encourages consistent and effective contraceptive use, thereby helping women to avoid unintended pregnancies and to time and space wanted pregnancies.

Access to Contraception Does Not Increase Adolescent Sexual Activity

20. Adolescent pregnancy has declined dramatically over the past several decades: In 2013, the U.S. pregnancy rate among 15–19-year-olds was at its lowest point in at least 80 years and had dropped to about one-third of a recent peak rate in 1990.[25] The adolescent birthrate has continued to fall sharply from 2013–2016, suggesting that the underlying pregnancy rates have likely declined even further.[26] Over these decades, adolescents' sexual activity has not increased—in fact, it has declined—while their contraceptive use has increased.

21. National data limited to adolescents attending high school document long-term increases from 1991–2015 in the share of students using contraception, and decreases over the same time period in the share of students who are sexually active.[27] Several studies have validated that contraceptive access reduces adolescent pregnancy without increasing sexual activity: The vast majority (86%) of the decline in adolescent pregnancy between 1995 and 2002 was the result of improvements in contraceptive use; only 14% could be attributed to a decrease in sexual activity.[28] Further, when examining these same two factors, all of the decline in the more recent

[25] Kost K, Maddow-Zimet I and Arpaia A, Pregnancies, *Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity*, New York: Guttmacher Institute, 2017, https://www.guttmacher.org/report/us-adolescent-pregnancy-trends-2013.
[26] Martin JA, Hamilton BE and Osterman MJK, Births in the United States, 2016, *NCHS Data Brief*, 2017, No. 287, https://www.cdc.gov/nchs/products/databriefs.htm.
[27] National Center for HIV/AIDS, Viral Hepatitis, TD, and TB Prevention, Centers for Disease Control and Prevention (CDC), *Trends in the Prevalence of Sexual Behaviors and HIV Testing National YRBS: 1991–2015,* Atlanta: CDC, no date, https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trends/2015_us_sexual_trend_yrbs.pdf.
[28] Santelli JS et al., Explaining recent declines in adolescent pregnancy in the United States: the contribution of abstinence and improved contraceptive use, *American Journal of Public Health*, 2007, 97(1): 150–156, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1716232/.

2007–2012 period was attributable to better contraceptive use: More adolescents were using contraception, they were using more effective methods, and they were using them more consistently, while adolescent sexual activity did not change.[29]

22. Recent trends in adolescent contraceptive use buttress this point: During 2011–2015, 81% of adolescent girls used contraception the first time they had sex, up from 75% in 2002; the share of adolescent girls who were sexually active stayed stable.[30,31] Similarly, use of emergency contraception among sexually active female adolescents increased from 8% in 2002 to 22% in 2011–2013; there was no significant change in sexual activity during this time.[32] And in a 2010 review of seven randomized trials of emergency contraception, there was no increase in sexual activity (e.g., reported number of sexual partners or number of episodes of unprotected intercourse) in adolescents given advanced access to emergency contraception.[33]

23. Along the same lines, studies of the availability of contraception in high schools provide evidence that it does not lead to more sexual activity. Rather, while several studies of school-based health care centers that provide contraceptive methods have shown contraceptives' availability increases students' use of contraception,[34,35] other studies have not found any

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[29] Lindberg L, Santelli J and Desai S, Understanding the decline in adolescent fertility in the United States, 2007–2012, *Journal of Adolescent Health*, 2016, 59(5): 577–583, http://www.jahonline.org/article/S1054-139X(16)30172-0/fulltext.

[30] Martinez G, Copen CE and Abma JC, Teenagers in the United States: Sexual activity, contraceptive use, and childbearing, 2006–2010 National Survey of Family Growth, *Vital Health Statistics*, 2011, Series 23, No. 31, https://www.cdc.gov/nchs/products/series/series23.htm.

[31] Abma JC and Martinez G, Sexual activity and contraceptive use among teenagers in the United States, 2011–2015, *National Health Statistics Reports*, 2017, No. 104, https://www.cdc.gov/nchs/products/nhsr.htm.

[32] Martinez GM and Abma JC, Sexual activity, contraceptive use, and childbearing of teenagers aged 15–19 in the United States, *NCHS Data Brief*, 2015, No. 209, https://www.cdc.gov/nchs/products/databriefs.htm.

[33] Meyer JL, Gold MA and Haggerty CL, Advance provision of emergency contraception among adolescent and young adult women: a systematic review of literature, *Journal of Pediatric and Adolescent Gynecology,* 2011, 24(1):2–9, http://www.jpagonline.org/article/S1083-3188(10)00203-2/fulltext.

[34] Minguez M et al., Reproductive health impact of a school health center, *Journal of Adolescent Health*, 2015, 56(3): 338–344, https://www.ncbi.nlm.nih.gov/pubmed/25703321.

[35] Knopf FA et al., School-based health centers to advance health equity: a Community Guide systematic review, *American Journal of Preventive Medicine*, 2016, 51(1): 114-126, http://www.ajpmonline.org/article/S0749-3797(16)00035-0/fulltext.

associated increases in sexual activity.[36] And a recent review of studies of school-based condom availability programs found condom use increased the odds of students using condoms, while none increased sexual activity.[37]

Eliminating the Cost of Contraception Leads to Improved Contraceptive Use and Reduces Women's Risk of Unintended Pregnancy

24. Extensive empirical evidence demonstrates what common sense would predict: eliminating costs leads to more effective and continuous use of contraception. That is because cost can be a substantial barrier to contraceptive choice. The contraceptive methods that can be purchased over the counter at a neighborhood drugstore for a comparatively low cost—male condoms and spermicide—are far less effective than methods that require a prescription and a visit to a health care provider,[38] which have higher up-front costs.[39]

25. The most effective methods of contraception are long-acting reversible contraceptives (LARC), such as implants and IUDs. Even with discounts for volume, the cost of these devices exceeds $500, exclusive of costs relating to the insertion procedure,[40] and the total cost of initiating one of these methods generally exceeds $1,000.[41] To put that cost in perspective, beginning to use one of these devices costs nearly a month's salary for a woman working full

[36] Kirby D, *Emerging Answers 2007: Research Findings on Programs to Reduce Teen Pregnancy and Sexually Transmitted Diseases*, Washington, DC: The National Campaign to Prevent Teen and Unplanned Pregnancy, 2007, https://thenationalcampaign.org/sites/default/files/resource-primary-download/EA2007_full_0.pdf.
[37] Wang T et al., The effects of school-based condom availability programs (CAPs) on condom acquisition, use and sexual behavior: a systematic review, *AIDS and Behavior*, 2017, https://www.ncbi.nlm.nih.gov/pubmed/28625012.
[38] Trussell J, Aiken A, "Contraceptive Efficacy" pp. 829–928. In Hatcher RA et al., eds., *Contraceptive Technology,* 21st ed., New York: Ayer Company Publishers, 2018.
[39] Trussell J et al., Cost effectiveness of contraceptives in the United States, *Contraception*, 2009, 79(1):5–14.
[40] Armstrong E et al., *Intrauterine Devices and Implants: A Guide to Reimbursement*, 2015, https://www.nationalfamilyplanning.org/file/documents----reports/LARC_Report_2014_R5_forWeb.pdf.
[41] Eisenberg D et al., Cost as a barrier to long-acting reversible contraceptive (LARC) use in adolescents, *Journal of Adolescent Health*, 2013, 52(4):S59–S63, http://www.jahonline.org/article/S1054-139X(13)00054-2/fulltext.

time at the federal minimum wage of $7.25 an hour.[42] These costs are dissuasive for many women not covered by the contraceptive coverage guarantee; one pre-ACA study concluded that women who faced high out-of-pocket IUD costs were significantly less likely to obtain an IUD than women with access to the device at low or no out-of-pocket cost. And only 25% of women who requested an IUD had one placed after learning the associated costs.[43] Even oral contraceptives, which are twice as effective as condoms in practice, require a prescription and have monthly costs. And although some stores offer certain pill formulations at steep discounts, access to those cost savings can require a woman to change to a different formulation than the one prescribed by her clinician and increases her risk of adverse health effects.

26. The government acknowledges that without coverage, many methods would cost women $50 per month, or upwards of $600 per year, and in doing so, implies that such costs are a minimal burden. This is not true. For example, a national study found that about one-third of uninsured people and lower-income people in the United States would be unable to pay for an unexpected $500 medical bill, and roughly another third would have to borrow money or put it on a credit card and pay it back over time, with interest.[44]

27. Without insurance coverage to defray or eliminate the cost, the large up-front costs of the more-effective contraceptive methods put them out of reach for many women who want them, driving them to less expensive and less effective methods. In a study conducted prior to the contraceptive coverage guarantee, almost one-third of women reported that they would change

[42] 29 U.S.C. § 206(a)(1)(C). At 40 hours a week, that amounts to $290 a week, before any taxes or deductions.
[43] Gariepy AM et al., The impact of out-of-pocket expense on IUD utilization among women with private insurance, *Contraception*, 2011, 84(6):e39–e42, https://escholarship.org/uc/item/1dz6d3cx.
[44] DiJulio B et al., Data note: Americans' challenges with health care costs, 2017, https://www.kff.org/health-costs/poll-finding/data-note-americans-challenges-with-health-care-costs/?utm_campaign=KFF-2017-March-Polling-Beyond-The-ACA.

their contraceptive method if cost were not an issue.[45] This figure was particularly high among women relying on male condoms and other less effective methods such as withdrawal. A study conducted after the enactment of the ACA had similar findings: among women in the study who still lacked health insurance in 2015, 44% agreed that having insurance would help them to afford and use birth control and 44% agreed that it would allow them to choose a better method for them; 48% also agreed that it would be easier to use contraception consistently if they had coverage.[46] Among insured women who still had a copayment using a prescription method (e.g., those in grandfathered plans), 40% agreed that if the copayment were eliminated, they would be better able to afford and use birth control, 32% agreed this would help them choose a better method, and 30% agreed this would help them to use their methods of contraception more consistently. Other studies have found that uninsured women are less likely to use the most expensive (but most effective) contraceptive methods, such as IUDs, implants, and oral contraceptives,[47] and are more likely than insured women to report using no contraceptive method at all.[48,49]

28. Reducing financial barriers is critical to increasing access to effective contraception. Before the ACA provision went into effect, 28 states required private insurers that cover prescription drugs to provide coverage of most or all FDA-approved contraceptive drugs and

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[45] Frost JJ and Darroch JE, Factors associated with contraceptive choice and inconsistent method use, United States, 2004, *Perspectives on Sexual and Reproductive Health,* 2008, 40(2):94–104, https://www.guttmacher.org/journals/psrh/2008/factors-associated-contraceptive-choice-and-inconsistent-method-use-united.

[46] Bearak JM and Jones RK, Did contraceptive use patterns change after the Affordable Care Act? A descriptive analysis, *Women's Health Issues*, 2017, 27(3):316–321, http://www.whijournal.com/article/S1049-3867(17)30029-4/fulltext.

[47] Culwell KR and Feinglass J, The association of health insurance with use of prescription contraceptives, *Perspectives on Sexual and Reproductive Health,* 2007, 39(4):226–230.

[48] Culwell KR and Feinglass J, The association of health insurance with use of prescription contraceptives, *Perspectives on Sexual and Reproductive Health,* 2007, 39(4):226–230.

[49] Culwell KR and Feinglass J, Changes in prescription contraceptive use, 1995–2002: the effect of insurance coverage, *Obstetrics & Gynecology*, 2007, 110(6):1371–1378, https://www.ncbi.nlm.nih.gov/pubmed/18055734.

devices.[50] These programs gave women access at lower prices than if contraception were not covered, but (at the time) all states still allowed insurers to require cost-sharing. Experience from these states demonstrates that having insurance coverage matters.[51] Privately insured women living in states that required private insurers to cover prescription contraceptives were 64% more likely to use some contraceptive method during each month a sexual encounter was reported than women living in states with no such requirement, even after accounting for differences including education and income.[52]

29. Although these state policies reduced women's up-front costs, other actions to eliminate out-of-pocket costs entirely—which is what the federal contraceptive coverage guarantee does—have even greater potential to increase women's ability to use methods effectively. For example, when Kaiser Permanente Northern California eliminated patient cost-sharing requirements for IUDs, implants, and injectables in 2002, the use of these devices increased substantially, with IUD use more than doubling.[53] Another example comes from a study of more than 9,000 St. Louis-region women who were offered the reversible contraceptive method of their choice (i.e., any method other than sterilization) at no cost for two to three years, and were "read a brief

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[50] Guttmacher Institute, Insurance coverage of contraceptives, *State Policies in Brief (as of July 2012)*, 2012.
[51] The government argued in the interim final rules that the state mandates have not been effective, asserting that "Additional data indicates that, in 28 States where contraceptive coverage mandates have been imposed statewide, those mandates have not necessarily lowered rates of unintended pregnancy (or abortion) overall." The study the government relied on for this assertion was published in a law review rather than in a peer-reviewed scientific journal. [See New MJ, Analyzing the impact of state level contraception mandates on public health outcomes, *Ave Maria Law Review*, 2015, 13(2):345–369.] One basic flaw in this article is that, at the time, none of the state contraceptive coverage mandates eliminated out-of-pocket costs entirely, which is the major advance from the federal guarantee and the issue in this case. In addition, over the course of the period the article evaluated, contraceptive coverage quickly became the norm in the insurance industry—even in states without mandates—thus minimizing potential differences between states with laws and states without them. [Sonfield et al. U.S. insurance coverage of contraceptives and impact of contraceptive coverage mandates, 2002, *Perspectives on Sexual and Reproductive Health,* 2004, 36(2):72–79, https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/3607204.pdf.]
[52] Magnusson BM et al., Contraceptive insurance mandates and consistent contraceptive use among privately insured women, *Medical Care*, 2012, 50(7):562–568.
[53] Postlethwaite D et al., A comparison of contraceptive procurement pre- and post-benefit change, *Contraception*, 2007, 76(5): 360–365

script informing them of the effectiveness and safety of" IUDs and implants.[54] Three-quarters of those women chose long-acting methods (i.e., IUDs or implants), a level far higher than in the general population. Likewise, a Colorado study found that use of long-acting reversible contraceptive methods quadrupled when offered with no out-of-pocket costs along with other efforts to improve access.[55]

30. Government-funded programs to help low-income people afford family planning services provide further evidence that reducing or eliminating cost barriers to women's contraceptive choices has a dramatic impact on women's ability to choose and use the most effective forms of contraception. Each year, among the women who obtain contraceptive services from publicly funded reproductive health providers, 57% select hormone-based contraceptive methods, 18% use implants or IUDs, and 7% receive a tubal ligation.[56] It is estimated that without publicly supported access to these methods at low or no cost, nearly half (47%) of those women would switch to male condoms or other nonprescription methods, and 28% would use no contraception at all.[57]

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[54] Peipert JF et al., *Preventing unintended pregnancies by providing no-cost contraception*, *Contraception*, 2012, 120(6):1291–1297.

[55] Ricketts S, Klinger G and Schwalberg G, Game change in Colorado: widespread use of long-acting reversible contraceptives and rapid decline in births among young, low-income women, *Perspectives on Sexual and Reproductive Health*, 2014, 46(3):125–132.

[56] Frost JJ and Finer LB, Unintended pregnancies prevented by publicly funded family planning services: Summary of results and estimation formula, memo to interested parties, New York: Guttmacher Institute, June 23, 2017, https://www.guttmacher.org/sites/default/files/pdfs/pubs/Guttmacher-Memo-on-Estimation-of-Unintended-Pregnancies-Prevented-June-2017.pdf.

[57] Frost JJ and Finer LB, Unintended pregnancies prevented by publicly funded family planning services: Summary of results and estimation formula, memo to interested parties, New York: Guttmacher Institute, June 23, 2017, https://www.guttmacher.org/sites/default/files/pdfs/pubs/Guttmacher-Memo-on-Estimation-of-Unintended-Pregnancies-Prevented-June-2017.pdf.

The ACA's Contraceptive Coverage Guarantee Has Had a Positive Impact

31. By ensuring coverage for a full range of contraceptive methods, services and counseling at no cost, the ACA's contraceptive coverage mandate has had its intended effect of removing cost barriers to obtaining contraception. Between fall 2012 and spring 2014 (during which time the coverage guarantee went into wide effect), the proportion of privately insured women who paid nothing out of pocket for the pill increased from 15% to 67%, with similar changes for injectable contraceptives, the vaginal ring and the IUD.[58] Similarly, another study found that since implementation of the ACA, the share of women of reproductive age (regardless of whether they were using contraception) who had out-of-pocket costs for oral contraceptives decreased from 21% in 2012 to just 4% in 2014.[59] These trends have translated into considerable savings for U.S. women: one study estimated that pill and IUD users saved an average of about $250 in copayments in 2013 alone because of the guarantee.[60]

32. Before the ACA, contraceptives accounted for between 30–44% of out-of-pocket health care spending for women.[61] Individual women themselves say that the ACA's contraceptive coverage guarantee is working for them. In a 2015 nationally representative survey of women aged 18–39, two-thirds of those who had health insurance and were using a hormonal contraceptive method reported having no copays; among those women, 80% agreed that paying nothing out of pocket helped them to afford and use their birth control, 71% agreed this helped

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[58] Sonfield A et al. Impact of the federal contraceptive coverage guarantee on out-of-pocket payments for contraceptives: 2014 update, *Contraceptive*, 2015, 91(1):44–48.
[59] Sobel L, Salganicoff A and Rosenzweig C, *The Future of Contraceptive Coverage*, Kaiser Family Foundation (KFF) Issue Brief, Menlo Park, CA: KFF, 2017, https://www.kff.org/womens-health-policy/issue-brief/the-future-of-contraceptive-coverage/.
[60] Becker NV and Polsky D, Women saw large decrease in out-of-pocket spending for contraceptives after ACA mandate removed cost sharing, *Health Affairs*, 2015, 34(7):1204–1211.
[61] Becker NV and Polsky D, Women saw large decrease in out-of-pocket spending for contraceptives after ACA mandate removed cost sharing, *Health Affairs*, 2015, 34(7):1204–1211.

them use their birth control consistently, and 60% agreed that having no copayment helped them choose a better method for them.[62]

33. Demonstrating the population-level impact of the ACA's coverage provision (e.g., a change in unintended pregnancy rates) is complicated, because the provision affects only a subset of U.S. women, and because there are so many additional variables that affect women's pregnancy intentions, contraceptive use and ultimately the unintended pregnancy rate in the population. The evidence on whether the ACA's provision has affected contraceptive use at the population level is not definitive, but some studies suggest the guarantee has had an impact on contraceptive use, among those benefiting from the provision.

34. A study using claims data from 30,000 privately insured women in the Midwest found that the ACA's reduction in cost sharing was tied to a significant increase in the use of prescription methods from 2008 through 2014 (before and after the ACA provision went into effect), particularly long-acting methods.[63] Another study of health insurance claims from 635,000 privately insured women nationwide showed that rates of discontinuation and inconsistent use of contraception declined from 2010 to 2013 (again, before and after the ACA provision went into effect) among women using generic oral contraceptive pills after the contraceptive guarantee's implementation (among women using brand-name oral contraceptives, only the discontinuation rate declined).[64]

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[62] Bearak JM and Jones RK, Did contraceptive use patterns change after the Affordable Care Act? A descriptive analysis, *Women's Health Issues*, 2017, 27(3):316–321, http://www.whijournal.com/article/S1049-3867(17)30029-4/fulltext.

[63] Carlin CS, Fertig AR and Down BE, Affordable Care Act's mandate eliminating contraceptive cost sharing influenced choices of women with employer coverage, *Health Affairs,* 2016, 35(9):1608–1615.

[64] Pace LE, Dusetzina SB and Keating NL, Early impact of the Affordable Care Act on oral contraceptive cost sharing, discontinuation, and nonadherence, *Health Affairs,* 2016, 35(9):1616–1624.

35. Two other studies, looking at the broader U.S. population, found no change in overall use of contraception or an overall switch from less-effective to more-effective methods among women at risk of unintended pregnancy before and after the guarantee's implementation.[65,66] However, both studies identified some positive trends among key groups. One of them found that between 2008 and 2014, among women aged 20–24 (the age group at highest risk for unintended pregnancy), LARC use more than doubled, from 7% to 19%, without a proportional decline in sterilization.[67] The other study showed that between 2012 and 2015, use of prescription contraceptive methods, and birth control pills in particular, increased among sexually inactive women, suggesting that more women were able to start a method before becoming sexually active or use a method such as the pill for noncontraceptive reasons after implementation of the contraceptive coverage guarantee.[68]

36. There is also considerable empirical data from controlled experiments to confirm that the concept of removing cost as a barrier to women's contraceptive use is a major factor in reducing their risk for unintended pregnancy, and the abortions and unplanned births that would otherwise follow. For example, a study of more than 9,000 St. Louis-region women who were offered the reversible contraceptive method of their choice at no cost found that the number of abortions performed at St. Louis Reproductive Health Services declined by 21%.[69] Study participants'

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[65] Bearak JM and Jones RK, Did contraceptive use patterns change after the Affordable Care Act? A descriptive analysis, *Women's Health Issues*, 2017, 27(3):316–321, http://www.whijournal.com/article/S1049-3867(17)30029-4/fulltext.

[66] Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017, https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012.

[67] Kavanaugh ML and Jerman J, Contraceptive method use in the United States: trends and characteristics between 2008, 2012 and 2014, *Contraception*, 2017, https://www.guttmacher.org/article/2017/10/contraceptive-method-use-united-states-trends-and-characteristics-between-2008-2012.

[68] Bearak JM and Jones RK, Did contraceptive use patterns change after the Affordable Care Act? A descriptive analysis, *Women's Health Issues*, 2017, 27(3):316–321, http://www.whijournal.com/article/S1049-3867(17)30029-4/fulltext.

[69] Peipert JF et al., *Preventing unintended pregnancies by providing no-cost contraception*, *Contraception*, 2012,

abortion rate was significantly lower than the rate in the surrounding St. Louis region, and less than half the national average.[70] Similarly, when access to both contraception and abortion increased in Iowa, the abortion rates actually declined.[71] Starting in 2006, the state expanded access to low- or no-cost family planning services through a Medicaid expansion and a privately funded initiative serving low-income women. Despite a simultaneous increase in access to abortion—the number of clinics offering abortions in the state actually doubled during the study period—the abortion rate dropped by over 20%.

Expanding Exemptions Would Harm Women

37. The Final Rules would make it more difficult, once again, for those receiving insurance coverage through companies or schools that use the exemption (i.e., employees, students and dependents) to access the methods of contraception that are most acceptable and effective for them. That, in turn, would increase those women's risk of unintended pregnancy and interfere with their ability to plan and space wanted pregnancies. These barriers could therefore have considerable negative health, social and economic impacts for those women and their families.

38. Allowing employers or schools to exclude all contraceptive methods, services and counseling from insurance plans—or to cover some contraceptive methods, services and information but not others—would prevent women from selecting and obtaining the methods of contraception that will work best for them. For example, Hobby Lobby objected to providing

120(6):1291–1297.
[70] Peipert JF et al., *Preventing unintended pregnancies by providing no-cost contraception*, *Contraception*, 2012, 120(6):1291–1297.
[71] Biggs MA, Did increasing use of highly effective contraception contribute to declining abortions in Iowa? *Contraception,* 2015, 91(2):167–173.

four specific contraceptive methods, including copper and hormonal IUDs, which are among the most effective forms of pregnancy prevention and also have among the highest up-front costs.

39. Allowing employers to restrict access to the full range of contraceptive methods and to approve coverage only for those they deem acceptable would place inappropriate constraints on women who depend on insurance to obtain the methods best suited to their needs. Moreover, in the absence of coverage, the financial cost of obtaining a method, and the fact that some methods have higher costs than others, would incentivize women to select methods that are inexpensive, rather than methods that are best suited to their needs and that they are therefore most likely to use consistently and effectively (see 10–19, above).

40. Excluding coverage for some or all contraceptive methods, services and counseling could deny women the ability to obtain contraceptive counseling and services from their desired provider at the same time they receive other primary and preventive care.[72,73] A woman going to her gynecologist for an annual examination, for example, may have to go to a different provider to be prescribed (or even discuss) contraception. This disjointed approach increases the time, effort and expense involved in getting needed contraception and interferes with her ability to obtain care from the provider of her choice.

41. Isolating contraceptive coverage in this way also would interfere with the ability of health care providers to treat women holistically. A woman's choice of contraception can be affected by her other medical conditions (e.g., diabetes, HIV, depression/mental health), and certain medications can significantly reduce the effectiveness of some methods of contraception, so a

[72] Leeman L, Medical barriers to effective contraception, *Obstetrics and Gynecology Clinics of North America,* 2007, 34(1):19–29.
[73] World Health Organization, Selected Practice Recommendations for Contraceptive Use, Third Ed., 2016, WHO: Geneva, Switzerland, http://apps.who.int/iris/bitstream/10665/252267/1/9789241565400-eng.pdf.

woman's chosen provider should be able to manage all health conditions and needs at the same time.[74,75]

42. To the extent that expanding the exemptions would burden women's contraceptive use in these ways, it would be harmful to women's health. Contraception allows women to avoid unintended pregnancies and to time and space wanted pregnancies, which has been demonstrated to improve women's health and that of their families. Specifically, pregnancies that occur too early in a woman's life or that are spaced too closely are associated with negative maternal health outcomes and/or adverse birth outcomes, including preterm birth, low birth weight, stillbirth, and early neonatal death.[76,77,78,79] Contraceptive use can also prevent preexisting health conditions from worsening and new health problems from occurring, because pregnancy can exacerbate existing health conditions such as diabetes, hypertension and heart disease.[80] Unintended pregnancy also affects women's mental health; notably, it is a risk factor for depression in adults.[81,82] For these reasons, the Centers for Disease Control and Prevention (CDC) included the development of and improved access to methods of family planning among

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[74] Centers for Disease Control and Prevention, *US Medical Eligibility Criteria for Contraceptive Use, 2016,* https://www.cdc.gov/reproductivehealth/contraception/mmwr/mec/summary.html.
[75] Centers for Disease Control and Prevention, U.S. medical eligibility criteria for contraceptive use, 2010, *Morbidity and Mortality Weekly Report,* May 28, 2010, Vol. 59, https://www.cdc.gov/mmwr/pdf/rr/rr59e0528.pdf.
[76] Kavanaugh ML and Anderson RM, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers,* New York: Guttmacher Institute, 2013, http://www.guttmacher.org/report/contraception-and-beyond-health-benefits-services-provided-family-planning-centers.
[77] Wendt A et al., Impact of increasing inter-pregnancy interval on maternal and infant health, Paediatric and Perinatal Epidemiology, 2012, 26(Suppl. 1):239–258.
[78] Conde-Agudelo A, Rosas-Bermúdez A and Kafury-Goeta AC, Birth spacing and risk of adverse perinatal outcomes: a meta-analysis, Journal of the American Medical Association, 2006, 295(15):1809–1823.
[79] Gipson JD, Koenig MA and Hindin MJ, The effects of unintended pregnancy on infant, child, and parental health: a review of the literature, *Studies in Family Planning,* 2008, 39(1):18–38.
[80] Lawrence HC, Testimony of American Congress of Obstetricians and Gynecologists, submitted to the Committee on Preventive Services for Women, Institute of Medicine, 2011, http://www.nationalacademies.org/hmd/~/media/8BA65BAF76894E9EB8C768C01C84380E.ashx.
[81] Herd P et al., The implications of unintended pregnancies for mental health in later life, *American Journal of Public Health,* 2016, 106(3):421–429.
[82] U.S. Preventive Services Task Force, Screening for depression in adults: recommendation statement, *American Family Physician,* 2016, 94(4):340A–340D, http://www.aafp.org/afp/2016/0815/od1.html.

the 10 great public health achievements of the 20th century.[83]

43. In the Final Rules, the government implies that there is debate about whether contraception may have negative health consequences that outweigh its benefits. In the previous interim final rules, the government implied that putative negative health consequences of contraception may outweigh its benefits. On the contrary, the government itself provides the oversight to ensure that the health benefits of contraception outweigh any potential negative consequences. Notably, the FDA's approval processes require that drugs and devices, including contraceptives, be proven safe and effective through rigorous controlled trials. In addition, the CDC publishes extensive recommendations to help clinicians and patients identify potential contraindications and decide which specific contraceptive methods are most appropriate for each patient's needs and health circumstances.[84,85] Medical experts, such as the American College of Obstetricians and Gynecologists, concur that contraception is safe and has clear health benefits that outweigh any potential risks.[86]

44. Expanding the exemptions to the contraceptive coverage requirement would also have negative social and economic consequences for women, families and society. By enabling them to reliably time and space wanted pregnancies, women's ability to obtain and effectively use contraception promotes their continued educational and professional advancement, contributing to the enhanced economic stability of women and their families.[87] Economic analyses have found

[83] Centers for Disease Control and Prevention, Achievements in public health, 1900–1999: family planning, *Morbidity and Mortality Weekly Report,* 1999, 48(47): 1073–1080.
[84] Centers for Disease Control and Prevention, *US Medical Eligibility Criteria for Contraceptive Use, 2016,* https://www.cdc.gov/reproductivehealth/contraception/mmwr/mec/summary.html.
[85] Centers for Disease Control and Prevention, U.S. medical eligibility criteria for contraceptive use, 2010, *Morbidity and Mortality Weekly Report,* May 28, 2010, Vol. 59, https://www.cdc.gov/mmwr/pdf/rr/rr59e0528.pdf.
[86] Brief of *Amici Curiae,* American College of Obstetricians and Gynecologists, Physicians for Reproductive Health, American Academy of Family Physicians, American Nurses Association, et al., *Zubik v. Burwell,* 2016, http://www.scotusblog.com/wp-content/uploads/2016/02/Docfoc.com-Amicus-Brief-Zubik-v.-Burwell.pdf.
[87] Sonfield A et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children,* New York: Guttmacher Institute, 2013, https://www.guttmacher.org/report/social-and-economic-benefits-

positive associations between women's ability to obtain and use oral contraceptives and their education, labor force participation, average earnings and a narrowing of the gender-based wage gap.[88] Moreover, the primary reasons women give for why they use and value contraception are social and economic: In a 2011 study, a majority of women reported that access to contraception had enabled them to take better care of themselves or their families (63%), support themselves financially (56%), stay in school or complete their education (51%), or get or keep a job or pursue a career (50%).[89]

45. The government contends that expanding the exemption would not impose any real harm, suggesting that the women most at risk for unintended pregnancy are not likely to be covered by employer-based group health plans or by student insurance sponsored by a college or university. That argument is misleading. Low-income women, women of color and women aged 18–24 are at disproportionately high risk for unintended pregnancy,[90] and millions of these women rely on private insurance coverage—particularly following implementation of the ACA. In fact, from 2013 to 2017, the proportion of women overall and of women below the poverty level who were uninsured dropped by more than one-third nationwide, declines driven by substantial increases in both Medicaid and private insurance coverage.[91] In addition, the ACA specifically expanded coverage for people aged 26 and younger, allowing them to remain covered as dependents on

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womens-ability-determine-whether-and-when-have-children.

[88] Sonfield A et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children,* New York: Guttmacher Institute, 2013, https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children.

[89] Frost JJ and Lindberg LD, Reasons for using contraception: perspectives of U.S. women seeking care at specialized family planning clinics, 2012, *Contraception,* http://www.guttmacher.org/pubs/journals/j.contraception.2012.08.012.pdf.

[90] Finer LB and Zolna MR, Declines in unintended pregnancy in the United States, 2008–2011, *New England Journal of Medicine*, 2016, 374(9):843–852.

[91] Guttmacher Institute, Gains in insurance coverage for reproductive-age women at a crossroads, *News in Context,* Dec. 4, 2018, https://www.guttmacher.org/article/2018/12/gains-insurance-coverage-reproductive-age-women-crossroads.

their parents' plans, regardless of whether the young woman is working herself or attending college or university.

Medicaid, Title X and State Coverage Requirements Cannot Substitute for the Federal Contraceptive Coverage Guarantee

46. State and federal programs and laws—such as the Title X national family planning program, Medicaid, and state contraceptive coverage requirements—cannot replicate or replace the gains in access made by the contraceptive coverage guarantee. In the interim final rules, the government claimed that "[i]ndividuals who are unable to obtain contraception coverage through their employer-sponsored health plans because of the exemptions created in these interim final rules…have other avenues for obtaining contraception…."[92]

47. Many women who have the benefit of the ACA's contraceptive coverage mandate are not eligible for free or subsidized care under Title X. Title X provides no-cost family planning services to people living at or below 100% of the federal poverty level ($12,060 for a single person in 2017),[93] and provides services on a sliding fee scale between 100% and 250% of poverty; women above 250% of poverty must pay the full cost of care. By contrast, the federal contraceptive coverage guarantee eliminates out-of-pocket costs for contraception regardless of income.

48. Funding for Title X has not increased sufficiently for the program even to keep up with the increasing number of women in need of publicly funded care;[94] therefore, Title X cannot

[92] Department of the Treasury, Department of Labor and Department of Health and Human Services, Religious exemptions and accommodations for coverage of certain preventive services under the Affordable Care Act, *Federal Register*, 82(197):47838–47862, https://www.gpo.gov/fdsys/pkg/FR-2017-10-13/pdf/2017-21852.pdf.
[93] Office of the Assistant Secretary for Planning and Evaluation, U.S. federal poverty guidelines used to determine financial eligibility for certain federal programs, 2017, https://aspe.hhs.gov/poverty-guidelines.
[94] Women in need of publicly funded contraceptive services are defined as those women who a) are younger than 20

sustain additional beneficiaries as a result of the Final Rules. From 2010 to 2014, even as the number of women in need of publicly funded contraceptive care grew by 5%, representing an additional one million women in need,[95] Congress cut funding for Title X by 10%.[96] With its current resources, Title X is able to serve only one-fifth of the nationwide need for publicly funded contraceptive care.[97] Still, the government has proposed diverting already insufficient Title X funding to help cover the cost of care for any women affected by the Final Rules,[98] an action that would inevitably hurt patients who rely on publicly funded services.

49. Similarly, many women who would lose private insurance coverage of contraception under the federal government's expanded exemption would not be eligible for Medicaid. Eligibility for Medicaid varies widely from state to state, particularly in states that have not expanded Medicaid eligibility under the ACA. In almost all of those states, nondisabled, nonelderly childless adults do not qualify for Medicaid at any income level, and eligibility for parents is as low as 18% of the federal poverty level in Alabama and Texas.[99] Several of these states have expanded eligibility specifically for family planning services to people otherwise

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or are poor or low-income (i.e., have a family income less than 250% of the federal poverty level) and b) are sexually active and able to become pregnant but do not want to become pregnant. See Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services, 2014 Update,* New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.

[95] Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services, 2014 Update,* New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.

[96] Department of Health and Human Services, Office of Population Affairs, Funding history, 2017, https://www.hhs.gov/opa/title-x-family-planning/about-title-x-grants/funding-history/index.html.

[97] Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services, 2014 Update,* New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.

[98] Department of Health and Human Services, Compliance with statutory program integrity requirements, *Federal Register*, 83(106):25502–25533, https://www.gpo.gov/fdsys/pkg/FR-2018-06-01/pdf/2018-11673.pdf.

[99] Kaiser Family Foundation, Medicaid income eligibility limits for adults as a percent of the federal poverty level, 2018, State Health Facts, https://www.kff.org/health-reform/state-indicator/medicaid-income-eligibility-limits-for-adults-as-a-percent-of-the-federal-poverty-level.

ineligible for full-benefit Medicaid; those income eligibility levels also vary considerably.[100,101] Again, by contrast, the federal contraceptive coverage guarantee applies regardless of income. And because the U.S. Supreme Court has ruled that states cannot be compelled by the federal government to expand Medicaid eligibility, the federal government cannot rely on Medicaid to fill in gaps in coverage that would result from expanding the exemption.

50. The federal government's assertion that Title X and Medicaid can replace or replicate the ACA's contraception coverage guarantee is additionally problematic given that the government itself is at the same time moving to undermine Title X and Medicaid. For example, the government's recent budget proposals have sought to exclude Planned Parenthood Federation of America and its affiliates from Title X, Medicaid and other federal programs,[102] and have called for massive cuts to Medicaid.[103] The Department of Health and Human Services has proposed sweeping changes to Title X regulations that would undermine quality of care and access to providers,[104] and it has encouraged states to revamp their Medicaid programs in ways that would restrict program eligibility (e.g., by imposing work requirements) and thereby interfere with coverage and care.[105] The administration has strongly backed similar congressional proposals for cutting and limiting access to Title X and Medicaid.

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[100] Guttmacher Institute, Medicaid family planning eligibility expansions, *State Laws and Policies (as of December 2018),* 2018, https://www.guttmacher.org/state-policy/explore/medicaid-family-planning-eligibility-expansions.
[101] Kaiser Family Foundation, Status of state action on the Medicaid expansion decision, 2018, State Health Facts, https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/.
[102] Hasstedt K, Beyond the rhetoric: the real-world impact of attacks on Planned Parenthood and Title X, *Guttmacher Policy Review,* 2017, 20:86–91, https://www.guttmacher.org/gpr/2017/08/beyond-rhetoric-real-world-impact-attacks-planned-parenthood-and-title-x.
[103] Luhby T, Not even the White House knows how much it's cutting Medicaid, *CNN,* May 24, 2017, http://money.cnn.com/2017/05/24/news/economy/medicaid-budget-trump/index.html.
[104] Department of Health and Human Services, Compliance with statutory program integrity requirements, *Federal Register*, 83(106):25502–25533, https://www.gpo.gov/fdsys/pkg/FR-2018-06-01/pdf/2018-11673.pdf.
[105] Sonfield A, Efforts to transform the nature of Medicaid could undermine access to reproductive health care, *Guttmacher Policy Review,* 2017, 20:97–102, https://www.guttmacher.org/gpr/2017/10/efforts-transform-nature-medicaid-could-undermine-access-reproductive-health-care.

51. In addition, proposed changes to Title X would make it even more unsuitable as a substitute for contraceptive coverage under the ACA. The recent proposed rule for Title X removes the requirement that the contraceptive methods offered by a Title X provider be "medically approved."[106] At the same time, the proposed rule seemingly opens the door to allow Title X funding to go to antiabortion counseling centers (also called "crisis pregnancy centers"), which do not offer the broad range of FDA-approved methods of contraception and may offer only abstinence-until-marriage counseling and fertility awareness–based methods. These proposed changes, if implemented, would shift the Title X program away from its mission of offering access to a broad range of family planning methods.[107]

52. Policymakers in many states have also restricted publicly funded family planning programs and providers, further undermining the ability of these programs to serve those affected by the expanded exemption.[108]

53. Neither can state-specific contraceptive coverage laws replicate or replace the increase in access to contraception provided by the ACA's contraceptive coverage guarantee. Twenty-one have no such laws at all.[109] Of the 29 states and the District of Columbia that do have contraceptive coverage requirements, only 10 currently bar copayments and deductibles for contraception (and another four states have new requirements not yet in effect). Additionally, the federal requirement limits the use of formularies and other administrative restrictions on women's use of contraceptive services and supplies, by making it clear that health plans may

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[106] Department of Health and Human Services, Compliance with statutory program integrity requirements, *Federal Register*, 83(106):25502–25533, https://www.gpo.gov/fdsys/pkg/FR-2018-06-01/pdf/2018-11673.pdf.
[107] Hasstedt K, A Domestic gag rule and more: the administration's proposed changes to Title X, *Health Affairs* Blog, June 18, 2018, https://www.guttmacher.org/article/2018/06/domestic-gag-rule-and-more-administrations-proposed-changes-title-x.
[108] Gold RB and Hasstedt K, Publicly funded family planning under unprecedented attack, *American Journal of Public Health,* 2017, 107(12):1895–1897, http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304124.
[109] Guttmacher Institute, Insurance coverage of contraceptives, *State Laws and Policies (as of December 2018),* 2018, http://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives.

seek to influence a patient's choice only within a specific contraceptive method category (e.g., to favor one hormonal IUD over another) and not across methods (e.g., to favor the pill over the ring).[110] Few of the state laws include similar protections. Similarly, most of the state requirements do not specifically require coverage of all the distinct methods that the federal requirement encompasses. For example, only eight states currently require coverage of female sterilization, and few state laws make explicit distinctions between methods that some insurance plans have attempted to treat as interchangeable (such as hormonal versus copper IUDs, or the contraceptive patch versus the contraceptive ring).[111] Finally, state laws cannot regulate self-insured employers at all, and those employers account for 60% of all workers with employer-sponsored health coverage.[112]

State-Specific Impacts

54. The Final Rules would have public health and fiscal consequences in states across the country. If unable to access contraception coverage through their employer or university, some lower-income women who meet the strict income requirements of public programs would rely on publicly funded services to access this beneficial service. Many women who lose or lack contraceptive coverage because their employer or university objects, however, would not meet the strict income and eligibility requirements of public programs, and if as a result they are not using their preferred or the most effective methods for them, or if cost forces them to forgo

[110] Department of Labor, FAQs about Affordable Care Act implementation (part XXVI), May 11, 2015, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxvi.pdf.
[111] Guttmacher Institute, Insurance coverage of contraceptives, *State Laws and Policies (as of December 2018),* 2018, http://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives.
[112] Claxton G et al., *Employer Health Benefits: 2017 Annual Survey,* Menlo Park, CA: Kaiser Family Foundation; and Chicago: Health Research & Educational Trust, 2017, https://www.kff.org/report-section/ehbs-2017-section-10-plan-funding/.

contraceptive use periodically or altogether, they would be at increased risk of unintended pregnancy. The costs of the resulting unintended pregnancies often then fall to the states because the federal government cannot or will not withstand these costs.

Pennsylvania

55. In Pennsylvania, some women impacted by the Final Rules would not qualify for Medicaid or Title X because they would not meet the income eligibility requirements for coverage or subsidized care under these programs.

56. For example, in Pennsylvania, childless adults and parents are only eligible for full-benefit Medicaid if they have incomes at or below 138% of the federal poverty level,[113] and individuals are eligible for coverage of family planning services specifically up to 220% of poverty.[114] This means that affected women who lose coverage as a result of the rules may not be eligible.

57. As a result, some women would be at increased risk of unintended pregnancy, either because they are not able to afford the methods that work best for them, or because cost would force them to forgo contraception use entirely.

58. Other women would be eligible for and rely on publicly funded family planning services through programs such as Medicaid and Title X. Those women could be denied the ability to obtain contraceptive counseling and services from their desired provider at the same time they receive other primary and preventive care, increasing the time, effort and expense involved in getting needed contraception. In addition, isolating contraceptive coverage in this way would

[113] Kaiser Family Foundation, Medicaid income eligibility limits for adults as a percent of the federal poverty level, 2018, State Health Facts, https://www.kff.org/health-reform/state-indicator/medicaid-income-eligibility-limits-for-adults-as-a-percent-of-the-federal-poverty-level.
[114] Guttmacher Institute, Medicaid family planning eligibility expansions, *State Laws and Policies (as of December 2018),* 2018, https://www.guttmacher.org/state-policy/explore/medicaid-family-planning-eligibility-expansions.

interfere with the ability of health care providers to manage all of a woman's health conditions and needs at the same time.

59. The increase in the number of women relying on publicly funded services would increase the strain on the state's family planning programs and providers, making it more difficult for them to meet the existing need for publicly funded care. In 2014, 746,000 women were in need of publicly funded family planning in Pennsylvania, and the state's family planning network was able to only meet 29% of this need.[115]

60. Another indicator of the existing unmet need for contraception in Pennsylvania is that substantial numbers of state residents experience unintended pregnancy each year. In 2010, 115,000 unintended pregnancies occurred among Pennsylvania residents, a rate of 47 per 1,000 women aged 15–44.[116]

61. Of those unintended pregnancies that ended in birth, 54% were paid for by Medicaid and other public insurance programs.[117] Unintended pregnancies cost the state approximately $248 million and the federal government approximately $479 million in 2010. The Final Rules are likely to increase the number of unintended pregnancies experienced by state residents, and thus to increase state and federal expenditures.

[115] Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services, 2014 Update*, New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.
[116] Kost K, *Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002*, New York: Guttmacher Institute, 2015, https://www.guttmacher.org/report/unintended-pregnancy-rates-state-level-estimates-2010-and-trends-2002.
[117] Sonfield A and Kost K, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010*, New York: Guttmacher Institute, 2015, https://www.guttmacher.org/report/public-costs-unintended-pregnancies-and-role-public-insurance-programs-paying-pregnancy.

62. In conclusion, adding to the number of women at risk of unintended pregnancy by expanding the exemption is not in the public health or economic interest of Pennsylvania or its residents.

New Jersey

63. In New Jersey, some women impacted by the Final Rules would not qualify for Medicaid or Title X because they would not meet the income eligibility requirements for coverage or subsidized care under these programs.

64. For example, in New Jersey, childless adults and parents are only eligible for full-benefit Medicaid if they have incomes at or below 138% of the federal poverty level.[118] (New Jersey has not expanded Medicaid eligibility specifically for family planning services.) This means that affected women who lose coverage as a result of the rules may not be eligible.

65. As a result, some women would be at increased risk of unintended pregnancy, either because they are not able to afford the methods that work best for them, or because cost would force them to forgo contraception use entirely.

66. Other women would be eligible for and rely on publicly funded family planning services through programs such as Medicaid and Title X. Those women could be denied the ability to obtain contraceptive counseling and services from their desired provider at the same time they receive other primary and preventive care, increasing the time, effort and expense involved in getting needed contraception. In addition, isolating contraceptive coverage in this way would interfere with the ability of health care providers to manage all of a woman's health conditions and needs at the same time.

[118] Kaiser Family Foundation, Medicaid income eligibility limits for adults as a percent of the federal poverty level, 2018, State Health Facts, https://www.kff.org/health-reform/state-indicator/medicaid-income-eligibility-limits-for-adults-as-a-percent-of-the-federal-poverty-level.

67. The increase in the number of women relying on publicly funded services would increase the strain on the state's family planning programs and providers, making it more difficult for them to meet the existing need for publicly funded care. In 2014, 455,000 women were in need of publicly funded family planning in New Jersey, and the state's family planning network was able to only meet 22% of this need.[119]

68. Another indicator of the existing unmet need for contraception in New Jersey is that substantial numbers of state residents experience unintended pregnancy each year. In 2010, 97,000 unintended pregnancies occurred among New Jersey residents, a rate of 56 per 1,000 women aged 15–44.[120]

69. Of those unintended pregnancies that ended in birth, 52% were paid for by Medicaid and other public insurance programs.[121] Unintended pregnancies cost the state approximately $186 million and the federal government approximately $291 million in 2010. The Final Rules are likely to increase the number of unintended pregnancies experienced by state residents, and thus to increase state and federal expenditures.

70. In conclusion, adding to the number of women at risk of unintended pregnancy by expanding the exemption is not in the public health or economic interest of New Jersey or its residents.

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[119] Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services, 2014 Update,* New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.
[120] Kost K, *Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002,* New York: Guttmacher Institute, 2015, https://www.guttmacher.org/report/unintended-pregnancy-rates-state-level-estimates-2010-and-trends-2002.
[121] Sonfield A and Kost K, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010*, New York: Guttmacher Institute, 2015, https://www.guttmacher.org/report/public-costs-unintended-pregnancies-and-role-public-insurance-programs-paying-pregnancy.

Ample evidence demonstrates that the Final Rules would interfere with women's ability to identify and consistently use the contraceptive methods that would work best for them, thus putting them at heightened risk of unintended pregnancy and the health, social and economic harms that would result.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: December 14, 2018

By: Kathryn Kost
Acting Vice President for Domestic Research
The Guttmacher Institute

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	**No. 2:17-cv-04540-WB**

DECLARATION OF CYNTHIA H. CHUANG, M.D., MSc[1]

I, Cynthia H. Chuang, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by the Commonwealth of Pennsylvania in the above-captioned matter and, in support thereof, I state as follows:

I. My Background and Experience

1. I am a practicing general internist, primary care provider, professor, and health services researcher, with a principal research interest in unintended pregnancy prevention and contraceptive decision-making in adult women.

A. *My Job, Educational Training and Academic Practice*

2. I work as a Professor of Medicine, Public Health Services, and Obstetrics and Gynecology in the Departments of Medicine, Public Health Sciences, and Obstetrics and Gynecology at the Pennsylvania State University College of Medicine, where I also serve as the Chief of the Division of General Internal Medicine, a division of over 70 physicians with clinical practice in primary care medicine, hospital medicine, palliative care, and post-acute care.

[1] I attach a true and correct copy of my curriculum vitae hereto as Exhibit 1.

3. I am also the Research Director of the Penn State K12 BIRCWH (Building Interdisciplinary Research Careers in Women's Health) Program.

4. I have been on faculty at the Penn State College of Medicine since 2004.

5. I earned a Bachelor of Science degree from the University of Michigan in 1992 and earned my Medical Degree from the New York University School of Medicine in 1997.

6. Thereafter, I completed my residency and chief residency in Internal Medicine at Temple University Hospital, in Philadelphia, Pennsylvania, in 2001.

7. I earned a Masters of Science in Epidemiology (MSc) from the Boston University School of Public Health in 2003 and completed my General Internal Medicine fellowship and residency in Preventive Medicine at Boston University School of Medicine, in 2004.

8. During my training, some of my most formative experiences were when I worked with patients in the areas of pregnancy prevention and contraceptive care at a family planning clinic in rural California; a primary care clinic at Temple University in North Philadelphia, Pennsylvania; and a women's health clinic at Boston Medical Center in Boston, Massachusetts.

9. Throughout my career, I have been an investigator on a number of studies and projects regarding contraception and reproductive health. For example, I was the Principal Investigator of a Patient-Centered Outcomes Research Institute (PCORI) contract to design and evaluate interventions aimed at assisting women with personalized contraceptive choices that best meet their individual needs (CD–1304–6117), and recipient of a National Institutes of Health (NIH) K23 career development award to study unintended pregnancy in women with chronic medical conditions. I am the Penn State site Principal Investigator for the PCORNet PaTH Clinical Data Research Network, a multi-institutional integrated research network in partnership with the University of Pittsburgh/University of Pittsburgh Medical Center, Temple University Health

System, Johns Hopkins University Health System, Geisinger Health System, and the University of Utah Health System.

10. I have authored over 70 scholarly publications, a significant portion of which focus on women's healthcare and preventive services. Among other topics, I have written about: reducing unintended pregnancies through reproductive planning and contraceptive action planning, contraceptive decision-making in women with and without chronic medical conditions, and the meaning of pregnancy intention.

11. Some of my recent articles include:

a. Snyder A, Weisman CS, Liu G, Leslie D, Chuang CH. The impact of the Affordable Care Act on contraceptive use and costs among privately insured women. *Women's Health Issues* 2018, 28(3): 219-223.

b. "Measuring Oral Contraceptive Adherence Using Self-Report Versus Pharmacy Claims Data," Contraception, 2017 Sep 04, Nelson HN, Borrero S, Lehman E, Velott DL, Chuang CH;

c. "How Do Pregnancy Intentions Affect Contraceptive Choices When Cost Is Not a Factor? A Study of Privately Insured Women," Contraception, 2015 Nov; 92(5):501-7, Weisman CS, Lehman EB, Legro RS, Velott DL, Chuang CH; and

d. "Making the Most of the Affordable Care Act's Contraceptive Coverage Mandate for Privately-Insured Women," Women's Health Issues, 2014 Sep-Oct; 24(5):465-8, Weisman CS, Chuang CH.

12. I have received multiple awards and recognitions for my academic work including delivering the 2017 Spring Dean's Lecture (Contraceptive Use: Before, During and After the Affordable Care Act). I received the Dean's Award for Innovation in Team Science in 2014, the

Department of Medicine Excellence in Mentoring Award in 2014 and the Junior Faculty Award for Excellence in Research in 2008. I have also received the Dean's Award for Excellence in Teaching in 2010 and 2014, and the Special Recognition for Education Leadership and Service Award on 2005.

B. ***My Medical Practice***

13. In addition to my academic work, I am also a clinician and maintain an active adult primary care practice in Hershey, Pennsylvania, in which a portion of my patients are women of child-bearing age.

14. My practice is focused on preventive medicine and chronic disease management.

15. For my female patients of child-bearing age, preventive medicine includes reproductive life planning, including the use of contraceptives.

16. For medical reasons, the ideal "spacing" between pregnancies is eighteen months, because there is a greater risk of poor birth outcomes, like low birthweight and preterm birth, if pregnancies are not properly spaced.

17. I routinely have conversations with my patients about spacing out their pregnancies due to their medical health and educational, work and economic goals. Indeed, the Centers for Disease Control and Prevention (CDC) recommends that doctors counsel their patients about issues of "reproductive life planning," including their life, financial and job goals.

18. These conversations routinely result in changes to patients' contraceptive care. Indeed, I have found that it is important to be flexible with respect to contraceptive care because patients' changing life situations will frequently call for changes in their contraceptive method choice.

19. Through my medical practice, I have found that the most important thing about

providing preventive contraceptive care is to counsel my patients to use the method of contraception that is best suited for their individual needs at their particular place in life.

20. My patients are generally highly insured and mostly white.

21. Some live in highly rural areas and drive long distances to see me.

22. I direct low-income patients without insurance to the Medicaid program (if eligible). I direct other uninsured or underinsured women without contraceptive coverage to seek care through Planned Parenthood, or another Federally Qualified Health Center (FQHC), where they may qualify for contraceptive coverage under Title X.

23. Some of my patients also work for and receive their health insurance through Catholic Schools and other institutions which might seek to eliminate contraceptive coverage through their employer-sponsored plans under the new religious and moral exemptions.

II. My Opinion on the Final Religious Exemption Rule and Final Moral Exemption Rule

24. I have reviewed both the final Religious Exemption Rule and the final Moral Exemption Rule (together, the "Final Exemption Rules"), as well as the amended Complaint filed by the Commonwealth of Pennsylvania in the above-captioned matter that challenges them.

25. Based upon my knowledge, education, training and experience, it is my professional opinion that the Final Exemption Rules will cause immediate and irreversible harm because they will cause women to lose preventive contraceptive care under their employer group health plans.

A. *Cost is a Barrier to Contraceptive Access*

26. It is my understanding, and it has been my experience, that cost is a barrier to access to contraceptives. This has been corroborated in research studies.

27. Prior to passage of the Affordable Care Act (the "Affordable Care Act" or "ACA"),

before preventive contraceptive care was provided at no out-of-pocket cost under the ACA's contraceptive mandate, I regularly counseled my patients about the cost related to their recommended contraceptive choices.

28. At that time, it was not unusual for my patients to reject the specific contraceptive I had recommended due to its cost; instead, they would request that I prescribe a less effective, but cheaper, method of contraception. Or they would forego use of contraception altogether.

29. Such requests were most frequent when I had recommended intrauterine Devices (IUDs) or contraceptive implants. IUDs and implants carried heavy cost-sharing responsibilities and, therefore, were most expensive to patients pre-ACA. But they are also a much more effective method of contraceptive care (<1% failure rate) than birth control pills (9% failure rate).

30. After the ACA passed and the contraceptive mandate was instituted, however, I saw that my patients were free to make contraceptive choices on the basis of their medical and personal needs and concerns, alone, without the burden of having to weigh the cost of the preferred medical choice. Put otherwise, post-ACA, the only concern has become what is best for the patient.

31. Since the ACA passed, no patient has contacted me to ask for a different, cheaper method of contraception than the one I had prescribed due to the cost under private insurance plans.

32. Furthermore, as a result of the ACA's contraceptive mandate, I have seen patients switch from a cheaper, less effective method to a more effective, expensive method that was better for their medical health and personal needs.

B. ***Because Patients Will Lose Contraceptive Coverage under the New Final Exemption Rules, They Will Make Less Medically Sound Contraceptive Choices and, Therefore, Will Be Harmed***

33. It is apparent, however, that under the new Final Exemption Rules this post-ACA focus on what is best for the patient will change.

34. This is so because, as a result of the Final Exemption Rules, some women will lose insurance coverage for preventive contraceptive care.

35. As a result, their costs for contraceptive care will rise.

36. Based upon my own experience and existing scientific and empirical information that I have reviewed and am aware of, under the new Final Exemption Rules, cost will, again, become a barrier to women's access to and use of the contraceptive that is medically recommended for them.

37. Many of these women who will no longer receive contraceptive coverage will not only face financial harm, but will also face medical harm.

38. This harm will manifest itself in the disruption of these patients' medical treatment, whether by substituting a less effective but cheaper method of contraception or by being forced to stop using contraceptives at all, due to financial reasons.

39. Some of these women will face unintended pregnancy and other adverse medical consequences.

C. ***The New Final Exemption Rules Are Not Based Upon Sound Scientific or Empirical Evidence***

40. It is also my opinion that the new Final Exemption Rules are not based upon sound scientific or empirical evidence.

41. The Final Exemption Rules indicate, among other things, that contraceptives are not effective in preventing unintended pregnancy. This is false.

42. This claim in the Final Exemption Rules is inconsistent with the weight of scientific and empirical authority.

43. Indeed, well-established research indicates that contraceptives are, in fact, effective preventing unintended pregnancy. To be sure, while various methods of contraception can be effective at preventing unintended pregnancy, some are more effective than others.

44. Several other statements in the Final Exemption Rules are also not scientifically credible.

45. The Final Exemption Rules state that some commenters criticized the 2011 IOM Report for citing studies that assert associative relationship between contraceptive use and decreases in unintended pregnancy, and not causal relationships. Establishing a causal relationship would be unethical and unrealistic. Studies of association have shown that women using specific contraceptive methods are less likely to become pregnant than women not using those methods. A causal relationship could only be established if a study were conducted where women were randomly assigned to receive a specific contraceptive method and compared with women who were randomly assigned to use no contraceptive method. Studies of association have provided the rationale for the knowledge that smoking causes lung cancer, HIV causes AIDS, and Pap smears reduce cervical cancer.

46. The Final Exemption Rules acknowledge commenters who report that hormonal contraceptives cause depression, citing one large study from Denmark. This report should not be evaluated in isolation, as other studies have found no consistent association between hormonal contraceptive use and depressive symptoms, while others have found hormonal contraception has reduced levels of depressive symptoms. These studies are difficult to conduct, since women who are receiving hormonal contraception must be enrolled in health care services, where they are more

likely to be screened and treated for depression.

47. The Final Exemption Rules acknowledge commenters who report that hormonal contraceptives may increase the risk of certain health conditions, such as venous thromboembolic disease (VTE) (i.e., deep venous thrombosis and pulmonary embolism). While it is true that the risk of VTE is increased with use of estrogen-containing hormonal contraception, pregnancy and the postpartum state increase VTE risk significantly more so. Thus, preventing unintended pregnancy is a more effective way to reduce risk of VTE than avoiding hormonal contraception.

48. Similarly, the Final Exemption Rules acknowledge commentators who expressed concern over the possible increased risk of certain cancers. There is conflicting evidence as to whether long-term hormonal contraceptive use may increase the risk of breast cancer, however there is strong evidence that hormonal contraception reduces the risk of ovarian and uterine cancer, and some evidence that it reduces the risk of colorectal cancer. The magnitude of the reductions in ovarian, uterine, and colorectal cancer greatly outweigh the potential increased risk in breast cancer.

49. For these reasons, I believe that an injunction of the Final Exemption Rules is necessary to prevent immediate and irreparable harm to women in Pennsylvania and around the Country, who will lose ongoing preventive care coverage under their group health plans due to the Final Exemption Rules.

I hereby affirm that the foregoing is true and correct based upon my knowledge, information and belief, and I make these statements subject to the penalty of perjury.

Date: 12/14/2018

By: _____
CYNTHIA H. CHUANG, M.D., MSc

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	**No. 2:17-cv-04540-WB**

DECLARATION OF CAROL S. WEISMAN, Ph.D.[1]

I, Carol S. Weisman, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by the Commonwealth of Pennsylvania in the above-captioned matter and, in support thereof, I state as follows:

I. My Background and Experience

1. I am originally from Pittsburgh, Pennsylvania and, since 2003, I have served as a Distinguished Professor of Public Health Sciences, Obstetrics and Gynecology, and Health Policy and Administration at the Pennsylvania State University College of Medicine. Since 2009, I have also served at the Associate Dean for Faculty Affairs at the College of Medicine. I am also a faculty associate at the Penn State Population Research Institute.

2. My area of academic specialization is women's healthcare, with a focus on preventive services, including contraceptives and family planning.

3. I earned a Bachelor of Arts degree, with High Honors, in Sociology and Anthropology from Wellesley College in 1969, and a Ph.D. in Social Relations (Sociology) from Johns Hopkins University in 1973.

[1] I attach a true and correct copy of my curriculum vitae hereto as Exhibit 1.

4. Prior to working at the Penn State College of Medicine, I taught doctoral courses, conducted research, and authored scholarly articles at two schools of public health.

5. From 1974 until 1997, I worked at Johns Hopkins University in Baltimore, Maryland, as an Assistant Professor at the School of Health Services (1974-1978), an Assistant Professor in the School of Hygiene and Public Health (1974-1981), an Associate Professor in the School of Hygiene and Public Health (1981-1988) and, from 1988 until 1997, as a Professor in the Department of Health Policy and Management in the School of Hygiene and Public Health.

6. In my 23 years at Johns Hopkins, I held several leadership roles. I served as the Director of the MHS Program in Health Finance and Management (1988-1992), the Director of the Doctoral Program in Health Care Organization and Financing (1992-1994) and the Associate Chair for Health Services Research (1997).

7. From 1997 until 2002, I served as a Professor in the Department of Health Management and Policy at the University of Michigan School of Public Health. I had a joint appointment in the Department of Obstetrics and Gynecology at the University of Michigan Medical School, and was the Founding Director of the Interdepartmental Concentration in Reproductive and Women's Health at the University of Michigan School of Public Health.

8. Throughout my career, I have published over 175 scholarly articles, books, books chapters, monographs, and reports in the area of women's healthcare, including on the following topics:

a. access to health care services and systems for women of reproductive age;

b. contraceptive decision processes;

c. contraceptive counseling in managed care and preventing unintended pregnancy in adults;

d. contraceptive action planning among privately insured women; and

e. contraceptive choices and cost.

9. In addition, I have been an investigator and lead investigator, on more than 40 studies and projects, many regarding women's healthcare. Most recently, I was a co-investigator on the project, "Reducing Unintended Pregnancies through Reproductive Life Planning and Contraceptive Action Planning," PCORI CD-1304-6117, 2013-2017.

10. I have also lectured and made almost 75 presentations throughout the country, in connection with my academic work, at various schools and professional organizations. My recent presentations include:

a. "The Affordable Care Act and Women's Preventive Services: The 2011 IOM Report," keynote lecture as Distinguished Professor in Women's Health, Society of General Internal Medicine 35th annual meeting, Orlando, FL, May 10, 2012;

b. "The Patient Protection and Affordable Care Act's Implications for Women's Health Care," invited seminar at the Pennsylvania Department of Health, Harrisburg PA, May 27, 2014; and

c. "Implications of Proposed Changes to the Affordable Care Act for Women's Reproductive Health Care," invited panelist for The Future of Reproductive Health Policy, Penn State College of Medicine, March 9, 2017.

11. Throughout my career, I have received accolades and recognitions. For example, in 1997, I received the National Award for Excellence in Women's Health Research from the National Association of Professionals in Women's Health; in 2008, I received the Leader in the Field Award from the Family Health Council of Central Pennsylvania; and, in 2012, I received the award of Distinguished Professor in Women's Health from the Society of General Internal

Medicine.

12. I also participate, and have participated, in a variety of professional activities. Among them, I have been on the Editorial Board of *Women's Health Issues* since 1990, serving as Editor-in-Chief (2003-2006) and Associate Editor (1995-2002 and 2007-present), and have been a Full Fellow of the Society of Family Planning since 2016. Since 1988, I have been a member of AcademyHealth, a professional organization dedicated to advancing the fields of health services research and health policy.

II. My Service on the Institute of Medicine Committee Convened by the U.S. Department of Health and Human Services, and the Committee's Report

13. Throughout my career, I have been engaged as a consultant to numerous governmental and academic institutions.

A. *My Service on the Institute of Medicine Committee on Preventive Services for Women*

14. From 2010 to 2011, I served as one of only sixteen invited members of the Institute of Medicine Committee on Preventive Services for Women (the "Committee").

15. This Committee was convened at the request of the United States Department of Health and Human Services ("HHS") to identify existing gaps in women's preventive care and to recommend services and screenings that HHS should consider to fill those gaps.

16. The sixteen experts on the Committee had backgrounds in preventive care, disease prevention, women's health issues, and other areas.

B. *Committee Recommends FDA-Approved Contraception, Sterilization Procedures, and Patient Education and Counseling as Part of Women's Preventive Care*

17. In 2011 the Committee issued its report, titled, *Clinical Preventive Services for Women: Closing the Gaps* (National Academies Press, 2011) (the "Report").

18. The Report made specific recommendations to the Health Resources and

Services Administration ("HRSA"), a department of HHS, regarding evidence-based preventive services to be incorporated in the guidelines promulgated pursuant to the Affordable Care Act, 42 U.S.C. § 18001 *et seq.* (2010) (the "Affordable Care Act" or "ACA").

19. The Committee found that contraceptives are preventive medical services because they prevent unintended pregnancies and that contraceptives should be included in the list of recommended preventive services for women under the ACA, specifically, the "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *See* Ex. B, Report at 109-10.

i. Reducing Unintended Pregnancies

20. In making this finding, the Committee relied on evidence that "contraception and contraceptive counseling" are "effective at reducing unintended pregnancies" and observed that "[n]umerous health professional associations recommend" that such family planning services be included as part of standard preventive care for women. *Id.* at 109.

21. In making this recommendation, the Committee considered recommendations from the American Academy of Pediatrics, the Society of Ado20lescent Medicine, the American Medical Association, the American Public Health Association, the American College of Obstetricians and Gynecologists, and the Association of Women's Health, Obstetric and Neonatal Nurses. *Id.* at 109-10.

22. But the Committee's recommendation was based on a review of the evidence, including the prevalence of unintended pregnancy in the United States.

23. As the Committee stated in its Report, in 2001, an estimated "49 percent of all pregnancies in the United States were unintended—defined as unwanted or mistimed at the time

of conception." *Id.* at 102 (internal citations omitted).

24. The Committee found that these "unintended" pregnancies disproportionately impact the most vulnerable: Although one in every 20 American women has an unintended pregnancy each year, unintended pregnancy is "more likely among women who are aged 18 to 24 years and unmarried, who have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." *Id.*

25. Furthermore, the Committee reported that unintended pregnancies are more likely than intended pregnancies to result in abortions; specifically, "[i]n 2001, 42 percent of [] unintended pregnancies [in the United States] ended in abortion." *Id.*

26. The Committee also concluded that evidence proved that women carrying babies to term are less likely to follow best health practices when their pregnancies were unintended.

27. According to the Institute Committee on Unintended Pregnancy, "women with unintended pregnancies are more likely than those with intended pregnancies to receive later or no prenatal care, to smoke and consume alcohol during pregnancy." *Id.* at 103.

28. Women facing unintended pregnancies are also more likely to be "depressed during pregnancy, and to experience domestic violence during pregnancy." *Id.*

29. The Committee also considered evidence that the "odds of preterm birth and low birth weight among unintended pregnancies ending in live births" was "significantly increased …. compared with pregnancies that were intended." *Id.*

30. Importantly, the Committee determined that contraceptives are effective in preventing unintended pregnancies, citing evidence of contraceptive effectiveness from the Food and Drug Administration and from Contraceptive Technology. *Id*. at 105.

31. The Committee also noted that "greater use of contraception within the population

is associated with lower unintended pregnancy and abortion rates nationally." *Id.* at 105.

32. In making this determination, the Committee relied on a study showing that, as the rate of contraceptive use by unmarried women increased in the United States between 1982 and 2002, their rates of unintended pregnancy and abortion both declined. *Id.*

33. The Committee also considered other studies that showed increased rates of contraceptive use by adolescents from the early 1990s to the early 2000s was associated with a "decline in teen pregnancies" and, conversely, that "periodic increases in the teen pregnancy rate are associated with lower rates of contraceptive use." *Id.*

ii. Minimizing Health Risks, Promoting Recommended Spacing, and Recognizing Additional Health Benefits Unrelated to Preventing Unintended Pregnancy

34. While all pregnancies carry inherent health risks, the Committee also considered that some women have serious medical conditions for which pregnancy is strictly contraindicated or inadvisable.

35. The Committee considered, for example, that "women with serious medical conditions such as pulmonary hypertension (etiologies can include idiopathic pulmonary arterial hypertension and others) and cyanotic heart disease, and … Marfan Syndrome," are advised against becoming pregnant. *Id.*

36. The Committee also considered that the use of contraceptives also promotes medically recommended "spacing" between pregnancies. *Id.*

37. The Committee found that such spacing is important because there is an "increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced (within 18 months of a prior pregnancy)" and "[s]hort interpregnancy intervals in particular have been associated with low birth weight, prematurity, and small for gestational age births." *Id.*

38. The Committee also considered the risks and benefits of contraception and

recognized that contraceptives have other significant health benefits unrelated to preventing unintended pregnancy, including "treatment of menstrual disorders, acne or hirsutism, and pelvic pain," and that long-term use of oral contraceptives has been shown to "reduce a woman's risk of endometrial cancer, as well as protect against pelvic inflammatory disease and some benign breast diseases." *Id.* at 105 and 107.

iii. Recognizing the Need for Family Planning Services and that Cost is a Barrier

39. The evidence reviewed by the Committee demonstrated that, as of 2008, there were still "approximately 36 million U.S. women of reproductive age (usually defined as ages 15 to 44 years)" who were "estimated to be in need of family planning services because they were sexually active, able to get pregnant, and not trying to get pregnant." *Id.* at 103.

40. Citing a Kaiser Permanente study that found "when out-of-pocket costs for contraceptives were eliminated or reduced, women were more likely to rely on more effective long-acting contraceptive methods," the Committee recognized that cost is a meaningful barrier to contraceptive access and found that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years." *Id.* at 109.

41. For these and the other reasons set forth in the Report, the Committee recommended that "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" be included in women's preventive care. *Id.* at 109-10.

42. The Committee's recommendation was based upon reaching consensus following consideration of evidence presented by its members and a variety of professionals and

academics.

III. My Opinion on the final Religious Exemption Rule and final Moral Exemption Rule

43. I have reviewed both the final Religious Exemption Rule and the final Moral Exemption Rule promulgated by the Defendants (the "final Exemption Rules"), as well as the amended Complaint filed by the Commonwealth of Pennsylvania in this matter that challenges them.

44. In addition to my relevant background and experience set forth above, by virtue of being one of the sixteen members of the Institute of Medicine Committee on Preventive Services for Women, I have direct knowledge regarding the Report, promulgated by the HRSA pursuant to the Affordable Care Act, which gave rise to the ACA's original guidelines regarding contraceptives as a preventive service.

45. Based upon my knowledge, education, training and experience, it is my professional opinion that the final Exemption Rules will cause immediate and irreversible harm because they will cause women to lose contraceptive care under their employer group health plans.

46. As set forth above and credited by the Committee, cost to patients has been shown to be a barrier to access to contraceptive care. Women are more likely to use contraceptives – and use them properly and consistently – if they have no cost-sharing responsibilities.

47. Conversely, when women are required to shoulder financial responsibility for preventive care, they are less likely to seek preventive care.

48. Several studies conducted after the ACA went into effect have shown that women are paying less for contraception and that they are using more effective contraceptive methods as a result of having contraceptive coverage under ACA.

49. A study we conducted at Penn State using national health claims data for privately insured women showed a post-ACA decrease in out-of-pocket contraceptive costs and an increase in uptake of long-acting reversible contraceptives, the most effective contraceptives on the market (Snyder AH, Weisman CS, Liu G, Leslie D, Chuang CH. The Impact of the Affordable Care Act on Contraceptive Use and Costs among Privately Insured Women. *Women's Health Issues* 28(3):219-223, 2018.

50. For these reasons, some women who lose contraceptive coverage through their employers as a result of the final Exemption Rules, will choose a less effective contraceptive option for their medical needs, will use contraception inconsistently, or will discontinue using contraceptives entirely.

51. This, in turn, will have irreparable negative physical and mental health impacts on women, including disruptions in ongoing medical treatment and/or unintended pregnancies.

52. It is also my opinion that the new final Exemption Rules are not based upon sound scientific or empirical evidence.

53. The final Exemption Rules indicate, among other things, that contraceptives are not effective in preventing unintended pregnancy, that they are harmful to women's health, and that they promote promiscuity.

54. These representations conflict with peer-reviewed and medically-accepted data, and are not credible.

55. For these reasons, I believe that an injunction of the final Exemption Rules is necessary to prevent immediate and irreparable harm to women in Pennsylvania and around the Country, who will lose ongoing preventive care coverage under their group health plan due to the final Exemption Rules.

I hereby affirm that the foregoing is true and correct based upon my knowledge, information and belief, and I make these statements subject to the penalty of perjury.

Date: 12/17/2018

By: Carol S. Weisman
CAROL S. WEISMAN, Ph.D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP, *et al.*, Defendants.	**No. 2:17-cv-04540-WB**

DECLARATION OF SAMANTHA F. BUTTS, M.D., MSCE[1]

I, Samantha F. Butts, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by the Commonwealth of Pennsylvania in the above-captioned matter and, in support thereof, I state as follows:

I. My Background and Experience

1. I am a doctor, teacher, and clinical researcher in the area of women's reproductive health. Of the time I spend working, I spend approximately 15% on education and administration, 10%-15% on clinical research, and 70%-75% on patient care.

A. *My Education, Licensure and Board Certifications*

2. I earned a Bachelor of Arts degree, *cum laude*, from Harvard University, in 1994, and a Medical Degree from the Harvard University School of Medicine, in 1998.

3. I completed both my residency in Obstetrics and Gynecology (1998-2002) and a Fellowship in Reproductive Endocrinology and Infertility (2002-2005) at the Hospital of the University of Pennsylvania.

4. After that, I earned a Masters of Science in Epidemiology (MSCE) from the

[1] I attach a true and correct copy of my curriculum vitae hereto as Exhibit A.

University of Pennsylvania School of Medicine in 2006.

5. I have been licensed to practice medicine in Pennsylvania since 2001.

6. I have also been certified by the American Board of Obstetrics and Gynecology with a specialty in Obstetrics and Gynecology since 2006 and subspecialty in Reproductive Endocrinology & Infertility since 2009.

B. ***My Teaching, Research and Additional Qualifications***

7. I have held a faculty position at the University of Pennsylvania School of Medicine since 2005.

8. I started as an Assistant Professor and, since 2014, I have served as an Associate Professor of Obstetrics and Gynecology, in the Division of Reproductive Endocrinology and Infertility (REI). From 2014-2016, I was honored to serve as the Ombudsman for the Students at the University of Pennsylvania School of Medicine, Perelman School of Medicine.

9. As an AssociateProfessor of Obstetrics and Gynecology, I am actively involved in the clinical training of medical students, residents and fellows. I participate in didactic education programs and mentor resident-driven clinical research projects.

10. I also developed the first comprehensive reproductive endocrinology and infertility curriculum for trainees at the Hospital of the University of Pennsylvania and supervise resident training in reproductive endocrinology and infertility. In 2011, my achievements in resident education were recognized with a National Faculty Teaching Award from the American College of Obstetricians and Gynecologists and the Council on Resident Education in Obstetrics and Gynecology.

11. I also spend a meaningful amount of my time acting as a clinical researcher.

12. In this capacity, I serve and have served as an investigator and principal

investigator on a number of studies and projects regarding women's healthcare, many of which have been fully funded by grants. For example, I was one of the first people to receive a National Institute of Health training grant as part of the NIH's National Training Program in Reproduction (NIH T32 grant), and I was the inaugural recipient of the New Investigator Award from the Center of Excellence in Environmental Toxicology at the University of Pennsylvania.

13. I have published more than 100 scholarly articles, abstracts, research publications, reviews, book chapters, and committee reports related to women's reproductive healthcare. Among these, I have researched and written peer-reviewed articles about treating hormonal disorders, such as polycystic ovary syndrome, using contraceptives as a first-line medication. *See, e.g., Polycystic Ovary Syndrome: How Best to Manage?*, Consultant, 46:745-749, (2006) and *Abnormal Uterine Bleeding*, NMS Series for Independent Study: Obstetrics and Gynecology, Chap. 23, (6th. Ed. 2008).

14. I am often engaged to consult and collaborate with academic and private institutions. Recently, for example, as a member of the American College of Obstetricians and Gynecologists' Committee on Gynecologic Practice (ACOG Committee), I was asked to develop an opinion regarding treatment of Primary Ovarian Insufficiency. In connection with my work on this issue, the ACOG Committee published an opinion in May of 2017 recommending that contraceptives be considered among the options to provide as hormone replacement therapy to treat Primary Ovarian Insufficiency. *See* Opinion 698, *Hormone Therapy for Primary Ovarian Insufficiency*, Obstetrics and Gynecology, 129(5): 963-964 (May 2017).

15. In connection with my work, I have lectured throughout the country, by invitation, about reproductive health. For example, at the 2016 Women in Statistics Conference in Charlotte, North Carolina, I delivered a presentation called "Reproductive Decision Making

and Your Career: Embracing Biology, Debunking Myths, and Gaining Control."

16. I have also organized and moderated multiple scientific meetings throughout my career, including annual meetings of the American Society of Reproductive Medicine.

17. I have held various professional appointments, as well. Among these, I have been a Member of the Center for Research on Reproduction and Women's Health since 2005; an Associate Scholar for the Center for Clinical Epidemiology and Biostatistics at the University of Pennsylvania since 2006; and a Member of the Center for Excellence in Environmental Toxicology, Endocrine Disruptors Core, since 2008.

18. I also maintain memberships in a number of professional, academic, and scientific societies, both nationally and internationally, including the American Society for Reproductive Medicine (since 2002), the Society for Reproductive Endocrinology and Infertility (since 2002), the American College of Obstetricians and Gynecologists (since 1998) and the Endocrine Society (since 2012). I have received many professional accolades, awards, and honor society memberships throughout my career.

C. *My Medical Practice*

19. In addition to my academic work, I maintain an active medical practice and, in 2017, was listed as one of *Philadelphia Magazine*'s "Top Doctors".

20. Since 2005, I have served as an Attending Physician in the Department of Obstetrics and Gynecology, and also in the Reproductive Surgical Facility at the Hospital of the University of Pennsylvania.

21. Last year I saw and treated approximately 1,500 to 2,000 patients.

22. Some of my patients travel thousands of miles for the specialty medical treatment I can provide at Penn Medicine.

23. But in many ways, my medical practice reflects the reality that the Hospital of the University of Pennsylvania is also the community hospital of West Philadelphia.

24. In addition to specialty patients and residents of West Philadelphia, I also treat many members of the academic community at at the University of Pennsylvania.

25. My clinical expertise includes reproductive endocrinology, with a focus on managing hormonal disorders such as polycystic ovary syndrome, primary ovarian insufficiency/premature ovarian failure, amenorrhea, dysmenorrhea/chronic pelvic pain, and abnormal uterine bleeding, as well as in infertility, in vitro fertilization, and reproductive surgery.

26. Many of these medical conditions and disorders are common among women.

27. As part of my practice, I regularly prescribe contraceptives for both contraceptive and non-contraceptive purposes.

II. Benefits of Contraceptive Use

A. *Contraceptives Are Effective and Approved for Uses Other Than Preventing Pregnancy*

28. Contraceptives are effective, and approved, to be used as medication for purposes other than preventing pregnancy. Indeed, I regularly use all kinds of contraceptives for non-contraceptive uses, including for the treatment of life-threatening problems.

29. For example, contraceptives are the standard first-line of care for a number of hormonal, and other, disorders, including poly-cystic ovarian syndrome, primary ovarian insufficiency/premature ovarian failure, amenorrhea, dysmenorrhea/chronic pelvic pain, and abnormal uterine bleeding.

30. These conditions greatly impact the quality of life of the many women who suffer from them. In fact, about 10% percent of all women have irregular periods caused by poly-cystic

ovarian syndrome or other hormonal disorders which can significantly harm well-being and quality of life. Extreme cases of heavy menstrual bleeding due to hormonal or anatomic problems of the uterus that I see and treat can at times be life-threatening.

31. I frequently use contraceptives to treat these conditions in my own medical practice and, in fact, prescribe "birth control pills" more for these other purposes than to prevent pregnancy given the population of patients who make up my practice.

32. Throughout my career, I have been required to perform non-operative blood transfusions for at least 50 women due to loss of blood caused by heavy periods and acute menstrual bleeding that can cause anemia.

33. In 2009, the FDA approved use of the Mirena Inter-Uterine Device (IUD) to treat women with heavy bleeding and hemophilia. Among my patients who use the Mirena IUD, the vast majority (90%-95%) use it for purposes other than birth control.

34. The hormonal and other disorders I treat inflict direct and indirect personal and financial costs upon the women who suffer from them; they prevent women from participating fully in the workplace and, more broadly in society.

35. Contraceptives are a cost-effective and clinically proven way to treat these often debilitating disorders.

B. *Contraceptives Are Effective in Preventing Unintended and Ill-Advised Pregnancies, and Their Use Causes Other Long-Term Health Benefits*

36. Contraceptives also play an important role in preventing unintended pregnancy.

37. For some women, this treatment is not optional – it is necessary to prevent serious illness and even death.

38. There are multiple high risk conditions for which pregnancy is relative or absolutely contraindicated. These conditions include cardiac problems and history of stroke.

39. For survivors of breast cancer, pregnancy hormones can cause serious medical harm until the patient is well into remission.

40. Contraceptives help patients avoid unintended pregnancies in such situations; they prevent medical harm and save lives.

41. Contraceptives use also carries long-term health benefits for women.

42. For instance, it has been shown that long-term users of the standard oral contraceptive pill (at least 5-10 years of usage) are 50-80% less likely to develop ovarian or uterine cancer.

III. My Opinion on the "Religious Exemption Rule" and "Moral Exemption Rule"

43. I have reviewed both the "Religious Exemption Rule" and the "Moral Exemption Rule" (together, the "Rules"), as well as the Complaint filed by the Commonwealth of Pennsylvania in the above-captioned matter that challenges them.

44. Based upon my knowledge, education, training and experience, it is my professional opinion that the Rules will cause immediate and irreversible harm because they will cause women to lose preventive contraceptive care under their employer group health plans.

A. *Cost is a Barrier to Contraceptive Access*

45. It is my understanding, and it has been my experience, that cost is a barrier to patient access to contraceptives.

46. Prior to passage of the Affordable Care Act (the "Affordable Care Act" or "ACA"), before preventative contraceptive care was provided at no additional cost under the ACA's contraceptive mandate, I regularly counseled my patients about the cost related to their recommended contraceptive choices.

47. I would estimate that, prior to the ACA, about 10-20% of the patients for whom I

had prescribed contraceptives would come back from the pharmacy without filling their prescriptions; they would, instead, request that I prescribe a less effective, but cheaper, method of contraception. Or they would forego use of contraception altogether.

48. Such requests were most frequent when I had prescribed an IUD because, pre-ACA, IUDs were one of the most expensive forms of contraception for patients. But they are also a much more effective method of contraceptive care than are birth control pills.

49. And, for therapeutic reasons, some patients cannot take estrogen birth control pills, at all.

50. After the ACA passed and the contraceptive mandate was instituted, however, I saw that my patients were free to make contraceptive choices on the basis of their medical needs and concerns, alone, without the burden of having to weigh the cost of the preferred medical choice. Post-ACA, the only concern has been what is best for the patient.

51. As a result, I have seen my patients making more medically informed contraceptive choices and have not had the experience of patients rejecting the contraceptives I prescribed due to their cost under private insurance plans.

C. *Because Patients Will Lose Contraceptive Coverage under the New Rules, They Will Make Less Medically Sound Contraceptive Choices and, Therefore, Will Be Harmed*

52. It is apparent, however, that under the new Rules this post-ACA focus on what is best for the patient will change.

53. This is so because, as a result of the Rules, some women will lose insurance coverage for preventative contraceptive care.

54. As a result, their cost for contraceptive care will rise.

55. Based upon my own experience and existing scientific and empirical information that I have reviewed and am aware of, under the new Rules, cost will, again, become a barrier to

women's access to and use of the contraceptive that is medically recommended for them.

56. Many of these women who will no longer receive contraceptive coverage will not only face financial harm, but will also face medical harm.

57. This harm will manifest itself in the disruption of these patients' medical treatment, whether by substituting a less effective but cheaper method of contraception or by being forced to stop using contraceptives at all, due to financial reasons.

58. Some of these women will face unintended pregnancy and other adverse medical consequences.

D. ***The New Rules Are Not Based Upon Sound Scientific or Empirical Evidence***

59. It is also my opinion that the new Rules are not based upon sound scientific or empirical evidence.

60. The Rules indicate, among other things, that contraceptives are not effective in preventing unintended pregnancy, that they are harmful to women's health, and that they promote promiscuity. This is false.

61. These representations conflict with peer-reviewed and medically-accepted data, and are not credible.

62. For these reasons, I believe that an injunction of the Rules is necessary to prevent immediate and irreparable harm to women in Pennsylvania and around the Country, who will otherwise lose ongoing preventive care coverage under their group health plans due to the Rules.

I hereby affirm that the foregoing is true and correct based upon my knowledge, information and belief, and I make these statements subject to the penalty of perjury.

Date: 10/25/17

By: _____
SAMANTHA F. BUTTS, M.D., MSCE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP *et al.* Defendants.	**NO. 2:17-cv-04540-WB**

DECLARATION OF SETH A. MENDELSOHN

I, Seth A. Mendelsohn, declare and state as follows:

1. I am the Executive Deputy Insurance Commissioner for the Pennsylvania Department of Insurance (the "Department"). In this capacity I oversee, *inter alia*, the Office of Insurance Product Regulation and Administration, including the Bureau of Life, Accident and Health Insurance.

2. The Department is the primary regulator for all health insurance products sold in the Commonwealth of Pennsylvania.

3. Insurance providers are subject to a complex set of federal and state laws and regulations, and federal and state agencies have distinct but overlapping responsibilities in regulating these entities.

4. For instance, the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA), governs most employee health care coverage and other benefit plans offered by private employers. ERISA preempts certain state laws relating to the regulation of insurance.

5. As a result of the preemption provisions of ERISA, the Department does not regulate self-funded health care coverage plans offered by private employers, which are plans established and maintained by an employer or by an employee organization for which the employer or employee organization bears the direct financial risk for the cost of claims for health care benefits. These plans are subject to ERISA and are regulated primarily by the U.S. Department of Labor.

6. The Department does regulate fully-insured employer group health insurance policies. These are health plans that an employer group purchases from an insurer, for which the insurer assumes the direct financial risk for the cost of claims for health care benefits.

7. In addition, the Department regulates health insurance policies offered in the individual market.

8. I am familiar with the Affordable Care Act's requirement that group health plans and health insurance issuers offering group or individual health insurance coverage cover preventive health services, including FDA-approved methods of contraception, without any cost-sharing requirements (the "Contraceptive Care Mandate").

9. The Contraceptive Care Mandate applies both to ERISA-regulated plans as well as almost all insured group and individual health insurance plans that are regulated by the Department.

10. More than 2.5 million women in Pennsylvania could benefit from the Contraceptive Care Mandate. This total includes women who receive insurance through their employer or through a spouse or other family member's employer, along with those who purchase insurance for themselves and their families through the individual market.

11. The Department estimates that the women in Pennsylvania who have benefited from the Contraceptive Care Mandate have saved over $250 million annually as a result.

12. Many states have enacted laws requiring insurers that cover prescription drugs to provide coverage for any Food and Drug Administration-approved contraceptive. These statutes are commonly referred to as "contraceptive parity" laws.

13. Pennsylvania, however, does not have a "contraceptive parity" statute. As a result, employers offering Department-regulated plans that opt out of the ACA's Contraceptive Care Mandate will not be subject to any requirement to provide contraceptives to their employees and beneficiaries. Thus, women in plans provided by these employers will not receive contraceptive coverage through these plans.

14. Similarly, employers offering plans that are subject to ERISA that opt out of the Contraceptive Care Mandate will also not be subject to any requirement to provide contraception to their employees and beneficiaries.

15. The Department anticipates that women who lose contraceptive coverage through employer plans – whether the plan of their own employer or that of another family member – may seek contraceptive coverage from other sources, including state-funded programs, or face the financial burden of paying for the full cost of contraceptives themselves.

16. Further, insofar as the Final Rules[1] effectively expand the universe of employers that may claim a contraceptive coverage exemption, even more women may be denied access to contraceptive coverage.

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[1] "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act", 83 Fed. Reg. 57536 et seq. (Nov. 15, 2018) and "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act", 83 Fed. Reg. 57592 et seq. (Nov. 15, 2018) (the "Final Rules").

17. Moreover, because the Final Rules contemplate that individuals, covered by employer plans that provide contraceptive care, may nevertheless opt out of the ACA's Contraceptive Care Mandate, and, in so doing, effectively deny contraceptive care to all of the individual's female dependents covered by the same plan, still more women may be denied access to contraceptive coverage.

18. In any case, whether it is the employer's choice or the individual's choice or the choice of the individual as to whom a woman is a dependent, women who have access to affordable employer-based coverage but who lose contraceptive coverage as a result of the Final Rules will be unable to purchase individual coverage on the marketplace with any applicable premium tax credit and cost sharing reductions. Again, the Department anticipates that women put in this position may seek contraceptive coverage from other sources, including state-funded programs, or face the financial burden of paying for the full cost of contraceptives themselves.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Seth A. Mendelsohn

SETH A. MENDELSOHN

Dated: December 12, 2018

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP *et al.* Defendants.	**NO. 2:17-cv-04540-WB**

DECLARATION OF LEESA ALLEN

I, Leesa Allen, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by the Commonwealth of Pennsylvania in the above-captioned matter and, in support thereof, I state as follows:

I. Background

1. I serve as the Acting Executive Deputy Secretary for the Pennsylvania Department of Human Services ("DHS" or "the Department"). Before assuming my current position, I was the Deputy Secretary for Medical Assistance Programs at DHS. I have worked for the Department of Public Welfare, now DHS, since 1993, serving in various roles within the Office of Medical Assistance Programs since 2000. I was most recently the Deputy Secretary for Medical Assistance Programs, the Executive Medicaid Director, Chief of Staff, and Director of the Bureau of Policy. In my current role, I oversee all of the Department's operations and report directly to the Acting Secretary of DHS, who serves as a member of the Governor's cabinet.

2. DHS is responsible for administering a variety of services and benefits to residents of Pennsylvania, including health care services, support for individuals with

disabilities, child support enforcement, treatment for substance use disorder, and services for children and families.

II. Pennsylvania's Medical Assistance Program

3. DHS's Office of Medical Assistance Programs has primary responsibility for overseeing Commonwealth programs that offer health benefits to Pennsylvania residents. Those programs include the Medicaid program, known as Medical Assistance in Pennsylvania. In my prior role as Deputy Secretary for Medical Assistance Programs, I oversaw the Office of Medical Assistance Programs.

4. Medicaid is a program jointly funded by the states and the federal government that makes health care available to low-income individuals and families. States have responsibility for administering Medicaid, but are subject to federal oversight.

5. Medicaid is funded according to a formula under which the federal government contributes a specific amount for every dollar spent by Pennsylvania. If additional Pennsylvanians enroll in the Medical Assistance program, the federal and state government will both spend more on the program, thereby shifting costs from the private to the public sector.

6. As of August 2017, there were 2,869,246 Pennsylvanians enrolled in the Medical Assistance program. For the period April 1, 2016, through March 31, 2017, a total of $28.8 billion in state and federal funding was spent on Medical Assistance. Of that amount, $11.2 billion was provided by the Commonwealth, and the remainder was provided by the federal government.

7. Eligibility for Medical Assistance is based primarily on income level. The Affordable Care Act expanded Medicaid eligibility so that individuals and families with incomes up to 138% of the federal poverty limit would generally be eligible for the program. However, in

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), the Supreme Court ruled that states could not be required to expand Medicaid under the ACA, and therefore the expansion was rendered optional.

8. Governor Tom Wolf elected to expand the Medical Assistance program in 2015, so that individuals and families in Pennsylvania with incomes up to 138% of the federal poverty limit are eligible for the program. Over 700,000 Pennsylvanians have enrolled in the Medical Assistance program as a result of the expansion.

9. For women who are pregnant, Medical Assistance eligibility requirements are different. Pregnant women are eligible if they have incomes at or below 215% of the federal poverty limit. In 2017, 215% of the federal poverty limit is $25,929 for an individual and $52,890 for a family of 4.

10. Medical Assistance provides beneficiaries with a variety of contraception options. In November 2016, DHS announced that it was making changes to its payment policies to hospitals to encourage the use of long-acting reversible contraception (LARC), which includes intrauterine devices and birth control implants.

11. Although LARCs are more effective than other methods of contraception and save money in the long run, they can have high upfront costs. By changing its fee-for-service payment policies for hospital providers for these costs, DHS has made it easier for women to use LARCs.

12. Over half of all unplanned pregnancies occur within two years of delivery of a child. For this reason, the Commonwealth encourages the use of LARCs as post-partum contraception to reduce the rate of such unplanned pregnancies.

13. In addition, Medical Assistance offers specific benefits for eligible pregnant women Those benefits include full scope medical benefits, as well as other benefits including proper prenatal care and early detection and treatment of health problems.

III. Pennsylvania's Family Planning Services Program

14. DHS also administers Pennsylvania's Family Planning Services program. The Family Planning Services program provides family planning benefits to individuals who are not eligible for full Medical Assistance benefits but satisfy other conditions. The Family Planning Services program receives federal and state Medicaid funds.

15. The Family Planning Services program was launched in 2008 as the SelectPlan for Women. Originally, it operated pursuant to a "Section 1115 waiver" granted by the U.S. Secretary of Health and Human Services. Section 1115 waivers free states from certain requirements of the Medicaid program so they can implement demonstration projects using federal and state Medicaid funds. Section 1115 waivers must be renewed every 5 years.

16. In 2015, the SelectPlan for Women Program authorized under the Section 1115 Waiver was transitioned to the Family Planning Services program authorized under the Medicaid State Plan. Under a provision of the ACA, states were provided the option to provide family planning and family planning-related services to individuals with incomes at or below 215% of the federal poverty limit who would not otherwise be eligible for Medicaid. With the transition, the program began to provide family planning and family planning-related services to men as well. As a result of this new authority, the Commonwealth no longer needs to seek a waiver from the Department of Health and Human Services every five years.

17. The Family Planning Services program is open to individuals and families with incomes at or below 215% of the federal poverty limit. Pregnant women (who would be eligible for Medical Assistance) are not eligible.

18. In August 2017, 17,333 individuals were enrolled in the Family Planning Services program.

19. Women and men who are employed and who receive health insurance through their employer may participate in Family Planning Services, provided they satisfy the eligibility criteria, and many beneficiaries of the program are employed. However, individuals who receive coverage for family planning services through their employer or from another source are not eligible for the program. Therefore, those participants in Family Planning Services who are employed either do not receive health coverage from their employers or receive coverage that does not include family planning services.

20. Because the Family Planning Services program is funded under Medicaid, total spending on the program depends on enrollment. If more individuals participate in the program, federal and state spending increase.

21. The Family Planning Services program provides contraceptive benefits, including coverage for birth control pills and LARCs. The program also provides a variety of other benefits, including pregnancy counseling, HIV and STD testing and treatment, and male and female sterilization.

22. These services are provided to beneficiaries without copays, deductibles, or other cost-sharing arrangements.

23. It is not unreasonable to expect that women who do not receive contraceptive care from their employers or private insurance will turn to government-funded programs,

such as Medical Assistance, to the extent they are eligible for these programs. Therefore, some eligible women who require contraceptive care but who work for employers that choose to opt out under the new exemption rules will likely seek out other coverage options, including the Commonwealth-funded programs discussed above.

IV. The Administration's Executive Orders

24. I am generally familiar with the Affordable Care Act's Contraceptive Care Mandate, which requires non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage to provide coverage for FDA-approved methods of contraception without imposing cost-sharing requirements.

25. I understand that the Administration issued two rules on October 6, 2017, that expanded the exemptions from the Contraceptive Care Mandate. Under these rules, covered entities may opt out of complying with the mandate on the basis of a sincerely held moral or religious conviction.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: October 27, 2017

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. DONALD J. TRUMP *et al.* Defendants.	**NO. 2:17-cv-04540-WB**

DECLARATION OF DAYLE STEINBERG

I, Dayle Steinberg, hereby submit this declaration in support of the Motion for Preliminary Injunction filed by the Commonwealth of Pennsylvania in the above-captioned matter and, in support thereof, state as follows:

1. I am the CEO of Planned Parenthood Southeastern Pennsylvania. Planned Parenthood is one of the nation's largest providers of health care to women, men, and teenagers.

2. Nationwide, Planned Parenthood operates more than 600 health centers providing a variety of health services, including family planning services. Each year, 2.4 million women, men, and young people visit a Planned Parenthood health center to obtain services or information. Approximately 75% of these patients seek services to prevent unintended pregnancy.

3. Planned Parenthood Southeastern Pennsylvania provides services in Chester, Delaware, Montgomery, and Philadelphia Counties. We operate 8 health centers in the area and, in fiscal year 2016, provided services to 36,779 women, men, and teens in these centers.

I. The Title X Program Provides Federal Grants for Family Planning Services

4. Title X of the Public Health Service Act[1] provides grants to both public and private agencies for family planning services. Specifically, Title X authorizes grant money "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."

5. Title X grants are awarded through a competitive process. They fund services provided by state and local health departments, hospitals, university health centers, and non-profit agencies. The Title X program is overseen by the Office of Population Affairs of the U.S. Department of Health and Human Services (HHS-OPA) oversees the Title X grant program.

6. Since 2010, Title X funding has decreased by $31 million, nationally. In 2010, the nationwide program received $317.5 million; in 2017, it received $286.5 million.[2] In addition, there are frequent efforts by some in Congress to eliminate funding for the program entirely.

7. In Pennsylvania, Title X grant money is provided directly to four private, non-profit, regional Family Health Councils. They are: AccessMatters (formerly the Family Planning Council) in Philadelphia; Adagio Health in Pittsburgh, Maternal and Family Health Services, Inc. in Wilkes Barre, and the Family Health Council of Central Pennsylvania in Camp Hill. The Alliance of Pennsylvania Councils supports and coordinates the efforts of the four Family Health Councils.

8. These four Family Health Councils also receive funding from the Commonwealth of Pennsylvania as well as local sources. For instance, in the fiscal year ending June 30, 2016, AccessMatters received approximately $8.2 million in federal funding and $3.9 million in state

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[1] 42 U.S.C. § 300 *et seq*.

[2] National Family Planning & Reproductive Health Association, Title X Budget & Appropriations, *available at* https://www.nationalfamilyplanning.org/title-x_budget-appropriations.

and local funding. The vast majority of this $3.9 million was provided by the Pennsylvania Department of Health and the Pennsylvania Department of Human Services.[3]

II. Pennsylvania's Family Planning Clinics

9. These four Family Health Councils in turn provide funding to a variety of organizations in Pennsylvania. These organizations operate clinic-based health centers throughout the Commonwealth.

10. As of December 2016, there were 162 facilities in Pennsylvania receiving Title X funding. Each county in Pennsylvania has at least one such clinic.

11. These clinics provide women and men with access to a variety of family planning services. These services include contraception, HIV and STD testing, counseling services, pregnancy testing, certain infertility services, and breast and cancer screening. They are important to the citizens of Pennsylvania and to the overall health of Pennsylvania, as a whole.

12. Although facilities that receive Title X grants are typically referred to as "Title X clinics," they actually receive funding from a variety of sources and only a small part through Title X. In fact, Title X accounts for less than one-fifth of their revenue.

13. According to the 2016 Title X Family Planning Annual Report[4] (at ES-3), the top three sources of revenue for Title X clinics nationwide were Medicaid and CHIP (the Children's Health Insurance Program) (39% of revenue); Title X (19%); and state government funding (10%).

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[3] AccessMatters, *Consolidated Financial Statements and Supplemental Information, Years Ended June 30, 2016, and 2015*, at 4, *available at* http://www.govwiki.info/pdfs/Non-Profit/PA%20Accessmatters%202016.pdf.

[4] Department of Health and Human Services Office of Population Affairs, *Title X Family Planning Annual Report, 2016 National Summary* (August 2017), *available at* https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf.

14. Title X acts as "the payer of last resort" for these clinics. In other words, each clinic can only use Title X funds to pay for services if no other source of funding is available. This includes funding from the Commonwealth or other federal funding. As a result, many of our patients receive services that are funded by multiple sources.

15. For this reason – and to ensure that clinic patients can receive the best possible care – Title X clinics work to educate patients about available government health programs and help patients enroll in programs for which they are eligible.

16. In Pennsylvania, these programs include Medical Assistance (Medicaid) and the Family Planning Service Program, both of which received Commonwealth funding. Title X clinics will assist patients who are eligible for (but not enrolled in) these programs with the necessary paperwork so that they can be enrolled. Doing so not only ensures that the patient has all the coverage for which she is eligible for, but it allows the clinic to save Title X and Commonwealth grant money.

17. While the priority of the Family Health Councils is to assist low income families, each Title X clinic in Pennsylvania provides family planning services to any individual seeking *services*, regardless of income or insurance status. Family planning services are provided based on a sliding scale fee structure depending on the individual/family income level.

18. According to the 2016 Annual Report (at B-3), in 2016, family planning services through Title X grants were provided to 198,825 Pennsylvania residents.

19. Of these recipients of care, 73% had some form of insurance. Among this 73%, 46% had insurance through Medicaid or another government-funded program (vs. 37% nationwide) and 27% had private insurance (vs. 18% nationwide) (2016 Annual Report at B-7).

20. Many Title X patients are currently employed or have a family member who is currently employed. Many of these patients receive insurance through their employer or their family member's employer.

21. In some cases, Title X clinics are reimbursed by the insurance company; however, private insurance often does not provide sufficient coverage. Thus, while 18% of all Title X users nationwide have private insurance, private sources of funding account for only 10% of clinic revenue (2016 National Report at B-7).

III. The Effects of the Contraceptive Care Mandate

22. I understand that the Administration has issued new regulations that will make it easier for employers and others to opt out of the Affordable Care Act's contraceptive mandate.

23. My colleagues at Planned Parenthood Southeastern Pennsylvania and I are very concerned that this action will lead to an increase in the number of employers in Pennsylvania that do not provide their employees with adequate insurance coverage for contraceptive care.

24. Women who need contraceptive care but whose employers refuse to provide coverage for it will be forced to get care elsewhere. Many of these women will seek assistance from government programs.

25. In fact, for many low-income women in this situation, a government-funded program will be the only viable option for obtaining contraceptive care.

26. Therefore, we expect that many women in Pennsylvania who lose their contraceptive coverage will seek care from one of the 162 Title X clinics in the Commonwealth.

27. Some of these women will likely be eligible for either Medical Assistance (Medicaid) or Pennsylvania's Family Planning Services program. If they seek care at a Title X clinic in Pennsylvania, the clinic will help them enroll in either program.

28. Low-income women who seek services from a Title X clinic and are not eligible for these programs will receive contraceptive care funded by other sources. In most instances, their care will be funded through Title X and funding provided by the Commonwealth of Pennsylvania.

29. We expect that the new exemptions from the Contraceptive Care Mandate will lead to an increase in the number of women who get contraception through Medicaid and Family Planning Services, as well as an increase in the number of women who obtain contraception from Title X clinics paid for by federal and state funding.

30. We are also concerned that some women who lose their coverage will stop using contraception altogether. Women who stop using contraception are more likely to have unplanned pregnancies and to require additional medical attention. According to an analysis of 2010 data by the Guttmacher Institute, 68% of unplanned births are paid for by public insurance programs, including Medicaid, while 38% of planned births are paid for by these programs.[5]

31. As I explained above, meeting this increased need will require additional state funds.

32. For all these reasons, I believe that the new exemptions to the contraceptive mandate will have a negative effect on the health of Pennsylvania women; that they will increase the number of women who receive contraceptive coverage through Medical Assistance and Family Planning Services; and that they will impose additional economic and other burdens on Title X clinics across the Commonwealth.

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[5] Guttmacher Institute, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010* (Feb. 2015), *available at* https://www.guttmacher.org/report/public-costs-unintended-pregnancies-and-role-public-insurance-programs-paying-pregnancy.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dayle Steinberg

Dated: October 31, 2017

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, and STATE OF NEW JERSEY Plaintiffs, v. DONALD J. TRUMP, *et al.* Defendants.	**Civil Action No: 2:17-cv-04540-WB**

DECLARATION OF SARAH ADELMAN

I, Sarah Adelman, declare and state as follows:

1. I serve as Deputy Commissioner of the New Jersey Department of Human Services. In this capacity I oversee the Division of Medical Assistance and Health Services ("DMAHS").

2. DMAHS administers New Jersey's $17 billion state- and federally- funded Medicaid and Children's Health Insurance Programs (collectively referred to as "NJ FamilyCare") that provide health coverage for certain low to moderate income residents. Through its programs, DMAHS serves more than 1.7 million people in New Jersey.

3. NJ FamilyCare provides comprehensive medical coverage and family planning services to its beneficiaries.

4. New Jersey also has Title X family planning clinics within the state that are not affiliated with DMAHS.

5. Medicaid is a program jointly funded by the states and the federal government that makes health care available to low-income individuals and families. States have responsibility for administering Medicaid, but are subject to federal oversight.

6. Medicaid is funded according to a formula under which the federal government contributes a specific amount for every dollar spent by New Jersey. If additional New Jerseyans enroll in the Medical Assistance program, the federal and state government will both spend more on the program, thereby shifting costs from the private to the public sector.

7. As of October 2018, there were 1,747,375 NJ FamilyCare beneficiaries in New Jersey. For State fiscal year 2018, a total of approximately $16,267,000,000 in state and federal funding was spent on NJ FamilyCare. Of that amount, roughly $9,843,000,000 was provided by the federal government, and $6,424,000,000 was provided by New Jersey.

8. For fiscal year 2018, DMAHS's estimated cost to provide contraceptive and family planning coverage through NJ FamilyCare was approximately $15 million, with the federal government covering 90% of that cost.

9. Eligibility for NJ FamilyCare is based primarily on income level. The Affordable Care Act expanded Medicaid eligibility so that individuals and families with incomes up to 138% of the federal poverty level would generally be eligible for the program. However, in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), the Supreme Court ruled that states could not be required to expand Medicaid under the Affordable Care Act, and therefore the expansion was rendered optional.

10. New Jersey elected to expand Medicaid in January 2014, so that single adults, childless couples, parents, and caretakers with incomes up to 138% of the federal poverty limit

are eligible for the program. Over 500,000 of these individuals have enrolled in NJ FamilyCare since its expansion.

11. For women who are pregnant, NJ FamilyCare has expanded income-based eligibility so that pregnant women are eligible if they have incomes at or below 205% of the federal poverty level. At present, 205% of the federal poverty level is $4,302 per month for a family of four.

12. DMAHS is planning the 2019 rollout of a family planning benefit program called Plan First for individuals with income ranging from 133% to 205% of the federal poverty level.

13. DMAHS projects that there will be 10,000 to 12,000 Plan First participants in the first year of the program, and between 31,000 to 55,000 participants by the fifth program year.

14. DMAHS designed the Plan First program to allow pregnant women to transition seamlessly into the Plan First program after the 60-day postpartum period and to allow Plan First beneficiaries who become pregnant to easily transition to a DMAHS program ensuring early prenatal treatment. The eligibility standards for Plan First will mirror the current NJ FamilyCare requirements for pregnant women.

15. NJ FamilyCare provides beneficiaries with a variety of contraception options, and there is no co-pay for family planning preventive services.

16. Among those options is long-acting reversible contraception ("LARC"), which includes intrauterine devices and birth control implants. While NJ FamilyCare has always covered LARC devices in an outpatient setting or as part of a bundled inpatient payment, it began to allow providers to bill separately for devices and insertion in the immediate postpartum period (defined as within 10 minutes after delivery of the placenta) in July 2018. In addition, the Plan First program will provide for access to LARCs for additional individuals in 2019.

17. New Jersey recognizes the importance of allowing members who wish to utilize LARC devices to have free and open access to them to reduce the rate of unplanned pregnancies. Although LARCs can have high upfront costs, they are not associated with compliance issues that can cause failures with other comparable methods of birth control, and as such are more effective than most other methods of contraception and would likely result in better outcomes and better long-term savings to the State when compared to other contraceptive methods.

18. LARCs facilitate optimal "birth spacing," defined as a minimum 18 month interval between pregnancies. Without birth spacing, babies are more likely to be premature, of low birthweight, small for their gestational age, and, consequently, more likely to face long-term health problems and higher mortality rates. In 2017, the prematurity rate in New Jersey was one in eleven babies.[1]

19. DMAHS anticipates that some women, particularly low-income women, who lose contraceptive coverage through their employer's plans may seek contraceptive coverage from other sources, such as NJ FamilyCare, Plan First, and Title X. This will result in additional costs to New Jersey, which will be forced to absorb additional costs presently borne by private insurers.

20. Other women who lose their contraceptive benefits may forego contraceptive use entirely, which would result in increased numbers of unintended pregnancies and a dramatic increase in costs to State-funded programs designed to ensure the health of women and infants.

21. The loss of employer-sponsored health insurance coverage for contraception can be expected to disproportionately impact New Jersey's women of color. In 2015, 28% of New

[1] March of Dimes, *A Profile of Prematurity in New Jersey, available at* https://www.marchofdimes.org/peristats/tools/prematurityprofile.aspx?reg=34.

Jersey pregnancies were unplanned, including 53.1% among non-Hispanic black women and 31.8% among Hispanic women.[2]

22. I am generally familiar with the Affordable Care Act's Contraceptive Care Mandate, which requires non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage to provide coverage for FDA-approved methods of contraception without imposing cost-sharing requirements.

23. I understand that the Administration has issued rules that expanded the exemptions from the Contraceptive Care Mandate. Under these rules, covered entities may opt out of complying with the mandate on the basis of a sincerely held moral or religious conviction.

24. The expanded exemptions are expected to result in greater financial expenditures by both the State of New Jersey and women in New Jersey on contraceptive coverage and on healthcare generally for women and infants.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Sarah Adelman

Dated: 12/7/18

[2] The Centers for Disease Control and Prevention and New Jersey Department of Health, *Pregnancy Risk Assessment Monitoring Report on Pregnancy Intention 2012-2015*, *available at* https://www.nj.gov/health/fhs/maternalchild/documents/NJ%20Pregnancy%20Intention%20Topic%20Report%202012-2015.pdf.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, and STATE OF NEW JERSEY, Plaintiffs, v. DONALD J. TRUMP, *et al.* Defendants.	**Civil Action No: 2:17-cv-04540-WB**

DECLARATION OF PHILIP GENNACE

I, Philip Gennace, declare and state as follows:

1. I am the Assistant Commissioner of Life and Health in the New Jersey Department of Banking and Insurance ("DOBI"). In this capacity, I oversee, *inter alia*, the licensing and oversight of health insurance regulated by the State of New Jersey. I make this affidavit based on my personal knowledge and information provided to me in my official capacity.

2. DOBI is the primary regulator for all fully-insured health insurance plans sold in the State of New Jersey.

3. Insurance carriers are subject to a complex set of federal and state laws and regulations, and federal and state agencies have distinct but overlapping responsibilities in regulating these entities.

4. For instance, the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), governs most employee benefit plans offered by private employers, including private employers' self-funded employee health benefit plans. ERISA

preempts most state laws relating to such plans.

5. As a result of the preemption provisions of ERISA, DOBI does not regulate self-funded health coverage plans offered by private employers, which are plans established and maintained by an employer or by an employee organization for which the employer or employee organization bears the direct financial risk for the costs of claims for health care benefits. These plans are subject to ERISA and are regulated primarily by the U.S. Department of Labor, and are often colloquially referred to as "ERISA plans."

6. DOBI does regulate fully-insured employer group health plans issued in the State. These are health plans that an employer group purchases from an insurer, for which the insurer assumes the direct financial risk for the cost of claims for health care benefits.

7. In addition, DOBI regulates health insurance policies offered in the individual market.

8. I am familiar with the Affordable Care Act's (ACA) requirement that group health plans and health insurance issuers offering group or individual health insurance coverage cover preventive health services, including FDA-approved methods of contraception, without any cost-sharing requirement (the "Contraceptive Care Mandate").

9. The Contraceptive Care Mandate applies both to non-grandfathered ERISA-regulated plans, as well as almost all insured group and individual health insurance plans that are regulated by DOBI.

10. In addition, New Jersey law requires employers who offer fully-insured plans to provide coverage for expenses incurred in the purchase of prescription female contraceptives to the same extent as any other outpatient prescription drug under the policy ("New Jersey

Mandate").[1]

11. Unlike the ACA's Contraceptive Care Mandate, however, the New Jersey Mandate does not require insurers to cover women's contraceptive services without cost sharing. Also, the ACA contraceptive mandate covers all FDA-approved female contraceptive methods. By contrast, the New Jersey mandate covers only those methods which are obtained via prescription (not those that are available over the counter or through an inpatient or out-patient procedure).

12. In addition, a religious employer (defined as a church, association or convention of churches, or an elementary or secondary school controlled, operated, or principally supported by a church) is statutorily entitled to an exclusion from the New Jersey Mandate if the required coverage conflicts with the employer's *bona fide* religious beliefs and practices. The exemption is not available for prescription drugs that may act as contraceptives but are prescribed for a particular user for medical reasons other than contraception. Also, the exemption is not available for prescription female contraceptives that are necessary to preserve the life or health of an insured.

13. Approximately 3,434,000 New Jersey residents who have health coverage are covered by employer plans that are self-funded.[2] Under ERISA, such plans offered by private employers are exempt from state regulation, including the New Jersey Mandate.

14. Private employers offering self-funded plans that opt out of the Contraceptive Care

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[1] *See* N.J.S.A. 17B:27A-7.12 (for individual health benefits plans); N.J.S.A. 17B:26-2.1y (for individual health insurers); N.J.S.A. 17:48A-7bb (for medical service corporations); N.J.S.A. 17:48-6ee (for hospital service corporations) and N.J.SA. 17:48E-35.29 (for health service corporations); N.J.S.A. 17:48F-13.2 (for prepaid prescription service organizations); N.J.S.A. 26:2J-4.30 (for health maintenance organizations); N.J.S.A. 17B:27A-19.15 (for small employer health benefits plans); N.J.S.A. 52:14-17.29j (for the State Health Benefits Plan); and N.J.S.A. 17B:27:46.1ee (for group health insurers).

[2] This includes residents covered under New Jersey's state health benefits programs, as well as self-funded plans offered by private employers.

Mandate under the newly expanded exemptions will not be subject to any federal or state requirement to provide contraception to their employees and beneficiaries. Thus, women in plans provided by these employers will not receive contraceptive coverage through these plans.

15. Upon information and belief, a number of these newly-exempted employers are expected to be New Jersey employers. As a result, those newly-exempted entities that offer self-funded plans, or that are church-affiliated schools eligible for New Jersey's religious exemption,[3] would no longer have an obligation to provide any contraceptive coverage for their employees and their employees' female dependents.

16. Moreover, because the ACA's Contraceptive Care Mandate is broader than the New Jersey Mandate and prohibits cost sharing, even employees and female dependents of newly-exempt employers who offer fully-insured plans subject to the New Jersey Mandate will lose coverage for certain contraceptive methods and be subject to cost sharing that was previously prohibited.

17. Therefore, many New Jersey women are likely to lose the medical coverage for contraceptive care to which they are otherwise entitled under the ACA.

18. DOBI anticipates that some women who lose contraceptive coverage through their employer's plans, particularly low-income women, will seek contraceptive coverage from other sources, including state-funded programs, such as the New Jersey Prescription Assistance Program, Medicaid, and Title X clinics. Women who do not seek outside funding or who seek it but do not qualify for financial assistance likely will face substantial additional costs. Among

[3] Churches and associations and conventions of churches have been exempted from the ACA's Contraceptive Care Mandate since 2011. *See* 76 Fed. Reg. 46621-01 (Aug. 3, 2011). However, unlike Defendants' broad new religious exemption, the 2011 exemption was not applicable to most church-affiliated schools.

these women, some likely will forgo regular contraceptive use or use cheaper, less effective contraceptive methods, resulting in more unintended pregnancies.

19. Women who lose their contraceptive coverage obtained through their employers' plans, even if they are in plans that remain subject to the New Jersey Mandate, likely will in many cases face copays and deductibles when attempting to obtain necessary contraceptive coverage. These financial constraints likely will cause some women to change their preferred choice of contraceptive method, fail to consistently maintain their use of contraceptives, or forgo contraceptive use entirely, which will result in more unintended pregnancies.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

PHILIP GENNACE

Dated: 12/12/18

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY, Plaintiffs, v. DONALD J. TRUMP, *et al.* Defendants.	**Civil Action No: 2:17-cv-04540-WB**

DECLARATION OF ELIZABETH COULTER

I, Elizabeth Coulter, declare and state as follows:

1. I serve as Deputy Director of the Office of Women's Health ("OWH") within the New Jersey Department of Health ("DOH"). I make this affidavit based on my personal knowledge and information provided to me in my official capacity.

2. DOH's priority is to strengthen New Jersey's health system by investing in population health, promoting equity, and achieving better health outcomes for all residents. DOH is committed to providing access to high quality, affordable, culturally competent, and trauma-informed care, as well as reducing and eliminating disparities in health outcomes across all healthcare services.

3. OWH is charged with eradicating health disparities and fostering women's equity and equality in healthcare and health outcomes. The office works closely with local, state, and federal government agencies, as well as private-sector partners, to oversee programs and services that, among other things, provide family planning and reproductive healthcare and provide science-backed sexual and reproductive health information and education.

I. New Jersey's Family Planning Clinics

4. The non-profit New Jersey Family Planning League ("NJFPL") has ten sub-grantee agencies that provide health services, including family planning services, through 47 service sites ("Family Planning Clinics") covering all 21 counties in the state.

5. New Jersey's Family Planning Clinics provide women and men with access to family planning services. These services include contraceptive services and counseling, HIV and STD testing, pregnancy testing, certain infertility services, and breast and cervical cancer screening. The Family Planning Clinics are integral to the family planning provider supply in New Jersey. Indeed, in 2017, NJFPL provided family planning and reproductive health care services to 99,844 New Jersey residents, including 89,945 female patients.

a. Funding to New Jersey's Family Planning Clinics

6. DOH awards family planning funds within New Jersey. These funds are aggregated from the following sources: Social Services Block Grant ("SSBG") funds, Maternal and Child Health ("MCH") Block Grant funds (administered within DOH's Maternal and Child Health Division), the State of New Jersey's budgeted family planning funds. DOH has awarded these funds to NJFPL.

7. OWH sets the programmatic, data reporting, and budget priorities with the NJFPL through the annual grant application process and oversees those priorities through quarterly reporting requirements.

8. In addition to receiving DOH-awarded funding, NJFPL receives funds from patient service revenues (which include Medicaid, private insurance, and patient self-pay) and from federal Title X grants, as the sole New Jersey grantee.[1]

[1] Although the Family Planning Clinics are sometimes colloquially referred to as "Title X clinics," Title X accounts for only about one-quarter of NJFPL's funding.

9. Title X of the Public Health Service Act[2] provides federal grants to both public and private agencies for family planning services. Specifically, Title X authorizes grant money "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services."

10. Since 2010, Title X funding has decreased by $31 million, nationally. In 2010, the nationwide program received $317.5 million; in 2017, it received $286.5 million.[3] In addition, there are frequent efforts by some in Congress to eliminate funding for the program entirely.

11. According to the 2016 Title X Family Planning Annual Report, the top three sources of revenue for Family Planning Clinics nationwide were Medicaid and CHIP (the Children's Health Insurance Program) (39% of revenue); Title X (19%); and state government funding (10%).[4]

12. OWH is not involved with the application for or administration of federal Title X funds.

b. Provision of Services and Payment at New Jersey's Family Planning Clinics

13. NJFPL's mission is to provide high quality comprehensive family planning and accompanying preventative reproductive health care to every person seeking services. All patients, regardless of income or insurance coverage, are offered a full range of contraceptive methods and services.

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[2] 42 U.S.C. § 300, *et seq.*

[3] National Family Planning & Reproductive Health Association Title X Budget & Appropriations, *available at* https://www.nationalfamilyplanning.org/title-x_budget-appropriations.

[4] Department of Health and Human Services Office of Population Affairs, *Title X Family Planning Annual Report, 2016 National Summary* (August 2017), *available at* https://www.hhs.gov/opa/sites/default/files/title-x-fpar-2016-national.pdf.

14. Family Planning Clinics bill private insurance or Medicaid if the patient presents such coverage. If the patient does not present coverage, family planning services are provided based on a sliding fee scale depending on the individual/family income level.

15. In 2017, NJFPL provided family planning and reproductive health care services to 99,844 New Jersey residents, including 89,945 female patients.

16. In 2017, approximately 51.9% of NJFPL patients had some form of insurance coverage (35.5% had insurance coverage through Medicaid or another government-funded program and 16.4% had private insurance coverage).

17. Many Family Planning Clinic patients are currently employed or have a family member who is currently employed. Many of these patients receive insurance through their employer or as dependents on coverage provided by their family member's employer.

18. In some cases, Family Planning Clinics are reimbursed by a patient's insurance plan, however, private insurance may not provide sufficient coverage. Thus, while 18% of all such clinic users nationwide have private insurance, private third-party sources of funding account for only 10% of clinic revenue (2016 National Report at B-7).

II. The Effects of the New Exemption Rules

19. The Affordable Care Act ("ACA"), together with its implementing regulations, requires coverage for all FDA-approved methods of contraception. As a result, New Jersey women have enjoyed widespread contraceptive coverage beyond that required by New Jersey's state contraceptive coverage requirement

20. I understand that the Trump Administration has issued new regulations ("Exemption Rules") that will make it easier for employers and others to opt out of the Affordable Care Act's contraceptive mandate.

21. My colleagues at DOH and I are very concerned that the Exemption Rules will reduce access to family planning care for New Jerseyans because there will be an increase in the number of New Jersey employers that do not provide their employees with adequate insurance coverage for contraceptive care.

22. Women whose employers opt out of providing contraceptive coverage face a dilemma: forego using contraception or find a way to pay for contraception without insurance coverage. This decision will be most challenging for lower income women. Without private insurance coverage and without the means to pay for contraception out of pocket, many such women will turn to assistance from government funded contraceptive care to prevent pregnancy.

23. Women who lose coverage for contraceptive care and therefore seek publicly-funded services at a Family Planning Clinic, rather than pay out of pocket for contraceptives, are more likely to be high need, lower-income patients. Many such women would likely utilize the Family Planning Clinics' sliding fee scale, drawing more heavily on the limited public funds for reproductive services.

24. In fact, for many low-income women in this situation, government-funded care will be the only viable option for obtaining contraceptive care.

25. Therefore, we expect that many women in New Jersey who lose their contraceptive coverage will seek care from one of the 47 New Jersey Family Planning Clinics. In order to ensure continued access to the most effective (and most expensive) forms of contraception, limited public funds, *state funds in particular,* would need to be expended.

26. Notably, the most effective methods of contraception are typically the most expensive.

27. If the increased need for contraceptive care were to exceed capacity without accompanying increases to funding, service reductions would be likely -- with clinic closures, decreased clinic hours of operation, and staff reductions as potential outcomes.

28. We are also concerned that New Jersey women who lose coverage (as a result of their employers opting out of the ACA's contraceptive mandate) will stop using contraception altogether. Women who stop using or never use contraception are more likely to have unplanned pregnancies and to require additional medical attention. According the Guttmacher Institute, 68% of unplanned births are paid for by public insurance programs, including Medicaid, while 38% of planned births are paid for by these programs. In New Jersey in 2010, the federal and state governments spent a combined $477.1 million on unintended births; of this, $186.1 million was paid by the State.[5]

29. Because women experiencing unintended pregnancies are less likely to receive timely prenatal care (or any prenatal care at all), access to contraception is vital to New Jersey's efforts to reduce both infant and maternal mortality. Lack of access to prenatal care yields poor outcomes for mother and baby.

30. Pregnancy carries significant risk, especially in New Jersey. Currently, New Jersey is ranked 45th worst nationally in maternal mortality, and the maternal mortality rate for black women is more than double the national average.[6] New Jersey women are more likely than women in other states to suffer injury and death related to pregnancy. Many costs associated with New

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[5] Guttmacher Institute, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010* (Feb. 2015), *available at* https://www.guttmacher.org/report/public-costs-unintended-pregnancies-and-role-public-insurance-programs-paying-pregnancy.

[6] United Health Foundation, America's Health Rankings, *2018 Health of Women and Children Report, New Jersey in 2018*, *available at* https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/overall_mch/state/NJ.

Jersey's high rate of maternal mortality are paid for using public funding. Planned pregnancies, through the use of contraception, are essential to curbing the tide of maternal mortality and morbidity in the State.

31. Other negative outcomes associated with unintended pregnancy include reduced likelihood of breastfeeding, increased risk of maternal depression, and increased risk of physical violence during pregnancy, in addition to severe limitations on participation in the economy.

32. Children born from unintended pregnancies are more likely to experience poor mental and physical health during childhood and, as teenagers, are more likely to experience lower rates of educational attainment and higher rates of behavioral issues. Many of these outcomes lead to conditions and circumstances for which social supports are publicly funded.

33. For all these reasons, I believe that the Exemption Rules to the contraceptive coverage mandate will have a negative effect on the health of New Jersey women; that they will increase the number of women who receive contraceptive coverage through NJFPL; and that they will impose additional economic and other burdens on the State.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Elizabeth Coulter

Dated: 12/12/2018

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA et al., Plaintiffs, v. DONALD J. TRUMP et al., Defendants.	**No. 2:17-cv-04540-WB**

SUPPLEMENTAL DECLARATION OF KATHRYN KOST

I, Kathryn Kost, hereby submit this supplemental declaration in support of the Motion for Preliminary Injunction filed by Plaintiffs in the above-captioned matter and, in support thereof, state as follows:

1. I am the Acting Vice President for Domestic Research at the Guttmacher Institute, a private, independent, nonprofit, nonpartisan research and policy organization committed to advancing sexual and reproductive health and rights in the United States and globally.

2. On December 14, 2018, I submitted a declaration in support of the Motion for Preliminary Injunction in this matter as an expert on reproductive health care, family planning, and unintended pregnancy, and the impact on individuals, families, and the public health from access to contraception and related care, or interference with that care, in the United States.

3. I understand that this lawsuit involves a challenge to the federal government's Final Rules ("Final Rules") regarding the Affordable Care Act's ("ACA") contraceptive coverage mandate. In my expert opinion, the Final Rules would compromise women's ability to obtain contraceptive methods, services and counseling and, in particular, to consistently use the best methods for them, thus putting them at heightened risk of unintended pregnancy.

4. The Final Rules would have public health and fiscal consequences in states across the country. If unable to access contraceptive coverage through their employer or university, some lower-income women who meet the strict income requirements of public programs would rely on publicly funded services to access this beneficial service. Many women who lose or lack contraceptive coverage because their employer or university objects, however, would not meet the strict income and eligibility requirements of public programs, and if as a result they are not using their preferred or the most effective methods for them, or if cost forces them to forgo contraceptive use periodically or altogether, they would be at increased risk of unintended pregnancy. The costs of the resulting unintended pregnancies often then fall to the states because the federal government cannot or will not withstand these costs.

5. Examples of this impact for the plaintiff states were included in my original declaration. In this supplemental declaration, I include data for all 50 states and the District of Columbia in a table as Exhibit A.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: January 7, 2019

By: Kathryn Kost
Acting Vice President for Domestic Research
The Guttmacher Institute

Exhibit A: State-Specific Data on Impact

	Medicaid eligibility, as % of federal poverty level (as of January 2018)			Women needing publicly supported contraceptive services and supplies, 2014		Unintended pregnancies, 2010		% of unplanned births paid for by public insurance programs, 2010	Public costs for unintended pregnancies, 2010	
	Childless adults	Parents	Family planning specific	Number	% of need met by publicly supported providers	Number	Rate per 1,000 women 15–44		State (in millions)	Federal (in millions)
Alabama	—	18%	146%	332,750	31%	46,000	48	61.6%	$72.6	$250.5
Alaska	138%	139%	—	41,200	63%	8,000	54	64.3%	42.9	70.8
Arizona	138%	138%	—	465,450	15%	61,000	49	64.6%	161.5	509.4
Arkansas	138%	138%	—	204,850	29%	29,000	50	72.3%	61.9	266.8
California	138%	138%	200%	2,643,580	50%	393,000	50	64.3%	689.3	1,062.1
Colorado	138%	138%	—	326,490	38%	43,000	42	63.8%	91.1	146.1
Connecticut	138%	138%	263%	183,070	38%	32,000	46	60.8%	80.1	128.4
Delaware	138%	138%	—	50,100	30%	11,000	62	71.3%	36.0	58.2
District of Columbia	215%	221%	—	44,910	84%	10,000	58	84.6%	13.3	50.9
Florida	—	33%	—	1,216,520	17%	207,000	58	70.6%	427.1	892.8
Georgia	—	36%	200%	695,120	16%	119,000	57	80.5%	229.7	687.7
Hawaii	138%	138%	—	73,090	25%	16,000	61	49.9%	37.8	76.7
Idaho	—	26%	—	113,020	21%	12,000	38	60.4%	18.5	70.2
Illinois	138%	138%	—	772,510	20%	128,000	49	78.3%	352.2	571.5
Indiana	139%	139%	146%	446,230	19%	55,000	43	64.6%	91.4	284.6
Iowa	138%	138%	—	190,270	29%	23,000	39	61.5%	48.3	127.6
Kansas	—	38%	—	188,100	17%	24,000	43	47.2%	50.4	115.7
Kentucky	138%	138%	—	284,530	24%	34,000	40	66.8%	75.0	302.8
Louisiana	138%	138%	138%	321,480	15%	53,000	57	78.7%	120.6	530.4
Maine	—	105%	214%	78,880	33%	9,000	37	74.7%	14.6	43.6
Maryland	138%	138%	200%	298,190	25%	71,000	60	58.2%	180.9	285.4
Massachusetts	138%	138%	—	373,060	25%	54,000	40	56.4%	138.3	219.6
Michigan	138%	138%	—	635,660	16%	93,000	49	71.9%	177.0	485.1
Minnesota	138%	138%	200%	294,680	29%	38,000	36	66.7%	128.7	203.9
Mississippi	—	27%	199%	213,930	28%	35,000	57	81.9%	40.4	226.7
Missouri	—	22%	—	391,510	18%	54,000	46	72.2%	132.6	385.9
Montana	138%	138%	216%	66,380	41%	7,000	42	47.8%	9.1	31.7
Nebraska	—	63%	—	118,170	20%	14,000	41	63.1%	41.7	91.9
Nevada	138%	138%	—	194,430	10%	29,000	54	60.0%	37.1	65.8
New Hampshire	138%	138%	201%	65,530	29%	8,000	32	52.7%	10.3	16.5
New Jersey	138%	138%	—	455,260	22%	97,000	56	52.4%	186.1	291.0
New Mexico	138%	138%	255%	151,950	28%	22,000	56	77.1%	47.9	191.2
New York	138%	138%	223%	1,227,170	32%	246,000	61	70.2%	601.1	937.7
North Carolina	—	43%	200%	667,910	20%	95,000	49	74.8%	214.7	643.5
North Dakota	138%	138%	—	44,180	26%	5,000	41	36.8%	7.7	17.9
Ohio	138%	138%	—	730,110	14%	109,000	49	68.7%	218.8	605.8
Oklahoma	—	45%	138%	256,880	31%	36,000	49	80.7%	77.0	254.0
Oregon	138%	138%	250%	270,990	39%	31,000	41	69.9%	47.2	122.7
Pennsylvania	138%	138%	220%	745,550	29%	115,000	47	53.5%	248.2	478.6
Rhode Island	138%	138%	—	71,320	35%	9,000	43	70.1%	27.5	48.7
South Carolina	—	67%	199%	323,140	31%	42,000	46	78.6%	84.0	327.3
South Dakota	—	50%	—	52,610	27%	7,000	46	46.2%	14.4	35.0
Tennessee	—	98%	—	434,440	26%	62,000	49	73.7%	130.7	400.0
Texas	—	18%	—	1,795,160	10%	298,000	56	73.7%	842.6	2,056.8
Utah	—	60%	—	207,350	22%	24,000	40	53.3%	30.4	127.6
Vermont	138%	138%	—	35,810	59%	4,000	36	73.5%	9.6	21.8
Virginia	—	38%	205%	447,970	17%	84,000	51	45.4%	194.6	312.0
Washington	138%	138%	260%	429,300	26%	61,000	45	63.1%	177.1	290.7
West Virginia	138%	138%	—	110,910	47%	15,000	43	76.0%	24.9	120.5
Wisconsin	100%	100%	306%	353,620	22%	42,000	38	62.0%	92.1	221.4
Wyoming	—	55%	—	34,630	30%	4,000	42	67.4%	21.3	34.1

Sources: References 113–117.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

DONALD J. TRUMP, *et al.*

Defendants,

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Proposed Defendant-Intervenors

Civil No. 2:17-CV-4540

DECLARATION OF MOTHER SUPERIOR MARIE VINCENTE

I, Mother Superior Marie Vincente, hereby declare as follows:

1. I am over the age of 21 and am capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty. I make this declaration based on my personal knowledge and experience of the Little Sisters, our organization, our ministry, and our religious beliefs and practices. My statements about the history of the Little Sisters, the scope of our ministry internationally, and the founding dates of our homes are drawn from organizational and historical documents that I believe to be correct.

2. I am the Mother Superior of the Saints Peter and Paul Home of the Little Sisters of the Poor in Pittsburgh, Pennsylvania.

3. I have been a Little Sister for 63 years, and have served as the Mother Superior of the Saints Peter and Paul Home for over 12 years.

I. History, Organization, and Structure of the Little Sisters of the Poor

4. The Little Sisters of the Poor is an international Roman Catholic Congregation of Sisters that has provided loving care to needy elderly persons of any race, sex, or religion for over 175 years.

5. The Little Sisters of the Poor were founded in France, in the winter of 1839, when St. Jeanne Jugan carried a blind elderly woman off the streets and into her home and laid the woman in her own bed. Over time, other women joined St. Jeanne in a religious ministry designed to protect and care for the elderly poor.

6. By the time St. Jeanne died forty years later, the Little Sisters of the Poor had established homes in eight countries, including the United States, where the first home was founded in 1868 in Brooklyn, New York.

7. Today, there are Little Sisters homes in over thirty countries around the world serving over 13,000 poor elderly people.

8. The Little Sisters of the Poor have founded and operate over twenty-five homes in the United States, which are located in twenty states and the District of Columbia. These homes are hosted by over 300 Little Sisters of various nationalities.

9. All Little Sisters homes share the same fidelity to the Catholic beliefs. Every home is operated under the control of the Little Sisters, and every Little Sister takes a vow of obedience to God, which assumes obedience to the Pope, the Church's teaching, and the authority of the Church in her hierarchy.

10. While Catholic and committed to following Church teaching, the Little Sisters' homes are not under the civil legal ownership and control of the dioceses in

which they are located. Instead, the Little Sisters of the Poor own and control the homes ourselves, through local corporations that are entirely within the civil legal control of the Little Sisters.

11. The Little Sisters' homes are not directly funded by the dioceses in which we are located. Instead, we take responsibility for funding our own operations. For most homes, about half of the budget comes from voluntary gifts, largely in response to the begging for funds and gifts in kind that the Little Sisters do to support our ministry.

II. Little Sisters of the Poor Pittsburgh

12. The Saints Peter and Paul Home of the Little Sisters of the Poor in Pittsburgh ("Little Sisters Pittsburgh"), is a Pennsylvania non-profit corporation that qualifies as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 ("the Code"). The Pittsburgh home is under my direct authority as Mother Superior.

13. Little Sisters Pittsburgh currently employs about 67 full-time employees.

14. Little Sisters Pittsburgh have adopted the Christian Brothers Employee Benefit Trust (the "Christian Brothers Trust") to provide medical benefits coverage for their employees.

15. It is my understanding that Christian Brothers Trust is a Catholic entity designed to serve the Catholic Church and related faith-based entities. It is my understanding that, like the Little Sisters, the Christian Brothers Trust operates in a manner consistent with our mutual Catholic beliefs. One of the reasons the Little Sisters chose to use the Christian Brothers Trust for our health benefits is because it

shares and is administered in accordance with our religious beliefs and provide benefits accordingly.

III. Religious Beliefs and Commitments of the Little Sisters of the Poor

16. Jesus taught that "in so far as you did it to the least of these brothers of mine, you did it to me." *See* Matthew 25:34. This teaching is a fundamental part of who the Little Sisters are. St. Jeanne urged her fellow Little Sisters, "Never forget that the poor are Our Lord; in caring for the poor say to yourself: This is for my Jesus—what a great grace!" Thus, each Little Sister makes a vow of Hospitality, through which she promises to care for the aged as if they were Christ himself.

17. As Little Sisters, we strive to witness to the value of the elderly by believing in their inviolable dignity, by recognizing their unique contributions to the Church and society, and by involving them in the activities of our Homes to develop their human potential.

18. Caring for the dying is the summit of the Little Sisters' service to the elderly poor. The Little Sisters maintain a constant presence with those who have entered the dying process and their families. We try to relieve their sufferings as much as possible, which includes giving emotional and prayerful support. Our provision of spiritual support is always consistent with the faith of the person we are serving; we do not force religious observance on anyone.

19. Because the Little Sisters care for those who are weak and dying, we strive to emphasize our respect for the uniqueness and dignity of each elderly person as they reach the end of their life. We offer this respect for two reasons. First, to treat

the individual with the dignity they are due as a person loved and created by God, with the same respect and compassion as if he or she was Jesus Christ. Second, to convey a public witness of respect for life, in the hope that we can help build a Culture of Life in our society.

20. We care for the elderly poor of all races and religions, or of no religion at all. We do not care for people because they are Catholic, but because we are Catholic.

21. We also hire employees of all races and religions, or of no religion at all. Because staff members are an important extension of our ministry to the elderly, they must support the Little Sisters' mission by welcoming the elderly poor, helping to make them happy and caring for them with respect or dignity until death. Failure to do so is one of the relatively few explicit grounds for staff dismissal.

22. The Little Sisters have also taken a vow of obedience to God, which assumes obedience to the Pope. We carefully follow all of his guidance, and obey all the decisions of the Church. Thus, we develop all of our programs, policies, and procedures in accord with the teachings of the Catholic Church, including its ethical teachings on the inviolable dignity of every human life.

23. These teachings include Catholic religious teachings about abortion, contraception, sterilization, and cooperation with acts that are intrinsically immoral.

24. Authoritative Catholic teachings are located in sacred Scripture and sacred tradition, and are set forth and specified in the Catechism of the Catholic Church, documents of ecumenical councils (such as the Second Vatican Council), papal encyclicals, directives issued by bishops' conferences, and other teaching documents

of the Church. *See generally* Catechism of the Catholic Church Nos. 888-892 (describing the teaching office of the Church); *Dei Verbum* No. 10 (describing how "[s]acred tradition and Sacred Scripture form one sacred deposit of the word of God, committed to the Church").

25. Sections 2270 and 2271 of the Catechism of the Catholic Church (1994) affirm that life begins at conception, that directly intending to take innocent human life is gravely immoral. Thus a post-conception contraceptive is an abortifacient and "gravely contrary to moral law." *See also* section 2274 ("Since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.")

26. The Catholic Church also teaches that contraception and sterilization are intrinsic evils. *Id.* at Section 2370.

27. The Church teaches that programs of "economic assistance aimed at financing campaigns of sterilization and contraception" are "affronts to the dignity of the person and the family." *See* Section 234 of the Compendium of the Social Doctrine of the Church (2004).

28. In a landmark encyclical, Blessed Pope John Paul II made clear that Catholics may never "encourage" the use of "contraception, sterilization, and abortion[.]" *See* Section 91 of *Evangelium Vitae* (1995).

29. Similarly, the United States Conference of Catholic Bishops ("USCCB") has issued a series of directives to inform the provision of health services in every U.S. Catholic health institution. These directives prohibit providing, promoting,

condoning, or participating in the provision of abortions, abortion-inducing drugs, contraceptives, and sterilization. Exhibit A, USCCB Directives for Catholic Health Care Services at Nos. 45, 52, & 53.

30. The directives specifically warn against partnering with other entities in a manner that could involve Catholic health care services in the provision of such "intrinsically immoral" services. *Id.* at Nos. 67-72.

31. Rather, the USCCB Directives instruct us to "distinguish [ourselves] by service to and advocacy for" people who are "at the margins of society" and "particularly vulnerable to discrimination," such as "the poor, the uninsured and underinsured; children and the unborn; single parents; the elderly; those with incurable diseases and chemical dependencies; racial minorities; immigrants and refugees." *Id.* at No. 3.

32. The Little Sisters are particularly concerned about the possibility that our conduct may lead others to do evil, or think that the Little Sisters condone evil. *See* Catechism No. 2284, 86 (instructing Catholic institutions to avoid "scandal" and defining "scandal" as "an attitude or behavior which leads another to do evil"; scandal can be caused "by laws or institutions"). The Little Sisters beg for funds and goods at Catholic parishes and elsewhere to support our ministry. Thus, participating in the provision of health benefits that violate Catholic teaching poses a grave risk for the Little Sisters as they interact with Catholic faithful and others who share our beliefs.

33. Catholic teaching also instructs us to provide our employees and their families adequate health benefits. "In return for their labor, workers have a right to

wages and other benefits sufficient to sustain life in dignity." *Economic Justice For All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* ¶ 103, http://www.usccb.org/upload/economic_justice_for_all.pdf ("The dignity of workers also requires adequate health care").

34. These religious teachings binding on how the Little Sisters carry out our religious ministry of caring for the elderly poor. We believe that the health plans that each home offers should be consistent with Catholic teaching.

IV. The Impact of the Mandate on the Little Sisters

35. The HHS contraceptive mandate (the "Mandate") requires the Little Sisters to participate in the provision of contraception, abortion, and sterilization to our employees via the use of our health plans, health plan information, and health plan infrastructure. If we do not comply with the Mandate, we face massive penalties, which places enormous pressure on the Little Sisters to violate our religious beliefs.

36. Our vow of hospitality, which asks us to treat each person in our care as if he or she were Christ himself, commits us just as much to respecting the dignity of human life at its beginning as at its end. We can no more participate in the provision of contraception, abortion, and sterilization than we could participate in the provision of euthanasia or assisted suicide.

37. Because of the religious beliefs set forth above, the Little Sisters cannot:

a. participate in the Mandate's program to promote and facilitate access to the use of sterilization, contraceptives, and abortion-inducing drugs and devices,

b. provide health benefits to our employees and plan beneficiaries that will include or facilitate access to sterilization, contraception, and abortion-inducing drugs and devices,

c. designate, authorize, or incentivize any third party to provide our employees or plan beneficiaries with access to sterilization, contraception, and abortion-inducing drugs and devices,

d. sign, execute, deliver, or otherwise file documents with a third party or with the government which could then be used to require, authorize, or incentivize that third party to provide our employees with access to sterilization, contraception, and abortion-inducing drugs;

e. agree to refrain from speaking with a third party to ask or instruct it not to deliver contraceptives, sterilization, and abortifacients to Little Sisters' employees and plan beneficiaries in connection with Little Sisters' health plans;

f. create or facilitate a provider-insured relationship (between the Little Sisters and Christian Brothers Services or any other third-party administrators), the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients in connection with the Little Sisters' health plans;

g. create, maintain, support, and facilitate health insurance plans, information, and infrastructure that is used to provide contraceptives,

sterilization, and abortifacients to Little Sisters' employees and plan beneficiaries;

h. take any action that would require, authorize, or incentivize Christian Brothers Trust or Christian Brothers Services to violate their own Catholic religious beliefs.

38. Obeying the Mandate's requirement to participate in the provision of abortion-inducing drugs would violate our public witness to the respect for life and human dignity that we are committed to displaying at all times through our vow of hospitality and our fidelity to Church teaching. It would similarly violate our duty to "advoca[te] for those people whose social condition puts them at the margins of our society and makes them particularly vulnerable," such as "the unborn." Exhibit A, USCCB Directives, at No. 3.

39. The Little Sisters believe that our ministry and all of our resources—including our health insurance plans and the efforts we make to maintain those plans—are gifts from God that we must use to God's glory and for the good of all, to help bear the burdens and sufferings of others. We cannot allow those gifts to be co-opted to serve ends that we believe dishonor God and the dignity of the human person.

40. The Mandate threatens the Little Sisters with large fines and penalties if we continue to act in accordance with our religious beliefs.

41. For example, if we continue our practice of providing health benefits to our employees and their families without including or facilitating free access to sterilization, contraception, and abortion-inducing drugs and devices, we will face

fines of "$100 for each day in the noncompliance period with respect to each individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1).

42. Depending on how the I.R.S. applied this penalty, the Little Sisters homes could face tens of millions of dollars of fines *each year* for our inability to facilitate the required coverage.

43. Little Sisters Pittsburgh currently employs about 67 full-time employees. If the I.R.S. levies the fine on a per-full-time-employee basis, we would be facing daily fines of $6,700 and annual fines of $2,445,500. If the I.R.S. levies the fine on the basis of total number of employees and dependents receiving benefits, the fines would be orders of magnitude larger.

44. The entire annual budget for Little Sisters Pittsburgh, which currently provides care for about 95 needy elderly individuals, is about $8 million.

45. Nor can we avoid these fines by choosing not to provide health benefits at all. Cutting off all benefits for our employees would be unconscionable. We love and respect our employees and are dedicated to providing adequate health benefits.

46. Cutting off all employee benefits would also have a severe negative impact on our employees and their families, and on our ability to hire and retain qualified medical staff and other employees. Benefits plans are an important reason that many employees make choices about which jobs to pursue, to keep, and to abandon.

47. Even if we could cut off all benefits in good conscience and without harming our employees or our homes, we would face large government fines for doing so. For

example, Little Sisters Pittsburgh would face annual fines of approximately $134,000 for dropping health benefits altogether.

48. For these reasons, the Mandate imposes enormous pressure on the Little Sisters to participate in activities prohibited by our sincerely held religious beliefs.

49. Prior to the Mandate, we engaged in conduct motivated by our sincerely held religious beliefs: providing benefits plans that do not include sterilization, contraception, and abortion-inducing drugs and devices. The Mandate penalizes our participation in that religious exercise.

50. The Mandate also places enormous pressure on the Little Sisters to engage in conduct contrary to our sincerely held religious beliefs. I am charged with making decisions for the Little Sisters Pittsburgh. The severe threats of fines and punishment create enormous pressure on me to violate my religious beliefs as the price of continuing our mission of helping the needy elderly.

51. We object to the Mandate not because it makes us *use* drugs or devices against our religious beliefs, but because it forces us to participate as a necessary part of the government's scheme to provide those drugs and devices.

The Little Sisters' Litigation Against the Mandate

52. The Little Sisters tried to avoid having to sue the federal government to protect our ministry. We made multiple public statements and filed a detailed public comment with the federal government to inform it of our sincere religious objection to incorporating us into its scheme. But the government refused to exempt us. Which meant that on January 1, 2014, we would start facing massive penalties.

53. We filed suit on September 24, 2013, and filed a motion for preliminary injunction one month later, on October 24. *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611 (D. Colo.).

54. Over the next four years, we would remain in constant litigation with the federal government. We twice had to go to the Supreme Court to be protected from the imposition of massive financial penalties.

55. The first time came on December 31, 2013, when just hours before the start of the penalties we filed for and received a temporary emergency injunction from Justice Sotomayor just hours. Later in January 2014, the rest of the Supreme Court would grant an injunction pending appeal without noted dissent. *Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014).

56. And the second time came after the Supreme Court granted certiorari in our case, when it vacated a Tenth Circuit ruling against us, remanded the case for further consideration, and ordered that "the Government may not impose taxes or penalties" on us while the case remained pending. *Zubik v. Burwell,* 136 S. Ct. 1557 (2016).

57. Our case has remained pending at the Tenth Circuit since that time.

The Interim Final Rule

58. On May 4, 2017, President Trump invited members of the Little Sisters of the Poor to the White House for the traditional proclamation of the National Day of Prayer and the signing of an Executive Order related to religious liberty.

59. At the signing ceremony, the President made clear that the Mandate's application to the Little Sisters had been inappropriate and illegal. The President

described the Mandate as an "attack[ ] against the Little Sisters of the Poor" that had put them through "a long, hard ordeal," and he listed it as an example of past "abuses" of religious liberty. *See* https://www.c-span.org/video/?428059-1/president-trump-signsreligious-liberty-executive-order (starting at 28:30).

60. The agencies issued an Interim Final Rule on October 6, 2017. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792 (Oct. 13, 2017). The rule explicitly referred to the Little Sisters' lawsuit and the Supreme Court decision in our case as the impetus for the regulatory change: "Consistent with the President's Executive Order and the Government's desire to resolve the pending litigation and prevent future litigation from similar plaintiffs, the Departments have concluded that it is appropriate to reexamine the exemption and accommodation scheme currently in place for the Mandate." 82 Fed. Reg. 47799; *see also id.* at 47798 (describing lawsuits and *Zubik* decision).

61. The Interim Final Rule conceded that "requiring certain objecting entities or individuals to choose between the Mandate, the accommodation, or penalties for noncompliance imposes a substantial burden on religious exercise under RFRA," and that because "requiring such compliance did not serve a compelling interest and was not the least restrictive means of serving a compelling interest, we now believe that requiring such compliance led to the violation of RFRA in many instances." *Id.* at 47800, 47806.

Conclusion

62. Being forced into four years of litigation, including two trips to the Supreme Court, has been a difficult and burdensome experience for the Little Sisters. We do not want to alarm in any way the elderly poor whom we serve, nor their families, our employees, or our benefactors. But to protect our ability to serve them as we always have, and to avoid violating and publicly rejecting our religious beliefs, our only recourse was a lawsuit.

63. It is deeply troubling to us that, after years of respectfully seeking recourse in federal court to be protected from the *federal* government, we are being forced to defend those same rights that are threatened by a *state* government. We had never been required to provide these objectionable services by Pennsylvania, and do not understand why Pennsylvania asks this Court to force us to provide them now. We hope a day will come when government will cease threatening our ministry in this way.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 18th day of November, 2017,

Mother Superior Marie-Vincente S.S.P.
Mother Superior Marie Vincente

	A	B	C	D	E	F	G	H	I	J
1	**Case**	**Plaintiffs**	**Type: For-profit (F), Nonprofit (N), House of Worship or IA (H), Church Plan (C), Pro-life (P), Grandfathered (G)**	**Number of Employees/Students**	**Document employee number located within**	**Are students/employees counted in final total?**	**If not counted, explanation why**	**Number counted towards final total**	**Total employees (minus HoW/IA and SICPs)**	**Total students at relevant universities**
2	Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 6:12-cv-03459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012);		F	175 employees	Complaint	Yes		175	175	
3	American Family Association v. Sebelius, 1:13-cv 00032-SA-DAS (N.D. Miss. Feb. 20, 2013)		N	135 employees	Complaint	Yes		135	135	
4	Annex Med., Inc. v. Burwell, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013)		F	18 employees	Complaint	Yes		18	18	
5	Archdiocese of St. Louis v. Burwell, No. 4:13-cv-02300 (E.D. MO), No. 14-3016 (8th Cir.)	Archdiocese of St. Louis	H	7,800 employees/staff	Complaint	No	Diocese self-insured plan (see Brandt v Burwell note below)	0	0	
6		Catholic Charities of St. Louis	C	1600 employees	Complaint	No	same	0	0	
7	Armstrong v. Burwell, No. 1:13-cv-00563-RBJ (D. Colo. Sept. 17, 2013); gov't appeal dismissed Sept. 4, 2014 (10th Cir. order);		F	730 employees	Complaint	Yes		730	730	
8	Association of Christian Schools International v. Burwell, No. 1:14-cv-2966 (D. Colo.), No. 14-1492 (10th Cir.)	Association of Christian Schools International	N	140 employees	Complaint	Yes		140	140	
9		Samaritan Ministries International	N	133 employees	Complaint	Yes		133	133	
10		Taylor University	N	1,900 Students; 641 Employees	Complaint	Students = no; employees = yes	Complaint does not state that they offer a student health plan; therefore students not counted	641	641	0
11		Indiana Wesleyan University	N	15,000 students; 3,565 employees (1,018 FT and 2,547 PT)	Complaint	Students = no; employees = partial	Complaint does not state that they offer a student health plan; therefore students not counted. Complaint states that 890 employees enroll in the plan. Because other entities usually provide the overall number of employees, not the number enrolled in the plan, and in the IFR we estimate 62% of all employees are in plans, this number is upscaled to 890/62%=1435.	1,435	1,435	0
12	Autocam Corp. v. Burwell, 730 F.3d 618 (6th Cir. Sept. 17, 2013),	Autocam	F	478 employees	Complaint	Yes		478	478	
13		Autocam Medical	F	183 employees	Complaint	Yes		183	183	
14	Ave Maria Foundation v. Burwell, No. 2:13-cv-15198 (E.D. Mich.), Nos. 14-1310 (6th Cir.)	The Ave Maria Foundation	N	51 employees	Estimated number based on online information	Yes		51	51	
15		Ave Maria Communications	N	19 employees	Form W-3 filing	Yes		19	19	
16		Domino's Farms Petting Farm	N	18 employees	Form W-3 filing	Yes		18	18	
17		Rhodora J. Donahue Academy, Inc.	N	26 employees	Website	Yes		26	26	
18		Thomas More Law Center	N	14 employees	Form W-3 filing	Yes		14	14	
19	Ave Maria School of Law v. Burwell, No. 2:13-cv-00795 (M.D. Fl.), Nos. 14-15777 (11th Cir.)		N	68 employees	Complaint	Employees = yes; students = no	Complaint does not state that they offer a sudent health plan; therefore students not counted	68	68	0
20	Ave Maria University v. Burwell, No. 2:13-cv-00630 (M.D. Fla.), Nos. 14-15780 (11th Cir.)		N	150 employees	Complaint	Employees = yes; students = no	Complaint does not state that they offer a student health plan, therefore students not counted	150	150	0
21	Barron Indus., Inc. v. Burwell, No. 1:13-cv-01330-KBJ (D.D.C. Sept. 25, 2013);		F	56 employees	Complaint	Yes		56	56	
22	Beckwith Elec. Co. v. Burwell, No. 8:16-cv-1944 (M.D. Fla.)		F	126 employees	Complaint	Yes		126	126	
23	Belmont Abbey College v. Sebelius, et al., No. 1:11-cv-01989 (D.D.C. Nov. 10, 2011)		N	1,600 students; 305 employees	Complaint	Yes		1,600 students; 305 employees	305	1,600
24	Bick Holdings, Inc. v. Burwell, No. 4:13-cv-00462-AGF (E.D. Mo. Apr. 1, 2013);		F	196 employees	Complaint	Yes		196	196	
25	Brandt v. Burwell, No. 2:14-cv-00681 (W.D. Pa.), Nos. 14-3663, 14-4087 (3d Cir.)	Diocese of Greensburg	H	3,100 employees; 5,000 other participants in plan (this is a high number- it includes employees from other Dioceses)	Complaint	No	Diocese self-insured plan; Government argued that these and all similar Catholic diocese-sponsored self-insured plans and entities participating in such plans that are litigants represented by Jones Day likely qualify to be church plans exempt from ERISA. See, e.g., Doc. # 23, 2:14-cv-00681-AJS (W.D. Pa.). We cannot force such plan TPAs to offer contraceptive payments, and it is likely the churches will tell them not to, and the TPAs will not make the offers.	0	0	
26		Catholic Charities	C	18 employees	Complaint	No	Diocese self-insured plan	0	0	
27		St. John School	C	13 employees	Complaint	No	Diocese self-insured plan	0	0	

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28	Briscoe v. Burwell, No. 1:13-cv-00285-WYD-BNB (D. Colo. Sept. 6, 2013); gov't appeal dismissed Sept. 4, 2014 (10th Cir. order);	Briscoe owns all plaintiff organizations involved: Continuum Health Partnerships, Inc./ Mountain States Health Properties, LLC/ Continuum Health Management, LLC/ CH-Greeley, LLC	F	200 employees	Complaint	Yes		200	200	
29	Catholic Benefits Association LCA v. Burwell (*CBA I*), No. 5:14-cv-00240 (W.D. Okla.), Catholic Benefits Association LCA v. Burwell (CBA II), No. 5:14-cv-00685 (W.D. Okla.),Nos. 14-6171, 14-6163, 15-6029, 15-6037, 15-6139, 16-6030, 16-6217 (10th Cir.)	Catholic Benefits Associatoin	N	Unknown	N/A	To estimate the number in CBA plans that may be effected, 10,000 used.	CBA does not carry its own insurance	0	10,000	
30		Catholic Insurance Company	N	Unknown	N/A	No	CBA owns CIC, so we assume CIC also does not offer insurance	0	0	
31		Archdiocese of Baltimore	H	5, 500 participants	Complaint	No	Diocese self-insured plan	0	0	
32		Cathedral Foundation (AKA Catholic Review Media)	C	32 employees	Complaint	No	Diocese self-insured plan	0	0	
33		Archdiocese of Oklahoma City- Complaint lists Mount St. Mary, St. Ann, and Office of Catholic Schools as sub-ministries	H	Unknown (see St. Ann, Mount St. Mary and Office of Catholic Schools below)		No	Diocese self-insured plan	0		
34		St. Ann	C	78 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
35		Mount St. Mary	C	Unknown		No	Diocese self-insured plan	0	0	
36		Office of Catholic Schools	C				Disocese self-insured plar	0	0	
37		Villa St. Francis Catholic Care Center	N	100 participants	Complaint	Yes		100	100	
38		Goodwill Publishers	N	140 employees	Complaint	Yes		140	140	
39		Catholic Charities Oklahoma City	C	103 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
40		All Saints	C	Unknown		No	Diocese self-insured plan	0	0	
41		Catholic Charities and Family Services, Diocese of Norwich	N	69 employees	Second Complaint	Yes		69	69	
42	Catholic Charities of the Archdioceses of Philadelphia	Catholic Social Services	C	626 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
43	v. Burwell, No. 2:14-cv-3096 (E.D. Pa.), No. 14-3126 (3d Cir.)	St. Francis Homes for Boys	C	227 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
44		St. Edmund's Home for Children	C	226 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
45		Don Guanella Village	C	413 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
46		Divine Providence Village	C	667 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
47		St. Gabriel's System	C	458 emplyees	Form W-3 filing	No	Diocese self-insured plan	0	0	
48		Catholic Community Services	C	92	Form W-3 filing	No	Diocese self-insured plan	0	0	
49		Nutritional Development Services	C	64	Form W-3 filing	No	Diocese self-insured plan	0	0	
50		Villa St. Martha	C	117 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
51		St. Monica Manor	C	356 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
52		St. John Neumann Nursing Home	C	360 Employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
53		Immaculate Mary Home	C	490 Employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
54		St. Francis Country House	C	488 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
55		St. Martha Manor	C	272 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
56		St. Mary Manor	C	339 employees	Form W-3 filing	No	Disocese self-insured plar	0	0	
57		St. John Vianney Center	C	84 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
58		Catholic Clinical Consultants	C	19	Form W-3 filing	No	Diocese self-insured plan	0	0	
59	Catholic Diocese of Beaumont v. Burwell, No. 1:13-cv-00709 (E.D. Tex.), No. 14-40212 (5th Cir.)	Diocese	H	950 employees; 232 staff at schools	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plan	0	0	
60		Catholic Charities of Southeast Texas, Inc.	C	18 employees	Complaint		Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plar	0	0	
61	Catholic Diocese of Biloxi v. Burwell, No. 1:14-cv-00146 (S.D. Miss.)	Diocese of Jackson	H	900 employees	Complaint	No	Diocese self-insured plan	0	0	
62		Catholic Charities	C	140 employees	Complaint	No	Diocese self-insured plan	0	0	
63		Vicksburg	C	70 employees	Website	No	Diocese self-insured plan	0	0	
64		St Joseph	C	85 employees	Website	No	Diocese self-insured plan	0	0	
65		Diocese of Biloxi	H	600 employees	Complaint	No	Diocese self-insured plan	0	0	
66		De L'epee Deaf Center	C	5 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
67		Catholic Social & Community Services Inc.	C	20 employees	Form W-3 filing	no	Diocese self-insured plan	0	0	
68		Resurrection Catholic and Sacred Heart	C	200 employees	Complaint	No	Diocese self-insured plan	0	0	

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69		St. Dominic-Jackson Memorial Hospital and affiliated locations and programs	G	2,200 employees	Complaint	No	Self-insured plan sponsored by Catholic affiliated hospital; grandfathered and already omits contraceptives, so could retain grandfathered status or pursue church plan status to continue omitting.	0	0	
70	Conlon, Bishop of Catholic Diocese of Joliet v. Sebelius, 1:12-cv-03932 (N.D. Ill. May 21, 2012)	Diocese of Joliet	H	At least 1,570 employees	Complaint	No	Diocese self-insured plan	0	0	
71		Catholic Charities of Joliet	C	240 employees	Complaint	No	Diocese self-insured plan	0	0	
72		Diocese of Springfield	H	2585 employees	Complaint	No	Diocese self-insured plan	0	0	
73		Catholic Charities of Springfield	C	200 employees	Complaint	No	Diocese self-insured plan	0	0	
74		Catholic Charities of Chicago	N	2700 employees	Complaint	Yes	Self-funded welfare benefit plan but not sure if church plan	2,700	2,700	
75	Catholic Diocese of Nashville v. Burwell, No. 3:13-cv-1303 (M.D. Tenn.), No. 13-6640 (6th Cir.)	Diocese of Nashville	H	1200 employees	Complaint	No	House of Worship, fully insured	0	0	
76		Catholic Charities	N	115 employees	Complaint	Yes		115	115	
77		Aquinas College	N	16 employees	Website	employees: yes; students: no	Website/news reports indicate recent drastic downsizing of workforce; students not counted because complaint does not allege a student plan	16	16	0
78		Camp Marymount	N	75 employees	Complaint	Yes		75	75	
79		MQA	N	85 employees	Complaint	Yes		85	85	
80		St. Mary Villa	N	50 employees	Complaint	Yes		50	50	
81		Dominican Sisters	H	23 employees		No	Religious order	0	0	
82	Catholic Diocese of Peoria v. Sebelius, 1:12-cv-01276 JES-BGC (C.D. Ill. August 9, 2012)		H	Unknown		No	Diocese self-insured plan (court order, 2013 WL 74240), and grandfathered	0	0	
83	Catholic Health Care System v. Burwell, No. 1:12-cv-02542 (E.D.N.Y.), No. 14-427 (2d Cir.); **PACER**	Archdiocese of New York	H	10,000 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
84		ArchCare	C	4,000 employees	Complaint	No	Catholic hospital self-insured plan	0	0	
85		Catholic Health Services of Long Island	C	17,000 employees	Complaint	No	Catholic hospital self-insured plan	0	0	
86		The Diocese of Rockville Centre	H	2,000 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
87		Monsignor Farrel High School	C	73 employees	Website	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
88		Cardinal Spellman High School	C	100 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
89	Christian & Missionary Alliance Foundation, Inc., No. 2:14-cv-00580 (M.D. FL.), Nos. 15-11437, 15-11635 (11th Cir.)	CMA d/b/a Shell Point Retirement Center		1247 employees	Form W-3 filing	Yes		1,247	1,247	
90		Alliance Community for Retirement Living		344 employees	Form W-3 filing	Yes		344	344	
91		Alliance Home of Carlisle		219 employees	Form W-3 filing	Yes		219	219	
92		Town and Country Manor		365 employees	Form W-3 filing	Yes		365	365	
93		Simpson University		815 employees	Complaint	employees: yes; students: no	Complaint does not seek relief for any student plan	815	815	0
94		Crown College		114 employees	Form W-3 filing; student enrollment: https://www.crown.edu/about/quick-facts/ ("nearly 1,300 students")	Yes		1,275 students; 114 employees	114	1,275
95	Christian Employers Alliance v. Burwell, No. 3:16-cv-309 (D.N.D.)	Christian Employers Alliance		Unknown		No	No claim was made for CEA plans, and no list of members beyond TBC and TIC	0	0	
96		Trinity Bible College		249 employees	Form W-3 filing	employees: yes; students: no	complaint does not mention student plan	249	249	
97		Treasure Island Coins		9 staff	Website	Yes		9	9	
98	Colorado Christian Univ. v. Burwell, No. 1:13-cv-02105 (D. Colo.), No. 14-1329 (10th Cir.)	Colorado Christian University		5,300 students; 680 employees	Complaint	Yes		5,300 students; 680 employees	680	5,300
99	Conestoga Wood Specialties Corp. v. Burwell (Burwell v. Hobby Lobby Stores, Inc.), No. 13-356 (U.S. June 30, 2014);	Conestoga Wood Specialties Corp. (Individual operators of Conestoga Wood Specialities Corporation are the three other named plaintiffs)		950 employees	Complaint	Yes		950	950	

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100	Diocese of Cheyenne v. Burwell, No. 2:14-cv-00021 (D. Wyo.), No. 14-8040 (10th Cir.)	Diocese of Cheyenne		16 employees plus over 100 teachers	Complaint	No	Diocese self-insured plan	0	0	
101		Catholic Charities		6 employees	Complaint	No	Diocese self-insured plan	0	0	
102		St. Anthony School		41 employees	Complaint	No	Diocese self-insured plan	0	0	
103		St. Joseph's Home		130 employees, 62 orphan children	Complaint	No	Diocese self-insured plan	0	0	
104		JPIICS		20	Complaint	No	Diocese self-insured plan	0	0	
105		Wyoming Catholic College		32 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plan	0	0	0
106	Diocese of Fort Wayne-South Bend Inc. v. Burwell, No. 1:12-cv-00159 (N.D. Ind.), No. 14-1431 (7th Cir.)	Diocese of Fort Wayne South Bend		2,741 employees	Complaint	No	Diocese self-insured plan; also grandfathered	0	0	
107		Catholic Charities		39 employees	Complaint	No	Diocese self-insured plan	0	0	
108		St Anne Home		310 employees	Complaint	Yes	Self-insured plan, but not sure if it is a church plan	310	310	
109		University of St Francis		2,300 students, 413 employees	Complaint	employees: yes; students: no	No student plan discussed; Employees are offered a self-insured health plan, but not sure it is a church plan, so included	413	413	0
110		Our Sunday Visitor		300 employees	Complaint	Yes	Self-insured plan, but not sure if it is a church plan	300	300	
111		Specialty Physicians		342 employees	Complaint	Yes		342	342	
112		Franciscan Alliance		18,000 employees	Complaint	Partial	All but 1,733 employees are on a church plan exempt from ERISA. See: https://www.franciscanhealth.org/sites/default/files/2015%20employee%20benefit%20booklet.pdf (Only employees in Illinois are in BCBS plans and there are 1733 of those employees according to complaint)	1,733	1,733	
113	Doboszenski & Sons, Inc. v. Burwell, No. 0:13-cv-03148-JNE-FLN (D. Minn. Nov. 11, 2013);			32 employees	Complaint	Yes		32	32	
114	Dobson v. Burwell, No. 1:13-cv-03326 (D. Colo.), No. 14-1233 (10th Cir.)			28 employees	Complaint	Yes		28	28	
115	Domino's Farms Corporation v. Sebelius et al., No. 12 cv-15488 (E.D. Mich. Dec. 20, 2012)			89 employees	Complaint	Yes		89	89	
116	Dordt Coll. v. Burwell, No. 5:13-cv-04100 (N.D. Iowa, Western Divison), No. 14-2726 (8th Cir.)	Dordt College		1,400 students, 280 employees	Complaint	Yes		1,400 students, 280 employees	280	1,400
117		Cornerstone University		2,923 students, 294 employees	Complaint	employees: yes; students: no	No student plan discussed	294	294	0
118	East Texas Baptist Univ. v. Burwell, No. 4:12-cv-03009 (S.D. Tex.), No. 14-20112 (5th Cir.)	Houston Baptist University		2,589 students, 416 employees	Complaint	No	Self-insured church plan	0	0	0
119		East Texas Baptist Univeristy		1,290 students, 283 employees	Complaint	Yes		1,290 students, 283 employees	283	1,290
120		Westminster Theological Seminary (Intervenor)		60 FT, 65 PT employees, 620 students	Complaint in intervention	employees: yes; students: no	complaint does not mention student plan	125	125	0
121	Eden Foods, Inc. v. Burwell, No. 13-1677 (6th Cir. June 28, 2013),			128 employees	Complaint	Yes		128	128	
122	Eternal Word Television Network, Inc. v. Burwell, No. 1:13-cv-00521 (S.D. AL), No. 14-12696 (11th Cir.)			350 employees	Complaint	Yes		350	350	
123	Fellowship of Catholic University Students v. Burwell No. 1:13-cv-03263-MSK-KMT (D. Colo. Apr. 23, 2014)			450 employees	Complaint	No	Case resolved on basis that plaintiff is integrated auxilary	0	0	
124	Feltl & Co., Inc. v. Burwell, No. 13-CV-2635 DWF/JJK (D. Minn. Nov. 8, 2013);	Complaint lists two owners of the company as individual plaintiffs		4 employees	Website	Yes		4	4	
125	Franciscan University v. Sebelius, 2:12–CV–440 (S.D. Ohio)			Unknown	Complaint	No	Sued while grandfathered and then dropped student plan. With no additional suit, no apparent affect from rule.	0	0	0
126	Geneva College v. Burwell, No. 2:12-cv-00207 (W.D. Pa.), Nos. 13-3536, 14-1374 (3rd. Cir.)	Geneva College		1,850 students, 350 employees	Complaint	Yes		1,850 students, 350 employees	350	1,850
127		Seneca Hardwood Lumber		22 employees	Complaint	No	Permanent injunction shields from previous rule	0	0	
128	Gilardi v. U.S. Dep't of Health and Human Servs.,	Freshway Foods		340 employees	Complaint	Yes		340	340	
129	No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1,	Freshway Logistics		55 employees	Complaint	Yes		55	55	
130	Grace Schools v. Burwell, No. 3:12-cv-00459 (N.D. Ind.), No. 14-1430 (7th Cir.)	Grace College and Seminary		2,700 students, 457 employees	Complaint	Yes		2,700 students, 457 employees	457	2,700
131		Biola University		6,222 students, 856 employees	Complaint	Yes		6,222 students, 856 employees	856	6,222

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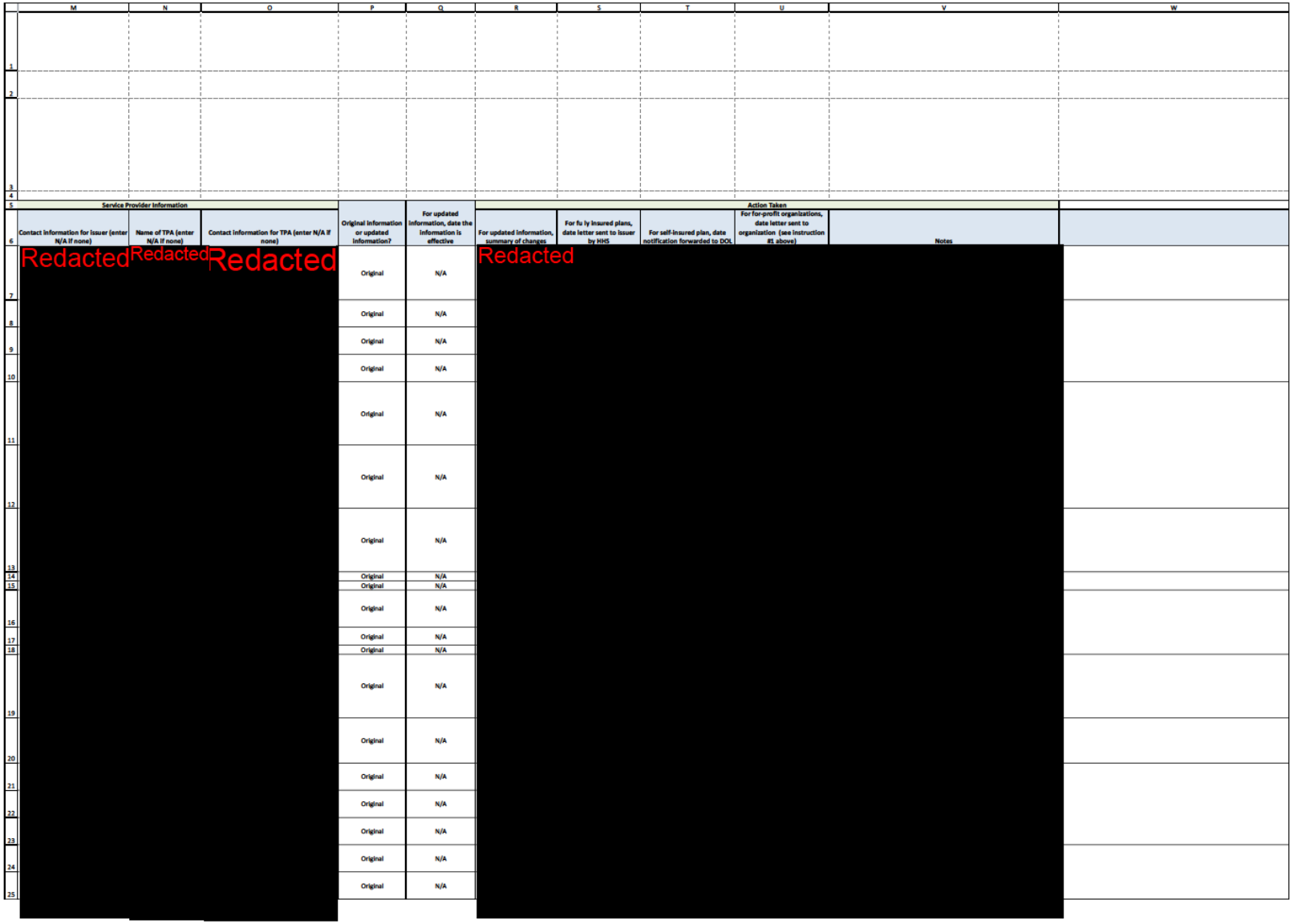
132	Grote Indus. LLC v. Burwell, No. 13-1077, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), cert. denied sub nom. Burwell v. Korte, No. 13-937 (U.S. July 1, 2014);			1,148 employees	Complaint	Yes		1,148	1,148	
133	Hall v. Burwell, No. 0:13-cv-00295-JRT-LIB (D. Minn. Apr. 2, 2013);			Approximately 50 employees	Complaint and online news reports	Yes		50	50	
134	Hartenbower v. U.S. Dep't of Health and Human	Hart Electric		54 employees (including owners)	Complaint	Yes		54	54	
135	Servs., No. 1:13-cv-02253 (N.D. Ill. Apr. 18, 2013);	H.I. Hart		7 employees	Complaint	Yes		7	7	
136	Hastings Chrysler Center, Inc. v. Burwell, No. 0:14-cv-00265-PAM-JJG (D. Minn. May 28, 2014);			60 employees	Complaint	Yes		60	60	
137	Hobby Lobby Stores, Inc., et al. v. Sebelius, et al., No.	Hobby Lobby		13,240 employees	Complaint	Yes		13,240	13,240	
138	CIV-12-1000-HE (W.D. Okla. Oct. 2, 2012); Burwell	Mardel		372 employees	Complaint	Yes		372	372	
139	Holland v. U.S. Dep't of Health and Human Servs, No. 13-15487 (S.D. W. Va. July 15, 2014);			150 employees	Complaint	Yes		150	150	
140	Infrastructure Alternatives, Inc. v. Burwell, No. 1:13-cv-00031-RJJ (W.D. Mich. Sept. 30, 2013)			70 employees	Complaint	Yes		70	70	
141	Insight for Living Ministries v. Burwell, No. 4:14-cv-675 (E.D. Tex.), No. 15-40031 (5th Cir.)			108 employees	Form W-3 filing	Yes		108	108	
142	Johnson Welded Prods. v. Burwell, No. 1:16-cv-557 (D.D.C.)			421 employees (including Lilli Johnson)	Complaint	Yes		421	421	
143	Korte v. Burwell, No. 12-3841, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), cert. denied No. 13-937 (U.S. July 1, 2014);			90 employees	Complaint	Yes		90	90	
144	Legatus v. Burwell, No. 2:12-cv-12061-RHC-MJH (E.D. Mich. Dec. 20, 2013)	Legatus		69 employees	Complaint	Yes		69	69	
145		Weignartz Supply Company, W&P Management LLC, and subsidiaries		170 employees	Complaint	Yes		170	170	
146	Lindsay v. U.S. Dep't of Health and Human Servs., No. 13-cv-1210 (N.D. Ill. Mar. 20, 2013);			70 employees	Complaint	Yes		70	70	
147	Little Sisters of the Poor Home for the Aged v. Burwell, No. 1:13-cv-2611 (D. Colo.), No. 13-1540 (10th Cir.)	Christian Brothers Employee Benefit Trust (Little Sisters uses Christian Brothers Employee Benefit Trust, and Christian Brothers Services is the TPA for the Christian Brothers Employee Benefit Trust)		5,000 employees	Complaint	No	Self-insured church plan	0	0	
148	Louisiana Coll. v. Burwell, No. 1:12-cv-00463 (W.D. La.), No. 14-31167 (5th Cir.)			1,450 students, 260 employees	Complaint	No	Self-insured church plan	0	0	0
149	March for Life v. Burwell, No. 1:14-cv-1149 (D.D.C.), No. 15-5301 (D.C. Cir.)			2 employees covered in plan; less than 10 overall		No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
150	Media Research Center v. Sebelius, No. 1:14-CV-379 (E.D. Virginia)			114 employees	Complaint	Yes		114	114	
151	Mersino Mgmt. Co. v. Burwell, No. 13-1944 (6th Cir. July 9, 2014)			110 employees	Complaint	Yes		110	110	
152	Michigan Catholic Conf. v. Burwell, No. 1:13-cv-	Michigan Catholic Charities		6,429 employees	Complaint	No	Self-insured church plan	0	0	
153	1247 (W.D. Mich.), No. 13-2723 (6th Cir.)	Catholic Charities		55 employees	Complaint	No	Self-insured church plan	0	0	
154	Midwest Fastener Corp. v. Burwell, No. 1:13-cv-01337-ESH (D.D.C. Oct. 16, 2013);			187 employees	Complaint	Yes		187	187	
155	MK Chambers Co. v. Dep't of Health and Human Servs., No. 13-cv-11379 (E.D. Mich. Nov. 21, 2014)			106 employees	Business profile on manta.org	Yes		106	106	
156	Nagle, Christopher, et al. v. Kathleen Sebelius, et al.; No. 2:13-cv-12036-VAR-DRG (E.D. Mich. May 10, 2013) (AKA "*M&N Plastics*")			109 employees	Complaint	Yes		109	109	
157	Newland v. Burwell, 881 F. Supp. 2d 1287 (D. Colo. July 27, 2012), affirmed on appeal, No. 12-1380 (10th Cir. Oct. 3, 2013)			Unknown		No	Permanent injunction	0		
158	O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir. Nov. 28, 2012)			87 employees	Complaint	Yes		87	87	
159	Ozinga v. Burwell, No. 1:13-cv-3292 (N.D. Ill.), No. 15-3648 (7th Cir.)			675+ employees	Complaint	Partial	Only 110 obtain insurance through the plan that would be affected by the exemption. This is upscaled to 110/62%=178	178	178	
160	Persico v. Burwell, No. 1:13-cv-0303 (W.D. Pa.),	Cathillice Diocese of Erie		1,500 employees	Complaint	No	Diocese self-insured plan	0	0	
161	Nos. 14-1376 (3d Cir.);	St Martin Center		61 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
162	formerly Most Reverend Donald W. Trautman, Bishop	Prince of Peace Center		20 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
163	of the Roman Catholic Diocese of Erie, et al., v. Sebelius; No. 1:12-cv-00123-SPB (W.D. Pa. May 30,	Erie Catholic Preparatory School		80 employees	Complaint	No	Diocese self-insured plan	0	0	
164	Priests for Life, No. 1:13-cv-01261 (D.D.C.), No. 13-5368 (D.C. Cir.)			60 employees	Website	Yes		60	60	

	A	B	C	D	E	F	G	H	I	J
1	**Case**	**Plaintiffs**	**Type: For-profit (F), Nonprofit (N), House of Worship or IA (H), Church Plan (C), Pro-life (P), Grandfathered (G)**	**Number of Employees/Students**	**Document employee number located within**	**Are students/employees counted in final total?**	**If not counted, explanation why**	**Number counted towards final total**	**Total employees (minus HoW/IA and SICPs)**	**Total students at relevant universities**
165	Randy Reed Auto. Inc. v. Burwell, No. 5:13-cv-6117-SJ-ODS (W.D. Mo. Dec. 3, 2013);			approximately 179 employees	Complaint	Yes		179	179	
166	Reaching Souls Int'l, Inc. v. Burwell, No. 5:13-cv-01092 (W.D. Okla.), No. 14-6028 (10th Cir.)			78,000 participants (pastors, employees, and their families)	Complaint	No	Self insured church plan	0	0	
167	Real Alternatives, Inc. v. Burwell, No. 1:15-cv-105 (M.D. Pa.), No. 16-1275 (3d Cir.)			3 employees	Complaint	No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
168	Right to Life of Michigan v. Kathleen Sebelius; No. 1:13-CV-01202 (W.D. Mich. Nov. 22, 2013)			43 employees	Complaint	No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
169	Roman Catholic Archbishop of Washington v. Burwell, No. 1:13-cv-01441 (D.D.C.), Nos. 13-5371, 14-5021 (D.C. Cir.)	Cathloic University		7,000 students, 1,766 employees	Complain	Yes		7,000 students, 1,766 employees	1,766	7,000
170		Archdiocese of Washington		2,100 eligible employees, 1,200 teachers/employees at schools	Complaint	No	Diocese self-insured plan	0	0	
171		Thomas Aquinas College		370 students, 78 eligible employees	Complaint	No	Church plan and complaint does not state that it offers student insurance	0	0	0
172		Consortium of Catholic Academies		119 employees	Complaint	No	Diocese self-insured plan	0	0	
173		Archbishop Carroll		70 employees	Complaint	No	Diocese self-insured plan	0	0	
174		Don Bosco		51 employees	Complaint	No	Diocese self-insured plan	0	0	
175		Cathloic Information Center		9 employees	Complaint	No	Diocese self-insured plan	0	0	
176		Mary of Nazareth		44 employees	Complaint	No	Diocese self-insured plan	0	0	
177		Catholic Charities		890 employees	Complaint	No	Diocese self-insured plan	0	0	
178		Victory Housing		184 employees	Complaint	No	Diocese self-insured plan	0	0	
179	Roman Catholic Archdiocese of Atlanta v. Burwell, No. 1:12-cv-03489 (N.D. Ga.), Nos. 14-12890, 14-13239 (11th Cir.)	Roman Catholic Archdiocese of Atlanta		9,800 students, 4,200 employees	Complaint	No	Diocese self-insured plan	0	0	
180		Catholic Charities		75 employees	Complaint	No	Diocese self-insured plan	0	0	
181		CENG		200 employees	Complaint	No	Diocese self-insured plan	0	0	
182		Diocese of Savannah		5,000 students; hundreds of employees	Complaint	No	Diocese self-insured plan	0	0	
183	Roman Catholic Diocese of Dallas v. Sebelius, No. 3:12-cv-01589-B (N.D. Tex.)			900 teachers/staff, 100+ employees	Complaint	No	Diocese self-insured plan	0	0	
184	School of the Ozarks v. Rightchoice Managed Care, Inc., No. 6:13-cv-03157 (W.D. Mo.), No. 15-1330 (8th Cir.)			1,442 students, 601 employees	Students - online; employees - Form w3 Filing	Employees only	Complaint does not say they offer a student plan	601	601	
185	Sharpe Holdings, Inc. v. Burwell, No. 2:12-cv-92 (E.D. Mo.) and CNS Intl Ministries, No. 14-1507 (8th Cir.)	Sharpe		50 employees	2dam complaint and Linked in	Yes		50	50	
186		Ozark		51 employees	2dam complaint and Linked in	Yes		51	51	
187		CNS International Ministries		204 employees	Form W-3 filing	Yes		204	204	
188		NIS Financial		49 employees	2dam Complaint	Yes		49	49	
189		CNS Corp		49 employees	2dam Complaint	Yes		49	49	
190		Heartland Christian College		12 employees	Form W-3 filing	Employees only	Complaint does not say they offer a student plan	12	12	0
191	Sioux Chief Mfg. Co. v. Burwell, No. 13-0036-CV-W ODS (W.D. Mo. Feb. 28, 2013);			370 employees	Complaint	Yes		370	370	
192	SMA, LLC v. Burwell, No. 0:13-cv-01375-ADM-LIB (D. Minn. July 8, 2013);			35 employees	Complaint	Yes		35	35	
193	Southern Nazarene Univ. v. Burwell, No. 5:13-cv-1015 (W.D. Okla.), No. 14-6026 (10th Cir.)	Southern Nazarene University		2,100 students, 505 employees	Complaint	Yes		2,100 students, 505 employees	505	2,100
194		OK Weselan University		1,220 students, 557 employees	Complaint	Employees only	Complaint does not say they offer a student plan	557 employees	557	0
195		OK Baptist University		1,900 students, 328 employees	Complaint	Yes		1,900 students, 328 employees	328	1,900
196		Mid America Christian University		1,447 stuendts, 298 employees	Complaint	No	Mid America Christian Univ is on Guidestone, a self-insured church plan	0	0	0
197	Stewart v. Burwell, No. 1:13-cv-01879 (D.D.C. Apr. 3, 2014);	Encompass Develop, Design & Construct, LLC		43 employees	Complaint	Yes		43	43	
198	Stinson Electric, Inc. v. Burwell, No. 14-00830-PJS-JJG (D. Minn. April 30, 2014);			19 employees	Business profile on manta.org	Yes		19	19	
199	The C.W. Zumbiel Co. v. Burwell, No. 1:13-cv-01611 (D.D.C. Nov. 27, 2013);			350 employees	Complaint	Yes		350	350	
200	The Criswell College v. Sebelius, No. 3:12-cv-04404-N (N.D. Tex.)			322 students, 50 employees	Complaint	Employees only	Complaint does not say they offer a student plan	50	50	
201	The QC Grp., Inc., v. Burwell, No. 0:13-cv-01726-JRT-SER (D. Minn. Sept. 11, 2013);			62 employees	Complaint	Yes		62	62	
202	Thomas G. Wenski v. Kathleen Sebelius; No. 12-cv-23820-Graham/Goodman (S.D. Fla. Nov. 7, 2012)	Archdiocese of Miami		Unknown		No	House of worship	0	0	
203		Catholic Health Services		2,000 employees	Complaint	Yes		2,000	2,000	
204		Catholic Hospice		610 employees	Form W-3 filing	Yes		610	610	

	A	B	C	D	E	F	G	H	I	J
1	**Case**	**Plaintiffs**	**Type: For-profit (F), Nonprofit (N), House of Worship or IA (H), Church Plan (C), Pro-life (P), Grandfathered (G)**	**Number of Employees/Students**	**Document employee number located within**	**Are students/employees counted in final total?**	**If not counted, explanation why**	**Number counted towards final total**	**Total employees (minus HoW/IA and SICPs)**	**Total students at relevant universities**
205		St. Thomas University		Unknown		No	Lawsuit mentions St. Thomas University but asserts no claims for its health plans	0	0	0
206	Tonn & Blank Constr. v. Burwell, No. 1:12-cv-00325-JD-RBC (N.D. Ind. Apr. 1, 2013);			60 employees	Complaint	Yes		60	60	
207	Trijicon, Inc. v. Burwell, No. 1:13-cv-1207 (D.D.C.)			469 employees	Complaint	Yes		469	469	
208	Tyndale House Publishers, Inc. v. Burwell, 904 F. Supp. 2d 106 (D.D.C. Nov. 16, 2012);			260 employees	Complaint	Yes		260	260	
209	Union University v. Burwell, No. 1:14-cv-1079 (W.D. Tenn.)			2,829 students, 1,116 employees	Students - online; employees - Form w3 Filing	Employees only	Complaint does not say they offer a student plan	1,116 employees	1,116	0
210	Univ of Dallas v. Burwell, No. 4:12-cv-00314 (N.D. Tex.), No. 14-10241 (5th Cir.), Nos. 14-10661 (5th Cir.)	Roman Catholic Diocese of Fort Worth		6,500 students, 2,000 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plar	0	0	
211		University of Dallas		2,600 students, 725 employees	Complaint	Yes		2,600 students, 725 employees	725	2,600
212		Catholic Charities		332 employees	Complaint	Yes		332	332	
213		Our Lady Of Victory Catholic School		23 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plar	0	0	
214	Univ. of Notre Dame v. Burwell, No. 3:13-cv-1276 (N.D. Ind.), No. 13-3853 (7th Cir.)			11,500 students, 5,000 employees	Complaint	yes		11,500 students, 5,000 employees	5,000	11,500
215	Valley Forge Christian College of the Assemblies of God v. Burwell; No. 14-4622 (E.D. Pa. Aug. 14, 2014)			Unknown	Complaint	No	Plaintiff voluntarily dismissed suit; our understanding is they were satisfied with previous accommodation	0	0	0
216	Weingartz Supply Co. v. Burwell, No. 2:12-cv-12061 (E.D. Mich.), No. 14-1183 (6th Cir.)			170 employees	DC Ruling	Yes		170	170	
217	Wheaton College v. Burwell, No. 1:13-cv-08910 (N.D. Ill.), No. 14-2396 (7th Cir.)			870 Employees	Complaint	Yes	Note: Students not counted because complaint states that Wheaton dropped student coverage	870	870	0
218	Williams v. Burwell, No. 1:13-cv-01699 (D.D.C. Nov. 19, 2013);			3 employees	Complaint	Yes		3	3	
219	Willis Law v. Burwell, No. 1:13-cv-01124-CKK (D.D.C. Aug. 23, 2013);			15 employees	Complaint	Yes		15	15	
220	Yep v. Seblius, No. 1:12-cv-6756 (N.D. Ill.), Triune Health Group, Inc. v. Burwell, No. 1:12-cv-06756 (N.D. Ill.); No. 13-1478 (7th Cir.)			4 employees	Website	Yes		4	4	
221	Zubik v. Burwell, No. 2:13-cv-1459 (W.D. Pa.), Nos. 14-1377 (3d Cir.)	Diocese		140+ full-time employees	Complaint	No	Diocese self-insured plan	0	0	
222		Catholic Charities		115 employees	Complaint	No	Diocese self-insured plan	0	0	
223		Catholic Cemeteries		207 employees	Complaint	No	Diocese self-insured plan. Cemeteries was covered by the diocese's previous self-insured plan the Catholic Employers Benefits Plan; the new complaint says that CEBS was converted to the Catholic Benefits Trust, and Cemeteries are omitted as co-plaintiffs.	0	0	
224								Total	64,352	46,737
225										7% of students use university sponsored plans http://www.gao.gov/new.items/d08389.pdf
226								Total	64,352	3,272
227									employees in affected plans	students in affected plans

	A	B	C	D	E	F	G	H	I	J	K	L
1					DRAFT: INFORMATION NOT RELEASABLE TO THE PUBLIC UNLESS AUTHORIZED BY LAW: This information has not been pub icly disclosed and may be privileged and confidential. It is for internal government use only and must not be disseminated distributed or copied to persons not authorized to receive the information. Unauthorized disclosure may result in prosecution to the fu l extent of the law.							
2					Notification from Elig ble Organizations to HHS Regarding Religious Objections to Providing Contraceptive Coverage							
3					Redacted							
4												
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
7	Redacted	8/26/2014	E-mail	Cummins-Al ison Corp and Cummins Illinois Inc.	Redacted	Other	No	Plan B Ella Mirena Copper IUDs	Redacted	Other	self-insured	Redacted
8		9/8/2014	E-mail	Loyola University		Non-profit	No	All		Other	Fully insured	
9										Other	Fully insured	
10										Other	Fully insured	
11		9/10/2014	E-mail	Valley Forge Christian College		Non-profit	Yes	Ulipristal (aka E la) Levonorgestrel (aka Plan B Plan B One-Step Next Choice) Intrauterine Devices (of any type) Abortion services except to save the life of the mother		Other	Fully insured	
12										Other	self-insured	
13		9/19/2014	E-mail	Sisters of the Order of St. Dominic of Grand Rapids (Dominican Sisters)		Non-Profit	No	All		Other	Fully insured	
14		9/19/2014	E-mail	Continuant		Other	No	Emergency Contraceptives & IUD's		Other	Fully Insured	
15										Other	Fully Insured	
16		10/ /2014	E-mail	Management Analysis and Ut lization Inc.		Other	No	"All abortifacient coverages such as but not limited to morning after and week after services"		Other	Both	
17										Other	Both	
18										Other	self-insured	
19		10/6/2014	E-mail	Holy Ghost Preparatory School		Non-profit	No	All		Other	Fully insured	
20		10/9/2014	Ma l	The Catholic Diocese of Memphis in Tennessee		Non-profit				Church Plan	self-insured	
21		10/9/2014	Ma l	Belhaven University		Non-profit		All		Other	self-insured	
22										Other	self-insured	
23										Other	self-insured	
24		10/10/2014	E-mail	Bingaman and Son Lumber Inc. PO Box 247 1195 Creek Mountain Rd Kreamer PA 17833		Other		Plan B Ella Mirena Paraguard		Other	Fully insured	
25										Other	Fully Insured	



	M	N	O	P	Q	R	S	T	U	V	W
1											
2											
3											
4											
5	Service Provider Information								Action Taken		
6	Contact Information for Issuer (enter N/A if none)	Name of TPA (enter N/A if none)	Contact Information for TPA (enter N/A if none)	Original Information or updated Information?	For updated information, date the information is effective	For updated information, summary of changes	For fu ly insured plans, date letter sent to Issuer by HHS	For self-insured plan, date notification forwarded to DOL	For for-profit organizations, date letter sent to organization (see instruction #1 above)	Notes	
7	Redacted	Redacted	Redacted	Original	N/A	Redacted					
8				Original	N/A						
9				Original	N/A						
10				Original	N/A						
11				Original	N/A						
12				Original	N/A						
13				Original	N/A						
14				Original	N/A						
15				Original	N/A						
16				Original	N/A						
17				Original	N/A						
18				Original	N/A						
19				Original	N/A						
20				Original	N/A						
21				Original	N/A						
22				Original	N/A						
23				Original	N/A						
24				Original	N/A						
25				Original	N/A						

Notifications

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
26	Redacted				Redacted				Redacted	Other	Fully insured	Redacted
27		10/15/2014	E-mail	Loyola University		Non-profit	No	All		Other	Fully insured	
28										Other	Fully insured	
29										Other	Fully insured	
30		10/16/2014	Litigation	Wheaton College		Non-profit	Yes	"Abortion-causing drugs abortion procedures and related services but has no religious objection to providing coverage for contraceptive drugs and devices that prevent conception (as opposed to interfering with the continued survival of a human embryo). Specifically identifies Plan B ella and certain unspecified IUDs as drugs and devices to which it has religious objections."		Other	self-insured	
31										Other	self-insured	
32										Student	Fully insured	
33		10/20/2014	Mail	Carithers-Wallace-Courtenay LLC		Other						
34		10/29/2014	Email	Contract Packaging Inc.		Other		Plan B E la Next Choice		Other		
35		11/5/2014	Mail	Avesta Homes LLC		Other		All		Other	Fully Insured	
36		11/1 /2014	E-mail	Kent Manufacturing Company		Other						
37		11/14/2014	Mail	Dakota Tube Inc		Other						
38		11/18/2014	E-mail	Oral Roberts University		Non-profit		EC Plan B One-step (the morning after pill); Ella Ulipristal Acetate (the week after pill); copper intrauterine devices; hormonal intrauterine devices; as we las any other drug device procedure or mechanism which has the purpose or effect of preventing an already fertilized egg from developing further by inhibiting or terminating its attachment to the uterus"		Other	Fully insured	

Notifications

	M	N	O	P	Q	R	S	T	U	V	W
5	Service Provider Information								Action Taken		
6	Contact Information for Issuer (enter N/A if none)	Name of TPA (enter N/A if none)	Contact Information for TPA (enter N/A if none)	Original Information or updated information?	For updated information, date the information is effective	For updated information, summary of changes	For fu ly insured plans, date letter sent to Issuer by HHS	For self-insured plan, date notification forwarded to DOL	For for-profit organizations, date letter sent to organization (see instruction #1 above)	Notes	
26	Redacted	Redacted	Redacted	Updated	1/ /2015	Redacted					
27				Updated	1/1/2015						
28				Updated	1/1/2015						
29				Original	N/A						
30				Original	N/A						
31				Original	N/A						
32				Original	N/A						
33											
34				Original	N/A						
35				Original	N/A						
36											
37											
38				Original	N/A						

Notifications

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
39	Redacted	11/20/2014	E-mail	J.E. Dunn Construction Group Inc.	Redacted	Other		· Plan B (levonorgestrel) and its generic equivalents · ella (ulipristal acetate) · ParaGard (copper IUD) · Mirena and Skyla (levonorgestrel-releasing IUDs)	Redacted	Other	Self-insured	Redacted
40										Other	Self-insured	
41		12/5/2014	E-mail	Greenv lle College		Non-profit		Plan B Ella and a l IUDs		Other	self-insured	
42										Other	self-insured	
43										Other	self-insured	
44		12/9/2014	E-mail	Covenant Presbyterian Church		Non-profit						
45		12/17/2014	E-mail	Trinity Schools Inc. D/B/A Trinity School at River Ridge		Non-profit	No			Other?	Fully Insured?	
46		12/17/2014	E-mail	People of Praise Minnesota Inc.		Non-profit	No			Other?	Fully Insured?	
47		12/2 /2014	E-mail	Oral Roberts University		Non-profit		EC Plan B One-step (the morning after pil); Ella Ulipristal Acetate (the week after pil); copper intrauterine devices; hormonal intrauterine devices; as we l as any other drug device procedure or mechanism which has the purpose or effect of preventing an already fertilized egg from developing further by inhibiting or terminating its attachment to the uterus"		Other	self-insured	
48		1/9/2015	Ma l	ParishSOFT LLC		Other		"All contraceptive medicatioins and procedures (ster lization abortions Rx contraceptive devices etc.)"		Other	Fully Insured	
49										Other	Fully Insured	
50		1/12/2015	Ma l	DAS Companies Inc.		Other		All		Other	self-insured	
51		1/30/2015	E-mail	Illinois Baptist Children's Home and Fam ly Services		Non-profit	No					
52		2/1 /2015	Ma l	Olivet Nazarene University		Non-profit	No	"the Health Plan w ll not provide pay for and/or facilitate access to abortion-inducing products and related counseling. This includes the use of Yaz EllaOne and the Copper-T IUD when prescribed with a diagnosis of pregnancy." The Health Plan will require a prior authorization for the dispensing of Yaz EllaOne and the Copper-T IUD. Coverage of these products will not be allowed until a doctor confirms the use of the medications for non-abortifacient purposes." Plan B will be non-covered."		Other	Fully Insured	
53		4/15/2015	Ma l	St. Raphael Health Plan - all participating employers (196 4)		Non-profit		All		Church Plan	self-insured	

Notifications

	M	N	O	P	Q	R	S	T	U	V	W
5	Service Provider Information								Action Taken		
6	Contact Information for Issuer (enter N/A if none)	Name of TPA (enter N/A if none)	Contact Information for TPA (enter N/A if none)	Original Information or updated information?	For updated information, date the information is effective	For updated information, summary of changes	For fu ly insured plans, date letter sent to Issuer by HHS	For self-insured plan, date notification forwarded to DOL	For for-profit organizations, date letter sent to organization (see instruction #1 above)	Notes	
39	Redacted	Redacted	Redacted	Original	N/A	Redacted					
40				Original	N/A						
41				Original	N/A						
42				Original	N/A						
43				Original	N/A						
44											
45					N/A						
46					N/A						
47				Updated	1/1/2015						
48				Original	N/A						
49				Original	N/A						
50				Original	N/A						
51				Original	N/A						
52				Original	N/A						
53				Original	N/A						

Notifications

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
54	Redacted	5/4/2015	Mail	Society of the Precious Blood	Redacted	Non-profit		All	Redacted	Other	Fully insured	Redacted
55		5/22/2015	E-mail	Michael James Sales Tax Solutions LLC		Other		"Any and all abortifacients"		Other	Fully insured	
56		07/087/15	Litigation (Zubik v. Burwell)	The ROMAN CATHOLIC DIOCESE OF PITTSBURGH (* exempt)		Non-profit	Yes	All		Church Plan	self-insured	
57		07/087/15	Litigation (Zubik v. Burwell)	THE ROMAN CATHOLIC DIOCESE OF ERIE (*exempt)		Non-profit	Yes	All		Church Plan	self-insured	
58		07/087/15	Litigation (Zubik v. Burwell)	CATHOLIC CHARITIES OF THE DIOCESE OF PITTSBURGH INC.		Non-profit	Yes	All		Church Plan	self-insured	
59		07/087/15	Litigation (Zubik v. Burwell)	THE CATHOLIC CEMETERIES ASSOCIATION OF THE DIOCESE OF PITTSBURGH		Non-profit	Yes	All		Church Plan	self-insured	
60		07/087/15	Litigation (Zubik v. Burwell)	ST. MARTIN CENTER INC.		Non-profit	Yes	All		Church Plan	self-insured	
61		07/087/15	Litigation (Zubik v. Burwell)	PRINCE OF PEACE CENTER INC.		Non-profit	Yes	All		Church Plan	self-insured	
62		07/087/15	Litigation (Zubik v. Burwell)	ERIE CATHOLIC PREPARATORY SCHOOL		Non-profit	Yes	All		Church Plan	self-insured	
63		8/3/2015	Mail	Oral Roberts University		Non-profit		EC Plan B One-step (the morning after pill); Ella Ulipristal Acetate (the week after pill); copper intrauterine devices; hormonal intrauterine devices; as well as any other drug device procedure or mechanism which has the purpose or effect of preventing an already fertilized egg from developing further by inhibiting or terminating its attachment to the uterus"		Student	Fully insured	

Notifications

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54	Redacted	Redacted	Redacted	Original	N/A	Redacted					
55				Original	N/A						
56				Original	N/A						
57				Original	N/A						
58				Original	N/A						
59				Original	N/A						
60				Original	N/A						
61				Original	N/A						
62				Original	N/A						
63				Original	N/A						

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
64	Redacted	8/2 /2015	E-mail	Cummins-Al ison Corp and Cummins Il inois Inc	Redacted	Other	No	Plan B Ella Mirena Copper IUDs	Redacted	Other	self-insured	Redacted
65		9/25/2015	E-mail	Weingartz Supply Co. Inc. & W & P Management LLC		Other	Yes	All contraceptive services		Other	Fully insured	
66		10/14/2015	Ma l	Carolyn's Place Inc.		Non-profit		All contraceptive services			Fully insured	
67		10/14/2015	Ma l	Dakota Tube Inc		Other						
68		10/28/2015	Ma l	Tyndale House Publishers Inc.		Other		post-conceptive medications and devices namely emergency contraceptives such as the "morning-after pill " the "week-after pi l " and intrauterine devices		Other	Self-insured	
69		10/29/2015	E-mail	Electrolock Inc. Dunstone Co. Inc. and Stone River Mgmt. Co. LLC.		Other		All		Other	self-insured	
70		11/19/2015	Ma l	Management Analysis and Ut lization Inc.		Other		Ella Plan B Plan B One Step Next Choice Next Choice One Dose My Way and Take Action		Other	Fully insured	
71											Fully Insured	
72											self-insured	
73		12/17/2015	SWIFT	Conestoga Wood Specialties Corp. Conestoga Transportation Inc. Phone: 717-445-6701		Other	Yes	Any hormonal drugs or IUDs		Other	self-insured	
74		12/2 /2015	E-mail	St. Joseph's Abby (AKA. Cistercian Abby of Spencer)		Non-profit	No	**ALL** contraceptive services required to be covered under PHS Act section 2713 as added by the Affordable Care Act and incorporated into ERISA section 715 and Code section 9815		Church Plan	Fully insured	
75		12/2 /2015	Ma l	Dakota Tube Inc.		Other						
76		1/28/2016	Ma l	Community Foundation of Northwest Indiana Inc. St. Mary Medical Center St. Catherine Hospital		Non-profit		All - "objection to providing coverage of all contraceptive services required to be covered under PHS Act section 2713 as added by the Affordable Care Act and incorporated into ERISA section 715 and Code section 9815."		Other	Self-insured	
77		2/2 /2016	E-mail	Miller Contracting Services Inc.		Other		All		Other		
78		3/3/2016	E-mail	Earth Sun Moon Trading company Inc		Other		All		Other	Fully insured	

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64	Redacted	Redacted	Redacted	Original	N/A	Redacted					
65				Original	N/A						
66				Original	N/A						
67											
68				Original	N/A						
69				Original	N/A						
70				Original	N/A						
71				Original	N/A						
72				Original	N/A						
73				Original	N/A						
74				Original	N/A						
75											
76				Original	N/A						
77				Original	N/A						
78				Original	N/A						

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5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
79	Redacted	3/7/2016	E-mail	Luurtsema Sales	Redacted	Other		All	Redacted	Other	Fully insured	Redacted
80		3/24/2016	E-mail	Continuum Health Partnerships Inc.		Other		Abortion causing drugs devices and sterilizations; patient education and counseling for all women with reproductive capacity.		Other	self-insured	
81				Continuum Health Management LLC								
82				Mountain States Health Properties LLC.								
83		3/28/2016	E-Mail	Fresh Unlimited Inc.		Other		All		Other	Fully Insured	
84		4/1/2016	E-mail	Sarkes Tarzian Inc.		Other		All		Other	Fully Insured	
85		7/19/2016	E-Mail	Mersino Management Company		Other	Yes	All		Other	self-insured	
86				Mersino Southwest. LLC								
87				Mersino Enterprise Inc.								
88				Global Pump Company								
89				Mersino Properties Company. LLC								
90				Mersino Dewatering Inc.								
91		7/26/2016	Litigation: 2nd Circuit Court 1:12-cv-02542-BMC Catholic Health Care System	Catholic Health Care System (aka ArchCare)			Yes	abortion-inducing drugs sterilizations contraceptives			self-insured	
92				Cardinal Spellman High School			Yes				self-insured	
93				Monsignor Farrell High School							self-insured	
94				Catholic Health Services of Long Island			Yes				self-insured	
95		7/26/2016	Litigation: Geneva 3nd Circuit Court 2:12-cv-00207	Geneva College (employee)			Yes	abortion-inducing drugs		Other	Fully Insured	
96				Geneva College (Student)			Yes			Student	Fully Insured	
97		7/26/2016	Litigation: Persico 3nd Circuit Court 1-13-cv-00303	The Roman Catholic Diocese of Erie* (exempt)		Non-profit	Yes	abortion-inducing drugs contraceptives or sterilization		Church Plan	self-insured	
98				Erie Catholic Preparatory School		Non-profit						
99				PRINCE OF PEACE CENTER INC.		Non-profit						
100				ST. MARTIN CENTER INC.		Non-profit						
101		7/26/2016	Litigation: Zubik 3nd Circuit Court 2-12-cv-00676	Catholic Charities of Pittsburgh		Non-profit	Yes	abortion-inducing drugs contraceptives or sterilization		Church Plan	self-insured	
102				Diocese of Pittsburgh* (Exempt)								
103		7/26/2016	Litigation: Catholic Diocese of Beaumont 5th Circuit Court	Catholic Charities of Southeast Texas			Yes	abortifacients contraception and sterlization		Other	self-insured	
104				Catholic Diocese of Beaumont* (Exempt)								

Notifications

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79	Redacted	Redacted	Redacted	Original	N/A	Redacted					
80				Original	N/A						
81											
82											
83				Original	N/A						
84				Original	N/A						
85											
86											
87											
88				Original	N/A						
89											
90											
91				Original	N/A						
92				Original	N/A						
93				Original	N/A						
94				Original	N/A						
95				Original	N/A						
96				Original	N/A						
97				Updated	N/A						
98											
99											
100											
101				Updated	N/A						
102											
103				Original	N/A						
104											

Notifications

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5				Eligible Organization Information					Plan Information			
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105	Redacted	7/26/2016	Litigation: ETBU 5th Circuit Court 4:12-CV-3009	East Texas Baptist University (employee)	Redacted		Yes	"abortion-inducing drugs .. and related services" NOT including contraceptives (compl. ¶ 28)	Redacted	Other	self-insured	Redacted
106				Houston Baptist			Yes				self-insured	
107				Westminster			Yes					
108		7/26/2016	Litigation: University of Dallas 5th Circuit Court 4:12-cv-314	Roman Catholic Diocese of Fort Worth* (Exempt)		Non-profit	Yes	"abortion-inducing drugs " sterilization and contraception		Church Plan	self-insured	
109				University of Dallas (employee)			Yes	"abortion-inducing drugs" and steri ization			self-insured	
110				University of Da las (student)			Yes	"abortion-inducing drugs " sterilization and contraception (prescribed to treat a medical condition only not to prevent pregnancy)		Student	Fully-insured	
111				Catholic Charities of Fort Worth			Yes	abortion-inducing drugs sterilization and contraception			Fully Insured	
112		7/26/2016	Litigation: Catholic Diocese of Nashville 6th Circuit Court 3:13-cv-01303	Aquinas College Nashv lle			Yes	"abortion-inducing products " steri ization and contraception			Fully Insured	
113				Camp Marymount Inc.								
114				Catholic Charities of Tennessee								
115				The Catholic Diocese of Nashvi le* (Exempt)								
116				Dominican Sisters of St. Cecilia* (Exempt)								
117				Mary Queen of Angels								
118				St. Mary's V lla Inc.								
119		7/26/2016	Litigat on: MCC 6th Circuit Court 1:13-cv-01247-GJQ	Catholic Family Services (aka Catholic Charities of Kalamazoo)			Yes	contraception and steri ization			self-insured	
120				Michigan Catho ic Conference* (Exempt)								
121		7/26/2016	Litigation: Catho ic Charities of Ft. Wayne 7th Circuit Court 1:12-cv-00159-JD-RBC	Catholic Charities of Ft. Wayne			Yes	"abortion-inducing products " steri ization and contraception			Self-insured	
122				Diocese of Ft. Wayne* (Exempt)			Yes	"abortion-inducing products " steri ization and contraception			Self-insured	
123				Franciscan Alliance			Yes	"abortion-inducing products " steri ization and contraception			Both	
124				Our Sunday Visitor			Yes	"abortion-inducing products " steri ization and contraception			Self-insured	
125				Specialty Physicians of I linois			Yes	"abortion-inducing products " steri ization and contraception			Fully-insured	
126				St. Anne Home			Yes	"abortion-inducing products " steri ization and contraception			Self-insured	
127				University of St. Francis			Yes	"abortion-inducing products " steri ization and contraception			Self-insured	

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105	Redacted	Redacted	Redacted	Original	N/A	Redacted					
106				Original	N/A						
107											
108				Original	N/A						
109				Original	N/A						
110				Original	N/A						
111				Original	N/A						
112											
113											
114											
115				Original	N/A						
116											
117											
118											
119				Original	N/A						
120											
121				Original	N/A						
122				Original	N/A						
123				Original	N/A						
124				Original	N/A						
125				Original	N/A						
126				Original	N/A						
127				Original	N/A						

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6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
128	Redacted	7/26/2016	Litigation: Grace Schools 7th Circuit Court 3:12-cv-00459-JD-CAN	Biola University (employee)	Redacted		Yes	"abortion-inducing drugs ike ella and Plan B" but not other contraceptives	Redacted		Fully Insured	Redacted
129				Biola University (student)			Yes	"abortion-inducing drugs ike ella and Plan B" but not other contraceptives		Student	Fully Insured	
130				Grace Schools (employee)			Yes	"abortifacient drugs" but not all contraceptives			Self-insured	
131				Grace Schools (student)			Yes	"abortifacient drugs" but not all contraceptives		Student	Fully Insured	
132		7/26/2016	Litigation: CNS 8th Circuit Court 2:12-cv-00092	CNS International Ministries (holding company for other listed plaintiffs: Sharpe Holdings Inc. Ozark Nat'l Life Ins. Co. and N.I.S. Financial Services Inc)			Yes	Plan B ella Copper IUDs			Self-insured	
133				Heartland Christian Co lege			Yes	Plan B ella Copper IUDs			Self-insured	
134		7/26/2016	Litigation: Dordt 8th Circuit Court 5:13-cv-04100	Cornerstone University			Yes	"post-coital 'emergency contraceptives'" such as "ella Plan B and IUDs"			Fully-insured	
135				Dordt Co lege (employee)							Self-insured	
136				Dordt College (student)						Student	Fully-insured	
137		7/26/2016	Litigation: Little Sisters 0th Circuit Court No. 13-1540 (10th Cir) Appeal of No. 1:13-CV-02611 (D. Co.)	Little Sisters of the Poor Baltimore Inc. (Little Sisters of Baltimore")		Non-profit	Yes	"sterilization contraceptives and drugs that cause abortions." "contraceptives abort facient drugs sterilizations and related education and counseling "			self-insured	
138				Little Sisters of the Poor Home for the Aged Denver Colorado ("Little Sisters of Denver")		Non-profit						
139		7/26/2016	Litigation: Reaching Souls	Reaching Souls			Yes	ella Plan B Plan B one-step Next Choice Copper IUDs IUDs w/Progestin		Church Plan	self-insured	
140				Truett-McConnell College								
141		7/26/2016	Litigation: Southern Nazarene 0th Circuit Court No. 14-6026 (10th Cir) appeal of No. 5:13-CV-01015-F (W.D. Okla.)	Mid-America Christian			Yes	"contraceptives abortifacients [such as Plan B and e lla] and related counseling to their employees and students."			self-insured	
142				Oklahoma Baptist (employee)							Fully-insured	
143				Oklahoma Baptist (student)						Student	Fully-insured	
144				Oklahoma Wesleyan				Plan B ella and IUDs			Fully-insured	
145				Southern Nazarene University (employee)				"contraceptives abortifacients [such as Plan B and e lla] and related counseling to their employees and students."			Partially self-insured. Insured for claims over $100 000	

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128	Redacted	Redacted	Redacted	Original	N/A	Redacted					
129				Original	N/A						
130											
131				Original	N/A						
132				Original	N/A						
133				Original	N/A						
134				Original	N/A						
135				Original	N/A						
136				Original	N/A						
137				Original	N/A						
138											
139				Original	N/A						
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142											
143											
144				Original	N/A						
145											

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146	Redacted			Southern Nazarene University (student)	Redacted				Redacted	Student	Fully-insured	Redacted
147		7/26/2016	Litigation: Priests for Life DC 1:13-cv-01261	Priests for Life			Yes	"contraception sterilization [and] abortifacients"			Fully-insured	
148		7/26/2016	Litigation: RCAW DC 1:13-cv-01441	Archdiocese of Washington (listed in complaint as "Roman Catholic Archbishop of Washington D.C." and as "Archdiocese of Washington")* (exempt)			Yes	abortion-inducing products contraception or sterilization			self-insured	
149				Catholic Charities of the Archdiocese of Washington Inc.								
150				Catholic Information Center Inc								
151				The Catholic University of America							Fully-insured	
152				The Catholic University of America (student)						Student	Fully-insured	
153				The Consortium of Catholic Academies of the Archdiocese o Washington D.C.							self-insured	
154				Archbishop Carroll High School								
155				Don Bosco Cristo Rey High School of the Achdiocese of Washington D.C.								
156				Mary of Nazareth Roman Catholic Elementary School Inc.								
157				Roman Catholic Archbishop of Washington								
158				Victory Housing Inc.								
159				Thomas Aquinas College								
160		7/26/2016	Litigation: Beckwith Electric 11th Circuit (M.D. Fl.) 8:16-cv-01944	Beckwith Electric Co. Inc.		Other	Yes	"emergency contraception " "abortifacients " "any drugs devices and services capable of ending innocent human life" (specifically lists Plan B ella and the IUD as examples of "abortifacients")		Other	self-insured	
161		7/26/2016	Litigation: Johnson Welded DC(DCC) 1:16-cv-00557	Johnson Welded Products Inc.		Other	Yes	"all of the contraceptive services required by the contraceptive services mandate"		Other	Not Indicated	
162		8/5/2016	Mail	Society of the Precious Blood		Non-profit	No	All		Other	Fully insured	
163		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Catholic Charities of the Archdiocese of Philadelphia d/b/a Catholic Social Services		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
164		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	St. John's Orphan Asylum		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	

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146	Redacted	Redacted	Redacted			Redacted					
147				Original	N/A						
148				Original	N/A						
149											
150											
151				Original	N/A						
152				Original	N/A						
153											
154											
155											
156				Original	N/A						
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158											
159											
160				Original	N/A						
161				Original	N/A						
162				Updated	7/1/2016						
163				Original	N/A						
164				Original	N/A						

Notifications

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
165	Redacted	9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	St. Edmond's Home for Crippled Children	Redacted	Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."	Redacted	Church Plan	Self-insured	Redacted
166		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Don Guanella Village of the Archdiocese of Philadelphia		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
167		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Divine Providence Village		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
168		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Philadelphia Protectory for Boys d/b/a St. Gabriel's System		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
169		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Catholic Community Services Inc.		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
170		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Nutritional Development Services Inc.		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
171		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Catholic Health Care Services - Supportive Independent Living d/b/a Villa St. Martha and Community Based Services		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
172		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	St. John Vianney Center		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
173		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Catholic Clinical Consultants		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
174		9/1/2016	Litigation: Catholic Charities Archdiocese of Philadelphia 3rd Circuit 2:14-cv-03096-AB	Roman Catholic Archdiocese of Philadelphia		Non-profit	Yes	"all of the required contraceptive services with the exception of the prescription and use of contraceptive medications for non-contraceptive medical purposes."		Church Plan	Self-insured	
175		9/15/2015	Litigation: Diocese of Cheyenne 10th Circuit court 14-8040	Diocese of Cheyenne		Non-profit	Yes	"to providing procuring or facilitating access to abortion-inducing products abortion sterilization or contraceptives" except when "prescribed with the intent of treating a medical condition not with the intent to prevent pregnancy or to induce abortion."		Church Plan	Self-insured	
176		9/15/2015	Litigation: Diocese of Cheyenne 10th Circuit court 14-8040	Catholic Charities of Wyoming		Non-profit	Yes	"to providing procuring or facilitating access to abortion-inducing products abortion sterilization or contraceptives" except when "prescribed with the intent of treating a medical condition not with the intent to prevent pregnancy or to induce abortion."		Church Plan	Self-insured	
177		9/15/2015	Litigation: Diocese of Cheyenne 10th Circuit court 14-8040	Saint Joseph's Children's Home		Non-profit	Yes	"to providing procuring or facilitating access to abortion-inducing products abortion sterilization or contraceptives" except when "prescribed with the intent of treating a medical condition not with the intent to prevent pregnancy or to induce abortion."		Church Plan	Self-insured	

Notifications

	M	N	O	P	Q	R	S	T	U	V	W
5	Service Provider Information					Action Taken					
6	Contact information for issuer (enter N/A if none)	Name of TPA (enter N/A if none)	Contact information for TPA (enter N/A if none)	Original information or updated information?	For updated information, date the information is effective	For updated information, summary of changes	For fully insured plans, date letter sent to issuer by HHS	For self-insured plan, date notification forwarded to DOL	For for-profit organizations, date letter sent to organization (see instruction #1 above)	Notes	
165	Redacted	Redacted	Redacted	Original	N/A	Redacted					
166				Original	N/A						
167				Original	N/A						
168				Original	N/A						
169				Original	N/A						
170				Original	N/A						
171				Original	N/A						
172				Original	N/A						
173				Original	N/A						
174				Original	N/A						
175				Original	N/A						
176				Original	N/A						
177				Original	N/A						

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5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
178	Redacted	9/15/2015	Litigation: Diocese of Cheyenne 10th Circuit court 14-8040	St. Anthony Tri-Parish Catholic School	Redacted	Non-profit	Yes	"to providing procuring or facilitating access to abortion-inducing products abortion sterilization or contraceptives" except when "prescribed with the intent of treating a medical condition not with the intent to prevent pregnancy or to induce abortion."	Redacted	Church Plan	Self-insured	Redacted
179		9/15/2015	Litigation: Diocese of Cheyenne 10th Circuit court 14-8040	Wyoming Catholic College		Non-profit	Yes	" abortion-inducing products or sterlization" except " contraceptives only when prescribed with the intent of treating a medical condition not with the intent to prevent pregnancy."		Church Plan	self-insured	
180		9/15/2015	Litigation: Colorado Christian University 10th Circuit Court 14-1329	Colorado Christian University (employee)		Non-profit	Yes	"coverage for a l services drugs and devices that could terminate human life from the moment of conception including medical abortions emergency contraceptives l ke Plan B and E la and IUDs" and "other contraceptives."		Other	self-insured	
181		9/15/2015	Litigation: Colorado Christian University 10th Circuit Court 14-1330	Colorado Christian University (student)		Non-profit	Yes	"coverage for abortions and all contraceptives including emergency contraceptives and IUDs."		Student	Fully Insured	
182		9/15/2015	Litigation: Dobson 10th Circuit Court 14-1233	Family Talk		Non-profit	Yes	"abortion-inducing or implantation-preventing drugs abortifacient items and related education and counseling spec fically IUDs and 'emergency contraception' such as Plan B and Ella" and "any counse ing or referrals to promote or refer for ... such abortion-inducing drugs and IUDs "		Other	Partia ly Self-Insured with a stop-loss provider and a third-party administrator	
183		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Association of Christian Schools International (employee)		Non-profit	Yes	"the procurement of participation in facilitation of or payment for abortion (including abortion-causing drugs and devices like Plan B ella and IUDs)"		Other	self-insured	
184		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Samaritan Ministries International (employee)		Non-profit	Yes	"the procurement of participation in facilitation of or payment for abortion (including abortion-causing drugs and devices like Plan B ella and IUDs)"		Other	self-insured	
185		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Taylor University (employee)		Non-profit	Yes	"the procurement of participation in facilitation of or payment for abortion (including abortion-causing drugs and devices like Plan B ella and IUDs)"		Other	self-insured	
186		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Indiana Wesleyan University		Non-profit	Yes	"the procurement of participation in facilitation of or payment for abortion (including abortion-causing drugs and devices like Plan B ella and IUDs)"		Other	self-insured	
187		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Asbury Theological Seminary		Non-profit	Yes	"the procurement of participation in facilitation of or payment for abortion (including abortion-causing drugs and devices like Plan B ella and IUDs)"		Other	self-insured	
188		9/15/2015	Litigation: Ass'n of Christian Schools Int'l v. Burwell 10th Circuit Court No. 14-1492	Alliance Defending Freedom		Non-profit	Yes	"emergency contraceptive medications hormonal contraceptive medications and devices and implanted contraceptive devices or related counseling or referrals to promote the use of such items"		Other	self-insured	
189		9/20/2016	Litigation: Catholic Benefits Ass'n LCA v. Burwell 10th Circuit Court Nos. 14-6163 14-6171	Good Will Pub ishers Inc.		Other	Yes	"contraception abortion-inducing drugs or devices sterilization and related counseling"		Other	Fully-insured	
190		9/20/2016	Litigation: Catholic Benefits Ass'n LCA v. Burwell 10th Circuit Court Nos. 14-6163 14-6171	Catholic Charities of the Archdiocese of Oklahoma City		Non-profit	Yes	"contraception abortion-inducing drugs or devices sterilization and related counseling"		likely church plan but never alleged	self-insured	
191		9/20/2016	Litigation: Catholic Benefits Ass'n LCA v. Burwell 10th Circuit Court Nos. 14-6163 14-6171	All Saints Catholic School		Non-profit	Yes	"contraception abortion-inducing drugs or devices sterilization and related counseling"		likely church plan but never alleged	self-insured	

Notifications

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178	Redacted	Redacted	Redacted	Original	N/A	Redacted					
179				Original	N/A						
180				Original	N/A						
181				Original	N/A						
182				Original	N/A						
183				Original	N/A						
184				Original	N/A						
185				Original	N/A						
186				Original	N/A						
187				Original	N/A						
188				Original	N/A						
189				Original	N/A						
190				Original	N/A						
191				Original	N/A						

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
19	Redacted	9/20/2016	Litigation: Catholic Benefits Ass'n LCA v. Burwell 10th Circuit Court Nos. 14-6163 14-6171	The Cathedral Foundation d/b/a Catholic Review Media	Redacted	Non-profit	Yes	"contraception abortion-inducing drugs or devices sterilization and related counseling"	Redacted	likely church plan but never alleged	self-insured	Redacted
19		9/20/2016	Litigation: Catholic Benefits Ass'n LCA v. Burwell 10th Circuit Court Nos. 14-6163 14-6171	Vila St. Francis Catholic Care Center Inc.		Non-profit	Yes	"contraception abortion-inducing drugs or devices sterilization and related counseling"		Other	Fully-insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13239	THE ROMAN CATHOLIC ARCHDIOCESE OF ATLANTA an association of churches and schools		Non-profit	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	self-insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13240	THE MOST REVEREND WILTON D GREGORY and his successors Archbishop of the Roman Catholic Archdiocese of Atlanta		Non-profit	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	self-insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13241	CATHOLIC CHARITIES OF THE ARCHDIOCESE OF ATLANTA INC. a Georgia non-profit corporation		Non-profit	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	Self-Insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13242	Catho ic Education of North Georgia Inc. (CENGI)		Other	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	Self-Insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13243	THE ROMAN CATHOLIC DIOCESE OF SAVANNAH an ecclesiastical territory		Non-profit	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	Self-Insured	
19		10/6/2016	Litigation: Roman Catholic Archdiocese of Atlanta et al. v. Secretary U.S. Dep't of Health & Human Servs et al Nos. 14-12890 14-13244	THE MOST REVEREND JOHN HARTMAYER and his successors Bishop of The Roman Catholic Diocese of Savannah et al.		Non-profit	Yes	"abortion-inducing products contraception steri ization and related counse ing" "unless they are necessary for medica ly diagnosed conditions unrelated to contraception."		Church Plan	Self-Insured	
20		10/6/2016	Eternal Word Television Network v. Burwell No. 14-12696	Eternal Word Television Network Inc.		Non-profit	Yes	"artificial contraception ster lization or abortion or related education and counseling."		other	Self-Insured	
20		11/ /2016	Email/mail	Bick Group Inc.		Other	Yes	"all contraceptive services"		Other	Fully-insured	
20		11/9/2016	Email	The Energy Lab INC		Other	No	All		Other	Fully-insured	
20		11/2 /2016	Email	Marian University		Non-profit	No	All		Church Plan	self-insured	

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192	Redacted	Redacted	Redacted	Original	N/A	Redacted					
193				Original	N/A						
194				Original	N/A						
195				Original	N/A						
196				Original	N/A						
197				Original	N/A						
198				Original	N/A						
199				Original	N/A						
200				Original	N/A						
201				Original	N/A						
202				Original	N/A						
203				Original	N/A						

	A	B	C	D	E	F	G	H	I	J	K	L
5				Eligible Organization Information					Plan Information			
6	Tracking number	Date notification received	Received via mail or e-mail?	Name of eligible organization	Contact information for eligible organization	Type of organization (Non-profit or other)	Plaintiff in Litigation? (Yes or No) (See instruction #2 above)	Contraceptive services not provided	Plan name	Plan type (Student Plan, Church Plan, Other)	Fully insured, self-insured or both?	Name of issuer (enter N/A if none)
204	Redacted	11/29/2016	Litigation: Louisiana College v. Burwell et al. No. 14-31167	Louisiana College	Redacted	Non-profit	Yes	Objects to providing: RU-486; Plan B; ella; "counseling regarding the use of abortifacients like ella and Plan B;" and any "drugs devices services or procedures contrary to its faith." Sec. Am. Compl. Dist. Ct. Dkt 77 at ¶¶ 27-33 "While excluding abortifacients ike ella and Plan B LC's employee health plan does cover contraceptives that prevent ovulation." Sec. Am. Compl. Dist. Ct. Dkt 77 at ¶ 37	Redacted	Church Plan	self-insured	Redacted
205		4/2 /2017	Mail	Continuum Health Partnerships Inc.		Other	No	Abortion causing drugs devices and sterilizations; patient education and counseling for all women with reproductive capacity.		Other	self-insured	
206				Continuum Health Management LLC								
207				Mountain States Health Properties LLC.								
208												
209												

Notifications

	M	N	O	P	Q	R	S	T	U	V	W
5	Service Provider Information								Action Taken		
6	Contact information for issuer (enter N/A if none)	Name of TPA (enter N/A if none)	Contact information for TPA (enter N/A if none)	Original information or updated information?	For updated information, date the information is effective	For updated information, summary of changes	For fully insured plans, date letter sent to issuer by HHS	For self-insured plan, date notification forwarded to DOL	For for-profit organizations, date letter sent to organization (see instruction #1 above)	Notes	
204	Redacted	Redacted	Redacted	Original	N/A	Redacted					
205				Updated	4/1/2017						
206											
207											
208											
209											

Notifications

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs., No. 6:12-cv-03459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012);		175 employees	Complaint	Yes		175	175	
American Family Association v. Sebelius, 1:13-cv 00032-SA-DAS (N.D. Miss. Feb. 20, 2013)		135 employees	Complaint	Yes		135	135	
Annex Med., Inc. v. Burwell, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013)		18 employees	Complaint	Yes		18	18	
Archdiocese of St. Louis v. Burwell, No. 4:13-cv-02300 (E.D. MO), No. 14-3016 (8th Cir.)	Archdiocese of St. Louis	7,800 employees/staff	Complaint	No	Diocese self-insured plan (see Brandt v Burwell note below	0	0	
	Catholic Charities of St. Louis	1600 employees	Complaint	No	same	0	0	
Armstrong v. Burwell, No. 1:13-cv-00563-RBJ (D. Colo. Sept. 17, 2013); gov't appeal dismissed Sept. 4 2014 (10th Cir. order);		730 employees	Complaint	Yes		730	730	
Association of Christian Schools International v. Burwell, No. 1:14-cv-2966 (D. Colo.), No. 14-1492 (10th Cir.)	Association of Christian Schools International	140 employees	Complaint	Yes		140	140	
	Samaritan Ministries International	133 employees	Complaint	Yes		133	133	
	Taylor University	1,900 Students; 641 Employees	Complaint	Students = no; employees = yes	Complaint does not state that they offer a student health plan; therefore students not counted	641	641	0
	Indiana Wesleyan University	15,000 students; 3,565 employees (1,018 FT and 2,547 PT)	Complaint	Students = no; employees = partial	Complaint does not state that they offer a student health plan; therefore students not counted. Complaint states that 890 employees enroll in the plan. Because other entities usually provide the overall number of employees, not the number enrolled in the plan, and in the IFR we estimate 62% of all employees are in plans, this number is upscaled to 890/62%=1435	1,435	1,435	0
Autocam Corp. v. Burwell, 730 F.3d 618 (6th Cir. Sept. 17, 2013),	Autocam	478 employees	Complaint	Yes		478	478	
	Autocam Medical	183 employees	Complaint	Yes		183	183	
Ave Maria Foundation v. Burwell, No. 2:13-cv-15198 (E.D. Mich.), Nos. 14-1310 (6th Cir.)	The Ave Maria Foundation	51 employees	Estimated number based on online information	Yes		51	51	
	Ave Maria Communications	19 employees	Form W-3 filing	Yes		19	19	
	Domino's Farms Petting Farm	18 employees	Form W-3 filing	Yes		18	18	
	Rhodora J. Donahue Academy, Inc.	26 employees	Website	Yes		26	26	
	Thomas More Law Center	14 employees	Form W-3 filing	Yes		14	14	
Ave Maria School of Law v. Burwell, No. 2:13-cv-00795 (M.D. Fl.), Nos. 14-15777 (11th Cir.)		68 employees	Complaint	Employees = yes; students = no	Permanent injunction 07/11/2018	0	0	0
Ave Maria University v. Burwell, No. 2:13-cv-00630 (M.D. Fla.), Nos. 14-15780 (11th Cir.)		150 employees	Complaint	Employees = yes; students = no	Permanent injunction 07/11/2018	0	0	0
Barron Indus., Inc. v. Burwell, No. 1:13-cv-01330 KBJ (D.D.C. Sept. 25, 2013);		56 employees	Complaint	Yes		56	56	
Beckwith Elec. Co. v. Burwell, No. 8:16-cv-1944 (M.D. Fla.)		126 employees	Complaint	Yes		126	126	
Belmont Abbey College v. Sebelius, et al., No. 1:11 cv-01989 (D.D.C. Nov. 10, 2011)		1,600 students; 305 employees	Complaint	Yes		1,600 students; 305 employees	305	1,600
Bick Holdings, Inc. v. Burwell, No. 4:13-cv-00462 AGF (E.D. Mo. Apr. 1, 2013);		196 employees	Complaint	Yes		196	196	
Brandt v. Burwell, No. 2:14-cv-00681 (W.D. Pa.), Nos. 14-3663, 14-4087 (3d Cir.)	Diocese of Greensburg	3,100 employees; 5,000 other participants in plan (this is a high number- it includes employees from other Dioceses)	Complaint	No	Diocese self-insured plan; Government argued that these and all similar Catholic diocese-sponsored self-insured plans and entities participating in such plans that are litigants represented by Jones Day likely qualify to be church plans exempt from ERISA. See, e.g., Doc. # 23, 2:14-cv-00681-AJS (W.D. Pa.). We cannot force such plan TPAs to offer contraceptive payments, and it is likely the churches will tell them not to, and the TPAs will not make the offers.	0	0	
	Catholic Charities	18 employees	Complaint	No	Diocese self-insured plan	0	0	
	St. John School	13 employees	Complaint	No	Diocese self-insured plan	0	0	

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
Briscoe v. Burwell, No. 1:13-cv-00285-WYD-BNB (D. Colo. Sept. 6, 2013); gov't appeal dismissed Sept 4, 2014 (10th Cir. order);	Briscoe owns all plaintiff organizations involved: Continuum Health Partnerships, Inc./ Mountain States Health Properties, LLC/ Continuum Health Management, LLC/ CH-Greeley, LLC	200 employees	Complaint	Yes		200	200	
Catholic Benefits Association LCA v. Burwell (*CBA I*), No. 5:14-cv-00240 (W.D. Okla.), Catholic Benefits Association LCA v. Burwell (CBA II), No. 5:14-cv-00685 (W.D. Okla.),Nos. 14-6171, 14-6163, 15-6029, 15-6037, 15-6139, 16-6030, 16-6217 (10th Cir.)	Catholic Benefits Associatoin	Unknown	N/A	No	Permanent injunction 03/07/2018	0	0	
	Catholic Insurance Company	Unknown	N/A	No	Permanent injunction 03/07/2018	0	0	
	Archdiocese of Baltimore	5, 500 participants	Complaint	No	Permanent injunction 03/07/2018	0	0	
	Cathedral Foundation (AKA Catholic Review Media)	32 employees	Complaint	No	Permanent injunction 03/07/2018	0	0	
	Archdiocese of Oklahoma City- Complaint lists Mount St. Mary, St. Ann, and Office of Catholic Schools as sub-ministries	Unknown (see St. Ann, Mount St. Mary and Office of Catholic Schools below)		No	Permanent injunction 03/07/2018	0		
	St. Ann	78 employees	Form W-3 filing	No	Permanent injunction 03/07/2018	0	0	
	Mount St. Mary	Unknown		No	Permanent injunction 03/07/2018	0	0	
	Office of Catholic Schools				Permanent injunction 03/07/2018	0	0	
	Villa St. Francis Catholic Care Center	100 participants	Complaint	Yes	Permanent injunction 03/07/2018	0	0	
	Goodwill Publishers	140 employees	Complaint	Yes	Permanent injunction 03/07/2018	0	0	
	Catholic Charities Oklahoma City	103 employees	Form W-3 filing	No	Permanent injunction 03/07/2018	0	0	
	All Saints	Unknown		No	Permanent injunction 03/07/2018	0	0	
	Catholic Charities and Family Services, Diocese of Norwich	69 employees	Second Complaint	Yes	Permanent injunction 03/07/2018	0	0	
Catholic Charities of the Archdioceses of Philadelphia v. Burwell, No. 2:14-cv-3096 (E.D. Pa.), No. 14-3126 (3d Cir.)	Catholic Social Services	626 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Francis Homes for Boys	227 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Edmund's Home for Children	226 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Don Guanella Village	413 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Divine Providence Village	667 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Gabriel's System	458 emplyees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Catholic Community Services	92	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Nutritional Development Services	64	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Villa St. Martha	117 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Monica Manor	356 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. John Neumann Nursing Home	360 Employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Immaculate Mary Home	490 Employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Francis Country House	488 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Martha Manor	272 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	St. Mary Manor	339 employees	Form W-3 filing	No	Disocese self-insured plan	0	0	
	St. John Vianney Center	84 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Catholic Clinical Consultants	19	Form W-3 filing	No	Diocese self-insured plan	0	0	
Catholic Diocese of Beaumont v. Burwell, No. 1:13-cv-00709 (E.D. Tex.), No. 14-40212 (5th Cir.)	Diocese	950 employees; 232 staff at schools	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plan	0	0	
	Catholic Charities of Southeast Texas, Inc.	18 employees	Complaint		Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plan	0	0	
Catholic Diocese of Biloxi v. Burwell, No. 1:14-cv-00146 (S.D. Miss.)	Diocese of Jackson	900 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities	140 employees	Complaint	No	Diocese self-insured plan	0	0	
	Vicksburg	70 employees	Website	No	Diocese self-insured plan	0	0	
	St Joseph	85 employees	Website	No	Diocese self-insured plan	0	0	
	Diocese of Biloxi	600 employees	Complaint	No	Diocese self-insured plan	0	0	
	De L'epee Deaf Center	5 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Catholic Social & Community Services Inc.	20 employees	Form W-3 filing	no	Diocese self-insured plan	0	0	
	Resurrection Catholic and Sacred Heart	200 employees	Complaint	No	Diocese self-insured plan	0	0	

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
	St. Dominic-Jackson Memorial Hospital and affiliated locations and programs	2,200 employees	Complaint	No	Self-insured plan sponsored by Catholic affiliated hospital; grandfathered and already omits contraceptives, so could retain grandfathered status or pursue church plan status to continue omitting.	0	0	
Conlon, Bishop of Catholic Diocese of Joliet v. Sebelius, 1:12-cv-03932 (N.D. Ill. May 21, 2012)	Diocese of Joliet	At least 1,570 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities of Joliet	240 employees	Complaint	No	Diocese self-insured plan	0	0	
	Diocese of Springfield	2585 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities of Springfield	200 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities of Chicago	2700 employees	Complaint	Yes	Self-funded welfare benefit plan but not sure if church plan	2,700	2,700	
Catholic Diocese of Nashville v. Burwell, No. 3:13-cv-1303 (M.D. Tenn.), No. 13-6640 (6th Cir.)	Diocese of Nashville	1200 employees	Complaint	No	House of Worship, fully insured	0	0	
	Catholic Charities	115 employees	Complaint	Yes		115	115	
	Aquinas College	16 employees	Website	employees: yes; students: no	Website/news reports indicate recent drastic downsizing of workforce; students not counted because complaint does not allege a student plan	16	16	0
	Camp Marymount	75 employees	Complaint	Yes		75	75	
	MQA	85 employees	Complaint	Yes		85	85	
	St. Mary Villa	50 employees	Complaint	Yes		50	50	
	Dominican Sisters	23 employees		No	Religious order	0	0	
Catholic Diocese of Peoria v. Sebelius, 1:12-cv-01276-JES-BGC (C.D. Ill. August 9, 2012)		Unknown		No	Diocese self-insured plan (court order, 2013 WL 74240), and grandfathered	0	0	
Catholic Health Care System v. Burwell, No. 1:12-cv-02542 (E.D.N.Y.), No. 14-427 (2d Cir.); **PACER**	Archdiocese of New York	10,000 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
	ArchCare	4,000 employees	Complaint	No	Catholic hospital self-insured plan	0	0	
	Catholic Health Services of Long Island	17,000 employees	Complaint	No	Catholic hospital self-insured plan	0	0	
	The Diocese of Rockville Centre	2,000 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
	Monsignor Farrel High School	73 employees	Website	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
	Cardinal Spellman High School	100 employees	Complaint	No	In the lawsuit the government took the position that this is a self-insured church plan. See, e.g., 987 F.Supp.2d at 242	0	0	
Christian & Missionary Alliance Foundation, Inc., No. 2:14-cv-00580 (M.D. FL.), Nos. 15-11437, 15-11635 (11th Cir.)	CMA d/b/a Shell Point Retirement Center	1247 employees	Form W-3 filing	Yes		1,247	1,247	
	Alliance Community for Retirement Living	344 employees	Form W-3 filing	Yes		344	344	
	Alliance Home of Carlisle	219 employees	Form W-3 filing	Yes		219	219	
	Town and Country Manor	365 employees	Form W-3 filing	Yes		365	365	
	Simpson University	815 employees	Complaint	employees: yes; students: no	Complaint does not seek relief for any student plan	815	815	0
	Crown College	114 employees	Form W-3 filing; student enrollment: https://www.crown.edu/about/quick-facts/ ("nearly 1,300 students")	Yes		1,275 students; 114 employees	114	1,275
Christian Employers Alliance v. Burwell, No. 3:16-cv-309 (D.N.D.)	Christian Employers Alliance	Unknown		No	No claim was made for CEA plans, and no list of members beyond TBC and TIC	0	0	
	Trinity Bible College	249 employees	Form W-3 filing	employees: yes; students: no	complaint does not mention student plan	249	249	
	Treasure Island Coins	9 staff	Website	Yes		9	9	
Colorado Christian Univ. v. Burwell, No. 1:13-cv-02105 (D. Colo.), No. 14-1329 (10th Cir.)	Colorado Christian University	5,300 students; 680 employees	Complaint	Yes	Permanent injunction 07/11/2018	0	0	0
Conestoga Wood Specialties Corp. v. Burwell (Burwell v. Hobby Lobby Stores, Inc.), No. 13-356 (U.S. June 30, 2014);	Conestoga Wood Specialties Corp. (Individual operators of Conestoga Wood Specialities Corporation are the three other named plaintiffs)	950 employees	Complaint	Yes		950	950	

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
DeOtte v. Azar, No. 4:18-cv-00825-Y (N.D. Tex. Complaint Oct. 6, 2018)	Richard W. DeOtte, Yvette DeOtte, John Kelley, Alison Kelley, Hotze Health & Wellness Center	75 employees	Complaint	Yes		75	75	
Diocese of Cheyenne v. Burwell, No. 2:14-cv-00021 (D. Wyo.), No. 14-8040 (10th Cir.)	Diocese of Cheyenne	16 employees plus over 100 teachers	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities	6 employees	Complaint	No	Diocese self-insured plan	0	0	
	St. Anthony School	41 employees	Complaint	No	Diocese self-insured plan	0	0	
	St. Joseph's Home	130 employees, 62 orphan children	Complaint	No	Diocese self-insured plan	0	0	
	JPIICS	20	Complaint	No	Diocese self-insured plan	0	0	
	Wyoming Catholic College	32 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plan	0	0	0
Diocese of Fort Wayne-South Bend Inc. v. Burwell, No. 1:12-cv-00159 (N.D. Ind.), No. 14-1431 (7th Cir.)	Diocese of Fort Wayne South Bend	2,741 employees	Complaint	No	Diocese self-insured plan; also grandfathered	0	0	
	Catholic Charities	39 employees	Complaint	No	Diocese self-insured plan	0	0	
	St Anne Home	310 employees	Complaint	Yes	Self-insured plan, but not sure if it is a church plan	310	310	
	University of St Francis	2,300 students, 413 employees	Complaint	employees: yes; students: no	No student plan discussed; Employee are offered a self-insured health plan, but not sure it is a church plan, so included	413	413	0
	Our Sunday Visitor	300 employees	Complaint	Yes	Self-insured plan, but not sure if it is a church plan	300	300	
	Specialty Physicians	342 employees	Complaint	Yes		342	342	
	Franciscan Alliance	18,000 employees	Complaint	Partial	All but 1,733 employees are on a church plan exempt from ERISA. See: https://www.franciscanhealth.org/sites/default/files/2015%20employee%20benefit%20booklet.pdf (Only employees in Illinois are in BCBS plans and there are 1733 of those employees according to complaint	1,733	1,733	
Doboszenski & Sons, Inc. v. Burwell, No. 0:13-cv 03148-JNE-FLN (D. Minn. Nov. 11, 2013);		32 employees	Complaint	Yes		32	32	
Dobson v. Burwell, No. 1:13-cv-03326 (D. Colo.), No. 14-1233 (10th Cir.)		28 employees	Complaint	Yes		28	28	
Domino's Farms Corporation v. Sebelius et al., No. 12-cv-15488 (E.D. Mich. Dec. 20, 2012)		89 employees	Complaint	Yes		89	89	
Dordt Coll. v. Burwell, No. 5:13-cv-04100 (N.D. Iowa, Western Divison), No. 14-2726 (8th Cir.)	Dordt College	1,400 students, 280 employees	Complaint	Yes	Permanent injunction 06/14/2018	0	0	0
	Cornerstone University	2,923 students, 294 employees	Complaint	employees: yes; students: no	Permanent injunction 06/14/2018	0	0	0
East Texas Baptist Univ. v. Burwell, No. 4:12-cv-03009 (S.D. Tex.), No. 14-20112 (5th Cir.)	Houston Baptist University	2,589 students, 416 employees	Complaint	No	Self-insured church plan	0	0	0
	East Texas Baptist Univeristy	1,290 students, 283 employees	Complaint	Yes		1,290 students, 283 employees	283	1,290
	Westminster Theological Seminary (Intervenor)	60 FT, 65 PT employees, 620 students	Complaint in intervention	employees: yes; students: no	complaint does not mention student plan	125	125	0
Eden Foods, Inc. v. Burwell, No. 13-1677 (6th Cir. June 28, 2013),		128 employees	Complaint	Yes		128	128	
Eternal Word Television Network, Inc. v. Burwell, No. 1:13-cv-00521 (S.D. AL), No. 14-12696 (11th Cir.)		350 employees	Complaint	Yes		350	350	
Fellowship of Catholic University Students v Burwell, No. 1:13-cv-03263-MSK-KMT (D. Colo. Apr. 23, 2014)		450 employees	Complaint	No	Case resolved on basis that plaintiff is integrated auxilary	0	0	
Feltl & Co., Inc. v. Burwell, No. 13-CV-2635 DWF/JJK (D. Minn. Nov. 8, 2013);	Complaint lists two owners of the company as individual plaintiffs	4 employees	Website	Yes		4	4	
Franciscan University v. Sebelius, 2:12–CV–440 (S.D. Ohio)		Unknown	Complaint	No	Sued while grandfathered and then dropped student plan. With no additional suit, no apparent affect from rule.	0	0	0
Geneva College v. Burwell, No. 2:12-cv-00207 (W.D. Pa.), Nos. 13-3536, 14-1374 (3rd. Cir.)	Geneva College	1,850 students, 350 employees	Complaint	Yes	Permanent injunction docket # 144	0	0	0
	Seneca Hardwood Lumber	22 employees	Complaint	No	Permanent injunction shields from previous rule	0	0	
Gilardi v. U.S. Dep't of Health and Human Servs., No. 13-5069, 2013 WL 5854246 (D.C. Cir. Nov. 1,	Freshway Foods	340 employees	Complaint	Yes		340	340	
	Freshway Logistics	55 employees	Complaint	Yes		55	55	
Grace Schools v. Burwell, No. 3:12-cv-00459 (N.D. Ind.), No. 14-1430 (7th Cir.)	Grace College and Seminary	2,700 students, 457 employees	Complaint	Yes	Permanent injunction 06/14/2018	0	0	0
	Biola University	6,222 students, 856 employees	Complaint	Yes	Permanent injunction 06/14/2018	0	0	0

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
Grote Indus. LLC v. Burwell, No. 13-1077, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), cert. denied sub nom. Burwell v. Korte, No. 13-937 (U.S. July 1, 2014);		1,148 employees	Complaint	Yes		1,148	1,148	
Hall v. Burwell, No. 0:13-cv-00295-JRT-LIB (D. Minn. Apr. 2, 2013);		Approximately 50 employees	Complaint and online news reports	Yes		50	50	
Hartenbower v. U.S. Dep't of Health and Human Servs., No. 1:13-cv-02253 (N.D. Ill. Apr. 18, 2013);	Hart Electric	54 employees (including owners)	Complaint	Yes		54	54	
	H.I. Hart	7 employees	Complaint	Yes		7	7	
Hastings Chrysler Center, Inc. v. Burwell, No. 0:14 cv-00265-PAM-JJG (D. Minn. May 28, 2014);		60 employees	Complaint	Yes		60	60	
Hobby Lobby Stores, Inc., et al. v. Sebelius, et al., No: CIV-12-1000-HE (W.D. Okla. Oct. 2, 2012);	Hobby Lobby	13,240 employees	Complaint	Yes		13,240	13,240	
	Mardel	372 employees	Complaint	Yes		372	372	
Holland v. U.S. Dep't of Health and Human Servs, No. 13-15487 (S.D. W. Va. July 15, 2014);		150 employees	Complaint	Yes		150	150	
Infrastructure Alternatives, Inc. v. Burwell, No. 1:13 cv-00031-RJJ (W.D. Mich. Sept. 30, 2013)		70 employees	Complaint	Yes		70	70	
Insight for Living Ministries v. Burwell, No. 4:14-cv-675 (E.D. Tex.), No. 15-40031 (5th Cir.)		108 employees	Form W-3 filing	Yes		108	108	
Johnson Welded Prods. v. Burwell, No. 1:16-cv-557 (D.D.C.)		421 employees (including Lilli Johnson)	Complaint	Yes		421	421	
Korte v. Burwell, No. 12-3841, 2013 WL 5960692 (7th Cir. Nov. 8, 2013), cert. denied No. 13-937 (U.S. July 1, 2014);		90 employees	Complaint	Yes		90	90	
Legatus v. Burwell, No. 2:12-cv-12061-RHC-MJH (E.D. Mich. Dec. 20, 2013)	Legatus	69 employees	Complaint	Yes	Legatus injunction 12/20/2013, case dismissed 02/02/2018	0	0	
	Weignartz Supply Company, W&P Management LLC, and subsidiaries	170 employees	Complaint	Yes		170	170	
Lindsay v. U.S. Dep't of Health and Human Servs., No. 13-cv-1210 (N.D. Ill. Mar. 20, 2013);		70 employees	Complaint	Yes		70	70	
Little Sisters of the Poor Home for the Aged v. Burwell, No. 1:13-cv-2611 (D. Colo.), No. 13-1540 (10th Cir.)	Christian Brothers Employee Benefit Trust (Little Sisters uses Christian Brothers Employee Benefit Trust, and Christian Brothers Services is the TPA for the Christian Brothers Employee Benefit Trust)	5,000 employees	Complaint	No	Self-insured church plan, and permanent injunction 05/29/2018	0	0	
Louisiana Coll. v. Burwell, No. 1:12-cv-00463 (W.D. La.), No. 14-31167 (5th Cir.)		1,450 students, 260 employees	Complaint	No	Self-insured church plan	0	0	0
March for Life v. Burwell, No. 1:14-cv-1149 (D.D.C.), No. 15-5301 (D.C. Cir.)		2 employees covered in plan; less than 10 overall		No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
Media Research Center v. Sebelius, No. 1:14-CV-379 (E.D. Virginia)		114 employees	Complaint	Yes		114	114	
Mersino Mgmt. Co. v. Burwell, No. 13-1944 (6th Cir. July 9, 2014)		110 employees	Complaint	Yes		110	110	
Michigan Catholic Conf. v. Burwell, No. 1:13-cv-1247 (W.D. Mich.), No. 13-2723 (6th Cir.)	Michigan Catholic Charities	6,429 employees	Complaint	No	Self-insured church plan	0	0	
	Catholic Charities	55 employees	Complaint	No	Self-insured church plan	0	0	
Midwest Fastener Corp. v. Burwell, No. 1:13-cv-01337-ESH (D.D.C. Oct. 16, 2013);		187 employees	Complaint	Yes		187	187	
MK Chambers Co. v. Dep't of Health and Human Servs., No. 13-cv-11379 (E.D. Mich. Nov. 21, 2014)		106 employees	Business profile on manta.org	Yes		106	106	
Nagle, Christopher, et al. v. Kathleen Sebelius, et al., No. 2:13-cv-12036-VAR-DRG (E.D. Mich. May 10, 2013) (AKA *"M&N Plastics"*)		109 employees	Complaint	Yes		109	109	
Newland v. Burwell, 881 F. Supp. 2d 1287 (D. Colo. July 27, 2012), affirmed on appeal, No. 12-1380 (10th Cir. Oct. 3, 2013)		265 employees	Dist Ct Brief 4/30/12	No	Permanent injunction	0		
O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir. Nov. 28, 2012)		87 employees	Complaint	Yes		87	87	
Ozinga v. Burwell, No. 1:13-cv-3292 (N.D. Ill.), No. 15-3648 (7th Cir.)		675+ employees	Complaint	Partial	Only 110 obtain insurance through the plan that would be affected by the exemption. This is upscaled to 110/62%=178	178	178	
Persico v. Burwell, No. 1:13-cv-0303 (W.D. Pa.), Nos. 14-1376 (3d Cir.); formerly Most Reverend Donald W. Trautman, Bishop of the Roman Catholic Diocese of Erie, et al., v. Sebelius; No. 1:12-cv-00123-SPB (W.D. Pa. May	Cathllice Diocese of Erie	1,500 employees	Complaint	No	Diocese self-insured plan	0	0	
	St Martin Center	61 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Prince of Peace Center	20 employees	Form W-3 filing	No	Diocese self-insured plan	0	0	
	Erie Catholic Preparatory School	80 employees	Complaint	No	Diocese self-insured plan	0	0	
Priests for Life, No. 1:13-cv-01261 (D.D.C.), No. 13-5368 (D.C. Cir.)		60 employees	Website	Yes		60	60	

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Randy Reed Auto. Inc. v. Burwell, No. 5:13-cv-6117 SJ-ODS (W.D. Mo. Dec. 3, 2013);		approximately 179 employees	Complaint	Yes		179	179	
Reaching Souls Int'l, Inc. v. Burwell, No. 5:13-cv-01092 (W.D. Okla.), No. 14-6028 (10th Cir.)		78,000 participants (pastors, employees, and their families)	Complaint	No	Self insured church plan and permanent injunction 03/15/2018	0	0	
Real Alternatives, Inc. v. Burwell, No. 1:15-cv-105 (M.D. Pa.), No. 16-1275 (3d Cir.)		3 employees	Complaint	No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
Right to Life of Michigan v. Kathleen Sebelius; No. 1:13-CV-01202 (W.D. Mich. Nov. 22, 2013)		43 employees	Complaint	No	All employees must/do oppose the coverage; therefore not counting as affected by rules	0	0	
Roman Catholic Archbishop of Washington v. Burwell, No. 1:13-cv-01441 (D.D.C.), Nos. 13-5371, 14-5021 (D.C. Cir.)	Cathloic University	7,000 students, 1,766 employees	Complain	Yes		7,000 students, 1,766 employees	1,766	7,000
	Archdiocese of Washington	2,100 eligible employees, 1,200 teachers/employees at schools	Complaint	No	Diocese self-insured plan	0	0	
	Thomas Aquinas College	370 students, 78 eligible employees	Complaint	No	Church plan and complaint does not state that it offers student insurance	0	0	0
	Consortium of Catholic Academies	119 employees	Complaint	No	Diocese self-insured plan	0	0	
	Archbishop Carroll	70 employees	Complaint	No	Diocese self-insured plan	0	0	
	Don Bosco	51 employees	Complaint	No	Diocese self-insured plan	0	0	
	Cathloic Information Center	9 employees	Complaint	No	Diocese self-insured plan	0	0	
	Mary of Nazareth	44 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities	890 employees	Complaint	No	Diocese self-insured plan	0	0	
	Victory Housing	184 employees	Complaint	No	Diocese self-insured plar	0	0	
Roman Catholic Archdiocese of Atlanta v. Burwell, No. 1:12-cv-03489 (N.D. Ga.), Nos. 14-12890, 14-13239 (11th Cir.)	Roman Catholic Archdiocese of Atlanta	9,800 students, 4,200 employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities	75 employees	Complaint	No	Diocese self-insured plar	0	0	
	CENG	200 employees	Complaint	No	Diocese self-insured plar	0	0	
	Diocese of Savannah	5,000 students; hundreds of employees	Complaint	No	Diocese self-insured plan	0	0	
Roman Catholic Diocese of Dallas v. Sebelius, No. 3:12-cv-01589-B (N.D. Tex.)		900 teachers/staff, 100+ employees	Complaint	No	Diocese self-insured plan	0	0	
School of the Ozarks v. Rightchoice Managed Care, Inc., No. 6:13-cv-03157 (W.D. Mo.), No. 15-1330 (8th Cir.)		1,442 students, 601 employees	Students - online; employees Form w3 Filing	Employees only	Complaint does not say they offer a student plan	601	601	
Sharpe Holdings, Inc. v. Burwell, No. 2:12-cv-92 (E.D. Mo.) and CNS Intl Ministries, No. 14-1507 (8th Cir.)	Sharpe	50 employees	2dam complaint and Linked in	Yes		50	50	
	Ozark	51 employees	2dam complaint and Linked in	Yes		51	51	
	CNS International Ministries	204 employees	Form W-3 filing	Yes		204	204	
	NIS Financial	49 employees	2dam Complaint	Yes		49	49	
	CNS Corp	49 employees	2dam Complaint	Yes		49	49	
	Heartland Christian College	12 employees	Form W-3 filing	Employees only	Complaint does not say they offer a student plan	12	12	0
Sioux Chief Mfg. Co. v. Burwell, No. 13-0036-CV W-ODS (W.D. Mo. Feb. 28, 2013);		370 employees	Complaint	Yes		370	370	
SMA, LLC v. Burwell, No. 0:13-cv-01375-ADM-LIB (D. Minn. July 8, 2013);		35 employees	Complaint	Yes		35	35	
Southern Nazarene Univ. v. Burwell, No. 5:13-cv-1015 (W.D. Okla.), No. 14-6026 (10th Cir.)	Southern Nazarene University	2,100 students, 505 employees	Complaint	Yes	Permanent injunction 05/15/2018	0	0	0
	OK Weselan University	1,220 students, 557 employees	Complaint	Employees only	Permanent injunction 05/15/2018	0	0	0
	OK Baptist University	1,900 students, 328 employees	Complaint	Yes	Permanent injunction 05/15/2018	0	0	0
	Mid America Christian University	1,447 stuendts, 298 employees	Complaint	No	Permanent injunction 05/15/2018	0	0	0
Stewart v. Burwell, No. 1:13-cv-01879 (D.D.C. Apr. 3, 2014);	Encompass Develop, Design & Construct, LLC	43 employees	Complaint	Yes		43	43	
Stinson Electric, Inc. v. Burwell, No. 14-00830-PJS-JJG (D. Minn. April 30, 2014);		19 employees	Business profile on manta.org	Yes		19	19	
The C.W. Zumbiel Co. v. Burwell, No. 1:13-cv 01611 (D.D.C. Nov. 27, 2013);		350 employees	Complaint	Yes		350	350	
The Criswell College v. Sebelius, No. 3:12-cv-04404 N (N.D. Tex.)		322 students, 50 employees	Complaint	Employees only	Complaint does not say they offer a student plan	50	50	
The QC Grp., Inc., v. Burwell, No. 0:13-cv-01726-JRT-SER (D. Minn. Sept. 11, 2013);		62 employees	Complaint	Yes		62	62	

Case	Plaintiffs	Number of Employees/Students	Document employee number located within	Are students/employees counted in final total?	If not counted, explanation why	Number counted towards final total	Total employees (minus HoW/IA and SICPs)	Total students at relevant universities
Thomas G. Wenski v. Kathleen Sebelius; No. 12-cv-23820-Graham/Goodman (S.D. Fla. Nov. 7, 2012)	Archdiocese of Miami	Unknown		No	House of worship	0	0	
	Catholic Health Services	2,000 employees	Complaint	Yes		2,000	2,000	
	Catholic Hospice	610 employees	Form W-3 filing	Yes		610	610	
	St. Thomas University	Unknown		No	Lawsuit mentions St. Thomas University but asserts no claims for its health plans	0	0	0
Tonn & Blank Constr. v. Burwell, No. 1:12-cv-00325 JD-RBC (N.D. Ind. Apr. 1, 2013);		60 employees	Complaint	Yes		60	60	
Trijicon, Inc. v. Burwell, No. 1:13-cv-1207 (D.D.C.)		469 employees	Complaint	Yes		469	469	
Tyndale House Publishers, Inc. v. Burwell, 904 F. Supp. 2d 106 (D.D.C. Nov. 16, 2012);		260 employees	Complaint	Yes		260	260	
Union University v. Burwell, No. 1:14-cv-1079 (W.D. Tenn.)		2,829 students, 1,116 employees	Students - online; employees Form w3 Filing	Employees only	Complaint does not say they offer a student plan	1,116 employees	1,116	0
Univ of Dallas v. Burwell, No. 4:12-cv-00314 (N.D. Tex.), No. 14-10241 (5th Cir.), Nos. 14-10661 (5th Cir.)	Roman Catholic Diocese of Fort Worth	6,500 students, 2,000 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plar	0	0	
	University of Dallas	2,600 students, 725 employees	Complaint	Yes		2,600 students, 725 employees	725	2,600
	Catholic Charities	332 employees	Complaint	Yes		332	332	
	Our Lady Of Victory Catholic School	23 employees	Complaint	No	Offers coverage through Christian Brothers Employee Benefit Trust- a self insured church plar	0	0	
Univ. of Notre Dame v. Burwell, No. 3:13-cv-1276 (N.D. Ind.), No. 13-3853 (7th Cir.)		11,500 students, 5,000 employees	Complaint	yes		11,500 students, 5,000 employees	5,000	11,500
Valley Forge Christian College of the Assemblies of God v. Burwell; No. 14-4622 (E.D. Pa. Aug. 14, 2014)		Unknown	Complaint	No	Plaintiff voluntarily dismissed suit; our understanding is they were satisfied with previous	0	0	0
Weingartz Supply Co. v. Burwell, No. 2:12-cv-12061 (E.D. Mich.), No. 14-1183 (6th Cir.)		170 employees	DC Ruling	Yes		170	170	
Wheaton College v. Burwell, No. 1:13-cv-08910 (N.D. Ill.), No. 14-2396 (7th Cir.)		870 Employees	Complaint	Yes	Permanent injunction 02/22/2018	0	0	0
Williams v. Burwell, No. 1:13-cv-01699 (D.D.C. Nov. 19, 2013);		3 employees	Complaint	Yes		3	3	
Willis Law v. Burwell, No. 1:13-cv-01124-CKK (D.D.C. Aug. 23, 2013);		15 employees	Complaint	Yes		15	15	
Yep v. Seblius, No. 1:12-cv-6756 (N.D. Ill.), Triune Health Group, Inc. v. Burwell, No. 1:12-cv-06756 (N.D. Ill.); No. 13-1478 (7th Cir.)		4 employees	Website	Yes		4	4	
Zubik v. Burwell, No. 2:13-cv-1459 (W.D. Pa.), Nos. 14-1377 (3d Cir.)	Diocese	140+ full-time employees	Complaint	No	Diocese self-insured plan	0	0	
	Catholic Charities	115 employees	Complaint	No	Diocese self-insured plar	0	0	
	Catholic Cemeteries	207 employees	Complaint	No	Diocese self-insured plan. Cemeteries was covered by the diocese's previous self-insured plan the Catholic Employers Benefits Plan; the new complaint says that CEBS was converted to the Catholic Benefits Trust, and Cemeteries are omitted as co-plaintiffs.	0	0	
						Total	48,654	25,265 10.4% of students covered in 2014

estimated 2,100,000 students were covered by plans of four-year granting institutions of higher education, and there were a total of 20,207,000 students in degree-granting postsecondary institutions other than 2-year degree programs. see at https://www.acha.org/documents/Networks/Coalitions/Why_SHIPs_Matter.pdf and https://nces.ed.gov/programs/digest/d16/tables/dt16_105.20.asp?current=yes.

Total	48,654 employees in affected plans	2,626 students in affected plans

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CIVIL ACTION NUMBER 17-4540

VS.

DONALD J. TRUMP, ET AL.

THURSDAY, DECEMBER 14, 2017
COURTROOM 3B
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE WENDY BEETLESTONE, ESQUIRE, J.

PRELIMINARY INJUNCTION HEARING

SUZANNE R. WHITE, RPR, FCRR, CM
OFFICIAL COURT REPORTER
FIRST FLOOR U. S. COURTHOUSE
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PROCEEDINGS RECORDED BY STENOTYPE-COMPUTER,
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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AND

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COUNSEL FOR DONALD TRUMP, ET AL.

(THE CLERK OPENS COURT.)

THE COURT: WE ARE HERE IN THE MATTER OF COMMONWEALTH OF PENNSYLVANIA VERSUS DONALD TRUMP; DONALD WRIGHT, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVE MNUCHIN, UNITED STATES DEPARTMENT OF THE TREASURY, RENE ALEXANDER ACOSTA, UNITED STATES DEPARTMENT OF LABOR. THIS IS CASE NUMBER 17-4540.

TODAY WE HAVE A HEARING ON THE COMMONWEALTH'S MOTION FOR A PRELIMINARY INJUNCTION.

LET ME TELL -- MOSTLY FOR THE FOLKS IN THE COURTROOM, I HAVE ALREADY DETERMINED HOW THIS WILL PROCEED. WE WILL BE WORKING FROM NOW UNTIL 6. IF THE PARTIES FINISH BEFORE 6, THEN WE WILL FINISH BEFORE 6.

THE PARTIES HAVE REQUESTED OPENING STATEMENTS. I HAVE ALLOWED THEM 15 MINUTES EACH FOR OPENING STATEMENTS. THE PARTIES HAVE ALSO ASKED FOR CLOSING STATEMENTS AND I HAVE ALLOWED THEM 15 MINUTES EACH FOR CLOSING STATEMENTS.

IN THE INTERIM, IT IS MY VIEW THAT THIS IS THE PLAINTIFF'S HEARING. I AM NOT GOING TO IMPOSE ANY PARTICULAR RULES. I'M GOING TO ALLOW THEM TO DO WHAT THEY THINK THEY NEED TO DO IN ORDER TO PROCEED.

WITH THAT, PLEASE CAN WE HAVE THE INTRODUCTIONS ON THE PLAINTIFFS' SIDE, MOVING TO THE DEFENSE SIDE.

MR. GOLDMAN: YOUR HONOR, MY NAME IS JONATHAN GOLDMAN, THE EXECUTIVE DEPUTY ATTORNEY GENERAL FOR THE COMMONWEALTH OF PENNSYLVANIA IN CHARGE OF THE CIVIL LAW DIVISION.

MS. BOLAND: GOOD MORNING, YOUR HONOR. MY NAME IS NICOLE BOLAND. I'M THE DEPUTY ATTORNEY GENERAL WITH THE OFFICE OF ATTORNEY GENERAL.

MR. FISCHER: GOOD MORNING, YOUR HONOR. MY NAME IS MICHAEL FISCHER, DEPUTY ATTORNEY GENERAL WITH THE OFFICE OF ATTORNEY GENERAL.

THE COURT: AND NICOLE BROCK, IS SHE HERE?

MS. BROCK: YES, YOUR HONOR. I'M NICOLE BROCK, DEPUTY ATTORNEY GENERAL FROM THE OFFICE OF ATTORNEY GENERAL.

MR. DAVIS: GOOD MORNING, YOUR HONOR. I AM ETHAN DAVIS. I'M A DEPUTY ASSISTANT ATTORNEY GENERAL WITH THE U.S. DEPARTMENT OF JUSTICE.

MS. KADE: GOOD MORNING, YOUR HONOR. MY NAME IS ELIZABETH KADE. I'M A TRIAL ATTORNEY WITH THE DEPARTMENT OF JUSTICE.

MR. SANDBERG: GOOD MORNING, YOUR HONOR. I'M JUSTIN SANDBERG. I'M A CHIEF TRIAL COUNSEL WITH THE DEPARTMENT OF JUSTICE.

MR. HEALY: GOOD MORNING, YOUR HONOR. MY

NAME IS CHRISTOPHER HEALY. I'M A TRIAL ATTORNEY FOR THE U.S. DEPARTMENT OF JUSTICE.

MS. KOPPLIN: GOOD MORNING, YOUR HONOR. MY NAME IS REBECCA KOPPLIN. I'M ALSO A TRIAL ATTORNEY WITH THE DEPARTMENT OF JUSTICE.

THE COURT: MR. GOLDMAN.

MR. GOLDMAN: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. GOLDMAN: BEFORE I BEGIN, YOUR HONOR, IF WE CAN CLARIFY ONE THING. I BELIEVE WE HAD SPOKEN ABOUT ON THE PHONE IN CONFERENCE THAT WE WOULD EACH HAVE A HALF-HOUR FOR OPENINGS AND A HALF-HOUR FOR CLOSINGS.

THE COURT: I DID NOT RECALL IT THAT WAY, BUT IF THAT IS HOW YOU WANT TO USE YOUR TIME, THAT IS FINE. YOU SHOULD OF COURSE ASSUME THAT I HAVE READ ALL THE BRIEFS AND THAT I'M VERY FAMILIAR WITH THE ARGUMENTS THAT YOU MADE IN YOUR BRIEFS AND ALSO THE ATTACHMENTS THERETO. SO TO THE EXTENT THAT IT'S POSSIBLE THAT YOU NOT REPEAT WHAT IS IN THOSE DOCUMENTS, THAT WOULD PROBABLY BE A GOOD THING.

GO AHEAD.

MR. GOLDMAN: THANK YOU, YOUR HONOR. AS I SAID, MY NAME IS JONATHAN GOLDMAN. I'M HERE FOR THE COMMONWEALTH OF PENNSYLVANIA.

IF I MAY ASK THE COURT'S INDULGENCE,

FOLLOWING OUR CONFERENCE ON TUESDAY EVENING AT WHICH YOUR HONOR URGED THE PARTIES NOT TO BRING LIVE WITNESSES TO REPEAT THE ALLEGATIONS ALREADY MADE UNDER OATH IN THEIR DECLARATIONS, THERE ARE OTHER FACTS THAT ARE ALREADY IN THE RECORD, WE SIGNIFICANTLY RESTRUCTURED OUR CASE. AND SEEKING TO FOLLOWING YOUR HONOR'S GUIDANCE, WE REDUCED THE NUMBER OF WITNESSES FROM SIX TO LIKELY THREE, AND WE SCALED BACK THE TESTIMONY OF THOSE WITNESSES.

THE LAWYERS BESIDE ME AT COUNSEL TABLE AND ALSO BACK THERE ARE MEMBERS OF THE TEAM. WE HAVE ALL WORKED TOGETHER, AND HAD WE HAD ALL SIX WITNESSES HERE, EVERYBODY WOULD HAVE HAD A WITNESS, A SPEAKING ROLE HERE. SOME MEMBERS OF COUNSEL MAY NOT, BUT I JUST WANTED TO ACKNOWLEDGE THEIR HARD WORK FOR THE COURT.

THIS CASE IS ABOUT TWO NEW REGULATIONS PROMULGATED BY THE DEFENDANTS, THE RELIGIOUS EXEMPTION RULE AND THE MORAL EXEMPTION RULE. THESE ARE EXEMPTIONS TO THE CONTRACEPTIVE MANDATE UNDER THE AFFORDABLE CARE ACT, WHICH IS THE LAW OF THE LAND. AND THEY ARE INCREDIBLY BROAD. THEY ARE THE EXCEPTIONS THAT SWALLOW THE RULE. THEY WERE PROMULGATED OUTSIDE THE CONSTRAINTS OF THE ADMINISTRATIVE PROCEDURE ACT AND ON TOP OF ALREADY EXISTING EXCEPTIONS, A RELIGIOUS EXCEPTION AND ACCOMMODATION, WHICH WERE MUCH NARROWER IN SCOPE. THEY

REQUIRE MORE ACCOUNTABILITY. AND IN THE CASE OF THE ACCOMMODATION, THEY REQUIRE AN EMPLOYER'S INSURER TO STEP IN AND PROVIDE CONTRACEPTIVE CONFERENCE FOR WOMEN IF THE EMPLOYER OPTS OUT. THESE NEW RULES DO NOT DO THAT.

AS A RESULT OF THESE NEW RULES, WOMEN IN PENNSYLVANIA AND ACROSS THE COUNTRY TOO WILL LOSE THEIR INSURANCE COVERAGE FOR CONTRACEPTIVE CARE. THIS WILL COST THE COMMONWEALTH TO SUFFER ECONOMIC DAMAGES AS IT'S FORCED TO STEP INTO THE BREACH, AND -- UNDER THE CURRENT LAWS, AND COVER THE COST OF ADDITIONAL CONTRACEPTIVE CARE FOR THE ADDITIONAL WOMEN WHO WILL NEED IT. AND WHERE WOMEN ARE NOT ABLE TO GET CONTRACEPTIVE COVERAGE THROUGH THE COMMONWEALTH OR ELSEWHERE, THERE WILL BE AN INCREASE IN UNINTENDED PREGNANCIES, WHICH WILL CAUSE THE COMMONWEALTH FURTHER ECONOMIC HARM.

IN ADDITION TO THESE ECONOMIC HARMS, THE NEW RULES WILL CAUSE WOMEN IN THIS COMMONWEALTH AND BEYOND TO SUFFER ECONOMIC HARM AND MEDICAL HARM, WHICH FOR SOME WOMEN MAY BE CATASTROPHIC.

ON TOP OF THIS, THE RULES PLAINLY VIOLATE THE LAW, AS WE HAVE LAID OUT IN OUR MOTION. THE COMMONWEALTH TODAY ASKS ONLY THAT THE COURT ENFORCE THE LAW AND ISSUE A PRELIMINARY INJUNCTION TO MAINTAIN THE STATUS QUO UNTIL WE CAN HAVE A FULL TRIAL.

THE COURT: MR. GOLDMAN, GIVEN THE ADMONITION THAT A COURT SHOULD NOT REACH CONSTITUTIONAL ISSUES WHEN IT CAN RESOLVE A MATTER ON STATUTORY CLAIMS, ARE YOU, IN THE CONTEXT OF THIS PRELIMINARY INJUNCTION, PURSUING THE CONSTITUTIONAL CLAIMS OR ARE YOU FOCUSING YOUR EFFORTS ON THE APA PROCEDURAL AND SUBSTANTIVE CLAIMS?

MR. GOLDMAN: WE ARE, AS WE DID ON OUR BRIEF, YOUR HONOR, WE'RE FOCUSING ON ALL OF THE CLAIMS. THE REASON WHY IS THIS -- AND TO BE VERY CLEAR, THE PROCEDURAL APA CLAIMS ARE VALID AND THE DEFENDANTS VIOLATED THE PROCEDURAL APA. IF YOU WERE TO ENJOIN THE RULES BASED ON THAT, PRESUMABLY IT WOULD NOT BE VERY EFFICIENT. PRESUMABLY THE DEFENDANTS WOULD GO BACK, TAKE THE SAME RULES, PUT THEM UP FOR NOTICE AND COMMENT FOR 30 DAYS, AND THEN WE WOULD BE RIGHT BACK HERE BEFORE YOUR HONOR ON THE MORE SUBSTANTIVE CLAIMS.

THE COURT: WELL, YOU HAVE TWO APA CLAIMS. ONE IS A PROCEDURAL CLAIM AND ONE IS A SUBSTANTIVE CLAIM UNDER THE APA. I THINK WHAT YOU SAID WOULD OCCUR IF I DETERMINED IT ONLY UNDER THE PROCEDURAL PRONG. BUT IF I ALSO DECIDED IT UNDER THE SUBSTANTIVE PRONG, WOULD THAT SAME ISSUE OCCUR?

MR. GOLDMAN: NO, YOUR HONOR. IF YOU DECIDED IT UNDER THE SUBSTANTIVE APA CLAIM, YOU COULD

ACTUALLY GET TO ALL OF THE CONSTITUTIONAL ISSUES THROUGH THE APA CLAIM BECAUSE IT WOULD SHOW THAT THE LAW -- THE APA WAS SUBSTANTIVELY VIOLATED BECAUSE THE RULES VIOLATE THE LAW ON THE CONSTITUTIONAL GROUNDS, NOT THE GROUNDS WE LAID OUT.

THE COURT: OKAY. GO AHEAD.

MR. GOLDMAN: SO TO YOUR POINT, YOUR HONOR, WE DO HAVE FIVE CLAIMS HERE AND WE ARE URGING YOUR HONOR TO CONSIDER ALL FIVE OF THEM: EQUAL PROTECTION, TITLE VII UNDER THE CIVIL RIGHTS ACT; AND THE PREGNANCY DISCRIMINATION ACT ESTABLISHMENT CLAUSE; AND THEN THE PROCEDURAL AND SUBSTANTIVE APA CLAIMS.

I KNOW YOU ARE WELL AWARE OF THE STANDARD FOR AN INJUNCTION. IT'S LAID OUT ON PAGE 17 OF OUR MOTION. AND WE BELIEVE, YOUR HONOR, THAT WE HAVE SOME WITNESSES TODAY TO ADD PRIMARILY ADDITIONAL TESTIMONY AND COLOR AND NUANCE. WE BELIEVE THAT YOUR HONOR IS IN GOOD STEAD TO ISSUE AN INJUNCTION ALREADY, BASED ON THE FINDINGS OF FACT AND THE FACTS THAT ARE IN OUR MOTION AND OUR PAPERS.

AND IF I MAY, I WOULD LIKE TO LIST THOSE OUT, SINCE THEY ARE ALREADY IN THE RECORD, UNLESS YOUR HONOR WOULD PREFER ME TO MOVE ON.

THE COURT: GO AHEAD.

MR. GOLDMAN: IN THE RECORD, THE FACTS

INCLUDE THE FOLLOWING. UNINTENDED PREGNANCY IS PREVALENT IN THE UNITED STATES. THAT IS IN THE WEISMAN DECLARATION AT PARAGRAPHS 22 THROUGH 23.

PREVENTING UNINTENDED PREGNANCY RESULTS IN FINANCIAL SAVINGS FOR WOMEN. THAT IS IN THE WEISMAN DECLARATION AT PARAGRAPHS 49 THROUGH 50 AND THE STEINBERG DECLARATION AT PARAGRAPH 30.

UNINTENDED PREGNANCY IS A PREVENTABLE HEALTH CONDITION FOR WOMEN, IN THE WEISMAN DECLARATION, PARAGRAPHS 19 THROUGH 20, AND THE CHUANG DECLARATION AT PARAGRAPHS 15 AND 41.

CONTRACEPTIVES ARE ALSO EFFECTIVE IN PREVENTING UNINTENDED PREGNANCY. NOT ONLY IS THAT ON TABLE 5-3 ON PAGE 106 OF THE COMMITTEE'S REPORT ITSELF, IT'S ALSO IN THE WEISMAN DECLARATION AT PARAGRAPH 30, THE CHUANG DECLARATION AT PARAGRAPHS 41 THROUGH 43, AND THE STEINBERG DECLARATION AT PARAGRAPHS 30 AND THE BUTTS DECLARATION AT PARAGRAPH 36.

WOMEN WHO FOREGO CONTRACEPTION OR USE LESS EFFECTIVE CONTRACEPTION ARE AT RISK OF UNINTENDED PREGNANCY. THAT IS ALREADY IN THE RECORD AT WEISMAN DECLARATION, PARAGRAPH 48, CHUANG DECLARATION PARAGRAPH 39, STEINBERG DECLARATION PARAGRAPH 30, AND THE BUTTS DECLARATION AT PARAGRAPH 58.

THE COURT: THERE IS NO NEED TO REFER TO

THE RECORD. I KNOW THE RECORD. JUST SAY WHAT YOU NEED TO SAY, AND I WILL BELIEVE YOU THAT IT'S IN THE RECORD.

MR. GOLDMAN: THANK YOU.

THE COURT: UNLESS OPPOSING COUNSEL SAYS IT'S NOT IN THE RECORD, AND THEN WE WILL HAVE A LITTLE FIGHT ON IT.

MR. GOLDMAN: FAIR ENOUGH.

COST IS A BARRIER TO ASSESSING CONTRACEPTION CARE. BEFORE THE ACA'S CONTRACEPTION MANDATE, PATIENTS WOULD NOT FILL THEIR CONTRACEPTIVE PRESCRIPTIONS, OPTING INSTEAD TO ASK THEIR PHYSICIANS FOR LESS EFFECTIVE BUT CHEAPER METHODS OF CONTRACEPTION AT LEAST UP FRONT, ULTIMATELY NOT CHEAPER IN THE LONG RUN. BEFORE THAT CONTRACEPTIVE MANDATE, PATIENTS WOULD NOT FILL THEIR CONTRACEPTIVE PRESCRIPTIONS, OPTING INSTEAD TO FAIL TO USE CONTRACEPTION SOMETIMES ALTOGETHER BECAUSE OF THE COST. BEFORE THE ACA CONTRACEPTIVE MANDATE, IUDS WERE ONE OF THE MOST EXPENSIVE FORMS OF CONTRACEPTIVES FOR PATIENTS IN TERMS OF THE INITIAL COST WHICH HAS TO BE PAID UP FRONT. AND YET IUDS ARE A MUCH MORE EFFECTIVE METHOD OF CONTRACEPTIVE CARE THAN ARE BIRTH CONTROL PILLS AND OBVIOUSLY THAN ARE NOTHING.

THE CONTRACEPTION MANDATE HAS RESULTED IN MORE WOMEN USING CONTRACEPTIVES GENERALLY AND MORE

EFFECTIVE METHODS OF CONTRACEPTIVES SPECIFICALLY. MORE WOMEN ARE USING IUDS, FOR EXAMPLE, THAN ORAL BIRTH CONTROL PILLS OR NO METHOD OF CONTRACEPTION AT ALL, SUCH THAT AFTER THE CONTRACEPTIVE MANDATE PATIENTS WERE FREE TO MAKE CONTRACEPTIVE CHOICES PURELY ON THE BASIS OF MEDICAL NEEDS, LISTENING TO THE RECOMMENDATIONS OF THEIR DOCTORS, WITHOUT HAVING TO WEIGH THE COST OF CARE, WHICH IS EXACTLY WHAT THE AFFORDABLE CARE ACT INTENDED. AND AS A RESULT, AFTER THE CONTRACEPTIVE MANDATE, PATIENTS HAD MADE MORE MEDICALLY INFORMED CONTRACEPTIVE CHOICES, WHICH HAVE BEEN BETTER FOR THE HEALTH OF THEM AND THEIR FAMILIES.

THE PENNSYLVANIA DEPARTMENT OF HEALTH AND HUMAN SERVICES HAS ENCOURAGED THE USE OF LARCS, LONG-ACTING CONTRACEPTION, AS POST PARTUM CONTRACEPTION TO REDUCE THE RATE OF UNINTENDED PREGNANCIES BY CHANGING ITS FEE FOR SERVICE PAYMENT POLICIES FOR HOSPITAL PROVIDERS, A POLICY OF THE COMMONWEALTH.

MORE THAN 2.5 MILLION WOMEN IN PENNSYLVANIA COULD BENEFIT FROM THE CONTRACEPTIVE CARE MANDATE AND OVER 700,000 PENNSYLVANIANS HAVE ENROLLED IN MEDICAID AS A RESULT OF THE EXPANSION UNDER THE CONTRACEPTIVE CARE MANDATE.

THE DEPARTMENT OF INSURANCE ESTIMATES THAT THE WOMEN IN PENNSYLVANIA WHO HAVE BENEFITED FROM

THE CONTRACEPTIVE CARE MANDATE HAVE SAVED OVER $250 MILLION ANNUALLY, AND THOSE ARE JUST THE DOLLARS. THAT IS NOT THE HEALTH BENEFITS.

HOWEVER, YOUR HONOR, PENNSYLVANIA HAS NO STATUTE OR REGULATION REQUIRING EMPLOYERS OFFERING PLANS REGULATED BY THE PENNSYLVANIA DEPARTMENT OF INSURANCE THAT OPT OUT OF THE CONTRACEPTIVE CARE MANDATE TO PROVIDE CONTRACEPTIVE COVERAGE TO ITS EMPLOYEES OR BENEFICIARIES. OTHER STATES MAY HAVE A LAW LIKE THAT. THIS ONE DOESN'T. AND SIMILARLY, PENNSYLVANIA HAS NO STATUTE OR REGULATION REQUIRING EMPLOYERS OFFERING PLANS REGULATED BY ERISA THAT OPT OUT TO PROVIDE CONTRACEPTIVE COVERAGE TO ITS EMPLOYEES OR BENEFICIARIES.

THEREFORE, DUE TO THE NEW RULES AND REGULATIONS, THESE EXEMPTIONS, WOMEN WILL LOSE CONTRACEPTIVE COVERAGE WHEN THEIR EMPLOYERS OPT OUT OF PROVIDING IT, OR IN SOME CASES THE EMPLOYERS OF THEIR SPOUSES THROUGH WHOM THEY HAVE COVERAGE. AS A RESULT SOME OF THESE WOMEN WILL FAIL TO USE CONTRACEPTIVES OR WILL USE LESS EFFECTIVE CONTRACEPTIVE METHODS DUE TO THE COST. WE HAVE SEEN THIS ALREADY.

MANY WOMEN WHOSE EMPLOYERS REFUSE TO PROVIDE COVERAGE FOR THEIR CONTRACEPTIVE COSTS WILL SEEK FINANCIAL ASSISTANCE THROUGH STATE GOVERNMENT PROGRAMS. THIS GETS TO THE ISSUE OF STATE HARM. THE AMOUNT OF

MONEY THE COMMONWEALTH SPENDS ON MEDICAID AND THE FAMILY PLANNING SERVICES PROGRAM IS CONTINGENT UPON ENROLLMENT SO THAT THE MORE PEOPLE HAVE TO HERE ENROLL IN THESE STATE PROGRAMS, THE MORE MONEY THE COMMONWEALTH MUST SPEND ON THEM. THE NEW RULES WILL IMPOSE ADDITIONAL ECONOMIC AND OTHER BURDENS ON FAMILY PLANNING CLINICS AROUND PENNSYLVANIA, AND THE COMMONWEALTH OF PENNSYLVANIA WILL BEAR MUCH OF THAT BURDEN. LOW INCOME WOMEN WHO ARE NOT ELIGIBLE FOR FUNDING THROUGH STATE GOVERNMENT PROGRAMS WILL BE FORCED TO CHOOSE BETWEEN PAYING OUT OF POCKET, IF THEY CAN, OR GOING WITHOUT CONTRACEPTION ALTOGETHER. WOMEN WHO STOP USING CONTRACEPTION ARE MORE LIKELY TO HAVE UNPLANNED PREGNANCIES AND TO REQUIRE ADDITIONAL MEDICAL ATTENTION. THESE THINGS ARE IN MANY WAYS TRUISMS.

BECAUSE PATIENTS WILL LOSE CONTRACEPTIVE COVERAGE UNDER THE NEW RULES, THEY WILL THEN MAKE LESS MEDICALLY SOUND CONTRACEPTIVE CHOICES AND THEREFORE THEY WILL BE HARMED.

MANY WOMEN WHO NO LONGER RECEIVE CONTRACEPTIVE COVERAGE WILL NOT ONLY FACE FINANCIAL HARM BUT WILL ALSO FACE MEDICAL HARM. AND AGAIN, SOME CASES YOU WILL HEAR AND IT'S ALREADY IN THE RECORD, THAT CAN BE CATASTROPHIC, EVEN FATAL HARM.

IN SUM, THE NEW RULES WILL HAVE A

NEGATIVE EFFECT ON THE HEALTH OF PENNSYLVANIA WOMEN. THAT IS IN ADDITION TO THE ECONOMIC HARM AND OTHER HARM TO THE COMMONWEALTH AS A WHOLE.

THE COURT: MR. GOLDMAN, I JUST NEED TO -- I NEED TO ROLL YOU BACK TO THE VERY BEGINNING, AND THAT ISSUE IS STANDING. I THINK SOME OF THE BRIEFING IS ABOUT STANDING. AND THE QUESTION IS, DOES THE COMMONWEALTH HAVE STANDING TO CHALLENGE AN AFFIRMATIVE ACTION OF AN AGENCY, AND IF SO, WHAT IS YOUR SUPPORT FOR THAT POSITION?

MR. GOLDMAN: THE COMMONWEALTH ABSOLUTELY DOES HAVE THAT STANDING. IT IS STANDING BOTH IN TERMS OF REAL ECONOMIC HARM. IT HAS SUFFERED HARM AND WILL SUFFER HARM. AND THEN ALSO UNDER THE PARENS PATRIAE DOCTRINE WHERE IT IS ABLE TO ASSERT STANDING ON BEHALF OF ITS CITIZENS IN A MORE GLOBAL SENSE.

THE COURT: WHICH CASE ARE YOU RELYING ON OR WHICH SET OF CASES?

MR. GOLDMAN: FORGIVE ME, JUDGE. THE CASES ARE IN OUR BRIEF.

THE COURT: WHO IS THE STANDING ATTORNEY WHO DID THE ANALYSIS FOR THAT? WHY DON'T YOU COME UP AND TELL ME ABOUT THAT.

MR. FISCHER: THANK YOU, YOUR HONOR.

MR. GOLDMAN: MAY I STAND HERE, YOUR

HONOR?

THE COURT: YOU MAY.

MR. FISCHER: GOOD MORNING, YOUR HONOR. MICHAEL FISCHER FOR THE COMMONWEALTH.

AS MR. GOLDMAN SAID, THE COMMONWEALTH DOES HAVE STANDING, BOTH DIRECT STANDING AS A RESULT OF THE FINANCIAL HARM, AS WELL AS PARENS PATRIAE STANDING TO ASSERT ITS INTEREST IN PROTECTING THE HEALTH AND WELFARE OF ITS RESIDENTS. AS WE DISCUSSED IN OUR BRIEF, WE THINK MASSACHUSETTS VERSUS EPA IS A TEXTBOOK EXAMPLE OF WHEN A STATE CAN ASSERT STANDING BASED BOTH ON A DIRECT INJURY AS WELL AS A PARENS PATRIAE THEORY.

THE COURT: WASN'T MASSACHUSETTS A CASE INVOLVING INACTION RATHER THAN AFFIRMATIVE ACTION?

MR. FISCHER: IT WAS AN INACTION CASE, YOU ARE RIGHT. TEXAS VERSUS UNITED STATES IS AN ACTION CASE. NOW AS THE COURT INDICATED IN THE DIRECTION WE WERE SENT, THAT CASE WAS AFFIRMED BY AN EVENLY DIVIDED SUPREME COURT. SO IT IS NOT -- THE COURT'S DECISION IS NOT BINDING ON YOUR HONOR.

HOWEVER, THE FIFTH CIRCUIT'S DECISION WE THINK IS INSTRUCTIVE. THE FIFTH CIRCUIT LOOKED AT THE GOVERNMENT'S POLICY, THE DAPA PROGRAM IN THAT CASE THAT HAD BEEN IMPLEMENTED, DECIDED IT WOULD CAUSE THE STATE OF TEXAS AND OTHER STATES DIRECT FINANCIAL HARM, FOUND

THAT THAT WAS SUFFICIENT TO ESTABLISH STATE STANDING. THAT DECISION AGAIN WAS AFFIRMED BY AN EVENLY DIVIDED COURT. SO AT LEAST FOUR JUSTICES OF THE COURT AT THE TIME WERE CONVINCED THAT THE STATE DID HAVE STANDING.

WE THINK THIS IS REALLY NO DIFFERENT FROM ANY OTHER STANDING ANALYSIS INVOLVING OTHER -- INVOLVING PRIVATE PLAINTIFFS, INVOLVING OTHER GOVERNMENT PLAINTIFFS. THE COMMONWEALTH HERE ALLEGES A DIRECT FINANCIAL HARM. THAT IS INJURY IN FACT. THAT IS TEXTBOOK INJURY IN FACT. IT IS CLEARLY TRACEABLE TO THE DEFENDANT'S ACTIONS. IT IS CLEARLY REDRESSABLE THROUGH RELIEF IN THIS COURT. SO WE BELIEVE IT'S FAIRLY CLEAR THAT WE SATISFY THE ELEMENTS OF STANDING UNDER A DIRECT THEORY.

AND IN ADDITION, UNDER PARENS PATRIAE THEORY, THERE IS SOME, I WILL ADMIT, SOMEWHAT CONFUSING CASE LAW ON PARENS PATRIAE THEORY. BUT ONE THEME THAT EMERGES, AND THIS IS ACTUALLY DISCUSSED AT LENGTH IN THE DISTRICT COURT DECISION IN TEXAS VERSUS UNITED STATES, IS THAT WHERE A STATE IS ASSERTING ITS QUASI SOVEREIGN INTEREST IN PROTECTING THE HEALTH AND WELFARE OF ITS CITIZENS, IT MAY DO SO IN CHALLENGING FEDERAL AGENCY ACTION THAT IT ALLEGES IS IN VIOLATION OF A FEDERAL STATUTE. THAT IS WHAT WE ARE ALLEGING HERE.

THERE ARE CASES GOING BACK TO I BELIEVE

MASSACHUSETTS VERSUS MELLON THAT SAY A STATE CANNOT ASSERT PARENS PATRIAE STANDING AGAINST THE FEDERAL GOVERNMENT IN CHALLENGING A FEDERAL STATUTE.

THE COURT: WELL, IS THIS -- THIS CONCEPT CALLED SPECIAL SOLICITUDE?

MR. FISCHER: YES.

THE COURT: AND I HAVE TO SAY THAT THE CONCEPT OF SPECIAL SOLICITUDE IS, SHALL WE SAY, NOT AS CRYSTAL CLEAR AS IT COULD BE IN THE JURISPRUDENCE.

MR. FISCHER: ABSOLUTELY.

THE COURT: TELL ME, HOW DOES IT APPLY, WHEN DOES IT APPLY, HOW DO I USE IT?

MR. FISCHER: IT APPLIES -- AND THE SPECIAL SOLICITUDE IS DISCUSSED IN MASSACHUSETTS VS. EPA, ALTHOUGH ACTUALLY, THE PHRASE APPEARS FIRST IN, I BELIEVE, THE D.C. CIRCUIT DECISION THAT WE CITED -- I APOLOGIZE, I FORGET THE NAME -- BUT AUTHORED BY THEN JUDGE SCALIA, WHERE HE TALKED AT LENGTH ABOUT PARENS PATRIAE STANDING AND QUASI-SOVEREIGN STANDING.

THE ESSENCE OF SPECIAL SOLICITUDE, WE BELIEVE, IS THAT A STATE HAS -- THAT THE COURT SHOULD GIVE ADDITIONAL DEFERENCE TO STATES IN ANALYZING THE EXTENT OF ANY INJURY THAT IS SUFFERED TO WHETHER OR NOT THAT INJURY CONFERS STANDING.

NOW, HERE -- FRANKLY, WE -- AS I SAID

EARLIER, I DON'T THINK IT'S NECESSARY TO EVEN RELY ON SPECIAL SOLICITUDE, BUT IN MASSACHUSETTS VERSUS EPA, THE COURT ESSENTIALLY SAID THE STATE OF MASSACHUSETTS, COMMONWEALTH OF MASSACHUSETTS, CAN ASSERT ITS INTEREST IN PROTECTING ITS CITIZENS FROM ENVIRONMENTAL HARM. THAT RESPONSIBILITY WAS ACTUALLY DELEGATED TO EPA.

EPA, UNDER THE SUPREMACY CLAUSE, COULD PROHIBIT MASSACHUSETTS FROM ACTING. SO SINCE EPA HAD THAT RESPONSIBILITY, MASSACHUSETTS, BECAUSE IT SIMILARLY HAD A DUTY TO PROTECT ITS CITIZENS, COULD CHALLENGE EPA'S INACTION IN THAT CASE UNDER THIS THEORY THAT AS A SOVEREIGN STATE, IT COULD INITIATE LITIGATION TO PROTECT THE -- IN THAT CASE, THE INTEREST OF ITS CITIZENS, A CLEAN ENVIRONMENT AND PROTECTION FROM THE HARMFUL EFFECTS OF CLIMATE CHANGE.

WE BELIEVE THAT DOES -- THAT EXPLAINS THE CONCEPT OF SPECIAL SOLICITUDE, THAT THERE IS ADDITIONAL DEFERENCE GIVEN TO A STATE WHEN IT'S ASSERTING AN INTEREST IN PROTECTING BOTH ITS OWN SOVEREIGN PREROGATIVES. THERE YOU HAD COASTLINE THAT MASSACHUSETTS ARGUED WAS BEING ERODED, AS WELL AS THE INTEREST OF ITS STATE -- INTEREST OF ITS RESIDENTS.

THE COURT: SO IS THE SPECIAL SOLICITUDE, IS IT, FOR WANT OF A BETTER TERM, A GLOSS OVER THE STANDING INQUIRY THAT I MUST UNDERTAKE OR DOES IT IMPACT

ON ANY OF THE PRONGS OF THE STANDING ANALYSIS IN PARTICULAR?

MR. FISCHER: YOUR HONOR, I BELIEVE -- I WOULD SAY THAT IT'S BOTH TO SOME EXTENT. IT IS A GLOSS, BUT I THINK IT IS PARTICULARLY DIRECTED TO THE INJURY PRONG. IT IS LESS RELEVANT TO I THINK THE CAUSATION AND REDRESSABILITY PRONGS, BUT IT DOES ALLOW THE COMMONWEALTH OR STATE TO ASSERT INJURIES THAT MAY BE IN SOME CASES, FOR A PRIVATE LITIGANT, WOULD NOT BE SUFFICIENT.

IT'S HARD TO THINK OF AN ANALOGOUS SITUATION INVOLVING A PRIVATE LITIGANT TO MASSACHUSETTS VERSUS EPA, BUT IT SEEMS LIKE THE COURT IS SAYING THAT TO THE EXTENT THERE IS ANY AMBIGUITY OR DOUBT HERE ABOUT WHETHER THIS IS A SUFFICIENT INJURY, WE ARE GOING TO RECOGNIZE THE STATE'S SOVEREIGN PREROGATIVE AND QUASI-SOVEREIGN INTEREST IN PROTECTING ITS CITIZENS AND FIND THAT THERE IS SUFFICIENT INTEREST HERE.

THE COURT: OKAY. THANK YOU, MR. FISCHER.

MR. FISCHER: THANK YOU, YOUR HONOR.

THE COURT: MR. GOLDMAN, YOU HAVE MORE TIME IF YOU WANT TO.

MR. GOLDMAN: IF I MAY ASK MR. FISCHER TO STAY HERE FOR ONE MOMENT, BECAUSE I WOULD LIKE TO TRY TO

MARRY UP A LITTLE BIT MASSACHUSETTS V EPA WITH THE CASE HERE.

THE COURT: OKAY.

MR. GOLDMAN: AND THAT IS MASSACHUSETTS VERSUS EPA, THERE WAS A LAW PROTECTING THE ENVIRONMENT WHICH ALSO PROTECTED THE CITIZENS OF MASSACHUSETTS. THE AGENCIES FAILED TO ENFORCE THAT LAW IN A WAY THAT HARMED MASSACHUSETTS. MASSACHUSETTS THEREFORE HAD STANDING.

SIMILARLY HERE, THERE IS A LAW THAT PROTECTS WOMEN AND PEOPLE AROUND THE COUNTRY; THAT'S THE AFFORDABLE CARE ACT AND THE CONTRACEPTIVE CARE MANDATE. THAT ALSO PROTECTS THE CITIZENS OF PENNSYLVANIA, MEN AND WOMEN, AND HERE, THE AGENCIES ARE NOT ENFORCING THE CONTRACEPTIVE CARE ACT. AND IN FACT, THE REGULATIONS AT ISSUE HERE HAVE UNDERMINED THE ACT, AND THAT IS -- IT'S VERY MUCH ON PAR AND IT REINFORCES THE STANDING THAT THE COMMONWEALTH HAS HERE.

THE COURT: OKAY, THANK YOU. PROCEED.

MR. GOLDMAN: SO ALL OF THAT IS ALREADY IN THE RECORD, YOUR HONOR. AND AGAIN, WE BELIEVE YOUR HONOR CAN SAFELY ISSUE AN INJUNCTION RIGHT NOW, AND IF YOU ARE INCLINED TO DO THAT, WE WOULD SIT DOWN, BUT I ASSUME WE WILL KEEP ARGUING OUR CASE.

ON TOP OF THAT, YOUR HONOR, WE ARE POISED TO BRING THREE WITNESSES TO THE COURT TODAY. THE FIRST

IS DR. CAROL WEISMAN. SHE WILL ADD -- THERE'S A DECLARATION IN THE RECORD, AS YOU WELL KNOW. SHE WILL ADD ADDITIONAL PERSPECTIVE TODAY AS ONE OF ONLY 16 MEMBERS OF THE INSTITUTE OF MEDICINES COMMITTEE ON PREVENTATIVE SERVICES FOR WOMEN THAT WAS CONVENED BY THE HEALTH RESOURCES SERVICES ADMINISTRATION, THE HRSA, IN CONNECTION WITH THE AFFORDABLE CARE ACT.

SHE WILL ALSO SPEAK ABOUT HER ROLE IN A STUDY PERFORMED SINCE THE ACA HAS GONE INTO EFFECT THAT DEMONSTRATES THAT THE CONTRACEPTIVE MANDATE HAS IN FACT RESULTED IN WOMEN MAKING BETTER, SAFER, MORE EFFECTIVE AND MORE COST-EFFECTIVE HEALTH CHOICES.

THE COURT: IN PENNSYLVANIA?

MR. GOLDMAN: YES, YOUR HONOR.

DR. SAMANTHA BUTTS WILL ALSO SPEAK TODAY, YOUR HONOR. SHE HAS, AS YOU KNOW, HAS A DECLARATION IN THIS CASE AS WELL. SHE IS GOING TO ADD ADDITIONAL PERSPECTIVE AS A MEDICAL DOCTOR, TEACHER AND RESEARCHER WHO USES A VARIETY OF CONTRACEPTIVES TO TREAT PATIENTS AS PART OF HER PRACTICE, WHICH INCLUDES INFERTILITY, HELPING WOMEN CONCEIVE.

AND YES, YOU WILL HEAR HOW SHE IS USING CONTRACEPTIVES AS PART OF HER PRACTICE AT THE UNIVERSITY OF PENNSYLVANIA SCHOOL OF MEDICINE IN WEST PHILADELPHIA. AND SHE WILL ALSO PROVIDE TESTIMONY ABOUT HOW

HER ABILITY TO PRESCRIBE THE BEST CONTRACEPTIVE PRESCRIPTIONS FOR PATIENTS CHANGED PRE AND POST CONTRACEPTIVE CARE MANDATE AND WHAT THAT WILL MEAN THEN FOR HOW WOMEN WILL BE HARMED UNDER THE NEW RULES AS THEIR EMPLOYERS OPT OUT OF PROVIDING COVERAGE.

AND LAST, DR. CYNTHIA CHUANG WILL ALSO TESTIFY TODAY.

THE COURT: CHUANG, T-U-O-N-G?

MR. GOLDMAN: I'M SORRY, IT'S C-H-U-A-N-G.

THE COURT: OKAY.

MR. GOLDMAN: AND IT'S PRONOUNCED CHUANG. SHE WILL ADD ADDITIONAL PERSPECTIVE AS A MEDICAL DOCTOR, TEACHER AND RESEARCHER WHO TREATS PATIENTS AT THE HERSHEY MEDICAL CENTER IN HERSHEY, PENNSYLVANIA.

SHE WILL ALSO PROVIDE SOME TESTIMONY ABOUT SOME OF HER OWN RESEARCH THAT HAS DEMONSTRATED THAT SINCE THE ACA'S CONTRACEPTIVE MANDATE HAS GONE INTO EFFECT IT ALSO HAS IN FACT RESULTED IN WOMEN MAKING BETTER, SAFER, MORE EFFECTIVE AND MORE COST-EFFECTIVE HEALTH CHOICES.

WE WILL DO OUR BEST AS WE RAISE THEM TO NOT BE DUPLICATIVE OF WHAT IS IN THE RECORD, AND YOU HAVE MADE VERY CLEAR, YOUR HONOR, YOUR COUNSEL TO DO THAT. WE HAVE RESTRUCTURED OUR WITNESS OUTLINES. WE DO

HAVE SOME LAYING OF FOUNDATION. IF AT ANY POINT YOU FEEL LIKE YOU HAVE ALREADY HEARD THAT, BY ALL MEANS, SHEPHERD US ALONG, AND WE WILL DO OUR BEST TO DO THAT TO OURSELVES SO YOU DON'T HAVE TO.

THE COURT: I'M ASSUMING THAT THE DEFENDANTS WILL NOT PUT YOU THROUGH THE PROCESS OF SETTING FORTH A DEEP FOUNDATION FOR EVERYTHING THAT IS TO BE ELICITED.

MS. KADE: YOUR HONOR, WE HAVE STIPULATED TO THE ADMISSIBILITY OF EVERYTHING EXCEPT FOR THE DEMONSTRATIVE EXHIBITS.

THE COURT: THANK YOU. OKAY.

MR. GOLDMAN: IN CONCLUSION, YOUR HONOR, WE BELIEVE THAT YOU CAN ISSUE THIS INJUNCTION NOW. WE HOPE THAT YOU WILL DO SO AS SOON AS YOUR HONOR IS READY, AND WILL DO SO CONSIDERING ALL OF THE DIFFERENT CLAIMS TO KEEP THE STATUS QUO IN PLACE AND PROTECT THE CITIZENS OF THE COMMONWEALTH.

THE COURT: SO I UNDERSTAND THERE IS A DATE BY WHICH PENNSYLVANIA THINKS IT WOULD BE USEFUL FOR ME TO HAVE DECIDED THIS MATTER.

MR. GOLDMAN: THERE IS, YOUR HONOR. I WOULD SAY BEYOND USEFUL, I WOULD SAY EVEN NECESSARY. THAT DATE IS JANUARY 1ST, 2018. THE REASON WHY THAT DATE IS IMPORTANT IS BECAUSE MANY ERISA HEALTHCARE PLANS

HAVE AN OPEN ENROLLMENT WHERE THE NEW PLANS START ON THE FIRST OF THE YEAR. NOT ALL OF THEM, BUT MANY. SO THAT WILL BE A -- WE BELIEVE A LARGE WINDOW WHERE POLICIES WILL CHANGE, EMPLOYERS WILL START TAKING ADVANTAGE OF THESE NEW RULES.

THE COURT: OKAY. SO YOU ARE SAYING THAT BECAUSE THE EXEMPTIONS WERE PUT IN PLACE EFFECTIVE IMMEDIATELY THAT WHILE THERE MAY BE NO CHANGE IN PLANS RIGHT NOW, AS OF JANUARY THE 1ST, BECAUSE THERE IS THIS OPEN ENROLLMENT PERIOD, IT IS LIKELY THAT THE PLANS WILL CHANGE AT THAT POINT?

MR. GOLDMAN: CORRECT, YOUR HONOR. AND BY THE WAY, IT IS CERTAINLY POSSIBLE THAT PLANS HAVE ALREADY CHANGED IF APPROPRIATE NOTICE HAS BEEN GIVEN. WE JUST DON'T KNOW THAT YET. WE HAVE NOT SEEN THAT YET.

THE COURT: OKAY. THANK YOU VERY MUCH.

MR. GOLDMAN: THANK YOU, YOUR HONOR.

THE COURT: DEFENSE.

MR. DAVIS: MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. DAVIS: GOOD MORNING, YOUR HONOR. ETHAN DAVIS FOR THE UNITED STATES.

IF THERE IS ONE THEME WE WOULD ASK YOUR HONOR TO KEEP IN MIND TODAY AS WE HEAR FROM THE WITNESSES, IT IS THAT THIS COURT IS NOT WRITING ON A

BLANK SLATE. OVER THE PAST SIX YEARS, DOZENS OF ENTITIES WITH RELIGIOUS AND MORAL OBJECTIONS HAVE SUED OVER THE CONTRACEPTIVE COVERAGE REQUIREMENT.

THOSE LAWSUITS PRODUCED A PATCHWORK OF PRELIMINARY AND PERMANENT INJUNCTIONS THROUGHOUT THE UNITED STATES, MANY OF WHICH ARE STILL IN EFFECT TODAY. THE SUPREME COURT ALSO WEIGHED IN ON THESE ISSUES FOUR TIMES, FIRST IN HOBBY LOBBY, THEN IN LITTLE SISTERS, THEN IN WHEATON COLLEGE, AND FINALLY IN ZUBIK.

AND THE FEDERAL GOVERNMENT HAS CHANGED THE RULES GOVERNING CONTRACEPTIVE COVERAGE MULTIPLE TIMES SINCE 2011. THERE IS A LOT OF WATER UNDER THE BRIDGE AND THIS POINT MATTERS TO VIRTUALLY ALL OF THE ISSUES IN THIS CASE.

FIRST ON STANDING. THE COMMONWEALTH'S PAPERS GIVE THE IMPRESSION THAT THE NEW RULES ARE GOING TO WITHDRAW CONTRACEPTIVE COVERAGE FROM MILLIONS OF WOMEN WHO ARE CURRENTLY RECEIVING COVERAGE AND THAT THEY ARE THE EXCEPTION THAT WILL SWALLOW THE RULE, BUT IT SHOULD NOT ESCAPE YOUR NOTICE, YOUR HONOR, THAT NONE OF THOSE MILLIONS OF WOMEN WHO WILL SUPPOSEDLY BE AFFECTED BY THESE RULES IS A PLAINTIFF IN THIS CASE, NOR DID ANY OF THEM SUBMIT A DECLARATION EXPLAINING THAT AN EMPLOYER IS ABOUT TO DROP CONTRACEPTIVE COVERAGE.

AND WHY DON'T WE SEE ANY INDIVIDUALS IN

THIS CASE, YOUR HONOR? IT'S BECAUSE YOUR HONOR IS NOT WRITING ON A BLANK SLATE. MANY AND MAYBE ALL OF THE RELIGIOUS EMPLOYERS WHO OBJECT TO PROVIDING CONTRACEPTIVE COVERAGE HAVE ALREADY SUED. MANY ARE ALREADY PROTECTED BY INJUNCTIONS. SO EMPLOYEES WHO WORK FOR THOSE RELIGIOUS ORGANIZATIONS HAVE NOT BEEN RECEIVING CONTRACEPTIVE COVERAGE FOR YEARS.

TAKE THE LITTLE SISTERS AS AN EXAMPLE. AS YOUR HONOR RECOGNIZED IN DENYING THE LITTLE SISTERS MOTION TO INTERVENE, GRANTING AN INJUNCTION IN THIS CASE WOULD NOT CHANGE THE FACT THAT THE LITTLE SISTERS ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE TO THEIR EMPLOYEES.

THE COURT: WELL, I AGREE WITH YOU WITH RESPECT TO THE RELIGIOUS EXEMPTION. QUITE CLEARLY THERE HAS BEEN A LOT OF LITIGATION ABOUT THIS, BUT THE MORAL EXEMPTION IS SOMETHING NEW, ISN'T IT?

MR. DAVIS: THE MORAL EXEMPTION IS NEW, YOUR HONOR, BUT THERE'S ALSO BEEN LITIGATION OVER THAT. THERE WAS A CASE HERE IN PENNSYLVANIA, THE REAL ALTERNATIVES CASE, AND THERE WAS ALSO A CASE IN D.C. CALLED MARCH FOR LIFE. SO I DON'T THINK THE LITIGATION OVER THAT IS NEW.

THE COURT: WELL, BUT IN THE CONTEXT OF THE AFFORDABLE CARE ACT, IT IS NEW, BECAUSE THE MORAL

EXEMPTION WAS ONLY ISSUED A FEW WEEKS AGO. SO THERE HAS BEEN NO LITIGATION IN THE CONTEXT OF THE MORAL EXEMPTION OR A MORAL EXEMPTION AS IT APPLIES TO THE ACA, CORRECT?

MR. DAVIS: I AGREE WITH THAT, YOUR HONOR. THERE HAS BEEN DISCUSSIONS OF CONSCIENCE ISSUES DURING THE RULEMAKINGS, BUT THERE HAS NOT BEEN LITIGATION OVER THIS MORAL EXEMPTION RULE, THIS ONE THAT WAS JUST PASSED IN 2017, UNTIL NOW.

THE COURT: SO I'M A LITTLE PUZZLED BY WHAT THE MORAL EXEMPTION MEANS. HOW DOES ONE DETERMINE -- WELL, A COUPLE OF QUESTIONS. HOW DOES AN ENTITY DETERMINE THAT IT HAS A MORAL CONVICTION? HOW IS THAT CONVICTION INSTANTIATED THROUGHOUT THE ENTIRE ORGANIZATION? WHO MAKES -- IN OTHER WORDS, WHO MAKES THE DETERMINATION? AND HOW DOES ONE DECIDE WHAT IS MORAL AND WHAT IS NOT MORAL?

I UNDERSTAND IN THE CONTEXT OF RELIGION THAT THERE ARE QUITE CLEAR MORAL PRECEPTS, BUT WE ARE A COUNTRY WHERE, RIGHTLY OR WRONGLY, WHETHER YOU AGREE WITH IT OR NOT, PEOPLE HAVE VERY DIFFERENT VIEWS ABOUT WHAT MORALITY IS. SO HELP ME UNDERSTAND THE MORALITY EXEMPTION IN THE CONTEXT OF THOSE QUESTIONS.

MR. DAVIS: SURE. YOUR HONOR, THE FIRST THING I SAY ABOUT THAT IS THAT THE MORAL EXEMPTION RULE DOES NOT APPLY TO PUBLICLY TRADED COMPANIES, UNLIKE THE

RELIGIOUS EXEMPTION RULE, SO WE ARE TALKING ONLY ABOUT CLOSELY-HELD ENTITIES. SO IN TERMS OF DECIDING WHO CAN ASSERT THE MORAL CLAIM, I THINK IT WOULD JUST BE THE OWNERS OF A CLOSELY-HELD ORGANIZATION OR A NONPROFIT.

THE COURT: ARE YOU POSITIVE OF THAT?

MR. DAVIS: YES, YOUR HONOR.

THE COURT: OKAY.

MR. DAVIS: THAT'S NOT TRUE FOR RELIGIOUS.

THE COURT: I'LL HAVE TO REREAD THE MORAL EXEMPTION, BECAUSE I THOUGHT IT SAID SOMETHING CONTRARY TO THAT.

MR. DAVIS: IT DOES NOT, YOUR HONOR.

THE COURT: I WILL TAKE A LOOK AT IT.

MR. DAVIS: SO THE ONLY QUESTION IS WHO CAN ASSERT IT. I THINK THAT WOULD BE JUST THE SAME PEOPLE WHO CAN ASSERT THE CLAIM IN A CONTEXT OF THE RELIGIOUS EXEMPTION, WHICH WOULD BE THE OWNERS OF THE CLOSELY HELD COMPANY OF WHOEVER RUNS A NONPROFIT. SO THAT'S THAT QUESTION.

AS TO YOUR OTHER QUESTION ABOUT WHAT DOES IT LOOK LIKE TO ASSERT THIS KIND OF CLAIM, I THINK IT LOOKS VERY SIMILAR TO WHAT HAPPENS WITH A RELIGIOUS EXEMPTION. I MEAN, THE EMPLOYER WILL JUST ASSERT A SINCERELY-HELD MORAL CONVICTION, AND THEN THAT EMPLOYER

IS EXEMPT.

I WILL SAY I DOUBT THAT THIS WILL BE WIDELY USED, BECAUSE AS THE RULES POINT OUT, PROVIDING CONTRACEPTIVE COVERAGE IS COST NEUTRAL. SO THERE REALLY WOULDN'T BE A REASON TO ASSERT THIS UNLESS AN EMPLOYER ACTUALLY DID HAVE A SINCERE --

THE COURT: WELL, WHAT IF A -- WHAT IF THE CEO OF THE COMPANY HAD A SINCERELY-HELD MORAL CONVICTION THAT WOMEN SHOULD REMAIN AT HOME AND THAT -- AND MADE A DETERMINATION, THEREFORE, NOT TO PROVIDE CONTRACEPTIVE SERVICES IN THE INSURANCE PLAN OF THE COMPANY IN ORDER TO IMPOSE HIS NORMATIVE CONSTRUCT ON HIS WORKFORCE, BUT THE BOARD OF DIRECTORS DOES NOT AGREE WITH THAT. IN FACT, THEY BELIEVE THAT THERE IS A MORAL IMPERATIVE THAT WOMEN BE ALLOWED TO MAKE THEIR OWN CHOICES. HOW DO YOU DETERMINE, ONE, WHAT IS AN APPROPRIATE MORAL CONVICTION, AND TWO, WHO PREVAILS IN THAT CONTEXT?

MR. DAVIS: WELL, A COUPLE OF ANSWERS TO THAT, YOUR HONOR. THE FIRST IS THAT I THINK GENERAL PRINCIPLES OF CORPORATE LAW WOULD ANSWER THE QUESTION ABOUT WHO IS ENTITLED TO ADVANCE THAT KIND OF OBJECTION ON BEHALF OF THE COMPANY. BUT IF YOUR HONOR'S HYPOTHETICAL POSES A SITUATION WHERE THE EMPLOYER ACTUALLY DOES NOT HAVE A SINCERE OBJECTION, IT'S REALLY

A PRETEXT FOR COVERING --

THE COURT: NO, I'M NOT SUGGESTING IT'S A PRETEXT. THE CEO REALLY DOES BELIEVE, AS A MORAL MATTER, THAT WOMEN SHOULD STAY AT HOME.

MR. DAVIS: BUT THE CEO DOES NOT HAVE A MORAL OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE. THE REAL OBJECTION IS TO -- THE REAL --

THE COURT: HE HAS A MORAL OBJECTION TO PROVIDING COVERAGE BECAUSE HE THINKS THAT WOMEN SHOULD STAY AT HOME AND HE BELIEVES THAT WOMEN SHOULD STAY AT HOME -- IF THEY ARE PREGNANT ALL THE TIME, THEY ARE GOING TO STAY AT HOME.

MR. DAVIS: YOUR HONOR, AGAIN, I THINK --

THE COURT: DON'T BUCK THE HYPOTHETICAL. JUST ANSWER THE QUESTION.

MR. DAVIS: UNDER THAT HYPOTHETICAL, YOUR HONOR, I ASSUME THAT EMPLOYEES WOULD COMPLAIN ABOUT IT TO IRS OR TREASURY OR LABOR, AND THE LABOR DEPARTMENT DOES HAVE A ROLE IN POLICING THE SINCERITY OF RELIGIOUS -- OR NOT -- NOT THE SINCERITY.

THE COURT: SO THE DEPARTMENT OF LABOR WOULD BE POLICING THE MORAL CONVICTIONS OF AN ENTITY?

MR. DAVIS: NO. THE DEPARTMENT OF LABOR COULD CONCEIVABLY, IN THAT CIRCUMSTANCE, ASK WHETHER A PARTICULAR -- POLICE THAT KIND OF SITUATION TO A DEGREE.

IT PROBABLY WOULDN'T --

THE COURT: SO WHO WOULD BE POLICING WHETHER A MORAL CONVICTION IS APPROPRIATELY HELD?

MR. DAVIS: I THINK, AGAIN, IT WOULD DEPEND ON THE CIRCUMSTANCES. IF AN EMPLOYEE WERE TO SAY TO THE GOVERNMENT THAT THERE IS NOT IN FACT A SINCERE MORAL OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE, THAT IN FACT, WHAT IS GOING ON HERE IS IT'S DISCRIMINATION AGAINST WOMEN, AND THAT IS -- THEN I THINK THAT THE LABOR DEPARTMENT COULD INVESTIGATE THAT.

THE COURT: SO THE LABOR DEPARTMENT WOULD HAVE TO BE DETERMINING WHAT A MORAL CONVICTION -- WHETHER A MORAL CONVICTION IS APPROPRIATE OR NOT?

MR. DAVIS: I WOULD NOT PUT IT THAT BROADLY, YOUR HONOR. I WOULD SAY IF THERE IS A -- AS LONG AS THERE IS A SINCERE MORAL OBJECTION TO PROVIDE CONTRACEPTIVE COVERAGE, THEN THAT EMPLOYER IS EXEMPT, PERIOD. AND ONLY IF THAT --

THE COURT: WELL, YOU ARE STILL BUCKING THE HYPOTHETICAL. IF THERE IS A MORAL CONVICTION RULE OUT THERE, SOMEONE IS GOING TO HAVE TO DETERMINE WHETHER IT IS AN APPROPRIATE MORAL CONVICTION OR NOT, CORRECT?

MR. DAVIS: NO, I DON'T AGREE WITH THAT, YOUR HONOR.

THE COURT: SO IS IT JUST SORT OF A

FREE-FLOATING CONCEPT THAT EVERYBODY DECIDES THEMSELVES AND NOBODY POLICES IT?

MR. DAVIS: YOUR HONOR, I WOULDN'T CALL IT A FREE-FLOATING CONCEPT THAT IS TOTALLY UNPOLICED. I WOULD SAY THAT, LIKE THE RELIGIOUS EXEMPTION, THE ONLY QUESTION THAT IS ASKED IS WHETHER AN EMPLOYER HAS A SINCERE RELIGIOUS OR MORAL OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE, AND IF THAT IS TRUE, THEN THAT EMPLOYER IS EXEMPT.

THE COURT: OKAY. SO WHAT YOU'RE TELLING ME IS IF THE CEO SAYS I HAVE A SINCERE MORAL CONVICTION TO NOT PROVIDE CONTRACEPTIVES TO WOMEN BECAUSE I WANT THEM TO STAY AT HOME, THAT IS FINE?

MR. DAVIS: I WOULD NOT SAY THAT IS FINE, YOUR HONOR. I WOULD SAY THAT IN THAT CIRCUMSTANCE, AGAIN, AN EMPLOYEE MIGHT COMPLAIN TO THE LABOR DEPARTMENT AND THERE IS SOME ROLE FOR THE LABOR DEPARTMENT --

THE COURT: THE LABOR DEPARTMENT, OKAY.

MR. DAVIS: WE CAN FOLLOW UP ON THAT.

THE COURT: MOVE ON.

MR. DAVIS: I WOULD SAY, RETURNING TO STANDING, YOUR HONOR, BECAUSE THE LITTLE SISTERS ARE PROTECTED BY THE ZUBIK INJUNCTION WHICH PROHIBITS THE FEDERAL GOVERNMENT FROM ENFORCING THE MANDATE AGAINST

THEM. THE SAME IS TRUE OF MANY OTHER RELIGIOUS ORGANIZATIONS. AND THAT IS WHY THE ONLY SPECIFIC EXAMPLE OF AN EMPLOYER WHO'S GOING TO DROP COVERAGE THAT PENNSYLVANIA WAS ABLE TO GIVE WAS THE UNIVERSITY OF NOTRE DAME, BUT AS THE COURT KNOWS, NOTRE DAME LATER ANNOUNCED THAT ITS THIRD-PARTY ADMINISTRATOR WOULD CONTINUE TO OFFER NO COST CONTRACEPTIVE COVERAGE.

I'M NOT SAYING THAT IT'S IMPOSSIBLE THAT ANYONE WOULD EVER HAVE STANDING TO CHALLENGE THESE RULES, YOUR HONOR. WHAT I'M SAYING IS THAT IT'S PENNSYLVANIA'S BURDEN TO SHOW YOUR HONOR SOMEONE WHO IS GOING TO LOSE COVERAGE, AND THEY HAVEN'T BEEN ABLE TO DO THAT, EVEN AFTER CLAIMING THAT MILLIONS OF WOMEN COULD BE AFFECTED BY THIS.

I SUSPECT YOU WILL HEAR TODAY FROM THE COMMONWEALTH'S WITNESS ABOUT THEIR CONCERNS ABOUT THE IMPACT THAT THE NEW RULES WILL HAVE ON WOMEN'S ACCESS TO CONTRACEPTION. WE HAVE NOT DEPOSED THESE WITNESSES. WE DON'T KNOW WHAT THEY ARE GOING TO SAY, BUT I URGE YOUR HONOR TO LISTEN TO WHETHER ANY OF THEM CAN POINT TO A SINGLE PENNSYLVANIA EMPLOYER OR ANY EMPLOYER OR A SINGLE EMPLOYEE WHO IS GOING TO LOSE COVERAGE AS OF JANUARY 1ST.

I WOULD ALSO LIKE TO TALK A LITTLE ABOUT THE PARENS PATRIAE THEORY THAT CAME UP EARLIER. YOUR

HONOR, IT HAS BEEN WELL SETTLED SINCE MASSACHUSETTS VERSUS MELLON, 1923, THAT A STATE CANNOT REPRESENT ITS CITIZENS PARENS PATRIAE AGAINST THE FEDERAL GOVERNMENT. AS MELLON EXPLAINED IT, IT HAS NO POWER -- IT IS NO PART OF ITS DUTY OR POWER TO ENFORCE THEIR RIGHTS IN RESPECT OF THEIR RELATIONS WITH THE FEDERAL GOVERNMENT. AND THAT FIELD IS THE UNITED STATES AND NOT THE STATE WHICH REPRESENTS THEM AS PARENS PATRIAE. THERE IS NO EXCEPTION TO THAT RULE IN MELLON FOR CASES WHERE THE STATE IS CHALLENGING A FEDERAL AGENCY ACTION INSTEAD OF A STATUTE.

AND MASSACHUSETTS VERSUS EPA, YOUR HONOR, THE SPECIAL SOLICITUDE DISCUSSION THAT WE HAD EARLIER, I THINK THE BEST WAY TO UNDERSTAND THE SPECIAL SOLICITUDE POINT IS THAT IT APPLIES WHEN THE STATE IS ABLE TO SHOW AN INJURY TO ITS CONCRETE SOVEREIGN INTEREST. AND IN MASSACHUSETTS VERSUS EPA, THAT WAS AN INJURY TO THE TERRITORY OF THE STATE ITSELF. AND THAT IS WHAT THIS CASE SAYS. I HAVE IT HERE. IT SAYS: GIVEN MASSACHUSETTS STATE IN PROTECTING ITS QUASI SOVEREIGN INTEREST, THE COMMONWEALTH IS ENTITLED TO SPECIAL SOLICITUDE IN ITS STANDING ANALYSIS. I DON'T THINK WE HAVE ANYTHING LIKE THAT HERE. WE DON'T HAVE ANY DAMAGE TO THE STATE'S TERRITORY. ALL WE HAVE IS SPECULATION THAT SOME EMPLOYERS WILL ULTIMATELY SHIFT FROM CURRENTLY

PROVIDING COVERAGE TO NOT PROVIDING COVERAGE.

THE COURT: LET ME TALK TO YOU ABOUT THE TEXAS VERSUS UNITED STATES CASE IN THE CONTEXT OF STANDING. SO IN THAT CASE THE SUPREME COURT CERTIFIED A NUMBER OF ISSUES, INCLUDING WHETHER OR NOT TEXAS HAD STANDING. AND THEN IT AFFIRMED BY AN EQUALLY DIVIDED COURT WITHOUT OPINION.

NOW ONE OF THE QUESTIONS THAT I ASKED YOU TO LOOK AT IS, GIVEN SILLIMAN VERSUS HUDSON RIVER BRIDGE COMPANY, WHICH I KNOW IS AN OLD CASE, 1861. DON'T TELL ME IT'S OLD SO THEREFORE IT DOES NOT APPLY. WHAT IS THE IMPACT IN YOUR VIEW OF SILLIMAN ON TEXAS VERSUS THE UNITED STATES, PARTICULARLY THE STANDING ANALYSIS THAT THE COURT IN TEXAS VERSUS UNITED STATES IN THE 5TH CIRCUIT DID.

MR. DAVIS: YOUR HONOR, I THINK THAT SINCE HUDSON BRIDGE, THE COURT HAS SAID REPEATEDLY THAT AN AFFIRMANCE BY AN EQUALLY DIVIDED COURT IS NOT ENTITLED TO PRECEDENTIAL WEIGHT.

THE COURT: WELL, EXCEPT SILLIMAN TALKED ABOUT THE JURISDICTIONAL CONTEXT, WHICH IS WHY IT IS DIFFERENT.

MR. DAVIS: I DON'T SEE ANY CASE SINCE SILLIMAN THAT SAYS THAT THE JURISDICTIONAL CONTEXT WOULD BE DIFFERENT, THAT SOMEHOW BECAUSE IT'S A JURISDICTIONAL

DECISION THAT THE COURT'S AFFIRMANCE WOULD BE ENTITLED TO --

THE COURT: NO. I THINK THE POINT IS THAT SILLIMAN WAS A JURISDICTIONAL DECISION. AND AS FAR AS WE CAN FIND, THE ONLY ISSUE WHEN THERE WAS AN EQUALLY DIVIDED COURT THAT CONCERNED A JURISDICTIONAL ANALYSIS. SO EVEN THOUGH SUBSEQUENT CASES HAVE SAID GENERALLY EQUALLY DIVIDED COURTS ARE NOT BINDING PRECEDENT, SILLIMAN SUGGESTS THAT THERE IS THIS CARVEOUT IN THE CONTEXT OF STANDING.

AND SO MY QUESTION TO YOU IS, DO I JUST IGNORE SILLIMAN OR DO I SAY THAT IT IS TOO OLD OR DO I SAY THAT SOMEHOW IT HAS BEEN MOOTED AT THIS POINT?

MR. DAVIS: YOUR HONOR, I WOULD SAY YOU SHOULD READ SILLIMAN IN LIGHT OF THE CASES THAT CAME LATER. AND THE CASES THAT CAME LATER SAID FLATLY, WITHOUT CARVING OUT JURISDICTION OR ANYTHING ELSE, THOSE CASES SAID AN AFFIRMANCE BY AN EQUALLY DIVIDED COURT IS NOT ENTITLED TO PRECEDENTIAL EFFECT. I'M NOT AWARE -- I HAVE NOT EXHAUSTIVELY LOOKED AT EVERY CASE SINCE 1861, BUT I'M NOT AWARE OF ANY CASE SINCE THEN THAT HAS HELD THAT A JURISDICTIONAL DECISION -- THAT AFFIRMANCE BY AN EQUALLY DIVIDED COURT OF A JURISDICTIONAL DECISION IS ENTITLED TO PRECEDENTIAL FORCE, OF THE SUPREME COURT.

THE CASES I WOULD CITE TO YOUR HONOR,

NEIL VERSUS BIGGERS, THAT'S N-E-I-L VERSUS B-I-G-G-E-R-S, 409 U.S. 188 AT 192. THAT IS A 1972 SUPREME COURT DECISION.

AND ARKANSAS WRITERS' PROJECT VERSUS RAGLAND, 481 U.S. 221. THAT'S A 1987 SUPREME COURT DECISION THAT HELD: OF COURSE, AN AFFIRMANCE BY AN EQUALLY DIVIDED COURT IS NOT ENTITLED TO ANY PRECEDENTIAL WEIGHT.

THE COURT: I WILL TAKE A LOOK AT THOSE CASES.

MOVE ON.

MR. DAVIS: I WOULD LIKE TO TALK A LITTLE ABOUT THE PROCEDURAL APA ISSUE, YOUR HONOR.

HERE AGAIN, YOUR HONOR IS NOT WRITING ON A BLANK SLATE. LIKE THE LAST ADMINISTRATION DID THREE TIMES IN 2010, 2011 AND 2014, THE AGENCIES ISSUED THE NEW RULES AS INTERIM FINAL RULES. LIKE THOSE PRIOR IFRS, THREE SEPARATE LAWS PROVIDE STATUTORY AUTHORITY: 26 U.S.C. 9833; 29 U.S.C. --

THE COURT: ARE YOU TALKING ABOUT -- YOU'RE CONNECTING WITH THE ORIGINAL RELIGIOUS EXEMPTION, THE SECOND RELIGIOUS EXEMPTION? IS THAT WHAT WE ARE TALKING ABOUT HERE?

MR. DAVIS: NO, YOUR HONOR. WE ARE TALKING ABOUT JUST THE BASIS OF STATUTORY AUTHORITY TO

DO THIS AS AN IFR INSTEAD OF THROUGH NOTICE AND COMMENT. I THINK EVEN APART FROM THE APA, THERE ARE THREE SEPARATE STATUTES THAT GIVE THE AGENCIES INDEPENDENT AUTHORITY TO DO THIS.

THE COURT: OKAY.

MR. DAVIS: AND THOSE STATUTES SAY THAT THE SECRETARY MAY PROMULGATE ANY INTERIM FINAL RULES AS THE SECRETARY DETERMINES ARE APPROPRIATE. THAT IS THE SAME AUTHORITY THAT THE PRIOR ADMINISTRATION RELIED ON TO DO THESE AS INTERIM FINAL RULES, AND WE ARE RELYING ON IT AS WELL.

IF YOUR HONOR DID NOT THINK THAT WAS SUFFICIENT, THERE WAS ALSO GOOD CAUSE DIRECTLY UNDER THE APA, AND THE D.C. CIRCUIT EXPRESSLY UPHELD ONE OF THE LAST ADMINISTRATION'S CONTRACEPTIVE COVERAGE IFRS IN THE PRIESTS FOR LIFE DECISION. AND THERE, LIKE HERE, THE AGENCY MADE A GOOD CAUSE FINDING IN THE RULE THAT IT ISSUED. THERE, LIKE HERE, THE IFR WAS MODIFYING REGULATIONS THAT HAD RECENTLY BEEN ENACTED UNDER NOTICE AND COMMENT RULE MAKING. THERE, LIKE HERE, THE ISSUES THE IFR HAD ADDRESSED HAD ALREADY BEEN SUBJECTED TO THOUSANDS AND THOUSANDS OF COMMENTS. THERE, LIKE HERE, HHS EXPOSED ITS INTERIM FINAL RULE TO COMMENTS BEFORE PERMANENT IMPLEMENTATION. AND THERE, LIKE HERE, THE GOVERNMENT WAS -- THERE THE GOVERNMENT WAS RESPONDING TO

THE SUPREME COURT'S DECISION IN WHEATON COLLEGE. HERE THE GOVERNMENT WAS RESPONDING TO THE SUPREME COURT'S DECISION IN ZUBIK. THERE DELAY AND IMPLEMENTATION OF THE RULE WOULD DELAY THE IMPLEMENTATION OF THE ALTERNATIVE OPT-OUT FOR RELIGIOUS OBJECTORS. AND HERE DELAY WOULD INTERFERE WITH THE IMPLEMENTATION OF THE RELIGIOUS AND MORAL EXEMPTIONS. SO I THINK IF THERE WAS GOOD CAUSE IN PRIESTS FOR LIFE, I THINK THERE IS GOOD CAUSE HERE.

THE COURT: WELL, IN PRIESTS FOR LIFE, THE NEW IFRS WERE PRETTY MUCH IDENTICAL TO PRIOR REGULATIONS, WEREN'T THEY?

MR. DAVIS: I DON'T THINK THEY WERE VIRTUALLY IDENTICAL, YOUR HONOR. THE IFR EXPANDED THE WAY THE ACCOMMODATION COULD BE INVOKED.

THE COURT: WELL, BUT THEY DIDN'T MAKE SIGNIFICANT CHANGES IN THE LAW, DID THEY?

MR. DAVIS: WELL, I DON'T KNOW IF I WOULD EVEN DESCRIBE THIS AS A MORE SIGNIFICANT CHANGE THAN THE ONE AT ISSUE, PRIESTS FOR LIFE, YOUR HONOR.

THE COURT: SO YOU WOULD SAY THAT THE RELIGIOUS EXEMPTION AND THE MORAL EXEMPTIONS ARE NOT SIGNIFICANT CHANGES.

MR. DAVIS: I WOULD NOT SAY IT THAT WAY, YOUR HONOR. I WOULD SAY THEY ARE ARGUABLY NOT MORE

SIGNIFICANT THAN THE CHANGE AT ISSUE IN THE IFR THAT WAS RESPONDING TO WHEATON COLLEGE. THAT IS BECAUSE, LIKE I HAVE DISCUSSED, THERE IS NO INDICATION HERE THAT ANYONE IS GOING TO LOSE CONTRACEPTIVE COVERAGE AS A RESULT OF THESE NEW RULES. BACK THEN IT WAS A -- THERE WAS A RELATIVELY SIGNIFICANT CHANGE TO THE RULES TO EXPAND THE WAY THAT THE ENTITIES COULD INVOKE THE ACCOMMODATION.

BUT I WOULD SAY EVEN IF YOUR HONOR DOES NOT SEE IT THAT WAY AND THINKS THAT THIS CHANGE IS MORE SIGNIFICANT THAN THE ONE BACK IN 2014, THAT IS ONLY ONE OF THE FACTORS IN THE PRIESTS FOR LIFE DECISION.

THE COURT: WELL, THE OTHER ONE WAS GOOD CAUSE. BUT IN PRIESTS FOR LIFE I THINK THE COURT MADE A DETERMINATION THAT THERE WAS GOOD CAUSE AND THUS SAID -- PUTTING ASIDE WHETHER THERE WAS -- THEY WERE IDENTICAL OR WHETHER THERE WAS A SIGNIFICANT CHANGE, THEN SAID IT WAS APPROPRIATE. BUT IN THIS CASE I HAVE TO -- ARE YOU -- DO YOU AGREE THAT I HAVE TO MAKE A THRESHOLD DETERMINATION OF GOOD CAUSE BEFORE I CAN GET INTO THE SAME SPACE THAT PRIESTS FOR LIFE -- THE PRIESTS FOR LIFE COURT WAS OR IS IT YOUR VIEW THAT I DON'T HAVE TO MAKE THAT DETERMINATION OF GOOD CAUSE BEFORE GOING ALONG WITH THE HOLDING IN THAT CASE?

MR. DAVIS: YOUR HONOR, IF I UNDERSTAND THE QUESTION CORRECTLY, I THINK THAT ALL OF THOSE --

THESE FACTORS WE HAVE BEEN DISCUSSING GO TO WHETHER OR NOT THERE WAS GOOD CAUSE TO DO THE IFR IN THAT CASE AS AN IFR INSTEAD OF THROUGH NOTICE AND COMMENT. I THINK THE SIGNIFICANCE OF THE CHANGE IS ALL UNDER THAT HEADING OF WHETHER OR NOT THERE IS GOOD CAUSE. I WOULD SAY YOU DON'T EVEN HAVE TO REACH THE GOOD CAUSE ISSUE AT ALL IN OUR VIEW BECAUSE OF THE SEPARATE BASES OF STATUTORY AUTHORITY. BUT IN THE EVENT YOU WERE TO REACH THE GOOD CAUSE ISSUE, I THINK IF YOU READ THAT PART OF THAT -- OF THE D.C. CIRCUIT'S DECISION, I THINK WE ARE ALMOST ON ALL FOURS WITH IT HERE.

THE COURT: GO AHEAD.

MR. DAVIS: I WOULD LIKE TO MOVE TO THE STATUTORY AUTHORITY FOR THE EXEMPTIONS.

THE COURT: GO AHEAD.

MR. DAVIS: YOUR HONOR, IN OUR VIEW WE HAVE THREE SEPARATE BASES OF STATUTORY AUTHORITY.

THE FIRST IS THE AFFORDABLE CARE ACT ITSELF. HERE AGAIN, YOUR HONOR IS NOT WRITING ON A BLANK SLATE. THIS IS THE SOURCE OF AUTHORITY THAT THE LAST ADMINISTRATION USED TO CRAFT THE ORIGINAL RELIGIOUS EMPLOYER EXEMPTION. THE STATUTE IS A BROADLY WORDED DELEGATION OF AUTHORITY TO THE AGENCIES. IT PROVIDES THAT COVERED GROUP HEALTH PLANS SHALL PROVIDE -- OR SHALL COVER WHATEVER HRSA SPECIFIES IN ITS GUIDELINES.

THE BREADTH OF THE STATUTE IS APPARENT WHEN COMPARED TO THE OTHER THREE SUBSECTIONS OF THAT STATUTE. THOSE SUBSECTIONS ADDRESS EVIDENCE BASED ITEMS OF SERVICES, IMMUNIZATIONS AND SERVICES FOR CHILDREN, ADDRESS GUIDELINES THAT WERE ALREADY IN EXISTENCE AT THE TIME THE AFFORDABLE CARE ACT WAS ENACTED. AND SUBSECTION (A)(4) WAS A GRANT OF AUTHORITY TO DEVELOP GUIDELINES THAT DID NOT ALREADY EXIST.

AND ON PAGE 23 OF ITS BRIEF, PENNSYLVANIA ARGUES THAT NOTHING IN THE LANGUAGE OF THE ACA OR ITS LEGISLATIVE HISTORY SUGGESTS THAT CONGRESS INTENDED TO GIVE DEFENDANTS OR ANY AGENCY BLANKET AUTHORITY TO PERMIT EMPLOYEES TO OPT-OUT. IF THAT IS TRUE, THE ORIGINAL EXEMPTION FOR CHURCHES HAS TO FALL AS WELL, WHICH WOULD EXPOSES CHURCHES AND HOUSES OF WORSHIP TO THE MANDATE FOR THE FIRST TIME. AND THAT RESULT WOULD IMPERIL THE MANDATE ITSELF BECAUSE WE KNOW FROM HOBBY LOBBY THAT IT IMPOSES A SUBSTANTIAL BURDEN.

SO PENNSYLVANIA ALSO ARGUES THAT THE RULES CONFLICT WITH THE PURPOSE OF THE STATUTE, WHICH IS TO INCREASE COVERAGE FOR PREVENTIVE SERVICES. AND THAT ARGUMENT WOULD ALSO WIPE AWAY THE ORIGINAL CHURCH EXEMPTION. IT'S ALSO INCONSISTENT WITH THE BEST EVIDENCE OF A STATUTE'S PURPOSE, WHICH IS ITS TEXT. AND THE ACA DOES NOT REQUIRE GROUP HEALTH PLANS TO COVER

CONTRACEPTION. IT DOES NOT MENTION CONTRACEPTION. INSTEAD IT DELEGATES AUTHORITY TO THE AGENCIES TO DECIDE WHAT KINDS OF PREVENTIVE SERVICES SHOULD BE COVERED.

THE COURT: WELL, THE CONTRACEPTIVE MANDATE WAS ADOPTED. WELL, THE HRSA ADOPTED THE INSTITUTE'S RECOMMENDATION IN AUGUST OF 2011. AND THE CONTRACEPTIVE MANDATE WAS ENACTED OR PROMULGATED UNDER THE AUTHORITY GIVEN BY THE ACA TO THE AGENCY. SO IN THIS CASE DOES THE -- DO THE EXEMPTIONS, THE MORAL AND RELIGIOUS EXEMPTIONS, IMPACT ON THE CONTRACEPTIVE MANDATE? DON'T THEY CARVE OUT EXCEPTIONS TO THE CONTRACEPTIVE MANDATE? SO YOU HAVE AN AGENCY CARVING OUT EXCEPTIONS TO AN AGENCY'S RULES.

MR. DAVIS: THAT'S CORRECT.

THE COURT: THAT IS CORRECT.

MR. DAVIS: YES.

THE COURT: WHAT AUTHORITY IS THERE FOR AN AGENCY TO CARVE OUT AN EXCEPTION TO AN AGENCY'S PREVIOUSLY PROMULGATED RULES?

MR. DAVIS: YOUR HONOR, I THINK IT IS JUST GENERAL REGULATORY AUTHORITY THAT ALL AGENCIES HAVE TO CHANGE THEIR RULES, CARVE OUT EXEMPTIONS TO THEM. I THINK THE STATUTES THAT I MENTIONED EARLIER PROVIDE THAT AUTHORITY. I THINK IT'S JUST INHERENT IN THE APA THAT AGENCIES HAVE THAT ABILITY. AND I THINK IF THE QUESTION

IS WHETHER THERE IS STATUTORY AUTHORITY FOR AGENCIES TO DO THAT, I WOULD JUST POINT YOUR HONOR AGAIN TO THE ACA, 42 U.S.C. 300 GG-13(A)(4), WHICH PROVIDES DISCRETION, A BROAD GRANT OF DISCRETION FOR THE AGENCIES TO DEVELOP RULES GOVERNING WHAT TYPES OF PREVENTIVE SERVICES WILL BE COVERED AND WHO WILL BE COVERED BY THEM. THERE IS NOTHING IN THAT STATUTE THAT PROHIBITS THE AGENCY FROM DOING THAT.

AND HERE I WOULD LIKE TO ADDRESS ANOTHER ONE OF YOUR HONOR'S QUESTIONS, WHICH IS WHETHER THE AGENCIES ARE ENTITLED TO DEFERENCE IN INTERPRETING THE AFFORDABLE CARE ACT. THE ANSWER TO THAT QUESTION IS YES. IT'S CLEAR THAT CONGRESS HAS DELEGATED TO THE AGENCIES THE AUTHORITY TO MAKE RULES CARRYING THE FORCE OF LAW IN THIS CONTEXT AND THE AGENCIES WERE EXERCISING THAT AUTHORITY IN CRAFTING THESE RULES.

THE COURT: BUT IF THE INTERPRETATION CONFLICTS WITH THE STATUTE'S PLAIN LANGUAGE, IT IS NOT ENTITLED TO JUDICIAL DEFERENCE, CORRECT?

MR. DAVIS: THAT'S CORRECT. BUT HERE I DON'T THINK THAT IS TRUE HERE, TO BE CLEAR, YOUR HONOR. I THINK THE STATUTE IS A BROAD GRANT OF AUTHORITY. THERE IS NOTHING IN IT THAT PROHIBITS THE AGENCIES FROM DOING THIS.

THE COURT: I UNDERSTAND.

MR. DAVIS: THE SECOND BASIS OF STATUTORY AUTHORITY FOR THESE EXEMPTIONS, YOUR HONOR, IS RFRA.

THE COURT: BEFORE YOU GO INTO THAT, AS I UNDERSTAND IT, YOU ARE NOT MAKING AN ARGUMENT WITH RESPECT TO THE MORAL EXEMPTION UNDER RFRA. YOUR RFRA ARGUMENT IS FOCUSED SOLELY ON THE RELIGIOUS EXEMPTION.

MR. DAVIS: THAT'S CORRECT, YOUR HONOR. AND THE SOURCE OF STATUTORY AUTHORITY FOR THE MORAL EXEMPTION IS THE ACA.

AS I SAID, THE SECOND BASIS OF STATUTORY AUTHORITY FOR THE EXEMPTIONS IS RFRA. HERE YOU DON'T HAVE TO INCLUDE THAT RFRA ACTUALLY REQUIRES THE EXEMPTIONS. BECAUSE EVEN IF RFRA DOES NOT REQUIRE THEM, RFRA AUTHORIZES THE RELIGIOUS EXEMPTION. AND AGAIN ON THIS POINT, YOUR HONOR, YOU ARE NOT WRITING ON A BLANK SLATE. WE KNOW FROM HOBBY LOBBY AND YEARS OF LITIGATION THAT THE UNADORNED MANDATE IMPOSES A SUBSTANTIAL BURDEN. THE AGENCIES HAVE DISCRETION IN DETERMINING HOW TO ALLEVIATE THAT BURDEN, AND IN EXERCISING THAT DISCRETION, THE AGENCIES REASONABLY DECIDED TO RESPOND WITH AN EXEMPTION RATHER THAN AN ACCOMMODATION.

THE COURT: WELL, LET ME ASK YOU A QUESTION. DOES ANY OF THE AGENCIES HERE HAVE ANY SPECIFIC EXPERTISE WITH RESPECT TO RFRA?

MR. DAVIS: YOUR HONOR, WE ARE NOT

ARGUING THAT THE AGENCIES ARE ENTITLED TO CHEVRON DEFERENCE UNDER RFRA WRIT LARGE. WE DO THINK THAT THE AGENCIES ARE ENTITLED TO DEFERENCE ON SOME OF THE SUBSIDIARY QUESTIONS THAT TRIGGER THEIR EXPERTISE, SUCH AS WHETHER THERE IS A COMPELLING INTEREST UNDER RFRA. A LOT OF THOSE ISSUES ACTUALLY INVOLVE INTERPRETATIONS OF THE AFFORDABLE CARE ACT AND THEY FALL SQUARELY WITHIN THE AGENCY'S TECHNICAL EXPERTISE. BUT RFRA IS A GENERALLY APPLICABLE STATUTE LIKE THE FREEDOM OF INFORMATION ACT OR OTHERS THAT ARE NOT GENERALLY CONSIDERED TO CONFER CHEVRON DEFERENCE.

AND BACK TO MY POINT ABOUT RFRA AUTHORIZING THE AGENCIES TO DO THIS, THE SUPREME COURT HAS RECOGNIZED THAT AN ENTITY FACED WITH CONFLICTING LEGAL OBLIGATIONS SHOULD BE AFFORDED SOME LEEWAY. SO IN THE RICCI VERSUS DESTEFANO CASE IN THE SUPREME COURT, THE CITY OF NEW HAVEN ADMINISTERED AN EXAM FOR FIREFIGHTERS. THE EXAM PRODUCED RACIALLY DISPARATE RESULTS. THE MINORITY FIREFIGHTERS TOLD THE CITY THAT IF IT CERTIFIED THE RESULTS, THEY WOULD SUE THE CITY FOR VIOLATING TITLE VII'S DISPARATE IMPACT PROVISION. AND THE WHITE FIREFIGHTERS TOLD THE CITY THAT IF IT DID NOT CERTIFY THE RESULTS, THEY WOULD SUE THE CITY FOR VIOLATING TITLE VII'S DISPARATE TREATMENT PROVISION. SO THE CITY WAS CAUGHT BETWEEN THE DISPARATE IMPACT

PROVISION ON THE ONE HAND AND THE DISPARATE TREATMENT PROVISION ON THE OTHER HAND. INSTEAD OF REQUIRING THE CITY TO HIT A PERFECT BULLSEYE IN BETWEEN THOSE TWO STATUTES, THE SUPREME COURT GAVE SOME LEEWAY. IT HELD THAT AN EMPLOYER MAY ENGAGE IN INTENTIONAL DISCRIMINATION FOR THE ASSERTED PURPOSE OF AVOIDING OR REMEDYING AN UNINTENTIONAL DISPARATE IMPACT IF THE EMPLOYER HAS A STRONG BASIS IN EVIDENCE TO BELIEVE THAT IT WILL BE SUBJECT TO DISPARATE IMPACT LIABILITY IF IT FAILS TO TAKE THE RISK CONSCIOUS DISCRIMINATORY ACTION. SO THE SAME IS TRUE HERE.

THE COURT: SO YOU ARE TAKING -- YOU ARE BORROWING LAW FROM THE DISCRIMINATORY -- DISCRIMINATION JURISPRUDENCE THAT PERTAINS TO A MUNICIPALITY AND APPLYING IT TO -- WHICH IS A STATE ENTITY, AND APPLYING IT TO A FEDERAL AGENCY THAT FALLS UNDER THE EXECUTIVE FUNCTION, IS THAT CORRECT?

MR. DAVIS: I WOULD NOT PUT IT LIKE THAT. AGAIN, YOUR HONOR --

THE COURT: WELL, THAT IS WHAT YOU ARE DOING, WHETHER YOU PUT IT LIKE THAT OR NOT. SO THE QUESTION IS WHY WOULD YOU TAKE -- WHY WOULD YOU BORROW FROM ONE LINE OF JURISPRUDENCE WHICH HAS NOTHING TO DO WITH WHAT WE ARE TALKING ABOUT HERE. AND IF YOU ARE GOING TO DO THAT, YOU HAVE TO PROVIDE ME WITH SOME

PRETTY STRONG RATIONALE BACKED UP BY APPLICABLE PRECEDENT, SO THAT MEANS THIRD CIRCUIT OR SUPREME COURT PRECEDENT, TO TELL ME THAT THAT IS APPROPRIATE.

MR. DAVIS: YOUR HONOR, I THINK IF YOU LOOK AT THE REASONING OF THIS CASE --

THE COURT: NO, I -- NO, NO. YOU CAN TAKE ANY KIND OF LOGICAL SYLLOGISM IN PRETTY MUCH ANY CASE IN THE LAW AND JUST SAY WELL, IT APPLIES HERE. BUT THAT IS NOT WHAT WE DO WHEN WE ANALYZE CASE LAW. WHAT WE DO IS TAKE A LOOK AT THE JURISPRUDENCE AND DETERMINE WHETHER IT IS APPROPRIATE TO APPLY A PARTICULAR SET OF JURISPRUDENCE IN ONE CONTEXT WHEN IT HAS BEEN DEVELOPED IN ANOTHER CONTEXT.

SO WHAT I NEED IF YOU WANT TO MAKE THAT COMPARISON IS TO DRAW A JURISPRUDENTIAL LINE BETWEEN THE CASE -- THE NEW HAVEN CASE THAT YOU MENTIONED, WHICH CONCERNS DISCRIMINATION, AND THE CASE HERE -- DISCRIMINATION IN THE CONTEXT OF A STATE ENTITY TO HERE, WHICH CONCERNS AN AGENCY'S DETERMINATION AS TO WHETHER IT CAN OR CANNOT ENACT A PARTICULAR REGULATION. IF YOU CAN DRAW -- IF YOU CAN DRAW THAT CONNECTION, FINE, I'M HAPPY TO CONSIDER IT. BUT YOU CAN'T JUST SAY IT.

MR. DAVIS: YOUR HONOR, I RESPECTFULLY DISAGREE WITH HOW YOU CHARACTERIZE THAT. I THINK IT IS APPROPRIATE IN REASONING ON THE BASIS OF CASES NOT TO

USE CASES IN THE EXACT SAME CONTEXT BUT INSTEAD TO USE REASON BY ANALOGY TO CASES THAT MAY INVOLVE A DIFFERENT CONTEXT, IN THAT CASE, THE MUNICIPALITY INSTEAD OF THE FEDERAL GOVERNMENT. BUT STILL THE GENERAL LEGAL PRINCIPLE THAT THAT CASE RECOGNIZES, THAT AN ENTITY FACED WITH CONFLICTING LEGAL OBLIGATIONS SHOULD BE AFFORDED SOME LEEWAY. AND THAT PRINCIPLE FROM THAT CASE APPLIES EQUALLY HERE. EVEN THOUGH IT IS IN A DIFFERENT CONTEXT IN THAT CASE, IT'S THE SAME THING HERE.

THE EXEMPTION RECOGNIZES THE REALITY THAT THE AGENCIES WOULD LIKELY BE SUBJECT TO UNDER RFRA. WELL, IT COULD BE SUBJECT TO LIABILITY UNDER RFRA THAT THE AGENCIES CHOSE THE ACCOMMODATIONS THAT -- BUT EVEN IF YOUR HONOR IS NOT PERSUADED BY THAT POSITION, WHICH I --

THE COURT: I CAN TELL YOU I'M NOT PERSUADED BY THAT.

MR. DAVIS: I UNDERSTAND, YOUR HONOR. THE OTHER BASIS FOR STATUTORY AUTHORITY HERE IS THAT RFRA DOES REQUIRE THE RELIGIOUS RULE, EVEN IF YOU THINK IT DOES NOT AUTHORIZE IT. AND HERE THE AGENCIES HAVE CONCLUDED THAT REQUIRING OBJECTING ENTITIES TO CHOOSE BETWEEN THE MANDATE, THE ACCOMMODATION, OR PENALTIES FOR NONCOMPLIANCE IMPOSES A SUBSTANTIAL BURDEN IN THE AGENCY'S VIEW THE ACCOMMODATION, THE PREVIOUS

ACCOMMODATION WAS NOT ENOUGH TO ALLEVIATE THAT SUBSTANTIAL BURDEN BECAUSE MANY ENTITIES OBJECTED TO THE ACT OF SUBMITTING A SELF-CERTIFICATION FORM. THOSE ENTITIES SINCERELY BELIEVE THAT SUBMITTING THE FORM MADE THEM COMPLICIT IN PROVIDING CONTRACEPTIVE COVERAGE. EVEN IF A COURT WERE TO DISAGREE WITH THAT BELIEF, HOBBY LOBBY PROHIBITS QUESTIONING IT, AND AS THE SUPREME COURT EXPLAINED, I BELIEVE, IMPLICATES A DIFFICULT AND IMPORTANT QUESTION OF RELIGION AND MORAL PHILOSOPHY THAT COURTS SHOULD NOT BE WADING INTO.

ON COMPELLING INTEREST, THE AGENCIES HAVE NOW TAKEN THE POSITION THAT THE MANDATE DOES NOT SERVE A COMPELLING GOVERNMENT INTEREST. AND THIS GOES TO THE LAST OF YOUR HONOR'S QUESTIONS, WHICH I PREVIOUSLY ADDRESSED. EVEN THOUGH THE AGENCIES DON'T GET CHEVRON DEFERENCE UNDER RFRA, ON THE SUBSIDIARY QUESTIONS UNDER RFRA, I THINK THEY DO ON THE COMPELLING INTEREST ISSUE, AND THAT IS BECAUSE THE COMPELLING INTEREST ISSUE IS TIED IN PART TO THE AGENCY'S INTERPRETATION OF THE AFFORDABLE CARE ACT AND IT GOES RIGHT TO THE AREAS WHERE THE AGENCIES HAVE DEFERENCE.

AND BEFORE I GO FURTHER, YOUR HONOR, I JUST WANT TO MAKE SURE I'M NOT GOING OVER TIME.

THE COURT: NO, I THINK YOU ARE ACTUALLY -- YOU STARTED ABOUT EIGHT MINUTES PAST AND IT

IS NOW 20 MINUTES TO, SO YOU ARE EXACTLY ON TIME. I THINK I DID GIVE THE OTHER SIDE A LITTLE BIT MORE. SO IF YOU HAVE ANYTHING ELSE YOU NEED TO SAY, FEEL FREE.

MR. DAVIS: I'LL JUST SAY THAT ON THE COMPELLING INTEREST ISSUE, THE AGENCIES MADE A VARIETY OF DIFFERENT CONCLUSIONS IN A WELL-REASONED PART OF THE RULE THAT SPANS SEVERAL PAGES. AND FIRST CONGRESS DID NOT MANDATE THAT CONTRACEPTION BE COVERED AT ALL. AS AN INTERPRETATION OF THE AFFORDABLE CARE ACT, THAT IS ENTITLED TO DEFERENCE. SECOND, CONGRESS EXPRESSLY DECIDED NOT TO APPLY THE PREVENTIVE SERVICES REQUIREMENT TO GRANDFATHER PLANS COVERING TENS OF MILLIONS OF EMPLOYEES.

THE COURT: LET ME TALK TO YOU ABOUT THOSE GRANDFATHERED HEALTH PLANS. I THINK ONE OF THE REASONS THAT WERE GIVEN IN THE IFRS FOR BYPASSING THE NOTICE AND COMMENT RULE MAKING WAS, I THINK IT WAS: DELAYING AVAILABILITY OF THE EXEMPTION WOULD ALSO INCREASE THE COST OF HEALTH INSURANCE BECAUSE GROUPS WITH GRANDFATHERED HEALTH PLANS WISH TO MAKE CHANGES TO THEIR HEALTH PLANS THAT WILL REDUCE THE COST OF INSURANCE COVERAGE FOR THEIR BENEFICIARIES OR POLICY HOLDERS BUT WHICH COULD CAUSE THE PLANS TO LOSE GRANDFATHERED STATUS.

DO YOU RECALL THAT --

MR. DAVIS: YES, YOUR HONOR.

THE COURT: -- RATIONALE?

SO THERE WERE 54,000 COMMENTS, AND I THINK YOU PROVIDED THEM TO US. WE HAVE THEM IN THE RECORD. SO IN ORDER TO MAKE SURE THAT THAT WAS BACKED UP BY THE RECORD, BECAUSE IT WAS JUST A BOLD STATEMENT, IT WAS A CONCLUSION, WE SEARCHED ALL THOSE 54,000 COMMENTS, AND WE COULD NOT LOCATE A SINGLE COMMENT THAT REFERENCED A GRANDFATHERED HEALTH PLAN. SO WE WONDER IS THERE ANY WAY THAT THEY COULD POSSIBLY BE IN THE COMMENTS UNDER A DIFFERENT TERMINOLOGY THAN GRANDFATHERED HEALTH PLAN.

MR. DAVIS: IF YOUR HONOR DOES NOT MIND, WE WILL GET BACK TO YOU ON THAT QUESTION.

THE COURT: WELL, IF YOU COULD, I THINK -- I'M SURE YOU HAVE SOMEONE THAT CAN DO IT NOW, BUT IF YOU COULD GET BACK TO ME BEFORE THE END OF THE DAY. WHAT I WOULD LIKE YOU TO DO IS TO SEARCH THE 54,000 COMMENTS AND TELL ME -- AND PROVIDE ME A LIST OF THE CASE -- OF THE INSTANCES IN WHICH THERE WAS SOME COMMENTARY FROM A GRANDFATHERED HEALTH PLAN WHICH SUGGESTED THAT THEY WISH TO MAKE CHANGES TO THEIR HEALTH PLANS IN A FASTER FASHION THAN WOULD OTHERWISE BE THE CASE. I THINK YOU CAN DO THAT OVER LUNCH AND GET BACK TO ME.

MR. DAVIS: YES.

THE COURT: OKAY. ANYTHING ELSE?

MR. DAVIS: I WILL STOP THERE, YOUR HONOR.

THE COURT: OKAY. SO WHAT WE ARE GOING TO DO NOW -- ARE YOU NOW READY TO GO TO YOUR WITNESSES?

MR. GOLDMAN: I AM, YOUR HONOR.

THE COURT: WELL, I THINK WE SHOULD TAKE A QUICK BREAK IN ORDER TO GET EVERYONE SORTED. WE WILL BE BACK HERE IN TEN MINUTES, SO THAT IS JUST ABOUT EIGHT MINUTES TO.

THE CLERK: ALL RISE.

(BREAK TAKEN.)

THE COURT: ARE YOU READY TO GO?

MR. GOLDMAN: YES, YOUR HONOR. MAY I APPROACH?

THE COURT: YOU MAY APPROACH. AND THE WITNESS MAY TAKE THE WITNESS STAND.

(CAROL WEISMAN, COMMONWEALTH'S WITNESS, SWORN.)

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: CAROL WEISMAN, C-A-R-O-L W-E-I-S-M-A-N.

DIRECT EXAMINATION

BY MR. GOLDMAN:
Q. WHERE ARE YOU FROM, DR. WEISMAN?
A. ORIGINALLY FROM PITTSBURGH, PENNSYLVANIA.
Q. AND WHAT DO YOU DO FOR A LIVING?
A. I'M A PROFESSOR AT THE PENN STATE COLLEGE OF MEDICINE.
Q. AND IF I MAY, YOU HAVE AN EXHIBIT BINDER BEFORE YOU.
MR. DAVIS: AND, YOUR HONOR, IF I UNDERSTAND YOUR RULES, YOU WOULD LIKE THE EXHIBITS MOVED INTO EVIDENCE BEFORE THE WITNESS IS QUESTIONED?
THE COURT: IT DOES NOT REALLY MATTER BECAUSE WE DON'T HAVE A JURY, SO JUST DO IT -- IT WOULD BE BETTER IF YOU DID NOT QUESTION HER.
BUT HAVE YOU STIPULATED TO EVERYTHING?
MS. KADE: EVERYTHING EXCEPT FOR DEMONSTRATIVE.
THE COURT: OKAY. SO CAN WE JUST STIPULATE THAT EXHIBITS 1 THROUGH -- WHICH ONE IS THE DEMONSTRATIVE?
MS. KADE: IT IS 18, YOUR HONOR.
THE COURT: CAN WE JUST STIPULATE AT THIS POINT THAT EVERYTHING EXCEPT EXHIBIT 18 IS ADMITTED?
MR. GOLDMAN: YES, YOUR HONOR.
MS. KADE: YES, YOUR HONOR.

THE COURT: THEY ARE ALL ADMITTED, AND THEREFORE YOU DO NOT HAVE TO LAY A FOUNDATION OR AUTHENTICATION.

(GOVERNMENT EXHIBIT 18 ADMITTED INTO EVIDENCE.)

BY MR. GOLDMAN:

Q. IF YOU WOULD TURN, DR. WEISMAN, TO TAB 4, WHICH WOULD BE EXHIBIT 4.

DO YOU KNOW WHAT THAT DOCUMENT IS?

A. YES. THAT IS MY CV.

Q. AND IF YOU WOULD JUST FLIP THROUGH IT BRIEFLY. CAN YOU CONFIRM THAT THE CONTENTS OF THAT ARE ACCURATE?

A. YES.

Q. AND EXHIBIT 3 OF THE TAB, IF YOU CAN FLIP THROUGH THAT.

A. YES.

Q. ARE YOU FAMILIAR WITH THAT DOCUMENT?

A. YES. THAT IS MY DECLARATION.

Q. AND IF YOU COULD REVIEW THAT BRIEFLY AND IF YOU CAN CONFIRM IF YOU ARE COMFORTABLE WITH THE STATEMENTS CONTAINED THERE?

A. YES, I AM.

Q. I WOULD LIKE TO ASK YOU BRIEFLY ABOUT YOUR EDUCATION. WHERE DID YOU GO TO COLLEGE -- AND BY THE WAY, YOUR HONOR, IF YOU WOULD PREFER US NOT TO GO

THROUGH THIS, WE CAN STIPULATE OVER IT.

THE COURT: I DON'T NEED IT.

DO YOU NEED IT?

MS. KADE: NO, YOUR HONOR.

THE COURT: WE DON'T NEED IT.

BY MR. GOLDMAN:

Q. I MAY ASK SOME TARGETED QUESTIONS IN THERE, IF I MAY. WHAT WAS THE FOCUS OF YOUR ACADEMIC WORK AT WELLESLEY AND THEN JOHNS HOPKINS UNIVERSITY?

A. I STUDIED SOCIOLOGY.

Q. AND WAS THERE A FOCUS WITHIN THAT?

A. AT THE UNDERGRADUATE LEVEL, NOT REALLY AT THE GRADUATE LEVEL, I BECAME INTERESTED IN GENDER RELATED ISSUES.

Q. AND DID THAT INCLUDE HEALTHCARE AT THAT TIME?

A. YES.

Q. YOU ARE NOT A MEDICAL DOCTOR, ARE YOU?

A. I AM NOT.

MR. DAVIS: YOUR HONOR, MAY I HAVE PERMISSION TO LEAD FOR SOME OF THESE FOUNDATIONAL QUESTIONS.

THE COURT: ARE YOU OKAY WITH THAT?

MS. KADE: UNTIL I SEE WHAT THE QUESTIONS ARE, YOUR HONOR, I'M NOT SURE, BUT AT THIS POINT, YES.

THE COURT: OKAY. PERMISSION TO LEAD FOR

THE MOMENT -- I'M SORRY, WHAT IS YOUR NAME?

MS. KADE: ELIZABETH, YOUR HONOR.

THE COURT: ELIZABETH WHAT?

MS. KADE: KADE.

THE COURT: THE MOMENT MS. KADE OBJECTS, THEN WE MAY HAVE TO CHANGE TASKS.

BY MR. GOLDMAN:

Q. AM I CORRECT THAT YOU -- AFTER YOU GOT YOUR PH.D. FROM JOHNS HOPKINS, YOU WORKED AS AN ASSOCIATE RESEARCH SCIENTIST THERE?

A. YES.

Q. AND WHY DID YOU CHOOSE TO WORK AT JOHNS HOPKINS UNIVERSITY?

A. I WAS OFFERED A FACULTY POSITION IN WHICH I COULD CONDUCT RESEARCH AS WELL AS TEACH AT THE GRADUATE LEVEL.

Q. AND DID THEY HAVE A PRETTY GOOD PROGRAM?

A. OH, THEY HAVE THE TOP PROGRAM IN PUBLIC HEALTH IN THE COUNTRY.

Q. DID YOU WORK IN THE -- YOU WORKED IN RESEARCH HEALTH SERVICES. AT THE TIME YOU JOINED JOHNS HOPKINS UNIVERSITY, DID THAT INCLUDE THE FIELD OF WOMEN'S HEALTHCARE?

A. THE FIELD OF HEALTH SERVICES RESEARCH WAS JUST BEING ESTABLISHED AT THAT TIME. IT'S AN

INTERDISCIPLINARY FIELD, PEOPLE FROM DIFFERENT TRAINING BACKGROUNDS STUDYING HOW HEALTHCARE IS DELIVERED, THE COST OF CARE, THE QUALITY OF CARE. AND I BECAME INVOLVED WITH THOSE RESEARCHERS SPECIFICALLY TO LOOK AT WOMEN'S HEALTHCARE.

Q. IS IT FAIR TO SAY THAT YOU PLAYED A PART IN THE CREATION OF WOMEN'S HEALTHCARE AS A FIELD WITHIN RESEARCH HEALTH SERVICES?

A. YES.

Q. AND YOU WORKED AT JOHNS HOPKINS UNIVERSITY FOR 24 YEARS?

A. YES.

Q. AND I'M NOT GOING TO ASK YOU ABOUT YOUR PROMOTIONS DURING THAT TIME, BUT GENERALLY SPEAKING, CAN YOU DESCRIBE THE WORK THAT YOU DID WHILE AT JOHNS HOPKINS UNIVERSITY?

A. I DESIGNED AND LED A NUMBER OF RESEARCH PROJECTS ON DIFFERENT TOPICS. I TAUGHT MASTERS LEVEL STUDENTS. I SUPERVISED DOCTORAL STUDENTS, ESPECIALLY IN THEIR DISSERTATION PROJECTS, AND I CO-LED A COUPLE OF ACADEMIC PROGRAMS.

Q. AND IS ALL THAT TEACHING WORK? DID YOU ALSO DO RESEARCH DURING THAT TIME?

A. YES, RESEARCH WAS A GREAT PART OF MY RESPONSIBILITIES.

Q. AND DID YOU ALSO GIVE PRESENTATIONS AND MAKE PUBLICATIONS AS WELL?
A. YES.
Q. SO AFTER JOHNS HOPKINS UNIVERSITY YOU WENT TO UNIVERSITY OF MICHIGAN AFTER 24 YEARS?
A. CORRECT.
Q. AND THEN YOU WENT TO PENN STATE COLLEGE OF MEDICINE, CORRECT?
A. CORRECT.
Q. AND WHEN DID YOU GO TO PENN STATE COLLEGE OF MEDICINE?
A. IN 2003, SO I HAVE BEEN THERE 15 YEARS.
Q. AND IS THAT YOUR CURRENT JOB?
A. YES.
Q. WHAT IS YOUR POSITION THERE?
A. A DISTINGUISHED PROFESSOR OF PUBLIC HEALTH SCIENCES AND OBSTETRICS AND GYNECOLOGY IN THE COLLEGE OF MEDICINE.
Q. AND YOU ARE NOT A DOCTOR?
A. I AM NOT.
Q. A MEDICAL DOCTOR.
A. NOT A PHYSICIAN.
Q. ARE THERE MANY NON-DOCTORS WHO ARE DISTINGUISHED PROFESSORS IN THAT PROGRAM WITHIN THE MEDICAL SCHOOL?
A. YES. MEDICAL SCHOOLS TYPICALLY HAVE M.D.'S AND

PH.D.'S ON FACULTY.
Q. WHAT IS THE FOCUS OF YOUR WORK AT PENN STATE?
A. AGAIN, THE FOCUS OF MY WORK IS CONDUCTING RESEARCH ON WOMEN'S HEALTHCARE TOPICS. I ALSO TEACH MASTERS LEVEL STUDENTS, PARTICULARLY IN THE MPH PROGRAM, AND DOCTORAL STUDENTS IN THE DOCTOR OF PUBLIC HEALTH PROGRAM.
I ALSO SPEND PART OF MY TIME AS ASSOCIATE DEAN FOR FACULTY AFFAIRS.
Q. DO YOU, IN ADDITION TO TEACHING AND RESEARCHING, DO YOU PUBLISH ARTICLES?
A. YES.
Q. AND GIVE PRESENTATIONS?
A. YES.
Q. IN THE CONTEXT OF YOUR RESEARCH, ARE THOSE CLINICAL INVESTIGATIONS?
A. SOMETIMES THEY ARE CLINICAL INVESTIGATIONS, SOMETIMES THEY ARE POPULATION-BASED STUDIES. SO IT'S A VARIETY OF DIFFERENT KINDS OF STUDIES.
Q. AND WHEN IT IS A CLINICAL INVESTIGATION, DO YOU EVER SERVE AS WHAT'S CALLED AN INVESTIGATOR IN THOSE STUDIES?
A. YES.
Q. WHAT IS AN INVESTIGATOR? WHAT METHODS DOES AN INVESTIGATOR USE?

A. AN INVESTIGATOR IS RESPONSIBLE FOR OVERSEEING THE CONDUCT OF A RESEARCH PROJECT. THE METHODS THAT WE USE CAN BE QUITE DIVERSE. THE RESEARCH I DO SOMETIMES INVOLVES SURVEY RESEARCH, IN WHICH WE ASK PEOPLE QUESTIONS IN A SYSTEMATIC WAY. SOMETIMES IT INVOLVES ANALYSIS OF HEALTH CLAIMS DATA TO LOOK AT COST OF CARE. SOMETIMES WE TEST INTERVENTIONS TO SEE IF THEY WORK WITH PATIENTS OR OTHERS.
Q. IS IT FAIR TO SAY THAT WHEN DO YOU THAT KIND OF WORK, THE WORK YOU DO IS BASED ON SCIENCE AND EVIDENCE?
A. YES.
Q. HAVE ANY OF THE INVESTIGATIONS THROUGHOUT YOUR CAREER BEEN RELATED TO CONTRACEPTIVE USE?
A. YES.
Q. YOU DON'T HAVE TO COUNT. I KNOW YOUR RÉSUMÉ IS VERY EXTENSIVE, BUT CAN YOU ESTIMATE ROUGHLY HOW MANY INVESTIGATIONS HAVE INVOLVED CONTRACEPTIVE USE?
A. WELL, I ESTIMATE I HAVE DONE OVER 40 PROJECTS IN MY CAREER, AND I WOULD SAY A THIRD TO A HALF OF THEM HAVE TO DO WITH WOMEN'S REPRODUCTIVE HEALTH GENERALLY.
Q. AND HAVE YOU AUTHORED ANY PUBLICATIONS SPECIFICALLY RELATING TO ACCESS TO CONTRACEPTIVE CARE?
A. YES.
Q. CAN YOU GIVE SOME EXAMPLES OF SPECIFIC AREAS IN WHICH YOU HAVE PUBLISHED ARTICLES RELATED TO

CONTRACEPTIVE CARE?

A. YES. SO I'VE CONDUCTED STUDIES OF ADOLESCENTS' CONTRACEPTIVE DECISION-MAKING. I HAVE CONDUCTED WORK ON WOMEN'S RECEIPT OF CONTRACEPTIVE COUNSELING IN THE CONTEXT OF MANAGED CARE PLANS. I HAVE CONDUCTED STUDIES IN INTEGRATION OF REPRODUCTIVE HEALTH SERVICES INTO WOMEN'S PRIMARY CARE SETTINGS, AND I HAVE CONDUCTED STUDIES OF WOMEN'S PRECONCEPTION HEALTHCARE, WHICH INCLUDES CONTRACEPTIVE USE BUT NOT EXCLUSIVELY.

AND THEN MORE RECENTLY I HAVE BEEN INVOLVED IN SOME STUDIES LOOKING AT WOMEN'S CONTRACEPTIVE BEHAVIOR FOLLOWING THE AFFORDABLE CARE ACT.

Q. SO IS IT FAIR TO SAY THAT YOU ARE FAMILIAR WITH THE AFFORDABLE CARE ACT?

A. YES.

Q. AND HAVE YOU TAUGHT, RESEARCHED, WRITTEN AND GIVEN PRESENTATIONS ON IT?

A. I HAVE.

Q. AND ARE YOU ALSO FAMILIAR WITH THE CONTRACEPTIVE MANDATE CONTAINED IN THE AFFORDABLE CARE ACT?

A. YES.

Q. AND HAVE YOU TAUGHT, RESEARCHED, WRITTEN AND GIVEN PRESENTATIONS ABOUT THAT AS WELL?

A. YES.

Q. HAS ANY OF THE SCHOLARLY WORK YOU HAVE DONE ON THIS TOPIC RELATED TO PEOPLE IN PENNSYLVANIA?

A. YES.

Q. AND HAS ANY OF THE SCHOLARLY WORK YOU'VE PERFORMED ON THIS TOPIC ALSO RELATED TO PEOPLE OUTSIDE OF PENNSYLVANIA AS WELL?

A. YES, BOTH NATIONAL STUDIES AND SOME STUDIES IN PENNSYLVANIA.

Q. AM I CORRECT THAT YOU WERE CHOSEN AS ONE OF ONLY 16 MEMBERS OF THE INSTITUTE OF MEDICINE'S COMMITTEE ON PREVENTATIVE SERVICES FOR WOMEN THAT WAS CONVENED BY THE HEALTH RESOURCES SERVICES ADMINISTRATION IN CONNECTION WITH THE AFFORDABLE CARE ACT?

A. YES.

MR. GOLDMAN: YOUR HONOR, IF I MAY AT THIS TIME, I WOULD LIKE TO PROFFER THIS WITNESS, DR. CAROL WEISMAN, BASED ON HER KNOWLEDGE, EDUCATION, EXPERIENCE AND TRAINING, AS AN EXPERT IN THE AREA OF PREVENTATIVE MEDICAL CARE FOR WOMEN, INCLUDING CONTRACEPTIVE CARE.

THE COURT: ANY OBJECTIONS?

MS. KADE: YOUR HONOR, WE OBJECT UNDER FEDERAL RULE 26(A) REQUIRES DISCLOSURE OF EXPERT TESTIMONY UNDER FEDERAL RULE 702, 703, AND 705. THE PLAINTIFF HAS NOT PROVIDED US WITH THE REQUIRED

DISCLOSURE OF THIS PERSON AS AN EXPERT OR THE SUBJECT MATTER ON WHICH THE WITNESS IS EXPECTED TO PRESENT EXPERT TESTIMONY.

MR. GOLDMAN: OBVIOUSLY, YOUR HONOR, THIS IS THE CONTEXT OF AN INJUNCTION PROCEEDING. THERE HAVE NOT BEEN ANY DEPOSITIONS, THERE'S NO TIME FOR THAT. AND IN FACT, MUCH OF DR. WEISMAN'S CONTENT OF HER TESTIMONY HAS BEEN DISCLOSED IN THE FORM OF HER DECLARATION WHICH IS ATTACHED TO OUR MOTION OVER A MONTH AGO.

MS. KADE: YOUR HONOR, THEY WERE NOT DISCLOSED AS AN EXPERT TESTIMONY.

THE COURT: OKAY. I OVERRULE YOUR OBJECTION. SHE IS ADMITTED AS AN EXPERT IN PREVENTATIVE MEDICAL CARE INCLUDING CONTRACEPTION. IS THAT WHAT YOU WANTED?

MR. GOLDMAN: YES, YOUR HONOR. AND JUST FOR THE RECORD, COUNSEL HAD OBJECTED TO DR. WEISMAN AS AN EXPERT, SO IT SEEMS THAT THEY MUST HAVE KNOWN FROM THE DECLARATION THAT SHE WAS BEING OFFERED AS AN EXPERT.

THE COURT: YOU JUST WON, YOU DIDN'T HAVE TO MAKE AN ARGUMENT.

MR. GOLDMAN: I'M SORRY?

THE COURT: YOU JUST WON, YOU DIDN'T HAVE TO MAKE ANOTHER ARGUMENT.

MR. GOLDMAN: THANK YOU, YOUR HONOR. I

UNDERSTAND.

THE COURT: IT'S OVER.

BY MR. GOLDMAN:

Q. WHAT IS THE INSTITUTE OF MEDICINE?

THE COURT: MS. KADE, WHAT'S UP?

MS. KADE: YOUR HONOR, TO THE EXTENT THAT THIS EXPERT TESTIMONY IS GOING TO BE OFFERED IN ORDER TO DETERMINE THE CORRECTNESS OR WISDOM OF THE AGENCY'S DECISION, IT SHOULD NOT BE PERMITTED, AND THAT IS A QUOTE FROM ASARCO V EPA AT 1160. IT'S A 9TH CIRCUIT 1980 DECISION THAT THE COURT REFERRED TO IN HER MOTION IN LIMINE THAT WAS ISSUED YESTERDAY.

THE COURT: OKAY, YOUR OBJECTION IS TAKEN.

GO AHEAD.

BY MR. GOLDMAN:

Q. WHAT IS THE INSTITUTE OF MEDICINE AND WHAT DO THEY DO?

A. THE INSTITUTE OF MEDICINE IS NOW CALLED THE NATIONAL ACADEMY OF MEDICINE AND IT IS A NONGOVERNMENTAL PRIVATE GROUP OF MEDICAL AND SCIENTIFIC EXPERTS WHO CONDUCT STUDIES AND PROVIDE RECOMMENDATIONS TO GOVERNMENT AND POLICYMAKERS AND OTHERS, WHEN ASKED.

Q. AND THIS SPECIFIC COMMITTEE THAT YOU WERE ONE OF 16 MEMBERS OF, WHAT WAS THE PURPOSE OF THAT COMMITTEE?

A. THAT COMMITTEE WAS CHARGED WITH MAKING RECOMMENDATIONS TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR SPECIFIC PREVENTIVE SERVICES FOR WOMEN THAT WERE NOT MENTIONED IN THE AFFORDABLE CARE ACT BUT MIGHT HAVE SUBSTANTIAL EVIDENCE TO SUPPORT THEIR PROVISION AS PART OF WOMEN'S PREVENTIVE CARE.

Q. AND WAS THE PURPOSE OF THAT COMMITTEE, WAS IT LIMITED TO RECOMMENDATIONS INVOLVING CONTRACEPTIVE CARE OR WAS IT BROADER THAN THAT?

A. OH, NO. OUR CHARGE WAS TO SCAN THE EXISTING RECOMMENDATIONS FOR WOMEN'S PRIMARY CARE AND WHAT WE KNEW OF THE SCIENTIFIC LITERATURE AROUND SPECIFIC PREVENTIVE SERVICES AND MAKE RECOMMENDATIONS FOR WHAT OUGHT TO BE INCLUDED IN ROUTINE PREVENTIVE CARE FOR WOMEN IN GENERAL.

Q. AND DID THE COMMITTEE ULTIMATELY ISSUE RECOMMENDATIONS?

A. YES, WE ISSUED EIGHT RECOMMENDATIONS.

Q. AND HOW MANY OF THEM, IF ANY, INVOLVED CONTRACEPTIVE CARE?

A. ONE OF THE EIGHT.

Q. DID THE COMMITTEE ULTIMATELY ISSUE A REPORT WITH ITS RECOMMENDATIONS?

A. YES.

Q. I WOULD LIKE TO TURN YOUR ATTENTION TO

EXHIBIT 5, IT SHOULD BE TAB 5 IN YOUR BINDER, AND ASK IF YOU HAVE EVER SEEN THIS DOCUMENT BEFORE?

A. YES, THIS IS THE REPORT OF THE COMMITTEE.

Q. AND THAT IS ALREADY IN EVIDENCE. THROUGHOUT YOUR TESTIMONY, I MAY BE REFERRING TO IT BRIEFLY.

IF YOU COULD FIRST, WOULD YOU TURN TO PAGE 223 OF THE REPORT. IT IS APPENDIX C. AND IT GOES -- THAT SECTION GOES THROUGH PAGE 230.

A. YES, I'M THERE.

Q. ARE THOSE THE BIOGRAPHIES OF THE PEOPLE ON THE COMMITTEE?

A. YES, THEY ARE.

Q. IF YOU'D TURN TO THE LAST PAGE, ON PAGE 230, THE LAST BIOGRAPHY, IS THAT YOUR BIOGRAPHY?

A. YES.

Q. DO YOU KNOW WHY YOU WERE LAST?

A. IT IS ALPHABETICAL. I THINK EXCEPT FOR THE CHAIR, SHE IS FIRST.

Q. UNDERSTOOD.

IN FORMING ITS RECOMMENDATIONS, WHAT WAS THE COMMITTEE ASKED TO CONSIDER?

A. WE WERE ASKED FIRST TO SCAN THE SOURCES OF PREVENTIVE CARE GUIDELINES THAT ARE NAMED IN THE AFFORDABLE CARE ACT. THOSE INCLUDE THE U.S. PREVENTIVE SERVICES TASK FORCE RECOMMENDATIONS, THE ADVISORY

COMMITTEE ON IMMUNIZATION PRACTICE RECOMMENDATIONS AND THE BRIGHT FUTURES RECOMMENDATIONS.

AND WE WERE ASKED TO LOOK FOR GAPS: IS THERE ANY ASPECT OF WOMEN'S PREVENTIVE CARE THAT IS NOT COVERED ALREADY BY THOSE EXISTING GUIDELINES. AND THEN WE WERE ASKED TO REVIEW THE SCIENTIFIC LITERATURE AND LISTEN TO SOME EXPERT TESTIMONY AND COME TO SOME CONCLUSIONS ABOUT WHAT SERVICES IN ADDITION TO THOSE ALREADY COVERED IN THOSE THREE SOURCES OUGHT TO BE PART OF WOMEN'S ROUTINE PREVENTIVE CARE.

Q. WAS THE COMMITTEE ASKED TO CONSIDER COSTS?

A. NO. WE WERE IN FACT SPECIFICALLY TOLD NOT TO CONSIDER COSTS.

Q. DID THE COMMITTEE, AS PART OF ITS STUDY AND RECOMMENDATION, DID IT FOCUS AT ALL ON THE ISSUE OF UNINTENDED PREGNANCY?

A. YES, THAT WAS ONE OF THE TOPIC AREAS IDENTIFIED AS A GAP BECAUSE IT WAS NOT ADDRESSED IN EXISTING GUIDELINES.

Q. DO YOU KNOW ROUGHLY HOW COMMON UNINTENDED PREGNANCY IS IN WOMEN?

A. UNINTENDED PREGNANCY IN THE UNITED STATES IS QUITE PREVALENT. AT THE TIME THE COMMITTEE WAS MEETING, 49 PERCENT OF ALL U.S. PREGNANCIES WERE UNINTENDED, AND THAT MEANS THEY WERE EITHER MISTIMED OR NOT WANTED BY

THE WOMAN AT THE TIME THAT SHE BECAME PREGNANT.
Q. YOU SAID THAT IT WAS 49 PERCENT AT THE TIME THE COMMITTEE MET. DO YOU KNOW IF IT HAS CHANGED TODAY?
A. IT CHANGED. IT WENT UP TO 51 PERCENT IN 2008, AND THEN SINCE 2008, IT HAS DECLINED. IT IS NOW AT 45 PERCENT.
Q. AND IS THAT -- THE 45 PERCENT NUMBER, IS THAT AS OF TODAY? DO YOU KNOW WHEN THAT NUMBER --
A. THAT IS AS OF 2011. THERE IS ALWAYS A GAP BETWEEN DATA COLLECTION AND WHEN WE KNOW THE EXACT RATES. SO THAT IS THE MOST RECENT DATA THAT WE HAVE.
Q. AM I CORRECT THAT IN 2011 THAT 45 PERCENT NUMBER HAD GONE DOWN BEFORE THE CONTRACEPTIVE CARE MANDATE WENT INTO EFFECT?
A. CORRECT.
Q. DO YOU KNOW WHY THE 45 -- THE NUMBER DECREASED BEFORE THE CONTRACEPTIVE CARE MANDATE?
A. THERE WAS AN ARTICLE PUBLISHED IN THE NEW ENGLAND JOURNAL OF MEDICINE IN 2016 BY FINER AND ZOLNA THAT ANALYZED THAT DECLINE IN THE UNINTENDED PREGNANCY RATE FROM THE HIGH OF 51 PERCENT TO 45 PERCENT, AND IT ATTRIBUTED THE DECLINE TO IMPROVED ACCESS TO CONTRACEPTION AND WOMEN USING MORE EFFECTIVE CONTRACEPTION.
Q. BUT HOW WAS THAT SO GIVEN THAT THAT WAS BEFORE

THE CONTRACEPTIVE CARE MANDATE WENT INTO EFFECT?

A. BECAUSE IN THAT PERIOD OF TIME, INCREASING NUMBERS OF EMPLOYER-BASED PLANS AND OTHER PLANS WERE BEGINNING TO COVER CONTRACEPTION AS A RESULT, IT'S MY UNDERSTANDING, OF STATE LEGISLATION AND CASES INVOLVING DISCRIMINATION IN PRESCRIPTION DRUG COVERAGE.

Q. SO THEN INCREASED ACCESS TO CONTRACEPTION LOWERED THE RATE OF UNINTENDED PREGNANCY?

A. THAT WAS THE INTERPRETATION OF THESE AUTHORS, YES.

Q. IS AN UNINTENDED PREGNANCY A BAD THING? DOES IT MATTER?

A. UNINTENDED PREGNANCY HAS A NUMBER OF NEGATIVE CONSEQUENCES. TO BEGIN WITH, 42 PERCENT OF UNINTENDED PREGNANCIES RESULT IN ABORTION. OF THOSE PREGNANCIES THAT CONTINUE, THERE IS A LOT OF EVIDENCE OF NEGATIVE HEALTH CONSEQUENCES FOR THE WOMEN AND FOR THE BABIES.

WOMEN, FOR EXAMPLE, CAN BECOME DEPRESSED DURING AN UNINTENDED PREGNANCY. THEY MIGHT NOT HAVE GONE INTO THE PREGNANCY WITH OPTIMAL HEALTH STATUS. FOR EXAMPLE, A DIABETIC WOMAN WHO HAS AN UNINTENDED PREGNANCY MIGHT NOT HAVE HAD HER GLUCOSE LEVELS UNDER CONTROL AT THE TIME THAT SHE BECAME PREGNANT, LEADING TO POTENTIAL CONSEQUENCES DURING THE PREGNANCY.

UNINTENDED PREGNANCIES OFTEN RESULT IN

DELAYED ENTRY INTO PRENATAL CARE BECAUSE THE WOMAN WAS NOT EXPECTING TO BECOME PREGNANT, MAY NOT HAVE REALIZED SHE WAS PREGNANT IN TIME TO GET OPTIMAL PRENATAL CARE.

THERE ARE ALSO A NUMBER OF STUDIES THAT SHOW THAT BABIES BORN OF UNINTENDED PREGNANCIES ARE MORE LIKELY TO BE BORN PRETERM OR WITH LOW BIRTH WEIGHT.

AND IN ADDITION TO THE HEALTH CONSEQUENCES, UNINTENDED PREGNANCIES ARE KNOWN TO BE DISRUPTIVE OF WOMEN'S PLANS FOR EDUCATION, FOR WORK, AND FOR SPACING THEIR CHILDREN, AND THEREFORE, CAN HAVE NEGATIVE ECONOMIC CONSEQUENCES FOR THE WOMAN AND HER FAMILY.

Q. SO WHO IS AT RISK FOR HAVING AN UNINTENDED PREGNANCY?

A. SO REALLY, ANY WOMAN OF REPRODUCTIVE CAPACITY WHO IS HAVING SEXUAL RELATIONS WITH MEN IS AT RISK OF AN UNINTENDED PREGNANCY.

Q. ARE THERE SOME WHO ARE MORE IMPACTED THAN OTHERS? ARE THERE CERTAIN RISK GROUPS?

A. UNINTENDED PREGNANCIES TEND TO BE MORE COMMON IN YOUNGER WOMEN AND LOW INCOME WOMEN AND WOMEN WITH LOWER EDUCATIONAL LEVELS.

Q. AM I AT RISK FOR UNINTENDED PREGNANCY?

A. NO, YOU ARE NOT.

Q. SORRY, I'M A LAWYER, BUT WHY IS THAT?

A. BECAUSE YOU ARE NOT A WOMAN.

Q. SO?

A. YOU DO NOT HAVE THE CAPACITY TO BECOME PREGNANT.

Q. AND CAN UNINTENDED PREGNANCY BE ADDRESSED THROUGH MEDICAL CARE AND PREVENTIVE MEDICAL SERVICES?

A. YES. 95 PERCENT OF UNINTENDED PREGNANCIES OCCUR IN WOMEN WHO ARE EITHER NOT USING CONTRACEPTION OR ARE USING CONTRACEPTION INCONSISTENTLY. AND WE HAVE VERY EFFECTIVE CONTRACEPTIVE METHODS AVAILABLE TODAY.

Q. LET ME TAKE A BRIEF STEP ASIDE FOR A MOMENT AND ASK YOU YOUR SPECIFIC ROLE ON THE COMMITTEE. DID YOU HAVE A SPECIFIC FOCUS WITHIN THE COMMITTEE?

A. NO. AS A MEMBER OF THE COMMITTEE, I PARTICIPATED IN ALL OF THE COMMITTEE DISCUSSIONS AND DELIBERATIONS. AND WHAT WE DID WAS IDENTIFY SOME KEY TOPICS FOR FURTHER INVESTIGATION AND BROKE UP INTO SUBGROUPS TO INVESTIGATE THOSE TOPICS.

Q. WERE YOU PART OF ONE OF THOSE SUBGROUPS OR ONE OR MORE?

A. I WAS PART OF TWO SUBGROUPS, ONE OF WHICH WAS THE SUBGROUP ON CONTRACEPTION AND UNINTENDED PREGNANCY.

Q. WHAT WAS THE OTHER?

A. IT WAS A SUBGROUP ON PRECONCEPTION CARE.

Q. ROUGHLY HOW MANY MEMBERS OF THE COMMITTEE WERE ON THE SUBGROUP INVOLVING CONTRACEPTION?

A. I DON'T REALLY REMEMBER. I WOULD SAY THREE TO FIVE.

Q. AND WAS THERE A ROBUST DISCUSSION ON THE ISSUE OF PREVENTATIVE CARE RECOMMENDATIONS ABOUT CONTRACEPTION?

A. OH, YES.

Q. WERE ANY NEGATIVE SIDE EFFECTS OF CONTRACEPTION CONSIDERED?

A. OH, YES. WE CONSIDERED ALL OF THE LITERATURE BOTH ON EFFECTIVENESS OF CONTRACEPTION, SIDE EFFECTS OF CONTRACEPTION, OTHER BENEFITS OF TAKING CONTRACEPTION THAN PREVENTING PREGNANCY, BECAUSE ALL OF THOSE FACTORS ARE IMPORTANT IN DECISIONS ABOUT USING CONTRACEPTION.

Q. AND IS CONTRACEPTION, IN FACT, EFFECTIVE AT PREVENTING UNINTENDED PREGNANCY?

A. YES, IT IS.

Q. I WOULD LIKE TO DIRECT YOU BACK TO THE REPORT AT EXHIBIT 5 TO PAGE 105. THAT'S TABLE 5.3. AND I'M GOING TO PUT THAT UP ON THE ELMO IF YOU'LL GIVE ME ONE QUICK MOMENT. BUT MY FIRST QUESTION IS, ARE YOU FAMILIAR WITH THIS TABLE?

A. YES. IT'S PAGE 106.

Q. 106. I'M SORRY.

A. YES, I AM. THAT IS IT.

Q. I WAS HOPING YOU COULD BRIEFLY WALK US THROUGH

THAT CHART AND EXPLAIN IT TO US.

A. SURE. SO THESE ARE DATA FROM CONTRACEPTIVE TECHNOLOGY, WHICH IS THE DEFINITIVE SOURCE ABOUT CONTRACEPTIVE EFFECTIVENESS USED BY PHYSICIANS.

AND THESE ARE THE DATA OF AVAILABLE -- ON CONTRACEPTIVE EFFECTIVENESS AT THE TIME THAT THE COMMITTEE WAS MEETING. AND WHAT THIS DOES IS SHOW ALL OF THE METHODS OF CONTRACEPTION AVAILABLE AT THE TIME INCLUDING NONE, AT THE TOP. AND THEN IT DESCRIBES THE EFFECTIVENESS OF EACH CONTRACEPTIVE METHOD BASED ON DATA. AND THE WAY EFFECTIVENESS OF CONTRACEPTION IS LOOKED AT IS BY LOOKING AT FAILURES, WHICH MEANS THE NUMBER OF PREGNANCIES THAT OCCUR IN A YEAR WITH USE OF THAT CONTRACEPTIVE METHOD.

SO THERE ARE TWO COLUMNS IN THE TABLE, THERE IS ONE CALLED TYPICAL USE AND ONE CALLED PERFECT USE. PERFECT USE IS IN A PERFECT WORLD WHERE PEOPLE DON'T MAKE MISTAKES. SO WHAT WE REALLY LOOK AT IS THE TYPICAL USE COLUMN, WHICH IS BASED ON DATA OF ACTUAL BEHAVIOR AND OUTCOMES OF PEOPLE USING CONTRACEPTION. AND WHAT THIS COLUMN SHOWS YOU IS THE NUMBER OF EXPECTED PREGNANCIES IN A YEAR PER 100 WOMEN USING THAT METHOD UNDER THE CONDITIONS OF TYPICAL USE.

Q. SORRY. GO ON.

A. SO IF NO CONTRACEPTION IS USED, WHICH IS THE TOP

ROW, WE WOULD EXPECT TO SEE 85 WOMEN BECOME PREGNANT IN A YEAR.

Q. **SO THEN IF WITHDRAWAL WAS USED, AM I CORRECT THAT YOU WOULD EXPECT TO SEE 27 WOMEN GET PREGNANT WITHIN ONE YEAR IF THE WITHDRAWAL METHOD WAS USED?**

A. **CORRECT. AND THEN GOING DOWN THE COLUMN, WE GET TO THE MOST EFFECTIVE METHODS OF CONTRACEPTION TOWARD THE BOTTOM. AT THE VERY BOTTOM ARE MALE AND FEMALE STERILIZATION, BUT JUST ABOVE THAT ARE IMPLANTS AND INTRAUTERINE DEVICES, WHICH RESULT IN ONE LESS THAN ONE PREGNANCY PER YEAR.**

Q. **IF I UNDERSTAND THIS CHART CORRECTLY, UNDER INTRAUTERINE DEVICES -- AND THAT IS AN IUD, RIGHT, THAT'S THE SAME THING?**

A. **CORRECT.**

Q. **THERE IS ONE CALLED A MIRENA IUD. THAT LOOKS LIKE OUT OF 100 WOMEN WHO ARE USING THAT IN A YEAR, THERE WOULD BE A .2 CHANCE OF GETTING PREGNANT, CORRECT?**

A. **CORRECT.**

Q. **AND THAT IS ACTUALLY LESS THAN FEMALE STERILIZATION, CORRECT --**

A. **YES.**

Q. **-- ON THE CHART?**

A. **THAT IS CORRECT.**

Q. **AND IMPLANTED, WHAT IS THAT?**

A. THAT IS THE IMPLANT. THAT IS A HORMONAL CONTRACEPTIVE THAT IS IMPLANTED UNDER THE SKIN.
Q. THERE THAT IS OUT OF A HUNDRED WOMEN, YOU WOULD HAVE .05?
A. RIGHT. THE BOTTOM LINE IS WITH THESE MOST EFFECTIVE METHODS AT THE BOTTOM, YOU WOULD EXPECT TO SEE LESS THAN ONE PREGNANCY IN A YEAR OF USE.
Q. AND --
A. OUT OF 100 WOMEN.
Q. SO THE ONES AT THE BOTTOM, ARE THEY PRESCRIPTION CONTRACEPTIVES?
A. ALL OF THE METHODS OF CONTRACEPTION ARE PRESCRIPTION METHODS WITH THE EXCEPTION OF SPERMICIDES, WITHDRAWAL, FERTILITY AWARENESS METHODS, AND THE SPONGE AND THE CONDOM. ALL THE OTHERS ARE PRESCRIPTION METHODS.
Q. AND NONE I ASSUME ALSO?
A. AND NONE, YES. THANK YOU.
Q. AM I CORRECT, FOR STERILIZATION YOU WOULD NEED A PRESCRIPTION? IS THAT CONSIDERED A PRESCRIPTION?
A. WELL, YES. IT IS A SURGICAL PROCEDURE, SO IT HAS TO BE PROVIDED BY A HEALTHCARE PROFESSIONAL WHO AGREES TO PROVIDE THE SERVICE.
Q. GIVEN THE STUDIES -- SORRY. GIVEN THE COMMITTEE STUDY OF CONTRACEPTION, INCLUDING NEGATIVE HEALTH

EFFECTS AND EFFICACY AS YOU EXPLAINED FROM THAT TABLE, DID THE COMMITTEE MAKE ANY RECOMMENDATION REGARDING CONTRACEPTION?
A. THE COMMITTEE RECOMMENDED THAT ALL FDA, THAT IS FOOD AND DRUG ADMINISTRATION, APPROVED CONTRACEPTIVES SHOULD BE PROVIDED AS PART OF WOMEN'S PREVENTIVE CARE, ALONG WITH COUNSELING REGARDING CONTRACEPTION.
Q. WHAT WAS THE COSTS TO WOMEN SUPPOSED TO BE FOR THIS EXPANDED CARE?
A. WELL, THE COMMITTEE DID NOT DISCUSS THE COST TO WOMEN, BUT WE WERE MAKING RECOMMENDATIONS TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES THAT WOULD THEN DECIDE WHETHER TO ADOPT THESE RECOMMENDATIONS, WHICH WE KNEW WOULD THEN MEAN IF THEY WERE ADOPTED THAT THEY WOULD BECOME PART OF WOMEN'S PREVENTIVE CARE WITHOUT COST SHARING UNDER THE AFFORDABLE CARE ACT.
Q. I WANT TO MAKE SURE I UNDERSTAND THAT CORRECTLY. DID I UNDERSTAND YOU TO SAY THAT BY MAKING THE RECOMMENDATIONS THAT THE FULL RANGE OF THIS CONTRACEPTIVE CARE BE MADE AVAILABLE, INHERENT IN THE RECOMMENDATIONS THAT WOULD BE RECOMMENDED WITHOUT ADDITIONAL COSTS TO WOMEN?
A. WHAT THE COMMITTEE WAS ASKED TO DO WAS RECOMMEND EFFECTIVE PREVENTIVE SERVICES FOR WOMEN THAT OUGHT TO BE PART OF ROUTINE PREVENTIVE CARE. SO WE DETERMINED THAT

CONTRACEPTION IS HIGHLY EFFECTIVE AT PREVENTING UNINTENDED PREGNANCY, WHICH IS A MAJOR WOMEN'S HEALTH PROBLEM, AND THEREFORE OUGHT TO BE PART OF PREVENTIVE CARE.

Q. ARE YOU AWARE WHETHER OR NOT THE COST OF CONTRACEPTION AFFECTS WOMEN'S USE OF CONTRACEPTION?

A. YES.

Q. AND HOW DOES THAT WORK?

A. PRIOR TO THE AFFORDABLE CARE ACT, SOME WOMEN HAD CONTRACEPTIVE COVERAGE, SOME DID NOT. THOSE WHO DID HAVE CONTRACEPTIVE COVERAGE ALWAYS HAD COST SHARING, SO THAT MEANS IF THEY WERE IN AN EMPLOYER-BASED OR OTHER PRIVATE HEALTH PLAN, THEY EITHER PAID A CO-PAY FOR CONTRACEPTIONS, CONTRACEPTIVE SERVICES SUCH AS STERILIZATION WOULD BE APPLIED TO THEIR DEDUCTIBLE. SO TYPICALLY WOMEN WOULD HAVE TO PAY SOMETHING OUT OF POCKET FOR THEIR CONTRACEPTIVE SERVICES.

Q. CO-PAYS ARE GENERALLY PRETTY SMALL, RIGHT?

A. THAT DEPENDS ON THE HEALTH PLAN, AND IT ALSO WOULD DEPEND ON THE NATURE OF THE CONTRACEPTION BEING USED. IF IT IS A MONTHLY METHOD LIKE ORAL CONTRACEPTIVES, THAT MEANS THERE WOULD BE A CO-PAY EVERY TIME A PRESCRIPTION WAS REFILLED. THERE IS AN ABUNDANT BODY OF LITERATURE SHOWING THAT EVEN VERY SMALL CO-PAYS AS SMALL AS $6 CAN DISCOURAGE PEOPLE FROM USING HEALTH

SERVICES.

Q. DO I UNDERSTAND THAT RIGHT, THAT EVEN A $6 CO-PAY COULD MAKE WOMEN OR CAUSE SOME WOMEN TO NOT USE CONTRACEPTION THAT WAS PRESCRIBED BY THEIR DOCTOR THAT THEY WOULD USE OTHERWISE?

A. YES.

MS. KADE: OBJECTION, LEADING.

THE COURT: SUSTAINED.

GO AHEAD. REASK THE QUESTION.

BY MR. GOLDMAN:

Q. IS -- SO WHAT COULD BE THE EFFECT OF EVEN A SMALL $6 CO-PAY?

A. A SMALL $6 CO-PAY TO A LOW INCOME WOMAN COULD MEAN THAT SHE DIDN'T HAVE -- WOULD NOT HAVE THE MONEY TO RENEW A PRESCRIPTION FOR BIRTH CONTROL PILLS, FOR EXAMPLE.

Q. SO BASED ON THE CHART THEN ON PAGE 106 OF TABLE 5.3, IS THAT IF A WOMAN HAD A $6 CO-PAY, DID NOT RENEW THE PRESCRIPTION AND DID NOT USE CONTRACEPTION, AM I RIGHT THAT HER RATE OF UNINTENDED PREGNANCY WITHIN ONE YEAR WOULD GO TO AN 85 PERCENT CHANCE?

A. WELL, IF SHE USED ORAL CONTRACEPTIVES INCONSISTENTLY BECAUSE SHE DID NOT RENEW A PRESCRIPTION OR IF SHE DISCONTINUED USE OF ORAL CONTRACEPTIVES BECAUSE SHE COULD NOT AFFORD TO RENEW HER PRESCRIPTIONS,

HER RISK OF UNINTENDED PREGNANCY WOULD INCREASE, YES.
Q. TO 85 PERCENT IF NO CONTRACEPTION WAS USED?
A. THAT I DON'T KNOW.
Q. I WOULD LIKE TO REFER YOU TO PAGE 107 ON THE CHART, SPECIFICALLY THE LAST FULL PARAGRAPH.
A. YES.
Q. I'M GOING TO PLACE THAT UP ON THE ELMO. I WOULD LIKE YOU TO TAKE A MOMENT TO READ THAT PARAGRAPH. AND IF I MAY, I WILL SORT OF READ IT ALONG WITH YOU: ALTHOUGH IT IS BEYOND THE SCOPE OF THE COMMITTEE'S CONSIDERATION, IT SHOULD BE NOTED THAT CONTRACEPTION IS HIGHLY COST EFFECTIVE. THE DIRECT MEDICAL COSTS OF UNINTENDED PREGNANCY IN THE UNITED STATES WAS ESTIMATED TO BE NEARLY 5 BILLION IN 2002 WITH COST SAVINGS DUE TO CONTRACEPTIVE USE ESTIMATED TO BE AT 19.3 BILLION. THEN IT SAYS IN PARENTHESES TRUSSELL 2007.
WHAT DOES THAT REFER TO?
A. WELL, THAT REFERS TO A STUDY OF THE POTENTIAL SAVINGS IN PUBLIC AND PRIVATE DOLLARS TO AVERTING UNINTENDED PREGNANCIES AT THE NATIONAL LEVEL.
Q. SO THAT IS A CITATION TO BACK UP THE PREMISE?
A. CORRECT. TRUSSELL IS THE AUTHOR, YES.
Q. AND THEN IT SAYS: THE COST EFFECTIVENESS OF FAMILY PLANNING IS ALSO DOCUMENTED IN AN EVALUATION OF FAMILY PACT, CALIFORNIA'S 1115 MEDICAID FAMILY PLANNING

WAIVER PROGRAM. THE UNINTENDED PREGNANCIES AVERTED IN THIS PROGRAM IN 2002 WOULD HAVE COST THE STATE $1.1 BILLION WITHIN TWO YEARS AND $2.2 BILLION WITHIN FIVE YEARS FOR PUBLIC SECTOR HEALTH AND SOCIAL SERVICES THAT OTHERWISE WOULD HAVE BEEN NEEDED.

AND IS THAT ANOTHER CITATION TO PROVE THAT PREMISE?

A. YES. THAT IS A STATE LEVEL STUDY.

Q. SO YOU HAD TOLD THE COURT THAT YOU WERE INSTRUCTED TO NOT CONSIDER COSTS, AND YET THIS PARAGRAPH SEEMS TO TALK ABOUT COSTS, AND I WAS WONDERING WHY THAT IS?

A. THE COMMITTEE DECIDED, SINCE THERE WAS A BODY OF LITERATURE ASSESSING THE COST EFFECTIVENESS OF CONTRACEPTION, TO PUT THE INFORMATION INTO OUR REPORT FOR THE DECISION-MAKERS WHO WERE GOING TO LOOK AT THE REPORT AND DECIDE WHETHER TO APPROVE THE RECOMMENDATIONS OR NOT. WE WANTED THE INFORMATION TO BE AVAILABLE TO THE DECISION-MAKERS.

Q. IF I MAY DIRECT YOU TO PAGE 109. I WOULD LIKE TO, IF I MAY, DIRECT YOU TO THAT MIDDLE PARAGRAPH?

A. DESPITE INCREASES?

Q. YES, THAT IS THE ONE.

THAT PARAGRAPH ALSO TALKS ABOUT COSTS, DOESN'T IT?

A. YES, IT DOES.
Q. AND WITHOUT READING THE WHOLE THING BECAUSE I KNOW THE COURT HAS IT, DOES THAT TALK ABOUT WHAT YOU WERE JUST TELLING THE COURT BEFORE ABOUT THE EFFECT OF CO-PAYMENTS IN AFFECTING WOMEN'S CONTRACEPTIVE CHOICES?
A. YES. AND IT SPECIFICALLY POINTS OUT TOWARD THE BOTTOM OF THE PARAGRAPH THAT IT WAS KNOWN AT THE TIME BECAUSE OF RECENT STUDIES THAT COST SHARING WAS A BARRIER TO WOMEN CHOOSING THE MOST EFFECTIVE FORMS OF CONTRACEPTION, THE IUD'S AND THE IMPLANTS.
Q. AND AM I CORRECT THAT THERE ARE CITATIONS TO EVIDENCE IN THIS PARAGRAPH AS WELL, TO HUDMAN AND O'MALLEY, A 2003, I ASSUME IT'S A PAPER; TRIVEDI, ET AL., 2008; AND THEN A RECENT STUDY CONDUCTED BY KAISER PERMANENTE?
A. CORRECT.
Q. WAS ALL THAT OBJECTIVE EVIDENCE THAT THE COMMITTEE BASED ITS FINDINGS ON?
A. YES. THIS EVIDENCE DOES NOT HAVE TO DO WITH THE EFFECTIVENESS OF CONTRACEPTION. THIS EVIDENCE HAS TO DO WITH HOW WOMEN'S CONTRACEPTIVE CHOICES MIGHT BE AFFECTED IF COST SHARING WERE ELIMINATED.
Q. I WANT TO TURN YOUR ATTENTION TO SORT OF THE FINALIZATION OF THE REPORT. BEFORE THE COMMITTEE FINALIZED ITS REPORT, DID ANYONE NOT ON THE COMMITTEE

REVIEW IT?

A. YES. WHEN THE COMMITTEE HAD FORMALIZED ITS FINAL DRAFT OF THE REPORT, IT WAS REVIEWED BY A GROUP OF OUTSIDE EXPERTS WHOSE NAMES ARE LISTED IN THIS DOCUMENT. DO YOU KNOW THE PAGE?

Q. I DO. IF I MAY DIRECT YOU AND THE COURT TO THE BEGINNING OF ROMAN -- SMALL ROMAN 7 THROUGH SMALL ROMAN 8.

THE COURT: WHAT PAGES ARE WE ON?

THE WITNESS: ROMAN NUMERAL 7 AND 8, AT THE VERY BEGINNING.

BY MR. GOLDMAN:

Q. SO ARE THERE APPROXIMATELY 11 OUTSIDE REVIEWERS WHO REVIEWED THIS --

A. YES.

Q. -- REPORT.

I WOULD ALSO LIKE TO DIRECT YOU TO PAGE 231 OF THE REPORT, IF I MAY. IT'S APPENDIX D. IT'S ENTITLED DISSENT AND RESPONSE. DO YOU SEE THAT?

A. YES.

Q. AM I CORRECT THAT A MEMBER OF THE COMMITTEE DISSENTED FROM THE REPORT?

A. YES.

Q. DO YOU KNOW WHY -- WAS THAT PERSON A MR. SASSO OR DR. SASSO MAYBE?

A. YES. DR. LO SASSO.

Q. DO YOU KNOW WHY HE DISSENTED?

A. DR. LO SASSO IS AN ECONOMIST, AND AS HIS DISSENT DESCRIBES, HIS MAIN OBJECTION TO THE REPORT WAS THAT HE WOULD HAVE PREFERRED THAT THE COMMITTEE CONSIDER COSTS AND COST EFFECTIVENESS IN MAKING ITS RECOMMENDATIONS.

HE ALSO WOULD HAVE PREFERRED THAT THE COMMITTEE HAD MORE TIME, AND HE CRITICIZES THE COMMITTEE'S DECISION-MAKING AS BEING NOT EVIDENCE-BASED.

MS. KADE: OBJECTION, YOUR HONOR. THE QUESTION DOES NOT NECESSARILY ASK FOR HEARSAY BUT THE ANSWER HAS PROVIDED HEARSAY.

THE COURT: SUSTAINED. I WILL NOT TAKE THAT INTO ACCOUNT.

BY MR. GOLDMAN:

Q. DID THAT DISSENT, WAS THAT FOCUSED ON ONE OF THE EIGHT RECOMMENDATIONS INVOLVING CONTRACEPTION OR DID IT APPLY TO THE ENTIRE COMMITTEE REPORT?

A. THE DISSENT APPLIED TO THE ENTIRE REPORT.

Q. AND WHAT, IF ANYTHING, DID YOU THINK OF DR. LOSASSO'S DISSENT?

A. WELL, I AND THE OTHER COMMITTEE MEMBERS DISAGREED WITH THE DISSENT.

Q. AND WHY IS THAT?

A. WELL, ON THE FIRST POINT, WE HAD SPECIFICALLY

BEEN TOLD IN OUR CHARGE THAT OUR JOB WAS NOT TO CONSIDER COST EFFECTIVENESS OF THESE SERVICES BUT TO LOOK ONLY AT EFFECTIVENESS, IN OTHER WORDS, DO THEY IMPROVE HEALTH.

AND OF COURSE, THE AMOUNT OF TIME THAT THE COMMITTEE HAD TO WORK WAS OUT OF OUR CONTROL, AND WE FELT THAT WE HAD BEEN VERY EVIDENCE BASED IN OUR DELIBERATIONS.

MS. KADE: YOUR HONOR, WE OBJECT TO THE EXTENT THAT DR. WEISMAN IS SPEAKING FOR ANYONE OTHER THAN HERSELF.

THE COURT: SUSTAINED.

BY MR. GOLDMAN:

Q. IF I MAY DIRECT YOU TO PAGE 235, A FEW PAGES IN AT THE BOTTOM, IT SAYS "RESPONSE TO DISSENTING STATEMENT."

DO YOU SEE THAT?

A. YES.

Q. AND THERE ARE A BUNCH OF NAMES AT THE TOP.

WHO ARE THOSE PEOPLE?

A. THOSE ARE ALL THE MEMBERS OF THE COMMITTEE OTHER THAN DR. LO SASSO, AND THAT IS OUR RESPONSE TO HIS DISSENT.

Q. YOUR NAME IS LAST AGAIN, HUH?

A. YEP.

Q. SO WHAT HAPPENED TO THIS REPORT AFTER THE

COMMITTEE WAS FINISHED WITH IT?

A. THE COMMITTEE'S REPORT WENT TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, WHO ACCEPTED THE RECOMMENDATIONS.

Q. ALL EIGHT OF THEM?

A. YES.

Q. IF YOU KNOW, WHEN YOU SAY THAT HRSA ACCEPTED THE RECOMMENDATIONS, DO YOU KNOW IF THAT HAD ANY EFFECT ON THE AFFORDABLE CARE ACT?

A. IT IS MY UNDERSTANDING THAT WHEN THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ACCEPTED THESE RECOMMENDATIONS, THEY THEN BECAME PART OF THE AFFORDABLE CARE ACT DESIGNATED PREVENTIVE SERVICES TO BE COVERED WITHOUT COST SHARING.

Q. AND THAT IS THE LAW THEN, CORRECT?

A. THAT IS MY UNDERSTANDING.

Q. I'D LIKE TO TURN YOUR ATTENTION NOW TO THE RULES WHICH ARE AT ISSUE IN THIS PARTICULAR MATTER. ARE YOU GENERALLY FAMILIAR WITH THESE NEW RULES?

THE COURT: BEFORE YOU GO THERE, MR. GOLDMAN. IF YOU ARE GOING TO GET INTO THIS EITHER LATER ON WITH THIS WITNESS OR WITH ANOTHER WITNESS, PLEASE STOP ME. I WANT TO FOCUS IN ON PENNSYLVANIA. IS THAT SOMETHING THAT YOU INTEND TO RAISE WITH THIS WITNESS LATER ON?

MR. GOLDMAN: IT IS IN SOME WAY, BUT IF YOUR HONOR HAS QUESTIONS --

THE COURT: WELL, LET'S TALK ABOUT -- YOU TALKED ABOUT DATA, AND YOU SAID, I THINK, THAT THE LATEST DATA YOU COULD GET WAS 2011 BECAUSE THE DATA TAKES SOME TIME TO ROLL IN, CORRECT?

THE WITNESS: THE DATA ON UNINTENDED PREGNANCIES?

THE COURT: UNINTENDED PREGNANCIES, OKAY. SO HAVE YOU, EITHER IN THIS CONTEXT OR OUTSIDE OF THIS CONTEXT, LOOKED INTO DATA WITH RESPECT TO UNINTENDED PREGNANCIES IN PENNSYLVANIA?

THE WITNESS: YES.

THE COURT: AND TELL ME THE PERCENTAGE. WHAT IS THE PERCENTAGE OF UNINTENDED PREGNANCIES IN PENNSYLVANIA?

THE WITNESS: IT'S CLOSE TO THE NATIONAL AVERAGE. IT MIGHT BE A LITTLE BIT LOWER, AND I CANNOT REMEMBER THE CURRENT NUMBER.

THE COURT: FAIR TO SAY SOMEWHERE BETWEEN 45 AND 49 PERCENT?

THE WITNESS: THE NATIONAL RATE CURRENTLY IS 45 PERCENT. WE ARE A LITTLE BIT LOWER IN PENNSYLVANIA.

THE COURT: SO SOMEWHERE BETWEEN 40 AND

45 PERCENT?

THE WITNESS: I THINK SO.

THE COURT: AND WHEN YOU SAY YOU THINK SO, WHAT DEGREE OF CERTAINTY DO YOU BRING TO THAT "I THINK SO"?

THE WITNESS: PRETTY CERTAIN. THE GUTTMACHER INSTITUTE PUBLISHES THE STATE-BY-STATE DATA. SO IT WOULD BE EASY TO CHECK ON.

THE COURT: IS THERE ANY POSSIBILITY THAT IT IS BELOW 40 PERCENT?

THE WITNESS: IT COULD BE IN THE HIGH THIRTIES, I'M NOT TOTALLY SURE.

THE COURT: SO IF I WERE TO SAY IT'S SOMEWHERE BETWEEN 35 PERCENT AND 45 PERCENT, THAT WOULD BE ABOUT RIGHT?

THE WITNESS: YES.

THE COURT: OKAY. HAVE YOU DONE ANY RESEARCH INTO THE COSTS OF UNINTENDED PREGNANCIES IN PENNSYLVANIA?

THE WITNESS: I HAVE INVESTIGATED ESTIMATES OF COSTS, BUT NOT RECENTLY.

THE COURT: OKAY. AND WHAT ABOUT HAVE YOU INVESTIGATED THE IMPACT OF PROVIDING NO COST CONTRACEPTION TO WOMEN IN PENNSYLVANIA?

THE WITNESS: YES.

THE COURT: TELL ME ABOUT THAT.

THE WITNESS: SO WE AT PENN STATE DID A RECENT STUDY OF A COHORT OF PRIVATELY-INSURED WOMEN WHO HAD EMPLOYER-BASED HEALTH INSURANCE IN PENNSYLVANIA, AND IN A TWO-YEAR PERIOD FOLLOWING THE PASSAGE OF THE AFFORDABLE CARE ACT, WHICH MEANT THAT THEY ALL HAD CO-PAY -- NO CO-PAYS FOR CONTRACEPTION, THEIR USE OF IUD'S AND IMPLANTS, WHICH ARE THE MOST EFFECTIVE REVERSIBLE FORMS OF CONTRACEPTION, MORE THAN DOUBLED.

THE COURT: SO LOOKING AT YOUR CHART THAT SHOWED THE EFFECTIVENESS OF VARIOUS FORMS OF CONTRACEPTION, IUD'S ARE --

MR. GOLDMAN: PAGE 106, AND IT IS ON THE ELMO, YOUR HONOR.

THE COURT: WHERE DOES IT SAY -- I DON'T SEE THE WORDS IUD.

THE WITNESS: INTRAUTERINE DEVICES, SIX LINES UP.

THE COURT: OKAY. SO DEPENDING ON WHETHER IT'S PARAGARD OR MIRENA --

THE WITNESS: CORRECT.

THE COURT: -- IT'S EITHER -- UNDER "TYPICAL USE," IT'S EITHER .8 OR .20.

THE WITNESS: CORRECT.

THE COURT: AND --

THE WITNESS: AND THE IMPLANT IS RIGHT BELOW THAT.

THE COURT: OKAY. WAS THERE ANY INDICATION, WAS THERE ANY CONTROL DATA SHOWING WHAT THESE WOMEN HAD USED PRIOR TO USING IUD'S?

THE WITNESS: YES, WE KNEW THAT FROM THE STUDY, AND MOST OF THEM HAD BEEN USING BIRTH CONTROL PILLS, BUT SOME HAD BEEN USING NOTHING OR A COMBINATION.

THE COURT: WHEN YOU SAY "MOST," DO YOU RECALL APPROXIMATELY HOW MANY PERCENTAGE WERE USING BIRTH CONTROL PILLS?

THE WITNESS: NO, I DON'T.

THE COURT: BUT THERE IS A DISTINCTION -- I LOOK AT THE BIRTH CONTROL PILLS, IS THAT -- WHERE DO I FIND THAT?

THE WITNESS: SO THAT IS THE "COMBINED PILL AND PROGESTIN-ONLY PILL" WHICH WOULD PRODUCE EIGHT PREGNANCIES PER YEAR OUT OF 100 WOMEN.

THE COURT: SO THERE IS A REDUCTION IN -- TO THE EXTENT YOU CAN HAVE A .2 PREGNANCY, EITHER YOU ARE PREGNANT OR YOU ARE NOT PREGNANT, BUT IT IS, WHAT, A 7.2 REDUCTION --

THE WITNESS: YEAH. I MEAN, ESTIMATING, IT'S ALMOST AN EIGHTFOLD INCREASE, SLIGHTLY LESS THAN THAT RISK.

THE COURT: IF ONE WERE TO USE BIRTH CONTROL RATHER THAN IUD'S?

THE WITNESS: CORRECT.

THE COURT: SO LOOKING AT --

THE WITNESS: IN REDUCING THE RISK.

THE COURT: REDUCING THE RISK BY ABOUT EIGHT PERCENT IF ONE WERE TO USE INTRAUTERINE DEVICES.

THE WITNESS: CORRECT.

THE COURT: SO WHY -- DID YOU REACH ANY CONCLUSIONS AS TO WHY THESE WOMEN WOULD MOVE TO USING IUD'S RATHER THAN OTHER FORMS OF BIRTH CONTROL?

THE WITNESS: YES. BECAUSE HISTORICALLY, COST HAS BEEN A BARRIER TO ADOPTING THESE MOST EFFECTIVE METHODS BECAUSE THE UPFRONT COST OF GETTING AN IUD OR AN IMPLANT IS CONSIDERABLE. AN IUD CAN COST UP TO A THOUSAND DOLLARS, WHEN YOU CONSIDER THE COST OF THE DEVICE ITSELF AND THE VISIT TO HAVE THE DEVICE IMPLANTED. AND AN IMPLANT I BELIEVE COSTS UP TO $500 UP FRONT, AND MANY WOMEN SIMPLY DON'T HAVE THAT KIND OF MONEY TO PAY OUT OF POCKET.

THE COURT: YOU INDICATED THAT THIS STUDY WAS PERFORMED RECENTLY. HOW RECENTLY?

THE WITNESS: BETWEEN 2012 AND 2014.

THE COURT: AND WHAT WAS THE COHORT OF WOMEN IN THE STUDY?

THE WITNESS: IT WAS ABOUT -- OVER 900 PRIVATELY-INSURED WOMEN IN PENNSYLVANIA.

THE COURT: AND YOU AND WHO ELSE DID THE STUDY?

THE WITNESS: COLLEAGUES AT PENN STATE COLLEGE OF MEDICINE, DR. CYNTHIA CHUANG AND OTHERS.

THE COURT: WAS IT PUBLISHED?

THE WITNESS: SOME RESULTS FROM THAT STUDY HAVE BEEN PUBLISHED. THE RESULT I JUST CITED TO YOU HAS NOT YET BEEN PUBLISHED BECAUSE THAT PAPER IS STILL IN PREPARATION.

THE COURT: IF YOU WANT TO FOLLOW UP ON THE QUESTIONS I HAVE ASKED IN THIS PARTICULAR AREA, FEEL FREE IF YOU THINK I'VE MISSED SOMETHING.

MR. GOLDMAN: I THOUGHT YOU DID AN EXCELLENT JOB.

THE COURT: WELL, I APPRECIATE IT.

BY MR. GOLDMAN:

Q. IF I MAY, THE STUDY YOU JUST SPOKE ABOUT CONCERNED ONLY WOMEN IN PENNSYLVANIA.

HAVE YOU BEEN INVOLVED IN ANOTHER STUDY OF LATE INVOLVING -- BASED ON CLAIMS DATA WITH A LARGER COHORT OF WOMEN, NOT JUST IN PENNSYLVANIA BUT AROUND THE COUNTRY?

A. YES. WE HAVE JUST RECENTLY CONCLUDED A NATIONAL

STUDY OF PRIVATELY-INSURED WOMEN USING A HEALTH CLAIMS DATABASE CALLED MARKETSCAN. AND WE WERE ABLE TO LOOK AT TRENDS IN CONTRACEPTIVE USE FROM 2006 THROUGH 2014. AND AS PART OF THAT ANALYSIS, WE FIRST OF ALL LOOKED AT COSTS TO WOMEN, WHICH DECLINED PRECIPITOUSLY TO ZERO, BASICALLY, AFTER THE AFFORDABLE CARE ACT MANDATE WENT INTO EFFECT.

WE ALSO LOOKED AT THE METHODS OF CONTRACEPTION THAT THEY USED OVER THIS TIME PERIOD, AND WE WERE ABLE TO SHOW THAT AFTER THE AFFORDABLE CARE ACT MANDATE WENT INTO EFFECT, THERE WAS A SIGNIFICANT INCREASE IN THE USE OF IUD'S AND IMPLANTS AMONG THESE INSURED WOMEN.

Q. AND THAT STUDY WAS BASED ON CLAIMS DATA?

A. CORRECT.

Q. IS CLAIMS DATA A RELIABLE WAY TO STUDY THIS SORT OF THING?

A. SOME PEOPLE THINK IT'S THE MOST RELIABLE WAY TO STUDY THE USE OF PRESCRIPTION MEDICATIONS IN GENERAL BECAUSE EVERY TIME A PRESCRIPTION IS PROVIDED THERE IS A CLAIM GENERATED, AND SO IT IS A GOOD WAY TO FOLLOW PATTERNS OF PRESCRIBING AND USE OF MEDICATIONS.

Q. AND WHAT STATES WAS THE CLAIMS DATA FROM THE STUDY FROM, IF YOU KNOW?

A. IT'S A NATIONAL DATABASE, SO EMPLOYER-BASED

INSURERS FROM ALL OVER THE COUNTRY PUT THEIR CLAIMS INTO THIS DATABASE. AND I THINK IT IS MOST STATES BUT I CAN'T SAY DEFINITIVELY.

Q. DO YOU KNOW IF PENNSYLVANIA WAS ONE OF THE STATES INCLUDED?

A. YES, IT WAS.

Q. IF I MAY TAKE YOU TO THE RULES NOW THAT ARE AT ISSUE BEFORE THE COURT. AND I WILL -- I DON'T THINK WE HAVE TO LOOK AT THEM SPECIFICALLY HERE, BUT I WOULD LIKE TO NOTE THAT THE RELIGIOUS EXEMPTION RULE IS MARKED AND ADMITTED AS EXHIBIT 1. THE MORAL EXEMPTION RULE IS EXHIBIT 2.

I KNOW THEY ARE LONG, BUT HAVE YOU HAD OCCASION TO READ THE RELIGIOUS EXEMPTION RULE?

A. YES.

Q. AND DO YOU BELIEVE YOU UNDERSTAND IT?

A. I UNDERSTAND PARTS OF IT.

Q. DO YOU UNDER -- DO YOU BELIEVE YOU UNDERSTAND IT SO FAR AS IT WOULD AFFECT WOMEN'S CONTRACEPTIVE CARE?

A. YES.

Q. DO YOU -- HAVE YOU ALSO SIMILARLY READ THE MORAL EXEMPTION RULE?

A. YES.

Q. AND DO YOU SIMILARLY BELIEVE THAT YOU UNDERSTAND IT AS IT WOULD IMPACT WOMEN'S CONTRACEPTIVE CHOICES?

A. YES.

Q. IN YOUR CAPACITY AS AN EXPERT IN THE FIELD OF PREVENTIVE MEDICAL CARE FOR WOMEN, INCLUDING CONTRACEPTIVE CARE, DO YOU HAVE AN OPINION TO A REASONABLE DEGREE OF CERTAINTY AS TO THE LIKELY EFFECT OF THE RULES ON THE HEALTH OF WOMEN IN PENNSYLVANIA?

A. YES.

Q. AND WHAT IS THAT OPINION?

A. THESE RULES OPEN UP THE OPPORTUNITY FOR MORE EMPLOYERS TO OPT OUT OF CONTRACEPTIVE COVERAGE WITHOUT CO-PAYS BY WOMEN. AND WE KNOW FROM A LARGE BODY OF RESEARCH INVOLVING USE OF HEALTHCARE IN GENERAL AND CONTRACEPTION IN PARTICULAR THAT EVEN VERY SMALL CO-PAYS CAN DISCOURAGE USE.

SO IF WOMEN WHO HAVE HAD CO-PAYS UNDER THE AFFORDABLE CARE ACT WERE -- SUDDENLY HAD THAT BENEFIT REMOVED, I FEEL BASED ON WHAT I KNOW OF THIS LITERATURE THAT WE WOULD SEE MORE WOMEN FAILING TO RENEW THEIR PILL PRESCRIPTIONS, NOT OPTING FOR A MORE EFFECTIVE METHOD THAT WOULD HAVE HIGHER UPFRONT COSTS, AND AS A RESULT OF THAT, WE WOULD EXPECT TO SEE AN INCREASE IN THE UNINTENDED PREGNANCY RATE AND MORE ABORTIONS.

Q. DID THAT OPINION YOU SO CLEARLY EXPRESSED, DOES THAT ALSO HOLD TRUE FOR WOMEN OUTSIDE OF PENNSYLVANIA

AND AROUND THE COUNTRY?
A. YES.
Q. DO YOU HOLD ALL OF YOUR OPINIONS THAT YOU HAVE SHARED WITH THE COURT TODAY WITHIN A REASONABLE DEGREE OF CERTAINTY FOR AN EXPERT IN PREVENTIVE MEDICAL CARE FOR WOMEN, INCLUDING CONTRACEPTIVE CARE?
A. YES.
MR. GOLDMAN: YOUR HONOR, IF I MAY HAVE ONE MOMENT TO CONSULT WITH MY CO-COUNSEL.
THE COURT: YES.
MR. GOLDMAN: YOUR HONOR, NOTHING FURTHER WITH THIS WITNESS.
THE COURT: MS. KADE.
MS. KADE: THANK YOU, YOUR HONOR.
PERMISSION TO APPROACH, YOUR HONOR.
THE COURT: YOU MAY.
MS. KADE: THANK YOU, YOUR HONOR.

CROSS EXAMINATION

BY MS. KADE:
Q. DR. WEISMAN, GOOD MORNING.
A. GOOD MORNING.
Q. MY NAME IS ELIZABETH KADE. HOW ARE YOU DOING THIS MORNING?
A. GOOD, THANKS.
Q. FIRST, WHAT DOCUMENTS DID YOU REVIEW IN ORDER TO

PROVIDE YOUR DECLARATION -- TO PREPARE YOUR DECLARATION?
A. MY CV, AND I REREAD THE IOM COMMITTEE REPORT, AND RE-FAMILIARIZED MYSELF WITH SOME OF THE REFERENCES IN THAT REPORT.
Q. IS THAT EVERYTHING?
A. I BELIEVE SO.
Q. AND WHO DID YOU MEET WITH IN ORDER TO PREPARE YOUR DECLARATION?
A. I SPOKE ON THE PHONE WITH JONATHAN AND NICOLE. THAT'S IT.
THE COURT: AND BY JONATHAN AND NICOLE, YOU MEAN JONATHAN GOLDMAN AND NICOLE BOLAND?
THE WITNESS: YES.
THE COURT: THANK YOU. MAKING SURE THE RECORD IS CLEAN.
BY MS. KADE:
Q. TURNING TO YOUR DECLARATION, LOOKING AT PARAGRAPH 44, YOU HAVE TESTIFIED THAT IT IS YOUR OPINION THAT THE NEW RULES WILL CAUSE IMMEDIATE AND IRREVERSIBLE HARM BECAUSE THEY WILL CAUSE WOMEN TO LOSE PREVENTIVE CONTRACEPTIVE CARE UNDER THEIR EMPLOYER GROUP --
I APOLOGIZE. YOU TESTIFIED THAT IT IS YOUR OPINION THAT THE NEW RULES WILL CAUSE IMMEDIATE AND IRREVERSIBLE HARM BECAUSE THEY WILL CAUSE WOMEN TO LOSE PREVENTIVE CONTRACEPTION CARE UNDER THEIR EMPLOYER GROUP

HEALTH PLANS, CORRECT?
A. YES.
Q. DO YOU KNOW HOW MANY RELIGIOUS EMPLOYERS ARE CURRENTLY PROTECTED BY INJUNCTION?
A. I DO NOT. I HAVE SEEN AN ESTIMATE THAT 10 PERCENT OF NONPROFITS HAVE CLAIMED THE EXEMPTION UNDER THE EXISTING RULES.
Q. SO THIS IS BEFORE THE NEW RULES THAT JUST WENT INTO EFFECT. CORRECT?
A. YES, CORRECT.
Q. DO YOU -- AND SO YOU KNOW THAT THE EMPLOYERS THAT ARE PROTECTED BY INJUNCTIONS ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE, CORRECT?
A. YES.
Q. DO YOU KNOW ABOUT THE 2016 ZUBIK INJUNCTION?
A. ONLY IN VERY GENERAL TERMS. I AM NOT A LAWYER.
Q. I APPRECIATE THAT, THANK YOU.
DO YOU HAVE ANY REASON TO DOUBT THAT THERE WAS ANOTHER INJUNCTION IN 2016 THAT WE'RE REFERRING TO COLLECTIVELY AS THE ZUBIK INJUNCTION?
A. NO.
Q. DO YOU KNOW THAT THE ENTITIES PROTECTED BY THE ZUBIK INJUNCTION ARE ALSO NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE?
A. YES.

Q. WHEN WAS THE "MY NEW OPTIONS" STUDY THAT YOU WERE REFERRING TO EARLIER, WHEN WAS THAT CONDUCTED?

A. THAT WAS CONDUCTED IN 2012 -- 2012 THROUGH 2014.

Q. CAN YOU IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS LOST COVERAGE AS A RESULT OF THE NEW RULES?

A. NO.

Q. CAN YOU IDENTIFY A SINGLE WOMAN IN THE UNITED STATES WHO HAS LOST COVERAGE AS A RESULT OF THE NEW RULES?

A. NO.

Q. YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS AN EXPERT ON INSURANCE MARKETPLACES, RIGHT?

A. CORRECT.

Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS AN EXPERT ON THE GOVERNMENT'S DECISION-MAKING PROCESS UNDER THE ADMINISTRATIVE PROCEDURE ACT, CORRECT?

A. CORRECT.

Q. I WANT TO TURN TO ANOTHER PARAGRAPH IN YOUR DECLARATION, PARAGRAPH 22. YOU HAVE TESTIFIED THAT IT IS YOUR OPINION THAT THE NEW RULES ARE NOT BASED UPON SOUND SCIENTIFIC OR EMPIRICAL EVIDENCE; IS THAT RIGHT?

A. CORRECT.

Q. AND HAVE YOU READ THE RULES THAT ARE AT ISSUE IN THIS CASE IN THEIR ENTIRETY?

A. YES, ALTHOUGH I FOCUSED ON THE SECTIONS HAVING

TO DO WITH CONTRACEPTION EFFECTIVENESS AND THE IOM REPORT.

Q. HAVE YOU READ ALL OF THE EVIDENCE THAT THE RULES RELY UPON AND CITE?

A. I WOULD NOT SAY ALL OF IT, BUT SOME OF IT.

Q. I'M GOING TO TURN TO A SPECIFIC PAGE, 47804 OF THE FEDERAL REGISTER, SO THIS IS EXHIBIT 1, AND IT SHOULD BE PAGE 46 OF THAT EXHIBIT.

A. WHAT TAB IS THAT?

Q. IT IS THE FIRST TAB. I'M ALSO GOING TO PUT IT ON THE ELMO FOR EVERYONE.

THIS IS TAB 1, PAGE 47804 OF THE FEDERAL REGISTER.

A. GOT IT.

Q. YOU HAVE SERVED ON THE EDITORIAL BOARD OF WOMEN'S HEALTH ISSUES SINCE 1990, CORRECT?

A. CORRECT.

Q. SO WOULD YOU SAY THAT IS A PUBLICATION THAT IS GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY?

A. YES.

Q. AND THE RULES SAY -- I'M LOOKING AT THE FIRST -- START OF THE FIRST FULL PARAGRAPH THAT STARTS WITH "SIMILARLY" ON THE LEFT-HAND SIDE: SIMILARLY, AT A STUDY INVOLVING OVER 8,000 WOMEN BETWEEN 2012 AND 2015 CONDUCTED TO DETERMINE WHETHER CONTRACEPTIVE COVERAGE

UNDER THE MANDATE CHANGED CONTRACEPTIVE USE PATTERNS, THE GUTTMACHER INSTITUTE CONCLUDED THAT WE HAVE OBSERVED NO CHANGES IN CONTRACEPTIVE USE PATTERNS AMONG SEXUALLY ACTIVE WOMEN. AND THAT CITES FOOTNOTE 31, WHICH IS AN ARTICLE ENTITLED: DID CONTRACEPTIVE USE HABITS CHANGE AFTER THE AFFORDABLE CARE ACT? A DESCRIPTIVE ANALYSIS, WHICH WAS PUBLISHED IN THE MAY TO JUNE 2017 ISSUE OF WOMEN'S HEALTH ISSUES; IS THAT CORRECT?

A. YES.

Q. YOU WERE ON THE COMMITTEE THAT PRODUCED THE 2011 IOM REPORT, CORRECT?

A. YES.

Q. SO LOOKING JUST BELOW WHERE THE REFERENCE TO PARAGRAPH 31, THE SENTENCE THAT STARTS WITH "WITH," THE RULES SAY: WITH RESPECT TO TEENS, THE SANTELLI AND MELNIKAS STUDY CITED BY IOM IN 2011 OBSERVES THAT BETWEEN 1960 AND 1990 AS CONTRACEPTIVE USE INCREASED, TEEN SEXUAL ACTIVITY OUTSIDE OF MARRIAGE LIKEWISE INCREASED, ALTHOUGH THE STUDY DID NOT ASSERT A CAUSAL RELATIONSHIP. IS THAT CORRECT?

A. YES.

Q. THE NATIONAL INSTITUTES OF HEALTH IS A ORGANIZATION THAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY; IS THAT CORRECT?

A. YES.

Q. THE RULES ALSO CITE IN THIS MIDDLE PARAGRAPH, JUST AGAIN, CONTRACEPTION'S ASSOCIATION, BUT I WILL START READING FROM THE SECOND SENTENCE IN THAT PARAGRAPH: THE RULES SAY, IN 2013, THE NATIONAL INSTITUTES OF HEALTH INDICATED IN FUNDING OPPORTUNITY ANNOUNCEMENT FOR THE DEVELOPMENT OF NEW CLINICALLY USEFUL FEMALE CONTRACEPTIVE PRODUCTS --

THE COURT: I'M SORRY. I'M NOT FOLLOWING YOU. WHERE ARE YOU IN THIS PARAGRAPH?

MS. KADE: I'M SORRY, YOUR HONOR. I'M IN THE MIDDLE COLUMN, THE PARAGRAPH THAT STARTS WITH CONTRACEPTION'S ASSOCIATION.

THE COURT: GOT IT.

MS. KADE: AND IN 2013, THE NATIONAL INSTITUTES OF HEALTH.

THE COURT: OKAY.

BY MS. KADE:

Q. SO THEY INDICATED THAT HORMONAL CONTRACEPTIVES HAVE THE DISADVANTAGE OF HAVING MANY UNDESIRABLE SIDE EFFECTS, ARE ASSOCIATED WITH ADVERSE EVENTS, AND OBESE WOMEN ARE AT HIGHER RISK FOR SERIOUS COMPLICATIONS SUCH AS DEEP VENOUS THROMBOSIS; IS THAT CORRECT?

A. YES.

Q. JAMA PSYCHIATRY IS A PUBLICATION THAT IS GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY,

CORRECT?
A. YES.
Q. IT'S PUBLISHED BY THE AMERICAN MEDICAL ASSOCIATION?
A. CORRECT.
Q. IT IS PEER REVIEWED?
A. YES.
Q. I'M GOING TO FOCUS EVERYONE'S ATTENTION TO FOOTNOTE 39. I REALIZE THE FONT IS GETTING SMALLER. BUT FOOTNOTE 39 CITES A 2016 JAMA PSYCHIATRY PUBLICATION ON THE ASSOCIATION OF HORMONAL CONTRACEPTION WITH DEPRESSION; IS THAT CORRECT?
A. YES.
Q. I WANT TO TURN TO THE 2011 IOM REPORT. THE 2011 IOM REPORT DID NOT STUDY THE EFFECT OF RELIGIOUS EXEMPTIONS, CORRECT?
A. CORRECT.
Q. AND THE 2011 IOM REPORT DID NOT STUDY THE EFFECT OF MORAL EXEMPTIONS, CORRECT?
A. YES.
Q. AND THE IOM PANEL DID NOT INVITE ANY SPEAKERS TO TESTIFY CONCERNING EXEMPTIONS FROM THE MANDATE, CORRECT?
A. CORRECT.
MS. KADE: THANK YOU, DR. WEISMAN.
THANK YOU, YOUR HONOR. I HAVE NOTHING

FURTHER.

THE COURT: OKAY. THANK YOU VERY MUCH. DO YOU HAVE ANY RECROSS?

MR. GOLDMAN: VERY BRIEFLY, IF I MAY APPROACH, YOUR HONOR.

RECROSS EXAMINATION

BY MR. GOLDMAN:

Q. COUNSEL ASKED YOU IF YOU HAD READ ALL OF THE SOURCES CITED IN THE COMMITTEE'S REPORT. I WANT TO ASK YOU, ARE YOU FAMILIAR WITH ALL OF THE SOURCES CITED IN THE COMMITTEE'S REPORT, SPECIFICALLY IN THE AREA OF CONTRACEPTION?

A. I AM FAMILIAR WITH REFERENCES 30 AND 31.

Q. I'M SORRY, DR. WEISMAN. I BELIEVE COUNSEL WAS REFERRING TO THE COMMITTEE'S REPORT AND NOT THE FEDERAL REGISTER.

A. WELL, I'M CONFUSED BECAUSE SHE ASKED ABOUT BOTH.

THE COURT: AS I UNDERSTAND IT, THE QUESTION WAS ABOUT HAVE YOU READ THE FEDERAL REGISTER. YOU SAID YES, I HAVE AND I FOCUSED ON THE CONTRACEPTIVE AND PREVENTIVE CARE COMPONENTS.

THE WITNESS: YES.

BY MR. GOLDMAN:

Q. ARE YOU FAMILIAR WITH THE SOURCES THAT COUNSEL ASKED YOU ABOUT?

A. YES. MOST OF THEM.
Q. AND DO YOU AGREE WITH THEM FOR THE PREMISES THEY ARE CITED FOR HERE?
A. NO.
Q. AND WHY IS THAT?
A. BECAUSE I THINK THEY ARE SELECTIVE COMMENTS WHICH DO NOT FULLY REFLECT THE BODY OF EVIDENCE THAT IS AVAILABLE. DO YOU WANT ME TO SAY MORE?
Q. PLEASE. GO ON.
A. SO THE FIRST REFERENCE THAT I WAS ASKED ABOUT WAS THIS FOOTNOTE 31, BEARAK AND JONES FOOTNOTE, THE PUBLICATION FROM THE GUTTMACHER INSTITUTE. AND IT IS CORRECT THAT THE ABSTRACT FOR THAT ARTICLE SAYS WE OBSERVE NO CHANGES IN CONTRACEPTIVE USE PATTERNS AMONG SEXUALLY ACTIVE WOMEN, BUT THAT STUDY FOUND AN IMPROVEMENT IN CONTRACEPTIVE USE, AN INCREASED USE OF CONTRACEPTION AMONG YOUNG WOMEN WHO WERE NOT SEXUALLY ACTIVE IN THE LAST MONTH, WHICH SUGGESTS THAT YOUNGER WOMEN WERE RESPONSIBLY -- MORE RESPONSIBLY USING CONTRACEPTION IN THAT STUDY. THAT IS NOT NOTED HERE.
Q. AND HOW ABOUT THE OTHER SOURCES?
A. SO THE SANTELLI REFERENCE WHICH COMES NEXT REGARDING TEEN PREGNANCIES, SANTELLI AND CO-AUTHORS JUST PUBLISHED A PAPER IN 2016 SHOWING THAT TEEN PREGNANCIES HAVE DECLINED MORE RECENTLY AND THAT THERE HAS BEEN NO

CONCOMITANT INCREASE IN SEXUAL ACTIVITY AMONG TEENS.

Q. DO YOU HAVE ANY OTHER EXAMPLES OF REASONS WHY YOU DISAGREE WITH THE CONCLUSIONS DRAWN FROM THE STUDIES THAT WERE CITED?

A. WELL, THE POINT ABOUT RISKS OF HORMONAL CONTRACEPTION AND THE POINT ABOUT RISK OF DEPRESSION IN CONTRACEPTIVE USE, I WOULD SAY THAT THE IMPLICATION IS THAT THIS IS SOMETHING NEW OR IMPORTANT, WHEN, IN FACT, THE MEDICAL COMMUNITY IS AWARE OF SIDE EFFECTS OF ALL KINDS OF CONTRACEPTION, AND THAT IS TAKEN INTO ACCOUNT IN COUNSELING WOMEN ABOUT THE APPROPRIATENESS OF THE METHODS THAT THEY CHOOSE, AND IT'S ANOTHER REASON WHY THE INSTITUTE OF MEDICINE COMMITTEE RECOMMENDED THAT ALL METHODS BE MADE AVAILABLE TO WOMEN SO THAT THEY CAN OPTIMALLY CHOOSE A METHOD THAT IS APPROPRIATE FOR THEM.

Q. AND, IN FACT, YOU TESTIFIED BEFORE THAT THE COMMITTEE TOOK NEGATIVE EFFECTS OF CONTRACEPTION INTO ACCOUNT IN MAKING ITS RECOMMENDATIONS, CORRECT?

A. YES.

Q. IF I MAY, ARE YOU FAMILIAR WITH A NEW REPORT INVOLVING MODERN HORMONAL CONTRACEPTION THAT WAS PERFORMED IN DANISH WOMEN THAT WAS RECENTLY IN THE FRONT PAGE -- IN THE NEW YORK TIMES?

A. YES.

Q. AND CAN YOU TELL US ABOUT THAT STUDY?

A. THAT STUDY WAS JUST PUBLISHED, AND IT'S BASED ON A LARGE SAMPLE OF DANISH WOMEN, AND IT FOUND A 1.2 RELATIVE RISK FOR BREAST CANCER AMONG WOMEN WHO USED HORMONAL METHODS OF CONTRACEPTION OVER TIME. WHAT THIS STUDY CONTRIBUTES IS THAT IT OBSERVED WOMEN WHO WERE USING THE MORE MODERN HORMONAL METHODS OF CONTRACEPTION AS OPPOSED TO OLDER ONES, BUT ITS FINDING OF A SMALL ELEVATED RISK FOR BREAST CANCER ASSOCIATED WITH USE OF HORMONAL METHODS IS NOT NEW. THAT HAS BEEN KNOWN FOR SOME TIME BASED ON STUDIES OF THE OLDER HORMONAL METHODS. AND IT IS TAKEN INTO ACCOUNT IN COUNSELING WOMEN ABOUT THE RISKS AND SIDE EFFECTS OF CONTRACEPTION. AND IT NEEDS TO BE BALANCED AGAINST OTHER STUDIES THAT SHOW HORMONAL METHODS OF CONTRACEPTION TO BE PROTECTIVE, THAT IS TO REDUCE THE RISKS OF OTHER CANCERS, OVARIAN CANCER, ENDOMETRIAL CANCER AND COLORECTAL CANCER. SO THERE ARE -- THERE IS A BALANCING REQUIRED IN MAKING A DECISION ABOUT A CONTRACEPTIVE CHOICE.

MS. KADE: YOUR HONOR, WITH THIS ANSWER, WE APPEAR TO BE BEYOND THE SCOPE OF CROSS.

THE COURT: WELL, I DON'T THINK WE ARE, BECAUSE YOU TALKED SPECIFICALLY ABOUT THOSE IMPACTS OF CONTRACEPTION.

BUT I DO THINK YOU SHOULD MOVE ON BECAUSE THIS IS NOT A FOCUS OF MY CONCERN.

MR. GOLDMAN: NOTHING FURTHER, YOUR HONOR.

THE COURT: OKAY. LET ME TALK TO YOU ABOUT A FOCUS OF MY CONCERN. I WANT YOU -- YOU SAID YOU HAD READ THE GUTTMACHER INSTITUTE STUDY SET FORTH IN FOOTNOTE 31.

THE WITNESS: BEARAK AND JONES, YES.

THE COURT: RIGHT. YOU ALSO TOLD ME ABOUT A STUDY WHICH IS CURRENTLY UNPUBLISHED THAT YOU PERFORMED. I WANT TO COMPARE AND CONTRAST THEM TO SEE WHETHER WE ARE TALKING ABOUT APPLES AND ORANGES OR JUST APPLES.

SO THE GUTTMACHER INSTITUTE STUDY WAS TO DETERMINE WHETHER CONTRACEPTIVE COVERAGE UNDER THE MANDATE CHANGED CONTRACEPTIVE USAGE PATTERNS. WAS THAT THE SAME PROPOSITION THAT YOU WERE ANALYZING IN YOUR STUDY?

THE WITNESS: YES, ALTHOUGH OUR STUDY LOOKED AT BOTH COSTS AND CONTRACEPTIVE USE PATTERNS.

THE COURT: AND DO YOU KNOW WHEN -- THIS IS -- THIS IS WOMEN BETWEEN 2012 AND 2015 IN THIS GUTTMACHER STUDY, IS THAT CORRECT?

WELL, THAT IS WHAT IT SAYS HERE.

THE WITNESS: THAT IS -- YES.

THE COURT: SO WHEN WAS YOUR STUDY DONE,

WHAT COHORT? WHAT WAS THE TIME FRAME OF YOURS?

THE WITNESS: THE PENNSYLVANIA STUDY?

THE COURT: YES.

THE WITNESS: 2012 THROUGH 2014.

THE COURT: AND HERE IT SAYS THE GUTTMACHER FOLKS DID 8,000 WOMEN. AND YOU TOLD ME YOU HAD HOW MANY WOMEN?

THE WITNESS: IN OUR PENNSYLVANIA STUDY, 900-SOME.

THE COURT: SO DO YOU KNOW WHETHER IN THOSE 8,000 WOMEN THERE WERE ANY PENNSYLVANIA WOMEN?

THE WITNESS: I DON'T, BECAUSE THESE WERE TWO SURVEYS DONE BY THE GUTTMACHER INSTITUTE, AND I DON'T KNOW HOW THEY SELECTED THOSE PARTICIPANTS.

THE COURT: WHAT IS THE GUTTMACHER INSTITUTE?

THE WITNESS: THE GUTTMACHER INSTITUTE IS A PRIVATE NOT-FOR-PROFIT RESEARCH INSTITUTE THAT FOCUSES ON REPRODUCTIVE HEALTH ISSUES IN THE UNITED STATES AND GLOBALLY.

THE COURT: IS IT AFFILIATED WITH ANY POLITICAL VIEWPOINT?

THE WITNESS: NO.

THE COURT: DO YOU KNOW WHETHER THIS PAPER, THE BEARAK AND JONES PAPER WAS PEER REVIEWED?

THE WITNESS: YES, IT WAS.

THE COURT: WHAT I HAVE BEEN TRYING TO ESTABLISH WAS SIMILARITIES AND DIFFERENCES. ARE THERE ANY DIFFERENCES THAT I HAVE NOT IDENTIFIED AT THIS POINT BETWEEN YOUR STUDY AND THE GUTTMACHER INSTITUTE STUDY APART FROM THE CONCLUSION AS SET FORTH IN THE FEDERAL REGISTER AS MODIFIED BY YOUR TESTIMONY WITH RESPECT TO THE CONCLUSION?

THE WITNESS: I DON'T THINK SO.

THE COURT: OKAY. THANK YOU.

BY MR. GOLDMAN:

Q. VERY BRIEFLY. IS THIS GUTTMACHER INSTITUTE STUDY, DO YOU KNOW IF THIS WAS BASED ON CLAIMS DATA IN THE WAY THE OTHER STUDY YOU SPOKE ABOUT?

A. IT WAS NOT. IT WAS BASED ON SURVEY DATA.

Q. AND IS THERE A DIFFERENCE IN RELIABILITY BETWEEN SURVEY DATA AND CLAIMS DATA?

A. THERE ARE THOSE WHO THINK THAT SURVEY DATA ARE LESS RELIABLE IN STUDYING CONTRACEPTIVE USE PATTERNS BECAUSE PEOPLE HAVE RECALL PROBLEMS AND MAY NOT RESPOND ACCURATELY. BUT HAVING SAID THAT, OUR MOST DEFINITIVE SOURCE OF INFORMATION ABOUT CONTRACEPTIVE USE AND UNINTENDED PREGNANCY IS THE NATIONAL SURVEY OF FAMILY GROWTH WHICH IS AN ONGOING NATIONAL SURVEY OF WOMEN ACROSS THE COUNTRY CONDUCTED BY THE FEDERAL GOVERNMENT.

Q. AND YOU HAD REFERRED BEFORE WHEN WE WERE SPEAKING TO A NATIONAL STUDY INCLUDING PENNSYLVANIA WOMEN THAT WAS BASED ON CLAIMS DATA?

A. CORRECT.

Q. AND HOW DO THE FINDINGS YOU HAVE FOUND FROM THAT STUDY COMPARE WITH THE GUTTMACHER INSTITUTE STUDY?

A. SO THE GUTTMACHER STUDY WAS NOT LOOKING AT COSTS. I BELIEVE IT WAS ONLY LOOKING AT CONTRACEPTIVE USE PATTERNS. OUR STUDY LOOKED AT BOTH, BUT WE FOUND, AS I MENTIONED BEFORE, A STATISTICALLY SIGNIFICANT INCREASE IN USE OF IUD'S AND IMPLANTS IN THE YEARS FOLLOWING THE AFFORDABLE CARE ACT. AND UNLIKE THE GUTTMACHER STUDY, WE HAD DATA BEFORE THE AFFORDABLE CARE ACT WENT INTO EFFECT AND AFTER THE AFFORDABLE CARE ACT WENT INTO EFFECT. THEIR DATA ARE ALL POST, POST AFFORDABLE CARE ACT.

MR. GOLDMAN: NOTHING FURTHER, YOUR HONOR, UNLESS YOU HAVE ANYTHING ELSE.

THE COURT: I HAVE NOTHING.

ANY RECROSS?

MS. KADE: NO, YOUR HONOR. JUST FOR THE RECORD, WE WOULD RENEW OUR OBJECTION TO THE EXPERT TESTIMONY TO THE EXTENT IT IS BEING OFFERED TO DETERMINE THE CORRECTNESS OF THE WISDOM OF THE AGENCY'S DECISION IN THIS APA CASE, YOUR HONOR.

THE COURT: YES, I UNDERSTAND.

YOU CAN LEAVE THE BENCH. THANK YOU.

WE WILL TAKE A BRIEF BREAK, AND WE WILL BE BACK IN TEN MINUTES.

THE CLERK: ALL RISE.

(WITNESS EXCUSED.)

(BREAK TAKEN.)

MR. GOLDMAN: THE COMMONWEALTH WOULD LIKE TO CALL DR. SAMANTHA BUTTS TO THE STAND, PLEASE.

MAY I APPROACH, YOUR HONOR.

THE COURT: YOU MAY.

SWEAR THE WITNESS.

THE CLERK: PLEASE RAISE YOUR RIGHT HAND AND STATE YOUR NAME FOR THE RECORD.

THE WITNESS: SAMANTHA BUTTS.

(DR. SAMANTHA BUTTS, COMMONWEALTH'S WITNESS, SWORN.)

THE CLERK: STATE AND SPELL YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: FIRST NAME IS S-A-M-A-N-T-H-A. LAST NAME IS BUTTS, B-U-T-T-S.

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. WILL YOU PLEASE STATE YOUR NAME FOR THE RECORD, DR. BUTTS?

A. SAMANTHA BUTTS.
Q. AND WHAT DO YOU DO FOR A LIVING?
A. I AM AN OBSTETRICIAN GYNECOLOGIST. I SPECIALIZE IN THE AREA OF REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY.
Q. THERE IS A WITNESS EXHIBIT BINDER IN FRONT OF YOU. IF I COULD DIRECT YOU TO EXHIBITS 8 AND 9 WHICH ARE ALREADY ADMITTED INTO EVIDENCE, I'D LIKE YOU JUST TO LOOK AT THOSE AND TELL ME IF YOU RECOGNIZE THEM, AND ASK YOU WHAT THEY ARE?
A. THESE ARE MY DECLARATIONS PURSUANT TO THIS CASE.
Q. AND THE WAY THE COPY IS ON TAB 9, IF YOU LOOK TO THE BACK OF THAT FIRST PAGE, WHAT IS THAT DOCUMENT?
A. THIS LOOKS LIKE MY CURRICULUM VITAE.
Q. OKAY. THE QUESTIONS ARE NOT HARD. I JUST WANTED YOU TO IDENTIFY.
ARE YOU ABLE TO BRIEFLY LOOK THROUGH THOSE DOCUMENTS AND JUST CONFIRM IF THERE ARE ANY INACCURACIES IN THEM OR IF YOU BELIEVE THEY ARE ACCURATE?
A. THE DOCUMENTS LOOK ACCURATE AND CURRENT.
Q. THANK YOU.
I WANTED TO ASK YOU BRIEFLY ABOUT YOUR EDUCATION. WHERE DID YOU GO TO COLLEGE?
A. I WENT TO HARVARD COLLEGE.

Q. AND WHEN DID YOU GRADUATE?

A. IN 1994.

Q. AND WHAT DID YOU DO AFTER THAT?

A. I WENT TO MEDICAL SCHOOL, ALSO AT HARVARD.

Q. AND WHEN DID YOU GRADUATE FROM THERE?

A. IN 1998.

Q. DID YOU DO A RESIDENCY AFTER THAT?

A. I DID. I DID A RESIDENCY IN OBSTETRICS AND GYNECOLOGY AT THE UNIVERSITY OF PENNSYLVANIA.

Q. AND DURING WHAT YEARS DID YOU DO YOUR RESIDENCY?

A. FROM 1992 -- PARDON ME, 1998 TO 2002.

Q. AND DID YOU DO A FELLOWSHIP ALSO?

A. I DID A SUBSPECIALTY FELLOWSHIP IN REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY FROM 2002 UNTIL 2005, ALSO AT THE UNIVERSITY OF PENNSYLVANIA.

Q. SO YOU'VE USED THE PHRASE REPRODUCTIVE ENDOCRINOLOGY AT LEAST TWICE.

A. YES.

Q. WHAT DOES THAT MEAN?

A. SO REPRODUCTIVE ENDOCRINOLOGY IS THE FIELD OF MEDICINE THAT INVESTIGATES HOW HORMONES AFFECT REPRODUCTIVE FUNCTIONING AND DISORDERS IN WOMEN.

Q. DO YOU HAVE ANY OTHER RELEVANT EDUCATION HERE TODAY?

A. I RECEIVED A MASTERS IN CLINICAL EPIDEMIOLOGY

AND BIOSTATISTICS AT THE UNIVERSITY OF PENNSYLVANIA DURING MY FELLOWSHIP IN REPRODUCTIVE ENDOCRINOLOGY.

Q. HOW MANY YEARS WAS THAT MASTERS PROGRAM?

A. THREE YEARS, 2003 UNTIL 2006.

Q. ARE YOU BOARD CERTIFIED?

A. I AM BOARD CERTIFIED BOTH IN GENERAL OBSTETRICS AND GYNECOLOGY AND IN REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY.

Q. WAS THE REPRODUCTIVE ENDOCRINOLOGY AND FERTILITY, IS THAT PART OF YOUR BOARD CERTIFICATION OR IS THAT A SUBSPECIALITY?

A. IT'S SUBSPECIALTY BOARD CERTIFICATION.

Q. I WOULD LIKE TO ASK YOU BRIEFLY ABOUT YOUR CURRENT WORK. WHERE DO YOU CURRENTLY WORK?

A. I AM ON -- I WORK AT THE UNIVERSITY OF PENNSYLVANIA HOSPITAL AS A REPRODUCTIVE ENDOCRINOLOGIST THERE, AND I'M ON THE FACULTY OF THE MEDICAL SCHOOL AT THE UNIVERSITY OF PENNSYLVANIA.

MR. GOLDMAN: YOUR HONOR, JUST IN THE INTEREST OF TIME FOR THESE BACKGROUND QUESTIONS, MAY I ASK FOR PERMISSION TO LEAD?

THE COURT: YOU CAN GO AHEAD, AND IF YOU ARE GOING TO OBJECT -- AT A POINT YOU FEEL IT IS OBJECTIONABLE, YOU'RE GOING TO GET UP AND TELL ME.

MS. KADE: THANK YOU, YOUR HONOR.

BY MR. GOLDMAN:

Q. AT THE UNIVERSITY OF PENNSYLVANIA MEDICAL SCHOOL AND HOSPITAL, DO YOU WORK AS A DOCTOR?

A. YES.

Q. DO YOU ALSO WORK AS A PROFESSOR?

A. I DO.

Q. DO YOU ALSO DO CLINICAL RESEARCH?

A. I DO.

Q. DO YOU ALSO PUBLISH ARTICLES AND SPEAK?

A. I DO.

Q. GENERALLY SPEAKING, WHAT KIND OF DOCTOR ARE YOU? WHAT DO YOU DO FOR YOUR PATIENTS?

A. I SEE PATIENTS WHO COME FOR THE EVALUATION OF INFERTILITY, SO HAVING DIFFICULTY ACHIEVING A PREGNANCY. IN THE REPRODUCTIVE ENDOCRINE COMPONENT OF WHAT I DO, I SEE WOMEN WHO SUFFER FROM A VARIETY OF DISORDERS, INCLUDING DISORDERS OF MENSTRUATION, CHRONIC PELVIC PAIN AND OTHER REPRODUCTIVE DISORDERS THAT I TREAT.

Q. IN YOUR FERTILITY WORK, YOU ACTUALLY HELP WOMEN HAVE BABIES?

A. THAT'S CORRECT.

Q. IN YOUR ROLE AS PROFESSOR, IS YOUR TITLE ASSOCIATE PROFESSOR?

A. YES.

Q. AND ARE YOU TENURED?

A. YES, I AM.

Q. AND DO YOU TEACH AND RESEARCH AS PART OF THAT ROLE AS PROFESSOR?

A. I DO.

Q. WHO DO YOU TEACH?

A. I TEACH MEDICAL STUDENTS, RESIDENTS IN OBSTETRICS AND GYNECOLOGY, AND FELLOWS TRAINING IN REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY.

Q. I WILL COME BACK TO YOUR MEDICAL PRACTICE WITH PATIENTS, BUT YOUR PROFESSORIAL DUTIES, ROUGHLY HOW MANY HOURS A WEEK DOES THAT TAKE?

A. APPROXIMATELY 5 TO 10 HOURS PER WEEK.

Q. MOVING ON TO YOUR WORK AS A CLINICAL RESEARCHER, ROUGHLY HOW MANY HOURS A WEEK DOES THAT TAKE?

A. THERE IS OVERLAP WITH MY RESPONSIBILITIES AS AN ASSOCIATE PROFESSOR, BUT I WOULD SAY APPROXIMATELY 5 TO 10 HOURS PER WEEK, WITH SOME OVERLAP BETWEEN THEM.

Q. SO THAT NUMBER INCLUDES THE OVERLAP, CORRECT?

A. CORRECT.

Q. HAS ANY OF YOUR RESEARCH BEEN FUNDED BY GRANTS?

A. YES.

Q. AND COULD YOU NAME A FEW OF THE GRANTS YOU HAVE BEEN FUNDED BY?

A. I HAVE BEEN FUNDED BY THE NATIONAL INSTITUTES OF HEALTH, THE NATIONAL INSTITUTES OF ENVIRONMENTAL HEALTH

SERVICES, AND OTHER FOUNDATIONS AND INTRAMURAL SOURCES AT THE UNIVERSITY OF PENNSYLVANIA.

MR. GOLDMAN: YOUR HONOR, I'M GOING TO SKIP OVER QUESTIONS ABOUT HER -- THE DOCTOR'S CURRENT PROJECTS AND PUBLICATIONS, SINCE THEY ARE IN THE RECORD, BUT I JUST WANTED TO POINT OUT THAT THEY ARE AVAILABLE.

BY MR. GOLDMAN:

Q. BUT I WOULD LIKE TO FOCUS ON YOUR WORK AS A MEDICAL DOCTOR. ROUGHLY HOW MANY HOURS A WEEK DO YOU WORK?

A. ROUGHLY 50 TO 70 HOURS PER WEEK IS THE RANGE.

Q. AND WHY IS THERE THAT RANGE?

A. THERE IS A RANGE THAT DEPENDS ON PROCEDURES THAT I ALSO DO. I FAILED TO MENTION BEFORE THAT AS PART OF MY WORK I ALSO DO SURGICAL PROCEDURES FOR WOMEN, AND I ALSO TAKE CALL ON AN APPROXIMATELY MONTHLY BASIS. SO THAT REQUIRES WORK AT NIGHTS AND ON THE WEEKENDS WHEN I AM ON CALL.

Q. AND THAT 50 TO 70 HOURS A WEEK, THAT IS ON TOP OF YOUR TEACHING AND RESEARCH?

A. CORRECT.

Q. DO YOU PRESCRIBE CONTRACEPTION WHEN YOU TREAT YOUR PATIENTS?

A. I DO.

Q. AND ARE YOU FAMILIAR WITH THE AFFORDABLE CARE

ACT?
A. I AM.
Q. ARE YOU FAMILIAR WITH THE CONTRACEPTIVE MANDATE THAT IS PART OF THE AFFORDABLE CARE ACT?
A. YES.
Q. ARE YOU FAMILIAR WITH THE NEW MORAL EXEMPTION RULE AND RELIGIOUS EXEMPTION RULE --
A. I AM.
Q. -- WHICH ARE AT ISSUE BEFORE THE COURT TODAY?
MR. GOLDMAN: BEFORE I PROCEED FURTHER, YOUR HONOR, I WOULD LIKE TO PROFFER THIS WITNESS, DR. SAMANTHA BUTTS, BASED ON HER KNOWLEDGE, EDUCATION, TRAINING AND EXPERIENCE, AS AN EXPERT IN THE AREA OF WOMEN'S REPRODUCTIVE HEALTH.
THE COURT: ANY OBJECTION?
MS. KADE: YES, YOUR HONOR. WE OBJECT FOR FAILURE TO DISCLOSE AS AN EXPERT AS WELL AS TO HER EXPERT TESTIMONY TO THE EXTENT IT IS BEING OFFERED TO DETERMINE THE CORRECTNESS OR WISDOM OF THE AGENCY'S DECISION IN THIS ACA CASE, YOUR HONOR.
THE COURT: I UNDERSTAND.
IS THE SCOPE AS NARROW OR -- THAN DESCRIBED BY MS. KADE OR IS IT --
MR. GOLDMAN: THE TESTIMONY WILL BE ABOUT WHAT SHE HAS SEEN IN HER OWN PRACTICE AS IT APPLIES TO

WOMEN'S REPRODUCTIVE HEALTH.

THE COURT: OKAY. SO SHE IS NOT GOING TO TESTIFY SPECIFICALLY ABOUT WHETHER OR NOT THE TWO EXEMPTIONS ARE APPROPRIATE?

MR. GOLDMAN: NO.

THE COURT: OKAY. SO THAT IS ONE OF YOUR OBJECTIONS, CORRECT?

MS. KADE: YES, YOUR HONOR.

THE COURT: AND THE OTHER ONE I OVERRULE.

MS. KADE: THANK YOU, YOUR HONOR.

THE COURT: GO AHEAD.

BY MR. GOLDMAN:

Q. RETURNING TO YOUR PATIENT WORK, DOCTOR, WHERE DO YOU -- WHERE DO YOUR PATIENTS COME FROM?

A. MY PATIENTS -- I HAVE A DIVERSE PATIENT POPULATION. THEY COME FROM MANY SOURCES. MANY ARE SELF-REFERRED. SOME ARE REFERRED FROM OTHER PHYSICIANS IN THE HEALTH SYSTEM AND SOME ARE EMPLOYEES IN THE UNIVERSITY OF PENNSYLVANIA -- AT THE UNIVERSITY OF PENNSYLVANIA, BUT THEY COME FROM MANY SOURCES.

Q. DO PATIENTS COME TO SEE YOU FROM AROUND THE WORLD?

A. YES.

Q. DO YOU ALSO SERVE AS A WEST PHILADELPHIA COMMUNITY HOSPITAL DOCTOR?

A. I DO.
Q. AND YOU ALSO HAVE PATIENTS WHO ARE STUDENTS AND PROFESSORS AT PENN, CORRECT?
A. YES.
Q. ROUGHLY HOW MANY PATIENTS DO YOU SEE A YEAR?
A. APPROXIMATELY 1500 PATIENTS PER YEAR, AND THERE CAN BE SOME VARIATION WHERE THAT IS CONCERNED.
Q. ARE THOSE INDIVIDUAL PATIENTS OR PATIENT VISITS?
A. WHEN I CALCULATE BOTH INDIVIDUAL PATIENTS THAT I SEE FROM A VARIETY OF SOURCES IN MY OWN PATIENT PRACTICE, WORKING IN OUR GROUP INFERTILITY PRACTICE, TAKING CALL AND DOING SURGICAL PROCEDURES, THAT NUMBER REPRESENTS INDIVIDUAL PATIENTS.
Q. AND DOES THAT NUMBER INCLUDE THE SURGERIES THAT YOU PERFORM?
A. IT DOES.
Q. IT DOES. AND DOES IT INCLUDE PATIENTS YOU WOULD SEE WHEN YOU WERE ON CALL?
A. IT DOES.
Q. AND DOES IT INCLUDE PATIENTS YOU WOULD SEE IN CONNECTION WITH YOUR TEACHING OF RESIDENTS AND FELLOWS?
A. IT DOES.
Q. HAVE YOU KEPT UP THIS PACE OF SEEING PATIENTS OVER THE MORE THAN 12 YEARS YOU HAVE BEEN SEEING PATIENTS?

A. GENERALLY, WITH SOME VARIATION FROM YEAR TO YEAR, YES.

Q. I WOULD LIKE TO ASK YOU A LITTLE BIT MORE ABOUT YOUR SPECIFIC MEDICAL PRACTICE. YOU MENTIONED THAT YOU TREAT WOMEN FOR DISORDERS OF MENSTRUATION, CHRONIC PELVIC PAIN AND PREMATURE OVARIAN FAILURE; IS THAT CORRECT?

A. THAT IS CORRECT.

Q. CAN YOU DESCRIBE BRIEFLY WHAT IS A DISORDER OF MENSTRUATION?

A. THE DISORDERS OF MENSTRUATION THAT I SEE INCLUDE MENSTRUATION THAT IS EXCESSIVELY HEAVY, EXCESSIVELY FREQUENT OR IRREGULAR IN FREQUENCY. AND SO THIS CAN SIGNIFICANTLY IMPACT QUALITY OF LIFE, AND TO THE EXTENT AND THE DEGREE OF THE CHRONICITY OF THE CONDITION CAN SIGNIFICANTLY IMPACT HEALTH OUTCOMES, RISKS AND SEVERE CONDITIONS FOR A WOMAN, AND IMPACT HER ABILITY TO BE A PRODUCTIVE MEMBER OF THE WORKFORCE IF SHE IS IMPAIRED IN HER ABILITY TO DO THAT BECAUSE SHE NEEDS TO ATTEND TO THE SERIOUS MEDICAL DISORDER.

Q. FORGIVE ME, DOCTOR, I WOULD BE LYING IF I TOLD YOU I HAD FIRSTHAND KNOWLEDGE OF WHAT THIS MEANS. AND YOU ARE USING WORDS LIKE CHRONICITY.

CAN YOU TELL ME IN PRACTICAL TERMS HOW THESE DISORDERS AFFECT WOMEN? WHAT DOES IT MEAN FOR

THEM IF YOU HAVE A MENSTRUATION DISORDER?

A. SO WHAT IT MEANS IS THAT A WOMAN HAS A MENSTRUAL PERIOD THAT IS SIGNIFICANTLY MORE LONG IN DURATION OR HEAVIER IN VOLUME THAN WE CONSIDER TO BE NORMAL, AND THIS CAN OBVIOUSLY BE INCREDIBLY JARRING AND UPSETTING FOR A PATIENT AND CREATE AN IMPACT ON QUALITY OF LIFE.

BUT TO THE EXTENT THAT THAT PROBLEM LASTS FOR A SIGNIFICANT AMOUNT OF TIME, IT CAN LEAD TO CHRONIC PROBLEMS, ONE OF THE MOST SEVERE OF WHICH IS MODERATE TO SEVERE ANEMIA, WHICH CAN ALSO LEAD TO SIGNIFICANT PROBLEMS FOR A PATIENT. IN THE MOST SEVERE CASE, SEVERE ANEMIA CAN REQUIRE A PATIENT TO NEED TO BE HOSPITALIZED AND RECEIVE A BLOOD TRANSFUSION.

Q. HAVE YOU EVER HAD TO PERFORM A BLOOD TRANSFUSION ON A PATIENT WITH MENSTRUATION DISORDER?

A. YES.

Q. AND ROUGHLY HOW MANY TIMES IN YOUR CAREER --

A. IN MY CAREER, I WOULD SAY AT LEAST 50 TIMES.

Q. AND DOES THIS SORT OF THING CAUSE WOMEN TO LOSE WORK?

A. YES.

Q. SORRY, HAVE TO MISS WORK?

A. YES.

Q. CAN IT AFFECT THEIR JOBS?

A. YES.

Q. TURNING TO THE DISORDERS OF CHRONIC PELVIC PAIN, ROUGHLY HOW MANY WOMEN FACE THIS TYPE OF DISORDER?

A. SO IT'S BEEN SUGGESTED THAT UP TO 10 PERCENT OF PATIENT VISITS TO THE GYNECOLOGIST HAVE TO DO WITH CHRONIC PELVIC PAIN. THERE ARE A NUMBER OF CAUSES OF CHRONIC PELVIC PAIN, BUT IT IS SOMETHING THAT I SEE COMMONLY IN MY PRACTICE BECAUSE IT'S SOMETHING THAT IS REFERRED TO ME ON A REGULAR BASIS.

Q. AND IS THAT THE SAME AS ENDOMETRIOSIS?

A. ENDOMETRIOSIS IS A COMMON CAUSE OF CHRONIC PELVIC PAIN AND SEVERE PAIN WITH PERIODS. THEY ARE VERY SIMILAR THINGS.

Q. ARE THERE TYPES OF CHRONIC PELVIC PAIN THAT ARE NOT CAUSED BY ENDOMETRIOSIS?

A. THERE ARE SOME, AND WE SEE THOSE NOT UNCOMMONLY AS WELL, BUT ENDOMETRIOSIS IS ONE OF THE MOST COMMON.

Q. IN PLAIN LANGUAGE, HOW DOES CHRONIC PELVIC PAIN AFFECT THE REAL LIVES OF WOMEN WHO SUFFER FROM THAT DISORDER?

A. SO I SEE PATIENTS WHO HAVE SEVERE DEBILITATING PELVIC PAIN, EITHER WITH THEIR PERIODS OR OUTSIDE OF THEIR PERIODS. WHEN PATIENTS COME TO SEE ME, IT'S USUALLY DEBILITATING TO THE POINT THAT OVER-THE-COUNTER MEDICATIONS HAVE NOT HELPED THEM AND THEY ARE LOOKING FOR ADDITIONAL LEVELS OF ASSESSMENT AND CARE. SO THESE

ARE WOMEN WHO SOMETIMES CANNOT GO TO WORK AND CANNOT FUNCTION ALONG THEIR ACTIVITIES OF DAILY LIVING BECAUSE THEY ARE DEBILITATED BY PAIN AND SOMETIMES CAN'T GET OUT OF BED.

Q. I'M GOING TO RETURN TO YOUR TREATMENT OF THESE DISORDERS, BUT I WANTED TO FIRST ASK YOU ABOUT THE DISORDER OF PREMATURE OVARIAN FAILURE. WHAT IS THAT?

A. IT'S A DISORDER WHERE THERE IS PREMATURE DEPLETION OF NORMAL OVARIAN FUNCTIONING RESULTING IN SIGNIFICANTLY DECREASED PRODUCTION OF NORMAL FEMALE HORMONES THAT THE OVARIES ARE SUPPOSED TO PRODUCE, AND SIGNIFICANTLY DECREASED ODDS OF BECOMING PREGNANT.

Q. IS THAT LIKE EARLY MENOPAUSE?

A. IT'S A SIMILAR CONDITION, YES.

Q. AND IF THERE IS AN AGE, ROUGHLY HOW OLD ARE YOUR PATIENTS WHO SUFFER FROM PREMATURE OVARIAN FAILURE?

A. THE STRICT DEFINITION MEANS THAT THE ONSET OF SYMPTOMS ARE HAPPENING BEFORE THE AGE OF 40. I SEE PATIENTS WHO SUFFER FROM THIS DISEASE ANYWHERE FROM THEIR 20S, 30S AND UP TO THE AGE OF 40.

Q. AND ROUGHLY HOW COMMON IS PREMATURE OVARIAN FAILURE?

A. IT AFFECTS APPROXIMATELY ONE PERCENT OF WOMEN.

Q. SO IT'S ONE OUT OF A HUNDRED WOMEN?

A. CORRECT.

Q. AND IS THAT ONE OUT OF A HUNDRED WOMEN IN PENNSYLVANIA OR IN THE COUNTRY OR --

A. THAT IS A NATIONAL PREVALENCE.

Q. AND AM I CORRECT THAT WITH THAT DISORDER, WOMEN'S OVARIES DON'T PRODUCE ESTROGEN?

A. THAT'S CORRECT.

Q. CAN THEY STILL GET PREGNANT?

A. THEY HAVE A DIMINISHED ODDS OF BECOMING PREGNANT BUT THEY CAN STILL ACHIEVE A PREGNANCY IN SOME CASES.

Q. WHAT HAPPENS TO WOMEN WHOSE OVARIES DO NOT PRODUCE ESTROGEN?

A. SO IF A WOMAN IS DIAGNOSED WITH THIS DISEASE IN HER 20S, FOR INSTANCE, AND WE KNOW THAT THE AVERAGE AGE OF NATURAL MENOPAUSE WHEN THESE CHANGES ARE SUPPOSED TO HAPPEN IS 51 YEARS OLD, THAT MEANS THAT SHE CAN STAND TO EXPERIENCE 30 YEARS OF HER ADULT LIFE WITHOUT ONE OF THE MOST CRITICAL HORMONES THAT HER BODY PRODUCES.

SO THE SHORT-TERM CONSEQUENCES OF THAT ARE SIGNIFICANT IMPAIRMENT OF QUALITY OF LIFE; HOT FLASHES, NIGHT SWEATS AND SYMPTOMS OF LOW ESTROGEN. SOME OF THE MORE SERIOUS LONG-TERM CONSEQUENCES INCLUDE INCREASED RISK OF CARDIOVASCULAR DISEASE. WHEN WOMEN ARE PREMATURELY DEPRIVED OF ESTROGEN, INCREASED RISK OF BONE LOSS AND HIP FRACTURE. AND THOSE ARE TWO OF THE MOST COMMON SERIOUS CONSEQUENCES THAT WE SEE.

Q. CAN WOMEN WHO SUFFER FROM LOSS OF ESTROGEN DIE FROM THAT?
A. WELL, I WOULD ARGUE THAT SINCE HEART DISEASE AND HEART ATTACK IS THE NUMBER ONE KILLER OF WOMEN AND ALL AMERICANS, ANYTHING THAT PUTS YOU AT GREATER RISK OF EXPERIENCING THAT INCREASES YOUR RISK OF DEATH.
Q. IN ADDITION TO THOSE THREE CATEGORIES OF DISORDERS, YOU ALSO TREAT INFERTILITY, CORRECT?
A. YES.
Q. I THINK WE ALL KNOW GENERALLY WHAT THAT IS, NOT TO YOUR DEGREE OF KNOWLEDGE, BUT I WOULD JUST LIKE TO INCLUDE THAT IN THE CONVERSATION.
SO HOW DO YOU TREAT YOUR PATIENTS WITH THOSE THREE DISORDERS AND THE PATIENTS SUFFERING FROM INFERTILITY?
A. SO FOR THE PATIENTS WE DESCRIBED, THE THREE DISORDERS OF ABNORMAL MENSTRUATION, CHRONIC PELVIC PAIN, SEVERE PAIN WITH PERIODS AND PREMATURE OVARIAN FAILURE, THERE ARE INDICATIONS FOR ALL THREE OF THOSE TO INCORPORATE HORMONAL CONTRACEPTION TO MANAGE THOSE DISORDERS AND TO MITIGATE SOME OF THE ASSOCIATED RISKS THAT WE TALKED ABOUT THAT ARE ASSOCIATED WITH THEM.
Q. WHEN YOU SAY HORMONAL CONTRACEPTION, DOES THAT MEAN THE BIRTH CONTROL PILL OR CAN THAT ALSO REFER TO IUD'S?

A. IT REFERS TO BOTH.
Q. AND DO YOU ALSO USE CONTRACEPTIVES ON PATIENTS WHO SUFFER FROM INFERTILITY?
A. WE INTEGRATE HORMONAL CONTRACEPTION TO HELP WITH THE PROTOCOLS THAT ARE BUILT INTO THE TREATMENTS THAT WE OFFER. IT HELPS MANAGE THE CYCLES THAT WE BUILD FOR PATIENTS WHEN WE ARE DOING TREATMENTS LIKE IN VITRO FERTILIZATION, FOR INSTANCE.
Q. I FEEL LIKE I'M A LITTLE BIT IN A SCIENCE CLASS. IT'S OKAY, IT'S BEEN A WHILE, BUT I'M GETTING THERE.
WHEN YOU TREAT WOMEN WITH -- WHO ARE SUFFERING FROM INFERTILITY WITH CONTRACEPTIVES, TO ME THAT SEEMS COUNTERINTUITIVE.
A. WE USE THE MEDICATIONS TO ACHIEVE SEVERAL THINGS WITH THE INFERTILITY TREATMENTS THAT WE HAVE TO OFFER. IN A CERTAIN POPULATION OF WOMEN, IT HELPS CREATE A SAFER PROCESS FOR THE PATIENT, SO BIRTH CONTROL PILLS, WE TAKE ADVANTAGE OF SOME OF THEIR NONCONTRACEPTIVE BENEFITS TO HELP PERFORM INFERTILITY TREATMENTS IN A WAY THAT IS -- ENHANCES THE SAFETY AND EFFICACY OF THOSE TREATMENTS OVERALL.
IT HELPS US WITH THE TIMING OF INITIATING THOSE TREATMENTS AS WELL. IT CAN ALSO HELP IN CERTAIN WOMEN WHO HAVE ENDOMETRIOSIS, WHICH IS ONE OF THE CONDITIONS I MENTIONED. IT CAN HELP THOSE WOMEN WITH

CONTROLLING SOME OF THEIR SYMPTOMS PRIOR TO TREATMENT AND MAY IN SOME WOMEN INCREASE THE LIKELIHOOD THAT THOSE TREATMENTS WILL WORK FOR THEM.

Q. SO WHEN YOU PRESCRIBE CONTRACEPTIVES TO THESE CATEGORIES OF YOUR PATIENTS, FOR SOME PATIENTS DO YOU PRESCRIBE THEM PURELY TO PREVENT PREGNANCY?

A. YES.

Q. AND IN OTHERS, DO YOU PRESCRIBE THEM NOT AT ALL TO PREVENT PREGNANCY?

A. THAT IS CORRECT.

Q. THAT MIGHT BE, FOR EXAMPLE, SOMEONE WHO IS POSTMENOPAUSAL BUT HAS CHRONIC PELVIC PAIN?

A. SOMETHING LIKE THAT, YES.

Q. AND ARE THERE TIMES WHEN YOU PRESCRIBE CONTRACEPTION FOR BOTH PURPOSES, TO PREVENT PREGNANCY BUT ALSO FOR NONPREGNANCY-PREVENTION PURPOSES?

A. YES.

Q. GENERALLY SPEAKING, WHAT TYPES OF CONTRACEPTIVES DO YOU PRESCRIBE TO YOUR PATIENTS?

A. THE CONTRACEPTIVES THAT I USE MOST REGULARLY INCLUDE THE ORAL CONTRACEPTIVE PILL AND THE MIRENA INTRAUTERINE DEVICE.

Q. I WOULD LIKE TO ASK YOU ABOUT YOUR EXPERIENCE IN PRESCRIBING CONTRACEPTIVES TO YOUR PATIENTS.

DO YOU HAVE EXPERIENCE PRESCRIBING

CONTRACEPTIVES TO YOUR PATIENTS BEFORE THE AFFORDABLE CARE ACT AND ITS CONTRACEPTIVE MANDATE WERE THE LAW?
A. YES.
Q. HAVE YOU ALSO PRESCRIBED CONTRACEPTIVES TO PATIENTS SINCE THE AFFORDABLE CARE ACT AND ITS CONTRACEPTIVE MANDATE BECAME THE LAW?
A. YES.
Q. SO YOU HAVE EXPERIENCE IN BOTH WORLDS, PRE-ACA AND POST?
A. YES, I DO.
Q. HAVE YOU SEEN ANY DIFFERENCES IN YOUR PRACTICE OF PRESCRIBING CONTRACEPTIVES TO PATIENTS DURING THESE TWO TIME PERIODS?
A. I HAVE EXPERIENCED THAT, YES.
Q. AND CAN YOU DESCRIBE FIRST, WHAT IT WAS LIKE PRESCRIBING CONTRACEPTIVES BEFORE THE CONTRACEPTIVE MANDATE WAS IN PLACE?
A. SO PRIOR TO THE MANDATE, THERE WAS FAR LESS CERTAINTY ABOUT PATIENT ABILITY TO ACCESS SOME OF THESE TREATMENTS FOR THE STATED PURPOSES WE DISCUSSED, DUE TO CONCERN ABOUT AFFORDABILITY AND COVERAGE AND WHETHER PATIENTS WOULD BE ABLE TO GET ACCESS ON THAT BASIS.
Q. SO AM I CORRECT THAT AS A DOCTOR, YOU WOULD ACCESS THE PATIENTS' NEEDS --
A. YES.

Q. -- MEDICAL NEEDS, AND THEN YOU WOULD PRESCRIBE THE BEST MEDICATION FOR THEM AND THEIR CONDITION; IS THAT RIGHT?

A. THAT'S CORRECT.

MS. KADE: OBJECTION, LEADING.

THE COURT: SUSTAINED. ASK THE QUESTION AGAIN.

BY MR. GOLDMAN:

Q. HOW WOULD YOU -- HOW DO YOU CHOOSE WHICH KIND OF PRESCRIPTION TO PRESCRIBE TO PATIENTS?

A. SO I PERFORM A THOROUGH AND COMPREHENSIVE EVALUATION OF THE PATIENT'S SYMPTOMS AND THE UNDERPINNINGS FOR THEIR CONDITION. I CONSIDER THE INDIVIDUAL CHARACTERISTICS OF THE PATIENT IN TERMS OF PRIOR ASSESSMENTS, PRIOR TREATMENTS, WHAT HAS WORKED, WHAT HAS NOT WORKED, AND ANY SPECIFIC RISK THEY MAY HAVE FOR ANY MEDICAL TREATMENT THAT I MAY OFFER.

AND I INDIVIDUALIZE THE CARE FOR THEIR PARTICULAR UNIQUE SET OF DIAGNOSES AND NEEDS, MAKING THE BEST DECISION THAT I CAN IN CONSULTATION WITH THE PATIENT.

Q. PRE-ACA, ONCE YOU DO YOUR ANALYSIS AND YOU MAKE YOUR PRESCRIPTION OF THE BEST MEDICATION FOR A PATIENT, WERE PATIENTS ALWAYS FILLING IT?

A. NOT ALWAYS.

Q. WERE THERE TIMES WHEN THEY WOULD COME BACK TO YOU AND ASK YOU FOR A DIFFERENT PRESCRIPTION OR NO PRESCRIPTION?

MS. KADE: OBJECTION, LEADING.

THE COURT: SUSTAINED. REASK THE QUESTION IN A NONLEADING WAY.

BY MR. GOLDMAN:

Q. WHEN PATIENTS WOULD NOT FILL THE PRESCRIPTION YOU GAVE THEM, WHAT WOULD HAPPEN?

A. WE WOULD -- I WOULD TRY TO GET AN UNDERSTANDING OF THE LACK OF COMPLIANCE FROM MY PERSPECTIVE OF NOT TAKING OR FILLING THE PRESCRIPTION, AND IN GETTING TO THE BOTTOM OF THIS, FOR MANY PATIENTS IT HAD TO DO WITH SIGNIFICANT COSTS AND INAFFORDABILITY OF THOSE TREATMENTS.

Q. AND DID THAT REASONING TAKE PLACE WHEN YOU PRESCRIBED ORAL BIRTH CONTROL PILLS?

A. IN SOME CASES, YES.

Q. CAN YOU ESTIMATE ROUGHLY WHAT PERCENTAGE OF YOUR PATIENTS WOULD REFUSE A PRESCRIPTION FOR ORAL BIRTH CONTROL PILLS PRE-ACA?

A. IN MY EXPERIENCE DURING THAT TIME, MY ESTIMATE WOULD BE ROUGHLY 10 TO 20 PERCENT OF PATIENTS WOULD HAVE A FINANCIAL BARRIER TO THOSE TYPES OF PRESCRIPTIONS.

Q. AND HOW ABOUT WHEN YOU WOULD PRESCRIBE AFTER

YOUR ANALYSIS IUD'S, WHAT WAS THE PERCENTAGE OF YOUR PATIENTS WHO WOULD REJECT THAT PRESCRIPTION?

A. IT WAS APPROXIMATELY AT LEAST 30 PERCENT.

Q. IS THAT BECAUSE IUDS ARE MORE EXPENSIVE THAN BIRTH CONTROL PILLS?

A. IT HAS TO DO WITH THE COSTS, TOTAL COSTS AROUND THE IUD DEVICE AND THE INSERTION, WHICH HAS A SIGNIFICANT ONE-TIME UP-FRONT COST WHICH, WHEN COMPARED TO THE INTERVAL COST OF THE BIRTH CONTROL PILL, IS SIGNIFICANTLY GREATER. BUT BECAUSE THE IUD THAT I PRESCRIBE REGULARLY, THE MIRENA, LASTS FOR FIVE YEARS, WHEN YOU EXTEND THAT ONE-TIME COST OVER FIVE YEARS, IT ACTUALLY ENDS UP BECOMING LESS EXPENSIVE, ESPECIALLY IF YOU COMPARE IT TO SOME PREPARATIONS WHERE THERE IS A MONTHLY COST THAT, OVER TIME, CAN BE SIGNIFICANTLY ADDITIVE.

Q. SO I WOULD LIKE TO DIG INTO THAT JUST A LITTLE BIT MORE.

YOU SAID THAT A MIRENA LASTS FIVE YEARS?

A. YES.

Q. AND WHAT IS THE UP-FRONT COST?

A. ALL FEES, THE DEVICE AND THE INSERTION, CAN BE ANYWHERE FROM ABOUT 800 TO $1,000.

Q. AND AFTER THE DEVICE IS PURCHASED AND INSERTED FOR 800 TO $1,000, ARE THERE ANY FURTHER COSTS OVER THE

FIVE-YEAR LIFE OF THE MIRENA IUD?

A. IF THE PATIENT HAS NO ISSUES AND DECIDES TO KEEP THE DEVICE IN PLACE FOR FIVE YEARS, THERE ARE NO ADDITIONAL COSTS.

Q. BY CONTRAST, THE ORAL BIRTH CONTROL PILL, YOU HAD SAID THAT IS A MONTHLY PRESCRIPTION?

A. YES.

Q. ROUGHLY HOW MUCH DOES THAT COST?

A. IT DEPENDS, OBVIOUSLY, ON THE PREPARATION. YOU KNOW, THERE ARE SOME PATIENTS WHO CAN PAY ON AVERAGE $30 PER MONTH OR MORE FOR A MONTHLY PRESCRIPTION. SO YOU CAN SEE HOW OVER TIME THE NUMBERS CAN CHANGE.

Q. SO ROUGHLY -- $30 A MONTH IS ROUGHLY, ROUGHLY $360 A YEAR?

A. YES.

Q. AND THEN OVER FIVE YEARS, WHICH IS THE TERM OF THE MIRENA IUD, IT WOULD COST ROUGHLY FIVE TIMES THAT?

A. YES.

Q. AND THAT IS ROUGHLY $1,800, IS THAT CORRECT?

A. YES.

Q. SO WHICH OF THOSE DEVICES IS MORE EFFECTIVE, OR PRESCRIPTION IS MORE EFFECTIVE?

A. THE INTRAUTERINE DEVICE IS A MORE EFFECTIVE CONTRACEPTIVE AND CAN BE MORE EFFECTIVE IN TERMS OF MANAGING HEAVY MENSTRUAL PERIODS FOR SOME WOMEN COMPARED

HEAD TO HEAD TO THE BIRTH CONTROL PILL.

Q. AM I CORRECT THEN TO UNDERSTAND YOU CORRECTLY THAT BECAUSE OF THE COST, WOMEN END UP PAYING MORE MONEY FOR LESS GOOD CARE?

A. THAT IS POTENTIALLY THE CASES FOR SOME WOMEN, YES.

MR. GOLDMAN: COURT'S INDULGENCE, YOUR HONOR.

(PAUSE.)

BY MR. GOLDMAN:

Q. WHEN YOU -- STRIKE THAT.

SO ALL THAT WAS BEFORE THE ACA. AFTER THE ACA AND THE CONTRACEPTIVE MANDATE WENT INTO EFFECT, DID ANYTHING CHANGE?

A. YES. SIGNIFICANT NOTABLE CHANGE IN MY OWN PRACTICE I CAN SPEAK TO WITH THE MOST AUTHORITY IN ACCESS TO THE IUD BASED ON AFFORDABILITY OF THE IUD.

Q. AFTER THE ACA, HOW OFTEN DID YOUR PATIENTS PUSH BACK ON YOUR PRESCRIPTIONS TO THEM?

A. FOR BOTH FORMS OR FOR EITHER?

Q. EITHER.

A. OKAY. FAR LESS. I CAN, YOU KNOW, TRY TO GIVE YOU A NUMBER IN TERMS OF THE ESTIMATE, BUT I'M VERY HARD-PRESSED TO THINK OF A PATIENT THAT I HAVE MANAGED IN RECENT MEMORY FOR WHOM I HAVE RECOMMENDED A MIRENA

IUD WHO HAS HAD DIFFICULTY ACQUIRING IT.

Q. LET ME MAKE SURE I UNDERSTAND THAT. SINCE THE ACA WENT INTO EFFECT, YOU CANNOT THINK OF A SINGLE PATIENT WHO HAS REJECTED YOUR PRESCRIPTION OF A MIRENA IUD?

A. I CAN'T THINK OF ONE THAT EASILY COMES TO MEMORY.

Q. AND BEFORE THE ACA, ROUGHLY 30 PERCENT WERE REJECTING THE MIRENA?

A. YES.

Q. DO YOU TREAT PATIENTS FOR WHOM IT IS DANGEROUS TO GET PREGNANT?

A. I DO.

Q. WHAT HAPPENS TO THEM IF THEY GET PREGNANT ANYWAY?

A. WELL, THERE ARE A VARIETY OF DISORDERS FOR WHICH PREGNANCY CAN BE INCREDIBLY COMPLICATED IF YOU GO INTO PREGNANCY WITH THOSE DISORDERS. THEY CAN BECOME MORE SEVERE AND POTENTIALLY LIFE-THREATENING TO A WOMAN WHO BECOMES PREGNANT IF SHE CARRIES THAT DISORDER INTO PREGNANCY.

Q. I WOULD LIKE TO TURN YOUR ATTENTION TO THE RULES, AND THEY ARE -- I DON'T THINK WE HAVE TO GO THROUGH THEM SPECIFICALLY, BUT IF YOU'D LIKE TO LOOK AT THEM, THEY ARE IN YOUR EXHIBIT BINDER. THE RELIGIOUS

EXEMPTION RULE IS MARKED AS EXHIBIT 1 AND THE MORAL EXEMPTION RULE I BELIEVE IS EXHIBIT 2.

ARE YOU GENERALLY FAMILIAR WITH THESE NEW RULES THAT ARE AT ISSUE IN THIS PROCEEDING?

A. YES.

Q. AND I KNOW IT'S A LONG DOCUMENT, BUT HAVE YOU READ THE RELIGIOUS EXEMPTION RULE?

A. I HAVE.

Q. AND DO YOU BELIEVE YOU UNDERSTAND THAT RULE INSOFAR AS IT WOULD AFFECT PATIENTS LIKE THE ONES YOU TREAT IN PENNSYLVANIA?

A. I BELIEVE I DO.

Q. AND THE MORAL EXEMPTION RULE IS SIMILARLY LONG, BUT HAVE YOU READ IT?

A. YES.

Q. DO YOU BELIEVE YOU UNDERSTAND IT AND CAN UNDERSTAND THE IMPACT IT MIGHT HAVE ON THE PATIENTS YOU TREAT?

A. I DO.

Q. IN YOUR CAPACITY AS AN EXPERT IN WOMEN'S REPRODUCTIVE HEALTH, DO YOU HAVE AN OPINION TO A REASONABLE DEGREE OF CERTAINTY AS TO WHETHER THESE SAME RULES WOULD AFFECT THE REPRODUCTIVE HEALTH OF WOMEN IN PENNSYLVANIA.

MS. KADE: OBJECTION, YOUR HONOR. THIS

GOES BEYOND THE SCOPE OF HER EXPERTISE. WE ARE NOW GETTING INTO STATISTICS.

THE COURT: THAT WAS THE BASIS OF YOUR OBJECTION, ESSENTIALLY. THE OBJECTION THAT YOU LODGED AT BEGINNING INCORPORATES, I THINK, THE OBJECTION YOU ARE MAKING NOW.

MS. KADE: WELL, MY CURRENT OBJECTION IS TO HIS CURRENT QUESTION AND WHAT HE IS ASKING FOR, WHICH IS A STATISTICAL QUESTION ASKING FOR A STATISTICAL ANSWER, AND SHE HAS NOT BEEN QUALIFIED AS THAT TYPE OF AN EXPERT, YOUR HONOR.

THE COURT: SUSTAINED.

MR. GOLDMAN: IF I MAY RESPOND TO THAT, YOUR HONOR, I DON'T ACTUALLY THINK THAT IS WHAT I'M ASKING FOR.

THE COURT: THAT IS -- OKAY. SO WHY DON'T YOU ASK THE QUESTION AGAIN SO THAT WE CAN MAKE SURE IT IS NOT WHAT YOU --

MR. GOLDMAN: SURE.

BY MR. GOLDMAN:

Q. YOU'VE TESTIFIED BASED ON YOUR EXPERIENCE THAT BEFORE THE AFFORDABLE CARE ACT WOMEN WERE NOT UNIFORMLY ACCEPTING YOUR PRESCRIPTION CARE, CORRECT?

A. CORRECT.

Q. AND THEN YOU ALSO TESTIFIED THAT AFTER THE

AFFORDABLE CARE ACT, THAT YOU CAN'T RECALL A SINGLE PATIENT WHO HAS REFUSED A PRESCRIPTION FOR AN IUD, CORRECT?

A. BASED ON -- BASED ON AFFORDABILITY ISSUES, YES.

Q. AND I BELIEVE YOU TESTIFIED THAT THE BASIS FOR THE CHANGES THAT -- POST-ACA CONTRACEPTIVE MANDATE, YOUR PATIENTS HAVE COVERAGE SO THEY DON'T HAVE TO PAY OUT OF POCKET FOR THESE PRESCRIPTIONS, CORRECT?

A. YES.

Q. UNDER THE RULES AS YOU UNDERSTAND THEM, DO YOU BELIEVE THE RULES WILL CHANGE THE NUMBER OF WOMEN IN PENNSYLVANIA WHO HAVE CONTRACEPTIVE CARE COVERAGE?

MS. KADE: OBJECTION, YOUR HONOR. AGAIN, SINCE SHE HAS NO PERSONAL KNOWLEDGE OF ANY OF HER PATIENTS THAT ARE AFFECTED BY THE NEW RULES, THIS IS ASKING FOR STATISTICAL PREDICTION.

THE COURT: IF YOU CAN ANSWER THE QUESTION WITHOUT A STATISTICAL PREDICTION, YOU ARE FREE TO ANSWER.

THE WITNESS: I CAN ANSWER THIS QUESTION SPEAKING TO MY EXPERIENCE OVER 12 YEARS OF PRACTICING WOMEN'S HEALTH IN MY CURRENT POSITION AND MY EXPERIENCE OF MORE DIFFICULT ACCESS AND UTILIZATION PRIOR TO THE MANDATE, AND MY SENSE THAT ANY THREAT TO ACCESS BASED ON RULES SUCH AS THESE MAY CHALLENGE THAT ACCESS AGAIN IN

WAYS THAT I PERSONALLY HAVE EXPERIENCE WITH IN MY PATIENT POPULATION.

BY MR. GOLDMAN:

Q. SO BASED ON THAT EXPERIENCE THAT YOU DESCRIBED, DO YOU HAVE AN OPINION AS TO THE RULES WHICH ALLOW MORE EXEMPTIONS TO THE MANDATORY COVERAGE, WHAT EFFECT THEY WOULD HAVE ON WOMEN IN PENNSYLVANIA?

MS. KADE: SAME OBJECTION, YOUR HONOR. TO THE EXTENT THAT SHE IS BEING ASKED TO PROVIDE HER SENSE OF WHAT MIGHT HAPPEN NOT BASED ON ANY ACTUAL WOMEN IN PENNSYLVANIA THAT SHE KNOWS ABOUT, IS OUTSIDE THE SCOPE OF HER EXPERTISE.

THE COURT: OVERRULED.

YOU CAN ANSWER.

THE WITNESS: SO I JUST WANT TO MAKE SURE I UNDERSTAND THE QUESTION ONE MORE TIME. SPEAK TO THE CONSEQUENCES OF THE EXEMPTIONS?

BY MR. GOLDMAN:

Q. SURE. THE RULES WHICH CREATE EXEMPTIONS TO CARE, WHAT EFFECT IF ANY DO YOU BELIEVE THEY WILL HAVE ON WOMEN IN PENNSYLVANIA?

A. MY SENSE IS THAT IT WILL MAKE AN IMPACT NEGATIVELY ON THE ABILITY OF WOMEN TO ACCESS THESE TREATMENTS, AND IN SO DOING LIMIT OUR ABILITY TO TREAT THE TYPES OF DISORDERS THAT I HAVE DISCUSSED WHICH

WILL -- COULD INCREASE PAIN AND SUFFERING FOR WOMEN WHO HAVE THOSE DISORDERS, WORSENING OF SOME OF THE SERIOUS MEDICAL CONSEQUENCES OF THOSE DISORDERS, AND RESULT IN UNINTENDED PREGNANCIES IN GENERAL. AND TO THE EXTENT THAT SOME OF THOSE UNINTENDED PREGNANCIES ARE IN WOMEN WITH VERY SERIOUS MEDICAL DISORDERS FOR WHOM PREGNANCY MAY BE CONTRA -- EXCUSE ME, PREGNANCY MAY BE RELATIVELY OR ABSOLUTELY CONTRAINDICATED, THAT CAN INCREASE RISKS IN A LIFE-THREATENING WAY FOR SOME WOMEN.

Q. PATIENTS MAY DIE?

A. YES.

Q. DOES THAT OPINION HOLD, IF YOU HAVE ONE, FOR WOMEN OUTSIDE OF PENNSYLVANIA AS WELL BECAUSE OF THE RULES?

MS. KADE: YOUR HONOR, WE ARE SO FAR OUTSIDE THIS WITNESS' EXPERTISE, WE CONTINUE TO OBJECT TO THIS LINE OF QUESTIONING.

THE COURT: SUSTAINED.

MR. GOLDMAN: NOTHING FURTHER.

THE COURT: YOUR WITNESS.

MS. KADE: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MS. KADE:

Q. GOOD MORNING, DR. BUTTS.

A. GOOD MORNING.

Q. MY NAME IS ELIZABETH KADE.

A. HELLO.

Q. FIRST, WHAT DOCUMENTS DID YOU REVIEW IN ORDER TO PREPARE YOUR DECLARATION?

A. TO PREPARE THE DECLARATION I REVIEWED MY OWN CURRICULUM VITAE. THAT WAS THE PRIMARY DOCUMENT THAT I REVIEWED AND -- PRIMARILY, YES.

Q. WAS THERE ANYTHING ELSE YOU CAN REMEMBER RIGHT NOW?

A. OFF THE TOP OF MY HEAD, NO OTHER DOCUMENTS.

Q. WHO DID YOU MEET WITH IN ORDER TO PREPARE YOUR DECLARATION?

A. I MET WITH COUNSEL SITTING BEFORE ME FROM THE ATTORNEY GENERAL'S OFFICE TO DISCUSS PROCESS AND THE DECLARATION.

Q. ANYBODY ELSE?

A. NO.

Q. TURNING TO YOUR DECLARATION, YOU HAVE TESTIFIED IN PARAGRAPH 53 OF YOUR DECLARATION THAT --

THE COURT: CAN YOU JUST TELL ME WHAT TAB THAT IS AGAIN?

MS. KADE: SURE, I BELIEVE IT IS TAB 8.

THE COURT: I SEE IT. 8, YES.

BY MS. KADE:

Q. I'M AT PARAGRAPH 53, WHICH IS PAGE 9 OF 35 AT

THE TOP, IF THAT IS HELPFUL, AND PAGE 8 AT THE BOTTOM?

A. OKAY.

Q. SO YOU HAVE TESTIFIED THAT AS A RESULT OF THE RULES, SOME WOMEN WILL LOSE COVERAGE, INSURANCE COVERAGE, FOR PREVENTIVE CONTRACEPTIVE CARE, CORRECT?

A. YES.

Q. DO YOU KNOW HOW MANY RELIGIOUS EMPLOYERS ARE CURRENTLY PROTECTED BY INJUNCTION?

A. I DO NOT.

Q. DO YOU KNOW THAT THOSE EMPLOYERS THAT HAVE INJUNCTIONS ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE?

A. I DO NOT.

Q. ARE YOU AWARE OF THE 2016 ZUBIK INJUNCTION?

A. I'M NOT AWARE OF THAT INJUNCTION.

Q. DO YOU KNOW THAT ENTITIES PROTECTED BY THAT INJUNCTION ARE NOT CURRENTLY PROVIDING CONTRACEPTIVE COVERAGE THEN?

A. AGAIN, NOT FAMILIAR WITH THAT CASE.

Q. DO YOU KNOW THAT THERE WERE EXEMPTIONS TO THE MANDATE BEFORE THE NEW RULE WENT INTO EFFECT?

A. CAN YOU REPHRASE THAT QUESTION?

Q. ARE YOU AWARE THAT EVEN BEFORE THE NEW RULES WENT INTO EFFECT, CERTAIN EMPLOYERS WERE NOT REQUIRED TO PROVIDE CONTRACEPTIVE COVERAGE PURSUANT TO THE MANDATE

BECAUSE THEY FELL UNDER ANY ONE OF A NUMBER OF EXEMPTIONS, LIKE THEY WERE A GRANDFATHERED PLAN, THEY WERE A CHURCH PLAN, SOMETHING LIKE THAT?

A. I AM AWARE OF THAT PHENOMENON TO AN EXTENT.

Q. NONE OF YOUR PATIENTS HAS HAD TO ASK FOR A CHEAPER FORM OF CONTRACEPTION SINCE THE MANDATE WENT INTO EFFECT?

A. I'M NOT SURE THAT THAT IS WHAT I TESTIFIED.

MY TESTIMONY WAS THAT SINCE THE MANDATE WENT INTO EFFECT, THERE HAS BEEN OVERALL MUCH BROADENED ACCESS AND FAR LESS PUSHBACK AGAINST ACCESSING THESE TREATMENTS BASED PURELY ON AFFORDABILITY.

Q. SO SOME OF YOUR PATIENTS HAVE STILL ASKED FOR A CHEAPER FORM OF CONTRACEPTION SINCE THE MANDATE WENT INTO EFFECT?

A. I CAN RECALL SOME, BASED ON SOME OF THE INDIVIDUAL VARIATION IN COVERAGE IN TERMS OF GENERIC FORMS OF THE BIRTH CONTROL PILL OR VERSUS BRAND NAMES, BUT IN GENERAL AND ON BALANCE, THIS HAS BEEN FAR LESS OF A PROBLEM POST MANDATE THAN PRE MANDATE.

Q. SO POST MANDATE, IN A POST MANDATE WORLD, WERE ANY OF THE PATIENTS THAT YOU HAD THAT WERE PUSHING BACK ON COST CONCERNS, WERE ANY OF THEM CONCERNED ABOUT THIS BECAUSE OF A DIFFERENCE IN CONTRACEPTIVE COVERAGE FROM THEIR INSURANCE BECAUSE OF AN EXEMPTION?

A. I DON'T THINK WE HAD THAT LEVEL OF CONVERSATION, AND I CAN'T -- I COULD NOT SPEAK TO THAT SPECIFICALLY.

Q. SO YOU ALSO WOULD NOT KNOW IF ANY OF THEM WERE CONCERNED BECAUSE THEIR EMPLOYER WAS SUBJECT TO AN INJUNCTION?

A. I HAVE -- I DO NOT KNOW.

Q. DR. BUTTS, CAN YOU IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS LOST CONTRACEPTIVE COVERAGE AS A RESULT OF THE NEW RULES?

A. AS A RESULT OF THE NEW RULES. I CANNOT IDENTIFY A SPECIFIC INDIVIDUAL PERSON AT THIS MOMENT.

Q. AND CAN YOU IDENTIFY A SINGLE WOMAN IN THE UNITED STATES WHO HAS LOST COVERAGE AS A RESULT OF THE NEW RULES?

A. NOT AT THIS MOMENT, NO.

Q. SO JUST LOOKING BACK AT YOUR DECLARATION, LOOKING AT PARAGRAPH 54 OF YOUR DECLARATION, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHOSE COST OF CONTRACEPTIVE CARE WILL RISE AS A RESULT OF THE RULES, RIGHT?

A. NOT A SPECIFIC INDIVIDUAL PERSON AT THIS MOVEMENT IN TIME, NO.

Q. AND LOOKING AT PARAGRAPH 55, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO WILL HAVE THIS BARRIER TO WOMEN'S ACCESS TO AND USE OF THE

CONTRACEPTIVE THAT IS MEDICALLY RECOMMENDED FOR THEM?

A. WELL, I CAN'T IDENTIFY AT THIS MOMENT, BUT I THINK CERTAINLY A CONCERN AS A PROVIDER IS THE POTENTIALLY EXPANDING NATURE OF THESE BARRIERS. SO THE REASON THAT I CAN'T IDENTIFY SOMEBODY TODAY DOES NOT MEAN THAT IT MAY NOT BE APPLICABLE TO FUTURE PATIENTS.

Q. BUT AGAIN, SITTING HERE TODAY, YOU CAN'T IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS LOST COVERAGE AS A RESULT OF THE NEW RULES, RIGHT?

A. NOT AT THIS MOMENT.

Q. AND SO ALL OF THE HARMS THAT YOU DESCRIBE IN PARAGRAPHS 54 THROUGH 58 OF YOUR DECLARATION, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO WILL SUFFER THOSE HARMS, CORRECT?

A. AS I SAID BEFORE --

MR. GOLDMAN: OBJECTION, YOUR HONOR. THE QUESTION IS A QUESTION ABOUT WHETHER THE DOCTOR CAN IDENTIFY SOMETHING THAT HAS NOT HAPPENED YET. IT'S IMPOSSIBLE TO ANSWER.

THE COURT: SUSTAINED.

BY MS. KADE:

Q. DR. BUTTS, FOR ALL OF THE HARMS THAT YOU LIST IN PARAGRAPHS 54 THROUGH 58, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS CURRENTLY SUFFERED ANY OF THOSE HARMS, CORRECT?

A. I'M JUST LOOKING AT THE DOCUMENT AS I CONSIDER MY ANSWER TO YOUR QUESTION.

MR. GOLDMAN: OBJECTION, YOUR HONOR. SORRY IT'S LATE, BUT IT'S VAGUE BECAUSE IT'S NOT CLEAR IF COUNSEL IS ASKING AS A RESULT OF THE RULES OR IN GENERAL PEOPLE HAVE SUFFERED THOSE CONSEQUENCES.

THE COURT: WELL, THE PROBLEM IS IT'S COMPOUND. IF ALL OF THE AREAS LISTED IN PARAGRAPH 53, 54 THROUGH 58 -- THAT IS A LOT OF AREAS.

MS. KADE: I'M HAPPY TO WALK THROUGH THEM INDIVIDUALLY, YOUR HONOR.

THE COURT: GO AHEAD.

MS. KADE: OKAY.

BY MS. KADE:

Q. OKAY. SO LOOKING AT PARAGRAPH 54, YOU CAN'T IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHOSE COSTS FOR CONTRACEPTIVE CARE HAS RISEN, CORRECT?

MR. GOLDMAN: OBJECTION. AGAIN, HAS RISEN AT ALL OR AS A RESULT OF ANYTHING ELSE?

MS. KADE: AS A RESULT OF THE NEW RULES, CORRECT?

THE WITNESS: NO.

BY MS. KADE:

Q. AND IN PARAGRAPH 55, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS HAD A BARRIER TO

WOMEN'S ACCESS TO AND USE OF CONTRACEPTIVES THAT IS MEDICALLY RECOMMENDED FOR THEM AS A RESULT OF THE NEW RULES, CORRECT?

A. NO.

Q. AND IN PARAGRAPH 56, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS FACED FINANCIAL HARM OR HAS FACED MEDICAL HARM AS A RESULT OF THE NEW RULES, CORRECT?

A. NO.

Q. AND IN PARAGRAPH 57, YOU CAN'T IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS HAD DISRUPTIONS OF THEIR MEDICAL TREATMENT AS A RESULT OF THE NEW RULES, CORRECT?

A. CORRECT.

Q. AND IN PARAGRAPH 58, YOU CANNOT IDENTIFY A SINGLE WOMAN IN PENNSYLVANIA WHO HAS FACED UNINTENDED PREGNANCY AND OTHER ADVERSE MEDICAL CONSEQUENCES AS A RESULT OF THESE NEW RULES, CORRECT?

A. CORRECT.

Q. SO ZOOMING OUT A LITTLE BIT TO CONTRACEPTIVES IN GENERAL, CONTRACEPTIVES ARE USED BY BOTH MEN AND WOMEN, CORRECT?

A. YES.

Q. ARE YOU AWARE THAT SOME EMPLOYERS ONLY HAVE SINCERE RELIGIOUS OR MORAL OBJECTIONS TO JUST A SUBSET OF THE RANGE OF AVAILABLE BIRTH CONTROL METHODS?

MR. GOLDMAN: OBJECTION, YOUR HONOR. I DON'T KNOW HOW THE WITNESS WOULD KNOW WHETHER SOMEONE'S OBJECTION IS SINCERE OR NOT.

THE COURT: SUSTAINED. SUSTAINED. IT'S ALSO BEYOND THE SCOPE.

BY MS. KADE:

Q. DR. BUTTS, THE COST OF PREGNANCIES THAT USE PRENATAL CARE, THOSE ARE TYPICALLY COVERED BY INSURANCE; IS THAT RIGHT?

A. YES.

Q. AND THAT COVERAGE DOES NOT VARY DEPENDING ON WHETHER IT IS AN INTENDED OR UNINTENDED PREGNANCY, RIGHT?

A. WHETHER -- YOU ARE ASKING ME WHETHER INSURANCE COVERAGE VARIES WHETHER THE PERSON INTENDED OR DID NOT INTEND TO BECOME PREGNANT?

Q. CORRECT.

MR. GOLDMAN: JUDGE, IF I MAY OBJECT, I BELIEVE THIS IS BEYOND THE SCOPE OF THE DIRECT.

THE COURT: SUSTAINED.

MS. KADE: IT IS WITHIN THE SCOPE OF HER DECLARATION. SHE TALKS ABOUT THE COSTS OF UNINTENDED PREGNANCIES.

THE COURT: WHERE IS -- POINT ME TO THAT.

MS. KADE: PARAGRAPH 58: SOME OF THESE

WOMEN WILL FACE UNINTENDED PREGNANCY AND OTHER ADVERSE MEDICAL CONSEQUENCES, AND THE COST OF THESE UNINTENDED PREGNANCIES IS THE BASIS OF --

THE COURT: WAIT, WAIT, STOP.

MS. KADE: I APOLOGIZE.

THE COURT: WHICH PARAGRAPH ARE YOU READING?

MS. KADE: IN PARAGRAPH 58, DR. BUTTS SAYS: SOME OF THESE WOMEN WILL FACE UNINTENDED PREGNANCIES AND OTHER ADVERSE MEDICAL CONSEQUENCES.

THE COURT: THAT IS ALL IT SAYS.

MS. KADE: AND THE HARM THAT PLAINTIFFS ARE ALLEGING IN THEIR COMPLAINT IS -- THE COST OF UNINTENDED PREGNANCIES IS ONE OF THEIR ALLEGATIONS.

THE COURT: YOUR QUESTION WAS ABOUT INSURANCE COVERAGE.

MS. KADE: MY NEXT QUESTION IS GOING TO BE ABOUT THE COST OF COVERING UNINTENDED PREGNANCIES ARE COVERED BY AN EMPLOYEE'S HEALTH PLAN. SO IT WOULD NOT BE BORNE BY THE STATE, YOUR HONOR.

MR. GOLDMAN: YOUR HONOR, THIS GOES FAR BEYOND THE DIRECT OR THE DECLARATION.

THE COURT: SUSTAINED. MOVE ON.

BY MS. KADE:

Q. DR. BUTTS, HAVE YOU READ THE RULES THAT ARE AT

ISSUE IN THIS CASE IN THEIR ENTIRETY?

A. I HAVE REVIEWED THE RULES, YES.

Q. HAVE YOU READ ALL OF THE EVIDENCE THAT THE RULES RELY UPON?

A. CAN YOU CLARIFY THAT QUESTION?

Q. SO THE RULES CITE DIFFERENT EVIDENCE AND STUDIES THROUGHOUT THE RULES. HAVE YOU READ ALL OF THOSE STUDIES?

A. NO.

Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS AN EXPERT ON INSURANCE MARKETPLACES, RIGHT?

A. NO, I HAVE NOT.

Q. AND YOU HAVE NOT BEEN PRESENTED TO THIS COURT AS AN EXPERT ON THE GOVERNMENT'S DECISION-MAKING PROCESS UNDER THE ADMINISTRATIVE PROCEDURE ACT, RIGHT?

A. NO, I HAVE NOT.

Q. THANK YOU, DR. BUTTS.

MS. KADE: THANK YOU, YOUR HONOR.

THE WITNESS: THANK YOU.

THE COURT: ANY REDIRECT?

MR. GOLDMAN: YES, YOUR HONOR.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q. DR. BUTTS, IF -- SINCE THE RULES WENT INTO EXISTENCE, IF A PATIENT CAME TO YOU AND TOLD YOU THAT

THEY COULD NOT AFFORD THE PRESCRIPTION YOU GAVE THEM, WOULD YOU NECESSARILY KNOW THAT IT WAS BECAUSE THEY LOST COVERAGE UNDER THE RULES?

A. I WOULD NOT NECESSARILY KNOW THAT WITHOUT A SIGNIFICANT INVESTIGATION INTO THE REASON FOR THE LOSS, WHICH USUALLY INVOLVES SOMEBODY WITH EXPERTISE IN BILLING AND COVERAGE TO HELP WITH THAT INVESTIGATION.

Q. DO YOU KNOW IF A PATIENT WHO CAME TO YOU WOULD EVEN KNOW THAT THE REASON THEIR PRESCRIPTION ALL OF A SUDDEN HAD A CO-PAY WAS BECAUSE OF THESE NEW RULES?

A. I'M NOT SURE THEY WOULD.

Q. YOU AGREED WITH COUNSEL THAT CONTRACEPTIVES ARE USED FOR BOTH MEN AND WOMEN. ARE PRESCRIPTION CONTRACEPTIVES USED BY BOTH MEN AND WOMEN?

A. NO. JUST WOMEN.

Q. THE WOMEN WHO -- AGAIN, ONLY IF YOU KNOW, WHO CAME BACK TO YOU POST ACA, OR MAY HAVE, WHO HAD CONCERNS AND HAD TO REJECT THEIR PRESCRIPTIONS, DO YOU KNOW IF THOSE WOMEN WERE PRIVATELY INSURED?

A. POST ACA OR --

Q. YES.

A. POST ACA WITH CONCERNS. I BELIEVE, AGAIN, TO THE BEST OF MY RECOLLECTION THAT MANY WERE.

Q. DO YOU KNOW THE PERCENT OF WOMEN WHO SUFFER FROM UNINTENDED PREGNANCY IN PENNSYLVANIA?

A. I BELIEVE THAT NUMBER IS 53 PERCENT.

Q. AND DO YOU KNOW IF THAT IS HIGHER OR LOWER THAN THE NATIONAL AVERAGE?

A. ACCORDING TO DATA FROM THE GUTTMACHER INSTITUTE, WHICH IS A CLEARINGHOUSE FOR INFORMATION ABOUT REPRODUCTIVE HEALTH AND PREGNANCY, IT IS HIGHER, AS THE NUMBER IN THE UNITED STATES IS 45 PERCENT.

Q. AND IS THAT INFORMATION AVAILABLE ON THE WEBSITE OF THE GUTTMACHER INSTITUTE?

A. IT IS.

Q. ONE OTHER LAST LINE OF QUESTIONING I JUST WANT TO CLARIFY.

COUNSEL ASKED YOU WHAT YOU REVIEWED PRIOR TO YOUR TESTIMONY. IN ADDITION TO YOUR RÉSUMÉ, DID YOU ALSO REVIEW YOUR PATIENT RECORDS?

A. I REVIEWED MY PATIENT RECORDS IN AN ATTEMPT TO GET AN UNDERSTANDING OF PRACTICE PATTERNS OVER TIME AND FLUCTUATIONS, BASED ON THE NATURE OF THIS CASE.

Q. AND DID YOU LOOK AT THOSE PATIENT RECORDS FOR A TIME PERIOD BEFORE THE AFFORDABLE CARE ACT?

A. I DID.

Q. DID YOU ALSO LOOK AT THE RECORDS FOR AFTER THE AFFORDABLE CARE ACT?

A. I DID.

Q. DID YOU NOTICE ANY TRENDS WITH RESPECT TO WHAT

PRESCRIPTIONS PATIENTS WERE FILLING?

A. SO THE DATA THAT I CAN SPEAK TO WITH THE MOST -- IN THE MOST DEPTH WOULD PERTAIN TO THE MIRENA IUD. AND I CAN TELL YOU, IN MY OWN INDIVIDUAL PRACTICE, WHICH I THINK REFLECTS OTHERS, BUT I CERTAINLY CANNOT SPEAK TO ANYONE ELSE'S PRACTICE WITH AS MUCH ACCURACY AS MY OWN, IN MY OWN PRACTICE, PRIOR TO THE ACA AND AFTER, THERE HAS BEEN A FIVEFOLD INCREASE IN THE NUMBER OF MIRENA IUD'S I HAVE INSERTED INTO -- INSERTED IN PATIENTS IN MY PRACTICE. SO A SIGNIFICANTLY ELEVATED INCREASE OVER TIME.

Q. SO PRE AND POST ACA, THE NUMBER OF PATIENTS WHO HAVE HAD A MIRENA IUD IMPLANTED INCREASED FIVE TIMES?

A. YES, IN MY PRACTICE.

Q. AND HAVE YOUR PRESCRIBING PRACTICES CHANGED SIGNIFICANTLY OVER THOSE YEARS?

A. MY MANAGEMENT OF THE CONDITIONS FOR WHICH I UTILIZE THIS TREATMENT HAS NOT CHANGED, NOR HAS THE EVIDENCE SUPPORTING THE USE OF A MIRENA IUD FOR THESE TREATMENTS. THE BULK OF THE EVIDENCE SUPPORTING THIS AS AN EXCELLENT AND OUTSTANDING TREATMENT FOR CHRONIC PELVIC PAIN AND HAVING MENSTRUAL BLEEDING WAS WELL ESTABLISHED PRIOR TO THE MANDATE. SO MY PRACTICE APPROACH AND THE EVIDENCE WERE ESTABLISHED WELL BEFORE THE MANDATE.

Q. SO TO WHAT DO YOU ATTRIBUTE THIS FIVEFOLD INCREASE IN YOUR PATIENTS WHO ARE NOW USING MIRENA IUD'S MORE EFFECTIVE FORM OF BIRTH CONTROL SINCE THE ACA WENT INTO EFFECT?

A. OF COURSE, IT CAN BE MULTIFACTORIAL. I THINK ONE OF THE FACTORS THAT WE HAVE TO CONSIDER AS INCREDIBLY INFLUENTIAL IS THE ACCESS GRANTED TO WOMEN TO UTILIZE THIS TREATMENT AS A BYPRODUCT OF THE MANDATE.

Q. COST?

A. YES. SIGNIFICANT REDUCTION, ELIMINATION OF COSTS SUCH THAT WOMEN CAN NOW GET ACCESS TO SOMETHING THAT I HAVE ALWAYS HAD IN MY MIND TO UTILIZE FOR THEIR CARE, JUST HAVE A GREATER ABILITY TO DO SO.

Q. DO YOU KNOW IF THAT IS THE PRIMARY REASON FOR THE FIVEFOLD INCREASE, DO YOU KNOW?

A. I MEAN, AGAIN, I THINK IT IS CERTAINLY MULTIFACTORIAL, BUT IN MY OPINION, BASED ON THE THINGS I MENTIONED ABOUT MY APPROACH TO CARE FOR THESE PATIENTS AND THE EVIDENCE, NOT SIGNIFICANTLY CHANGING SINCE THE MANDATE, I WOULD HAVE TO CONCEDE THAT THE MANDATE IS A PRIMARY DRIVING FORCE FOR THE FIVEFOLD INCREASED UTILIZATION OF MIRENA IUDS IN MY PRACTICE.

MR. GOLDMAN: NOTHING FURTHER, YOUR HONOR.

THE COURT: OKAY. ONE QUESTION, I HAVE

ONE QUESTION. WHAT PERCENTAGE OF YOUR PATIENTS ARE FROM PENNSYLVANIA?

THE WITNESS: THE MAJORITY. IF I COULD GIVE YOU A NUMBER, I WOULD SAY PROBABLY 80 PERCENT OR MORE.

THE COURT: OKAY. THANK YOU, YOU CAN LEAVE THE STAND.

THE WITNESS: THANK YOU.

(WITNESS EXCUSED.)

THE COURT: IT IS NOW 12:30, WHICH IS A PERFECT TIME FOR LUNCH. WHAT WE WILL DO IS WE WILL HAVE LUNCH BREAK FOR AN HOUR AND WE WILL BE BACK AT 1:30, AND WHEN WE COME BACK, I UNDERSTAND THAT YOU HAVE BEEN DOING THE RESEARCH ON THE GRANDFATHERING. I HAVE SEEN YOU RUNNING AROUND.

MR. HEALY: APOLOGIZE FOR THE RUNNING AROUND.

THE COURT: NOT A PROBLEM. I'M HAPPY TO SEE THAT YOU'RE DOING IT. SO I WILL TALK TO YOU AFTER THE THIRD AND FINAL WITNESS FROM THE COMMONWEALTH. THANK YOU.

THE CLERK: ALL RISE.

(LUNCHEON BREAK TAKEN.)

MS. BOLAND: OUR NEXT WITNESS IS CYNTHIA CHUANG.

MR. GOLDMAN: YOUR HONOR, IF I MAY ADDRESS A QUICK PROCEDURAL MATTER WITH THE COURT. MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. GOLDMAN: I HAVE A DOCUMENT THAT I WOULD LIKE TO BE ABLE TO PASS UP TO YOUR HONOR. THIS IS A DOCUMENT THAT IS CITED IN OUR COMPLAINT WITH A HYPERLINK AT PARAGRAPH 99.

THE COURT: OKAY.

MR. GOLDMAN: SO THE COMMONWEALTH WOULD LIKE TO MOVE THIS DOCUMENT INTO EVIDENCE ALONG WITH THE ATTACHMENT WHICH IS PART OF THE ARTICLE. WE APPROACHED THE GOVERNMENT DURING BREAK, AND I BELIEVE THEY WILL STIPULATE TO THE AUTHENTICITY AND ADMISSIBILITY OF THE ARTICLE, BUT NOT TO THE ATTACHMENT.

THE COURT: WHAT DO YOU THINK THE ATTACHMENT IS?

MR. GOLDMAN: THE ARTICLE SAYS THAT IT IS A LEAKED COPY OF THE RULES, THE DRAFT RULES THAT ARE BEFORE US NOW.

THE COURT: SO LET ME -- LET'S ASSUME --

LET ME HEAR FROM YOU JUST ON THE PROCEDURAL MATTER OF WHAT YOU'RE OBJECTING TO HERE. YOU ARE OKAY WITH THE ARTICLE BUT NOT THE ATTACHMENT?

MS. KADE: THANK YOU, YOUR HONOR. YES.

THE ATTACHMENT, WE WERE JUST HANDED THIS, YOU KNOW, 125-PAGE DOCUMENT, SO WE ARE NOT ABLE TO STIPULATE AS TO THE AUTHENTICITY OF IT AT THIS POINT, BUT WE ALSO ARE NOT ABLE TO STIPULATE TO THE ADMISSIBILITY OF IT BECAUSE IT'S CLEARLY LABELED CONFIDENTIAL DRAFT AND COVERED BY PRIVILEGES. SO WE ARE NOT ABLE TO STIPULATE TO EITHER THE AUTHENTICITY OR THE ADMISSIBILITY AT THIS POINT.

THE COURT: I ACCEPT THAT YOU ARE NOT ABLE TO DO IT. I'M NOT SURE WHETHER YOU ARE RIGHT WITH RESPECT TO THE CONFIDENTIALITY AND DRAFT, THAT COMPONENT OF WHAT YOU JUST SAID.

SO WHAT IS THE POINT OF THIS IN THE CONTEXT OF THIS PRELIMINARY INJUNCTION HEARING? I MEAN, IT'S NOT THE REGULATIONS. I DON'T KNOW WHAT IT IS. AND THEN THERE IS A VOX ARTICLE. SO HOW DOES IT PERTAIN TO WHAT WE ARE DOING HERE?

MR. GOLDMAN: RIGHT. SO -- AND THIS IS PART OF THE REASON WHY WE STATED IT IN OUR COMPLAINT, WE CITED IT. SO THIS -- IT'S A PUBLIC DOCUMENT NOW, NO MATTER WHAT IT SAYS ON IT. WE DIDN'T CHANGE IT. IT IS EXACTLY WHAT WAS ATTACHED TO THE ARTICLE, BUT IT PURPORTS TO BE A DRAFT OF THE REGULATIONS WHICH WAS LEAKED. IT IS -- I HAVE NOT LINED IT UP AGAINST THE ACTUAL FINAL REGULATIONS, BUT THEY ARE REMARKABLY SIMILAR. AND SO IF YOU ARE LOOKING AT WHAT THE AGENCIES

WERE DOING IN TERMS OF RULE MAKING AND CONSIDERATION, YOU CAN LOOK -- WELL, AT THIS MOMENT IN TIME, THIS IS WHAT PURPORTS TO BE A DRAFT. LATER IN TIME, THERE IS THESE -- THERE HAS BEEN NO -- THERE WERE NO DRAFT RULES PUT FORTH FOR COMMENT, FOR NOTICE OR COMMENT. SO YOU CAN LOOK AT WHAT CHANGES, IF ANY, TOOK PLACE BETWEEN THIS POINT IN TIME, THE ARTICLE IS MAY 31, AND WHEN THE RULES WERE ACTUALLY PROMULGATED.

THE COURT: THAT IS AN INTERESTING EXERCISE, BUT I STILL DON'T UNDERSTAND WHY IT IS RELEVANT HERE, BECAUSE YOUR POINT IS THAT THE NEW RULES WERE ISSUED WITHOUT NOTICE AND COMMENT AND WITHOUT GOOD CAUSE. SO HOW DOES -- HOW DOES THIS -- I MEAN, ASSUMING THAT THIS IS A DRAFT VERSION OF THE RULES ISSUED SOME MONTHS BEFORE THE FINAL VERSION WAS ISSUED, HOW DOES IT IMPACT ON WHAT WE ARE DOING HERE TODAY, WHICH IS DECIDING THE PRELIMINARY INJUNCTION MOTION?

MR. GOLDMAN: COURT'S INDULGENCE, YOUR HONOR, JUST TO CLARIFY.

(PAUSE.)

MR. GOLDMAN: YES, SO THE BEARAK ARTICLE FROM THE GUTTMACHER INSTITUTE WAS A FOOTNOTE TO THE RULES IN THE IFRS, AND THE GOVERNMENT IS TAKING THE POSITION THAT THE RULES HAVE RELIED HEAVILY ON THIS ARTICLE, WHICH IS IN THE FOOTNOTE OF THE FINAL.

THE ISSUE HERE IS, IN THIS DRAFT, IT'S NOT IN HERE BUT THE RULES ARE THE SAME.

THE COURT: OKAY. WELL, I DON'T THINK I CAN ADMIT THE ATTACHMENT BECAUSE WE DON'T KNOW WHERE IT CAME FROM, WE DON'T -- IT SAYS "DRAFT" ON IT. IT SAYS "DEPARTMENT OF THE TREASURY" BUT IT CERTAINLY DOES NOT LOOK LIKE THE FORM THE RULES USUALLY TAKE. I DON'T KNOW WHETHER ONCE THE DOCUMENT IS FINISHED IN THE AGENCY IT THEN GOES OFF TO SOME DEPARTMENT AND GETS TRANSFORMED INTO WHAT THE RULES USUALLY LOOK LIKE, SO I JUST DON'T KNOW WHAT IT IS. WE DON'T HAVE ANYONE HERE TO TELL US WHAT IT IS, SO I CAN'T ADMIT THAT.

AND I THINK THAT THE GOVERNMENT HAS NOT OBJECTED TO THE ARTICLE BEING ADMITTED, CORRECT?

MS. KADE: CORRECT, YOUR HONOR.

THE COURT: I'M HAPPY TO ADMIT THE ARTICLE, BUT I HAVE TO TELL YOU, I DON'T THINK I'M GOING TO RELY ON IT BECAUSE IT'S A NEWSPAPER ARTICLE SAYING THINGS THAT I -- THERE IS JUST NO TESTIMONY TO DETERMINE WHETHER IT IS IN FACT THE CASE.

MR. GOLDMAN: I UNDERSTAND. MAY I JUST TRY ONE OTHER LINE AND THEN --

THE COURT: GO AHEAD.

MR. GOLDMAN: AND THAT IS JUST THAT WE DON'T KNOW -- WE ARE NOT SAYING THAT THIS IS IN FACT A

DRAFT OF THE RULES AT THAT TIME. THIS IS JUST WHATEVER THE ARTICLE SAID.

THE COURT: I UNDERSTAND. SO WE ARE JUST GOING TO -- WE WILL PUT IT IN THE RECORD IN THE LIMITED WAY THAT IT IS. WE WILL PUT IT IN THE RECORD, BUT I CAN TELL YOU NOW THAT I WON'T BE RELYING ON IT.

MR. GOLDMAN: FAIR ENOUGH, YOUR HONOR.

THE COURT: OKAY. YOUR NEXT WITNESS.

MS. BOLAND: MAY I APPROACH?

THE COURT: YOU MAY.

MS. BOLAND: GOOD AFTERNOON, YOUR HONOR. IT'S NICOLE BOLAND AGAIN FROM THE COMMONWEALTH, AND WE CALL DR. CYNTHIA CHUANG.

MS. KOPPLIN: YOUR HONOR, WE WOULD OBJECT TO THIS WITNESS AS CUMULATIVE.

THE COURT: OKAY. HOLD ON A SEC AND LET ME -- BEFORE YOU DO, LET ME JUST HAVE HER SWORN.

(CYNTHIA CHUANG, COMMONWEALTH'S WITNESS, SWORN.)

THE CLERK: PLEASE STATE AND SPELL YOUR NAME FOR THE RECORD.

THE WITNESS: CHUANG IS SPELLED C-H-U-A-N-G.

THE COURT: OKAY. BEFORE I ADDRESS YOUR OBJECTION, GIVE ME IN A NUTSHELL WHAT YOU INTEND TO

ELICIT FROM THIS WITNESS.

MS. BOLAND: SURE, YOUR HONOR. DR. CHUANG WAS ACTUALLY THE LEAD AUTHOR ON THE "MY NEW OPTIONS" STUDY THAT DR. WEISMAN PREVIOUSLY TESTIFIED ABOUT, SO SHE CAN OFFER ADDITIONAL INFORMATION ABOUT THAT STUDY. AND WE ALSO HAVE A DEMONSTRATIVE EXHIBIT REFLECTING THOSE FINDINGS.

THE COURT: IS THE "MY NEW" STUDY THE PENNSYLVANIA STUDY THAT WEISMAN TALKED ABOUT?

MS. BOLAND: YES.

THE COURT: OKAY. THE ONE THAT IS NOT PUBLISHED YET.

MS. BOLAND: CORRECT, YOUR HONOR. AND DR. CHUANG IS ACTUALLY THE LEAD, AND THERE'S A FEW POINTS TO CLARIFY WITH RESPECT TO THE PRIOR TESTIMONY. AND ALSO, DR. CHUANG IS A PRACTICING PHYSICIAN SO SHE HAS THE CLINICAL PERSPECTIVE THAT DR. WEISMAN DID NOT OFFER PREVIOUSLY.

THE COURT: OKAY. DO YOU INTEND TO GO OVER ALL THE FACTS THAT YOU HAVE ALREADY GONE OVER WITH PROFESSOR WEISMAN?

MS. BOLAND: REGARDING THE "MY NEW OPTIONS" STUDY?

THE COURT: YES.

MS. BOLAND: TO A SMALL DEGREE, JUST FOR

CLARIFICATION OF SOME DATES OF THE STUDY. SHE IS MORE PREPARED TO SPEAK TO MORE OF THE DETAILS OF THE STUDY. I WON'T GO IN DEPTH AND REPEAT EVERYTHING THAT DR. WEISMAN SAID, BUT JUST A VERY GENERAL OVERVIEW OF THE STUDY AND JUST TO CLARIFY THE TIME FRAMES OF THE STUDY FOR THE RECORD.

THE COURT: OKAY. WHAT IS YOUR RATIONALE FOR --

MS. KOPPLIN: YOUR HONOR, AS PLAINTIFFS' COUNSEL ALLUDES TO, THE TESTIMONY WOULD BE HIGHLY DUPLICATIVE OF WHAT PROFESSOR WEISMAN AND DR. BUTTS HAVE ALREADY TESTIFIED TO. BASED ON THE WITNESS' DECLARATION, SHE REACHES MANY OF THE SAME CONCLUSIONS AND RELIES ON MUCH OF THE SAME EVIDENCE.

SPECIFICALLY I WOULD POINT YOU TOWARDS, IN THE THIRD CIRCUIT, ROBERT V STETSON SCHOOL INC., THAT'S 256 F.3D 159, WHERE THE EXCLUSION OF AN EXPERT WAS UPHELD ON CUMULATIVE GROUNDS WHEN TWO OTHER EXPERTS HAD ALREADY TESTIFIED AT LENGTH ON THE SAME ISSUE.

THE COURT: OKAY. I UNDERSTAND THAT PRECEDENT, BUT, YOU KNOW, THERE IS NO REASON WHY IT APPLIES HERE. AND WE ARE ALL HERE, WE ARE ALL FRIENDS HERE. YOU KNOW, WE MIGHT AS WELL JUST GO FOR IT. WE DON'T HAVE A JURY SO THEY CAN'T BE PREJUDICED BY WHAT WE ARE ABOUT TO HEAR. IT'S ONLY ME.

OKAY. GO AHEAD.

MS. BOLAND: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MS. BOLAND:

Q. JUST A FEW HOUSEKEEPING MATTERS TO START OFF.

DR. CHUANG, WILL YOU KINDLY REFER TO TAB 6 IN THE BINDER?

A. YES.

Q. CAN YOU IDENTIFY THAT DOCUMENT FOR THE COURT, PLEASE?

A. YES, THAT IS MY DECLARATION.

Q. WILL YOU JUST KINDLY FLIP THROUGH AND TELL US IF IT APPEARS TO BE COMPLETE AND ACCURATE?

A. YES.

Q. GREAT. I WOULD LIKE TO POINT YOU NOW TO TAB 7. WILL YOU KINDLY IDENTIFY THAT DOCUMENT FOR THE COURT?

A. YES, THAT IS MY CV.

Q. AND WILL YOU KINDLY JUST FLIP THROUGH AND CONFIRM THAT IT IS COMPLETE AND ACCURATE.

A. YES.

Q. GREAT. THANK YOU, DOCTOR.

SO THE COURT HAS YOUR CV TO CONSIDER. I'M NOT GOING TO REVIEW EVERYTHING ON IT BUT I DO WANT TO HIGHLIGHT A FEW POINTS.

TO START OFF, WHO'S YOUR EMPLOYER?

A. I WORK AT THE PENN STATE HERSHEY MEDICAL CENTER.
Q. AND HOW ARE YOU EMPLOYED AT PENN STATE HERSHEY?
A. I'M A PHYSICIAN THERE. I'M A GENERAL INTERNIST. I'M CHIEF OF THE DIVISION OF GENERAL INTERNAL MEDICINE AND I'M A PROFESSOR OF MEDICINE AND PUBLIC HEALTH SCIENCES.
Q. SO YOU ARE A PRACTICING DOCTOR AND A PROFESSOR?
A. CORRECT.
Q. DO YOU ALSO CONDUCT RESEARCH?
A. I DO.
Q. ARE YOU FAMILIAR WITH THE CONTRACEPTIVE MANDATE?
A. YES, I AM.
Q. WHAT IS YOUR UNDERSTANDING OF THE CONTRACEPTIVE MANDATE?
A. THE MANDATE SAYS THAT FOR MOST PRIVATELY INSURED WOMEN, THAT CONTRACEPTION -- FDA-APPROVED CONTRACEPTION WOULD BE COVERED WITH NO OUT-OF-POCKET COSTS.
Q. AND HAVE YOU RESEARCHED THE CONTRACEPTIVE MANDATE AS PART OF YOUR WORK?
A. YES, I HAVE.
Q. AND BEFORE WE GET INTO THAT RESEARCH, JUST A COUPLE OF QUESTIONS ON YOUR BACKGROUND. WILL YOU JUST VERY BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND FOR THE COURT?
A. SURE. I COMPLETED MY UNDERGRADUATE TRAINING AT

THE UNIVERSITY OF MICHIGAN, WHERE I GRADUATED WITH HONORS. I THEN SPENT A YEAR LIVING IN NORTHERN CALIFORNIA WHERE I WORKED IN A FAMILY PLANNING CLINIC FOR A YEAR, PROVIDING REPRODUCTIVE HEALTHCARE SERVICES AT A FAMILY PLANNING CLINIC.

I THEN STARTED MEDICAL SCHOOL AT NEW YORK UNIVERSITY, AND FOLLOWING MY MEDICAL DEGREE, I COMPLETED MY INTERNAL MEDICINE RESIDENCY TRAINING AT TEMPLE HOSPITAL HERE IN PHILADELPHIA AS WELL AS MY CHIEF RESIDENCY. THAT WAS IN 2001, AND THEN FOLLOWING THAT, I DID A GENERAL INTERNAL MEDICINE FELLOWSHIP AT BOSTON UNIVERSITY. I DID A GENERAL INTERNAL MEDICAL FELLOWSHIP, WHICH INCLUDED A MASTERS OF EPIDEMIOLOGY AS WELL AS A RESIDENCY IN PREVENTIVE MEDICINE.

Q. DID YOU CONDUCT RESEARCH AS PART OF YOUR FELLOWSHIP?

A. I DID. THE PRIMARY PURPOSE OF THE FELLOWSHIP WAS RESEARCH TRAINING, YES.

Q. AND WHAT WAS THE FOCUS OF YOUR RESEARCH?

A. I HAD ALREADY HAD A STRONG INTEREST IN WOMEN'S HEALTH AND REPRODUCTIVE HEALTHCARE. THE PRIMARY FOCUS OF MY RESEARCH THERE WAS EMERGENCY CONTRACEPTION.

Q. THANK YOU, DOCTOR.

I CAN SEE FROM YOUR RÉSUMÉ THAT YOU'VE AUTHORED NUMEROUS SCHOLARLY ARTICLES. DO YOU MIND

GIVING THE JUDGE JUST A BALLPARK IDEA OF HOW MANY SCHOLARLY ARTICLES YOU HAVE WRITTEN THROUGHOUT YOUR CAREER?
A. I BELIEVE THERE'S 70 PUBLICATIONS RIGHT NOW.
Q. HAVE YOU AUTHORED ANY PUBLICATIONS REGARDING CONTRACEPTION?
A. YES, THAT'S -- PROBABLY THE MAJORITY OF THE PUBLICATIONS ARE ABOUT CONTRACEPTION.
Q. AND CAN YOU JUST KINDLY GIVE SOME EXAMPLES OF SOME OF THE TOPICS THAT WOULD INCLUDE?
A. YEAH, SURE. SO LIKE I SAID, WHEN I STARTED IN MY FELLOWSHIP TRAINING, THE BULK OF ARTICLES AROUND THAT TIME WERE ABOUT EMERGENCY CONTRACEPTION. FOLLOWING THAT, WHEN I CAME TO PENN STATE, MY FOCUS TURNED TOWARD UNINTENDED PREGNANCY AND CONTRACEPTIVE USE IN WOMEN WITH CHRONIC MEDICAL CONDITIONS.
THERE IS ALSO SOME PUBLICATIONS ABOUT GESTATIONAL WEIGHT GAIN DURING PREGNANCY, AND THEN MORE RECENTLY, MY PUBLICATIONS ARE ABOUT CONTRACEPTIVE BEHAVIOR AND REPRODUCTIVE LIFE PLANNING AS A TOOL TO ASSIST WITH CONTRACEPTIVE DECISION-MAKING.
Q. AND ARE SOME OF THOSE ARTICLES SPECIFICALLY ABOUT THE CONTRACEPTIVE MANDATE?
A. SEVERAL OF THEM ARE IN THE CONTEXT OF THE CONTRACEPTIVE MANDATE, YES.

Q. AND ARE ALL THOSE PUBLICATIONS THE PRODUCT OF RESEARCH THAT YOU'VE PERSONALLY CONDUCTED?
A. YES.
Q. AND SEPARATE FROM THAT WORK, DO YOU ALSO SERVE AS A PEER REVIEWER FOR ARTICLES IN OTHER PUBLICATIONS?
A. YES. I AM FREQUENTLY ASKED TO PEER REVIEW FOR JOURNALS. I'M ON THE EDITORIAL BOARD OF A JOURNAL CALLED WOMEN'S HEALTH ISSUES, SO I REVIEW FOR THEM REGULARLY. AND I'M ALSO FREQUENTLY ASKED BY OTHER JOURNALS TO REVIEW, USUALLY AROUND TOPICS RELATED TO WOMEN'S HEALTH OR PREVENTIVE HEALTHCARE.
Q. I NOTICE FROM YOUR CV THAT YOU ARE AN INVESTIGATOR. AND WHAT DOES IT MEAN TO BE AN INVESTIGATOR?
A. IT MEANS YOU ARE A RESEARCHER.
Q. AND HOW ARE YOUR PROJECTS FUNDED WHEN YOU DO INVESTIGATIONS?
A. SO RESEARCH CAN BE FUNDED IN ANY NUMBER OF WAYS. THEY CAN BE FUNDED THROUGH THE FEDERAL GOVERNMENT LIKE THROUGH THE NATIONAL INSTITUTES OF HEALTH OR THE CDC, FOR EXAMPLE. THERE'S ALSO SOME NONFEDERAL AGENCIES LIKE PCORI, WHICH IS THE PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE WHERE SOME OF MY WORK WAS BEEN FUNDED, AS WELL AS THE NIH. IT CAN BE FUNDED BY PRIVATE FOUNDATIONS. IT CAN BE FUNDED ALSO BY INSTITUTIONS, BUT SO --

ACADEMIC INSTITUTIONS.
Q. ABOUT HOW MANY PROJECTS HAVE YOU BEEN INVOLVED IN AS AN INVESTIGATOR THROUGHOUT YOUR CAREER?
A. I THINK ABOUT 20.
Q. AND HAVE THOSE PROJECTS BEEN FUNDED BY GRANTS?
A. YES, THOSE ARE ALL THE ONES THAT ARE FUNDED.
Q. DO YOU HAVE ANY OFFICIAL ROLES AT HERSHEY WITH REGARD TO RESEARCH?
A. LIKE I MENTIONED EARLIER, I'M THE CHIEF OF THE DIVISION OF GENERAL INTERNAL MEDICINE SO I OVERSEE ALL ASPECTS OF THE DIVISION, INCLUDING THE RESEARCH ACTIVITIES IN THE DIVISION.
PRIOR TO BECOMING DIVISION CHIEF TWO YEARS AGO, I WAS THE ASSOCIATE DIRECTOR FOR RESEARCH FOR THE DIVISION. I'M ALSO THE RESEARCH DIRECTOR FOR THE PENN STATE BIRCWH PROGRAM. BIRCWH STANDS FOR BUILDING INTERDISCIPLINARY RESEARCH CAREERS IN WOMEN'S HEALTH, WHICH IS AN NIH-FUNDED PROGRAM TO HELP PROVIDE SUPPORT FOR JUNIOR INVESTIGATORS TRYING TO BUILD THEIR CAREERS IN WOMEN'S HEALTH RESEARCH.
Q. HAVE ANY OF YOUR PROJECTS INVOLVED THE IMPACT OF THE CONTRACEPTIVE MANDATE?
A. YES.
Q. CAN YOU TELL US ABOUT A PROJECT TO THAT EFFECT?
A. SURE. SO THE PROJECT THAT WAS REFERRED TO

EARLIER, THE "MY NEW OPTIONS" STUDY, IS A STUDY THAT WAS FUNDED BY PCORI, THE PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE. AND THE "MY NEW OPTIONS" STUDY WAS A TWO-YEAR STUDY WHERE WE LOOKED AT THE EFFECT OF WEB-BASED CONTRACEPTIVE INTERVENTIONS TO SEE IF THEY HELPED WOMEN WITH THEIR CONTRACEPTIVE DECISION-MAKING.

Q. OKAY. WE WILL DISCUSS THAT PROJECT A LITTLE BIT MORE AT LENGTH IN A FEW MINUTES.

I WANTED TO TURN NOW TO YOUR MEDICAL PRACTICE. IN ADDITION TO YOUR WORK AS A PROFESSOR, YOU TESTIFIED THAT YOU ALSO MAINTAIN AN ACTIVE MEDICAL PRACTICE; IS THAT RIGHT, DOCTOR?

A. CORRECT.

Q. WHERE IS YOUR PRACTICE LOCATED?

A. I PRACTICE AT THE HERSHEY MEDICAL CENTER, AT THE INTERNAL MEDICINE EAST CLINIC, WHICH IS LOCATED AT 35 HOPE DRIVE IN HERSHEY.

Q. AND WHAT KIND OF PRACTICE DO YOU HAVE?

A. IT'S AN INTERNAL MEDICINE PRACTICE, SO IT'S ADULT PRIMARY CARE. MY PRACTICE HAS MOSTLY WOMEN PATIENTS, AND SO ADULT WOMEN.

Q. HOW LONG HAVE YOU BEEN PRACTICING MEDICINE?

A. WELL, I GRADUATED FROM MEDICAL SCHOOL 20 YEARS AGO, SO 20 YEARS.

Q. AND ARE CONTRACEPTIVES PART OF YOUR MEDICAL

PRACTICE?

A. YES.

Q. HOW SO?

A. ANY TIME I HAVE A FEMALE PATIENT WHO'S OF REPRODUCTIVE AGE WHO'S CAPABLE OF PREGNANCY, IT'S A PART OF EVERY VISIT TO DISCUSS WHAT HER DESIRES ARE AROUND PREGNANCY OR -- EITHER ACHIEVING PREGNANCY OR AVOIDING PREGNANCY, AND SO OBVIOUSLY, CONTRACEPTION BECOMES AN IMPORTANT PART OF THAT CONVERSATION.

Q. THANK YOU.

MS. BOLAND: AT THIS TIME, YOUR HONOR, I WOULD LIKE TO OFFER DR. CHUANG AS AN EXPERT IN THE AREAS OF PREVENTATIVE MEDICAL CARE FOR WOMEN, INCLUDING CONTRACEPTIVE CARE.

MS. KOPPLIN: WE WOULD OBJECT TO THAT, YOUR HONOR.

THE COURT: REASON?

MS. KOPPLIN: FIRST, FOR THE SAME REASONS AS THE OTHER EXPERTS. THIS EXPERT WAS NOT DISCLOSED TO US AS REQUIRED BY FEDERAL RULE OF CIVIL PROCEDURE 26(A) OR FEDERAL RULES OF EVIDENCE 702, 703 AND 705. AND SECOND, FOR THE SAME AS THE OTHER EXPERTS, IT'S IMPROPER TO ADMIT EXPERT EVIDENCE TO THE EXTENT THAT IT IS BEING USED TO DETERMINE THE CORRECTNESS OR WISDOM OF AN AGENCY'S DECISION IN AN APA CASE.

THE COURT: ARE YOU GOING TO USE HER -- IS SHE GOING TO ISSUE AN OPINION ON THE CORRECTNESS OF THE AGENCY IN COMING UP WITH THE EXEMPTIONS?

MS. BOLAND: NO, YOUR HONOR.

THE COURT: SO THAT PARTICULAR OBJECTION IS MOOT, I THINK, AND THEN WITH RESPECT TO THE RULE 26 OBJECTION, OVERRULING YOU ON THAT ONE.

GO AHEAD.

BY MS. BOLAND:

Q. DR. CHUANG, SINCE CONTRACEPTIVES PLAY A ROLE IN YOUR PRACTICE, DO YOU COUNSEL PATIENTS REGARDING CONTRACEPTIVE OPTIONS?

A. YES, I DO.

Q. AND WHAT ARE SOME CONSIDERATIONS THAT GO INTO RECOMMENDING A PARTICULAR CONTRACEPTION?

A. WELL, THERE IS MANY THINGS TO CONSIDER, AND SO, LIKE I MENTIONED EARLIER, IF A WOMAN IS INTENDING TO BECOME PREGNANT OR TRYING TO AVOID PREGNANCY AND WHAT HER TIMING IS FOR THAT; WHEN DOES SHE THINK SHE MIGHT WANT TO BE PREGNANT IN THE FUTURE.

I CERTAINLY ALSO ASK HER ABOUT HER EXPERIENCE WITH PRIOR CONTRACEPTIVE METHODS IN THE PAST; WHAT HAS WORKED WELL OR NOT WORKED WELL FOR HER PERSONALLY. CERTAINLY CONSIDERING HER HEALTH SITUATION, IF SHE HAS ANY CHRONIC MEDICAL ISSUES, OTHER MEDICATIONS

SHE IS TAKING THAT MAY AFFECT THE SAFETY OF ANY CONTRACEPTIVE METHODS, THAT IS OBVIOUSLY VERY IMPORTANT TO DISCUSS.

SIDE EFFECTS OF DIFFERENT CONTRACEPTIVE METHODS, WHAT A PARTICULAR WOMAN IS WILLING TO TOLERATE OR NOT TOLERATE IN TERMS OF SIDE EFFECTS. AND ALSO JUST, YOU KNOW, HER OWN PERSONAL PREFERENCE. WOMEN SOMETIMES HAVE VERY STRONG OPINIONS ABOUT WHAT KIND OF METHODS THEY WANT TO USE OR NOT USE, AND THOSE ARE VERY IMPORTANT PARTS OF THE DECISION FOR HER.

Q. AND DO -- THE EFFECTIVENESS OF A PARTICULAR CONTRACEPTION, DOES THAT PLAY INTO YOUR COUNSELING HOW EFFECTIVE A PARTICULAR METHOD OF CONTRACEPTION IS?

A. ABSOLUTELY. BUT INTERESTINGLY, IT CAN VARY FROM WOMAN TO WOMAN. THERE ARE SOME WOMEN WHO ARE WILLING TO TOLERATE LESS EFFECTIVE METHODS BECAUSE OF ALL THE OTHER CONSIDERATIONS THAT SHE HAS. BUT YES, TALKING ABOUT CONTRACEPTIVE EFFECTIVENESS IS VERY IMPORTANT.

Q. AND WHAT ARE THE MOST EFFECTIVE FORMS OF CONTRACEPTION?

A. SURE. SO THE MOST EFFECTIVE REVERSIBLE METHODS ARE WHAT WE COMMONLY CALL LARCS, L-A-R-C-S, WHICH STANDS FOR LONG-ACTING REVERSIBLE CONTRACEPTIVE. THE LARCS INCLUDE THE CONTRACEPTIVE IMPLANT, WHICH IS A ROD THAT GETS IMPLANTED ON THE INNER PART OF THE ARM, AS WELL AS

THE INTRAUTERINE DEVICE OR THE IUD.

Q. THEY ARE THE MOST EFFECTIVE. AND THEN WHAT WOULD YOU SAY WOULD BE THE NEXT LEVEL DOWN?

A. RIGHT. SO THE LARCS ARE THE HIGHEST TIER OF EFFICACY. THE NEXT TIER DOWN ARE OTHER HORMONAL METHODS, SO THAT INCLUDES THE BIRTH CONTROL PILL, THE BIRTH CONTROL PATCH, THE CONTRACEPTIVE VAGINAL RING, THE CONTRACEPTIVE INJECTABLE OR DEPO-PROVERA. THAT WOULD BE IN THE NEXT TIER OF EFFECTIVENESS. AND THEN THE LOWEST TIER OF EFFECTIVENESS ARE METHODS SUCH AS WITHDRAWAL, NATURAL FAMILY PLANNING, BARRIER METHODS SUCH AS CONDOMS. THOSE ARE IN THE LOWEST TIER OF EFFECTIVENESS.

Q. DO YOU USE ANY PARTICULAR TEACHING TOOLS IN COUNSELING PATIENTS REGARDING THE VARIOUS METHODS?

A. I COMMONLY USE -- THERE IS A CHART THAT IS AVAILABLE ON THE CDC WEBSITE. SO I USUALLY HAVE THAT HANDY IN MY EXAMINATION ROOM SO WE CAN LOOK AT THE EFFECTIVENESS TOGETHER.

Q. THANK YOU, DOCTOR.

I WOULD LIKE TO POINT YOU TO TAB 17 OF THE BINDER.

A. OKAY.

Q. WILL YOU KINDLY IDENTIFY THAT DOCUMENT.

A. YEAH, THIS IS THE CDC CHART I WAS JUST REFERRING TO.

Q. ALL RIGHT, DOCTOR. JUST VERY BRIEFLY, IF YOU CAN WALK THROUGH WHAT THIS CHART REFLECTS.

A. SURE. SO THE CHART IS ORGANIZED IN THREE ROWS SEPARATED BY THOSE BLACK LINES, SO AT THE VERY TOP ROW, THOSE ARE THE MOST EFFECTIVE METHODS, THE HIGHEST TIER. SO THAT IS WHERE THE LARCS ARE. YOU CAN SEE THE CONTRACEPTIVE IMPLANT AND THE IUD UP THERE, AND YOU CAN SEE THEIR EFFECTIVENESS RATES THERE. IT IS LISTED AS LESS THAN ONE PREGNANCY PER 100 WOMEN PER YEAR. THEY ARE LINED UP RIGHT NEXT TO THE PERMANENT STERILIZATION METHODS. YOU MIGHT BE INTERESTED TO SEE THAT THE IMPLANT AND THE IUD ARE ACTUALLY MORE EFFECTIVE THAN THOSE PERMANENT STERILIZATION METHODS.

THE NEXT TIER AFTER THAT IS WHERE YOU SEE THE SHOT, THE PILL, THE PATCH, THE RING, AND THOSE ARE THE ONES THAT ARE THE NEXT LEVEL EFFECTIVENESS, SO YOU CAN SEE ON THE LEFT SIDE OF THE CHART IT SAYS 6 TO 12 PREGNANCIES PER 100 WOMEN IN A YEAR. WOMEN ARE OFTEN SURPRISED THAT THE PILL IS ASSOCIATED WITH THAT MANY PREGNANCIES.

AND THEN IN THE LOWEST TIER AT THE BOTTOM ARE THAT -- THE BARRIER METHODS WE TALKED ABOUT BEFORE, THE CONDOMS, WITHDRAWAL, SPERMICIDE AND THE NATURAL FAMILY PLANNING METHOD.

Q. ARE SOME CONTRACEPTIVES MORE EXPENSIVE THAN

OTHERS?

A. YES. IT SO HAPPENS THAT THE MOST EFFECTIVE METHODS, SO THE LARCS AT THE TOP ROW, ARE THE MOST EXPENSIVE METHODS, AND THEN THE SECOND TIER AND THEN THE LOWEST TIER.

Q. THANK YOU, DOCTOR.

DO CONTRACEPTIVES ALSO PLAY A ROLE IN PLANNING CHILDREN?

A. YEAH. SO I THINK CONTRACEPTION CAN BE VERY HELPFUL, IMPORTANT IN HELPING WOMEN TIME THEIR PREGNANCIES AND THE SPACING BETWEEN THEIR PREGNANCIES, SO THERE ARE SEVERAL GUIDELINES THAT SUGGEST THAT WOMEN SHOULD WAIT AT LEAST 18 MONTHS AFTER THE BIRTH OF A CHILD BEFORE GETTING PREGNANT AGAIN, AND THAT IS BECAUSE MORE CLOSELY-SPACED PREGNANCIES ARE ASSOCIATED WITH PRE-TERM BIRTH AND LOW BIRTH WEIGHT. SO BEING ABLE TO CONTROL THE SPACING OF THE PREGNANCIES CAN BE VERY IMPORTANT.

BUT AS IMPORTANT IS ALLOWING WOMEN TO BE EMPOWERED TO COMPLETE THEIR GOALS IN LIFE, SO BE ABLE TO FINISH SCHOOL, BE ABLE TO ACHIEVE THEIR JOB AND CAREER GOALS, REACH THEIR FINANCIAL GOALS SO THEY CAN HAVE THEIR CHILDREN WHEN THEY FEEL FINANCIALLY STABLE. SO I THINK BEING ABLE TO HAVE THE CHILDREN, THE NUMBER OF CHILDREN THEY WANT AND WHEN IT'S RIGHT FOR THEM IS VERY

IMPORTANT, AND WITHOUT CONTRACEPTION, THEY WOULD NOT BE ABLE TO DO THAT.

Q. DO MOST OF YOUR PATIENTS HAVE HEALTH INSURANCE?

A. YES. MY PRACTICE IN HERSHEY IS A MOSTLY INSURED POPULATION, YES.

Q. PRIOR TO THE CONTRACEPTIVE CARE MANDATE, WAS COST SOMETHING THAT YOU COUNSELED ABOUT IN THE CONVERSATION ABOUT CONTRACEPTION?

A. YES. SO WHEN I WOULD PULL OUT THIS CHART, I WOULD ALSO TALK ABOUT THE COSTS OF THE DIFFERENT METHODS AND OBVIOUSLY FOR SOME WOMEN, THERE WERE SOME METHODS THAT WE COULD NOT TALK ABOUT BEYOND COSTS BECAUSE THEY WERE COST-PROHIBITIVE.

Q. AND SINCE THE AFFORDABLE CARE ACT, DO YOU STILL COUNSEL YOUR PRIVATELY-INSURED PATIENTS REGARDING COSTS?

A. I'M ABLE TO TELL WOMEN WHO HAVE PRIVATE HEALTH INSURANCE THAT THEIR HEALTH INSURANCE COVERS ALL THE FDA-APPROVED METHODS WITH NO OUT-OF-POCKET COSTS, SO I'M ABLE TO PUT THIS CHART IN FRONT OF THEM AND REASSURE THEM THAT THEY WOULD HAVE NO CO-PAYS OR DEDUCTIBLES AND WE CAN TALK ABOUT THE DIFFERENT METHODS WITHOUT COSTS.

Q. IN YOUR EXPERIENCE IN YOUR PRACTICE PRIOR TO THE CONTRACEPTIVE MANDATE, DID YOU HAVE ANY EXPERIENCE WHERE PATIENTS WOULD RETURN TO YOU AND DECIDE NOT TO CHOOSE THE CONTRACEPTION THAT YOU RECOMMENDED OR TO FORGO

CONTRACEPTION ALTOGETHER BECAUSE OF COST?

A. YES, ABSOLUTELY. THERE WERE MANY OCCASIONS I CAN THINK OF WHERE A WOMAN MIGHT REALLY DESIRE TO GET AN IUD BUT IT WAS COST PROHIBITIVE SO SHE WOULD HAVE TO CHOOSE A DIFFERENT METHOD.

Q. HAVE YOU EXPERIENCED THAT PHENOMENON WITH ANY PATIENTS SINCE THE CONTRACEPTIVE MANDATE, PRIVATELY-INSURED PATIENTS?

A. NO, I HAVE NOT.

Q. WHAT DO YOU DO WHEN YOU ENCOUNTER A WOMAN WHO DOES NOT HAVE INSURANCE AND IS NEEDING CONTRACEPTIVE CARE?

A. IN OUR PRACTICE WE HAVE A SOCIAL WORKER, WE HAVE A FINANCIAL DEPARTMENT AT THE HERSHEY MEDICAL CENTER, SO IF SOMEONE IS UNINSURED, I AM ABLE TO REFER THEM TO THOSE SERVICES. IF THE PATIENT QUALIFIES FINANCIALLY, THEY MAY BE ABLE TO HELP THAT PATIENT APPLY FOR MEDICAID OR FIND OTHER ASSISTANCE, BUT IF THE PATIENT DOES NOT QUALIFY FOR MEDICAID OR IS UNABLE TO OBTAIN INSURANCE IN ANY OTHER WAY, I PERSONALLY WOULD REFER THAT PERSON TO PLANNED PARENTHOOD OR A FEDERALLY-QUALIFIED HEALTH CENTER FOR THEM TO RECEIVE THEIR CONTRACEPTIVE SERVICES.

THE COURT: DID YOU SAY FEDERALLY-QUALIFIED HEALTH CENTER?

THE WITNESS: YEAH.

BY MS. BOLAND:

Q. OKAY, DOCTOR. I WOULD NOW LIKE TO TURN YOUR ATTENTION TO THE "MY NEW OPTIONS" STUDY, WHICH WAS REFERENCED BEFORE. CAN YOU TELL US GENERALLY ABOUT THIS STUDY? I UNDERSTAND YOU BEGAN TO EXPLAIN, BUT IF YOU CAN TELL THE COURT EXACTLY WHAT WERE THE PARAMETERS OF THE STUDY AND WHAT WAS YOUR GOAL IN CONDUCTING THE STUDY?

A. SURE. SURE. SO THE "MY NEW OPTIONS" STUDY WAS FUNDED THROUGH PCORI, THE PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE. WE RECEIVED FUNDING IN THE FALL OF 2013 AND WE STARTED RECRUITING THE RESEARCH PARTICIPANTS IN THE SPRING OF 2014. IT WAS A TWO-YEAR STUDY, SO IT RAN UNTIL THE MIDDLE OF 2016.

THE PURPOSE OF THE STUDY WAS TO RECRUIT REPRODUCTIVE-AGE WOMEN WHO ARE PRIVATELY INSURED, AND WE RECRUITED PRIVATELY-INSURED WOMEN BECAUSE WE WANTED THEM TO HAVE COVERAGE FOR CONTRACEPTION. AND WE RECRUITED THEM AND THEY WERE RANDOMIZED INTO THREE DIFFERENT GROUPS IN ORDER TO SEE DIFFERENT -- AND SOME OF THE GROUPS RECEIVED CERTAIN WEB-BASED COUNSELING INTERVENTIONS TO SEE IF IT WOULD HELP THEM WITH THEIR CONTRACEPTIVE DECISION-MAKING.

Q. OKAY. AND SO TO CLARIFY, THE TIME FRAME FOR THIS STUDY WAS 2014 THROUGH 2016?

A. THAT'S CORRECT.

Q. SO IF DR. WEISMAN TESTIFIED EARLIER IT WAS 2012 THROUGH 2014, WAS THAT MISTAKEN?

A. THAT WAS MISTAKEN, YES.

Q. OKAY. AND WHAT DID YOU FIND AS A RESULT OF THIS STUDY?

A. YES, SO WE ACTUALLY FOUND THAT OUR WEB-BASED INTERVENTIONS DID NOT MAKE A DIFFERENCE; THEY DID NOT PARTICULARLY HELP WOMEN OR CHANGE WOMEN IN THEIR CONTRACEPTIVE DECISION-MAKING. HOWEVER, WE WERE ABLE TO TAKE THE OPPORTUNITY TO SEE THAT WE WERE ABLE TO FOLLOW THESE WOMEN FROM PENNSYLVANIA OVER THE COURSE OF TWO YEARS, AND AS A PARTICIPANT IN THE STUDY, THEY COMPLETED A LOT OF SURVEYS FOR US AND THE SURVEYS HAD A LOT OF QUESTIONS ABOUT CONTRACEPTIVE USE AND BEHAVIOR. SO WE WERE ABLE TO SEE WHAT WOMEN REPORTED THEY WERE DOING ABOUT CONTRACEPTION AT THE BEGINNING OF THE STUDY, THROUGHOUT THE STUDY, AND AT THE END OF THE STUDY.

Q. AND THE CONTRACEPTIVE MANDATE WAS ALREADY IN PLACE --

MS. KOPPLIN: YOUR HONOR, I'M SORRY, WE WOULD OBJECT TO THIS LINE OF QUESTIONING. WE HAVE NOT HAD ANY DISCLOSURE ABOUT THE METHODOLOGY THAT WAS USED IN THIS STUDY OR WHERE THIS DATA CAME FROM.

THE COURT: OVERRULED.

ARE YOU GOING TO TALK ABOUT THAT?

MS. BOLAND: YES.

BY MS. BOLAND:

Q. WILL YOU SPEAK TO THE METHODOLOGY BEHIND THIS STUDY, PLEASE, DR. CHUANG?

A. SURE. THIS WAS A RANDOMIZED TRIAL. WE RECRUITED -- YOU WANT TO HEAR THE DETAILS OF THE RECRUITMENT METHODS? OKAY.

SO WE PARTNERED WITH HIGHMARK, A PRIVATE INSURANCE PROVIDER. FOR THE REASON I STATED EARLIER, WE WERE SPECIFICALLY INTERESTED IN RECRUITING PRIVATELY INSURED WOMEN WHO LIVED IN THE STATE OF PENNSYLVANIA, AND SO WE SENT OUT INVITATIONS TO WOMEN WHO HAD HEALTH INSURANCE, WERE BETWEEN THE AGES OF 18 AND 40, AND INVITED THEM TO PARTICIPATE IN THE STUDY.

AND FOR WOMEN WHO CONSENTED, ENROLLED IN THE STUDY, THEY COMPLETED A SURVEY AT THE BEGINNING OF THE STUDY AND THEY WERE RANDOMIZED INTO ONE OF THREE GROUPS. ONE GROUP WAS A CONTROL GROUP; THEY DID NOT GET ANY PARTICULAR INTERVENTION AT ALL. AND THE OTHER TWO GROUPS WERE TWO DIFFERENT GROUPS WHERE THEY WOULD SEE TWO DIFFERENT TYPES OF WEBSITES THAT PROVIDED INFORMATION ABOUT CONTRACEPTION TO SEE IF THOSE WEBSITES WOULD HELP THEM WITH THEIR DECISION-MAKING.

HOWEVER AT THE END OF THE STUDY, AT THE

END OF THE TWO YEARS, WE FOUND THAT ALL THREE GROUPS BEHAVED SIMILARLY AND THERE WAS NO DIFFERENCE BETWEEN THE GROUPS THAT GOT THE WEBSITE INTERVENTION AND THE GROUP THAT DID NOT. SO UNFORTUNATELY FOR ME, WE DIDN'T SEE ANY DIFFERENCES WITH OUR WEBSITE INTERVENTION, BUT WE WERE ABLE TO SEE WHAT THE CONTRACEPTIVE BEHAVIORS WERE AMONGST THE WOMEN WHO WERE PARTICIPATING IN THE STUDY.

AND I DON'T THINK I SAID BEFORE, THERE WERE 984 WOMEN WHO WERE IN THE STUDY.

Q. AND WHAT DID YOU LEARN THAT THE CONTRACEPTIVE BEHAVIORS WERE OVER THIS PERIOD OF TIME FOR ALL THREE GROUPS INCLUDING THE CONTROL GROUP, RIGHT?

A. SURE. YES. SO WE WERE ABLE TO SEE WHAT TYPES OF CONTRACEPTIVE METHODS WERE BEING USED THROUGHOUT THE STUDY. SO IN THE BEGINNING OF THE STUDY, THERE WERE RELATIVELY FEW WOMEN USING LARCS, THE LONG-ACTING REVERSIBLE CONTRACEPTIVES. THERE WERE ABOUT 8 PERCENT OF WOMEN USING LARCS, AND BY THE END OF THE STUDY THERE WERE ALMOST 18 PERCENT OF WOMEN USING LARCS IN THE STUDY. AND SO WE THOUGHT THAT WAS AN INTERESTING FINDING.

Q. DOCTOR, I WOULD LIKE TO POINT YOU TO TAB 18 IN THE BINDER.

A. OKAY.

Q. WILL YOU PLEASE IDENTIFY THIS DOCUMENT FOR THE COURT?

A. SURE. THIS IS A RESULTS TABLE THAT IS TAKEN FROM SOME OF OUR -- TAKEN FROM A PRESENTATION THAT WE HAD DONE PRESENTING THE "MY NEW OPTIONS" STUDY AT A NATIONAL CONFERENCE.

Q. THANK YOU. IF YOU PUT --

MS. KOPPLIN: YOUR HONOR -- I'M SORRY -- WE WOULD OBJECT. WHAT IS THE SOURCE OF THIS DATA?

THE COURT: WELL, WHY DON'T YOU -- OFFER OF PROOF. WHAT IS THE SOURCE OF DATA?

MS. BOLAND: DR. CHUANG HERSELF DRAFTED THIS CHART AND SHE PUT IN THE DATA HERSELF. SHE HAS ALREADY TESTIFIED AS TO THE METHODOLOGY BEHIND IT. THIS IS JUST PUTTING HER TESTIMONY IN CHART FORM TO DEMONSTRATE FOR THE COURT.

THE COURT: SO MS. -- MS. CHUANG, DID YOU CREATE THIS FOR THIS PARTICULAR PROCEEDING OR YOU CREATED IT FOR THE STUDY?

THE WITNESS: I CREATED IT FOR THE STUDY. THIS TABLE IS ACTUALLY TAKEN FROM A PRESENTATION WE DID AT THE SOCIETY OF GENERAL INTERNAL MEDICINE MEETING BACK IN THE SPRING. I ALSO GAVE A PRESENTATION AT THE SOCIETY FOR FAMILY PLANNING MEETING, AND THIS TABLE WAS TAKEN FROM THOSE PRESENTATIONS.

THE COURT: AND THE DATA INCLUDED IN THE TABLE IS TAKEN FROM WHERE?

THE WITNESS: THIS IS FROM THE "MY NEW OPTIONS" RESULTS.

THE COURT: OKAY. OVERRULED.

GO AHEAD.

BY MS. BOLAND:

Q. IF YOU FLIP TO THE NEXT PAGE, CAN YOU JUST TELL US WHAT THAT IS?

A. THAT IS ANOTHER TABLE FROM THE SAME PRESENTATIONS.

Q. REFLECTING THE SAME DATA?

A. YES.

Q. IS IT JUST REPACKAGED A DIFFERENT WAY?

A. YES. SO THE FIRST TABLE SHOWS THE CONTRACEPTIVE TYPES THAT ARE USED IN THE STUDY DIVIDED INTO THE FOUR CATEGORIES THAT ARE SIMILAR TO THOSE TIERS THAT WE LOOKED AT ON THE CDC WEBSITE. SO THE FIRST ROW IS LARCS, THE SECOND ROW IS OTHER PRESCRIPTION METHODS, THIRD ROW IS NONPRESCRIPTION METHODS, AND THE LAST ROW IS NO METHOD. THE SECOND TABLE REALLY IS THE SAME DATA BUT IT'S JUST LOOKING AT WOMEN WHO WERE ON ANY CONTRACEPTIVE METHOD AT ALL VERSUS NO METHOD. SO IN THE SECOND TABLE, IT JUST REALLY COLLAPSES THOSE FIRST THREE ROWS INTO ONE ROW, SO IT IS REALLY SHOWING THE SAME DATA

IN TWO DIFFERENT FORMATS.

Q. AND I THINK YOU JUST TESTIFIED THAT YOU SAW A STATISTICAL JUMP FROM THE NUMBER OF WOMEN USING LARCS AT THE BEGINNING OF THE STUDY TO THE NUMBER OF WOMEN USING LARCS AT THE END OF THE STUDY. IS THAT REFLECTED SOMEWHERE ON THESE DOCUMENTS?

A. SO I'M LOOKING AT TABLE 1, AND SO IN THAT FIRST ROW WHERE IT SAYS LARCS, AND THEN IF YOU LOOK AT THE NEXT COLUMN WHERE IT SAYS BASELINE, THAT IS THE BEGINNING OF THE STUDY WHERE THERE ARE 984 WOMEN ENROLLED IN THE STUDY.

SO 83 WOMEN AT THE BEGINNING OF THE STUDY, WHICH WAS 8.4 PERCENT OF THE SAMPLE, AT THAT TIME WERE USING LARCS. AND THEN IF YOU GO OVER TO THE NEXT ROW, WHERE IT SAYS 24 MONTHS, THERE WERE 130 WOMEN OUT OF 727 WOMEN USING LARCS AT THE END OF THE STUDY, WHICH WAS 17.9 PERCENT.

IF YOU LOOK AT THE NEXT TWO ROWS, THERE ARE REALLY NO DIFFERENCES. IF YOU LOOK AT THE PERCENTAGES OF OTHER PRESCRIPTION METHODS IT WAS 49.7 PERCENT BOTH AT BASELINE AND 24 MONTHS. AND THEN IN THE THIRD ROW, NOT MUCH DIFFERENCE EITHER IN THE NONPRESCRIPTION METHOD. BUT THEN IF YOU LOOK AT THE LAST ROW, THE NO-METHOD ROW, YOU WILL SEE THAT BASELINE THERE WERE 11.5 PERCENT OF WOMEN NOT USING ANY METHOD

AND THAT HAD DROPPED TO 5.1 PERCENT BY THE END OF THE STUDY.

AND THEN IN THE THIRD COLUMN WHERE IT SAYS P VALUE. THE P VALUE IS OUR TEST OF STATISTICAL SIGNIFICANCE, AND IN BIOMEDICAL RESEARCH WE GENERALLY ACCEPT A P VALUE OF LESS THAN .05 TO INDICATE STATISTICAL SIGNIFICANCE. SO THE P VALUE WE HAD FOR THESE RESULTS WAS LESS THAN .001, WHICH SHOWS THAT THERE WAS A STATISTICALLY SIGNIFICANT CHANGE IN THESE NUMBERS THAT I JUST REVIEWED.

Q. AND JUST A COUPLE OF POINTS OF CLARIFICATION. IT LOOKS LIKE ALTHOUGH THE PERCENTAGE IS THE SAME FOR OTHER PRESCRIPTION METHODS, THE NUMBER OF -- THE OTHER NUMBER CHANGED. CAN YOU EXPLAIN WHAT WE ARE SEEING HERE AND WHY THE PERCENTAGE IS THE SAME BUT THE NUMBER OF PEOPLE DIFFERS?

A. SURE. SO I WILL TAKE YOU BACK UP TO THE HEADER ROW WHERE IT SAYS BASELINE, N EQUALS 984, AND 24 MONTHS, N EQUALS 727. SO IT MIGHT SEEM PECULIAR THAT THERE WAS SUCH A DIFFERENT -- A DROP IN THE NUMBERS BETWEEN THE BEGINNING AND THE END OF THE STUDY.

HOWEVER, WE JUST INCLUDED WOMEN IN THE STUDY WHO WERE ACTIVELY TRYING TO AVOID PREGNANCY. SO I SHOULD HAVE MENTIONED BEFORE WHEN I WAS DESCRIBING THE STUDY THAT WE ENROLLED WOMEN WHO SAID THEY WERE TRYING

TO AVOID PREGNANCY FOR THE NEXT YEAR.

OVER THE COURSE OF THE TWO-YEAR STUDY, WOMEN CHANGED THEIR MIND AND SOME WOMEN THEN DECIDED THEY WERE TRYING TO GET PREGNANT. AND SO THOSE WOMEN WERE NO LONGER COUNTED BECAUSE THEY DIDN'T HAVE AN INDICATION TO USE BIRTH CONTROL ANYMORE. SO THAT IS WHY THERE WAS ONLY 727 WOMEN AT 24 MONTHS.

THERE WERE SOME OTHER REASONS THAT WOMEN WERE EXCLUDED TOO. THERE WERE SOME WHO GOT A HYSTERECTOMY DURING THAT TIME FRAME OR THEY GOT THEIR TUBAL STERILIZATION DURING THAT TIME FRAME, SO THAT ACCOUNTED FOR SOME OF THE REDUCED NUMBERS AS WELL.

Q. DOES THE FACT THAT SOME WOMEN DROPPED OUT, DID THAT AFFECT THE RELIABILITY OF YOUR FINDINGS?

A. NO, BECAUSE THAT IS ACCOUNTED FOR WHEN YOU DO THE STATISTICAL TEST AND GENERATE THE P VALUE. IT CONSIDERS THE SAMPLE SIZE NUMBER.

Q. SO WHAT IS YOUR OPINION WITH A REASONABLE DEGREE OF CERTAINTY AS TO WHY WOMEN CHANGED THEIR BEHAVIOR OVER THIS TIME FRAME?

A. WELL, WHAT I CAN SAY IS THAT THE STUDY, SINCE WE STARTED THE STUDY IN 2014, IT OCCURRED PRETTY SHORTLY AFTER THE CONTRACEPTIVE MANDATE WENT INTO EFFECT. WE DIDN'T SEE AN EFFECT OF OUR STUDY INTERVENTION AND REALLY THE ONLY OTHER THING THAT WAS GOING ON AT THE

TIME WAS THIS CHANGE IN CONTRACEPTIVE -- IN THE CONTRACEPTIVE MANDATE.

SO MY HYPOTHESIS WOULD BE THAT WHAT WE ARE SEEING IS THE CHANGE IN CONTRACEPTIVE BEHAVIOR THAT COULD HAVE RESULTED FROM THE CONTRACEPTIVE MANDATE.

Q. AND IS THAT CONSISTENT WITH OTHER RESEARCH OUT THERE, TO YOUR KNOWLEDGE?

A. YEAH. ACTUALLY THERE HAS BEEN SEVERAL OTHER STUDIES IN THE LITERATURE THAT HAVE SHOWN THAT SINCE THE CONTRACEPTIVE MANDATE, WE DO KNOW THAT OUT-OF-POCKET COSTS FOR WOMEN HAVE GONE DOWN SINCE THE CONTRACEPTIVE MANDATE. THERE'S BEEN SOME STUDIES TO SHOW THAT THERE MAY BE SOME CHANGES IN METHODS THAT WOMEN ARE CHOOSING WITH MORE LARCS BEING USED. SO I THINK THIS IS CONSISTENT WITH THOSE OTHER STUDIES.

Q. IS THIS CONSISTENT WITH YOUR EXPERIENCE IN YOUR OWN PRACTICE IN TERMS OF WOMEN'S DECISION-MAKING AFTER THE MANDATE WAS PUT IN PLACE?

A. WELL, I CAN SAY THAT I CERTAINLY HAD SOME PATIENTS WHO, AFTER LEARNING ABOUT THE MANDATE, HAVE RETHOUGHT THEIR CONTRACEPTIVE DECISION-MAKING. SOME OF THEM THAT HAS HELPED THEM CHANGE THEIR MIND. I HAVE HAD SOME WOMEN WHO WERE PREVIOUSLY NOT USING A METHOD OR USING A LESS-EFFECTIVE METHOD THAT HAVE THEN CHOSEN TO USE A MORE-EFFECTIVE METHOD, WHETHER THAT BE A LARC OR

PILL OR SOMETHING ELSE, YES.

Q. IN YOUR OPINION, DOCTOR, HAS THE CONTRACEPTIVE MANDATE BENEFITED WOMEN?

A. YES, I THINK IT HAS.

Q. AND FOR WHAT REASON?

A. I THINK BECAUSE IT HAS ALLOWED WOMEN TO HAVE THAT FULL RANGE OF CHOICES THAT ARE ON THAT CDC CHART WE LOOKED AT. SO INSTEAD OF ONLY HAVING A COUPLE OF THOSE AVAILABLE TO WOMEN TO CONSIDER, THEY HAVE THE WHOLE SPECTRUM OF CHOICES TO CONSIDER, AND IT GIVES THE PATIENT A LOT MORE FREEDOM TO TALK WITH THEIR PROVIDER ABOUT WHAT METHODS ARE REALLY BEST SUITED FOR THEM AS AN INDIVIDUAL. WHEN THEY CONSIDER WHAT THEIR OWN HEALTH CONDITIONS ARE, WHAT THEIR OWN PREFERENCES ARE, WHAT SIDE EFFECTS ARE OKAY OR NOT OKAY FOR THEM, IT REALLY ALLOWS THEM TO CONSIDER THE FULL SET OF OPTIONS.

Q. HAVE YOU HAD THE OPPORTUNITY TO READ THE RELIGIOUS AND MORAL EXEMPTION RULES AT ISSUE IN THIS CASE?

A. YES, I HAVE READ THEM.

Q. WHAT DO YOU BELIEVE THE IMPACT OF THOSE RULES WILL BE ON PRIVATELY-INSURED WOMEN -- ON SOME PRIVATELY-INSURED WOMEN IN PENNSYLVANIA?

MS. KOPPLIN: OBJECTION, YOUR HONOR. THIS IS NOT AN OPINION THAT IS GOING TO BE -- THAT THERE

IS ANY EVIDENCE IT'S GOING TO BE THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS BY THE WITNESS.

THE COURT: OVERRULED.

THE WITNESS: I --

THE COURT: WHAT YOU KNOW FROM YOUR EXPERIENCE.

THE WITNESS: SURE. SO BASED ON MY EXPERIENCE, I WOULD IMAGINE THAT IT WOULD BE SIMILAR TO BEFORE THE CONTRACEPTIVE MANDATE WHEN CONTRACEPTIVE COUNSELING HAD TO INCLUDE COSTS. SO I WOULD IMAGINE THAT WOULD BE THE CASE AGAIN.

BY MS. BOLAND:

Q. IS IT YOUR OPINION THAT COST IS A BARRIER TO ACCESS TO CONTRACEPTIVE CARE, OR CAN BE A BARRIER TO CONTRACEPTIVE CARE?

A. YES, I HAVE SEEN THAT BE THE CASE.

Q. AND IN YOUR OPINION, WHAT WILL HAPPEN IF WOMEN FORGO CONTRACEPTIVE CARE BECAUSE OF COST?

A. I THINK THAT IF WOMEN CAN'T CHOOSE FROM THE FULL SET OF OPTIONS, THEY MAY BE MORE LIKELY TO CHOOSE THE LESS EXPENSIVE OPTIONS, WHICH ARE, UNFORTUNATELY, THE LESS EFFECTIVE OPTIONS. AND SO MY FEAR WOULD BE THAT WE WOULD SEE A RISE IN UNINTENDED PREGNANCIES AND CONCOMITANTLY A RISE IN ABORTIONS.

Q. THANK YOU, DR. CHUANG.

MS. BOLAND: BEAR WITH ME ONE MOMENT, YOUR HONOR.

THE COURT: OKAY.

BY MS. BOLAND:

Q. TWO POINTS FOR CLARIFICATION, DOCTOR. EARLIER I ASKED YOU ABOUT THE MOST EXPENSIVE METHODS OF CONTRACEPTION. SPEAKING IN TERMS OF UP-FRONT COST, WHAT IS THE MOST EXPENSIVE METHOD OF CONTRACEPTION?

A. THE LARCS ARE THE MOST EXPENSIVE WITH UP-FRONT COSTS, BECAUSE YOU HAVE TO PAY FOR THE DEVICE AND THE INSERTION FEE ALL AT ONCE UP FRONT.

Q. IN REGARD TO THE "MY NEW OPTIONS" STUDY, WHY WAS THERE A DELAY IN THE CHANGES OVER TIME IF THE MANDATE WENT INTO EFFECT IN 2012? IN OTHER WORDS, WHY WASN'T IT INSTANTANEOUS THAT YOU WOULD SEE CHANGES IN WOMEN'S BEHAVIOR?

A. WELL, A COUPLE OF THINGS.

WOMEN MAY NOT HAVE BEEN AWARE OF THE CHANGES IN THEIR CONTRACEPTIVE COVERAGE RIGHT AWAY. IN FACT, I HAD PATIENTS COME TO ME AND SAY, OH, I THINK THEY MADE A MISTAKE AT THE PHARMACY, THEY DID NOT CHARGE ME A CO-PAY THIS MONTH. SO THEY DID NOT REALIZE THAT THERE WAS A CHANGE IN POLICY. SO THAT IS NUMBER ONE.

SECONDLY, YOU KNOW, WOMEN DON'T RUSH TO THE DOCTOR EVERY DAY, SO THEY MIGHT -- MOST WOMEN WHO

ARE HEALTHY REPRODUCTIVE-AGE WOMEN MIGHT ONLY SEE THEIR PHYSICIAN ONCE A YEAR, SO PROBABLY JUST THE TIMING OF WHEN THEY WERE SEEING THEIR PROVIDERS AND MAKING CHANGES IN THEIR CONTRACEPTION IS WHAT I WOULD GUESS.

MS. BOLAND: THANK YOU VERY MUCH, DOCTOR. I HAVE NO FURTHER QUESTIONS.

THE COURT: MS. KOPPLIN.

MS. KOPPLIN: YOUR HONOR, MAY I APPROACH?

THE COURT: YOU MAY.

CROSS-EXAMINATION

BY MS. KOPPLIN:

Q. GOOD AFTERNOON. DR. CHUANG, MY NAME IS REBECCA KOPPLIN. I'M JUST GOING TO ASK YOU A COUPLE QUESTIONS.

HOW ARE YOU DOING?

A. GOOD, THANK YOU.

Q. DR. CHUANG, WHAT DOCUMENTS DID YOU CONSIDER IN PREPARING YOUR DECLARATION? COULD YOU LIST THE DOCUMENTS?

A. I'M NOT SURE WHAT TYPES OF DOCUMENTS YOU MIGHT BE REFERRING TO.

Q. LET'S SAY ALL TYPES OF DOCUMENTS.

A. WELL, BEING A PRIMARY CARE PROVIDER AND BEING A RESEARCHER IN THIS FIELD AND A LECTURER IN THIS AREA, THE DECLARATION INCLUDED YEARS OF READING MANY SCIENTIFIC ARTICLES AND DOING YEARS OF RESEARCH AND THE

BODY OF KNOWLEDGE THAT HAS ACCUMULATED FROM THAT.
Q. OTHER THAN THE GENERAL BODY OF KNOWLEDGE YOU HAD WHEN YOU STARTED WORKING AND PREPARING THE DECLARATION, WHAT SPECIFIC SOURCES DID YOU SEEK OUT AND REVIEW?
A. I'M NOT SURE I UNDERSTAND THE QUESTION.
Q. FOR EXAMPLE, DID YOU READ THE RULES WHEN YOU WERE PREPARING YOUR DECLARATION?
A. AT THE TIME THAT I PREPARED MY DECLARATION -- I'M ACTUALLY -- I CANNOT PRECISELY REMEMBER IF I HAD ALREADY READ THE RULES AT THE TIME OF THE DECLARATION.
Q. SO YOU DO NOT RECALL IF YOU HAD READ THE RULES OR NOT WHEN YOU WROTE YOUR DECLARATION?
A. I DO NOT RECALL.
Q. DID YOU READ ANY OF THE ARTICLES THAT ARE CITED IN THE RULES?
A. IN READING -- WHEN I DID READ THE RULES, A LOT OF THE ARTICLES ARE COMMONLY-CITED ARTICLES IN FAMILY PLANNING LITERATURE, SO MANY OF THEM I WAS ALREADY FAMILIAR WITH AND SINCE SOME OF THEM I READ SUBSEQUENT TO READING THE RULES, BUT I DID NOT READ EVERY SINGLE ONE OF THEM, NO.
Q. DO YOU RECALL ANY OTHER THINGS THAT YOU WOULD HAVE LOOKED AT IN PREPARING YOUR DECLARATION, FOR EXAMPLE, NEWSPAPER ARTICLES, BLOG POSTS?
A. I WOULD NOT HAVE REFERRED TO THE LAY PRESS FOR

MY INFORMATION, NO.

Q. DO YOU RECALL IN PARTICULAR ANY STUDIES THAT YOU READ OTHER THAN THOSE CITED IN THE RULES?

A. I CONSIDER AS PART OF MY DAILY WORK TO BE READING RESEARCH ARTICLES ABOUT CONTRACEPTION, SO YES, I READ ARTICLES ON A NEAR-DAILY BASIS ABOUT THIS FIELD.

Q. SURE. MY QUESTION WAS IF YOU RECALLED IN PARTICULAR ANY ARTICLES THAT YOU READ TO PREPARE FOR THE DECLARATION?

A. SURE. I HAVE READ MANY ARTICLES IN THE LAST COUPLE OF WEEKS, PERHAPS MAYBE MORE FREQUENCY THAN USUAL BECAUSE I KNEW THAT I WOULD BE HERE TODAY.

Q. SURE. IF YOU RECALL ANY IN PARTICULAR, WHO WAS THE AUTHOR OF THAT STUDY AND WHAT WAS ITS TITLE?

A. SO I KNOW, FOR EXAMPLE, THAT YOU GUYS HAVE THE BEARAK AND JONES ARTICLES, SO I HAVE READ -- I READ THAT AGAIN IN PREPARATION FOR TODAY. THERE ARE SEVERAL OTHER ARTICLES THAT -- AS I MENTIONED BEFORE, THERE'S OTHER RESEARCH THAT HAS DOCUMENTED A -- CHANGES IN CONTRACEPTIVE BEHAVIOR AND UPTAKE OF MORE EFFECTIVE METHODS, SO I READ, REVIEWED SOME OF THOSE ARTICLES. THERE WAS AN ARTICLE BY LYDIA PACE THAT WAS PUBLISHED IN HEALTH AFFAIRS LAST YEAR. THERE WAS ANOTHER ARTICLE PUBLISHED IN HEALTH AFFAIRS LAST YEAR REGARDING THE SAME TOPIC. THERE IS AN ARTICLE BY KAVANAUGH AND COLLEAGUES

THAT WAS PUBLISHED IN CONTRACEPTION THIS YEAR THAT ALL RELATE TO INCREASES IN MORE EFFECTIVE CONTRACEPTIVE USE FOLLOWING THE CONTRACEPTIVE MANDATE. THOSE ARE ALL ARTICLES THAT I REREAD RECENTLY IN PREPARATION FOR THIS.

Q. WHO DID YOU MEET WITH TO PREPARE FOR YOUR DECLARATION?

A. I MET WITH THE LAWYERS HERE.

Q. ANYONE ELSE?

A. NO.

Q. SO YOU ARE HERE TODAY TO TESTIFY ABOUT THE NEW EXEMPTION TO THE CONTRACEPTIVE COVERAGE MANDATE, CORRECT?

A. YES.

Q. NOW, BEFORE THESE NEW EXEMPTIONS EXISTED, YOU ARE AWARE THAT THERE WERE SOME GRANDFATHERED PLANS THAT WERE ALREADY EXEMPT FROM THE COVERAGE MANDATE?

A. YES.

Q. AND YOU'RE AWARE THAT SOME OF THESE PLANS WERE THEREFORE NOT PROVIDING COVERAGE FOR CONTRACEPTIVES?

A. COULD YOU REPEAT THAT? SORRY.

Q. SO YOU WOULD AGREE WITH ME THAT BECAUSE SOME OF THESE PLANS WERE GRANDFATHERED, THOSE PLANS WERE NOT PROVIDING COVERAGE FOR CONTRACEPTIVES?

A. YES.

Q. DO YOU HAVE AN IDEA OF HOW MANY OF THOSE PLANS

THERE WERE IN PENNSYLVANIA?

A. I DO NOT PRECISELY KNOW THE NUMBER, BUT I KNOW THE NUMBER HAS BEEN DECLINING WITH EVERY YEAR.

Q. BUT YOU COULD NOT EVEN GIVE ME AN ESTIMATE OF A NUMBER?

A. I KNOW AT THE TIME THE CONTRACEPTIVE MANDATE WENT INTO PLACE, I RECALL THAT MAYBE THE NUMBER OF GRANDFATHERED PLANS WAS AROUND 20 PERCENT, AND I UNDERSTAND THAT IT HAS DECLINED IN EVERY YEAR SINCE THEN, BUT I DON'T KNOW WHAT THE PRECISE NUMBER IS NOW.

Q. AND YOU ARE AWARE THAT PRIOR TO THE CURRENT EXEMPTIONS, THERE WAS ALREADY AN EXEMPTION FOR HOUSES OF WORSHIP?

A. YES.

Q. AND SO THEREFORE THERE WERE SOME HOUSES OF WORSHIP THAT WERE NOT PROVIDING CONTRACEPTIVE COVERAGE?

A. CORRECT.

Q. ARE YOU AWARE ABOUT HOW MANY OF THOSE THERE WERE IN PENNSYLVANIA?

A. NO, I DON'T KNOW HOW MANY.

Q. AND YOU ARE AWARE THAT PRIOR TO THIS LITIGATION, THERE WAS OTHER LITIGATION CHALLENGING THE CONTRACEPTIVE MANDATE, AND AS A RESULT OF THAT, SOME ENTITIES OBTAINED INJUNCTIONS SO THEY DID NOT HAVE TO PROVIDE CONTRACEPTION COVERAGE, CORRECT?

A. SO IF YOU ARE REFERRING TO ACCOMMODATIONS, YES, I'M FAMILIAR WITH THAT.
Q. AND DO YOU KNOW HOW MANY OF THOSE ACCOMMODATED ENTITIES WERE IN PENNSYLVANIA?
A. NO, I DO NOT KNOW. I DO KNOW THAT THE COMPANIES THAT WERE INVOLVED, LIKE HOBBY LOBBY, ARE PENNSYLVANIA COMPANIES, BUT I DO NOT KNOW BEYOND THAT HOW MANY ARE FROM PENNSYLVANIA.
Q. SO I'M LOOKING AT YOUR DECLARATION NOW, WHICH IS AT TAB 6 IN THE BINDER. AT PARAGRAPH 31, YOU STATED THAT: SINCE THE ACA HAS PASSED, NO PATIENT HAS CONTACTED ME TO ASK FOR A DIFFERENT, CHEAPER METHOD OF CONTRACEPTION THAN THE ONE I HAD PRESCRIBED DUE TO THE COST UNDER PRIVATE INSURANCE PLANS.
DID I READ THAT CORRECTLY?
A. YOU DID.
Q. SO YOU WOULD AGREE WITH ME THEN THAT SINCE THE ACA PASSED, NONE OF YOUR PATIENTS ASKED FOR CHEAPER METHODS OF CONTRACEPTION EVEN THOUGH ALL OF THESE EXEMPTIONS THAT WE JUST TALKED ABOUT WERE IN EXISTENCE?
A. THAT'S RIGHT.
Q. NOW, LET'S TURN TO THE NEW EXEMPTIONS THAT ARE AT ISSUE HERE. THE NEW EXEMPTIONS ARE FOR ENTITIES WITH SINCERE RELIGIOUS AND MORAL OBJECTIONS, CORRECT?
A. CORRECT.

Q. BUT YOU ARE NOT AWARE OF ANY EMPLOYERS IN PENNSYLVANIA THAT HAVE INVOKED THE NEW EXEMPTIONS SO FAR, CORRECT?

A. I'M NOT AWARE, NO.

Q. SO YOU ARE NOT AWARE OF ANY INDIVIDUALS IN PENNSYLVANIA WHO HAVE LOST THEIR CONTRACEPTIVE COVERAGE DUE TO THE NEW EXEMPTIONS?

A. NO, I'M NOT. I DON'T KNOW.

Q. AND NOT JUST IN PENNSYLVANIA, BUT YOU ARE NOT AWARE OF ANY PEOPLE NATIONALLY EITHER WHO HAVE LOST COVERAGE BECAUSE OF THE EXEMPTION?

A. I'M NOT AWARE OF ANY, NO.

Q. AND YOU DON'T KNOW OF ANY PEOPLE EITHER IN PENNSYLVANIA OR IN THE ENTIRE COUNTRY WHO WILL LOSE COVERAGE, LIKE THEIR PLANS HAVE ALREADY ANNOUNCED THAT THEY ARE GOING TO CHANGE, FOR EXAMPLE?

A. NO.

Q. LOOKING AT YOUR DECLARATION AT PARAGRAPH 23, YOU STATED: SOME OF MY PATIENTS ALSO WORK FOR AND RECEIVE THEIR HEALTH INSURANCE THROUGH CATHOLIC SCHOOLS AND OTHER INSTITUTIONS WHICH MIGHT SEEK TO ELIMINATE CONTRACEPTIVE COVERAGE THROUGH THEIR EMPLOYER-SPONSORED PLANS UNDER THE NEW RELIGIOUS AND MORAL EXEMPTIONS.

DID I READ THAT CORRECTLY?

A. YES, YOU DID.

Q. SO NOW HERE TODAY IN DECEMBER, YOU STILL CAN'T IDENTIFY ANY ACTUAL PATIENTS WHO WILL LOSE COVERAGE, CORRECT?

A. I HAVE PATIENTS WHO ARE EMPLOYED OR -- AND HAVE HAD PATIENTS WHO HAVE BEEN EMPLOYED AT THESE INSTITUTIONS, SO THEY MAY ALREADY NOT HAVE COVERAGE.

Q. DO YOU KNOW OF ANY THAT HAVE ALREADY LOST COVERAGE?

A. NOT AS A RESULT OF THE NEW RULES, NO.

Q. SO ALTHOUGH YOU DO HAVE SOME PATIENTS WHO ARE EMPLOYED AT THESE, AS OF RIGHT NOW YOU DON'T KNOW ANY OF THEM WHO ARE ACTUALLY GOING TO LOSE THEIR COVERAGE BECAUSE OF THE NEW RULES?

A. THEY MAY ALREADY HAVE NOT HAD COVERAGE, BUT I DO NOT KNOW OF ANY PATIENTS WHO MAY BE LOSING COVERAGE.

Q. RIGHT. AND YOU DO KNOW OF ANY PATIENTS WHOSE SITUATION IS CHANGING FOR THE WORSE BECAUSE OF THE RULES?

A. I DO NOT KNOW INDIVIDUALS IN THAT CASE RIGHT NOW, NO.

Q. NOW, IN PARAGRAPH 34, YOU STATED THAT: AS A RESULT OF THESE RULES, SOME WOMEN WILL LOSE CONTRACEPTIVE -- SORRY -- SOME WOMEN WILL LOSE INSURANCE COVERAGE FOR PREVENTATIVE CONTRACEPTIVE CARE.

DID I READ THAT CORRECTLY?

A. YES.

Q. BUT AS OF TODAY, YOU CAN'T IDENTIFY ANY ACTUAL WOMEN WHO HAVE LOST COVERAGE BECAUSE OF THE NEW RULES, CORRECT?

A. CORRECT.

Q. IN PARAGRAPH 35, REFERRING TO THESE WOMEN WHO WOULD LOSE COVERAGE, YOU STATED: AS A RESULT THEIR COSTS FOR CONTRACEPTIVE CARE WILL RISE.

DID I READ THAT CORRECTLY?

A. YES.

Q. BUT STILL WE CAN'T IDENTIFY ANY ACTUAL WOMEN WHO COSTS HAVE RISEN BECAUSE OF THE EXEMPTION?

A. NO.

Q. AND IN PARAGRAPH 36, YOU STATED THAT: UNDER THE NEW RULES, COSTS WILL AGAIN BECOME A BARRIER TO WOMEN'S ACCESS TO AND USE OF THE CONTRACEPTIVE THAT IS MEDICALLY RECOMMENDED FOR THEM.

BUT TODAY YOU CAN'T IDENTIFY ANY ACTUAL WOMEN WHO ARE EXPERIENCING SUCH A BARRIER BECAUSE OF THE NEW RULES, CORRECT?

A. CORRECT.

Q. AND IN PARAGRAPH 37, REFERRING TO THE SAME WOMEN, YOU STATED THAT THEY WOULD FACE MEDICAL HARM, BUT AS OF TODAY, YOU CAN'T IDENTIFY ANY ACTUAL WOMEN WHO ARE FACING THAT MEDICAL HARM BECAUSE OF THE RULES, CORRECT?

A. CORRECT.

Q. AND IN PARAGRAPH 38, REFERRING TO THESE SAME WOMEN, YOU STATED THAT THERE WOULD BE A DISRUPTION OF THESE PATIENTS' MEDICAL TREATMENT, BUT AS OF TODAY, WE DON'T KNOW -- YOU DON'T KNOW OF ANY ACTUAL WOMEN WHOSE MEDICAL TREATMENT HAS BEEN DISRUPTED BY THE RULES, CORRECT?

A. CORRECT.

Q. IN PARAGRAPH 39, YOU STATED THAT: SOME OF THESE WOMEN WILL FACE UNINTENDED PREGNANCIES AND OTHER ADVERSE MEDICAL CONSEQUENCES, BUT AS OF TODAY, YOU DON'T KNOW OF ANY ACTUAL WOMEN WHO ARE FACING UNINTENDED PREGNANCIES OR OTHER ADVERSE MEDICAL CONSEQUENCES BECAUSE OF THE RULES, CORRECT?

A. CORRECT.

Q. AND IN PARAGRAPH 45, YOU STATED THAT YOU BELIEVED AN INJUNCTION OF THE RULES IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM TO WOMEN IN PENNSYLVANIA AND AROUND THE COUNTRY WHO WILL LOSE ONGOING PREVENTATIVE CARE COVERAGE UNDER THEIR GROUP HEALTH PLANS DUE TO THE RULES, BUT AS OF TODAY, YOU DON'T KNOW OF ANY ACTUAL WOMEN WHO HAVE LOST THEIR ONGOING PREVENTATIVE CARE COVERAGE DUE TO THE RULES, CORRECT?

A. IT SAY "PREVENTIVE," NOT "PREVENTATIVE," BUT

OTHERWISE, CORRECT.

Q. APOLOGIES. THANK YOU.

HAVE YOU HEARD FROM -- I'M SORRY. IN YOUR MEDICAL PRACTICE, DO YOU PRACTICE WITH OTHER DOCTORS?

A. I DO.

Q. HAVE YOU HEARD FROM ANY OF THEM THAT LIKE THEY DON'T -- HAVE YOU LEARNED THROUGH ANY OTHER MEANS ABOUT ANY OTHER PATIENTS IN YOUR PRACTICE WHO MIGHT HAVE THIS PROBLEM?

A. I HAVE NOT HAD THOSE CONVERSATIONS WITH MY COLLEAGUES.

Q. HAVE YOU LEARNED, FOR EXAMPLE, THROUGH CALLS FROM PHARMACIES OR PHARMACISTS ABOUT ANY PATIENTS WHO ARE HAVING PROBLEMS GETTING THEIR PRESCRIPTIONS BECAUSE OF THE NEW RULES?

MS. BOLAND: OBJECTION, CALLS FOR HEARSAY.

THE COURT: SUSTAINED.

MS. KOPPLIN: IF I MIGHT CONFER WITH MY COLLEAGUES FOR JUST A MOMENT, YOUR HONOR.

(PAUSE.)

MS. KOPPLIN: THANK YOU FOR YOUR TESTIMONY.

YOUR HONOR, NO FURTHER QUESTIONS.

THE COURT: ANY REDIRECT?

MS. BOLAND: NO REDIRECT, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH. YOU ARE EXCUSED.

OKAY. WHAT I THINK WHAT WE WILL DO NOW IF YOU ARE READY, YOU ARE UP. TELL US WHAT YOU FOUND.

MR. HEALY: PERMISSION TO APPROACH, YOUR HONOR?

THE COURT: YES. AND YOU ARE MR. HEALY.

MR. HEALY: CHRISTOPHER HEALY.

THE COURT: OKAY.

MR. HEALY: THANK YOU, YOUR HONOR. I APOLOGIZE AGAIN FOR THE SCRAMBLING BACK AND FORTH.

THE COURT: NOT A PROBLEM. I THINK I ASKED YOU TO DO IT. YOU WERE PERFECTLY WITHIN YOUR RIGHTS.

MR. HEALY: SO I LOOKED INTO THE AGENCY'S RATIONALE BEHIND THE STATEMENT YOUR HONOR READ FROM THE BENCH THIS MORNING, WHICH I BELIEVE, IF I HAVE IT CORRECT, I PUT ON THE SCREEN HERE.

THE COURT: WHAT ARE WE LOOKING AT HERE?

MR. HEALY: THIS IS THE STATEMENT I BELIEVE -- IF YOU COULD CONFIRM FOR ME, THE STATEMENT THAT YOU READ FROM THE BENCH THIS MORNING THAT WAS: AS REFLECTED IN LITIGATION PERTAINING TO THE MANDATE --

THE COURT: YES.

MR. HEALY: -- THEY WISH TO MAKE CHANGES TO THEIR HEALTH PLANS THAT WILL REDUCE THE COST OF INSURANCE COVERAGE FOR THE BENEFICIARIES, ET CETERA.

SO THIS STATEMENT READS: AS REFLECTED IN LITIGATION PERTAINING TO THE MANDATE, SOME ENTITIES ARE IN GRANDFATHERED HEALTH PLANS THAT DO NOT COVER CONTRACEPTION. THEY WISH TO MAKE CHANGES TO THEIR HEALTH PLANS THAT WILL REDUCE THE COST OF INSURANCE COVERAGE FOR THEIR BENEFICIARIES OR POLICYHOLDERS BUT WHICH WOULD CAUSE THE PLANS TO LOSE GRANDFATHERED STATUS. THEY ARE REFRAINING FROM MAKING THOSE CHANGES AND THEREFORE ARE CONTINUING TO INCUR AND PASS ON HIGHER INSURANCE COSTS TO PREVENT THE MANDATE FROM APPLYING TO THEIR PLANS IN VIOLATION OF THEIR CONSCIENCES.

THE COURT: SO WHEN I ASKED YOU -- I SAID WE HAD GONE THROUGH 58,000 COMMENTS, AND WE HAD PUT IN THE WORD "GRANDFATHER" OR "GRANDFATHERED" AND HAVE FOUND NOTHING THAT WENT DIRECTLY TO THAT FINDING. SO WHAT YOU WERE GOING TO DO WAS FIND ME -- PERHAPS THERE WAS A DIFFERENT WORD THAT WAS USED IN THE COMMENTS.

MR. HEALY: SO THOSE 54,000 COMMENTS THAT YOUR HONOR MENTIONED WERE COMMENTS WITH REGARD TO THE 2016 REQUEST FOR INFORMATION, WHICH HAD TO DO WITH WAYS THAT THE DEPARTMENT MIGHT AMEND THE ACCOMODATION, NOT

THE GRANDFATHERED HEALTH PLANS, SO THAT MAY HAVE BEEN THE REASON.

WE'VE ASKED THE AGENCY, AND THE AGENCY POINTED OUT TWO PARTICULAR PREVIOUS COURT CASES THAT THE AGENCY RELIED ON. AS THEY MENTION IN THE RULE -- THEY WROTE -- THEN IT SAYS: AS REFLECTED IN LITIGATION PERTAINING TO THE MANDATE.

SO THOSE TWO CASES THAT THE AGENCY --

THE COURT: WHICH CASES ARE THOSE?

MR. HEALY: THOSE ARE THE DIOCESE OF FORT WAYNE VERSUS SEBELIUS. THAT'S 988 F.SUPP.2D 958. AND ALSO ARCHDIOCESE OF ATLANTA. SO ARCHDIOCESE OF ATLANTA, THIS IS THE COMPLAINT FROM THAT CASE. THAT IS CASE NUMBER 1:12-CV-3489 IN THE NORTHERN DISTRICT OF GEORGIA. I APOLOGIZE THAT I DON'T HAVE A FEDERAL CITATION FOR THAT, BUT THAT IS THE CASE NUMBER.

AND THIS IS FROM THE COMPLAINT IN THAT CASE. IT SAYS: BASED ON THE LEGAL OPINION OF COUNSEL, PLAINTIFFS BELIEVE THAT THE ATLANTA PLAN AND SAVANNAH PLAN CURRENTLY MEET THE AFFORDABLE CARE ACT'S DEFINITION OF GRANDFATHERED PLAN. AND LATER ON: PLAINTIFFS WILL LOSE THEIR GRANDFATHERED STATUS IN THE NEAR FUTURE FOR REASONS THAT CANNOT BE AVOIDED --

THE COURT: WHICH CASE IS THIS?

MR. HEALY: THIS IS THE ARCHDIOCESE OF

ATLANTA CASE.

THE COURT: WHAT DATE WAS THIS DOCUMENT YOU ARE SHOWING ME?

MR. HEALY: THAT WAS FROM 2012.

THE COURT: SINCE THE CONTRACEPTIVE MANDATE -- SINCE THE NEW IFR HAS BEEN PUT INTO PLACE, HAVE THESE FOLKS CHANGED THEIR PLAN?

MR. HEALY: I'M NOT AWARE WHETHER THESE FOLKS HAVE CHANGED THEIR PLAN.

THE SECOND CASE THAT THE AGENCY RELIED ON IS THIS, WHICH IS THE DIOCESE OF FORT WAYNE CASE, WHICH HAS THIS HIGHLIGHTED PORTION HERE ON THE SCREEN. MAYBE I CAN ZOOM OUT SO EVERYONE CAN SEE IT. THIS WAS ONE OF THE PREVIOUS CHALLENGES TO THE CONTRACEPTIVE COVERAGE MANDATE. IT SAYS THAT -- THIS IS FROM THE COURT'S OPINION IN THAT CASE FROM THE NORTHERN DISTRICT OF INDIANA.

THE COURT: WHAT IS THE CITE?

MR. HEALY: THAT WAS THE ONE I READ BEFORE FROM 2013. AND THAT SAYS: CURRENTLY THE DIOCESAN HEALTH PLAN ALSO MEETS THE ACA'S DEFINITION OF A GRANDFATHERED PLAN AND INCLUDES A STATEMENT IN PLAN MATERIALS PROVIDED TO PARTICIPANTS OR BENEFICIARIES THAT IT BELIEVES IS A GRANDFATHERED PLAN AS IT IS REQUIRED TO MAINTAIN ITS GRANDFATHERED STATUS. BUT IN ORDER TO

MAINTAIN ITS GRANDFATHERED STATUS, THE DIOCESE FORGOES APPROXIMATELY $180,000 A YEAR IN INCREASED PREMIUMS SO THAT IT CAN PROTECT CATHOLIC CHARITIES FROM THE CONTRACEPTIVE MANDATE.

ABSENT MAINTAINING ITS GRANDFATHERED STATUS AT A GREAT EXPENSE, THE ONLY OTHER OPTIONS WOULD BE EITHER, ONE, SPONSOR A PLAN THAT WOULD PROVIDE THE EMPLOYEES OF CATHOLIC CHARITIES WITH ACCESS TO FREE CONTRACEPTION, ABORTION, INDUSTRY PRODUCTS, STERILIZATION, AND RELATED COUNSELING; OR TWO, NO LONGER EXTEND ITS PLAN TO CATHOLIC CHARITIES, SUBJECTING IT TO MASSIVE FINES IF IT DOES NOT CONTRACT WITH ANOTHER INSURANCE PROVIDER THAT WILL PROVIDE THE OBJECTIONABLE COVERAGE.

THE COURT: DO WE KNOW WHETHER THE PLAINTIFF IN THIS CASE HAS -- SUBSEQUENT TO THE ENACTMENT OF THE NEW -- RATHER THE ISSUANCE OF THE NEW IFRS HAS CHANGED THEIR PLAN?

MR. HEALY: I DO NOT KNOW THAT THEY HAVE.

THE COURT: SO APART FROM THESE TWO CASES, THAT IS -- THAT IS WHAT YOU GOT?

MR. HEALY: THERE MAY BE OTHER COMMENTS. WE HAD LOOKED THROUGH AS MANY OF THEM AS WE COULD IN THE TIME WE HAD. HOWEVER, WE HAVE IDENTIFIED NO PARTICULAR COMMENTS. THAT SAID, ALTHOUGH THESE TWO CASES WERE NOT

IN THE ADMINISTRATIVE RECORD, IT'S NOT GENERALLY THE PRACTICE TO INCLUDE PRIOR COURT CASES IN ADMINISTRATIVE RECORDS. HOWEVER -- BASICALLY BECAUSE OF THE FACT THAT THEY ARE ALREADY JUDICIALLY NOTICEABLE. HOWEVER, THEY WERE CITED IN THE RULES AND IT WAS SOMETHING THAT THE AGENCY RELIED ON.

THE COURT: SO TO THE EXTENT THAT THIS ISSUE, THE GRANDFATHER HEALTH PLANS WANTING TO MAKE CHANGES AND NOT LOSE THEIR GRANDFATHER STATUS, TO THE EXTENT THAT THAT WAS A UNDERLYING RATIONALE FOR THE NEW IFRS, WE HAVE TWO PLANS RIGHT NOW? TWO COURT CASES THAT YOU HAVE BEEN UNABLE TO IDENTIFY, WHICH WARRANTED THE CONCLUSION THAT THERE WAS GOOD LAW?

MR. HEALY: YES, THAT IS CORRECT, YOUR HONOR, AND WE ARE HAPPY TO CONTINUE LOOKING THROUGH OTHER COMMENTS THAT HAVE COME SINCE THEN. WE HAD AN OPEN COMMENT PERIOD THAT ENDED ON DECEMBER 5TH. HOWEVER, AT THIS TIME WE HAVE NOT BEEN ABLE TO IDENTIFY FURTHER COMMENTS.

THE COURT: WELL, I THINK THAT THE ISSUE IS WHAT COMMENTS HAD COME IN AT THE TIME THE NEW IFRS WERE ISSUED, BECAUSE THAT WAS THE REASON THAT THE AGENCIES WERE SAYING THEY HAD GOOD CAUSE WAS BECAUSE OF THOSE. SO TO THE EXTENT THAT THINGS HAVE HAPPENED SUBSEQUENTLY, I DON'T THINK IT'S RELEVANT TO MY

ANALYSIS.

MR. HEALY: THAT MAKES SENSE. THAT'S CORRECT, YOUR HONOR.

THE COURT: OKAY. LET'S TAKE A BRIEF BREAK AND THEN -- DID YOU WANT HALF AN HOUR TO CLOSE OR 15 MINUTES TO CLOSE?

MR. FISCHER: YOUR HONOR, HALF AN HOUR, ALTHOUGH I WILL TRY NOT TO TAKE ALL OF IT.

MR. DAVIS: I THINK HALF AN HOUR IS FINE. I WILL ALSO TRY NOT TO TAKE ALL OF IT.

THE COURT: OKAY. WE'RE DOING VERY WELL. IT'S ONLY QUARTER TO 3. I HAD GIVEN YOU UNTIL 6 SO WE CAN PROBABLY GET OUT EARLIER THAN WE ANTICIPATED.

THE CLERK: ALL RISE.

(BREAK TAKEN.)

THE COURT: WHO'S DOING CLOSINGS FOR THE COMMONWEALTH?

MR. FISCHER: YOUR HONOR, I'M GOING TO DO CLOSING FOR THE COMMONWEALTH.

THE COURT: OKAY.

MR. FISCHER: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON.

MR. FISCHER: I THINK IT IS IMPORTANT TO START BY REMEMBERING EXACTLY WHAT WE ARE CHALLENGING AND WHAT WE ARE NOT CHALLENGING IN THESE PROCEEDINGS.

MR. DAVIS SAID IN THE BEGINNING THAT THESE RULES WERE NOT ISSUED ON A BLANK SLATE, AND THAT IS ABSOLUTELY CORRECT. A LOT HAS HAPPENED IN THIS AREA BEFORE WE GET TO THIS POINT.

WE ARE NOT CHALLENGING THE ORIGINAL EXEMPTION FOR CHURCHES AND CLOSELY-RELATED INSTITUTIONS. WE ARE NOT CHALLENGING THE ACCOMMODATION PROCESS THAT WAS ORIGINALLY CREATED AND THEN EXPANDED AS A RESULT OF THE SUPREME COURT'S HOBBY LOBBY DECISION.

WHAT WE ARE CHALLENGING ARE TWO RULES THAT ARE SWEEPING IN THEIR SCOPE. THERE ARE A LOT OF CONCERNS WE HAD ABOUT THESE RULES, BUT THERE ARE THREE ASPECTS IN PARTICULAR THAT I WANT TO FOCUS ON.

THE FIRST IS THAT FOR THE FIRST TIME, THE RELIGIOUS EXEMPTION RULE ALLOWS PUBLICLY-TRADED COMPANIES TO OPT OUT OF THE CONTRACEPTIVE MANDATE. THAT WAS NEVER THE CASE BEFORE. THERE IS A LIMITED JUSTIFICATION FOR THAT DECISION IN THE RULES, AND IT POTENTIALLY THREATENS CONTRACEPTIVE COVERAGE FOR A SIGNIFICANT NUMBER OF WOMEN.

THE SECOND FACTOR THAT I'D LIKE TO MENTION IS THAT AS A RESULT OF THESE TWO RULES, THE ACCOMMODATION PROCESS IS NOW OPTIONAL.

THE COURT: IS NOW WHAT?

MR. FISCHER: OPTIONAL. THERE IS NO

REQUIREMENT THAT COMPANIES THAT WISH TO OPT OUT NOTIFY THEIR INSURANCE COMPANY OR THEIR THIRD-PARTY ADMINISTRATOR OF THEIR DECISION SO THAT THEIR EMPLOYEES CAN GET COVERAGE. SO AS A RESULT OF THAT, WOMEN EMPLOYED BY THE COMPANIES THAT ARE CURRENTLY USING THAT PROCESS FACE A LOSS OF COVERAGE.

AND THEN FINALLY, THE THIRD ISSUE I WOULD LIKE TO TOUCH ON, WHICH YOUR HONOR DISCUSSED EARLIER, IS THE MORAL EXEMPTION. THE MORAL EXEMPTION IS INCREDIBLY VAGUE, DOES NOT DEFINE EXACTLY WHAT'S MEANT BY A SINCERELY-HELD MORAL BELIEF, AND AS I THINK YOUR HONOR'S QUESTIONING REFLECTED, OPENS UP ALL SORTS OF POTENTIAL PROBLEMS OF HOW DO FEDERAL AGENCIES DETERMINE WHETHER A BELIEF IS SINCERELY HELD, WHAT THE NATURE OF THE BELIEF IS, WHAT BELIEFS DO QUALIFY TO ALLOW SOMEBODY TO OPT OUT, WHAT BELIEFS MAY NOT QUALIFY. SO I THINK THAT RULE BY ITSELF IS SIGNIFICANTLY PROBLEMATIC.

WHAT WE ARE SEEKING AS A RESULT OF THIS IS AN INJUNCTION THAT WOULD ESSENTIALLY TAKE US BACK TO THE STATUS QUO BEFORE THESE RULES WERE ISSUED, BACK TO OCTOBER 5TH OF THIS YEAR.

IT IS OUR HOPE THAT AS A RESULT, AT THE VERY LEAST, THE AGENCIES WILL FOLLOW THE CORRECT PROCESS IF THEY TRY TO DO THIS AGAIN, BECAUSE WHAT WE HAVE HERE IS A FLAWED PROCESS THAT PRODUCED A FLAWED RESULT.

WE THINK IT IS CLEAR THAT THE AGENCY HAS VIOLATED THE PROCEDURAL REQUIREMENTS OF THE APA AND CAME UP WITH A RESULT THAT VIOLATES THE SUBSTANTIVE REQUIREMENTS OF THE APA, IS ARBITRARY AND CAPRICIOUS, VIOLATES THE AFFORDABLE CARE ACT, AND HAS OTHER SIGNIFICANT PROBLEMS.

THE COURT: LET ME FOLLOW UP WITH YOU ON THAT ONE.

WHEN YOUR COLLEAGUE OPENED, I ASKED HIM WHETHER -- THERE CLEARLY IS A DISTINCTION BETWEEN THE CLAIMS THAT ARE BROUGHT UNDER THE APA AND THE CLAIMS THAT ARE THE CONSTITUTIONAL CLAIMS.

THE FISCHER: YES, THAT'S CORRECT.

THE COURT: AND AS YOU KNOW, WHEN A COURT CAN REACH A STATUTORY CLAIM RATHER THAN A CONSTITUTIONAL CLAIM, THE ADMONITION AT ALL LEVELS ALL OF THE WAY UP TO THE SUPREME COURT AND THE THIRD CIRCUIT IS THAT THE COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUES BUT SHOULD PROCEED WITH THE PROCEDURAL ISSUES.

SO IF I WERE TO PROCEED WITH THE PROCEDURAL ISSUES ALONE, AND ASSUMING THAT I WOULD DO IT UNDER BOTH THE PROCEDURAL COMPONENT, THE NOTICE OF COMMENT, AND THE SUBSTANTIVE COMPONENT, THE LACK OF GOOD CAUSE, WHAT KIND OF INJUNCTION WOULD THE COMMONWEALTH BE LOOKING FOR?

IN THOSE CIRCUMSTANCES, I THINK YOUR COLLEAGUE SAID IF IT WAS ONLY THE PROCEDURAL, THEY WOULD JUST GO BACK AND GO THROUGH THE PROCEDURE AND STILL HAVE THE SAME RULES.

SO WHAT INJUNCTION WOULD YOU BE ASKING FOR IN THOSE LIMITED CIRCUMSTANCES?

MR. FISCHER: WE WOULD BE SEEKING AN INJUNCTION PREVENTING THEM FROM ENFORCING THESE RULES, AND OUR HOPE IS THAT, PARTICULARLY IF THERE IS A SUBSTANTIVE COMPONENT TO YOUR HONOR'S RULING, IT WOULD BE TAKEN BY THE AGENCIES -- AGENCIES AS AN INDICATION THAT THE NEXT RULE THEY COME OUT WITH BETTER EITHER HAVE MORE SUBSTANTIVE SUPPORT BEHIND IT OR ADDRESS THESE ISSUES DIFFERENTLY, PARTICULARLY THE THREE THAT I MENTIONED.

THE COURT: SO HOW DOES THAT ISSUE -- HOW IS THAT ISSUE LINED UP IN AN ORDER? BECAUSE YOU ARE NOT, YOU HAVE NOT ASKED FOR A MANDATORY INJUNCTION, YOU HAVE NOT ASKED ME TO TELL THEM TO DO RULES IN A PARTICULAR WAY, SO HOW WOULD AN ORDER LOOK THAT DEALS WITH THE GOOD CAUSE COMPONENT IF I WERE TO RULE IN THAT WAY.

MR. FISCHER: AN ORDER COULD SIMPLY PRECLUDE THEM FROM ENFORCING THESE TWO SPECIFIC RULES, WHICH WOULD THEN REQUIRE THEM TO, AT THE VERY LEAST, GO

THROUGH THE PROCESS AGAIN, AND DEPENDING ON WHAT COMES OUT OF THAT PROCESS, WE MAY BE BACK HERE AGAIN. OUR HOPE WOULD BE THAT THEY WOULD COME UP WITH A DIFFERENT RESULT.

BUT I DON'T BELIEVE THERE IS ANYTHING THIS COURT CAN DO TO ENJOIN THE NEXT RULE. AND, YOU KNOW, MAYBE WE ARE BACK HERE. I HOPE THAT IS NOT THE CASE. HOPEFULLY THEY WILL GET THE MESSAGE AND MAKE SOME CHANGES TO THE RULES THAT ADDRESS THE REAL ISSUES.

BUT I THINK THAT THE INJUNCTION WE HAVE REQUESTED IS OF THESE TWO RULES AS THEY ARE CURRENTLY MADE.

THE COURT: OKAY.

MR. FISCHER: SO LET ME TALK A LITTLE MORE ABOUT THE PROCEDURAL VIOLATION OF THE APA. THE GOVERNMENT HAS ARGUED THAT THEY HAVE STATUTORY AUTHORITY TO WAIVE NOTICE AND COMMENT. WE ADDRESS THIS IN OUR BRIEFS. THE APA IS VERY CLEAR ABOUT THIS. SECTION 559 SAYS: SUBSEQUENT STATUTE MAY NOT HOLD -- MAY NOT BE HELD TO SUPERSEDE OR MODIFY THIS SUBCHAPTER, AND SEVERAL OTHERS, EXCEPT TO THE EXTENT IT DOES SO EXPRESSLY.

AND THE D.C. DISTRICT COURT IN COALITION FOR PARITY VERSUS SEBELIUS LOOKED AT THE VERY SAME AUTHORITY THAT THE AGENCIES ARE RELYING ON HERE, ANALYZED IT UNDER SECTION 549 OF THE APA, AND SAID IT

CLEARLY DOES NOT EXPRESSLY MODIFY THE REQUIREMENTS OF THE APA.

THE SECOND -- THE LANGUAGE THEY ARE RELYING ON IS SIMPLY A GENERAL GRANT THAT SAYS: THE SECRETARY MAY PROMULGATE ANY INTERIM FINAL RULES AS THE SECRETARY DETERMINES ARE APPROPRIATE TO CARRY OUT THIS PART.

NOTHING ABOUT WAIVING NOTICE AND COMMENT, NOTHING ABOUT PREEMPTING THE APA. GIVEN THE CLEAR REQUIREMENT IN THE APA THAT MODIFICATIONS HAVE TO BE DONE EXPRESSLY, WE THINK IT'S CLEAR THAT THAT DOES NOT GIVE THEM THE AUTHORITY THEY CLAIM IT DOES.

WE ALSO THINK IT IS FAIRLY CLEAR THEY DON'T HAVE GOOD CAUSE. THE GOOD CAUSE ARGUMENT, AS I UNDERSTAND, IS ESSENTIALLY, WELL, THERE IS A LOT OF LITIGATION GOING ON. WE WANT TO WRAP IT UP, SO WE WANT THESE RULES TO BE EFFECTIVE IMMEDIATELY.

NOW, IT IS INTERESTING, THEY HAVE ARGUED THAT MANY OF THE PLAINTIFFS IN THOSE CASES ARE PROTECTED BY INJUNCTIONS, WHICH IS TRUE. SO IF THE ARGUMENT IS -- THE ARGUMENT IS WE NEED TO PROTECT THESE PEOPLE IMMEDIATELY, WELL, BY THEIR OWN ADMISSION, MANY OF THEM ALREADY DO HAVE PROTECTION.

WE TALKED EXTENSIVELY IN OUR BRIEF ABOUT THE THIRD CIRCUIT'S DECISION IN UNITED STATES VERSUS

REYNOLDS BECAUSE IT SQUARELY REJECTS THE ARGUMENT THAT RESOLVING UNCERTAINTY IS AN ADEQUATE JUSTIFICATION FOR ISSUING IFRS. THE THIRD CIRCUIT THERE SAID VERY CLEARLY THAT THERE IS ALWAYS UNCERTAINTY IN THE RULEMAKING PROCESS, AND PARTICULARLY IF AN IFR IS ISSUED AS THIS ONE WAS, WITH A REQUEST FOR SUBSTANTIVE COMMENTS AND THE STATEMENT FROM THE AGENCY THAT THEY MAY BE MAKING FURTHER CHANGES TO THE RULE. THERE IS SIMPLY NO CERTAINTY THAT IS ACHIEVED AS A RESULT OF THAT.

AND FINALLY, I THINK THERE IS AN ARGUMENT THAT THEY MADE A FEW TIMES, WHICH IS THAT, WELL, IFR'S WERE ISSUED EARLIER IN APPLYING THE AFFORDABLE CARE ACT WOMEN'S HEALTH AMENDMENT, SO IT IS OKAY THIS TIME.

BUT I THINK IF THE COURT LOOKS BACK TO PRIESTS FOR LIFE, WHICH ADDRESSED THE PRIOR IFR THAT THEY ARE TALKING ABOUT, THE SPECIFIC IFR THAT THEY CITED TO YOU, WHICH IS AVAILABLE AT 79 FEDERAL REGISTER 51092, WAS ISSUED FOLLOWING THE WHEATON COLLEGE DECISION, WHICH CAME RIGHT AFTER HOBBY LOBBY.

ON THE SAME DAY, THE AGENCIES ISSUED A NOTICE OF PROPOSED RULEMAKING CALLED THE HOBBY LOBBY -- AND AN IFR THAT WAS BASED ON WHEATON COLLEGE. HERE IS WHAT THE WHEATON COLLEGE IFR SAID: THESE INTERIM FINAL REGULATIONS PROVIDED AN ALTERNATIVE PROCESS THAT AN ELIGIBLE ORGANIZATION MAY USE TO PROVIDE NOTICE OF ITS

RELIGIOUS OBJECTIONS TO PROVIDING CONTRACEPTIVE COVERAGE WHILE PRESERVING PARTICIPANTS' AND BENEFICIARIES' ACCESS TO COVERAGE OF THE FULL RANGE OF FDA-APPROVED CONTRACEPTIVES.

ALL THAT DID IS IT SAID, UNDER THE ACCOMMODATION BEFORE, YOU HAD TO PROVIDE NOTICE TO YOUR INSURANCE COMPANY OR YOUR THIRD-PARTY ADMINISTRATOR. THE COURT IN WHEATON COLLEGE ESSENTIALLY SAID, YOU WILL HAVE TO ALSO LET THEM PROVIDE NOTICE TO HHS, AND THEN YOU DO THE LEGWORK AND CONTACT THE THIRD-PARTY ADMINISTRATOR OR INSURANCE COMPANY.

SO ALL THIS REGULATION DID IS IT ESSENTIALLY IMPLEMENTED WHAT THE COURT DIRECTED. IT SAID, WE ARE GOING TO CREATE ANOTHER PROCESS WHERE YOU CAN SEND THE FORM TO US. THAT IS A FAR CRY FROM THE SWEEPING CHANGES THAT ARE AT ISSUE IN THIS CASE.

YOUR HONOR, I WOULD LIKE TO GET INTO THE SUBSTANTIVE APA DISCUSSION A LITTLE BIT BECAUSE I THINK THAT IS IN MANY WAYS THE MOST IMPORTANT -- YOU KNOW, ONE OF THE MOST IMPORTANT ISSUES IN THIS CASE.

YOUR HONOR HAD ASKED ABOUT CHEVRON DEFERENCE AND WHETHER THAT APPLIED HERE. CHEVRON DOES NOT APPLY EITHER TO THEIR INTERPRETATION OF THE AFFORDABLE CARE ACT OR TO THEIR INTERPRETATION OF RFRA.

WITH RESPECT TO RFRA, I THINK COUNSEL

CONCEDED EARLIER THAT -- THAT THEY DO NOT GET CHEVRON DEFERENCE UNDER RFRA, AND CERTAINLY IN THE HOBBY LOBBY DECISION, THERE WAS NOT EVEN A MENTION OF CHEVRON OR WHETHER THE GOVERNMENT'S INTERPRETATION OF RFRA WAS ENTITLED TO --

THE COURT: SO STEP ZERO ON RFRA.

MR. FISCHER: YES, IT'S A ZERO ON RFRA. AND ACTUALLY, I BELIEVE IT'S STEP ZERO ON THE ACA TOO.

AND I WOULD REFER TO --

THE COURT: SO -- WELL, WHY IT WOULD BE STEP 1 BUT YOU WOULD BE ARGUING THAT THEY HAVE TAKEN ULTRA VIRES ACTIONS UNDER STEP 1?

MR. FISCHER: I BELIEVE IT COULD BE FRANKLY ANY OF THE STEPS, I THINK. BUT I JUST WANT TO START AT STEP ZERO AND SAY THE SUPREME COURT DECISION IN KING VERSUS BURWELL I THINK IS A GOOD EXAMPLE. THAT WAS THE CASE INVOLVING THE LANGUAGE IN THE ACA ABOUT TAX CREDITS BEING AVAILABLE TO PEOPLE WHO PURCHASED HEALTH COVERAGE ON AN EXCHANGE RUN BY THE STATE. AND THE QUESTION WAS WHETHER THAT APPLIED TO THE HEALTHCARE.GOV OR BY THE FEDERAL GOVERNMENT.

CHIEF JUSTICE ROBERTS REJECTED THE ARGUMENT THAT CHEVRON DEFERENCE APPLIED, AND HIS REASONING WAS -- WAS THIS: THE TAX CREDITS ARE AMONG THE ACT'S KEY REFORMS INVOLVING BILLIONS OF DOLLARS IN

SPENDING EACH YEAR AND AFFECTING THE PRICE OF HEALTH INSURANCE FOR MILLIONS OF PEOPLE. WHETHER THOSE CREDITS ARE AVAILABLE UNDER FEDERAL EXCHANGES IS THUS A QUESTION OF DEEP ECONOMIC AND POLITICAL SIGNIFICANCE THAT IS CENTRAL TO THE STATUTORY SCHEME. HAD CONGRESS WISHED TO ASSIGN THAT QUESTION TO AN AGENCY, IT SURELY WOULD HAVE DONE SO EXPRESSLY. IT IS ESPECIALLY UNLIKELY THAT CONGRESS WOULD HAVE DELEGATED THIS DECISION TO THE IRS, WHICH HAS NO EXPERTISE IN CRAFTING HEALTH INSURANCE POLICY OF THIS SORT.

NOW HERE, THE STATUTE HAS A CLEAR DELEGATION OF AUTHORITY TO IDENTIFY APPROPRIATE PREVENTIVE SERVICES. THAT IS TO THE HEALTH RESOURCES AND SERVICE ADMINISTRATION. HRSA HAS SIGNIFICANT EXPERTISE ON PREVENTIVE MEDICINE, ON INCREASING ACCESS TO HEALTHCARE, ON PROMOTING HEALTHCARE FOR UNDERSERVED COMMUNITIES. THERE IS NO EXPERTISE THERE IN DEFINING EXEMPTIONS FOR EXISTING MANDATORY REQUIREMENTS.

IN FACT, THAT ACTUALLY RUNS COUNTER TO THEIR MISSION. THEIR MISSION IS TO INCREASE ACCESS TO HEALTHCARE. SO IT STRAINS CREDULITY TO SAY THAT CONGRESS WOULD HAVE DELEGATED TO HRSA THE RESPONSIBILITY TO INTERPRET THIS PROVISION IN A WAY THAT ALLOWED FOR SIGNIFICANT EXEMPTIONS.

REGARDLESS, IF WE DO GET INTO THE CHEVRON

FRAMEWORK, THE GOVERNMENT NEEDS TO IDENTIFY THE LANGUAGE IN THE ACA THAT THEY ARE INTERPRETING AND WHAT THEIR INTERPRETATION IS SO THE COURT CAN ASSESS WHETHER THEIR INTERPRETATION IS PRECLUDED BY THE LANGUAGE, AND IF NOT, WHETHER IT'S REASONABLE.

AS I READ THE GOVERNMENT'S ARGUMENTS, THEY REFER TO THE SECTION WHICH WE REFER TO. IT SAYS: A GROUP HEALTH PLAN AND HEALTH INSURANCE ISSUER OFFERING GROUP OR INDIVIDUAL HEALTH INSURANCE COVERAGE SHALL, AT A MINIMUM, PROVIDE COVERAGE FOR AND SHALL NOT IMPOSE ANY CAUTIONARY REQUIREMENTS FOR -- AND THEN SUBSECTION 4 IS: WITH RESPECT TO WOMEN, SUCH ADDITIONAL PREVENTIVE CARE AND SCREENINGS NOT DESCRIBED IN PARAGRAPH 1 AS PROVIDED FOR IN COMPREHENSIVE GUIDELINES SUPPORTED BY THE HRSA.

THE ONLY ARGUMENT I HAVE HEARD FROM THE GOVERNMENT AS TO HOW THEY ARE INTERPRETING THAT UNDER CHEVRON IS THAT SOMEHOW THE USE OF THE WORD "AS" BEFORE "PROVIDED FOR" IMPLIES THAT HRSA -- AND THEIR QUOTE IS: MAY DETERMINE NOT ONLY THE SERVICES COVERED BUT THE MANNER OR REACH OF THAT COVERAGE.

AND THEN THEY GO ON TO SAY: THE AGENCIES READ THE STATUTE TO AUTHORIZE THEM TO CRAFT OR MODIFY EXEMPTIONS FOR ANY CONTRACEPTIVE COVERAGE MANDATE AND THAT REASONABLE CONSTRUCTION MUST PREVAIL. AND THAT PUTS A LOT OF -- THE WORD "AS" IS DOING A LOT OF WORK

THERE. THAT IS THE INTERPRETATION THEY COME UP WITH.

HRSA HAS NO EXPERTISE IN THIS AREA AND THERE IS SIMPLY NO WAY THAT I CAN SEE THAT THAT LANGUAGE CAN REASONABLY BE READ TO SAY HRSA OR THE AGENCIES UNDER WHICH HRSA IS WORKING CAN CREATE THESE SIGNIFICANT CARVE-OUTS.

THE COURT: SORRY, GO ON.

MR. FISCHER: NO.

THE COURT: SO I ASKED THE GOVERNMENT -- THE DEFENSE -- YOU ARE BOTH THE GOVERNMENT -- WHETHER -- JUST TO TALK ME THROUGH THIS NOTION THAT THERE IS THE -- THE ACA SAYS TO HRSA: PROVIDES SOME GUIDELINES. THE GUIDELINES THAT ARE CREATED ON THE CONTRACEPTIVE MANDATE. AND THEN THE RULES, THE NEW IFR'S, ARE CREATED AS AN EXCEPTION TO THE GUIDELINES, SO IT'S AN AGENCY MODIFYING A GUIDELINE OR A RULE OF AN AGENCY.

AND I THINK THE RESPONSE OF THE DEFENDANTS WAS PERFECTLY FINE, IT HAPPENS ALL THE TIME. SO CAN YOU RESPOND TO THAT PARTICULAR POINT AND TELL ME -- IT SEEMS A LITTLE ODD, AND TELL ME WHETHER IT'S JUST ODD OR WHETHER THERE IS SOMETHING PROBLEMATIC ABOUT IT.

MR. FISCHER: WE BELIEVE IT'S SERIOUSLY PROBLEMATIC. THE AGENCY CANNOT MODIFY GUIDELINES IN A WAY THAT CONFLICTS WITH THE STATUTORY DIRECTION THAT

CREATED THOSE GUIDELINES, AND THE DELEGATION WAS TO HRSA AND IT WAS TO HRSA FOR A REASON, BECAUSE THEY HAVE EXPERTISE IN IDENTIFYING PREVENTIVE MEDICINE.

THERE HAS BEEN A LOT OF DISCUSSION ABOUT HOW CONTRACEPTIVE COVERAGE IS NOT SPECIFICALLY MENTIONED IN THE ACA. WELL, I DON'T THINK WE WANT CONGRESS TO IDENTIFY THE SPECIFIC PREVENTIVE CARE THAT INSURANCE COMPANIES MUST PROVIDE. CONGRESS, I BELIEVE, MADE A WISE DECISION THAT THAT DECISION WAS GOING TO BE DELEGATED TO HRSA, WHICH HAS EXPERTISE AND THEN COULD MODIFY THE SERVICES THAT IT RECOMMENDED ON AN AS-NEEDED BASIS, AS MEDICINE CHANGED, AS SCIENTIFIC ADVANCES MOVED US FORWARD.

SO THE IDEA THAT AN AGENCY CAN SIMPLY TAKE A GRANT OF AUTHORITY THAT IS FAIRLY CLEARLY LIMITED TOWARD IDENTIFYING THE SERVICES THAT HAVE TO BE PROVIDED AND BLOW THAT UP INTO, WELL, WE CAN CREATE ENTIRE EXEMPTIONS, BROAD EXEMPTIONS FROM THIS RULE THAT SAYS -- AND I REFER BACK TO THE PREFATORY LANGUAGE IN 42 U.S.C. 30GG-13, WHICH SAYS PROVIDERS OF HEALTH COVERAGE SHALL, AT A MINIMUM, PROVIDE COVERAGE AND SHALL NOT IMPOSE ANY COST SHARING REQUIREMENTS FOR. THAT LANGUAGE IS ABOUT AS MANDATORY AS YOU CAN GET.

AND THEN IT LISTS THE FOUR THINGS. AT THE VERY BOTTOM IS THE WOMEN'S HEALTH AMENDMENT. THE

GOVERNMENT SOMEHOW READS THE LANGUAGE IN THE WOMEN'S HEALTH AMENDMENT TO APPLY BACK TO THE MANDATORY LANGUAGE IN THE BEGINNING AND ALLOW HRSA, WHICH AGAIN, HAS NO EXPERTISE HERE, TO CREATE BROAD EXEMPTIONS FROM IT.

WE THINK THAT SIMPLY CAN'T BE SQUARED WITH LANGUAGE OF THE STATUTE, AND IN ADDITION, FLIES DIRECTLY IN THE FACE OF THE PURPOSE OF THE WOMEN'S HEALTH AMENDMENT, WHICH WAS INTENDED TO IMPROVE WOMEN'S ACCESS TO PREVENTIVE CARE.

THE GOVERNMENT ALSO RELIES A LOT ON THE EXISTENCE OF GRANDFATHER PLANS. I THINK YOUR HONOR DISCUSSED THAT. THERE IS VERY LITTLE EVIDENCE IN THE RECORD THAT GRANDFATHERED PLANS ARE CLAMORING FOR THE ABILITY TO CHANGE, AND THIS -- THE CONTRACEPTIVE MANDATE IS SOMEHOW BLOCKING THEM.

BUT ALSO, AS YOU HEARD FROM DR. CHUANG, THE NUMBER OF GRANDFATHER PLANS CONTINUES TO DECLINE. IT WAS LIMITED TO BEGIN WITH. AND THE FACT THAT CONGRESS MADE WHAT APPARENTLY WAS A NECESSARY COMPROMISE TO GET THE ACA PASSED DOES NOT UNDERMINE THE ARGUMENT THAT THE CONTRACEPTIVE COVERAGE HERE SERVES A COMPELLING AND IMPORTANT GOVERNMENT INTEREST.

I ALSO THINK IT IS IMPORTANT TO REMEMBER THAT THE ACA DOES NOT HAVE A CONSCIENCE CLAUSE. ONE WAS PROPOSED AND IT WAS REJECTED. THROUGHOUT THE RULES, THE

ARGUMENT THE GOVERNMENT MAKES IS, WELL, OTHER STATUTES HAVE THEM SO WE CAN RELY ON THAT HERE. THAT IS SIMPLY NOT THE CASE. YOU CAN'T TAKE LANGUAGE FROM ANOTHER STATUTE AND APPLY IT WHERE IT DOES NOT EXIST.

AND WHAT'S MORE IS THE FACT THAT CONGRESS REJECTED IT IS A PRETTY GOOD INDICATION THAT CONGRESS DOES NOT BELIEVE THERE IS AN IMPLICIT CONSCIENCE CLAUSE THAT IS ALREADY THERE.

NOW, IN THEIR BRIEFING, AND THE GOVERNMENT TO SOME EXTENT THE RULES SAID ALL OF THIS IS REQUIRED UNDER RFRA, THAT WE'RE ALL THIS -- EXCEPT FOR THE MORAL EXCEPTION, WHICH IS NOT A LAW REQUIRED UNDER RFRA.

AGAIN, THAT IS A MUCH BROADER READING OF RFRA THAN ANY COURT HAS EVER ADOPTED. AT THE VERY LEAST, I'M NOT AWARE OF ANY DECISION HOLDING THAT RFRA APPLIES TO PUBLICLY-TRADED COMPANIES. I THINK IN SOME WAYS THE IDEA THAT A PUBLICLY-TRADED COMPANY COULD ENGAGE IN THE FREE EXERCISE OF RELIGION IS A LITTLE QUESTIONABLE. CERTAINLY THE SUPREME COURT HAS NEVER HELD THAT.

AND FOR THE AGENCIES TO UNILATERALLY SAY WE THINK THIS IS WHAT RFRA MEANS I THINK GOES WELL BEYOND THE SCOPE OF THEIR AUTHORITY. THEY HAVE ALSO DECIDED APPARENTLY THAT THE CONTRACEPTIVE MANDATE DOES

NOT SERVE A COMPELLING INTEREST.

WELL, FIVE JUSTICES IN THE SUPREME COURT IN HOBBY LOBBY SEEM TO DISAGREE. THE FOUR CENTERS CLEARLY SAID THAT IT SERVES A COMPELLING INTEREST, AND JUSTICE KENNEDY DISCUSSED THE COMPELLING INTEREST, NEVER ACTUALLY SAID SPECIFICALLY "I BELIEVE IT SERVES A COMPELLING GOVERNMENT INTEREST," BUT MADE IT PRETTY CLEAR THAT THAT WAS HIS BELIEF. AND FRANKLY, THE MAJORITY IN HOBBY LOBBY NEVER EVEN QUESTIONED THAT. THEY JUST ASSUMED IT FOR PURPOSES OF THE OPINION.

SO THE IDEA THAT RFRA SOMEHOW REQUIRES WHAT THE GOVERNMENT IS DOING, THAT IT REQUIRES APPLYING THIS TO PUBLICLY-TRADED COMPANIES, THAT IT REQUIRES MAKING THE ACCOMMODATION PROCESS OPTIONAL IS NOT SUPPORTED BY ANY OF THE CASE LAW THAT IS RELEVANT HERE. AND IT'S NOT SUPPORTED BY A FAIR READING OF THE STATUTE.

AND I THINK TO SEE THAT THAT IS THE CASE, WE DON'T NEED TO LOOK ANY FURTHER THAN THE ZUBIK DECISION, WHERE THE SUPREME COURT CLEARLY STRUGGLED WITH APPLYING RFRA IN THE CONTEXT OF AN ENTITY WHO DID OBJECT TO THE ACCOMMODATION PROCESS. IF THE GOVERNMENT WAS CORRECT AND THIS WAS A SLAM DUNK UNDER RFRA, ZUBIK WOULD HAVE BEEN AN EASY DECISION FOR THE SUPREME COURT.

IT WAS NOT. ZUBIK EMPHASIZED THE NEED TO BALANCE WHAT IT SAW AS LEGITIMATE EXERCISE OF RELIGION

AND THE NEEDS OF WOMEN AND THE COMPELLING GOVERNMENT INTEREST IN SERVING AND PROVIDING ACCESS TO CARE -- WELL, ZUBIK DID NOT SPECIFICALLY FIND THAT IT WAS A COMPELLING INTEREST, BUT I THINK THE FACT THAT THAT DECISION CAME OUT THE WAY IT DID IS A SIGN -- IS A CLEAR INDICATION THAT RFRA SIMPLY DOES NOT SAY WHAT THE GOVERNMENT HERE BELIEVES IT SAYS.

I THINK -- I'M HAPPY TO COME BACK TO THE CONSTITUTIONAL CLAIMS. I WOULD ALSO LIKE TO GET INTO THE HARM THAT PENNSYLVANIA WILL SUFFER, BECAUSE I THINK THAT IS IMPORTANT AS WELL. IT GOES BOTH TO THE IRREPARABLE INJURY PRONG OF THE INJUNCTION AS WELL AS STANDING THAT THE COMMONWEALTH HAS IN THIS CASE.

THERE HAS BEEN A LOT OF QUESTIONING TODAY SUGGESTING, WELL, THE COMMONWEALTH CAN'T POINT TO ANY SPECIFIC EMPLOYER WHO IS GOING TO TAKE ADVANTAGE OR WHO HAS ANNOUNCED THEY ARE TAKING ADVANTAGE OF THIS. WELL --

THE COURT: WELL, ALSO, THEY CAN'T POINT TO ANY PARTICULAR WOMAN. SO TELL ME WHY -- GIVE ME A RESPONSE TO THAT.

MR. FISCHER: WELL, THAT IS A FUNCTION IN MANY RESPECTS OF THE WAY THE RULES ARE DRAFTED. THE RULES ARE DRAFTED SO THAT EMPLOYERS CAN DO THIS QUIETLY. THERE IS NO REQUIREMENT TO NOTIFY HHS. THERE'S NO

REQUIREMENT TO MAKE A PUBLIC ANNOUNCEMENT. THERE IS NOT EVEN A REQUIREMENT TO CLEARLY COMMUNICATE TO ALL PLAN MEMBERS WE ARE DROPPING YOUR CONTRACEPTION COVERAGE.

AN EMPLOYER CAN DO THIS BY SIMPLY INCLUDING IN THE SUMMARY OF BENEFITS OF COVERAGE THAT THEY PROVIDE ON AN ANNUAL BASIS, THAT WE ALL GET, AND PROBABLY MOST OF US DON'T NECESSARILY READ THAT THOROUGHLY. AS LONG AS SOMEWHERE IN THAT DOCUMENT THERE IS AN INDICATION THAT CONTRACEPTION COVERAGE IS NOT PROVIDED AND THAT DOCUMENT IS PROVIDED 30 DAYS PRIOR TO THE START OF THE PLAN YEAR, THAT SATISFIES THE NOTICE REQUIREMENTS.

SO THE IDEA THAT SOMEHOW WE WOULD KNOW ABOUT THIS, THAT IT WOULD BE WIDESPREAD KNOWLEDGE WHO IS OPTING OUT, IS NOT CONSISTENT WITH THE WAY THE RULES ARE WRITTEN. NOW, THEY COULD HAVE WRITTEN THE RULES IN SUCH A WAY THAT IT WOULD BE CLEAR HOW MANY COMPANIES ARE TAKING ADVANTAGE, HOW MANY WOMEN ARE AFFECTED. THEY COULD HAVE REQUIRED -- THIS IS HHS -- THEY COULD HAVE REQUIRED NOTICE TO STATE REGULATORS. THEY DID NOT.

AND HERE WE ARE IN A SITUATION WHERE IT IS EXTREMELY DIFFICULT FOR ANYONE TO ESTIMATE EXACTLY HOW MANY WOMEN ARE AFFECTED. IN FACT, THE GOVERNMENT CONCEDES THAT. THEY SAY THEY DON'T EVEN KNOW HOW MANY WOMEN ARE AFFECTED BY THE CURRENT ACCOMMODATION PROCESS.

THE ONLY NUMBERS THEY COME UP WITH ARE BASED ON THE COMPANIES THAT HAVE NOTIFIED HHS UNDER THAT SPECIFIC OPTION, AS WELL AS SOME COMPANIES THAT ARE SELF-INSURERS WHERE THE THIRD-PARTY ADMINISTRATOR HAS BEEN IN CONTACT WITH HHS.

NOW, DESPITE NOT FULLY KNOWING HOW MANY PEOPLE USE THE ACCOMMODATION, THEY DO TRY TO COME UP WITH ESTIMATES IN THE RULES AS TO HOW MANY WOMEN WILL BE AFFECTED. THEY ESTIMATE THAT OVER 1 MILLION INDIVIDUALS ARE COVERED BY PLANS THAT CURRENTLY USE THE ACCOMMODATION PROCESS. AND THEY GET THAT DOWN TO AN ESTIMATE OF ROUGHLY 32,000 WOMEN NATIONWIDE WHO MAY LOSE COVERAGE -- WHO WILL LOSE COVERAGE AS A RESULT OF THESE RULES.

NOW, WE BELIEVE THAT THERE ARE PROBLEMS WITH THE WAY THEY ESTIMATED THOSE NUMBERS, BUT REGARDLESS, THEIR OWN ESTIMATES TELL YOU THAT LARGE NUMBERS OF WOMEN WILL BE AFFECTED, AND THAT WILL INCLUDE LARGE NUMBERS OF WOMEN HERE IN PENNSYLVANIA. AS WE DETAIL IN OUR BRIEF, MANY OF THE PLAINTIFFS IN THESE CASES WERE PENNSYLVANIA ENTITIES.

YOU HAVE SEEN EVIDENCE OR YOU HAVE SEEN ARGUMENTS IN SOME OF THE AMICUS BRIEFS ABOUT HOW THIS RULE WILL AFFECT WOMEN IN DIFFERENT STATES ACROSS THE COUNTRY. I BELIEVE IN THE AMICUS BRIEFS SUBMITTED BY

THE OTHER STATES, THERE WAS AN ESTIMATE THAT OVER HALF A MILLION WOMEN IN PENNSYLVANIA WHO CURRENTLY RECEIVE EMPLOYER-SPONSORED COVERAGE WOULD BE ELIGIBLE FOR STATE-FUNDED PROGRAMS IF THEY LOST THEIR COVERAGE AND THEREFORE COULD WIND UP POSING A DIRECT COST TO THE STATES.

AND YOU HAVE ALSO HEARD TESTIMONY FROM OUR EXPERTS ABOUT THEIR EXPERIENCE WITH THE AFFORDABLE CARE ACT, WHAT THAT HAS MEANT TO PENNSYLVANIA WOMEN, AND THEREFORE WHAT THEY BELIEVE WILL HAPPEN IF WOMEN ARE DENIED COVERAGE.

SO BECAUSE OF THIS 30-DAY OPTION THAT ALLOWS AN EMPLOYER TO -- AN EMPLOYER OR ANY PLAN ENTITY, ANY PLAN SPONSOR TO MODIFY OR ELIMINATE ITS CONTRACEPTIVE BENEFITS AT THE BEGINNING OF A PLAN YEAR WITH ONLY 30 DAYS' NOTICE, THAT IS WHY WE BELIEVE AN INJUNCTION BY JANUARY 1ST IS IMPORTANT. JANUARY 1ST IS THE START OF THE PLAN YEAR FOR MANY EMPLOYERS, AND THEREFORE WE BELIEVE ON THAT DAY MANY WOMEN WILL BE AT A RISK OF LOSING THEIR COVERAGE.

PENNSYLVANIA IS ACTUALLY IN A UNIQUE SITUATION AS WELL, BECAUSE UNLIKE A LOT OF OTHER STATES, WE DO NOT HAVE A CONTRACEPTIVE PARITY STATUTE. SO WOMEN WHO ARE COVERED BY FULLY-INSURED PLANS THAT ARE NOT REGULATED UNDER ERISA DO NOT HAVE A FALLBACK OPTION

WHERE THERE IS A STATE LAW THAT WOULD REQUIRE THEIR EMPLOYER TO CONTINUE COVERING CONTRACEPTION. SO THE HARM IN PENNSYLVANIA WILL BE MORE SIGNIFICANT THAN IT IS IN SOME OTHER STATES LIKE NEW YORK AND MASSACHUSETTS, CALIFORNIA, WHERE THEY DO HAVE CONTRACEPTION PARITY STATUTES.

SO THE RESULT OF ALL OF THIS IS THAT WOMEN WILL LOSE COVERAGE, THERE WILL BE COSTS IMPOSED ON THE STATE BECAUSE SIGNIFICANT NUMBERS OF THESE WOMEN WILL BE ELIGIBLE FOR STATE-FUNDED PROGRAMS OR WILL GO TO CLINICS THAT RECEIVE STATE FUNDING, AND ULTIMATELY THE STATE AND OTHER ENTITIES WILL BE PAYING THOSE COSTS.

AGAIN, THAT IS NOT SOMETHING WE ARE JUST SPECULATING ABOUT. THERE IS EVIDENCE IN THE RECORD ABOUT HOW THOSE PROGRAMS WORK AND IT'S ALSO REFLECTED IN THE GOVERNMENT'S RULES. WHEN THEY ARGUE THAT THE RULES WILL NOT IMPOSE A SIGNIFICANT IMPACT ON WOMEN, ONE OF THE POINTS THEY MAKE IS, WELL, THERE ARE ALL THESE OTHER PROGRAMS OUT THERE, ALL THESE OTHER STATE-FUNDED PROGRAMS, STATE AND FEDERAL GOVERNMENT-FUNDED PROGRAMS THAT CAN PROVIDE COVERAGE, AND THEY POINT SPECIFICALLY TO TITLE 10 CLINICS.

SO EVEN THE GOVERNMENT ACKNOWLEDGES THAT THERE WILL BE A SHIFT FROM EMPLOYERS TO PUBLICLY-FUNDED PROGRAMS AS A RESULT OF THESE RULES.

FINALLY, YOUR HONOR, IN GETTING INTO PENNSYLVANIA ENTITIES THAT MAY TAKE ADVANTAGE OF THE EXEMPTION, WE HAVE INCLUDED IN EXHIBIT 20, WHICH IS IN THE RECORD, A SUBSET OF DOCUMENTS FROM A FOIA REQUEST THAT WAS A MADE OF THE GOVERNMENT, OF THE FEDERAL AGENCIES, AND WHAT THESE DOCUMENTS ARE ARE SOME OF THE NOTICES TO HHS AND SUBSEQUENT RESPONSES ABOUT ENTITIES, AND MOST OF THE ONES IN EXHIBIT 20 ARE PENNSYLVANIA ENTITIES, ENTITIES THAT WERE USING THE ACCOMMODATION PROCESS.

NOW, AS I SAID EARLIER, THE GOVERNMENT DOES NOT KNOW EVERYBODY WHO USES THE ACCOMMODATION PROCESS BECAUSE NOT EVERYBODY NOTIFIES THE GOVERNMENT, BUT HERE ARE SOME OF THE EXAMPLES OF PENNSYLVANIA ENTITIES THAT HAVE USED THE ACCOMMODATION PROCESS, WHICH AS A RESULT OF THESE RULES IS NOW OPTIONAL, AND IT'S CERTAINLY A REASONABLE INFERENCE THAT ENTITIES THAT HAVE A SINCERELY-HELD RELIGIOUS OBJECTION TO PROVIDING CONTRACEPTIVE COVERAGE WILL CHOOSE, IF GIVEN THE OPPORTUNITY, TO OPT OUT ENTIRELY RATHER THAN TO PARTICIPATE IN A PROCESS WHICH SOME ENTITIES HAVE ARGUED -- AND THIS HAS BEEN THE SUBJECT OF ZUBIK LITIGATION -- SOME ENTITIES HAVE ARGUED NEVERTHELESS STILL IMPOSES A SUBSTANTIAL BURDEN ON THEIR RELIGIOUS BELIEFS.

SO FOR ALL OF THOSE REASONS, WE THINK IT IS FAIRLY CLEAR THAT THE RULES VIOLATE THE APA. THEY ARE ARBITRARY AND CAPRICIOUS, THEY ARE INCONSISTENT WITH THE AFFORDABLE CARE ACT AND THE PROCESS THAT WAS FOLLOWED WAS NOT LEGITIMATE, AND BECAUSE OF THAT HARM, BECAUSE OF THAT ILLEGALITY, SUBSTANTIAL INJURY WILL OCCUR IN THE COMMONWEALTH.

I WANT TO RETURN TO JUST ONE ISSUE ON STANDING BEFORE I WILL CONCLUDE, BUT THE COURT ASKED EARLIER ABOUT THE EXTENT OF PENNSYLVANIA'S INJURY AND HOW, AS A STATE, PENNSYLVANIA CAN BRING THIS ACTION. WE THINK IT IS FAIRLY CLEAR THAT MASSACHUSETTS VS. EPA CONTROLS AND ALLOWS THE COMMONWEALTH TO BRING AN ACTION CHALLENGING THE DECISIONS HERE IN THE FEDERAL GOVERNMENT. THE COURT POINTED OUT THAT THAT WAS THE CASE INVOLVING INACTION RATHER THAN ACTION, BUT IN MANY WAYS THIS CASE, ALTHOUGH IT IS CHALLENGING THE SPECIFIC REGULATIONS THAT WERE ISSUED, ULTIMATELY IS ABOUT THE GOVERNMENT CHOOSING NOT TO ENFORCE THE REQUIREMENTS OF THE AFFORDABLE CARE ACT AND THE CONTRACEPTIVE MANDATE AGAINST ENTITIES THAT OBJECT. AS A RESULT OF THESE RULES, THOSE LAWS, THOSE REQUIREMENTS WILL NO LONGER BE ENFORCED.

WHAT IS MORE, I DON'T THINK THAT FOR STANDING ANALYSIS PURPOSES THERE IS A SIGNIFICANT

DIFFERENCE BETWEEN ACTION AND INACTION. EITHER WAY, PENNSYLVANIA'S HARMED, PENNSYLVANIA'S RESIDENTS ARE HARMED, THE COMMONWEALTH'S QUASI-SOVEREIGN INTEREST IN PROTECTING THE HEALTH AND SAFETY OF ITS RESIDENTS IS GOING TO BE HARMED, AND FOR ALL OF THOSE REASONS, WE BELIEVE THAT THE COMMONWEALTH DOES HAVE STANDING IN THIS CASE.

THE COURT: OKAY, I THINK YOUR COLLEAGUE WANTS YOU TO TELL ME ONE MORE THING.

MR. FISCHER: YOUR HONOR, I APOLOGIZE. I DO NOT BELIEVE I RESERVED ANY TIME FOR REBUTTAL. WOULD THAT BE POSSIBLE? IF I HAVE TIME LEFT --

THE COURT: THAT IS FINE.

MR. FISCHER: OKAY.

THE COURT: AS I SAID, IT'S ME AND YOU. THERE IS NO ONE HERE SO IT'S FINE. WE HAVE UNTIL 6 O'CLOCK SO LET'S --

MR. FISCHER: SO -- YEAH.

THE COURT: ARE YOU DONE NOW?

MR. FISCHER: I JUST HAVE ONE MORE --

THE COURT: GO AHEAD.

MR. FISCHER: ON THIS QUESTION OF WHETHER THE COMMONWEALTH WILL BE HARMED, IT REALLY COMES DOWN TO COMMON SENSE. WHAT THE GOVERNMENT IS SAYING IS THAT

DESPITE THESE SWEEPING NEW RULES THAT THEY ARGUE ARE SO IMPORTANT THAT THEY HAVE TO BE IMPLEMENTED IMMEDIATELY TO PROTECT PEOPLE THAT ARE SUFFERING, NEVERTHELESS, NOBODY IN PENNSYLVANIA IS GOING TO BE HARMED BECAUSE NO EMPLOYER IS GOING TO TAKE ADVANTAGE OF THEM.

NOW THAT JUST DEFIES LOGIC. IT IS FAIRLY CLEAR THAT THERE WILL BE WOMEN ACROSS THE COUNTRY AND IN PENNSYLVANIA, BASED ON THEIR OWN ESTIMATES, BASED ON PRIOR LITIGATION, BASED ON SOME OF THE DOCUMENTS IN THE RECORD, THERE WILL BE WOMEN WHO ARE HARMED. THAT WILL CAUSE HARM TO THE COMMONWEALTH, AND CLEARLY WE BELIEVE THAT THAT NOT ONLY GIVES US STANDING, BUT ALSO ESTABLISHES INJURY FOR PURPOSES OF OUR INJUNCTION.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

WHO WILL BE ARGUING ON BEHALF OF THE DEFENDANTS?

MR. DAVIS: I WILL, YOUR HONOR.

MAY I APPROACH, YOUR HONOR?

THE COURT: YOU MAY.

MR. DAVIS: IF YOUR HONOR WOULD INDULGE ME AT THE BEGINNING, I WOULD LIKE TO MAKE A RECORD ON CERTAIN EVIDENTIARY ISSUES. SPECIFICALLY WE WOULD LIKE TO MOVE TO STRIKE THE TESTIMONY OF DRS. WEISMAN, BUTTS AND CHUANG TO THE EXTENT THEY TESTIFIED ABOUT THE IMPACT

OF THE NEW RULES ON WOMEN'S ACCESS.

THE COURT: THE HORSE HAS LEFT THE BARN ON THAT. YOU HAD AN OPPORTUNITY, YOU HAD A LAWYER WHO WAS HANDLING THAT ISSUE. I RULED.

MR. DAVIS: YOUR HONOR, CERTAIN THINGS CAME UP THROUGH THE TESTIMONY AFTER THE OBJECTION WAS MADE THAT I'D JUST LIKE TO PUT ON THE RECORD, IF YOU DON'T MIND.

THE COURT: I RULED AGAINST YOU. I DO MIND. YOU DON'T GET TO HAVE A SECOND BITE AT THE APPLE.

GO AHEAD. THIS IS NOW THE CLOSING ARGUMENT PORTION OF THE PROCEEDING.

MR. DAVIS: OKAY. ON STANDING, YOUR HONOR, YOU HEARD FROM DRS. WEISMAN, BUTTS AND CHUANG THAT THEY ARE NOT AWARE OF A SINGLE INDIVIDUAL WHO WILL BE AFFECTED BY THE NEW RULES AND THEY ARE NOT AWARE OF A SINGLE EMPLOYER WHO WILL BE TAKING ADVANTAGE OF THE NEW RULES. I THINK IT WOULD BE EXTRAORDINARY TO GRANT AN INJUNCTION THAT WOULD NOT BENEFIT A SINGLE IDENTIFIABLE INDIVIDUAL. I THINK THAT TESTIMONY WAS VERY TELLING.

THE COURT: IF THEY HAD BEEN ABLE TO IDENTIFY ONE PERSON, WOULD YOUR RESPONSE HAVE BEEN DIFFERENT?

MR. DAVIS: YOUR HONOR, I THINK IT MIGHT HAVE BEEN DIFFERENT WITH RESPECT TO STANDING BUT NOT

WITH RESPECT TO IRREPARABLE INJURY. I THINK IRREPARABLE INJURY REQUIRES SOME SORT OF DAMAGE MORE THAN A MINOR AMOUNT, AND IT WOULD NOT BE DIFFERENT IN A SENSE -- WITH RESPECT TO STANDING, IN THE SENSE THAT THEY WOULD ALSO HAVE TO SHOW THAT THAT EMPLOYEE WOULD ACTUALLY QUALIFY FOR A STATE-FUNDED PROGRAM AND WOULD ACTUALLY GO SEEK COVERAGE FROM THAT STATE-FUNDED PROGRAM. SO IF THEY COULD SHOW ALL OF THAT, MAYBE IT WOULD CHANGE THE STANDING ANALYSIS.

THE COURT: WELL, LET'S FOCUS IN ON STANDING THEN.

SO I'M LOOKING AT FEDERAL REGISTER 82-197 AND THERE IS A SECTION, THE RELIGIOUS EXEMPTION. IT'S THE DISCUSSION OF THE PEOPLE WHO WOULD BE IMPACTED OR THE WOMEN WHO WOULD BE IMPACTED. IT SAYS: BASED ON OUR LIMITED INFORMATION FROM THE LITIGATION AND ACCOMMODATION NOTICES, WE EXPECT THAT THE OVERLAP IS SIGNIFICANT. NEVERTHELESS, IN ORDER TO ESTIMATE THE POSSIBLE EFFECTS OF THESE RULES WE ASSUME THERE IS NO OVERLAP BETWEEN THESE TWO NUMBERS AND THEREFORE -- AND HERE IS THE IMPORTANT PART -- THAT THESE INTERIM FINAL RULES WOULD AFFECT THE CONTRACEPTIVE COSTS OF APPROXIMATELY 31,700 WOMEN.

SO I THINK THAT YOUR RULES ALONE SUGGEST THAT -- WELL, THEY DON'T SUGGEST, THEY SAY THAT 31,700

WOMEN WILL BE AFFECTED. AM I READING THAT CORRECTLY?

MR. DAVIS: YOUR HONOR, THE RULES ESTIMATE THAT SOME WOMEN WILL BE AFFECTED BY THIS. THAT ESTIMATE STANDARD IS LOWER THAN THE CERTAINLY IMPENDING STANDARD NECESSARY TO SHOW STANDING. IN A COURTROOM, I THINK THE STANDARD IS CERTAINLY IMPENDING, REASONABLY CERTAIN, AND I THINK THAT IS WHAT THEY FAILED TO SHOW HERE. AND AGAIN, YOU'D THINK THAT --

THE COURT: SO INSTEAD OF STEPPING AWAY FROM MY QUESTION, ANSWER MY QUESTION. SO IN THE REGULATIONS THERE IS A STATEMENT IS THAT THESE INTERIM FINAL RULES WOULD AFFECT THE CONTRACEPTIVE COSTS OF APPROXIMATELY 31,700 WOMEN. IS THAT A CORRECT STATEMENT OF WHAT THE RULES SAY?

MR. DAVIS: YOUR HONOR, I DON'T HAVE THAT STATEMENT RIGHT IN FRONT OF ME. I ASSUME YOUR HONOR IS READING IT CORRECTLY.

THE COURT: SO GIVEN THE FACT THAT THE RULES THEMSELVES HAVE SAID 31,700 WOMEN WILL BE -- THE COST OF SEVEN -- 31,700 WOMEN WILL BE AFFECTED, HOW DOES THAT IMPACT HERE ON THE STANDING ANALYSIS?

MR. DAVIS: AGAIN, YOUR HONOR, IN THE CONTEXT OF THE RULES, THAT IS AN ESTIMATE. THAT IS NOT A BLANKET STATEMENT THAT 31,000 WOMEN ARE DEFINITELY GOING TO BE AFFECTED BY THESE RULES. I FUNDAMENTALLY

DISAGREE WITH THE IDEA THAT THAT IS AN IRONCLAD PREDICTION OF WHAT WILL HAPPEN. THAT IS AN ESTIMATE.

THE RULES IN OTHER PLACES SAY THAT THEY -- THAT IT'S -- THIS ENDEAVOR IS FRAUGHT WITH UNCERTAINTY, IT'S NOT CLEAR WHAT EFFECT THESE WILL HAVE, THAT MANY EMPLOYERS ARE ALREADY PROTECTED BY INJUNCTIONS. I DON'T THINK THERE IS ANY WAY TO READ THAT STATEMENT AS AN IRONCLAD PREDICTION THAT THIS IS WHAT WILL HAPPEN.

THE COURT: GO AHEAD.

MR. DAVIS: I WOULD ALSO LIKE TO -- YOU ALSO HEARD, ALSO ON THE STANDING QUESTION, YOUR HONOR, YOU HEARD FROM THE WITNESSES THAT ACCESS TO CONTRACEPTIVE COVERAGE HAS INCREASED IN THE YEAR AFTER THE AFFORDABLE CARE ACT, THAT NO LONGER ARE THEY BEING -- ARE DOCTORS BEING ASKED ABOUT COST-FREE CONTRACEPTION. I JUST WANTED TO POINT OUT THAT THIS NEW WORLD THAT THEY ARE TALKING ABOUT AFTER THE AFFORDABLE CARE ACT IS A WORLD WHERE EVERY KNOWN RELIGIOUS OBJECTOR WAS ALREADY EXEMPT. IT WAS ALREADY NOT PROVIDING CONTRACEPTIVE COVERAGE, SO IT'S NOT CLEAR THEN WHY THESE NEW RULES WOULD RETURN US BACK TO THE WORLD OF THE PRE-ACA ERA.

I'D ALSO LIKE TO RETURN TO WHAT WE TALKED ABOUT EARLIER THIS MORNING, YOUR HONOR, ON THE MORAL

OBJECTORS WHO COULD -- WHETHER OR NOT THERE IS A WAY TO POLICE SINCERITY IN THAT CONTEXT. JUST TO ELABORATE ON WHAT I SAID EARLIER, IT'S POSSIBLE FOR AN EMPLOYEE OF A COMPANY WHO BELIEVES THAT HER EMPLOYER IS IMPROPERLY ASSERTING A MORAL OBJECTION TO FILE A COMPLAINT UNDER ERISA WITH THE DEPARTMENT OF LABOR. LABOR HAS THE AUTHORITY TO ENFORCE UNDER ERISA.

LABOR ALSO HAS THE AUTHORITY TO REFER TO THE TREASURY DEPARTMENT, FOR IRS TO INVESTIGATE THE COMPANY FOR FAILING TO PAY EXCISE TAXES, IN OTHER WORDS FOR FAILING TO COMPLY WITH THE MANDATE. AND SINCE SINCERITY IS AN ELEMENT OF THE EXEMPTION, THAT WOULD BE A LIVE ENFORCEMENT ISSUE IN THIS CONTEXT.

AND I ALSO ADD THAT AN EMPLOYEE IN THAT CONTEXT WOULD CONCEIVABLY HAVE A TITLE VII REMEDY AVAILABLE AGAINST HER EMPLOYER.

I WOULD ALSO, ALTHOUGH I KNOW YOUR HONOR WAS NOT ENAMORED WITH THIS ARGUMENT, I WOULD JUST LIKE TO ADD JUST A COUPLE OF QUICK WORDS ON THE RICCI VERSUS DESTEFANO ARGUMENT. YOUR HONOR HAD EXPRESSED CONCERN THAT THAT CASE WAS NOT SUFFICIENTLY ON ALL FOURS WITH THIS CASE BECAUSE IT INVOLVED A CITY AND NOT THE FEDERAL GOVERNMENT FOR OTHER REASONS. IF IT GIVES YOU ANY SOLACE, YOUR HONOR, THERE ARE -- THERE IS AN ANALOGOUS PRINCIPLE IN THE CONTEXT OF CHEVRON DEFERENCE THAT MAY

BE CLOSER TO THIS CASE.

AND THERE IS A SUPREME COURT CASE CALLED SCIALABBA, S-C-I-A-L-A-B-B-A, VERSUS CUELLAR DE OSORIO, C-U-E-L-L-A-R D-E O-S-O-R-I-O, 134 S.CT 2191: WHEN AN AGENCY THUS RESOLVES STATUTORY TENSION, ORDINARY PRINCIPLES OF ADMINISTRATIVE DEFERENCE REQUIRE US TO DEFER.

ANOTHER CASE -- I WILL GIVE YOU THE CITE IN A SECOND -- SAYS THAT WHEN A STATUTORY SCHEME CONTAINS A FUNDAMENTAL AMBIGUITY ARISING FROM THE DIFFERENT MANDATES OF TWO PROVISIONS, IT IS APPROPRIATE TO LOOK TO THE IMPLEMENTING AGENCY'S EXPERT INTERPRETATION.

SO I THINK THAT MIGHT BE CLOSER TO WHAT YOUR HONOR WAS LOOKING FOR.

THE COURT: THAT IS BETTER.

MR. DAVIS: AND THAT CASE IS NATIONAL ASSOCIATION OF HOMEBUILDERS VERSUS DEFENDERS OF WILDLIFE. 551 U.S. 644-666.

THE COURT: SCIALABBA, WHAT YEAR WAS SCIALABBA?

MR. DAVIS: I NEGLECTED TO WRITE DOWN THE YEAR. I THOUGHT I HAD THAT.

ONE SECOND, YOUR HONOR. I WILL GET THAT FOR YOU.

THE COURT: OKAY.

MR. DAVIS: 2014.

THE COURT: 2014.

MR. DAVIS: YES.

THE COURT: OKAY. I WILL TAKE A LOOK AT THAT CASE.

MR. DAVIS: I WOULD LIKE TO RESPOND TO A FEW THINGS THAT MY COLLEAGUE ON THE OTHER SIDE JUST SAID. HE SUGGESTED THAT RECOGNITION OF MORAL OBJECTIONS IS UNPRECEDENTED, IF I HEARD HIM CORRECTLY. THAT IS NOT TRUE. MORAL OBJECTIONS HAVE BEEN STANDARD IN THE LAW FOR QUITE A LONG TIME. IN FACT, PENNSYLVANIA HAS ITS OWN CONSCIENCE CLAUSE PERMITTING MEDICAL PROFESSIONALS TO OPT OUT OF PROVIDING ABORTIONS, FOR EXAMPLE, AND THERE HAS BEEN THE CONSCIENCE CLAUSE EXEMPTING CONSCIENTIOUS OBJECTORS FROM THE DRAFT.

I WOULD ALSO LIKE TO ADDRESS THE KING VERSUS BURWELL ISSUE THAT CAME UP, YOUR HONOR, IN THE CONTEXT OF WHETHER OR NOT THE AGENCY'S INTERPRETATION IS ENTITLED TO -- OF THE AFFORDABLE CARE ACT IS ENTITLED TO CHEVRON DEFERENCE. YOUR HONOR, IN KING VERSUS BURWELL THE COURT HELD THAT WHETHER TAX CREDITS ARE AVAILABLE ON FEDERAL EXCHANGES IS A MAJOR QUESTION, THAT IT WOULD BE INCONCEIVABLE THAT CONGRESS WOULD HAVE DELEGATED THAT TO THE -- IMPLICITLY DELEGATED THAT TO THE AGENCIES.

SO KING WAS ABOUT IMPLICIT DELEGATIONS BUT THIS CASE IS ABOUT AN EXPLICIT DELEGATION OF AUTHORITY AT 42 U.S.C. 300GG-13(A)(4).

ANOTHER POINT I'D LIKE TO CLARIFY THAT CAME UP WAS THE QUESTION ABOUT WHETHER THE AGENCIES HAVE AUTHORITY TO CREATE EXEMPTIONS FROM THE GUIDELINES, WHICH WE DISCUSSED EARLIER. I JUST WANTED TO CLARIFY THAT THE EXEMPTIONS THEMSELVES ARE IN THE HRSA GUIDELINES, SO IT'S NOT LIKE THESE RULES ARE CREATING EXEMPTIONS TO HRSA'S GUIDELINES; THE GUIDELINES THEMSELVES SPELL OUT THE RELIGIOUS AND MORAL EXEMPTIONS.

AND THAT IS TRUE NOT ONLY OF THESE RULES OF THE GUIDELINES IN 2016, IT'S ALSO TRUE OF THE GUIDELINES IN 2011, WHEN THE LAST ADMINISTRATION DID THE RELIGIOUS EMPLOYER EXEMPTION. THE HRSA GUIDELINES THERE THEMSELVES INCORPORATED THE EXEMPTION, SO I DON'T THINK THIS QUESTION ABOUT WHETHER AGENCIES CAN CREATE EXCEPTIONS TO THE GUIDELINES IS REALLY PRESENTED HERE.

THERE WAS ALSO A REFERENCE TO ALL OF THE PENNSYLVANIA ENTITIES THAT ARE USING THE ACCOMMODATION. I JUST POINT OUT THERE, YOUR HONOR, THAT THERE IS NO INDICATION THAT ANY OF THOSE ENTITIES ARE GOING TO SWITCH FROM USING THE ACCOMMODATION TO USING THE EXEMPTION. IT MAY BE, LIKE FOR MANY ENTITIES, THAT THE ACCOMMODATION SATISFIES THEIR RELIGIOUS EXEMPTIONS AND

THEY WON'T SWITCH TO ANYTHING ELSE.

AND, FINALLY, YOUR HONOR, I THINK THIS POINT ABOUT HOW -- ON IRREPARABLE INJURY, ABOUT HOW THE EXCLUSION MUST BE CLEAR ON THE FACE OF THE PLAN DOCUMENT AND THAT IS WHY MAYBE THESE WITNESSES DID NOT KNOW ABOUT ANYONE WHO KNEW ABOUT ANYONE WHO WAS GOING TO LOSE CONTRACEPTIVE COVERAGE, WELL, THERE IS ALSO A REQUIREMENT THAT AN EMPLOYER WHO PLANS TO TAKE THIS EXEMPTION NOTIFY ITS EMPLOYEES 30 DAYS BEFOREHAND AND SEND OUT A PLAN DOCUMENT THAT -- WHERE THE EXCLUSION OF COVERAGE IS APPARENT FROM THE FACE OF THE PLAN DOCUMENT. AND WE HAVE HEARD NOTHING ABOUT ANY OF THOSE NOTICES BEING SENT OUT. NO WITNESS HAS TESTIFIED THAT THEY ARE AWARE OF ANY OF THOSE NOTICES. AND YOU WOULD THINK IF THIS IMPACT WAS GOING TO BE AS WIDESPREAD AS THE COMMONWEALTH SUGGESTS, WE WOULD HAVE HEARD SOME INKLING OF THAT. AND THE FACT IS THAT WE HAVE NOT.

SO I JUST -- THE LAST POINT I WOULD JUST LIKE TO MAKE, YOUR HONOR, IS THAT AGAIN, YOU ARE NOT WRITING ON A BLANK SLATE HERE. THERE IS A LOT OF WATER UNDER THE BRIDGE. THERE IS A LOT OF EXISTING PRELIMINARY INJUNCTIONS AND PERMANENT INJUNCTIONS OUT THERE THAT HAVE MEANT THAT THE STATE OF THE WORLD BEFORE THESE NEW RULES CAME OUT WERE THAT MOST, MAYBE EVEN ALL OF THE EMPLOYERS WHO OBJECTED TO PROVIDING CONTRACEPTIVE

COVERAGE WERE EXEMPT FROM THIS REQUIREMENT ALREADY. SO THERE IS NOT -- IT'S NOT CLEAR WHAT IMPACT AN INJUNCTION WOULD HAVE. AND IN THAT CIRCUMSTANCE, IT'S BLACK-LETTER LAW THAT THE AGENCY SHOULD STAY ITS HAND -- OR THE COURT SHOULD STAY ITS HAND. IT'S BLACK-LETTER LAW THAT THE COURT SHOULD STAY ITS HAND.

YOUR HONOR, ON ONE MORE ISSUE, ON THE APA, I JUST WOULD LIKE TO ADD THAT THIS CASE IS SUPPOSED TO BE LIMITED TO THE ADMINISTRATIVE RECORD, AND THAT WHILE I RECOGNIZE WHAT YOUR HONOR SAID ABOUT SOME OF THESE WITNESSES' TESTIMONY --

THE COURT: I DON'T THINK THAT IS THE CASE. IF YOU READ MY ORDER ON THE MOTION IN LIMINE, THAT IS NOT THE CASE.

MR. DAVIS: WELL --

THE COURT: DID YOU READ THE ORDER ON MOTION IN LIMINE?

MR. DAVIS: I DID, YOUR HONOR.

THE COURT: THEREFORE, THE CASE IS NOT SUPPOSED TO BE DECIDED ON THE ADMINISTRATIVE RECORD ONLY.

MR. DAVIS: YOUR HONOR, I'M RESPECTFULLY DISAGREEING WITH YOUR HONOR'S MOTION.

THE COURT: YOU CAN SAY THAT YOU BELIEVE THAT THAT IS THE CASE, BUT I DON'T THINK YOU CAN SAY

SUPPOSED TO, BECAUSE THERE IS AN ORDER OF THIS COURT WHICH PARTICULARLY DESCRIBES WHAT RECORD THIS DECISION IS BEING MADE ON. DO YOU UNDERSTAND THAT?

MR. DAVIS: FAIR ENOUGH, YOUR HONOR. I WILL PHRASE IT DIFFERENTLY. I BELIEVE THAT THIS CASE SHOULD BE DECIDED ON THE BASIS OF THE ADMINISTRATIVE RECORD. I DON'T BELIEVE THAT THE COURT'S RULING ON THE MOTION IN LIMINE WAS CORRECT. I THINK THAT THE WITNESS TESTIMONY IN THIS CASE WENT FAR BEYOND THE ADMINISTRATIVE RECORD. I THINK IT WENT INTO QUESTIONING THE CORRECTNESS AND WISDOM OF THE AGENCY'S DECISION. I THINK IT'S BLACK-LETTER LAW THAT THAT STUFF IS NOT PROPER.

THE COURT: MOVE ON. THAT WAS ON A MOTION IN LIMINE. WE ARE DOING THE CLOSING IN THIS CASE RIGHT NOW.

MR. DAVIS: YOUR HONOR, THAT IS ALL I HAVE, UNLESS YOU HAVE FURTHER QUESTIONS.

THE COURT: I HAVE NO FURTHER QUESTIONS.

REBUTTAL.

MR. FISCHER: THANK YOU, YOUR HONOR. I WILL TRY TO KEEP THIS BRIEF.

THE DISCUSSION THAT WE ARE HAVING ABOUT THE MORAL EXEMPTION I THINK IS A GOOD METAPHOR FOR ALL THE PROBLEMS WITH BOTH RULES. THE FACT THAT WE ARE NOW

IN POSITION WHERE WE ARE HAVING A DEBATE ABOUT WHETHER THE DEPARTMENT OF LABOR SHOULD BE INVESTIGATING WHETHER EMPLOYERS' PROFESSED MORAL BELIEFS ARE SINCERE OR NOT, AND THEY FEEL AN EMPLOYEE DENIED CONTRACEPTIVE COVERAGE HAS TO FILE A TITLE VII CLAIM BECAUSE HER EMPLOYER, AS THE COURT HYPOTHESIZED, MAY DECIDE THAT HE OBJECTS TO WOMEN BEING IN THE WORKFORCE AND HE IS GOING TO DENY CONTRACEPTIVE COVERAGE AS A RESULT OF THAT. I THINK THAT IS A WORLD WE DON'T WANT TO BE IN.

THE RELIGIOUS FREEDOM RESTORATION ACT ADDRESSED THE TENSION INHERENT IN THAT ISSUE IN THE CONTEXT OF RELIGIOUS BELIEFS AND STRUCK A BALANCE WHERE COURTS GENERALLY DO NOT GET INTO THE SINCERITY OF BELIEFS, NOR SHOULD THEY. WHAT THEY CAN LOOK AT IS WHETHER THOSE BELIEFS OR THE EXERCISE OF THOSE BELIEFS IS SUBSTANTIALLY BURDENED BY GOVERNMENT PROGRAMS. THAT IS WHERE RFRA STRUCK THE BALANCE. WHAT WE HAVE NOW IS TWO RULES FROM THE GOVERNMENT THAT WOULD ESSENTIALLY UPSET THAT BALANCE AND PUT EMPLOYEES AT THE WHIM OF THE MORAL BELIEFS, WHATEVER THEY MAY BE, OF THEIR EMPLOYERS. AND I THINK THE GOVERNMENT IS SUGGESTING AT LEAST THAT AN EMPLOYER WHO HAD A MORAL BELIEF THAT WOMEN SHOULD NOT BE IN THE WORKFORCE, THAT THAT WOULD NOT BE A SINCERELY-HELD OR LEGITIMATE MORAL BELIEF. THERE IS NOTHING IN THE RULES THAT SAYS THAT. THERE IS NOTHING

IN THE RULES THAT LIMITS THE TYPES OF MORAL BELIEFS THAT AN ENTITY CAN PROFESS.

I WOULD LIKE TO THINK THAT HAD THIS GONE THROUGH THE RIGHT PROCESS, THERE WOULD HAVE BEEN SOME THOUGHT GIVEN TO THAT AND MAYBE THERE WOULD HAVE BEEN A DIFFERENT RESULT AND WE WOULD NOT HAVE THIS SWEEPING EXEMPTION, WE WOULD NOT HAVE THE PUBLICLY-TRADED COMPANY OPTION UNDER THE RELIGIOUS EXEMPTION RULE, AND WE WOULD NOT HAVE THE PROVISION MAKING THE ACCOMMODATION OPTIONAL. I THINK IN SOME WAYS THOSE ARE ALL THE RESULTS OF A FLAWED PROCESS AS I SAID THAT LED TO A FLAWED RESULT, BUT I ALSO THINK THAT BECAUSE THE RESULT IS SO FLAWED, IT IS IMPORTANT TO GET THAT ON THE RECORD AND MAKE CLEAR THAT IF WE ARE FORTUNATE, IF THE COURT DOES GRANT AN INJUNCTION AND THE GOVERNMENT GOES BACK TO THE DRAWING BOARD, ONE WOULD HOPE THAT THEY WOULD COME UP -- IF THEY DECIDE THERE'S A NEED FOR FURTHER RULE MAKING, ONE WOULD HOPE THAT THEY WOULD COME UP WITH A RULE THAT IS MUCH NARROWER THAN THIS, THAT DOES NOT ALLOW FOR SUCH SWEEPING OBJECTIONS, THAT IS MUCH MORE JUSTIFIABLE UNDER THE AFFORDABLE CARE ACT AND UNDER RFRA.

THE GOVERNMENT SAID -- TURNING BRIEFLY TO THE HARM, AGAIN, THE GOVERNMENT HAS SAID WELL, EVERY KNOWN RELIGIOUS OBJECTOR IS EXEMPT. NOW, THAT IS SIMPLY

NOT THE CASE.

RELIGIOUS -- MANY RELIGIOUS OBJECTORS ARE STILL OPERATING UNDER THE ACCOMMODATION PROCESS UNDER WHICH THEIR EMPLOYEES DO GET HEALTH COVERAGE. AND, IN FACT, EVEN IF YOU LOOK AT WHAT IS REFERRED TO AS THE ZUBIK INJUNCTION, THE ORDER FROM THE SUPREME COURT, THE COURT DID NOT SAY YOUR EMPLOYEES DO NOT GET COVERAGE. WHAT THEY SAID IS, HHS NOW KNOWS BY VIRTUE OF THIS LITIGATION YOU OBJECT, SO THEY CAN GO AHEAD AND ARRANGE FOR COVERAGE, AND THEY CAN'T FINE YOU FOR NOT PROVIDING THE NOTICE. NOW, SOME OF THOSE ENTITIES ARE COVERED BY CHURCH PLANS, WHICH IS A SIDE ISSUE, AND THEIR EMPLOYERS -- THEIR EMPLOYEES MAY NOT BE GETTING COVERAGE. BUT CERTAINLY TO STAY THAT ALL KNOWN RELIGIOUS OBJECTORS ARE EXEMPT IS NOT CONSISTENT WITH THE RECORD IN THIS CASE.

YOUR HONOR, THE GOVERNMENT COUNSEL HAS TALKED A LITTLE BIT ABOUT THE NEED TO DEFER TO THEIR INTERPRETATION AND CITED THE TWO CASES. IN THOSE CASES IT SOUNDS LIKE AT LEAST THERE WAS LEGITIMATE TENSION IN ONE OR AMBIGUITY IN ANOTHER THAT ALLOWED THE GOVERNMENT TO SAY WE ARE ADOPTING A REASONABLE INTERPRETATION. HERE THERE SIMPLY ISN'T. THERE'S NOT A BASIS FOR READING INTO THE WOMEN'S HEALTH AMENDMENT THIS BROAD AUTHORITY TO CARVE OUT EXEMPTIONS FROM WHAT IS A CLEAR

MANDATORY OBLIGATION THAT CONGRESS PASSED THAT THESE PLAN SPONSORS HAVE TO PROVIDE AND HAVE TO NOT IMPOSE COST SHARING REQUIREMENTS FOR THE NECESSARY PREVENTIVE MEDICINE AS DEFINED BY HRSA, THIS IDEA THAT HR -- THE GUIDELINES INCLUDE THE EXEMPTIONS. WELL, THE AGENCIES PROMULGATE THE EXEMPTIONS AND THEN THEY GIVE HRSA THE AUTHORITY, AND THEY APPEAR ON THE WEB PAGE. SO I DON'T THINK IT'S THE CASE THAT HRSA IS EXERCISING ITS INDEPENDENT AUTHORITY TO IMPLEMENT THESE GUIDELINES -- OR IMPLEMENT THESE EXCEPTIONS.

YOUR HONOR, LET'S RETURN TO THE THREE MOST PROBLEMATIC ASPECTS THAT I MENTIONED IN THE BEGINNING. THE MORAL EXEMPTION RULE IS SIMPLY NOT SUPPORTED BY THE RECORD. THIS EXPANSION OF PUBLICLY TRADED COMPANY IS NOT SUPPORTED. AND THE RENDERING OF THE ACCOMMODATION PROCESS OPTIONAL REALLY DOES THREATEN TO TAKE AWAY COVERAGE FOR MANY WOMEN WHO WORK FOR RELIGIOUS EMPLOYERS BUT WHO ARE NONETHELESS GETTING CONTRACEPTIVE COVERAGE TODAY.

AND WITH RESPECT TO ALL OF THESE IN SOME WAY, AT LEAST CERTAINLY THE MORAL EXEMPTION AND THE PUBLIC-TRADED COMPANY EXPANSION, THE GOVERNMENT'S RESPONSE IS, WELL, WE JUST DON'T THINK THAT MANY PEOPLE ARE GOING TO TAKE ADVANTAGE OF IT. THAT IN SOME WAYS IS KIND OF A PERFECT EXAMPLE OF ARBITRARY AND CAPRICIOUS

RULEMAKING. TO ALLOW FOR A SUCH SWEEPING EXEMPTION, BUT THEN TO SAY WE ARE DOING THIS BECAUSE WE DON'T ACTUALLY THINK THERE IS MUCH DEMAND FOR IT, WE DON'T THINK THERE IS MUCH NEED FOR IT, THAT IS SIMPLY NOT HOW THE AGENCY RULEMAKING PROCESS IS SUPPOSED TO WORK AND IT'S NOT THE KIND OF RESULT THAT IS ENTITLED TO DEFERENCE OR ENTITLED TO BE AFFIRMED BY A COURT.

AND FOR ALL OF THOSE REASONS WE BELIEVE THE RULES ARE ILLEGAL, THAT THEY WILL CAUSE IRREPARABLE HARM TO THE COMMONWEALTH, TO THE COMMONWEALTH'S RESIDENTS. PUBLIC INTEREST STRONGLY FAVORS AN INJUNCTION HERE, AND WE WOULD ASK THE COURT TO GRANT THE COMMONWEALTH'S MOTION. THANK YOU.

THE COURT: OKAY. AS I SAID AT THE BEGINNING OF THIS HEARING, I CONSIDERED ALL THE BRIEFINGS SUBMITTED BY THE PARTIES WITH RESPECT TO THIS PRELIMINARY INJUNCTION, INCLUDING THE COMMONWEALTH'S MOTION FOR PRELIMINARY INJUNCTION AND ITS SUPPORTING EXHIBITS, THE DEFENDANT'S RESPONSE IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION, AND THE COMMONWEALTH'S REPLY. I HAVE ALSO CONSIDERED THE ADMINISTRATIVE RECORD SUBMITTED BY THE DEFENDANTS. I ALSO WISH TO THANK THE AMICI FOR SUBMITTING THEIR THOUGHTFUL BRIEFS IN THIS CASE.

BASED ON THESE DOCUMENTS AND AS WELL AS

THE DOCUMENTS I HAVE RECEIVED AT TODAY'S HEARING, THE TESTIMONY I HAVE HEARD AT TODAY'S HEARING, AND THE ARGUMENT I HAVE HEARD, I WILL BE ABLE TO ISSUE AN OPINION IN THE TIME SCALE REQUESTED BY PENNSYLVANIA, WHICH IS PRIOR TO THE BEGINNING OF THE YEAR, AND WILL ENDEAVOR TO GET THAT OPINION OUT AS SOON AS POSSIBLE.

THANK YOU. ANYTHING ELSE?

MR. FISCHER: NOTHING FURTHER FROM THE COMMONWEALTH, YOUR HONOR.

MR. DAVIS: NOTHING FURTHER, YOUR HONOR.

MR. GOLDMAN: YOUR HONOR, I'M SORRY. YOU HAD SUGGESTED ON TUESDAY EVENING THAT YOU WANTED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

THE COURT: BASED ON WHAT I HAVE READ AND WHAT I HAVE, I DON'T NEED YOU TO DO THAT. I WILL -- WE WILL BE ABLE TO DO THAT INTERNALLY. I THINK YOU WERE VERY CLEAR IN YOUR BRIEFS, AND I APPRECIATE THAT FROM ALL SIDES. SO TO THE EXTENT THAT MY PREVIOUS ORDER INDICATES A TIME FOR POST-HEARING BRIEFING AND POST-HEARING SUBMISSION OF FINDINGS OF FACT, I'M ABROGATING THAT PORTION IN MY ORDER. IT IS NOT NECESSARY THAT YOU DO THAT. SO INSTEAD OF HAVING TO GO HOME RIGHT NOW AND START WRITING, YOU CAN, I DON'T KNOW, GO AND HAVE A DRINK OR SOMETHING.

ALL COUNSEL: THANK YOU, YOUR HONOR.

(HEARING CONCLUDED.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DATE

OFFICIAL COURT REPORTER

SUZANNE R. WHITE

INDEX PAGE

XAVIER BECERRA, State Bar No. 118517
Attorney General of California
JULIE WENG-GUTIERREZ, State Bar No. 179277
Senior Assistant Attorney General
CHRISTINA BULL ARNDT, State Bar No. 175403
Deputy Solicitor General
R. MATTHEW WISE, State Bar No. 238485
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Telephone: (916) 210-7913
Fax: (916) 324-5567
E-mail: Karli.Eisenberg@doj.ca.gov
Attorneys for Plaintiff State of California

[Additional counsel listed on next page]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF DELAWARE; THE STATE OF MARYLAND; THE STATE OF NEW YORK; THE COMMONWEALTH OF VIRGINIA, Plaintiffs, **v.** **ERIC D. HARGAN, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; DOES 1-100,** Defendants.	4:17-cv-05783-HSG **DECLARATION OF SHARITA GRUBERG IN SUPPORT OF THE STATES' REPLY TO OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

ATTORNEYS FOR ADDITIONAL PLAINTIFFS

MATTHEW P. DENN
Attorney General of Delaware
AARON R. GOLDSTEIN*
State Solicitor
LAKRESHA S ROBERTS*
Chief Deputy Attorney General
JESSICA M. WILLEY*
Deputy Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801

BRIAN E. FROSH
Attorney General of Maryland
STEVE M. SULLIVAN*
Solicitor General
CAROLYN A. QUATTROCKI*
Deputy Attorney General
KIMBERLY S. CAMMARATA*
Director, Health Education and Advocacy
200 St. Paul Place
Baltimore, MD 21202

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Attorney General of New York
LISA LANDAU*
Bureau Chief, Health Care Bureau
SARA MARK*
Special Counsel
ELIZABETH CHESLER*
Assistant Attorney General
120 Broadway
New York, NY 10271

MARK R. HERRING
Attorney General of Virginia
SAMUEL T. TOWELL*
Deputy Attorney General
202 North Ninth Street
Richmond, VA 23219

* Pro hac vice application forthcoming

I, Sharita Gruberg, declare as follows:

1. I am Associate Director of the LGBT Research and Communications Project at the Center for American Progress (CAP). I am a lawyer with five years of experience filing Freedom of Information Act requests.

2. On May 31, 2017, CAP submitted a Freedom of Information Act (FOIA) request to the U.S. Department of Health and Human Services for all records of religious accommodation requests submitted to the agency under the Affordable Care Act's contraceptive mandate. Records were requested from when the Affordable Care Act went into effect to the date the FOIA request was submitted and included filings made by requesting entities as well as the agency's responses.

3. We received 558 pages of documents from January 2014 to March 2016 in response to our request. A true and correct copy of these documents is attached as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct of my own personal knowledge.

Executed on December 6, 2017 in Washington, D.C.

Sharita Gruberg
Center for American Progress

SA2017109209
52715008.docx

VALLEY FORGE CHRISTIAN COLLEGE | Office of the President

September 10, 2014

Sylvia Mathews Burwell
Secretary of Health and Human Services
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H
Via email to marketreform@cms.hhs.gov

Re: Valley Forge Christian College Objection to Health Care Mandate

To the Secretary of Health and Human Services:

Valley Forge Christian College has a religious objection to providing coverage of a subset of contraceptive services required to be covered under PHS Action Section 2713, as adopted by the Affordable Care Act, and incorporated under ERISA section 715 and Code section 9815.
The services for which this organization objects are the following:
We are requesting relief, based on our sincerely held religious beliefs, from the regulations issued under the Patient Protection and Affordable Care Act (PPACA) that force employers to provide, directly or indirectly, insurance plans that include potentially life threatening drugs and devices, which harm or terminate a fertilized human egg (the "Mandate"); including but not limited to:

- Ulipristal (aka Ella)
- Levonorgestrel (aka Plan B, Plan B One-Step, Next Choice)
- Intrauterine Devices (of any type)
- Abortion services except to save the life of the mother

Service Provider Information

(a) Plan Name	(b) Service Provider Name	(c) Service Provider Contact Information	(d) Service Provider Category	(e) Plan type if applicable
Valley Forge Christian College	Aetna	Karla Hellings Senior Account Manager-Established Business SEPA 980 Jolly Road U11E Blue Bell, PA 19422 215-775-7815 HellingsKJ@aetna.com	Issuer	N/A
Valley Forge Christian College	PrimePay	Brad Ramer Product Specialist/Channel Manager, HR & Benefit Services 1487 Dunwoody Drive, West Chester, PA 19335 484.913.3535 **bramer@primepay.com**	TPA	N/A

Information being submitted is:

[x] Original Information [ ] Updated

Contact Information: Kindly direct all correspondence related to this matter to

Don Meyer, Ph.D.
President
VALLEY FORGE CHRISTIAN COLLEGE
1401 Charlestown Road
Phoenixville, PA 19460
610.917.1402 (O)

Eligible Organization: Nonprofit entity – Christian college

VALLEY FORGE CHRISTIAN COLLEGE

By _____
Don Meyer, Ph.D.
President

[redacted]

December 29, 2014

Honorable Sylvia Burwell
Secretary, Health & Human Services
The U.S. Department of Health and Human Services
c/o Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
Room 739H
200 Independence Avenue, SW
Washington, DC 20201

Notification of Objection

Dear Ms. Burwell:

DAS Companies, Inc. is a closely-held corporation organized in Pennsylvania. The sole shareholder of the corporation is a [redacted] and adheres to the tenets of his faith. As a closely-held family corporation with deep religious convictions and based on the United States Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (U.S. 2014), DAS objects to providing coverage of all contraceptive services required to be covered under PHS Act section 2713, as added by the Affordable Care Act, and incorporated into ERISA section 715 and Code section 9815.

DAS will continue to provide comprehensive health care plans for its employees. Based on its religious objections to the mandate to provide contraceptives, however, no form of contraceptives will be offered in the health care plans provided for its employees. The DAS health plan is the DAS Companies, Inc. PPO. It is administered by a Third Party Administrator: Highmark Blue Shield, 1800 Center Street, Camp Hill PA 17089.

Should you have any questions regarding this letter, please feel free to contact the undersigned.

Sincerely,

[redacted]

Chief Financial Officer & Assistant Secretary

[redacted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

March 03, 2016

Mary Hentosz
UPMC Health Plan
600 Grant Street
Pittsburgh, Pa. 15219

Re: Earth Sun Moon Trading Health Plan, Earth Sun Moon Trading Company, Inc.

Dear Ms. Hentosz,

This is to inform you that the Department of Health and Human Services (HHS) has received notice from Earth Sun Moon Trading Company, Inc. that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Earth Sun Moon Trading Company, Inc. has notified HHS of its religious objection to the coverage of the following contraceptive services for its group health plan(s) Earth Sun Moon Trading Health Plan: "all contraceptive benefits".

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

Jacob Ackerman
Acting Director, Market-wide Regulation Division
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION
& INSURANCE OVERSIGHT

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

October 14, 2014

Andrea Meehan
Sr. Account Executive
Sales
3031C Walton Road, Ste. 201
Plymouth Meeting, PA 19462
Andrea.Meehan@ibx.com

Re: PAISBOA Plan & Trust, Holy Ghost Preparatory School

Dear Ms. Meehan,

This is to inform you that the Department of Health and Human Services has received notice from Holy Ghost Preparatory School that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Holy Ghost Preparatory School has notified HHS of its religious objection to the coverage of all contraceptive services for its group health plan PAISBOA Plan & Trust.

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

James Mayhew
Director, Division of Regulations and Policy
Acting Director, Division of Compliance and Enforcement
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room T3901

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION
& INSURANCE OVERSIGHT

VIA OVERNIGHT MAIL& E-MAIL
RETURN RECEIPT REQUESTED

September 18, 2014

Karla Hellings
Senior Account Manager-Established Business SEPA
Aetna
980 Jolly Road U11E
Blue Bell, PA 19422
215-775-7815
HellingsKJ@aetna.com

Re: Valley Forge Christian College

Dear Ms. Hellings,

This is to inform you that the Department of Health and Human Services has received notice from Valley Forge Christian College that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Valley Forge Christian College has notified HHS of its religious objection to the coverage of the following contraceptive services that for its group health plan Valley Forge Christian College: drugs and devices which harm or terminate a fertilized human egg, including but not limited to

- Ulipristal (aka Ella)
- Levonorgestrel (aka Plan B, Plan B One-Step, Next Choice)
- Intrauterine Devices (of any type)
- Abortion services except to save the life of the mother

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@sec.hhs.gov.

Sincerely,

James Mayhew
Director, Division of Regulations and Policy
Acting Director, Division of Compliance and Enforcement
Oversight Group

VALLEY FORGE CHRISTIAN COLLEGE | Office of the President

September 10, 2014

Sylvia Mathews Burwell
Secretary of Health and Human Services
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H
Via email to marketreform@cms.hhs.gov

Re: Valley Forge Christian College Objection to Health Care Mandate

To the Secretary of Health and Human Services:

Valley Forge Christian College has a religious objection to providing coverage of a subset of contraceptive services required to be covered under PHS Action Section 2713, as adopted by the Affordable Care Act, and incorporated under ERISA section 715 and Code section 9815.
The services for which this organization objects are the following:
We are requesting relief, based on our sincerely held religious beliefs, from the regulations issued under the Patient Protection and Affordable Care Act (PPACA) that force employers to provide, directly or indirectly, insurance plans that include potentially life threatening drugs and devices, which harm or terminate a fertilized human egg (the "Mandate"); including but not limited to:

- Ulipristal (aka Ella)
- Levonorgestrel (aka Plan B, Plan B One-Step, Next Choice)
- Intrauterine Devices (of any type)
- Abortion services except to save the life of the mother

Service Provider Information

(a) Plan Name	(b) Service Provider Name	(c) Service Provider Contact Information	(d) Service Provider Category	(e) Plan type if applicable
Valley Forge Christian College	Aetna	Karla Hellings Senior Account Manager-Established Business SEPA 980 Jolly Road U11E Blue Bell, PA 19422 215-775-7815 HellingsKJ@aetna.com	Issuer	N/A
Valley Forge Christian College	PrimePay	Brad Ramer Product Specialist/Channel Manager, HR & Benefit Services 1487 Dunwoody Drive, West Chester, PA 19335 484.913.3535 **bramer@primepay.com**	TPA	N/A

Information being submitted is:

[x] Original Information [ ] Updated

Contact Information: Kindly direct all correspondence related to this matter to

Don Meyer, Ph.D.
President
VALLEY FORGE CHRISTIAN COLLEGE
1401 Charlestown Road
Phoenixville, PA 19460
610.917.1402 (O)

Eligible Organization: Nonprofit entity – Christian college

VALLEY FORGE CHRISTIAN COLLEGE

By _____
Don Meyer, Ph.D.
President

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

August 19, 2015

Michael Worrell
Director, Human Resources
Bingaman and Son Lumber Inc.
PO Box 247
1195 Creek Mountain Rd
Kreamer, PA 17833
E-mail: mworrell@bingamanlumber.com

Re: Notification regarding religious objections to providing contraceptive coverage

Dear Mr. Worrell,

The Department of Health and Human Services (HHS) has received notice from your for-profit organization of its religious objection to the coverage of contraceptive services for its group health plan(s).

The Departments of the Treasury, Labor, and HHS recently published final rules titled "Coverage of Certain Preventive Services Under the Affordable Care Act" (July 14, 2015, 80 FR 41318), which expand the set of entities that may avail themselves of an accommodation with respect to the coverage of contraceptive services to include a closely held for-profit entity whose highest governing body has adopted a resolution or similar action under its applicable rules of governance and consistent with state law establishing that it objects to covering some or all contraceptive services on account of the owners' sincerely held religious beliefs. The regulations define a closely held for-profit entity as one that is not publicly traded and has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto. For purposes of determining ownership interests, an individual is considered to own the ownership interests owned by or for his or her family (brothers, sisters, half-brothers, half-sisters, spouse, ancestors, and lineal descendants). These family members count as a single owner. These final regulations are effective September 14, 2015 and are applicable beginning on the first day of the first plan year that begins on or after September 14, 2015.

If an organization satisfies the definition of an eligible organization as defined in 45 CFR 147.131(b), it may use EBSA Form 700 to notify the issuer or third-party administrator of its group health plan of its religious objections to coverage of all or a subset of contraceptive services. The EBSA Form 700 is accessible at:
http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertification700.pdf

Alternately, an eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services. The notice must include the following information, as required in 45 CFR 147.131(c): the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, including, if applicable, an identification of the subset of contraceptive services to which coverage the eligible organization objects; the plan name and type (*i.e.*, whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. A model notice is available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-22-14.pdf.

If your organization is eligible and would like to avail itself of the accommodation, please provide notification, using one of the two mechanisms described above, that your organization meets the definition of a closely held for-profit entity as set forth in 45 CFR 147.131(b) and include all the required information. If you have any questions regarding whether your organization qualifies for the accommodation, you may send a letter describing its ownership structure to HHS at accommodation@cms.hhs.gov. The rules cited above specify the process that will occur after HHS receives such a letter. Other questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

J Ackerman

Jacob Ackerman
Acting Director, Market Rules Division
Oversight Group

CONESTOGA™
WOOD SPECIALTIES

November 23, 2015

Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue, SW
Room 739H
Washington, DC 20201

Re: Religious Objection to Providing Certain forms of Contraception

To the Secretary of Health and Human Services:

As you are well aware, Conestoga Wood Specialties Corp., Conestoga Wood Transportation, Inc., and its owners, the Hahn family, have long objected to providing certain forms of contraception as part of their employer sponsored healthcare plan. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (which consolidated our appeal with that of Hobby Lobby and provided us injunctive relief from the relevant mandate). As our history in this subject demonstrates, we are an eligible, closely-held, for-profit corporation with a sincerely held religious belief. As such, we do not provide any of the hormonal drugs or IUDs but do provide barrier contraception and sterilization.

I can be reached at the address and phone number listed on this letterhead. Additionally, you can reach our Third Party Administrator for Conestoga Wood Specialties Employee Benefit Plan through Highmark Blue Shield, Attention: Jason Campbell, Lead Client Manager, 1800 Center Street LA L4, Camp Hill, PA 17089-0089 (717) 302-2461.

Sincerely,

Anthony Hahn
President and Chief Executive Officer

AH/mms

Conestoga Wood Specialties Corp.
245 Reading Road • PO Box 158 • East Earl, PA • 17519-0158
Telephone: 717.445.6701 • www.conestogawood.com

MODEL NOTICE

Date: 10/7/2014

To the Secretary of Health and Human Services:

The following eligible organization has a religious objection to providing coverage of [ ] all or [X] a subset of contraceptive services required to be covered under PHS Act section 2713, as added by the Affordable Care Act, and incorporated into ERISA section 715 and Code section 9815. *If the eligible organization objects to providing coverage of a subset of contraceptive services, insert a description of the services for which the eligible organization objects to providing coverage:*

Plan B, which is one form of the morning-after pill.

Ella (the manufacturer uses a lower case "e") is another version of the morning-after pill.

Mirena, an IUD that changes cervical mucus.

ParaGard, which is a copper IUD.

(1) Name of eligible organization: Bingaman and Son Lumber Inc. Po Box 247 (1195 Creek Mountain rd) Kreamer PA 17833

Contact information: Michael Worrell, Director Human Resources 520-374-1108 mworrell@bingamanlumber.com

Eligible organization is a: [ ] Non-profit entity; OR [X] Other eligible organization

(2) Service provider information:

(a) Plan name	(b) Service provider name	(c) Service provider contact information	(d) Service provider category	(e) Plan type (if applicable)
Health America/ Health Assurance PPO $5000 plan	PO Box 6506 Carol Stream Il 60197		[X]Insurer or [ ]TPA	[ ]Church plan [ ]Student plan
UPMC PPO $3500 plan	One Chatham Center 112 Washington Place Pittsburgh PA 15219		[X]Insurer or [ ]TPA	[ ]Church plan [ ]Student plan

(3) Information being submitted is (check one):
[X] Original information; OR [ ] Updated information.

If updated information is being provided, specify the date upon which the updated information was, or will be, effective and what has changed:

Signature of authorized representative of eligible organization — Date: 10/9/2014

Michael Worrell — Date: 10/7/2014
Typed name of authorized representative of eligible organization

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

August 19, 2015

Michael Worrell
Director, Human Resources
Bingaman and Son Lumber Inc.
PO Box 247
1195 Creek Mountain Rd
Kreamer, PA 17833
E-mail: mworrell@bingamanlumber.com

Re: Notification regarding religious objections to providing contraceptive coverage

Dear Mr. Worrell,

The Department of Health and Human Services (HHS) has received notice from your for-profit organization of its religious objection to the coverage of contraceptive services for its group health plan(s).

The Departments of the Treasury, Labor, and HHS recently published final rules titled "Coverage of Certain Preventive Services Under the Affordable Care Act" (July 14, 2015, 80 FR 41318), which expand the set of entities that may avail themselves of an accommodation with respect to the coverage of contraceptive services to include a closely held for-profit entity whose highest governing body has adopted a resolution or similar action under its applicable rules of governance and consistent with state law establishing that it objects to covering some or all contraceptive services on account of the owners' sincerely held religious beliefs. The regulations define a closely held for-profit entity as one that is not publicly traded and has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto. For purposes of determining ownership interests, an individual is considered to own the ownership interests owned by or for his or her family (brothers, sisters, half-brothers, half-sisters, spouse, ancestors, and lineal descendants). These family members count as a single owner. These final regulations are effective September 14, 2015 and are applicable beginning on the first day of the first plan year that begins on or after September 14, 2015.

If an organization satisfies the definition of an eligible organization as defined in 45 CFR 147.131(b), it may use EBSA Form 700 to notify the issuer or third-party administrator of its group health plan of its religious objections to coverage of all or a subset of contraceptive services. The EBSA Form 700 is accessible at:
http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf

Alternately, an eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services. The notice must include the following information, as required in 45 CFR 147.131(c): the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, including, if applicable, an identification of the subset of contraceptive services to which coverage the eligible organization objects; the plan name and type (*i.e.*, whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. A model notice is available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-22-14.pdf.

If your organization is eligible and would like to avail itself of the accommodation, please provide notification, using one of the two mechanisms described above, that your organization meets the definition of a closely held for-profit entity as set forth in 45 CFR 147.131(b) and include all the required information. If you have any questions regarding whether your organization qualifies for the accommodation, you may send a letter describing its ownership structure to HHS at accommodation@cms.hhs.gov. The rules cited above specify the process that will occur after HHS receives such a letter. Other questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

Jacob Ackerman
Acting Director, Market Rules Division
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

August 19, 2015

John Borst
Chief Financial Officer & Assistant Secretary
DAS Companies, Inc.
724 Lawn Road,
Palmyra, PA 17078

Re: Notification regarding religious objections to providing contraceptive coverage

Dear Mr. Borst,

The Department of Health and Human Services (HHS) has received notice from your for-profit organization of its religious objection to the coverage of contraceptive services for its group health plan(s).

The Departments of the Treasury, Labor, and HHS recently published final rules titled "Coverage of Certain Preventive Services Under the Affordable Care Act" (July 14, 2015, 80 FR 41318), which expand the set of entities that may avail themselves of an accommodation with respect to the coverage of contraceptive services to include a closely held for-profit entity whose highest governing body has adopted a resolution or similar action under its applicable rules of governance and consistent with state law establishing that it objects to covering some or all contraceptive services on account of the owners' sincerely held religious beliefs. The regulations define a closely held for-profit entity as one that is not publicly traded and has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto. For purposes of determining ownership interests, an individual is considered to own the ownership interests owned by or for his or her family (brothers, sisters, half-brothers, half-sisters, spouse, ancestors, and lineal descendants). These family members count as a single owner. These final regulations are effective September 14, 2015 and are applicable beginning on the first day of the first plan year that begins on or after September 14, 2015.

If an organization satisfies the definition of an eligible organization as defined in 45 CFR 147.131(b), it may use EBSA Form 700 to notify the issuer or third-party administrator of its group health plan of its religious objections to coverage of all or a subset of contraceptive services. The EBSA Form 700 is accessible at: http://www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf

Alternately, an eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services. The notice must include the following

information, as required in 45 CFR 147.131(c): the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, including, if applicable, an identification of the subset of contraceptive services to which coverage the eligible organization objects; the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. A model notice is available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Model-Notice-8-22-14.pdf.

If your organization is eligible and would like to avail itself of the accommodation, please provide notification, using one of the two mechanisms described above, that your organization meets the definition of a closely held for-profit entity as set forth in 45 CFR 147.131(b) and include all the required information. If you have any questions regarding whether your organization qualifies for the accommodation, you may send a letter describing its ownership structure to HHS at accommodation@cms.hhs.gov. The rules cited above specify the process that will occur after HHS receives such a letter. Other questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

Jacob Ackerman
Acting Director, Market Rules Division
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room T1911

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION
& INSURANCE OVERSIGHT

VIA OVERNIGHT MAIL& E-MAIL
RETURN RECEIPT REQUESTED

September 18, 2014

Kaila Hellings
Senior Account Manager-Established Business SEPA
Aetna
980 Jolly Road U11E
Blue Bell, PA 19422
215-775-7815
HellingsKJ@aetna.com

Re: Valley Forge Christian College

Dear Ms. Hellings,

This is to inform you that the Department of Health and Human Services has received notice from Valley Forge Christian College that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Valley Forge Christian College has notified HHS of its religious objection to the coverage of the following contraceptive services that for its group health plan Valley Forge Christian College: drugs and devices which harm or terminate a fertilized human egg, including but not limited to

- Ulipristal (aka Ella)
- Levonorgestrel (aka Plan B, Plan B One-Step, Next Choice)
- Intrauterine Devices (of any type)
- Abortion services except to save the life of the mother

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

James Mayhew
Director, Division of Regulations and Policy
Acting Director, Division of Compliance and Enforcement
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

October 14, 2014

Andrea Meehan
Sr. Account Executive
Sales
3031C Walton Road, Ste. 201
Plymouth Meeting, PA 19462
Andrea.Meehan@ibx.com

Re: PAISBOA Plan & Trust, Holy Ghost Preparatory School

Dear Ms. Meehan,

This is to inform you that the Department of Health and Human Services has received notice from Holy Ghost Preparatory School that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Holy Ghost Preparatory School has notified HHS of its religious objection to the coverage of all contraceptive services for its group health plan PAISBOA Plan & Trust.

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

James Mayhew
Director, Division of Regulations and Policy
Acting Director, Division of Compliance and Enforcement
Oversight Group

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

October 17, 2014

Patricia Mayhall
United HealthCare
1110 Montlimar Drive
Suite 250
Mobile, AL 36609
Patricia_Mayhall@uhc.com

Re: Loyola University Core, Basic and Plus Plans (Policy Number 903297), Loyola University New Orleans

Dear Ms. Mayhall,

This is to inform you that the Department of Health and Human Services has received notice from Loyola University New Orleans that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Loyola University New Orleans has notified HHS of its religious objection to the coverage of the following contraceptive services for its group health plans Loyola University Core Plan (Policy Number 903297, Balanced - 40/1000/80% Plan 422 Modified), Loyola University Basic Plan (Policy Number 903297, Traditional with Deductible - 25/500/90% Plan 4Y4 Modified), and Loyola University Plus Plan (Policy Number 903297, Traditional with Deductible - 20/100% 3D1 Modified): all contraceptive benefits.

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

March 03, 2016

Mary Hentosz
UPMC Health Plan
600 Grant Street
Pittsburgh, Pa. 15219

Re: Earth Sun Moon Trading Health Plan, Earth Sun Moon Trading Company, Inc.

Dear Ms. Hentosz,

This is to inform you that the Department of Health and Human Services (HHS) has received notice from Earth Sun Moon Trading Company, Inc. that it is an eligible organization as defined in 45 CFR 147.131(b) and that your organization is the issuer of its group health insurance coverage. Earth Sun Moon Trading Company, Inc. has notified HHS of its religious objection to the coverage of the following contraceptive services for its group health plan(s) Earth Sun Moon Trading Health Plan: "all contraceptive benefits".

As the issuer of the eligible organization's health insurance coverage your organization is responsible for complying with PHS Act section 2713(a)(4) and 45 CFR 147.131 with respect to coverage of such contraceptive services to which the eligible organization objects on religious grounds. As such, your organization is required to provide payments for such contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. You may not require any documentation or other information from the eligible organization.

Questions can be directed to marketreform@cms.hhs.gov.

Sincerely,

Jacob Ackerman
Acting Director, Market-wide Regulation Division
Oversight Group

VALLEY FORGE CHRISTIAN COLLEGE | Office of the President

September 10, 2014

Sylvia Mathews Burwell
Secretary of Health and Human Services
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201
Room 739H
Via email to marketreform@cms.hhs.gov

Re: Valley Forge Christian College Objection to Health Care Mandate

To the Secretary of Health and Human Services:

Valley Forge Christian College has a religious objection to providing coverage of a subset of contraceptive services required to be covered under PHS Action Section 2713, as adopted by the Affordable Care Act, and incorporated under ERISA section 715 and Code section 9815.
The services for which this organization objects are the following:
We are requesting relief, based on our sincerely held religious beliefs, from the regulations issued under the Patient Protection and Affordable Care Act (PPACA) that force employers to provide, directly or indirectly, insurance plans that include potentially life threatening drugs and devices, which harm or terminate a fertilized human egg (the "Mandate"); including but not limited to:

- Ulipristal (aka Ella)
- Levonorgestrel (aka Plan B, Plan B One-Step, Next Choice)
- Intrauterine Devices (of any type)
- Abortion services except to save the life of the mother

Service Provider Information

(a) Plan Name	(b) Service Provider Name	(c) Service Provider Contact Information	(d) Service Provider Category	(e) Plan type if applicable
Valley Forge Christian College	Aetna	Karla Hellings Senior Account Manager-Established Business SEPA 980 Jolly Road U11E Blue Bell, PA 19422 215-775-7815 HellingsKJ@aetna.com	Issuer	N/A
Valley Forge Christian College	PrimePay	Brad Ramer Product Specialist/Channel Manager, HR & Benefit Services 1487 Dunwoody Drive, West Chester, PA 19335 484.913.3535 **bramer@primepay.com**	TPA	N/A

Information being submitted is:

[x] Original Information [ ] Updated

Contact Information: Kindly direct all correspondence related to this matter to

Don Meyer, Ph.D.
President
VALLEY FORGE CHRISTIAN COLLEGE
1401 Charlestown Road
Phoenixville, PA 19460
610.917.1402 (O)

Eligible Organization: Nonprofit entity – Christian college

VALLEY FORGE CHRISTIAN COLLEGE

By 

Don Meyer, Ph.D.
President

MODEL NOTICE

Date: 10/7/2014

To the Secretary of Health and Human Services:

The following eligible organization has a religious objection to providing coverage of [ ] all or [X] a subset of contraceptive services required to be covered under PHS Act section 2713, as added by the Affordable Care Act, and incorporated into ERISA section 715 and Code section 9815. *If the eligible organization objects to providing coverage of a subset of contraceptive services, insert a description of the services for which the eligible organization objects to providing coverage:*

Plan B, which is one form of the morning-after pill.

Ella (the manufacturer uses a lower case 'e') is another version of the morning-after pill.

Mirena, an IUD that changes cervical mucus.

ParaGard, which is a copper IUD.

(1) Name of eligible organization: Bingaman and Son Lumber Inc. Po Box 247 (1195 Creek Mountain rd) Kreamer PA 17833

Contact information: Michael Worrell, Director Human Resources 570-374-1108 mworrell@bingamanlumber.com

Eligible organization is a: [ ] Non-profit entity; OR [X] Other eligible organization

(2) Service provider information:

(a) Plan name	(b) Service provider name	(c) Service provider contact information	(d) Service provider category	(e) Plan type (if applicable)
Health America/ Health Assurance PPO $5000 plan	PO Box 6506 Carol Stream Il 60197		[X]Insurer or [ ]TPA	[ ]Church plan [ ]Student plan
UPMC PPO $3500 plan	One Chatham Center 112 Washington Place Pittsburgh PA 15219		[X]Insurer or [ ]TPA	[ ]Church plan [ ]Student plan

(3) Information being submitted is (check one):
[X] Original information; OR [ ] Updated information.

If updated information is being provided, specify the date upon which the updated information was, or will be, effective and what has changed:

Signature of authorized representative of eligible organization — Date: 10/7/2014

Michael Worrell — Date: 10/7/2014
Typed name of authorized representative of eligible organization

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, et al.,	:	CIVIL ACTION
Plaintiffs,	:	
vs.	:	
DONALD J. TRUMP, et al.,	:	NO. 17-4540
Defendants,	:	
LITTLE SISTERS OF THE POOR SAINT PETER AND PAUL HOME	:	
Intervenor-Defendant.	:	

PHILADELPHIA, PA

JANUARY 10, 2019

BEFORE: THE HONORABLE WENDY BEETLESTONE, J.

ORAL ARGUMENT

APPEARANCES:

OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA
BY: MICHAEL J. FISCHER, ESQUIRE
Chief Deputy Attorney General
AIMEE D. THOMSON, ESQUIRE
Deputy Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
For the Commonwealth of Pennsylvania

(CONT.)

APPEARANCES: (CONT.)

ATTORNEY GENERAL STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
BY: GLENN J. MORAMARCO, ESQUIRE
Assistant Attorney General
R.J. Hughes Justice Complex
25 Market St. P.O. Box 112
Trenton, NJ 08625-0112
For the State of NJ

U.S. DEPARTMENT OF JUSTICE
BY: JUSTIN MICHAEL SANDBERG, ESQUIRE
REBECCA M. KOPPLIN, ESQUIRE
20 Massachusetts Avenue NW
Room 7302
Washington, DC 20530
For the Federal Defendants

BECKET FUND FOR RELIGIOUS LIBERTY
BY: MARK RIENZI, ESQUIRE
President
LORI WINDHAM, ESQUIRE
Senior Counsel
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
For the Defendant Intervenor

KATHLEEN FELDMAN, CSR, CRR, RPR, CM
Official Court Reporter
Room 1234 - U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
(215)779-5578

(Transcript produced by machine shorthand via C.A.T.)

(Deputy Clerk opened court)

THE COURT: Good morning. Have a seat.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: Okay, we're here in the Commonwealth of Pennsylvania versus Trump, 17-4540, on the second motion for preliminary injunction this time on the Final Rules.

Can I have some introductions on this side, please.

(Indicating)

MR. FISCHER: Good morning, Your Honor. Michael Fischer for the Commonwealth of Pennsylvania.

MS. THOMSON: Aimee Thomson for the Commonwealth of Pennsylvania.

MR. MORAMARCO: Glenn Moramarco for the State of New Jersey.

THE COURT: Okay.

MR. SANDBERG: Good morning, Your Honor. Justin Sandberg for the Federal Defendants.

MS. KOPPLIN: Rebecca Kopplin for the Federal Defendants.

MR. RIENZI: Mark Rienzi for the Little Sisters of the Poor.

MS. WINDHAM: Lori Windham for the Little Sisters of the Poor.

THE COURT: Okay, I have Little Sisters of the Poor or some members of the Little Sisters of the Poor in the

courtroom. I also have other people in the courtroom. Are there any amici, other amici in the courtroom?

Okay, so who's taking the lead?

MR. FISCHER: Good morning, Your Honor. I will be speaking first.

THE COURT: Fine.

MR. FISCHER: Your Honor, with the Court's permission, we would like to divide the argument up on our side.

Ms. Thomson will be speaking to issues arising out of the Administrative Procedure Act, specifically, the substantive and procedural violations that we allege.

I will be speaking to the remaining issues involving standing, venue, and the scope of any injunction as well as irreparable harm.

THE COURT: Okay.

MR. FISCHER: And before I begin, I would like to acknowledge that the Third Circuit issued an order yesterday relating to this case essentially staying the current appeal while this Court resolved the pending injunction.

We don't think that necessarily changes anything.

The one aspect of the ruling that was perhaps relevant is that it noted this Court could perhaps issue an indicative ruling if it wished to modify the previous injunction.

Given the timing, we do not think that is the best approach. As the rules go into effect on Monday, the indicative ruling takes some time, has to go back to the Court of Appeals, come back here, and we would prefer just a new injunction which is what we moved for.

THE COURT: I will be issuing a ruling.

I also note that the Honorable Judge Krause indicated that she trusts that I will resolve Pennsylvania's second motion for a preliminary injunction expeditiously and I intend to do that.

MR. FISCHER: Yes, thank you very much, Your Honor.

We're here, as the Court indicated, because we have filed a new injunction motion to challenge the Final Rules.

Approximately one year ago, this Court entered an injunction blocking the Interim Final Rules, the IFRs in this case, on the ground that they violated both the procedural aspects of the APA and the substantive aspects of the APA and, in particular, that they were inconsistent with the Women's Health Amendment of the Affordable Care Act.

Since that time, the Agencies have issued Final Rules that comport to, in their words, finalize the IFRs, but very little has changed in other respects.

The harm that women of Pennsylvania, New Jersey, and across the country will suffer remains the same. The procedural and substantive infirmities of the Rules have not

been fixed. Pennsylvania and now New Jersey's standing is very real. And for all of those reasons, we think that a preliminary injunction of the Final Rules, like the one the Court issued of the IFRs, is the only correct outcome of this motion.

So I'd first like to talk about standing as well as the issue of the irreparable harm that the states will suffer because I think those two issues are inextricably linked in a number of ways.

As I indicated at the beginning, not much has changed since this Court's prior decision. There are, however, a few relevant facts that have changed.

For one thing, New Jersey has now joined Pennsylvania as a plaintiff in a lawsuit.

The second thing, we now have the benefit of the Ninth Circuit's decision involving a similar challenge to the Rules which held that the states there had standing, that venue was proper, that the injunction was proper, although limited in scope, which I will address later on.

And then finally, with respect to the Final Rules, the Agencies have now found that their previous estimate of the number of women who will be harmed was off by a factor of over 100 percent.

As this Court noted originally, the Agencies previously estimated that 31,700 women would be at risk. They

now estimate the number to be closer to 70,500.

Now, we think that goes to a number of issues that are relevant to that case including the arbitrary nature of the Rules, the failure to consider relevant background information and to conduct a thorough investigation, but it certainly more than anything shows that the states have standing and the states will suffer irreparable injury in the event these rules go into effect.

This Court previously found that the state has standing. I won't belabor the arguments we made before, but just to briefly summarize, we assert standing under two theories.

The first is that women in Pennsylvania and New Jersey and across the country will lose employer-sponsored and, in some cases, college and university-sponsored contraceptive coverage as a result of these rules. We don't think there can be any real dispute about that given the numbers the Defendants themselves have asserted, the numbers of women they estimate will be at risk as a result.

Some number of those women will turn to government-funded plans, whether they be Medicaid, whether they be Family Planning Services Programs, or whether they be Title X clinics. They'll turn to those programs in Pennsylvania, New Jersey. And we submitted a number of declarations from officials in both states outlining how those

plans work and the eligibility criteria and why it is reasonable to expect that women who lose coverage under their employer's plans will turn to the state-funded plans.

And then, finally, some number of women will be forced to go without contraception entirely as we have argued before and as our declarants, particularly, Professors Chuang and Weisman, saying in declarations that for some women, pregnancy is a life-threatening condition. For many, it's contraindicated. For some, it is potentially life threatening. So for them, acts of contraception is lifesaving medical care.

But, in addition, for the women for whom pregnancy is not necessarily life threatening, there will still be an increase in unintended pregnancies as a result of these Rules.

The majority of unintended pregnancies in this country, the costs are borne by public-funded programs, and, in particular, I would direct the Court to the supplemental declaration we submitted with our reply brief from the Guttmacher Institute which goes down state by state and lists the percentage of costs associated with unintended pregnancies that are borne by state-funded programs in every single state. And in virtually every state, the number is higher than 50 percent and in many states it's as high as 80 percent.

So if women lose coverage as a result of the Rules, which we think is the inevitable result, we will see an

increase in unplanned pregnancies, many of those, the cost of those pregnancies will be borne by Medicaid and other state-funded programs that will cause harm to the states.

We think on that basis, both standing and the existence of irreparable injury is clear.

THE COURT: Now, is it your position that if I decide the issue in your favor on the direct injury theory of standing, I don't have to address sovereign or parens patriae standing?

MR. FISCHER: That is correct, Your Honor. And I will say as the Court indicated in Your Honor's previous opinion, there's this issue of special solicitude which arises in Massachusetts v EPA which affects both direct standing and parens patriae standing.

We think that direct standing in this case is very clear. We also think parens patriae standing is very clear, but it's not necessary to issue the second one, to address the second issue particularly in light of the special solicitude that the Supreme Court has directed courts to take into account in addressing state standing.

So with that, I will now turn to the issue of venue unless the Court has questions about standing.

THE COURT: No, that's fine.

MR. FISCHER: On the question of venue, the Ninth Circuit reached the right result. It found that a state

resides everywhere throughout its borders. That's the only natural understanding of the notion of state residency. Even though it was a bit of an open question before the Ninth Circuit ruled, we would submit that that is because there is no other logical residency for a state other than across the entirety of its borders.

As we noted in 2005, an Alabama court, the Northern District of Alabama issued a ruling finding that common sense dictates that a state resides throughout its sovereign borders.

We think that makes sense and that because Pennsylvania is the Plaintiff in this suit, it can file suit in the Eastern District of Pennsylvania.

The Defendants argue that venue is not proper because 28 U.S.C. § 1391 was subsequently amended with this provision providing for entity residency for certain -- for venue purposes.

The Ninth Circuit correctly rejected that argument, finding that if you look at the legislative history, that that provision was enacted to ensure that partnerships and similar organizations were treated the same way as corporations. Essentially, Congress wanted to correct this discrepancy that some courts have found that partnerships -- that unincorporated associations were treated differently.

There's nothing in the legislative history

indicating that that provision was intended to apply to the states. And, frankly, common sense and principles of federalism, which we think are at play here, would dictate that it doesn't, that Congress cannot tell a state where it resides. That would raise interesting constitutional questions, but that, moreover, particularly without a clear expression of Congressional intent, there's no reason to read that statute as applying to the states. And the Ninth Circuit, as I said, reached the right result on that decision.

As we've also argued, venue is proper because the harm for the Rules will be felt in the states.

There are three avenues for venue against a suit involving the Federal Government:

One, where the Plaintiffs resides.

Second, where the Defendant resides.

And then, third, where a substantial portion of the events giving rise to the cause of action have occurred.

Because the harm will be felt in Pennsylvania, in the Eastern District specifically, venue is proper in this district.

In addition to being proper, it's because the Plaintiff, Commonwealth of Pennsylvania, resides throughout its borders.

And, finally, I would add that if the Federal Government were correct that the narrow residency definition

under 1391 applies to the states, presumably it would also apply to the United States, as well, and the United States would be a resident of this district because under 1391, Defendant residency is tied to personal jurisdiction in the case at issue. Personal jurisdiction has not been challenged here. So to the extent the United States asserts personal jurisdiction of this Court, it would also be proper to assert a venue under 1391(e)(1)(A).

That's not our primary argument. Our primary argument is that the Plaintiff resides here, the Ninth Circuit ruled correctly, but I think that it's worth considering that if the Defendants arguably are correct, there would be this anomaly where the United States would also be subject to the same reasoning.

THE COURT: Okay.

MR. FISCHER: Your Honor, I'd also like to talk about this issue of the scope of any injunction the Court issues today.

I'm happy to do that now or to let Ms. Thomson address the APA issues first if the Court has a preference.

THE COURT: I think that is an argument that should be at the end.

MR. FISCHER: Okay.

THE COURT: I think it's a very important argument, but why don't we turn now to the defense to address the

standing and the venue argument.

MR. FISCHER: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. SANDBERG: Good morning, Your Honor.

THE COURT: Good morning.

MR. SANDBERG: I'll just state at the outset, and then move to the specific questions the Court wanted us to address, but, obviously, we think for a whole host of reasons that the Court should deny the preliminary injunction in that they can't establish the merits or any of the other factors and I'll happily turn to the two issues the Court wanted me to address.

As to standing, I think in the interest of brevity, we're content to rest on our briefs. We continue to assert and believe all the arguments in those briefs, but --

THE COURT: Why doesn't the law of the case apply here?

MR. SANDBERG: Well, standing --

THE COURT: You're way beyond a motion for reconsideration and the law of the case would generally say that if I've decided the issue, absent extraordinary circumstances, I shouldn't disturb that finding.

MR. SANDBERG: I don't think the law of the case applies to the district court's rulings.

I think a couple of things.

One, it was decided at the preliminary injunction stage. And courts ordinarily review the issues that they decided at preliminary injunction because they're usually decided in haste and there's much case law on that.

I'd say the second thing is jurisdiction is not something that I think law of the case would normally apply to because the Court is always obligated to reevaluate its jurisdiction. So the Court can't say, Oh, I've decided jurisdiction so I don't have to look at it again.

THE COURT: Okay.

MR. SANDBERG: Then, as I said, we're content to rest on our briefs unless Your Honor -- with regard to standing unless Your Honor has more specific questions.

THE COURT: No.

MR. SANDBERG: With regard to venue, I'll start with the residency basis that the state alleges.

We think that's flawed. 1391(c)(2) states that an entity, which the state certainly is, is a resident where its principal place of business is when it's in the Plaintiff capacity.

We think there's no doubt that the principal place of business for the State of Pennsylvania is Harrisburg. That's where the Governor sits, it's where the Legislature meets, it's where many of the federal agencies are headquartered. So we don't think there's any dispute about

that.

We don't think it's necessarily a matter of common sense where the residency of a Plaintiff is for purposes of federal venue. The venue statutes are devised for purposes of a Defendant's fairness. So it's entirely in that vein, it's entirely common sense to believe that it was limited. It would limit Plaintiffs to its principal place of business and not allow them to look around the state and pick whatever venue they choose.

The Plaintiffs also argue in their brief that permitting this argument would permit us to forum shop because we could selectively assert or not assert a venue objection, but that argument runs against any venue limitation, any venue limitation is waived. So that would say there should be no venue limitation because Defendants can always choose to waive them or not waive them.

Clearly that's not the case. We have venue limitations and it is waivable at the Defendants' discretion and that's again because the venue statute is designed for the fairness to Defendants.

And I'd like to quickly address a couple of the arguments that they've raised here that I don't believe were in their brief, frankly.

THE COURT: The federalism argument and the 1391(e)(1)(A) argument?

MR. SANDBERG: Correct.

THE COURT: Yes, I'd like to hear about that.

MR. SANDBERG: Yes. So my first objection would be they don't raise those arguments in their brief.

My second would be -- certainly I think there's at least the notion that the United States could not tell Pennsylvania to move its capital. As a little physical matter, it couldn't say, Pennsylvania, move your capital from Harrisburg to Philadelphia. But venue is really controlled in federal courts and what litigants can raise claims in what federal courts. So certainly the Federal Government can control sort of its federal courts.

And the second thing I would say is if that argument's right, then if the Federal Government can't tell the Plaintiff where it resides, then Pennsylvania in a case in which California is not a Plaintiff could go up to San Francisco and file suit saying, We reside here because the Federal Government can't tell us where we reside and, you know, we have -- there is somebody from the State of Pennsylvania who, you know, is out in California who is an emissary to the state and they do work out of here and, therefore, Pennsylvania resides in California. That clearly can't be the case so I think that argument fails.

As to the residency point, that the Federal Government would be a resident, I would say there's a separate

statutory provision, 1391(e), that addresses the Federal Government under the venue provision. There is no separate provision that addresses states. And so I think for that reason, I don't think it makes sense to assume that 1391(c) defines necessarily where the Federal Government resides in the Defendant capacity. But, again, this is an argument that was not in their briefs and so if the Court would like further briefing on that after we've had a chance to more fully consider it, we'd be happy to provide it.

THE COURT: Okay. Where are we going next? Oh, I'm sorry.

MR. RIENZI: Briefly on standing, Your Honor?

THE COURT: Yes. Go ahead.

MR. RIENZI: Thank you, Your Honor.

On the two issues you asked for, first, to be clear, we take no position on the venue argument. That's between the two sovereigns as they fight.

On Article III, I would just like to make a few brief points since we weren't here to argue about it last year.

The states are trying to enlist this Court in what is essentially a political fight. It's a policy disagreement between the states and the federal government about coverage of contraception.

THE COURT: The courts have pretty much been

enlisted at this point. They've been enlisted for many years so I --

MR. RIENZI: Well, yes, Your Honor, but I think it's quite different.

Here there's a pretty extraordinary claim about the impact on the states that is quite different from the first five or six -- the first five or six years, there was no standing challenge, there was no Article III question, no one doubted it because the Little Sisters and other groups were being directly commanded, You must do X.

Here the claim is, I would say, quite different. The claim is that the states have the ability to enlist an Article III Court to order the Federal Government to order somebody else to indirectly provide contraceptives instead of either the states doing it directly or the Federal Government doing it directly. That's an odd proposition and it's one for which they have not established the Article III standing that they need.

And just a few brief points on why they don't have the Article III standing that they need.

First, we're now 13 or 14 months into this case. They still cannot find the first person or the first employer who's planning to change their coverage based on this Final Rule. That actually makes a lot of sense because the religious objectors who had religious objections filed

lawsuits before. It's not that it's impossible that there couldn't be some new religious entity that gets created or something like that, but they ought to have to prove that there's one. They can't find one.

To the extent that there are people who work for these religious employers, for the most part, those employers are already protected by injunctions. In other words, the issuance of the Interim Rule or the Final Rule is not going to suddenly yank away somebody's coverage that we need a preliminary injunction if there were injunctions in place before there were injunctions placed now. There's no sudden rush of people who are going to show up on the state rolls.

The way that you know that that's true is that this isn't the first time there's going to be a gap like this, right. The contraceptive mandate doesn't cover -- the federal contraceptive mandate doesn't cover every employer. It covers the big ones. Those who have more than 50 employees are required to provide this health care. It doesn't cover the grandfather plans. It doesn't cover the religious employers who met the Obama Administration's narrow definition of religious employers. If those types of gaps were going to lead to a bunch of people showing up on the state's rolls, you'd see that in the declarations that are in front of you. They submitted a stack of declarations that big (indicating), but what they don't say and what they can't say is that as a

result of the injunction, Hobby Lobby, for example, they suddenly had a new rush of people showing up on the rolls as the result of the grandfather provision. If you like your health plan, you can keep your health plan, right. That was, you know, the big argument about the law over the line in the first place. There's no argument that that -- even though that covers millions and millions of people, no argument that that landed people on the state rolls.

So the idea that suddenly putting into the Final Rules this Religious Exemption is now -- this is the one thing that's going to land people on the state rolls is farfetched and the fact is they can't find a single employer, they can't find a single employee. Even if they found one of those things, they'd have to then connect the dots and say that those people will end up on state aid programs, that they qualify for state aid programs. If they have an unintended pregnancy, even though these are people who, by supposition, have full health coverage, we're supposed to assume that they have full health insurance, but they're going to turn to the state to finance their unintended pregnancy and their childbirth. That's a pretty out-there kind of suggestion. They ought to be required to show some proof and I'd suggest they've shown no proof even though they've had lots of other situations where people could have been in that position.

THE COURT: You talk about the Religious Exemption.

MR. RIENZI: Yes.

THE COURT: You have yet to refer to the Moral Exemption.

Do your clients take any position with respect to the Moral Exemption?

MR. RIENZI: Very narrowly to this extent, Your Honor. If the Court were to say that the Moral Exemption is valid and the Religious Exemption is invalid, then my clients would show up and say, Okay, well, we also have a moral objection. It's religious and moral.

We're not here principally to defend the moral objection. I will say that we've had six or seven years of this mandate so we have some pretty good evidence of the scope of how many moral objectors there are out there. And to my knowledge, I think there are only two in the whole United States. There may be three. And I think it's one or two pro-life pregnancy centers that are nonreligious pro-life centers and the March for Life. That's it. In other words, there is no other group.

On the religious side, there were dozens, if not more than 100, lawsuits and probably several hundred Plaintiffs in those cases nationwide. We know they're religious objectors.

Moral objectors who aren't religious, really, really narrow category we know from experience, and it's essentially

only openly pro-life groups.

So I would just say that it's presented as a very, very big exemption. I would suggest to you that all the experience we have shows it's going to be extremely tiny and for validly pro-life groups.

The last one I would make on the standing and this will eventually get more to the merits and I'll talk about it more later, but Mr. Fischer said not much has changed in the past year.

One thing that's changed is there have been either 10 or 12 additional Final Orders from other federal judges across the country telling the Government that their old rule violates RFRA.

So after Your Honor's injunction put the IFR, you know, on hold so the IFR was invalid and couldn't be enforced, though the Rule that took its place, the Rule I think the states are going to continue arguing for today, is the older Interim Final Rules and Rules from the Obama Administration.

What happened --

THE COURT: So lower courts have said that. The Supreme Court has not.

MR. RIENZI: The Supreme Court has not, I agree.

THE COURT: Is there anything before the Supreme Court addressing any of those cases?

MR. RIENZI: Not at present, no, Your Honor.

THE COURT: Any cert petitions? Any cert granted?

MR. RIENZI: No. There's no cert displayed because we've won them all. In other words, there's really nothing to fight about. The government -- Federal Government now admits it violates RFRA. Federal judges across the country have repeatedly found that there is a substantial burden, that the Government has other ways to do this.

And I would just suggest that the more and more injunctions shows there is less and less likelihood that anybody is suddenly turning to the states because of the Final Rule. If they're turning to the states, they'd be turning to the states because there's grandfathering because the contraceptive mandate doesn't cover everybody because there's injunctions. They don't make any claim that any of that has happened. The idea that there's somebody who slips through the gap now and they are going to show up on the state rolls is farfetched and I would say they have not proven it.

Let me stop there. I think the rest of what I have to say is more merit based.

So if Your Honor has no questions --

THE COURT: I just need you to put a final point on your point about the other cases have ruled that -- you said prior Rules violate RFRA.

MR. RIENZI: Yes.

THE COURT: Can you describe, when you say prior

Rules --

MR. RIENZI: Sure.

THE COURT: -- there are many.

MR. RIENZI: Understood, Your Honor. I've been living with the prior Rules for a very long time.

THE COURT: Yes. Just tell me which ones you're talking about.

MR. RIENZI: Sure. The Rules that the IFR changed -- that is the best way.

So the accommodation. What was at issue in Geneva College. What was at issue in Geneva College.

THE COURT: Okay, the accommodation.

MR. RIENZI: The accommodation, that that set of Rules was invalid, was --

THE COURT: For various reasons.

MR. RIENZI: All for the same reasons, really. All for the violation of RFRA.

THE COURT: Okay. No, but I mean the violation of RFRA was premised on different components of what one had to do under the Rules.

MR. RIENZI: Yes. I would say the Hobby Lobby era of cases for the for-profit employers was one version of it and the accomodation --

THE COURT: And Wheaton was another and Zubik was don't think about it.

MR. RIENZI: Yes. Everything I'm telling you about, Your Honor, there's certainly plenty before Zubik, but when I say 10 or 12 new ones, I'm talking about since your injunction like a year ago, 10 or 12 new ones. So those were all post Zubik. Essentially, there's no court in the country that after the Federal Government admitted the things it admitted in Zubik, there's no court in the country that has not found a RFRA violation.

THE COURT: All right. Okay.

MR. RIENZI: Thank you, Your Honor.

MR. SANDBERG: Your Honor, I neglected in my excitement to talk about residency, to discuss the substantial part of the acts and omissions part of venue.

Could I briefly address that?

THE COURT: Okay. This is the last time you get grace and favor, though.

MR. SANDBERG: Okay. Maybe I shouldn't use it now. It's like a coach's challenge in football.

I will say that in their reply brief, the Plaintiff cited a number of cases saying that where the effects are felt provides a basis for a venue under the substantial part of events giving rise to the claim aspect of the statute, and they cite a number of cases in their reply brief, but I think it's notable they don't cite any cases from this district and that's because this district, the courts have repeatedly found

that where an effect is felt is not a sufficient basis for standing under the acts and omissions part of the statute.

And I'm happy to provide a cite if the Court would like it, but --

THE COURT: Okay, thank you.

MR. SANDBERG: -- that's my moment for grace.

THE COURT: Okay. So what are we moving to now?

MR. FISCHER: Your Honor, Ms. Thomson is going to address the APA violations.

THE COURT: The APA violations?

MR. FISCHER: Yes.

THE COURT: And you're starting with process and moving to substance, is that -- or what are we doing?

MS. THOMSON: Good morning, Your Honor. I'm happy to go in whatever order you prefer. I was going to start with the procedural violations and then turn to the substantive violations.

THE COURT: Let's do that.

MS. THOMSON: Great.

So we believe that there are many reasons why the Final Exemption Rules are unlawful and should be enjoined. We're going to focus in this oral argument and we focused in our motion on the APA violation, but we also retain our other claims as well.

First of all, the Final Exemption Rule violates the

APA's procedural requirements because they were promulgated to finalize IFRs that Your Honor previously found to violate the APA. You previously held the Agency has lacked authority to issue -- to bypass the APA's notice and comment requirements. They were not authorized under the APA to do so, HIPPA did not provide them express or implied authority, and they lacked good cause.

Now, the APA requires in almost all circumstances for Agencies to put forward proposals to the public for comments, not final decisions, and this is -- and the only narrow exceptions that allow an Agency to go around it are the ones I just mentioned, either express statutory authority or good cause, which this Court has already found the Agencies lacked to issue the IFRs.

THE COURT: Let me just sort of set the stage briefly here. I just want to clear away some brush.

Your argument is that the Agencies failed to respond to significant comments adequately, correct?

MS. THOMSON: That's our second procedural argument, Your Honor.

THE COURT: Okay.

MS. THOMSON: We raised two procedural arguments.

THE COURT: But there's no challenge to the notice or any other -- or to the actual notice itself?

MS. THOMSON: We would argue we think that the IFRs

were issued without regard to notice and comment and that is the law of the case as Your Honor held previously.

We're not challenging the specific notice aspect as it relates to the comment. What we do believe, though, is that the Final Rules were functionally issued in violation of the APA because they did not take notice and comment as the APA requires. Because what they put forward to the public was a Final Decision for comment, not a proposal for comment.

So as you had previously held or as you recognized in your prior opinion, the reason why the APA requires Agencies to put forward proposals is because participants are less likely to influence Agencies' thinking later in the decision-making process.

So the APA requires Agencies to have an open mind, they must put forward their thinking, take public comment, and then issue a Final Decision.

But what happened here is the Agencies took public comment on a Final Decision. As a result, the public, including the Commonwealth, approached the Agencies hat in hand and basically asked them to reconsider something that they had already decided.

And I'd note that also during that time, the Agencies were actually litigating in defense of the IFRs. So they particularly lacked the open mind that the APA requires when considering public comments.

Now, we think that there are several points of authority that support the unlawfulness of the Final Rules. Particularly, the Third Circuit case, NRDC v. EPA, in which the Third Circuit functionally found that Final Rules that were issued after unlawfully-issued -- not Interim Final Rules, but an order issued in the absence of notice and comment did not cure that violation. And the remedy that the Third Circuit ordered in NRDC v. EPA wasn't -- required that the Final Rule was invalidated. And we think the same circumstance of NRDC v. EPA also applies here.

Here the Agencies issued a Final Decision, took public comment on that Final Decision, and then issued a second Final Decision. And that second Final Decision, which we are challenging here, is still procedurally invalid under the APA.

And, in fact, as the Third Circuit recognized in NRDC v. EPA, this actually speaks to the function of what the APA is supposed to do. A contrary holding here would allow any Agency to issue a Final Rule in every case, take comment on that Final Rule, and then -- or on whether that action should continue and then issue a second Final Rule that cures the process because they have taken public comment.

As you recognized a year ago in your prior opinion, permitting post issuance commentary carte blanche would simply write the notice and comment requirements out of the APA and

that is what we are concerned about here. So, for that reason, we believe that the Final Rules are procedurally improper, first, because they did not take notice and comment as required by the APA.

We also have, as Your Honor mentioned, a second procedural claim which has to do with the adequacy of their consideration of public comment.

Now, the APA required Agencies to respond to significant comments, to consider comments are all vital questions of cogent materiality, to remain open-minded, and engage with the substantive responses.

We just got the administrative record last night, but we still think that there are several things on the face of the Final Rules themselves that evidence the failure to comply with the APA requirement.

Amongst other things, the Commonwealth in its comments that it submitted discussed, along with many other commentators, how pregnancy is contraindicated and, in fact, can be fatal for some women and the Final Rules failed to at all address this point.

More broadly, they -- the number of commentators, including the Commonwealth and others, discussed how the Final Rules would have a negative impact on women, whether women would lose access to contraceptive coverage, and instead the Final -- instead of actually engaging with the loss that women

will have -- that some women, at least 70,000, if not more, certainly more -- they simply either minimize it by saying that those women constitute simply .01 percent of the nation's population or they say those women aren't actually using anything. There's actually no burden on them at all. It's really about relieving a burden on employers.

So that to us demonstrates a failure to really engage with the substance of what will happen if these women lose access to contraception.

So now those are our two procedural points. Unless Your Honor has any more questions, I'll move on to the substantive.

To Your Honor's substantive point, first and foremost, the Final Exemption Rules are unlawful because they violate the Women's Health Amendment of the Affordable Care Act.

As Your Honor ruled a year ago, the ACA contains no statutory authority allowing the Agencies to create sweeping exemptions to the requirements to cover preventive services.

THE COURT: Okay, let me stop you right there because this is puzzling me.

So on August the 1st, 2011, the Agencies issued an IFR with respect to Religious Employer Exemptions, and then on July 2nd, 2013, they issued the Final Rule. And there was litigation about those Rules. So what you're asking me to do

right now is to say that there is no authority of the Agencies to develop exemptions, but they've already been doing that for many years and there's been a lot of litigation. So what is different about this case? Has this issue been addressed before by another court? Has it been decided before? You know, if I write an opinion just on -- like a match to the Chevron analysis and ignore everything that has gone before, how does that play out in this context?

MS. THOMSON: Certainly I think I have two responses to that, Your Honor.

First, this case is not about those prior exemptions. I realize that that --

THE COURT: Well, that wouldn't really help me.

MS. THOMSON: Yes, I understand, but to the extent that there is nothing that -- there's no order that you could issue that would invalidate the prior exemptions because the only thing that we are challenging are the Final Religious and Moral Exemptions.

But more broadly we believe, as I think you found a year ago, those Initial Religious Exemptions are required under RFRA and so the Agencies had authority to issue those exemptions from RFRA.

THE COURT: And those exemptions were specifically made under RFRA? They were not made under any other authority?

Was that a specific finding of the Agencies in issuing the August 1st, 2011 IFRs and the July 2nd, 2013 Final Rules?

MS. THOMSON: I can't answer that question, Your Honor.

THE COURT: That's an important question.

MS. THOMSON: Certainly.

THE COURT: So I need someone to think about that question and come up with the answer before we end here today.

MS. THOMSON: Okay, we'll get back to you on that.

THE COURT: Okay.

MS. THOMSON: But as to the authority of -- I'm sorry, as to -- I would say that what the Supreme Court recognized in Hobby Lobby is that there are certain things that the Agencies are required to do.

I think it's reasonable to conclude that the Agencies lack a compelling or have a less-than-compelling interest with regard to women who work for churches. I believe what they found in the original issuance of the Final -- of those Final Religious Exemptions is that it's very likely that women who work for churches and their integrated auxiliaries are likely to share the religious views of their employers.

I think that's a far cry from what we have here where the exemptions extend to publicly-traded corporations

and so it is much less likely to think that women who work for a publicly-traded corporation share the religious views of their employers and I believe that informed the decision making about the original Religious Exemption and differs from the circumstance here and that differs in -- and that changes the analysis which is always a case-specific situation.

I can continue with the discussion with the Women's Health Amendment.

THE COURT: Go ahead.

MS. THOMSON: But I believe it's -- what we believe is that Your Honor ruled correctly a year ago and the reasoning that applied to the IFRs applies equally to the Final Rules here for all the reasons that were identified before that the Agencies lack authority to issue them.

Turning to RFRA, though, which is really, I think, the crux of the Government's case here --

THE COURT: Well, let me talk about the -- I'm going back a little bit about the taint issue.

Is it your understanding that no Third Circuit case has presented the question of whether the procedural defect that taints the original Interim Final Rule carries over to the succeeding Final Rule as squarely as this one does?

MS. THOMSON: As squarely as NRDC does or as squarely as --

THE COURT: As this one does. NRDC addresses it,

but is that the closest case or is there a closer case than NRDC?

MS. THOMSON: I believe NRDC is what we believe is our strongest authority on this point and I do think that the Third Circuit was not exactly explicit, but their remedy is absolutely consistent with the continuing existence of the Final Rule in that case because the Final Rule that was issued after taking public comment required that some amendments would go into effect at a date later in time than when they were supposed to and some other amendments would be continually -- or further postponed.

What the Third Circuit ordered was that all of the amendments would go into effect as of their original March 30, 1981 date and that is absolutely inconsistent with the continued existence of the Final Rule that the EPA issued there. So, by necessity, the Third Circuit invalidated the Final Rule in that case.

THE COURT: Okay.

MS. THOMSON: If Your Honor has any more questions about our initial argument, I can turn to RFRA.

THE COURT: All right. Actually, let's put RFRA on hold for now. Let's go over to the defense.

MS. THOMSON: Absolutely. Thank you, Your Honor.

THE COURT: Mr. Sandberg.

MR. SANDBERG: So I'll start with the procedural APA

argument.

The Plaintiffs here raise a challenge under 553 that they lack notice and comment. They clearly had notice. In fact, the State of Pennsylvania provided a comment.

They argue that that notice is somehow infirm and one of the things they say is that the Agency is less likely to change its mind.

On that score, it's not clear how the Interim Final Rule here and a Notice of Proposed Rulemaking differ.

Now, maybe if the Interim Final Rule hadn't been enjoined, you could say, well, there's sort of a bureaucratic inertia and reliance is built up so the Agency's going to be reluctant to walk back from that.

Here, of course, the Interim Final Rule was enjoined nearly at the outset so there's no reason to believe that the Interim Final Rule here -- for some reason, the Agency is going to be any less willing to change from the Interim Final Rule than it would be from a Notice of Proposed Rulemaking.

THE COURT: Well, how do you respond to the point that defense were fighting, that they went to the Third Circuit, and so how could you fight a Rule and at the same time remain open-minded?

MR. SANDBERG: Well, I will say this. To me, that's akin to an argument that you sometimes see in cases about whether a Plaintiff has to exhaust administrative remedies

before the Federal Government. And Plaintiffs have occasionally, before they finished exhausting, have filed cases in court and the Government's defended and the Plaintiffs have said, See, the exhaustion was futile because the Government rejected my argument.

And my understanding of those cases is that on the whole, they've said you can't sort of invite the Federal Government into court and then when it naturally defends itself say, See, you had a closed mind and you were never willing to consider my comment.

We can provide you in a subsequent briefing with information about those cases, but my understanding is that it's akin to that argument that you can't sort of drag the Government into federal court and then say, See, you had a closed mind because you defended against our federal court too. I don't think that's true. In any case, the Rule itself demonstrates that the Agency considered the comments, and this gets more to the second part of their APA claim, which I'll get to, to let them bleed into each other right now. The Rule itself demonstrates that they considered the comments. They didn't just say, We rejected this in federal court so we're rejecting it here. They gave their reasoned basis for rejecting the comments.

I'd like to next turn to the NRDC case, which is obviously central to the Court's inquiry into Plaintiffs'

argument.

In NRDC, there were a number of Rules that were postponed, but there were four that are essentially the heart of the case because they continued to be postponed.

In that case, the NRDC issued an Interim Final Rule and it postponed these four Rules. It then accepted comment about whether these four Rules should continue to be postponed. And then it issued a Final Rule saying, Yes, we're going to continue to postpone these Rules. And what the Third Circuit said was that was invalid because you were asking the wrong question. You were asking about whether the Rule should continue to be postponed, whereas if you had asked the right question, if you had done this properly, the right question would be should these Rules be postponed at all. So, in essence, what the Agency had done is again injected reliance interests into the decision in the way it otherwise wouldn't have been. If the Rules had been allowed to go into effect as they appropriately should have according to the Third Circuit, they would have been in effect for several years and reliance interests would have been built up and that would have affected the analysis. Because they had postponed them, they never -- those reliance interests never built up and so the Agency was, in effect, answering a different question than it would have had it done it appropriately the first time.

That's not the case here. As we've noted, the

Interim Final Rule asked for comment. It asked for comment on the very same thing that -- what that issue in the Final Rule was, whether there should be exemptions -- I'm sorry, whether the Religious Exemptions should be expanded or whether there should be a Moral Exemption. And there's no mismatch of reliance interests for sort of the reasons I had referred to earlier in that, you know, whether this ends up being an act of grace or not, the Court had enjoined it so no reliance interests had built up in favor of these IFRs that then put, I guess in the view through the NRDC lens, an impermissible thumb on the scale. If the Agency had sort of "done it right" by issuing an NPRM and did it the way they did here, it would have been the same thing. There was notice of the proposed changes, they took comments, and then they made a decision, and there were no sort of improper reliance interests that had built up.

So as to the consideration of comments, unless Your Honor has any further questions about this sort of notice aspect, I would say that the Rule -- to take an example, they say the Rule sort of doesn't address the impact on women and there's several pages from, I think, 83 Fed. Reg. 57,555 to 556 or beyond where they address the sort of efficacy of the mandate and what effect this will have they say more generally on the women who would be subject -- who might be affected by the exemption. So it's not something that wasn't addressed.

They clearly -- they took in the comments, they thought about them, and the fact they didn't agree with the Pennsylvania doesn't mean they didn't consider the comments.

And I think that's the strain of the argument that runs through this, because they reached a different conclusion, that means that they didn't adequately consider the arguments, and clearly that's not what the law says.

Unless you have any further questions on that, I'm happy to turn to the sort of substantive APA argument.

As to the substantive APA, I'll start with it's our position that there were two bases for the enactment of the extended Religious Exemption and Moral Exemption.

One is RFRA, which I guess we'll put off to the side for now.

And the second is the discretion accorded to HRSA through the ACA.

The statutory provision 42 U.S.C. § 300gg, I think it's 13(a)(4), delegates, as the Supreme Court recognized in Hobby Lobby, it delegates the important and sensitive task of determining the scope of additional preventive care to HRSA, and as we've talked about in previous briefing and the hearing, it says, As provided for in guidelines supported by HRSA.

THE COURT: Again, I just want to clear some brush away here.

MR. SANDBERG: Sure.

THE COURT: It's the Defendants' position that the Agency's authority to promulgate the Moral Exemption Rule comes solely from the APA and not from RFRA, right?

MR. SANDBERG: Correct, Your Honor.

THE COURT: Okay.

MR. SANDBERG: So the Congress and the statute delegated to HRSA to promulgate the Rule, and as Your Honor noted, since 2011, the Agency has recognized a form of Religious Exemption which has expanded over the years. And the initial exemptions we cited, I think it's page 3 of our brief, we cite a couple of places where the -- I think it's the previous Administration created the original Religious Exemption and then explained it and it did not rely on RFRA.

THE COURT: In any of the litigation -- I'll ask you the same question I asked the Plaintiffs. Were there any challenges brought under 7062(a) or 7062(c), the APA arbitrary and capricious abuse of discretion? Were they all RFRA challenges?

And, Mr. Rienzi, I know you know the answer to that.

I'm just asking everyone so I can get --

MR. SANDBERG: Can I call a friend?

My understanding is that they were RFRA challenges, but I'm not certain about that.

THE COURT: Okay.

MR. SANDBERG: I am certain that the Agency did not rely on RFRA when it enacted these original Religious Exemptions.

As we cited in our brief, it relied on the discretion afforded to it in the ACA and we, frankly, think that there's no basis to distinguish in terms of the authority between the authority to create the original Religious Exemption and to create -- to extend this Religious Exemption and create the Moral Exemption.

THE COURT: So the original, the August 1st, 2011 and the July 2, 2013 were not only RFRA, but also the discretion, or just the discretion --

MR. SANDBERG: Just the discretion. They were not RFRA.

THE COURT: Okay, and there was no challenge -- there was no legal challenge under the APA substantive provisions?

MR. SANDBERG: That's the part I'm not certain about.

THE COURT: Okay.

MR. SANDBERG: And it's entirely consistent with the delegation that Congress gave the Agencies because, as the Rules recite, Congress has a long history of recognizing Religious and Moral Exemption in the field of health care. This is something that Congress commonly does. So it's

entirely consistent with the delegation from Congress to make regulations pertaining to health care, for the Agency to do the same thing, for the Agency to recognize, you know, the sort of special place that religion and objections of conscience have in our country with respect to health care and do the same thing.

And there is, frankly, no real principal basis in our view to distinguish the Religious Rule exemption previously granted and this one in terms of saying, Well, that one was okay, but this one is not.

We certainly don't think, and the state doesn't raise here now, we don't think there's a First Amendment basis because the original one did not turn on whether any of the Churches actually objected. So it couldn't -- there's no plausible free exercise basis because it didn't turn on that at all. And when you look to RFRA, we also don't think there's a basis to distinguish between the two.

I think Plaintiffs here primarily relied on the argument that women who work for Churches and integrated auxiliaries are more likely to share the sort of religious tenets of their employer than women covered by this exemption. But as the Agency said in this rulemaking, they don't think there's evidence to support that. The Agency looked at that and concluded there isn't evidence to support that. And, you know, anecdotally, you can think of religious broadcasters or

other entities like that which wouldn't have fallen within the old exemption, but it surely seems logical to believe that many of the women who worked for a small closely-held, you know, religious -- for-profit religious broadcaster are going to share their employer's views. So I don't think that's a basis.

I don't think there's any basis on RFRA to say that the compelling interest is different based on the likelihood of shared beliefs. There's no evidence of that, certainly, and the Agency found quite to the contrary.

So that I don't have to use grace again, I'm going to turn to my colleague to make sure -- I'm told I didn't screw up this time.

THE COURT: Mr. Rienzi, if you could answer that second question I have first, that would be good.

MR. RIENZI: Yes.

THE COURT: The question is, one, the reliance of the Agencies and, two, any challenges under the substantive provisions of the APA.

MR. RIENZI: Yes. Sure.

So reliance of the Agency, I agree with Mr. Sandberg, although I was just pulling it up on the computer and it didn't get all the way there.

My memory of it also is that the Agencies said -- the Agencies did not say it would violate the free exercise

clause or it would violate RFRA if we applied this to churches and integrated auxiliaries. Instead, they said, Well, HRSA's understanding -- the one quote I have is, "In the Department's view, it is appropriate that HRSA issuing guidelines takes into account the effects on the religious beliefs of certain religious employers." And that's 76 Fed. Reg. 46,623. I believe that's from the 2011 Rule.

THE COURT: So they just said it's just the authority that's delegated to us. We have the authority to do this.

MR. RIENZI: Yes, and I think they were doing that against the backdrop where HRSA had the discretion to not put contraceptives in the basket at all. I mean, the entire question was left to HRSA. So I think their view was HRSA's allowed to come up with guidelines about how we're going to do this, but it was completely discretionary. It still remains completely discretionary what HRSA does with that. I would point out, actually, HRSA's inclusion of contraceptives was never the subject -- I mean, forget Interim Final Rules. It was never the subject of any rulemaking. It's posted on a website. That's what it was back in 2011. That's what it remains today.

THE COURT: And so is it your position that at any point, the Agency could take contraceptive services out of the definition of preventive care?

MR. RIENZI: Yes, absolutely. I mean, I think that's both straight from the ACA. That's from Hobby Lobby. Your Honor's opinion from last year acknowledges that the discretion was granted to HRSA to decide this.

They could act, for example, like Pennsylvania. Pennsylvania doesn't have a contraceptive mandate for employers. The Federal Government could decide, well, we have lots of other ways to do this. We do it through Title X, we do it through our exchanges where people can go get health care. There's nothing that says the world must be the way that the last Administration decided to make it in 2012 or 2013. They have complete discretion to do that.

THE COURT: Okay, so have there been any legal challenges to the Rules other than on a RFRA basis?

MR. RIENZI: So, yes. Let me tell you what I know and then be clear about what I do not know.

THE COURT: Yes.

MR. RIENZI: So the only APA decision -- at least the only APA decision from a Court of Appeals that I know of is the Priest for Life decision from the D.C. Circuit in 2000 -- probably late 2014 or it might be late 2015, actually, but in the Priest for Life decision, the D.C. Circuit said that third Interim Final Rule, which is the one after the Wheaton College decision of the Supreme Court, they said that one was fine. And I believe that was the subject of -- I

believe that would have been in the briefing before Your Honor last year on the Interim Final Rule question.

THE COURT: So was there an analysis of the APA substantive --

MR. RIENZI: Yes, but it was not -- yes. So it was not on the substantive point to my knowledge. It was only on is there good cause, is it a procedural cause?

THE COURT: Right. So as far as you're aware, there has been no challenge under the substantive provisions of the APA?

MR. RIENZI: So I'm not aware of any rulings by courts on the substantive provisions. I will say that the Complaints challenging those Rules tend to be long Complaints with a dozen counts. They were all litigated essentially as RFRA free exercise cases.

THE COURT: Right, but no analysis by any court on that particular point?

MR. RIENZI: Not that I can recall.

THE COURT: Okay. That's what I think, but I just wanted to make sure.

MR. RIENZI: Yes. So far as I know, no.

So if I can start with the -- follow the pattern you've been doing, start with the procedural issues.

THE COURT: Go ahead.

MR. RIENZI: Then do the substance and then save

RFRA for -- it sounds like the final round.

THE COURT: Yes.

MR. RIENZI: First, let me just make a point about the procedural questions before Your Honor. Does the IFR taint everything after? Was it good enough looking at comments and so forth?

Just as a threshold point, and I said a version of this at the status conference, but just to reiterate it, I'm obviously going to take my best run at convincing you that the substantive ruling Your Honor entered last year about the IFR isn't right, frankly, and shouldn't be applied here. So I'm certainly going to make that argument. But if I don't change your mind, if nobody changes your mind and you come away firmly convinced that what you already decided is that this is substantively invalid under the APA, it can't happen, can I just suggest one possible path for Your Honor is to say that the procedural stuff is stuff that in some ways then would almost be advisory. In other words, if you've already reached a conclusion that the states are entitled to an injunction based on the substantive invalidity and if they're asking you to reach out to relatively new, relatively unclear areas of procedural law, one possible path for the Court is to say, Well, based on the substantive invalidity that I already found before and that I'm still convinced of, and I hope you're not, but if you are, that that would be a ground to not reach out

and do the procedural stuff.

THE COURT: You've never been subject to the Third Circuit's searing analysis of one of your opinions, obviously.

MR. RIENZI: I have not, Your Honor.

THE COURT: Okay.

MR. RIENZI: On the procedural claims, first, just a note about terminology in the briefs. The states repeatedly talk about post promulgation notice and comment and they cite some cases that talk about post promulgation.

I'll just point out, I think that's a confusing term in this context because if you look at the cases, what I think the cases are saying, and NRDC versus EPA, I agree, is sort of the outlier of the bunch, but, generally speaking, I think what the cases the state cites are saying is that the post IFR notice and comment doesn't make the IFR okay. In other words, that the comment after the fact doesn't make the old thing okay. That's what I think when courts are talking about the post promulgation is not good enough, I think they're talking about it's not good enough to revive the old IFR.

Here it's a different question because what we're talking about is a comment that was after the IFR, but is before the Final Rule, right?

So if we're looking at the Final Rule, this is not post promulgation notice and comment. It's notice and comment that came before a Final Rule.

As to the argument about how the Court should think about that, I would suggest that, and you raised this a little bit, if you go back and look at the transcript of everything the state argued about why this Final Rule is invalid, it would also invalidate the contraceptive mandate and the accommodation. In other words, all of the analysis is the same. You had IFRs. Those went into effect right away. They were challenged in court. The Government took comments after the IFRs and then said, Yes, we finalized the IFR. The Rule was still effective immediately. The Government was still litigating it. We, the Little Sisters, my clients, were showing up hat in hand saying, Hey, guys, you issued this Rule, but it's wrong. You should do something different.

So if that's really the Rule of Law, and I don't think it is, but if that were really the Rule of Law, I don't see how as the Court sitting in equity you could possibly enter a ruling that says, Well, the new Rule that did that is invalid and, therefore, Federal Government, I order you to operate under the old Rule that came into effect by the exact same process. If that process is no good, then the whole thing is no good and then we've got to go back to start. But it can't possibly be the case that when you're putting in a contraceptive mandate, you can have IFR comment and finalizing and, Hey, that's fine, but when you want to tweak it and create a Religious Exemption to it, now that process is no

good so we're going to enforce it.

THE COURT: Well, but the court is a court of limited jurisdiction. We deal with cases that are presented to us. So if no one was presented with the earlier case --

MR. RIENZI: Well, I mean, I'm presenting it to you now, Your Honor. You're a court of equity and they're asking you to enforce that Rule.

THE COURT: Right, you're presenting an argument. The issue of the validity of the earlier IFR is not in front of me or whether the contraceptive mandate should be in or out should be included in the definition of preventive services, that's not in front of me, and I think that it has not been challenged in this litigation.

I understand your clients take a different position, but just maybe give me a guess from all the parties, that is not at issue in this litigation?

MR. RIENZI: I'll just say no to the extent I'm being asked -- and I'm happy to explain why I think it is at issue.

THE COURT: Okay. Yes. Okay.

MR. RIENZI: I don't want to interrupt your poll.

MR. FISCHER: Yes, from the Commonwealth.

THE COURT: Right.

MR. SANDBERG: Just to be clear, the question is whether the previous Rules not in the Complaint are at issue

in this case?

THE COURT: Correct.

MR. SANDBERG: Yes, our position is you'd be correct, those Rules are not at issue.

THE COURT: They're not at issue in this case, okay.

So, Mr. Rienzi, you're arguing that they are and I understand why. I mean, if you wanted to give me a legal theory as to why --

MR. RIENZI: Sure.

THE COURT: -- an Intervenor can assert its view of what the Complaint is on the Plaintiff and the Defendant, I'm happy to listen.

MR. RIENZI: Sure, and I don't think I'm actually asserting my view of what the Complaint is.

The Complaint asks you to reinstate a set of Rules. If you don't reinstate the old set of Rules, right, if you don't reinstate the old set of Rules, they don't get the relief that they want.

The only way they get the relief that they want is if you reinstate Rules that were superseded by the IFR and now the Final Rules.

So they're asking you to enter an injunction that makes the Federal Government operate by a set of Rules. I'm saying that the set of Rules that they're asking you to tell the Federal Government to follow is subject to all the same

criticisms that they're making to get you to issue that ruling.

THE COURT: Well, I am under the impression they are not asking me to issue a mandatory injunction, they're asking me to issue a protective injunction. So you're reading it entirely different than I am. They're saying, Stop these Rules. As I understand it, they're not saying, Reimpose these Rules, they're just saying, Stop these Rules.

MR. RIENZI: So at least as I understand it, I don't think they could possibly get the relief that they're telling you is irreparable, the stuff that they need done. I don't think that could happen unless your order to the Federal Government reinstated those Rules.

So I think you're sitting in equity, you're being asked to issue an injunction. I don't see how you can write an opinion that says, IFR Final Rules, no good, therefore, I'm going to reinstate a set of Rules as IFR by filing my Final Rules. I think -- I'm not sure how that works.

Ultimately, I would say the state's problems -- you know, they say the Federal Government didn't consider the comments and, again, I think the answer is the Federal Government obviously considered them. They came to a different conclusion than Pennsylvania in this litigation. I'd say they came to a more pro-contraceptive conclusion than Pennsylvania in terms of their own policies. Again, the

Federal Government chose to keep in place a contraceptive mandate as to 99 percent of the employers in the country. They could have said, Oh, the heck with it, no contraceptive mandate at all. They didn't. They kept the contraceptive mandate in place for 99-plus percent of employers. They did create a Religious Exemption that matches a bunch of injunctions that they're subject to, but the idea that that's not permissible consideration out of the mouths of states, you know, New Jersey does have a contraceptive mandate, but they also have a Religious Exemption in their contraceptive mandate. So the idea that the Plaintiffs can argue to you that that sort of consideration, it could never possibly be right, when they're doing it themselves strikes me as tough to swallow.

The states also can't, on their procedural argument, they can't explain how any error that they're complaining about isn't harmless.

There's two versions of their argument, one of which I'll suggest I should probably save.

But, first, they don't explain how the world would really be different if the Government had issued a Notice of Proposed Rulemaking.

In other words, the Federal Government has received like a million comments by now on what should the scope of Religious Employer Exemption be. Right, it is maybe slightly

off, maybe 8 or 900,000, but it is a lot of comments over the past six or seven years. They've litigated the thing coast to coast multiple times to the Supreme Court and never winning their argument at the Supreme Court. The idea that something would be different if they slapped the title Notice of Proposed Rulemaking instead of IFR on the top of it doesn't make any sense. They commented, everybody else commented, there were comments on things the Agencies have heard a long time. This is probably one of the most commented-on issues any of us will ever see.

The argument that they are presenting that the IFR taints everything that comes after would invalidate -- you know, would be a very far-reaching argument. So they say you can look at NRDC versus EPA and you can sort of assume that what they must have been doing is killing the Final Rule. And I would just say if you read it that way, then you have to deal with the SORNA cases, too, Reynolds and the cases that come after it, the sex offender registration cases, Reynolds and the other SORNA cases that come after it, where in Reynolds, the Third Circuit says, Well, the Interim Final Rule, that was invalid. But then there's a bunch of cases after Reynolds in which the Third Circuit upholds SORNA convictions based on the Final Rule that issues after the Interim Final Rule. And so that's the SORNA litigation, the Reynolds case that they cite, and the ones that follow it.

It's also the contraceptive mandate that they are asking to have reinstated here, right? It was the same thing. It was Interim Final Rules finalized later. It's also, according to the Government Accountability Office, about 35 percent of the major regulations in the Code of Federal Regulations. In other words, Agencies do this quite regularly where they do Interim Final Rule, take comments, and then they finalize it. If the Court were to issue a ruling that says that is invalid, that would end up being a pretty far-reaching ruling. They don't have anything directly that says that and that's a little bit odd given how often the Federal Government does it. I would suggest that that means it's probably not the Rule. And, again, I don't see how we could get to a ruling that says it's the Rule for parts of the contraceptive mandate, but not other parts.

On the NRDC case, if I could just suggest two distinctions from that case, two reasons why I don't think it applies here. I think that was a pretty unique specific situation the Court was dealing with in that case.

First, the time lag, and Mr. Sandberg got to this a little bit, but the time lag there was really different. In this case, Your Honor enjoined the IFRs I think probably before they affected a single person's insurance plan. You did it very promptly when the states came in and asked -- you did it before January 1st which is when the plan years for

most people turn over. And so that interim, the effectiveness of that was taken away immediately.

In the NRDC case, the Rules were supposed to take effect in January of 1981. The Interim Final Rule on that wasn't invalidated until 18 months later in July 1982 and they didn't even ask for comments until like October 1981. So there was a much longer period of time in which the effect of these things were felt and in which they were built up and ongoing in a way that's not the case here because of Your Honor's swift action the last time.

But two other differences that the Court in the NRDC case talked about that I think matter here.

One is in NRDC versus EPA, it was a complete reversal. It was a complete reversal of policy. In other words, the Rule's going to go into effect and they pulled it out entirely, right, 100 percent we took away the old policy.

Here I would suggest that's not the case at all, right? The main piece of the policy, Will contraceptive coverage be required for most employers covered by this mandate? Yes. They kept it in place. They kept 99 point something percent of this policy in place. They did create Religious Exemption, but it's nothing like the wholesale taking out of another Rule that happened in NRDC and the Third Circuit said that that was a reason for them to be extra -- I'm paraphrasing -- extra concerned or stare extra closely at

it because it's such a stark reversal.

Here I would suggest it's not a stark reversal on the main policy. The main policy, they could have said no contraceptive mandate, but they haven't said that. They kept 99 percent of it. They got the small Religious Exemption.

The second thing at issue in the NRDC case, there was a mismatch between how the Rule got in and how the Rule got out. In the NRDC case, you had a Rule that was fully subject to notice and comment rulemaking and that they had issued a Final Rule and it was almost at the effective date, and then they killed a sort of full Notice and Comment Final Rule with a quick Interim Final Rule. Right, so there was a mismatch. You have something that really had been through the process yanked out by something sort of quick and slapped at you.

In this case, you have a contraceptive mandate that was built on IFR after IFR after IFR, right, so you don't really have that mismatch. That is the process by which the thing came to be. And so the idea that the process by which the thing came to be is insufficient to change it a little bit, I don't think makes a lot of sense, and I think makes it quite different from NRDC versus EPA.

And, again, I would just suggest that if the Government's argument is right and the SORNA cases are wrong, the contraceptive mandate itself is invalid. And even if Your

Honor doesn't think it's before the Court in this case, I suppose we or somebody else will go bring that case here or elsewhere, but it's quite an extraordinary claim by people arguing that they want the federal contraceptive mandate to be in place to say that you should issue a ruling that legally would say that that one doesn't work either.

Let me pause there before moving on to the substance. Is there anything else Your Honor would like me to address on the procedure?

THE COURT: Go ahead.

MR. RIENZI: Okay, on the substance and, again, I think I understood the Court to be saying you want us to leave the RFRA arguments for the end? Okay.

The states have -- I'm sorry, the Federal Government has discretion under the ACA. I read you that quote from the Obama Administration before. 2011, '12, '13, '14. This is not like a new Trump Administration invention. This is the way people in the Agency on, you know, both pretty far sides of the spectrum interpreting this have all understood that they had some discretion to do that. They did not take the view that the state said here that it was required by RFRA. They didn't take the view that it was required by the free exercise clause. They just said, Hey, Congress gave us discretion. They said, We get to come up with the guidelines. When we're doing that, we're going to take into account

important things. One of them is the impact on religions and we're going to do that.

So that was sort of a unified position from Obama to Trump that they had the authority to do that.

The idea that it would be required by something else, Your Honor in your opinion last year, you said that you thought it was required by the free exercise clause, that that was what justified the original Religious Employer Exemption that was part of the contraceptive mandate or the claim that it's required by RFRA.

The problem with all those arguments -- I actually, to be clear, I actually agree that RFRA requires these things. Free exercise clause requires them not just for those employers, for my clients as well. I think they require them for everybody. But what you can't get to is a view of RFRA and the free exercise clause that require them for integrated auxiliaries and houses of worship, but not for the Little Sisters and other religious employers who weren't covered and here's why.

The argument that the free exercise clause requires it is based on the idea there's some burden that the Government is lifting. Well, if it were really true that the accommodation is no burden at all, there would be nothing to lift, right, and if it were really true that the accommodation is no substantial burden at all, I don't understand how the

state could have the view that RFRA requires exempting somebody else from it.

In other words, if the accommodation's no big deal, you just fill out a form, Sister, hand it to somebody else, and it's not your plan, right -- I don't think that's accurate, but that's how it was proposed for a long time. If that's not a burden, well, it's not a burden on anybody. Anybody else could do the same thing. If you can't do that, that's a burden for some, but not for others, depending on how you're financed or how you're organized. That doesn't make sense.

The Obama Administration's argument from the beginning I think is clearly right. I think -- there's more I would say, but it's clearly right that they had the discretion. And the Agency here is dealing with a situation -- I'll table most of this for the RFRA argument -- they're dealing with a situation where they've got a discretionary thing which is, Are we going to include contraceptives, on one hand, and a mandatory thing, RFRA, on the other hand. And the question that they have to wrestle with in this Rule is how am I going to balance those two things? And the current Administration has come up with what they think is the right balance, which is, I'll require contraceptives for almost everybody, but for people who have a valid RFRA claim, I'm not going to do that, right. So their view is that instead of

losing these cases court by court and case by case all across the country, we're just going to say people who have got a religious objection don't have to do that.

I would say in terms of, Is that a valid way to respond to comments -- I think absolutely. I think that actually they had to do it, right? So I think this is the other reason, it's procedurally valid.

Whatever you might think of any of these procedural arguments, at the end of the analysis, the answer I think is that RFRA required this. And since RFRA required it, you'd have whatever process you want.

THE COURT: Don't go into RFRA.

MR. RIENZI: Yes. My point is just to --

THE COURT: I understand.

MR. RIENZI: -- draw the connection that --

THE COURT: I understand.

MR. RIENZI: -- the substantive argument bolsters the procedural one at hand.

Thank you, Your Honor.

THE COURT: Okay, quick response from Plaintiff.

MS. THOMSON: Okay, Your Honor, I'll just first -- we've done some preliminary research into looking into the 2011 and 2013 in response to your question.

My understanding is in 2013, they did a search that was not based on RFRA. In 2011, it appears to be as the

intervenors.

We would need -- if you would like a greater discussion of this, we'd request the opportunity to file a short supplemental brief that discusses it. However, I do not think that it is necessary to your decision or really necessary to the holding to the RFRA resolution in this case for several reasons.

One, as I stated before, we're not challenging the prior Religious Exemption or the accommodation. We are challenging the current Moral and Religious Exemption. So nothing that Your Honor can do can affect -- can order those to be invalidated in any way. That's for a future lawsuit, if one at all.

Second, Agencies assert authority all the time in the things that they issue, and as you've observed and as appears to be the case, no one has ever challenged a prior Religious Exemption for an excess -- for being outside of the Agency's statutory authority. So whether or not they claimed that authority in the regulations is not necessarily indicative of whether they actually had the authority because no Court has ruled that they had or did not have the authority.

However, it seems clear from the Supreme Court in Hobby Lobby that RFRA does require the Agencies to take steps where -- because the mandate imposed a substantial burden on

certain religious objectors, to seek out the least restrictive means of satisfying a compelling Government interest.

For most people, the Government decided that was the accommodation. For churches and their integrated auxiliaries, the exemption seemed to be the choice that they made. However, we're not here to defend those choices because we're here to challenge the decision made by the current Administration to issue the Religious and Moral Exemption.

So although we're happy to brief those things --

THE COURT: No, I don't need any briefing on it.

MS. THOMSON: Okay.

THE COURT: Because I agree, it's the elephant in the room and I just have to understand it.

MS. THOMSON: Absolutely.

Second, so speaking to the numerous points made by the defense intervenors about the NRDC opinion, I would first note that we are not asserting that all IFRs are per se invalid. We're saying that IFRs that are issued that do not -- either in the absence of statutory authority or the absence of good cause would therefore impermissibly taint a Final Rule. However, impermissibly tainting a Final Rule is also one way of looking at it. We're challenging the Final Rules from the point that the Final Rules fail to go through the notice and comment procedure required by the APA, which is that an Agency put forward a proposal, accept comment, and

then issue a Final Rule. So it's not simply that they took comment. What they take comment on has to be something about which the Agency has an open mind because it's a proposed change.

And I would note here, as you observed a year ago, the Final Rules like the IFRs are a sweeping change compared to what had existed previously. There had -- yes, there were hundreds of thousands of comments on Religious Exemptions before, but nowhere had the Federal Defendants previously indicated that they planned to exempt for-profit publicly-traded companies, for example, or that they planned to create a Moral Exemption. They instead dropped that in October 2017 without a chance for comment and those went into effect immediately. And those Interim Final Rules were in effect for about three months until you enjoined them. That was for almost the entire duration of the comment period. The entire time the public approached the Agencies to issue comment, the Rules were in effect and that's really what the Third Circuit in NRDC was concerned about. They were concerned about writing the notice of comment provision out of the APA because the APA envisioned giving the public an opportunity to approach an Agency that hasn't yet made up its mind. And here by issuing an IFR and not taking comment, the public was deprived of that opportunity and the Final Rules, by finalizing that, did not follow the process.

I think that actually -- unless you have any further questions.

THE COURT: No, I'm fine.

Okay, so what we're going to do, we've been going for about an hour and 20 minutes. We're going to take a ten-minute break.

When we come back, we'll talk about RFRA, we'll talk about the remedy, the national injunction, the scope of the injunction, and if you want to talk about irreparable harm, balance of the equities and public interest, that's fine, but my focus is going to be on RFRA and the scope of the injunction.

(After recess:)

THE DEPUTY CLERK: All rise.

THE COURT: Have a seat. Okay, let's move to RFRA.

Before we get there, I have just one clearing-the-brush question.

Ms. Thomson, in Count Two of your Complaint, you allege the Rules violate Title VII of the Civil Rights Act and the Pregnancy Discrimination Act. In your briefing, though, you argue, "Because the Rule authorized illegal conduct, meaning conduct that violates Title VII and the PDA, the Rules are not in accordance with law and they must be held unlawful and set aside," and then you cite the APA.

Is Count Two then an independent cause of action

under Title VII or the PDA or an alternative argument as to why the Rule violates the APA, or both?

MR. FISCHER: Your Honor, if I may respond to that?

THE COURT: Yes.

MR. FISCHER: It is an independent count. We have today focused on other counts, the two primary counts being our procedural APA count and then our substantive count as it relates to authority to issue the injunction -- I'm sorry, the authority to issue the exception as well as to the arbitrary nature of some of the changes.

We have not focused on that. We did include it in our earlier briefing. And, again, as we indicated at the prior hearing, we don't believe it's necessary to get into the constitutional or, in that case, the Title VII claim if the Court focuses on the two primary --

THE COURT: Okay, but you do in your briefing suggest that it adds weight to your argument.

MR. FISCHER: Yes. Absolutely.

THE COURT: Okay. Okay.

MR. FISCHER: Thank you, Your Honor.

THE COURT: Go ahead.

I notice my sign was not up so you probably had no idea who you were speaking to.

Go ahead.

MS. THOMSON: Thank you, Your Honor.

So as the Government has admitted, only the Religious Exemption Rule can be justified by RFRA. However, RFRA provides no support because the Final Religious Rule is neither required nor authorized by RFRA.

Now, in Hobby Lobby, the Supreme Court held that the contraceptive mandate violates RFRA only because it is not the least -- it was not the least restrictive means of accomplishing a compelling Government interest and Justice Alito in that opinion looked to the accommodation as a lesser restrictive means that satisfied the compelling Government interest, but also would have not been as burdensome on the religious objections of the Plaintiffs in that case.

Now, the Agencies up until the issuance of the IFRs had consistently concluded that the accommodation did not impose a substantial burden at all on religious practice.

Eight out of nine Courts of Appeal had agreed with them, including the Third Circuit in Geneva College, and although that opinion was vacated, it was not vacated on the merits, and the reasoning of that opinion I think is persuasive as to why the accommodation, which simply requires an entity to say, I am not going to provide coverage, does not actually involve a burden, much less a substantial burden.

However, in issuing the Final Rule, the Agencies reversed their position and determined -- and concluded that the accommodation does now pose a substantial burden under

RFRA.

Now, we have agreed Agencies are allowed to change their policy position, however, the Supreme Court has held in Navarro and Fox Television Stations that the APA requires the Agency to give good reason to do so, and when there are reliance issues engendered by the prior policy position, the Agency must give an even more reasoned explanation.

Here, pursuant to the Final Rules, more than half a million women were working for entities that used the accommodation in 2017. That is a significant reliance interest. So they're required to provide not simply an explanation, but a more reasoned one. However, in the Final Rules, they provide no explanation at all. They simply say that because some people have a sincerely-held religious objection to the accommodation, that is per se a substantial burden. However, this -- the Third Circuit has held in Geneva College, but also in Real Alternatives, which is still binding on this Court, that whether or not something is a substantial burden is a question of law. And in Geneva College, it spoke whether or not it's a burden and whether that burden is substantial. These are both questions of law.

And while the Court must defer to the sincerity of someone, of an entity to religious beliefs, they do not have to defer to that entity's claims that the burden exists or is substantial. That requires an objective analysis of the

nature of the burden.

The Agencies in reversing their position made no attempt to engage at all with that position to engage with the analysis that Geneva College and eight of the nine other Courts of Appeals had done in determining that the accommodation was not a substantial burden. And so as a result, under Navarro, I think is the most on point, because they reversed their position so abruptly without any explanation, that invalidates the Final Rule. They have to provide something to do that.

However, we also believe that they reversed their position -- they also reversed their position on whether or not they had a compelling interest to enforce the mandate. They did provide reasons, however, the reasons don't match up with what it is that they reversed their position on. They say they actually haven't reversed position on whether the entire mandate generally is a compelling Government interest, but simply on whether they have a compelling interest in enforcing the mandate against objecting entities. However, none of the reasons that they offer, that HRSA has discretion or that there were prior gaps, et cetera, none of those match on to why a lack of compelling interest in enforcing the mandate against objecting entities and why the women who work for those objecting entities, which, again, can be a publicly-traded corporation or an organization that has a

moral objection, why those women do not deserve access to federally-mandated preventive health care or should not get access to federally-mandated necessary preventive health care. And so their failure to offer reasons on that reversal is also a violation of the APA substantive requirements and also shows that their invocation of RFRA generally is arbitrary and capricious. And we would note that contrary to what the Intervenor said earlier, the Agencies were not faced with a choice between whether to cover contraception and whether to respect the religious views of objectors.

HRSA has included contraception in its Guidelines since 2011. They reaffirmed that in 2016. Contraceptive coverage is the law. It is required.

In Zubik, the Supreme Court in Zubik recognized this when they ordered the Agencies to come to a solution that both tried to accommodate the religious objections of the lawyers and also ensure that women had access to full and equal health coverage including contraceptive care.

The Agencies here in issuing the moral religious Final Rules have claimed RFRA, but they have done so only taking -- only following one side of the Supreme Court's order. They have completely issued any opportunity to try to ensure that the women who work for objecting entities, who will claim the religious objection, will have any access to contraceptive coverage as required by the Women's Health

Amendment.

So, for that reason, we believe that -- for those reasons, we believe the Agencies' attempt to justify the Religious Exemption Rule with RFRA is invalid.

THE COURT: Okay. Let me hear from the Government on RFRA, and before you start, I have a question designed to try to understand what the baseline for the Government's position is.

Is it Defendants' position that RFRA is an affirmative grant of authority to Agencies to promulgate generally applicable regulations such as the Final Rules?

MR. SANDBERG: Let me think of the best way to answer that.

I think the best way to answer that is that RFRA is, in a sense, integrated into all federal statutes. Congress had -- the way Congress enacted RFRA was that it applied unless specifically exempted.

So you can think of RFRA as a part of every federal statute that the Agencies have to comply with. Just like when they issue a Rule, they can't violate the First Amendment or the Fourth Amendment or the Sixth Amendment. It's a background norm that the Agencies have to comply with.

It's not our position that RFRA independently gives an Agency the ability to necessarily make Rules, but that in making the Rules that it's authorized to do so, it has to

comply with RFRA, like I said, just like it has to comply with the Constitution or any other sort of federal statutes that there are like RFRA that may sort of be background norms, for lack of a better term.

THE COURT: Okay, so RFRA speaks explicitly in terms of being a judicial remedy. So given that it speaks in terms of judicial remedy, I would at least on the surface read that as if an entity has a concern with an Agency Rule, it would seek a judicial remedy in order to change that Rule.

So given that reading, and I'm not suggesting that that is the final reading that I will reach, it's just a possible reading, if that were the reading, where is the authority for regulatory bodies to issue Rules based on RFRA?

MR. SANDBERG: Well, I mean, if -- like to the extent that assumes the conclusion, if you're going to say RFRA only allows courts to do something and doesn't allow --

THE COURT: Well, I'm just looking at the language of RFRA.

MR. SANDBERG: Yes.

THE COURT: It speaks explicitly in terms of a judicial remedy. So that would suggest that rather than it be a grant of authority to the Agencies, it is a remedial statute which can be taken advantage of if someone objects to a particular Agency Rule.

MR. SANDBERG: It certainly is that, but I guess our

position is it's not only that. We don't think that Agencies -- that it makes sense that Agencies should be able to issue or should go around issuing regulations without considering RFRA, thinking, Oh, I'll wait until someone sues me under RFRA.

We do think that RFRA provides Agencies the authority to certainly -- and requires them to take it into consideration and to not impose regulations that, you know, impose a substantial burden unless the other two parts of the RFRA analysis are met.

THE COURT: Okay. So let's keep along this pathway. If Agencies are required to take into account the RFRA rubric, at some point presumably there has to be an analysis of whether a RFRA violation has occurred or an analysis of how to draft a particular Rule in order to avoid a RFRA violation. Is that fair to say?

MR. SANDBERG: Yeah, I mean it's fair to say if you're going to consider RFRA, you have to consider RFRA.

THE COURT: Right. So as a court, I must take into account an Agency's expertise in determining how to view a particular Agency Rule. But what expertise do any of the Agencies here have on RFRA?

MR. SANDBERG: Well, I mean, on that score, I don't know that any Agency -- I mean, that would be an argument that every Agency should go around, you know, ignoring RFRA.

There may be some. There may be some sort of small agencies, you know, designed for the point of their religious fluidity. But on that score, there would be definitely scores of Agencies that would be, I guess, empowered or designated to go around violating RFRA. I mean, if you think about the Constitutional backdrop, like presumably Agencies can't issue Rules that violate the Constitution. Like are these Agencies experts in the Constitution.

THE COURT: Well, I accept that --

MR. SANDBERG: That's --

THE COURT: -- yes, that's a different issue.

MR. SANDBERG: I don't know that it is. I mean, the Constitution, the First Amendment, raises speech issues, religion issues. I don't know that it is a different issue to the extent RFRA is written in by Congress as a background norm that Agencies have to consider.

And Agencies, of course, have many lawyers and access to the Department of Justice so I don't think that it makes sense to say -- especially in the realm of health care, frankly, where Congress has recognized that it raises -- that it repeatedly recognizes it raises religious and moral issues and has created exemptions. So I don't think it's in any way anomalous to say that HHS, which is obviously charged with making recommendations about vast swatches of this nation's health care system, sort of lacks the necessary

expertise to consider those kinds of issues.

THE COURT: So let's say tomorrow the EPA issued an exemption to the Clean Air Act, which is based solely on RFRA, because they determined that climate change is something that is a God-ordained situation, and that for the Rule, they're going to take into account the fact that it is God either showing us a different way or punishing us for whatever we have done. Would that be appropriate?

MR. SANDBERG: Well, you'd have to -- as you said, if you're going to consider RFRA, you have to consider RFRA.

So if there were a reason to believe that there were individuals whose religious beliefs had been substantially burdened as a result of some government action or some government program, then you would move through the next steps of the analysis.

So, you know, I can't say in the abstract whether -- I can't say in the abstract the EPA can never issue a Rule that, you know, creates an exemption, for lack of a better term, on the basis of RFRA.

THE COURT: So let me just get the terms right. It's either a background norm or -- RFRA is either a background norm or an affirmative grant of authority.

Is it -- and, well, let's put that on a continuum.

Let's put on one end of the continuum the background norm and on the other end of the continuum affirmative grant

of authority.

Where in your view does RFRA fall?

MR. SANDBERG: Well, I -- and I use background norms just to the extent that I mean it's sort of woven into the fabric of every statute given that Congress says it applies unless it is specifically exempted by that statute.

And as to affirmative grant of authority, I think it's an affirmative grant to the authority to the extent an Agency issuing a Rule certainly can consider its obligations under RFRA and what could occur under RFRA.

I don't take the position that it independently authorizes rulemaking.

I mean, here the Agencies have authority to implement the ACA and part of implementing the ACA was devising the meaning of preventive, additional preventive services. So certainly they have the authority to promulgate Rules about the meaning of additional preventive services. And so our position is simply that given that they have that authority to do that, it's entirely consistent with the way RFRA is drafted and it's, in fact, their obligation to consider the terms of RFRA and what it requires of Agencies.

THE COURT: Okay. So can the Agencies point to any instance outside the Women's Health Amendment where an Agency has relied on RFRA alone to issue a generally applicable regulation?

MR. SANDBERG: Well, again, they don't rely on RFRA alone despite the hypothetical. Again, they rely on the rulemaking ability to --

THE COURT: Okay, well, thank you for that friendly amendment.

Can you think of any instance where outside this, the Women's Health Amendment and the regs, where an Agency has relied on RFRA at least in part to issue a generally applicable regulation?

MR. SANDBERG: I'm not -- but, again, two important notes to that.

One is, as you know, the number of federal regulations are copious and I'm not going to stand up here and pretend to be an expert in every federal regulation that's been issued.

And the second here is that the history of this case gave them particularly good reason to do so. You know, the original exemption was issued and then the accommodation and then there was years of litigation about who the accommodation would apply to. And, you know, Hobby Lobby comes down and says it applies to closely held for-profit companies and then there's more litigation and dispute about how that accommodation should work and whether folks should have to send their sort of notices directly to the Government or whether they have to send it to insurers or they have to send

it to the Government. So there's litigation about that. And there's more litigation about are people substantially burdened by the accommodation itself, which we think they are, but then there was litigation about that which resulted in the Zubik case and the related cases.

So here there was, I mean, special reason for the Agency to do that and I'm not aware of any instance -- it doesn't mean it hasn't happened before and that if it hasn't happened before doesn't mean it's appropriate. I mean, I think this case demonstrates why it's appropriate.

And just a note on the Zubik order, the Zubik order, I think contrary to the suggestion of counsel on the other side, did not dictate any results on the merits. It didn't say that, you know, any broader exemption was inappropriate. It was a remand to try to get the -- in the hopes that the parties could find an accommodation that would work for sort of everyone, for lack of a better term.

And as this Court I'm sure knows, in January 2017, the previous Administration essentially said, you know, We thought about this. We tried really hard. We're not aware of any other accommodation that's going to suit everyone's needs.

And so I think that goes a long way to supporting our argument that RFRA authorizes what happened here. If it doesn't, you have Agencies in this untenable position where they have to try to hit the exact right target and then face

years of litigation as they try to find that exact right target.

I know we had a colloquy about this at the last hearing I recall extensively so I won't go too much into that, but that's the very reason why the RFRA authorizes argument makes sense.

As the Court recognized in Ricci, and I remember there was an extended colloquy about the applicability of Ricci, but we think that the Court recognized in Ricci that entities should have some leeway in determining the best way out of navigating these conflicting legal obligations and they would be conflicting here if the Court rejected our argument that the ACA gave the authority for HRSA to create the exemption just purely out of delegation and there would be this conflict between what the ACA requires and, in our view, what RFRA requires. And the Court said for that framework to apply, you have to have at least a strong basis in evidence to believe in this case that you'd be subject to liability under RFRA.

And we think that certainly is the case here as to substantial burden. There is one Court of Appeals certainly that has found it a substantial burden, and while that opinion was vacated on -- for reasons other than the merits, certainly there's a reason to believe at least in those seven or eight states in the Eighth Circuit the Government would face

liability and we think that's more than enough to say that there's a strong basis or at least there would be substantial burden. We think that's more than enough reason to believe that they have a strong basis to believe that they face liability under RFRA.

And an additional fact is if you look at the reasoning of Hobby Lobby, there was an argument there about whether the Plaintiffs there were properly understanding the religion in terms of innocent -- whether acts are innocent and when they're complicit in bad behavior. And the Court said, Hey, it's not our job to draw that line to determine, you know, when people are appropriately drawing the line between innocent acts and acts that enmesh them, make them complicit in behavior they think violates their religious tenets.

So given that line of reasoning which, contrary to my friend's argument, is certainly in the Rule -- and I want to mention as an aside, that argument backs a little more into APA arguments about whether the Agency sort of had properly addressed certain comments or made certain findings. We certainly think they had so I'm trying to focus more here specifically on the RFRA sort of as an objective matter and not on the extent to which the Agency made the necessary findings for RFRA. We think they did and I'm happy to address that, that sort of aspect.

So that goes to the substantial burden point and

that applies both -- you know, we think there's a strong basis in evidence with a substantial burden which relates to our RFRA authorizes argument.

As to our RFRA requires argument, we think, in fact, there is a substantial burden for the reasons I've said.

And then the other portion of our analysis is that the Agency concluded that there was no compelling interest in applying the mandate to this -- to these objecting religious employers. And I think a key component of that analysis is the number of exemptions that already exist to contraceptive coverage under the Affordable Care Act.

The Affordable Care Act did not require contraceptive grandfathered plans to cover contraceptive coverage, and I don't know exact numbers, but based on the Rule suggests that there's millions -- there's millions of women covered by plans that do not require contraceptive coverage.

The ACA still doesn't require it and I will back step and say the ACA did, however, require grandfather plans to cover certain other aspects of reform that it thought were particularly important, but it did not include concept of coverage as one of those sort of reform provisions that needed to be included in grandfathered plans.

There's also a small employer exemption. So if there's a woman who works for an employer with less than 50

employees that does not offer health care coverage, and they're not obligated to offer health care coverage, then that woman also does not have contraceptive coverage.

And then the Rules refer to basically an indirect exemption, which is if they're self-insured church plans, they -- so called self-insured church plans that use the accommodation, the only way to enforce the accommodation is under ERISA, and under ERISA, self-insured church plans are sort of exempt from that.

So there was, in a sense, no way to enforce the accommodation against self-insured church plans so they had sort of a de facto exemption.

So there's just a number of -- there's a number of categories in which women aren't covered, which the estimate is probably that covers millions of women. Millions. Those exemptions cover millions of women. So there's millions of women who are not covered by the contraceptive coverage mandate. And the Supreme Court has recognized that when there's a supposedly compelling interest, you have to look at the scope of that coverage and whether there are significant swatches of behavior of people that are not covered. And here having millions of women covered certainly makes it -- certainly we think decimates the argument that there's a compelling interest.

The Agency laid out other bases for its conclusion

that there's no compelling interest.

Congress, as I said, did not obligate HRSA to cover contraceptives. It did not state explicitly that contraceptives need to be covered.

And then the Agency evaluated evidence and determined, based on its review of evidence, that there was no compelling evidence to require the coverage of contraceptives and that it was a compelling interest with regard to these objecting employers.

And the last point I would make, hopefully at my colleague's suggestion, is that we're not aware of any Court that has found a compelling interest when the Government has not articulated a compelling interest in the case.

If the Court has no further questions.

THE COURT: Okay.

Mr. Rienzi.

MR. RIENZI: Thank you, Your Honor.

If I could just work backwards from a couple of things that came up in your questioning of the two lawyers for the different governments.

One, on what RFRA says, Your Honor's correct that in 2000bb-1(c), there's a provision for judicial relief, but I don't think there is any way you could read the statute to only be about the judicial relief.

Section (a) of that says, Government shall not

substantially burden the person's exercise of religion even if it's from a rule of general applicability. And then in the next part of the definitions, it defines Government to include a branch, department, agency, instrumentality or official.

So I think the best reading of RFRA and the one that I believe the Federal Government, again, across Administrations on all sides of the spectrum has always had is that RFRA is Congress telling the Agencies there are certain things you can't do. You have to avoid doing these things. And that's an affirmative obligation that they have and I would say whether it's EPA -- I think your hypothetical about the climate change thing I think is pretty unlikely to happen, but you can imagine the EPA having some regulation of a piece of land that, you know, someone could point to a cathedral is on and there would be some question of that. All right, so I don't know that that's happened. I would assume it's happened. I would say it certainly probably happens in prison contexts.

It happens with RLUIPA, right, which is the prison equivalent of RFRA.

I'm sure it happens in the drug context. If you think about a case like O Centro. Both before and after Gonzales v. O Centro, the Federal Government created Religious Exemptions for certain drug use because, obviously, RFRA was, in part, designed to overturn Smith.

I don't think there's any RFRA requirement or much sense in the idea that under RFRA, the Federal Government is just supposed to keep running into RFRA violations, wait until they get sued and lose, and kind of lose them retail all across the country instead of fixing it wholesale and just not burdening the religion. The command from Congress is don't do that and I think they have an obligation to not do that.

THE COURT: Okay.

MR. RIENZI: There's also a brief mention of Title VII which, for the most part, I'm happy to stand on what we said about it in the briefs, but I would simply say to the extent that it's Title VII as an APA argument, which is what I think I heard the state to be saying, well, this violates Title VII because it authorizes illegal conduct, again, I would just suggest it's pretty hard to believe that the states actually think that's true given that Pennsylvania doesn't have a contraceptive mandate. So is Pennsylvania authorizing illegal conduct?

New Jersey has a broader Religious Exemption than the one they're saying the Feds can have here. Is New Jersey authorizing illegal conduct? New Jersey's mandate only works if you've already covered prescriptions and it doesn't cover sterilization. And it's not no costs, it involves costs sharing. Are they engaged in illegal behavior? I don't think they really think that.

And so the only federal court to ever consider the Title VII question is the Eighth Circuit one that we cited to Your Honor, but it's a pretty farfetched argument to say that having a Religious Exemption here is sex discrimination against women. If that were true, then Hobby Lobby, for example, the Supreme Court's decision in Hobby Lobby would be sex discrimination against women. None of the nine Justices suggested that it was.

Okay, on to RFRA. RFRA, as Your Honor knows, says that if there is a -- the Government cannot impose a substantial burden on religion. Most of the litigation over the many years has been over is there a substantial burden on religion imposed by the mandate and then by the accommodation.

What Hobby Lobby said in 2014 is that it is a substantial burden on someone's religion to tell them that they have to give out a health plan that includes things that violate their religion. That was Hobby Lobby.

There was a short period of time in 2014 and '15 when the Government had a particular argument that it no longer has where it said, Well, the accommodation is not like Hobby Lobby because you don't have to give somebody a plan that comes with the stuff that violates your religion. Somebody else is going to give that out and it's not your plan.

So if you look at the cases, the words that are all

over it are separate, independent, elsewhere. We cited the ones that were used in the Geneva College briefing in our brief to Your Honor.

But the point is that the argument at the time was, the reason this is not Hobby Lobby, the reason Hobby Lobby didn't end the whole thing is that for the religious nonprofits, we've got this accommodation, and under the accommodation, you don't have to give somebody the plan that comes with the stuff that violates religion because that's happening someplace else. And that was the state of the Federal Government's argument at the time of Geneva College.

What happened after Geneva College, though, is really important, which is in the Zubik litigation, the Government acknowledged, in fact, that it is the same plan. And as Mr. Sandberg said -- well, Mr. Sandberg said that ERISA is necessary to make the system work in a lot of contexts and it has to be the same plan for ERISA to control it. And the Government admitted that and this is not a Trump versus Obama thing. The Obama Administration admitted that to the Supreme Court in 2015 and 2016 that it actually is the same plan.

Well, once they did that, they could never win another RFRA claim, and actually once they did that, there's not a court in the country anyplace who said they could win a RFRA claim. Why? Because the whole basis of the Geneva College opinion was, in fact, this claim that under the

accommodation, it's not the Hobby Lobby thing where you've got to give a plan and this is part of the plan. It's different. You give your plan over here and it's not part of your plan and it's something else that happens over there. That was a fiction and the Federal Government eventually admitted it wasn't so. The Federal Government eventually admitted it's actually the same plan.

So that the Sisters and all the other religious nonprofits actually are being asked by the old version of the mandate to give out a plan that will include the things that violate their religion.

Under Hobby Lobby, that's a substantial burden.

And once the Government had acknowledged that, they could never win another case. It was over. And, in fact, that's been borne out.

And in every case where it's been litigated since Zubik and every Court to consider the issue since Zubik, every single one of them has found that the accommodation imposes a substantial burden.

Now, Your Honor pointed out before, and this is true, that those were all district courts and I agree with that. They're all district courts. There's no split. There's no Court of Appeals or Supreme Court decision on it.

But I would suggest that if you were the Agency and you're making Rules, you have to care what other Article III

Courts say. In other words, I don't think the Agency can just say, Oh, well, it was just district court that told me I was wrong, therefore, I'm just going to forge ahead. That's not really a government of laws and it's not a very good government of laws to just say that we don't care what federal judges have told us because they sit in Oklahoma or Colorado or Chicago or Philly -- they apparently want to sit in D.C. -- so I'm going to ignore them.

That's not the way I think we expect the Federal Government to act. To their credit, it's not the way the Federal Government acted here. What they've said here is now that they have acknowledged that it really is the same plan, well, then the "accomodation" doesn't solve anybody's problem because you're still telling the Little Sisters you have to give out a plan that includes the things that violate your beliefs.

Under Hobby Lobby, the substantial burden question is over. It's done. That is a substantial burden. The Supreme Court already decided it. It's binding on HHS. It's binding on lower courts. It's done.

And so, one, it's after those concessions, after they acknowledge that fact -- which is different from what they told the Third Circuit in Geneva College. Once they acknowledged that fact, they couldn't win a RFRA case, right.

So what could they do? Well, they could either do

what they've done for the past year, which is go on and just keep losing RFRA cases, right, and that's kind of fun for me and I'll sue them everyplace else and my clients will keep winning.

But that's no way to make law, right? That's not what Congress told them. Congress told them don't substantially burden religion.

One, two, three, four -- ten courts now have said this substantially burdens religion. Was the Agency really supposed to say, I don't care. I'm going to keep doing it anyway. I'll keep getting sued. I'll just keep losing. I don't have the authority to fix it. Or should they say, Well, enough courts have told me I'm violating people's federal civil rights. I'll obey the law and I'm going to fix it.

And that's what they did and I'd say that's the right thing to do. I would say that's the only option they had. In other words, I don't think legally they had the option to say, I don't care that everyone keeps saying this was a substantial burden on religion, I'm going to keep doing it anyway.

RFRA says, Government shall not do that. They're the Government. They are duty bound to obey RFRA. They're not free to just say, I'd rather not, right? That's not one of the choices that they had.

And so the choice the states want to put them to is

a mandate that applies to people like the Little Sisters of the Poor, which the Government has now conceded violates RFRA, and lots of courts have found that, or, frankly, no mandate at all, right, because those are the two choices they're being given.

The states are saying you can't possibly have a mandate that applies to just about everybody on the planet, but exempts the people who beat you under RFRA.

I don't think there's anything in the law that tells the Government to behave that way. I think it's pretty bizarre to think that the APA or that Congress intends for the Agencies to just forge right ahead losing the cases and that they can't fix what they've done. They can't stop losing the cases by just changing the Rule. What benefit is there to having them lose each of these cases retail, to make the religious nonprofits go get lawyers and show up in court and drag the DOJ lawyers who, I think, right now aren't even getting paid, right, drag these people around court to court for losing these cases. For what? There's no benefit. No one benefits from that.

And so the state's argument, I would say, requires you to ignore the fact that the Agencies face these injunctions. It's not clear what they should have done with that. It's not clear what the states think they should do with that. But it would be odd, I think, for one Article III

Court to say, Oh, Agency, what you really should have done is stop caring so much about those other ten judges who said that it was a substantial burden and you should just forge ahead with the reg. I think that would be odd. I'm not aware of other courts who have said things like that.

At times I read the state's briefs to be saying that RFRA perhaps authorizes one and only one solution and you can go for that one solution, but anything else, RFRA doesn't authorize it.

I don't think that's right. I think that's a particularly bizarre way to read RFRA. You can't reconcile it with Hobby Lobby, right? Hobby Lobby, the Court said, There's a substantial burden. And then the Court says, Let me think about a few less restrictive alternatives you could use.

Right, they start with what they say was the "most straightforward" thing, which is, Hey, Government, if you want to get everybody free contraceptives, I've got an idea, why don't you give people free contraceptives instead of making other people give people free contraceptives. The Federal Government, if that's important to you, you can do it yourself. That's the most straightforward way. And the Court said that that was obviously less restrictive, a less restrictive alternative that they could have tried under RFRA.

Then the Court went on to talk about the accommodation as it was presented to them then, that it's some

separate plan, and they said, Well, that looks less restrictive too. Right? If RFRA was -- there was only one possible solution, you can do that one and otherwise you lose, that type of approach from the Court doesn't make sense.

And RFRA is designed to be very protective of religion. That's the whole point of RFRA. To look at RFRA and say that, Well, RFRA's going to say you'd better hit -- you'd better get the bulls eye. You'd better get it exactly right. If you get it exactly right, fine. If you get it at all wrong in one direction, you'll go lose a bunch of RFRA cases. And if you overshoot the mark by being a little too protective of religion, nationwide injunctions are against you.

That's a pretty strict way to read RFRA and it's not a terribly protective-of-religion way.

I would say the better way and the way the Supreme Court was discussing in Hobby Lobby is to say, Well, under RFRA, when you're imposing a substantial burden, you've got to go do something else and the Court threw out a couple of different possibilities. I think it's pretty odd to look at this world -- like this particular set of accommodations, right? So, no, we don't cover grandfathers, it's only for people under 50. I think the state still wants the Obama-era Religious Exemption. So an accommodation with the Obama-era Religious Exemption that doesn't work for anybody on church

plans that requires this handoff of the piece of paper, that's the one thing RFRA allows.

That's weirdly path dependent, Your Honor. That's strangely path dependent to say that's the one.

That's the one that the Obama Administration came upon and perhaps in entirely good faith, right, in 2013. That's what they came up with.

But the idea that that's the only thing? That's the only way the Federal Government could decide to get people contraceptives that would comply with their obligations under RFRA? That's odd.

The Supreme Court again didn't think Hobby Lobby when they said there was a different more straightforward way.

Again, the obligation of RFRA is mandatory. It's not discretionary. Putting contraceptives into the preventive services mandate, that is discretionary. That's just done on a website.

RFRA is a statute. RFRA binds them. They have no choice but to follow it. They have to follow it. Federal civil rights laws are obligatory.

In Your Honor's 2017 opinion, you addressed RFRA and, you know, we certainly were in front of you to make the arguments we're making, so I don't feel like I'm presenting something new to you, but when you addressed RFRA, you did it through the lens of Geneva College and Real Alternatives.

We laid out in the brief and I'd just like to spend a couple of minutes explaining why I don't think those cases can actually resolve the RFRA claim.

Geneva College, as Your Honor pointed out, that's been vacated.

Real Alternatives specifically said that they weren't saying Geneva College was binding. So Real Alternatives did not revive Geneva College. Certainly not for this particular claim, the employer's claim.

In other words, in Real Alternatives, the only RFRA claim on the table was whether an employee has a RFRA claim to not have to have an insurance policy that gives them access to something else. There was no religious employer claim at issue in Real Alternatives.

So Geneva College, you know, is vacated, was not revived by Real Alternatives. You know, to just give you one data point, the Geneva College case itself is one in which the trial judge has since entered a RFRA injunction saying that there's a substantial burden on religion. So in Geneva College, Geneva College is not even law of the case. I mean, in that case, the trial judge went back and said, Oh, based on what's presented to me now, yes, that is a substantial burden. So I don't think Geneva College is in any way binding on this Court. It's also not persuasive in light of what the Government has conceded since then and we lay out what they

claimed in their briefs to the Court and what the Court had found in Geneva College. But, again, Geneva College is based on the fiction that it's not your plan and the reality which they have since conceded is that, in fact, it is your plan. And once they conceded that reality, I don't see how you can say Geneva College is persuasive authority because Geneva College is analyzing a state of facts that I don't think anybody in the courtroom now can claim is true. Nobody can say it's not your plan because what they eventually had to acknowledge is that, well, to make the thing work, we need ERISA and we need to order your plan administrator to administer the plan in a certain way. And so once they did that, they had to acknowledge it was the same plan. To their credit, they told the truth, they said it was the same plan. But once they did that, the RFRA case was sealed. And, again, every Court considering it since then has found that it was a RFRA violation.

The states argued that there was no reasoned explanation for why the Agencies have switched their position. They didn't explain why they now do think it's a substantial burden. In the IFR, and I believe they incorporated the IFR by reference in the Final Rules, they do say, Now that we have acknowledged that it is the same plan, we realize that it actually wasn't accommodating anybody's religion and it's still a substantial burden. So they do explain why that's so.

Again, it's very public record. They've done it in open court. There's no mystery as to what happened. They've explained that it's the same plan. Once you do that, they've lost that argument.

Two last points and I'll sit down, Your Honor.

One, the states, again, as I heard them, were making the argument that they think the Obama-era Religious Employer Exemption was required by RFRA. If it's required by RFRA, it's because there is a burden. And it can't be that there's a burden on those employers, but not on these. So if you think that it's RFRA, the free exercise clause that requires it, it's because you think there's a burden. There's no world in which you can say RFRA and free exercise required this thing that I like because I don't really want to say I'm going after churches, but they don't impose a burden on these other people. Like either there's a burden here to fill out the form and hand it to somebody or there's not. I think the answer pretty clearly is, yes, there is, because it means your plan is covering something that you have religious objection to and Hobby Lobby already answered that question.

And then, lastly, I would just make a brief plea to the Court, which is, this has been a long and, frankly, unnecessary fight. There are a lot of ways to get people contraceptives.

The Federal Government's pretty good at it. State

governments are actually pretty good at it too. They all do it. The idea that these two governments should be fighting over whether the Constitution or federal law requires the Federal Government to indirectly make nuns or somebody else do it as opposed to these two governments doing it themselves doesn't make a whole lot of sense. And RFRA, frankly, exists to say, Hey, guys, if you all can do it yourselves, you can't go burden somebody else. That's precisely what we've got here.

All of the state's declarations talk about all of the great programs that they have to do this. Well, given that they all have all these great programs to do it, it can never be this compelling interest in dragging nuns into the process.

So we'd ask Your Honor to rule against the state's motion for an injunction and hopefully put us on the path of being done with this unnecessary fight.

Thank you, Your Honor.

THE COURT: Response briefly.

MS. THOMSON: Thank you, Your Honor. A few brief points.

First of all, I would note that the law under the ACA Women's Health Amendment as implemented by HRSA is that all employers must include contraceptive services and counseling in their insurance program. So that is the law

that exists. This idea of a tortured path dependence thing is I think not relevant because the law is that. This is what insurance employers -- employers must provide to their insurees.

All RFRA does is prevent the Government from enforcing the law against certain people where there's not a least restrictive means to further the compelling Government interests.

So with regards to what Hobby Lobby held and with regards to Geneva College, there is a difference between whether someone's religious objections are sincere and whether they do impose a substantial burden.

With regards to whether Geneva College was procured on false pretenses, I would point that the law under Third Circuit and under RFRA is that a Court must look to what the parties actually are obligated to do, not what third parties are obligated to do.

So what the Third Circuit held in Geneva College is that the actual people who were claiming this a burden were not -- were only obligated to say they were not going to cover contraception. That was it. The fact that the law stepped in and required third parties to follow the law and provide federally-mandated contraceptive services to other third parties, the employees of the objecting entities, was not something that could constitute a burden because the only

burden is on the action that the actual objecting person is seeking. So the logic of Geneva College still controls.

I would note that all of the Courts to consider the accommodation post this purported concession in Zubik have been uncontested decisions, at least the ones in the district court, and I would note that the Supreme Court in Zubik did not actually find that the accommodation violated RFRA or make any decision about the accommodation. So there is actually no -- that Court, despite this purported concession, did not recognize that it was somehow a fatal flaw to the accommodation. And every Court to look at it after has been looking at uncontested circumstances, about whether or not the accommodation posed a substantial burden.

Finally, I would note that with regards to Government providing services, there's been talk in the briefing about Title X and an issue with the Government potentially allowing women whose employers claim the exemption to go to a Title X clinic to get access to those federally-mandated contraceptive services.

I would note that simultaneously, the Government is promulgating a new Rule to be issued in their Notice of Proposed Rulemaking and they're actually set probably to issue the Final Rule any day now which will substantially limit funding for Title X clinics. It's also not clear how exactly this would function because all it says in the Title X Rule is

that women whose employers claim the exemption will be considered low income families for the purposes of Title X clinics. But given that employers don't have to actually do anything affirmative to claim the exemption, it's not at all clear how this would function in reality. And, moreover, this is not a solution to the real issue which is -- the real interests which is giving women seamless access to contraception as part of all of their other services because contraception is, at the end of the day, health care and it should be included in all of women's other health care services with their doctor instead of having to go to a different place, go through a different process to get this particular form of health care.

If Your Honor has no further questions.

THE COURT: No.

MS. THOMSON: Thank you.

THE COURT: Okay, we're going to move to national injunction, but I have a series of questions that I just need quick answers to.

Defendants, is it your position that the Final Rules make no substantive changes to the IFRs? That is, the Final Rules have the same substantive effect as would the IFRs had they not been enjoined?

Put differently, are there any changes to the IFRs embodied in the Final Rules? Are they all technical revisions

to clarify the meaning of the IFRs or is there anything that makes substantive changes?

MR. SANDBERG: Would you like me to answer here or there?

THE COURT: Yes.

MR. SANDBERG: So to avoid any confusion about labels, I'll do the best I can to explain it.

I think the one that sort of might be termed substantive change is that the Rule discusses the meaning as supported by -- in the Women's Health Amendment in terms of HRSA's delegation, which, to the extent the Agency therefore adopts that rationale, that may factor into Chevron.

But in terms of --

THE COURT: Sorry, spell that out a bit more.

MR. SANDBERG: Yes, sure.

So the Agency sort of takes the position that the -- which I don't recall that it did in the IFR -- that the part of the ACA that says, you know, the additional preventive service shall be those -- shall be required as provided by guidelines supported by HRSA. The Rule goes into what the Agency thinks "as provided by" means.

THE COURT: Ah, okay, so this is the "as", what does "as" mean --

MR. SANDBERG: Correct.

THE COURT: Essentially, in the Rules, the Agency

has taken a position on what "as" means in a statute.

MR. SANDBERG: Correct.

THE COURT: Isn't that a judicial function? Quite clearly a judicial function?

MR. SANDBERG: No, I mean, not if -- under Chevron Step One, if Congress is clear, then the meaning is what Congress says.

Under Step Two, if there's ambiguity, then you defer to the Agency's reasonable interpretation.

THE COURT: Okay, where can I find that discussion in the Final Rules?

MR. SANDBERG: I can get you that. Did you have any other questions that you --

THE COURT: Well --

MR. SANDBERG: And just I think, I mean, otherwise, generally, I would say the changes are sort of technical and sort of housecleaning and clarifying things from the IFR.

There's a couple of places where the Agency says, you know, We said this in the IFR. People asked what we meant. What we meant was, you know, A, B, C.

So they don't say they're changing anything. They're just clarifying what's in there.

THE COURT: Okay, so to keep on this line, you're going to provide me with the "as" supported by a pinpoint cite, but I do have a question about the change that the IFRs

and Final Rules make to the existing accommodation exemption framework. That hasn't gotten much attention.

It's my understanding that the IFRs and now the Final Rules changed the level at which the exemption is to be applied. So whereas before, the availability of the exemption was to be determined on an employer-by-employer basis, the IFRs provide that the exemption will be determined on a plan basis.

MR. SANDBERG: To my understanding, that's correct.

THE COURT: And do you have any information about how often an insured's health care plan sponsor will be a different entity than the insured's employer?

MR. SANDBERG: I don't standing up here. It's not saying the Agency doesn't. I don't standing up here.

THE COURT: Okay. So we just got the administrative record here. The fact that I just received the administrative record, do you think that that makes any difference? Do you think I need to -- that the Plaintiff should have another opportunity to look at the administrative record? Do you think that we need to -- is there anything that we need to do here in this court with respect to that?

MR. SANDBERG: Well, I would say this. To the extent the Court, which we would think is incorrect, would say, I can look to these outside declarants, these people outside the Agency to determine the correctness of what the

Agency did, we think the Court's previous ruling in our motion in limine which said you could rely on sort of extra record information for a limited purpose -- but that limited purpose did not include assessing the correctness of what the Agency did. So the only thing I would say would be if the Court were inclined to say, Because I got the record just today or yesterday, I'm going to rely on extra record evidence, we think that would be incorrect and that, you know, if the Court wants to take additional time or permit additional briefing on what's in the record, we would prefer that certainly as opposed to --

THE COURT: Well, yes, that wasn't the question.

The issue is -- well, I suppose it's for the Plaintiff.

Have you had access to the administrative record before yesterday or whatever?

MR. FISCHER: Your Honor, we received -- no, not before. We received it by FedEx, I believe --

THE COURT: Do you think it makes a difference here?

MR. FISCHER: It does certainly because I think it heightens the burden on Defendants to justify their reversals of position here.

If they're relying on what's in the administrative record to justify, for instance, their reinterpretation of the word "as", the fact is we have not had the chance to go

through and analyze exactly what they relied on.

Now, the only thing we found related to that, someone printed out the OED definition of the word "as" two weeks after the Rules were issued and they threw it to us in the record, but I think it makes the burden higher on Defendants.

I also think it may inform -- regardless of what happens today, it may inform how the case proceeds and I'll talk about this a little bit more when we get into injunctions, but perhaps it's an argument for all parties that are moving expeditiously toward a final judgment. If there's a preliminary injunction entered or if there is not, but one that will give everybody the opportunity to take full account of the administrative record rather than resting on a decision on a PI that was the basis of a record that we have only had a day to look at and not even a day, frankly --

THE COURT: So do you think I can make a decision without any further briefing with respect to the administrative record?

MR. FISCHER: Yes, I believe Your Honor can because we think that the conclusions in the Rule are in many ways arbitrary and capricious on their face. We think that, for instance, the reversal on benefits of contraception, which is justified by a statement that they've identified, one study that's ambiguous on the benefits, that by itself simply

doesn't carry their burden. We think that there's enough in there right now to show that the conclusions that the Government's reaching are simply not justified. The same as I think with this "as" issue.

There's been a lot of discussion about, you know, does the ACA give the Agency the authority to create exemptions. Well, they're resting the authority on the word "as". But that's the only argument I've heard as to where this authority comes from. They say, well, because it says as provided for, HRSA can do more than just identify services which is what HRSA did. They're saying HRSA -- which has no expertise in religious exercise identifying a burden on religious beliefs -- they're saying HRSA, nonetheless, has the authority to create broad-sweeping exemptions and they're resting all of that on the use of the word "as".

So, frankly, I think it's unlikely there's anything in the history of the record that will show that to be justified. On its face, I think it's, frankly, just wrong and Your Honor could rule on that basis.

THE COURT: Okay. Have you got the "as" cite now?

MR. SANDBERG: Yes. The cites are the Religious Rule. It's 83 Fed. Reg --

THE COURT: 83 Fed. Reg.

MR. SANDBERG: -- 57,540 to 41.

THE COURT: 57,540 to 41.

MR. SANDBERG: And the parallel citation in the Moral Rule, would you like that?

THE COURT: Yes.

MR. SANDBERG: 83 Fed. Reg. 57,597 --

THE COURT: 57,597.

MR. SANDBERG: -- to 98.

THE COURT: Okay.

MR. SANDBERG: I do want to point out, our only basis is not the word "as".

We've had argument here this morning, we've provided other bases entirely tendentious to their only basis for --

THE COURT: I understand. I understand. I just want to focus on the "as" argument.

MR. SANDBERG: And it's also entirely tendentious to say that we rely on one study for the benefit. There's -- I think there's four or five pages in the Federal Register regarding sort of the Agency's assessment of the efficacy of contraceptives and it doesn't rely on one study.

THE COURT: Okay, so let's now turn to the scope of the remedy.

MR. SANDBERG: Okay.

MR. FISCHER: Thank you, Your Honor.

The states believe that the only remedy that will fully address the harm that they and the residents are likely to suffer is an injunction preventing the Agencies from

enforcing the Rules nationwide. That is what the Court issued before and we believe it's also warranted under the facts of the Final Rules.

Now, the question of what remedy is appropriate depends on a variety of factors. It involves looking at the nature of the violation, it involves looking at the nature of the harm, it involves balancing the equities, looking at the public interest. And I think the Supreme Court's decision in the -- one of your early travel ban cases where the Court granted a stay of a nationwide injunction in some respects, but allowed the nationwide injunction to go forward in other respects, particularly with individuals who were similarly situated to the Plaintiffs in that case. So while the Court stayed some aspects of the injunction, it did not say a nationwide injunction was improper.

THE COURT: Well, Justice Thomas did.

MR. FISCHER: Justice Thomas did.

THE COURT: In his dissent, he put forth five reasons why they were totally improper.

MR. FISCHER: Exactly. It was his dissent and I believe he was writing for himself and either one or two other Justices so it didn't carry the day. The remainder of the Court felt that a nationwide injunction at least in some respects was appropriate.

And, frankly, you're going to think if we look at

the concerns that Justice Thomas raised, they're not appropriate in this case or they certainly are not a reason to not issue an injunction which we think is necessary to give the states the full relief that we believe they made a case for. You know, Justice Thomas talks about issues need to percolate among the circuits. This issue clearly is. There's a case pending in California, there's a case pending in Massachusetts where the Commonwealth of Massachusetts lost on standing ground. It continued to press ahead with that case. That's before the First Circuit. There are other cases brought by private entities or organizations that are also pending.

This issue will be addressed by a number of circuits. So -- and, frankly, I think the fact of whether or not Your Honor issues a nationwide injunction isn't going to have much significant impact on whether those other cases proceed. Those are decisions being made by the litigants in those cases. So it's not as if the Supreme Court, if this issue ultimately reaches the Court, will be deprived of the benefit of many, many courts looking at this issue. In fact, I think it's inevitable that many courts will have considered this issue by the time that it comes before the Court.

I also think it's important to understand the harm that we are asserting, which is that residents of Pennsylvania and New Jersey will be deprived of contraceptive coverage and

will turn to state-funded plans.

Now, the Defendants have said Your Honor can just issue an injunction that applies in Pennsylvania and New Jersey. I don't really understand what that means.

When you've got a situation where college students in Pennsylvania may be on a health plan from their parents, that their parents pay for, the parents live across the country, is that college student then allowed -- is that parents' plan then required to cover contraception or are they exempt from the injunction?

If the answer is because that plan is located in another state, they're not required to cover contraception, then that's a harm that Pennsylvania will suffer.

So given the highly integrated nature of insurance, achieving full relief for the states will require an injunction that goes well beyond our borders.

THE COURT: So in your brief, you talk about -- you provide me with two categories of people who may come from outside of Pennsylvania, but may use Pennsylvania's services. One are the folks who commute into either New Jersey or Pennsylvania. So I suppose there you would have the neighboring or nearby states. So the question I would have there is why would an injunction cover, let's say, New Mexico when it's highly unlikely that someone is commuting to Pennsylvania and New Jersey from New Mexico, but then I hear

you talk about students who come from around the country. Is there any indication, do you have any evidence to suggest that there are students in Pennsylvania from every state in the union or any reason to believe that that is the case, any evidence?

MR. FISCHER: I am fairly confident that is the case. I can't point to specific, you know, pieces of evidence in the record.

I'll note in the amicus brief that was submitted by 20 states and the District of Columbia, there's a reference to Pennsylvania I think having the second highest number of first-year students of any colleges -- of any --

THE COURT: This is the American Association of College --

MR. FISCHER: No, this is the one from other states, from the Commonwealth of Massachusetts and 19 other states as well as D.C. I believe it's on page 14 of that brief. There's a reference to, essentially, how significant a role education plays in Pennsylvania, that Pennsylvania has a large number of colleges and universities, and I'm confident that -- well, I'm reasonably confident that some individual college in Pennsylvania could probably say they have students from every state and certainly the state -- the Commonwealth as a whole, I would be very surprised if that were not the case. I will say that and I'm happy to submit something for the record

later.

This is sort of the complicated nature and this kind of shows why this case is different from other cases where courts have put the brakes on nationwide injunctions.

There's a citation to the Chicago case which involved the dispute over so-called sanctuary cities laws.

Well, the issue there was whether the Justice Department had to give grant money to states and to cities that it was trying to withhold. Now, it's very easy to sever Chicago's grant from Philadelphia's grant from your grant and say, Okay, Chicago, you have shown you should prevail, therefore, you get your grant money, but it doesn't matter whether California, San Francisco, whether anybody else gets the grant money to remedy the violation that you have alleged.

This is a very different situation here. Saying that the Rules should not harm anybody in Pennsylvania or should not cause injury in Pennsylvania or New Jersey requires much broader relief than was available in that case and requires broader relief than just simply an order saying the Defendants may not enforce the injunction within the borders of Pennsylvania or New Jersey. We believe that would prove to be unworkable and that, therefore, something broader is necessary in this case.

I also think it's relevant to the analysis, and this is, again, I think the Court's -- the Supreme Court's decision

in the IRAP travel ban case touches on issues of public interest and balance of equities. It's relevant that these Rules are harming women across the country.

There's a great deal of evidence in the record on this. We've submitted the supplemental declaration from Ms. Kost from the Guttmacher Institute which breaks down per state essentially the percentage of women who are -- who need publicly-funded Family Planning benefits and who actually get it and what that shows is there's a gap in every single state. No state is able to meet all of the needs of women who need Family Planning benefits. So that if the pool of women who have to rely on the state is expanded, the burden on the states everywhere is going to increase.

It also, as I mentioned earlier, noted the fact that well over half of the unplanned pregnancies in this country end up imposing costs on the states. That's true across the board with the exception of a few states where the percentage is just under 50 percent. But, regardless, increasing the number of women who do not have access to contraception will increase the number of unplanned pregnancies and will impose costs on every state in the country.

These again are factors that go into the equities that the Court should consider in fashioning appropriate relief.

THE COURT: Do you think there's a perfect solution?

I mean, I sort of have to go between the concept of providing complete relief, but also providing relief that is no broader than necessary to provide full relief. So is there a perfect solution here?

MR. FISCHER: Well, there is in that a nationwide injunction is in many ways the least restrictive form of relief that would give the states full relief for what harms they've alleged. And, frankly, if the analysis were to be more restrictive than that, the Supreme Court in the IRAP case would have done something different and would have said we're only allowing the injunction to move forward as to the named Plaintiffs, not as to individuals who are similarly situated.

The Supreme Court considered issues like public interest, balance of equities and said it was not an abuse of discretion to allow that, to allow that class of individuals the benefit of the injunction.

So I think where there may be some tension between fashioning relief that gives the Plaintiffs, you know, full remedy for their harms versus fashioning a relief that is broader than necessary, the Third Circuit I think has made clear that the injunction to be crafted must give the Plaintiffs -- must address the Plaintiffs' injury that they have alleged.

So that, therefore, to the extent what -- you know, to the extent addressing the injury that Pennsylvania and New

Jersey have suffered requires nationwide injunction, that is the least restrictive way of addressing this claim.

And I would also note I think it is relevant again that other states have weighed in. There's an amicus brief from 20 other states and D.C. that talk about the importance of this issue to their states. It is not as if this is a harm being felt in Pennsylvania and New Jersey alone and other states do not have an interest in this. I think that goes to some of these other issues that are relevant.

And then, finally, I think that the Court should consider the sweeping nature of the Rule itself in fashioning relief. You know, I think we sometimes -- I think the arguments sort of drifted away from what's actually at issue here.

We're not trying to reinstate the mandate on the Little Sisters of the Poor. Let me make absolutely clear about that. They are protected by an injunction from the District Court of Colorado that says the Government cannot require them to pay for contraception. We are in no way challenging that. We're not challenging the earlier exemption, we're not challenging the earlier accommodation.

We are challenging these Rules which allow for the first time publicly-traded companies to opt out of the exemption, which it's clear got opted out of the contraceptive mandate, which completely do away with the accommodation and

render it totally optional even in the cases of the companies that never asserted that it violated their religious beliefs to fill out the form and send it to their insurance company.

And then, of course, there's the Moral Exemption which, as Your Honor correctly held earlier, could allow a company to say, It is our moral belief that women should not be in the workplace and we're not going to offer contraception.

Now, I was frankly surprised that in light of that decision, the Agencies did not at least go back and say they were going to withdraw this Rule, issue a new NPRM, go through the process and try to address some of these concerns.

I don't see any real discussion of those concerns and I think, as the earlier colloquy indicated, there's very little substantively different about the Rules. They essentially are the IFRs with a few tweaks and a few things that were true earlier sort of explained a little better.

So I think with all of those factors considered, that the scope of the Rules that we are challenging, the harm to women across the country, the integrated nature of insurance in this country, the difficulty of providing complete relief for Pennsylvania and New Jersey without imposing a nationwide injunction and, finally, the fact that this issue is going to percolate, we think a nationwide injunction is the only appropriate remedy.

And I also have just one final thing. I think the Ninth Circuit, as Your Honor's aware, remanded that case for consideration of the appropriateness of the nationwide injunction. One of the factors that it turned on, which was interesting, was that the case had been stayed after the preliminary injunction was issued. We think that that perhaps should inform how our case proceeds afterwards. And as I indicated earlier, given the issue with the administrative record, we likely would not agree to a further stay following a preliminary injunction and we are certainly prepared to move this case forward to a final remedy.

But in the interim, what is necessary to preserve the status quo as it existed really prior to the IFRs on October 5th, 2017, is a nationwide injunction that prevents the Agencies from enforcing the Rule. Okay, that's what we request.

THE COURT: Thank you. Just off the record for a second.

(Recess taken)

(After recess:)

THE COURT: Okay. Have a seat. Okay, let's hear from the defense on the nationwide injunction issue.

MR. SANDBERG: Thank you, Your Honor.

I think the well-understood backdrop to this is we don't think an injunction is appropriate.

Forging on from there, our first argument is that Plaintiffs need standing for every form of relief sought and Plaintiffs do not have standing to seek relief for a state just because of similarly situated and the sort of recent -- Supreme Court's recent decision in Gill versus Whitford, which is admittedly a different context, it has to do with voting rights, the Supreme Court there found that residents of one district didn't have standing to challenge how the state had set up other districts because they weren't injured by it. So in terms of getting an injunction, getting an injunction that covers the whole state, they could only get an injunction that related to the districts they were in and that's because they don't have standing under Article III.

We think the same law clearly applies here.

Another argument against a nationwide injunction is the sort of traditional equitable limits of injunctions.

Injunction is an equitable remedy. And as a traditional matter, injunctions were given only to the extent necessary to provide the relief to Plaintiffs. And so unless Plaintiffs can establish that a nationwide injunction is necessary, and it's their burden as Plaintiff, I think, to establish the scope of the necessary injunction, unless they can establish a nationwide injunction is necessary, they haven't met the threshold of that traditional equitable principle and I'd like to pick up a little bit on the sort of

the college student example.

So if you have a college student from Idaho that goes to Penn State and the idea is, well, maybe they're on their parents' plan.

One question: Are they on their parents' plan?

Second question: You know, did their parents' plan in Idaho, did it previously cover contraceptives?

Maybe; maybe not.

Are they now invoking the exemption?

Maybe; maybe not.

Are they invoking the exemption as to contraceptives this college student uses because some employers and providers are willing to cover certain things? So are they covering it as to a contraceptive used by this woman?

Maybe; maybe not.

Will this woman then qualify for state coverage?

Maybe; maybe not.

Will she choose to use state coverage?

Maybe; maybe not.

So the fact that you have a student from Idaho, certainly even if you had 1 or 10 or 20, that's not dispositive of whether, in fact, the State of Pennsylvania is going to be harmed because it relies on a long causal chain and to just -- I think partly because, and I don't want to devolve too much in that, but partly because their standing is

in the realm of maybes, now their injunction is in the realm of maybe, too.

It's like, Well, because, you know, maybe this person's harmed, maybe this will happen, maybe that will happen, and then maybe we'll need a nationwide injunction.

So I certainly think that as an equitable matter, there's no basis for a nationwide injunction based on a series of maybes, a chain of reasoning that relies on many maybes across many different potential individuals affected.

And as to the interference of development of law, I think it's likely true unless, you know, this Court's decision somehow stands in the way of Judge Gilliam in the Ninth Circuit deciding something, that there at least will be a couple of decisions on this, but I think in terms of the percolation of issues and interference and development of law, you have to look at the cases that aren't filed and decided as well. You can't just say, Oh, there's two cases so it's not going to interfere with the development of the law.

Well, maybe the issuance of a nationwide injunction prevents other cases from being filed and decided.

And I think that's a key question when talking about the interference of development of law.

And on this point, I would like to add, a nationwide injunction would presumably extend to Massachusetts and I believe Massachusetts has filed an amicus brief here.

Massachusetts, of course, lost their case in the District of Massachusetts so I think that sort of brings into sharp relief parts of the problem of issuing a nationwide injunction. And this case includes potentially giving someone a win they didn't get when they litigated in a court in their district.

I would like to cover a few other points somewhat more briefly.

I think Plaintiffs are overreading the International Refugee Assistance Plan case. That case certainly doesn't squarely decide the scope of preliminary injunctions and when national injunctions are appropriate. And, in particular, Plaintiffs discuss language that the Court says that you have to consider the overall public interest, and that's true, and it's a long-held principle that when courts are issuing injunctions, they consider it's a public interest. It's one of the factors when the Court's balancing it, it balances the parties' interest and then it also balances the public interest. But I don't think that's ever, at least in my -- I don't think that's appropriately understood as meaning you can give the Plaintiff an injunction broader than that necessary to provide them relief. So sort of, as I view it, when the Court said consider the public interest, it meant something like this: If the Government has a building project that's going to impose irreparable harm of $5,000 on a Plaintiff and, you know, ceasing that project will impose some harm on the

Defendant, you consider that, but then you also consider maybe that building project has brought 500 jobs to the area that wouldn't otherwise be there. So if you grant the Plaintiff an injunction that would be sort of necessary to provide them relief, it would, you know, maybe cost those 500 jobs. So that's the kind of public interest you consider. In the course of granting an injunction of appropriate scope sufficient to provide the Plaintiff relief, you consider the public interest in that injunction. I don't think it means anything more than that. I don't think it means, Oh, we can consider whether there are other states that might be kind of similar and therefore give Plaintiff a broader injunction than is necessary to provide them the remedy they need. And I certainly don't think that's what the Supreme Court was saying.

There were a couple brief asides that I thought were sort of tangentially related to the scope of the injunction. I'd like to comment briefly on the publicly-traded companies aspect.

As the Rule points out, it seems possible, but unlikely, that there are going to be many publicly-traded companies that will invoke the Religious -- that will invoke the Religious or Moral Exemptions. They certainly created an exemption for publicly-traded companies on the Religious Rule, but the Rule itself says they think this is limited and

unlikely to occur. And, in fact, Hobby Lobby, I believe, the Supreme Court said a similar thing about the likely effect of publicly-traded companies getting exemptions and accommodations.

And the other thing would be that the Moral Exemption is some sort of open invitation to gender discrimination. This was addressed, as I recall, in the last hearing and I think we provided responses including there might be other potential remedies.

But I would also like to say, as Mr. Rienzi has pointed out, the states have their own exemptions and they clearly don't think that the potential for some bad actors in some small number of cases to misuse those exemptions is a basis to not have Moral Exemptions to health care, otherwise applicable health care law. They haven't seen this as an insuperable barrier for their own exemptions. It's hard to understand why the fact that there might be a few bad actors through whom, as we say, there might be other remedies somehow becomes an insuperable barrier to the basis of the Moral Exemption here.

If the Court has no further questions.

THE COURT: Mr. Rienzi.

MR. RIENZI: Just three brief points for Your Honor.

One, on the publicly -- I'm sorry --

THE COURT: On the what, sir?

MR. RIENZI: On the publicly-traded point, I would just point out that most of us were probably paying attention when Hobby Lobby was litigated. And when the claim was, Oh, if you let Hobby Lobby exercise religion, we're going to see a rash of these claims of for-profit businesses coming in and making all sorts of outlandish religious liberty claims. That claim's getting kind of stale. Frankly, it's 2019. It was four and a half years ago. It hasn't happened. There's no reason to believe it will happen.

The reason the Rule has to cover publicly-tradeds is the same reason in Hobby Lobby that they said you couldn't exclude corporations generally, which the Dictionary Act says, Person includes corporation. And so it's pretty farfetched, it's pretty unlikely, we still haven't seen the first such case, even though Hobby Lobby was almost five years ago, but it certainly should make the Rules invalid. Congress said person.

Secondly, you heard a bunch of times really, but, in particular, the nationwide injunction argument references to the sweeping nature of this Rule, to the great deal of evidence of the problems. We heard about all the amici who filed briefs and the 20-some states that filed briefs.

I would just point out the more you hear that, I would just ask Your Honor to think about the fact that, Well, gosh, it's pretty weird to have a sweeping, but imperceptible

Rule, right? Like it's sweeping, it covers all these people, all these amici are in the case, the 20 states, everyone showed up. Nobody can find a soul. Nobody can find one. There's not one employer who said they're going to change. There's not one employee who said they're going to lose it. Maybe it's all fake.

I suggest to Your Honor it is all fake. There's actually not some huge group of people who are about to lose coverage. Why? Because the actual objectors have their RFRA suits. Because the states and the feds have all of their programs. From the modern era through 2013, women got contraceptives through a zillion different programs and they didn't need nuns.

And so the idea that this is going to cause some huge problem is just really farfetched and the more you talk about how sweeping the relief needs to be and all these people who are showing up tell you, yes, it's a problem in my state, too, the more you should pause and say, Gosh, and none of you people can find a soul, not one? That's odd. That's consistent with the fact that it's not really the big problem that they're claiming it's going to be.

Lastly, Your Honor, you said, you know, you're wondering if there's a perfect solution on the nationwide injunction point. To be clear, The Little Sisters, we don't take a position either way on scope of relief, on whether

nationwide injunctions are okay or not okay.

But I will say if you're looking for the perfect solution, RFRA gave it to you. RFRA gives you the solution that lets you have a contraceptive mandate and lets a small number of religious objectors not do it and lets all the other ways that people can get contraceptives continue forward, including changing Title X to make them more accessible. That's your perfect solution. Not a solution that instead asks this Court to issue an order that puts the Administration to an all-or-nothing choice, that either you have no contraceptive mandate or you have one that gets Little Sisters of the Poor. That is the furthest from perfect kind of solution you can have.

So I would just suggest that the RFRA solution, the live and let live solution that says, We're big enough to both have a lot of people that want contraceptives and a pretty small minority to say, Hey, I can't have something to do with that, the Government's got to do it another way, that's the RFRA solution. That's actually the perfect solution that would get everything done.

Thank you, Your Honor.

THE COURT: Okay. Anything else from the Plaintiffs?

MR. FISCHER: Real briefly, Your Honor?

THE COURT: Okay.

MR. FISCHER: Just to be clear, Mr. Rienzi just acknowledged that many of the objectors are protected by injunction. So if the Rule is not for the benefit of the people who have objected, then whose benefit is it for?

To be clear, we do not know exactly how many women will be affected because the way the Rule is written, the notice provisions are almost seemingly designed to make it difficult to figure out whether your employer is going to withhold contraception. There is just simply no additional notice is required beyond that which is required by ERISA. So it's not like employers need to publicly announce that we are not going to provide contraception any more.

I'm aware of a case where the college did publicly announce, and it was met with significant backlash, and then changed its mind which is probably a lesson to others that perhaps they should not make a big deal out of the fact that they're going to deny contraception. That's not to say that there are not entities that are planning to do it.

Finally, just to the nationwide injunction point, although there are certainly laws restricting insurance to -- you know, the interstate sale of insurance, there is still a nationwide market for insurance. That's why ERISA exists. There are companies that provide coverage for their employees nationwide that are governed under ERISA. As we mentioned earlier, there are students in Pennsylvania who receive

coverage from their parents' plans up until age 26. There's just simply no clean way of carving out the harm to Pennsylvania and New Jersey without leaving our states somehow short of full relief than a nationwide injunction and that's why we think it's appropriate here.

We think that the IRAP case does give some direction.

I also would refer to the Texas versus United States challenge to the DOPA Program which we discussed at length the last time. Now, again, that was a 4 to 4 decision, but obviously four Justices agreed on standing, on the merits, and on relief. And the relief in that case was not limited to Texas and the other Plaintiffs. The relief was to strike down the DOPA Program nationwide. So four Justices of the Supreme Court felt that was appropriate frankly on, I would submit, much weaker evidence of harm. There the harm in Texas was the cost of providing driver's licenses to undocumented immigrants who would be allowed to stay in the states.

We would submit the harm here is much more significant.

So, at the very least, four Justices of the Supreme Court gave pretty clear direction.

So with that, Your Honor we would again repeat our request for nationwide injunction.

THE COURT: Okay, thank you.

So the Final Rules are expected to go or scheduled to go into effect on the 14th, is that correct?

MR. RIENZI: Correct, Your Honor.

THE COURT: Okay, I know you've told me before that it doesn't really matter whether I rule before or after because nothing's going to really happen for what, 30 to 60 days, but I am going to rule before the 14th or on the 14th.

So what is that? When is the 14th? Tuesday?

MR. FISCHER: Monday, Your Honor.

THE COURT: Monday. So I'll be working on Sunday.

Okay, anything else before I get off the bench?

MR. FISCHER: Nothing further, Your Honor.

MR. RIENZI: Nothing from us, Your Honor.

MR. SANDBERG: Nothing further, Your Honor.

THE COURT: Great. Thank you.

(Court adjourned)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

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Kathleen Feldman, CSR, CRR, RPR, CM
Official Court Reporter

DATE:

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing appendix with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.