STATE OF NEW YORK
COURT OF APPEALS

CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY, *et al.*	:	
Plaintiffs-Appellants,	:	Appellate Division No. 96621
- vs -	:	Supreme Court, Albany County Index No. 8229-02
GREGORY V. SERIO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF INSURANCE,	:	
Defendant-Respondent.	:	

PROPOSED BRIEF FOR *AMICI CURIAE* AMERICAN JEWISH COMMITTEE; ANTI-DEFAMATION LEAGUE; CENTER FOR REPRODUCTIVE RIGHTS; COALITION OF LABOR UNION WOMEN; COMMUNITY HEALTHCARE NETWORK; FAMILY PLANNING ADVOCATES OF NEW YORK STATE; HADASSAH; MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY; NARAL PRO-CHOICE NEW YORK; NATIONAL COUNCIL OF JEWISH WOMEN - NEW YORK SECTIONS, NATIONAL COUNCIL OF JEWISH WOMEN - NEW YORK STATE PUBLIC AFFAIRS COMMITTEE AND NATIONAL COUNCIL OF JEWISH WOMEN - LONG ISLAND SECTIONS; NATIONAL ORGANIZATION OF WOMEN - NEW YORK STATE; NATIONAL WOMEN'S LAW CENTER; AND THE 13 PLANNED PARENTHOOD AFFILIATES IN NEW YORK STATE, ON BEHALF OF DEFENDANT-RESPONDENT SERIO

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DISCLOSURE STATEMENT

For purposes of Rule 500.1 of this Court, none of the *amici* appearing herein have corporate parents, subsidiaries or affiliates.

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STATEMENTS OF INTEREST OF AMICI[1]

The **American Jewish Committee** ("AJC"), a national organization of over 150,000 members and supporters represented by thirty-two regional chapters, including four in the state of New York, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure. To that end, AJC has long stated its opposition to gender discrimination and advocated for women's equality in the workplace and for reproductive rights through the filing of amicus briefs and legislative activity.

At the same time, AJC has been a vocal advocate of reasonable accommodation of religious freedom in the workplace and the general right to free religious exercise. As part of its effort to protect the free exercise of religion for all Americans, AJC has sought, in the courts and in Congress and state legislatures, to redress the diminution in protection of the free exercise of religion brought about by the U.S. Supreme Court's 1990 decision in Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

AJC firmly believes that women's equality and free exercise of religion are compatible concerns, and that it is possible for states to address compelling societal

[1] Each Statement of Interest below describes the position of the individual amicus whose name it follows. These positions are not necessarily shared by other amici; only the remainder of the brief reflects the views of all amici.

needs without placing undue burdens on free exercise, so long as the resulting law is narrowly tailored to limit any burden on free exercise as much as possible, as is the case here.

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, it is one of the world's leading civil and human rights organizations combating all types of prejudice, discriminatory treatment, and hate. ADL's history is marked by a commitment to protecting the civil rights of all persons, and to assuring that each person receives equal treatment under the law. ADL is dedicated to preserving the principles of religious freedom and individual liberty while also eliminating sex discrimination and protecting reproductive choice. The League has participated as amicus curiae in numerous cases before the Supreme Court and other courts when these issues have been implicated, including Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), Hope v. Perales, 83 N.Y.2d 563 (1994), and Catholic Charities of Sacramento, Inc. v. The Superior Court of Sacramento County, 85 P.3d 67 (Cal. 2004), cert. denied, 543 U.S. 816 (2004).

The **Center for Reproductive Rights** ("CRR") is a national public interest law firm based in New York City dedicated to preserving and expanding reproductive rights in the United States and throughout the world. CRR is a tax-

exempt, non-profit organization. CRR's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services, including contraceptives. The Domestic Legal Program of CRR specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation in the nation. CRR actively supports efforts to expand insurance coverage of contraceptives throughout the United States.

The **Coalition of Labor Union Women** (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. For more than 20 years, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its 75 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. The CLUW Center for Education and Research engages in research, educational and training activities

designed to inform women about their reproductive choices and their freedom to choose various means of birth control and other protections for reproductive autonomy. The CLUW Center's Reproductive Rights Project and its Contraceptive Equity Project are two of many programs that are designed to educate and inform workers, union leaders and employers about issues of reproductive freedom and gender equality in the workplace. CLUW's educational and advocacy efforts have led to the adoption of numerous collective bargaining proposals and policies establishing insurance coverage for prescription contraceptives, drugs and other preventive care on the same terms as coverage afforded for other types of drugs, devices and preventive care and medical services.

Community Healthcare Network (CHN) is a not-for-profit organization that provides access to affordable, culturally-competent and comprehensive community-based primary care, mental health and social services for diverse populations in underserved communities throughout New York City. Although it began more than 25 years ago as an agency of community family planning centers, today CHN provides not only reproductive health care but also general medical care. CHN serves more than 60,000 individuals a year who would otherwise have little or no access to the health care they require. Community Healthcare Network strongly supports the State's position that the WHWA is

constitutional. As one of the oldest and largest family planning providers in New York State, CHN was involved in organizing and lobbying for the bill because of the potential impact on its patients. CHN president/CEO Catherine M. Abate also serves as Chair of the Board of Family Planning Advocates of New York State.

Family Planning Advocates of New York State ("FPA") is a non-partisan, non-profit statewide membership organization. FPA's membership consists of hundreds of organizational members, including family planning clinics, community health centers, sexual assault survivor and domestic violence organizations, and the state's Planned Parenthood affiliates, as well as hundreds of individual members. The mission of FPA is to advance public policies that fulfill the rights of individuals to comprehensive sexual and reproductive health services, including contraceptives, and to ensure that all women have affordable access to means to plan their families. An important aspect of FPA's mission is to lower the high rate of unintended pregnancies in the state. FPA is concerned that the important objectives of the WHWA—to end sex discrimination in insurance coverage, and provide insurance coverage for vital women's health care—would be undermined by exempting a broad range of employers from the law's contraceptive coverage requirement.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States,

with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah is one of the nation's preeminent advocates of women's health issues. Hadassah strongly supports equity in prescription coverage, specifically regarding prescription contraceptives, since access to reproductive health services is a vital healthcare need for women.

Medical and Health Research Association of New York City (MHRA) is a 46-year-old nonprofit dedicated to improving the health of individuals, families, and communities through direct delivery of public health and social services, research and evaluation, and regranting and technical assistance. MHRA provides family planning and prenatal care services to 25,000 low-income women every year through its MIC-Women's Health Services program, a network of 8 centers. MHRA has also been the Title X (the federal family planning program) grantee for New York City since 1982. Ellen Rautenberg, President and CEO of MHRA, is the chair of the board of the National Family Planning and Reproductive Health Association as well as a board member and former president of the Family Planning Councils of America. MHRA is committed to all women of New York State having access to a full range of reproductive health services and the universal implementation of the WHWA.

NARAL Pro-Choice New York, the New York State affiliate of NARAL Pro-Choice America, representing tens of thousands of members across New York State, worked in coalition with other organizations to support the passage of the WHWA. NARAL Pro-Choice New York believes that all health plans should offer equal access and care regardless of gender. This legislation recognizes that women's health needs are not auxiliary but a vital part of overall health care. The WHWA ensures that necessary medical needs—mammograms; osteoporosis screening, prevention, and treatment; contraceptive drugs and devices; and cervical cancer screenings—are available and affordable for women with employer-sponsored insurance. This legislation must remain intact so New York women will finally have access to basic health care services they need and deserve.

National Council of Jewish Women-New York Sections, National Council of Jewish Women-New York State Public Affairs Committee and National Council of Jewish Women-Long Island Sections (together, NCJW-NYS) are volunteer organizations that work through a program of research, education, advocacy, and community service. Among other matters, NCJW-NYS monitors issues of concern to women, children and families both locally and nationally. NCJW-NYS worked in coalition with numerous organizations to fight for the passage of the WHWA.

National Organization for Women-New York State, Inc. ("NOW-NYS"), founded in 1972, is New York State's largest women's political action organization with over 12,000 active, dues-paying members. NOW-NYS is dedicated to advancing the rights of women throughout New York State and is able to effect change for New York State women through persistent and strategic lobbying at all levels of the New York State legislature. As one of the leading supporters and advocates of the WHWA, NOW-NYS has an acute interest in the issues presented in this case. Access to prescription contraception is fundamentally necessary to ensure that women can exercise control over reproductive choice. In addition, the failure to provide women with such prescription coverage results in significant inequities in the health insurance options provided to women and those provided to men. The position of NOW-NYS is that the WHWA is essential and progressive legislation designed to remedy and protect the aforementioned issues.

The **National Women's Law Center** (the "Center") is a non-profit legal advocacy organization based in Washington, D.C. that is dedicated to the advancement and protection of women's legal rights. Since 1972, the Center has worked to protect women's right to privacy, their access to a full range of health care that includes reproductive health care, and their right to be free from discrimination in all facets of their lives. As part of the Center's effort to eliminate

sex discrimination in employment and increase access to a full range of reproductive health care services, the Center has been at the forefront of efforts to expand insurance coverage of contraception, through litigation (including participation in Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001), policy advocacy, and public education.

The thirteen **Planned Parenthood affiliates of New York State**—Northern Adirondack Planned Parenthood, Planned Parenthood of Buffalo & Erie County, Planned Parenthood Hudson Peconic, Planned Parenthood of Mid-Hudson Valley, Planned Parenthood Mohawk Hudson, Planned Parenthood of Nassau County, Planned Parenthood of New York City, Planned Parenthood of Niagara County, Planned Parenthood of Northern New York, Planned Parenthood of the Rochester/Syracuse Region, Planned Parenthood of South Central New York, Planned Parenthood of the Southern Finger Lakes, and Upper Hudson Planned Parenthood—operate health clinics throughout the state that provide a broad range of reproductive health services to approximately 300,000 patients annually. Family planning services are the most common medical services sought by Planned Parenthood patients. In addition to clinical services, New York State's Planned Parenthood affiliates work to protect and expand access to reproductive health services. An important aspect of the Planned Parenthood affiliates' mission is to lower the high rate of unintended pregnancy in the State and to ensure that all

women have affordable access to means to plan their families. The affiliates are concerned that the important objectives of the WHWA—to end sex discrimination in insurance coverage and provide insurance coverage for vital women's health care—would be undermined by exempting a broad range of employers from the law's contraceptive coverage requirement.

INTRODUCTION

The amici curiae described above ("Amici") urge this Court to affirm the January 12, 2006 decision of the Appellate Division, Third Department (hereafter "App. Div. Dec."), which, like the Supreme Court's order and decision before it, upheld the contraceptive coverage requirement of the Women's Health and Wellness Act, N.Y. Insurance Law §§ 3221(l)(16) and 4303(cc) (the "WHWA" or the "Act").

Amici fully endorse the position of Defendant-Respondent Serio (the "State") that this comprehensive public health and gender equity statute does not violate the religious rights of Plaintiffs-Appellants ("Plaintiffs") under either the federal or state constitutions. We write separately to expand on the fact that the WHWA furthers the State's longstanding and compelling interests in eliminating sex discrimination, protecting the fundamental right of reproductive choice, and ensuring access to contraception. Given that the New York State Legislature (the "Legislature") had compelling interests in enacting the WHWA, its carefully

crafted exemption, which balances religious rights with women's equality and health interests, should be upheld as constitutional.

FACTUAL BACKGROUND

Prescription contraceptives are a form of health care available only to women, and the consequences of the lack of access to prescription contraceptives—including unintended pregnancy with all of its ramifications for women's physical and emotional well-being, and their educational, professional and financial attainment—fall disproportionately on women. For this reason, prescription contraception is a "primary healthcare issue" for the 60 million women in this country who are of reproductive age. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1272-74 (W.D. Wash. 2001).

Indeed, women cannot achieve equality in the workplace, in education, or in any other sphere of their lives until they have both the right and the ability to decide whether and when to bear children. Effective access to contraception—including the ability to pay for it—therefore is central to women's ability to attain equality in society. See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."). Conversely, absent effective access to contraceptives, women are at high risk of unintended pregnancy, and thus of

"reduced educational attainment and employment opportunity, [and] greater welfare dependency . . . ." United States Dep't of Health and Human Servs., Healthy People 2010: Understanding and Improving Health 9-5 (January 2000).

For these reasons, contraception is not merely a lifestyle option. Rather, it is an essential part of women's health care, and one that is central to most women's ability to control their personal and professional lives and to play a full and equal role in society. The average woman is fertile for approximately three decades, and without contraception could expect to become pregnant between twelve and fifteen times during that period. Washington Business Group, Promoting Healthy Pregnancies: Counseling and Contraception as the First Step, Family Health in Brief, Issue No. 3, August 2000. Thus, at any given time, approximately 7 out of 10 women in their childbearing years—42 million in total—are sexually active and do not wish to become pregnant. Kaiser Family Foundation, Contraception in the '90s (June 1997), available at http://www.kff.org/womenshealth/1270-contra90f.cfm, last accessed June 7, 2006. One-third of these women use a reversible contraceptive method requiring a prescription. Kaiser Family Foundation, Fact Sheet: Women's Health Policy Facts: Coverage of Gynecological Care and Contraception (December 2000), available at http://www.kff.org/womenshealth/1557b-index.cfm, last accessed June 7, 2006, at 1. Of all sexually-experienced women aged 20 to 44 in this country, 85.1 percent

have used oral contraceptives at some time in their lives. Jacqueline E. Darroch, Alan Guttmacher Institute, Cost to Employer Health Plans of Covering Contraceptives (June 1998) (tabulations from the 1995 National Survey of Family Growth.), available at http://www.guttmacher.org/pubs/kaiser_0698.html, last accessed June 7. 2006.

Women who lack insurance coverage for contraceptives are more likely to experience unintended pregnancies. See Erickson, 141 F. Supp. 2d at 1273 ("Insurance policies and employee benefit plans which exclude coverage for effective forms of contraception contribute to the failure of at-risk women to seek a physician's assistance in avoiding unwanted pregnancies"). This is so because in the absence of insurance coverage, some women are more likely to use less effective, less expensive contraceptive methods (for example, condoms or other over-the-counter methods), have gaps in their use of contraceptives (for example, they may skip a few days of taking birth control pills until they have money to refill their prescription), or cease using contraceptives altogether. Affidavit of JoAnn M. Smith, sworn April 2, 2003, R. 1153-1315 (hereafter, "Smith Aff."), at ¶ 4 (R. 1155) & Ex. 2 at 6 (R. 1192); Adam Sonfield and Rachel Benson Gold, New Study Documents Major Strides in Drive for Contraceptive Coverage, Guttmacher Report on Pub. Policy (June 2004), available at http://www.guttmacher.org/pubs/tgr/07/2/index.html, last accessed June 7, 2006

(reporting survey finding that among women who became pregnant despite using oral contraceptives, one in ten reported using the method inconsistently because they had run out of supplies).

Because insurance coverage reduces the number of unintended pregnancies women experience, it also reduces the number of abortions. In the United States, 45 percent of pregnancies are unplanned, and nearly half (48 percent) of all women have experienced an unplanned pregnancy. Smith Aff., Ex. 2 at 2 (R. 1188). A significant proportion of women who experience an unplanned pregnancy choose to have an abortion. Contraceptive use reduces the probability that a woman will have an abortion by 85 percent. Id.

Three quarters of women of reproductive age report that whether a contraceptive method is covered by their insurance is a factor in their decision whether to use it; forty percent report that it is a "'very' important" factor. Kaiser Family Foundation, Americans Support Requiring Insurers to Cover Contraceptives, Even If Premiums Rise (June 1998), available at http://www.kff.org/womenshealth/1404-insurance.cfm, last accessed June 7, 2006. This statistic is especially significant in light of the fact that over-the-counter

contraceptives are generally both cheaper and less effective than prescription contraceptives when typical use is taken into account.[2]

Avoiding unintended pregnancies is crucial to women's health, well-being, and economic standing. Because contraceptive insurance coverage reduces the likelihood that women will experience an unintended pregnancy, it reduces the likelihood that women will suffer the potentially serious physical and emotional consequences of an unintended pregnancy, many of which are discussed in detail in the Brief of Amicus Curiae American College of Obstetricians and Gynecologists, New York District, *et al.*, submitted in this appeal. These consequences of unintended pregnancy fall disproportionately on women and their children.

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[2] A one-month supply of the oral contraceptive pill costs between $20 and $35, and is 92–99.7% effective. Planned Parenthood Federation of America, Your Contraceptive Choices, available at http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-contraception-choices.xml, last accessed June 7, 2006. A one-month patch costs between $30 and $40, and is up to 99.7% effective. Id. The estimated cost of the quarterly Depro-Provera shot is $30 to $75, and the shot is up to 99.7% effective. Planned Parenthood Federation of America, Is the Shot Right For You? available at http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-depo-provera.xml, last accessed June 7, 2006. In contrast, male condoms cost approximately $0.50 each, but are only 85% effective with typical use. Planned Parenthood Federation of America, The Condom, available at http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-condom.xml, last accessed June 7, 2006.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY RULED THAT THE LEGISLATURE ENACTED THE WHWA TO ENSURE GENDER EQUITY IN PRESCRIPTION COVERAGE IN NEW YORK STATE

The Appellate Division correctly ruled that the Legislature enacted the WHWA to address "the conjoined interests of gender equality and health care," App. Div. Dec. at 11, by eliminating long-standing discrimination against women in the provision of coverage for women's preventative health care, and specifically, for "obstetric and gynecologic care, periodic mammography and cervical cytology screenings, . . . bone density exams, . . . [and] prescribed contraceptive drugs or devices." App. Div. Dec. at 2.

The finding that the WHWA was enacted to address gender discrimination is well-supported by the legislative history. Indeed, the New York State Senate Introducer's Memorandum in Support states: "These statutory changes are necessary in order to close gaps in health plan coverage for essential services relating to women's health care." Affidavit of Nancy M. Groenwegen, sworn April 14, 2003, R. 980-1036 (hereafter, "Groenwegen Aff."), at ¶ 9 (R. 982) and Ex. 3 (R. 998-1001). Likewise, the transcript of the Committee on Rules indicates that the Legislature:

> (1) was concerned with equity and fairness between men and women regarding healthcare coverage; (2) found that women's healthcare costs are considerably higher than men's; and (3) concluded that the WHWA would provide women with healthcare coverage equivalent to men's.

(R. 36).

In addition, several members of the Legislature made statements demonstrating that the Legislature's goal was to eliminate a source of sex discrimination. See, e.g., Groenwegen Aff. at ¶ 19 (R. 983) and Ex. 5, New York State Senate, L. 2002, ch. 554, Legislative Debates, June 17, 2002, p. 5008 (R. 1017), Sen. Bonacic ("[The Act] restores equity and fairness between men and women when it comes to healthcare coverage."); id. p. 5014 (R. 1023), Sen. Hoffman ("[W]e have a responsibility to all of the women of this state to make contraceptive coverage affordable and accessible through insurance plans, just as we make a wide range of men's health aids and other activities available to them").

The Legislature's decision that the Act was a necessary and proper means to end this form of sex discrimination was well supported by the evidence before it. As the Appellate Division correctly noted, Plaintiffs have not disputed the adequacy of the Legislature's fact-finding process. App. Div. Dec. at 12. As is set forth in greater detail below, the evidence before the Legislature showed that in the absence of a contraceptive coverage mandate, contraceptive exclusions are prevalent despite the fact that providing coverage actually saves money for employers and insurers; that men's health insurance coverage is more comprehensive than women's; and that contraceptive exclusions have a disproportionately adverse impact on women's economic well-being.

A. The Legislature Was Aware that Contraceptive Exclusions Are Prevalent Even Though the Cost Is Not Burdensome

The Legislature had before it significant evidence that prescription contraception is important to women and their families. As the Appellate Division noted:

> The record also bears evidence that unplanned pregnancies can have substantial negative impact on the physical, emotional and economic health of women and children, and that increased access to prescription contraceptives would address these issues.

App. Div. Dec. at 12. Nevertheless, a significant percentage of health plans exclude coverage for these prescription drugs and devices. Indeed, the Legislature was apprised of a 1994 report[3] showing that while 97 percent of large group health plans in the nation cover prescription drugs generally, only 15 percent cover all prescription contraceptive methods. Smith Aff. ¶ 11 (R. 1158) & Ex. 6 at 12 (R. 1231). In other words, over 85 percent of large group health plans excluded at least some prescription contraceptives.

The Legislature was aware of studies showing that this widespread lack of contraceptive coverage made little business sense because covering contraceptives saves money for employers and insurers by preventing unintended pregnancies and too-closely-spaced pregnancies. Smith Aff. ¶ 17 (R. 1160) & Ex. 2 at 11 (R.

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[3] That report—Alan Guttmacher Institute, Uneven & Unequal, Insurance Coverage and Reproductive Health Services (1994)—contained the most current data at the time the Legislature was considering this issue.

1197). A report prepared by the management consulting firm William M. Mercer, Inc. as a guide for employers on contraceptive coverage in employee health plans was provided to each member of each legislative committee as that committee considered the legislation, and to many other members of the Legislature. Smith Aff. ¶ 18 (R. 1160-1161). This study concluded that covering contraceptives would result in direct cost savings due to a decrease in maternity cases and fewer births of unhealthy newborns. Id.

An additional supporting document distributed to members of the Legislature was James Trussell, *et al.*, The Economic Value of Contraception, 85 Am. J. Pub. Health. 494 (1995). Smith Aff. ¶ 19 (R. 1161) & Ex. 11 at 500 (R. 1307). That article concludes that by increasing use of effective contraceptive methods "savings generally are realized by third-party payers" (i.e., insurance companies) because contraception prevents costly unplanned pregnancies, ectopic pregnancies, spontaneous abortions, and other negative health outcomes for women and newborns.

B. The Legislature Was Aware that Men's Insurance Coverage Is More Comprehensive

The Legislature was also well aware of discrepancies in insurance coverage between contraceptives and the male-only drug Viagra. This discrepancy in coverage between female-only and male-only prescription drugs was explicitly brought to the attention of the Legislature. See Smith Aff. ¶ 14 (R. 1159) & Ex. 7

(R. 1257) (describing 1998 press conference in Albany where advocates drew attention to the disparity in coverage between Viagra and contraceptives, and called on the Senate to "remedy [the] discriminatory practice of excluding contraceptive coverage" by passing legislation requiring insurance plans to cover contraceptives).[4] Moreover, this sharp discrepancy in insurance coverage for drugs used exclusively for one gender was extensively covered by the Albany-area and regional press. See, e.g., Associated Press, Doctors See Bias in Viagra Coverage, Times Union, May 13, 1998; Shannon McCaffrey, Gender Bias Claimed Concerning Birth Control, The Record, June 9, 1998; Marilyn Hipp, FPA Raises Insurance Inequity Issue, The Legislative Gazette, June 15, 1998; Carey Goldberg, Insurance for Viagra Spurs Coverage for Birth Control, N.Y. Times, June 30, 1999, all attached as Exhibit 8 to the Smith Affidavit (R. 1260-1264).

C. The Legislature Was Aware that the Financial Cost of Contraceptive Exclusions Falls Disproportionately on Women

The Legislature was also aware that contraceptive exclusions have disproportionate adverse effects on women's finances by requiring women to pay

[4] The discrepancy in New York between insurance coverage for male-only and female-only medical services became even more apparent after June 2000, when the Legislature passed a bill (A5037) requiring insurance plans to cover the cost of prostate exams—which are needed only by men. Advocates discussed this "double standard" in a letter to the Governor's counsel, and urged the Governor to press for passage of the WHWA to put women's preventive health needs on par with men's. Smith Aff. ¶ 15 (R. 1159) & Ex. 9 (R. 1266).

out-of-pocket for basic health care needs. As the Appellate Division observed:

> [T]he record contains evidence that out-of-pocket costs for insured women were 68% higher than such costs for insured men, and that male-related medical care was more accessible through insurance than was female-related care, supporting the Legislature's conclusion that group health insurance coverage in this state was inequitable as between men and women.

App. Div. Dec. at 12. The Legislature was also familiar with the study's conclusion that most of this differential can be attributed to reproductive care. See Smith Aff. ¶ 16 (R. 1159-1160) & Ex. 10, at 2-3 (R. 1273-74).

The same study also showed that approximately 10.8 million Americans between the ages of 15 and 44 spend more than 10 percent of their income on out-of-pocket health expenses, and that nearly 70 percent of these people are women, with the majority of them privately insured. Id. In fact, almost 5 million privately-insured women in that age group spend more than 10 percent of their income on out-of-pocket health costs. Id.

Given the statements by legislators and the extensive evidence before the Legislature regarding the gender inequities caused by contraceptive exclusions, the Appellate Division correctly ruled that eliminating this form of sex discrimination was one of the primary motivations underlying enactment of the WHWA. App. Div. Dec. at 12. Thus, although the WHWA may incidentally interfere with religious practices, the record is clear that the Legislature was motivated not by any denominational preference but rather by its interest in limiting the scope of the

"religious employer" exception so as to ensure contraceptive coverage, and thus the promotion of gender equality, for the maximum number of women in New York State.

II. THE APPELLATE DIVISION CORRECTLY RULED THAT NEW YORK STATE HAS A COMPELLING INTEREST IN PROHIBITING THE SEX DISCRIMINATION CAUSED BY CONTRACEPTIVE EXCLUSIONS

The Appellate Division correctly held that "the state's interests . . . [in] the social value of gender equity and the health and related interests of thousands of women and children" are sufficient to uphold the WHWA's constitutionality, regardless of any burden imposed on Plaintiffs' religious exercise. App. Div. Dec. at 12. The Appellate Division clarified that this is true regardless of the level of scrutiny applied. Id. at 17 ("While we disagree with the [dissent's] determination to apply strict scrutiny in the first instance, we note that this analysis fails to acknowledge the compelling state interests [of gender equality and public health] at issue, and ignores the unrebutted presumption that the Legislature conducted adequate fact-finding with respect to the effect of the opt-out provision."). See also Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67, 92 (Cal. 2004), cert. denied, 543 U.S. 816 (2004) (upholding California contraceptive equity law with virtually identical exception because regardless of the level of

scrutiny, the law "serves the compelling state interest of eliminating gender discrimination").[5]

On appeal, Plaintiffs now offer several arguments for why the Legislature's plain interest in ending sex discrimination is not—contrary to the Appellate Division's Decision—sufficient to justify the Act, even if the WHWA burdens Plaintiffs' religious exercise. First, they argue that the State's interest in promoting gender equity by enacting WHWA is "weak[]" and "limited." See, e.g., Brief for Plaintiffs-Appellants (hereafter "Pl. Br.") at 34 ("the majority went astray. . . in failing to recognize the weakness of the interests weighing against the plaintiffs' free exercise rights."); id. at 18 n.8 ("The statute thus promotes 'gender equity' in only the most limited of ways."); see also id. at 30-32 (arguing that gender equity interest in contraceptive coverage is not cognizable interest sufficient to reach balancing test under New York State constitution's religious freedom provision).

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[5] The Trial Court Decision detailed how the WHWA is narrowly tailored to accomplish these state interests. See Trial Court Decision at 17-18 (R. 49-50) ("the WHWA is in fact closely fitted to the purposes of improving healthcare for women and ending discrimination against women in health insurance coverage . . . The narrow exemption serves to protect the rights and health of large numbers of employees who do not share their employer's religious views . . . . Expanding the exemption would certainly reduce the effectiveness of the WHWA in meeting its legitimate governmental purposes."). The California Supreme Court came to a similar conclusion regarding the similarly worded California law. See Catholic Charities of Sacramento, 85 P.3d at 93-94 ("Nor are any less restrictive (or more narrowly tailored) means readily available for achieving the state's interest in eliminating gender discrimination. Any broader exemption increases the number of women affected by discrimination in the provision of health care benefits.").

Second, Plaintiffs argue that the narrowness of the "religious employer" exception undermines the WHWA's goal by creating incentives for employers to terminate prescription coverage altogether, rather than providing coverage for prescription contraception. Pl. Br. at 23, 34-35.

As explained below, however, these arguments must fail. First, as shown by judicial and administrative rulings from around the country, the Appellate Division was correct that contraceptive exclusions discriminate on the basis of sex. Second, Plaintiffs are wrong in describing New York's interest in gender equity as "limited" or "weak[]." In fact, New York has a long history of considering the elimination of sex discrimination to be a compelling interest. And finally, Plaintiffs argument that the WHWA creates perverse incentives for organizations that do not qualify for the statute's religious employer exemption to opt out of prescription coverage altogether is speculative and lacking in record support, and ignores the Legislature's policy determinations and uncontroverted findings of fact.

A. Contraceptive Exclusions Discriminate Against Women

The Appellate Division's conclusion that the WHWA furthers New York's compelling interest in eliminating sex discrimination is well supported and in line with rulings around the country. Indeed, in upholding California's contraceptive equity mandate, which contained an exception virtually identical to the one in the

WHWA, the California Supreme Court ruled that the California law "serves the compelling state interest of eliminating gender discrimination." Catholic Charities of Sacramento, 85 P.3d at 92.

Moreover, a growing body of law confirms that contraceptive exclusions do, in fact, discriminate against women. Every court but one to rule on the issue has found that the exclusion of prescription contraception coverage in comprehensive employer-sponsored health plans constitutes unlawful discrimination against women in violation of Title VII, 42 U.S.C. § 2000e *et seq*. ("Title VII").[6] See In Re Union Pacific R.R. Employment Practices Litig., 378 F. Supp. 2d 1139 (D. Neb. 2005) (granting summary judgment for plaintiff class on ground that employer's exclusion of prescription contraceptives from its employee health plan is sex discrimination under Title VII), appeal docketed, No. 06-1706 (8th Cir. March 13, 2006); Erickson v. Bartell Drug, 141 F. Supp. 2d at 1277 (granting summary judgment for plaintiff class on same ground, concluding that "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered"); accord Wessling v. AMN Healthcare, No. 01-CV-0757 W, slip op. at 4-5 (S.D. Cal. Aug. 8, 2001) (denying motion to dismiss Title VII claim on the basis of the reasoning in Erickson) (Exhibit A hereto); EEOC v. United Parcel

[6] Some of these courts have based their rulings in particular on the Pregnancy Discrimination Act amendment to Title VII, 42 U.S.C. § 2000e(k) ("PDA").

Serv., Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying motion to dismiss Title VII claim based on lack of contraceptive coverage for non-contraceptive medical condition); Cooley v. DaimlerChrysler, 281 F. Supp. 2d 979, 986 (E.D. Mo. 2003) (denying motion to dismiss disparate treatment claim because "the law recognizes that women have different sex-specific needs for which provisions must be made to same extent as other health care requirements"); see also Catholic Charities of Sacramento, 85 P.3d at 92 (upholding California contraceptive coverage mandate with narrow religious exception because the law "serves the compelling state interest of eliminating gender discrimination"), but see Cummins v. State of Illinois, No. 2002-cv-4201-JPG (S.D. Ill. Aug. 30, 2005) (finding contraceptive exclusion does not discriminate on the basis of sex) (Exhibit B hereto), appeal docketed, No. 05-3877 (7th Cir. Sept. 30, 2005).[7] In a very recent decision, a Missouri federal court specifically rejected the cramped reasoning in Cummins and Alexander and endorsed the reasoning in Erickson and Union Pacific. See Stocking v. AT&T Corp., No. 03-00421-CV-W-HFS, slip op at 3-4 (W.D. Mo. June 5, 2006) (granting summary judgment on liability to plaintiffs in a Title VII

[7] In Alexander v. American Airlines, Inc., No. 4:02-CV-0252-A, 2002 WL 731815 (N.D. Tex. April 22, 2002) (Exhibit C hereto), the court questioned the plaintiff's Title VII contraceptive exclusion claim in dictum but did not reach it because the plaintiff, who was seeking to become pregnant, lacked standing.

contraceptive equity case; court characterized the reasoning in Union Pacific as "quite compelling") (Exhibit D hereto).

This reasoning is also applied in a Commission Decision of the Equal Employment Opportunity Commission (EEOC)—the agency charged with interpreting and enforcing Title VII. See United States EEOC Commission, Decision on Coverage of Contraception (December 14, 2000), available at http://www.eeoc.gov/policy/docs/decision-contraception.html, last accessed June 7, 2006 ("EEOC Commission Decision").[8] The EEOC Commission Decision found that it is illegal sex discrimination under Title VII to exclude prescription contraceptives in a plan providing coverage for other preventive prescription drugs. The EEOC reasoned:

> Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, [the employers] could not discharge an employee from her job because she uses contraceptives. So, too, [the employers] *may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.*

[8] During its consideration of the WHWA, the Legislature was well aware of the EEOC Commission Decision and the Erickson court ruling. Smith Aff. ¶ 20 (R. 1161-1162).

EEOC Commission Decision (emphasis added).[9]

Based on the reasoning of the cases discussed above, and the EEOC Commission Decision, it is clear that both the Legislature and the Appellate Division appropriately concluded that excluding prescription contraceptives from comprehensive health benefits plans is sex discrimination.

B. The Fact that Both Male and Female Employees Lack Contraceptive Coverage Does Not Render the Exclusion Non-Discriminatory

The conclusion that insurance-based contraceptive exclusions discriminate against women is not changed by any argument that the historical exclusion of contraceptive coverage addressed by the WHWA applied equally to men and women. As the Erickson court recognized,

> [m]ale and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the

[9] In accord with these judicial and agency interpretations of federal anti-discrimination law, the federal government and numerous states have passed laws mandating that federal and state employees' health insurance plans must include contraceptive coverage. See, e.g., Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7 § 635, 117 Stat. 11, 472 (2003) (Federal Employee Health Benefits Act); Ga. Code Ann. § 33-24-59.6. Furthermore, 21 states in addition to New York require (by statute or regulation) that all health plans issued in the state that provide prescription coverage cover prescription contraceptives. Alan Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives, available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf last accessed June 7, 2006.

> same extent, and on the same terms, as other healthcare needs. Even if one were to assume that [the employer's] prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII.

Erickson, 141 F. Supp. 2d at 1271-72.

Since enactment of the PDA, equal benefits for purposes of Title VII are now measured by "the comprehensiveness of [the] coverage . . . to which each sex is subject," not "by the sameness of coverage despite differences in need." Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 393 (9th Cir. 1985) (citations omitted), aff'd on other grounds, 479 U.S. 272 (1987). As the Second Circuit has held, affording men and women "equal access to the same benefits, even if certain sex-specific benefits were excluded" is no longer considered gender neutral. Saks v. Franklin Covey Co., 316 F.3d 337, 344 (2d Cir. 2003). Rather "[u]nder Title VII the proper inquiry in reviewing a sex discrimination challenge to a health benefits plan is whether sex-specific conditions exist, and if so, whether exclusion of benefits for those conditions results in a plan that provides inferior coverage to one sex." Id.

Because only women may ever have the need to use prescription contraceptives, it is irrelevant to the analysis that both male and female employees of Plaintiffs lack contraceptive coverage. If men receive comprehensive health

coverage, so must women—and prescription contraceptives are among the basic health care needs of many women.

C. New York State Has a Long-Standing Commitment to Eradicating Sex Discrimination

Plaintiffs argue that their religious autonomy rights should prevail because New York's interests in enacting the WHWA are not sufficiently strong to stand up to strict scrutiny, or indeed, even to rational basis review. They characterize New York's interest in promoting gender equality by enacting WHWA as "limited" (Pl. Br. 18, n.8) and "weak[]" (Pl. Br. 34), and suggest that New York State does not recognize gender equality as among the interests that can be weighed against its constitutional protections for religious freedom. Pl. Br. at 30-32. This is simply untrue.

As the Appellate Division correctly noted in rejecting Plaintiffs' "constricted reading" of the New York State Constitution, App. Div. Dec. at 11, New York State has long considered the elimination of all forms of discrimination against its citizens—including sex discrimination—one of its highest priorities. Indeed, as the Appellate Division observed, the New York Human Rights Law states that

> the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination [or

> other reason] not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

N.Y. Exec. Law § 290(3); App. Div. Dec. at 11.

The same high priority on eliminating sex discrimination is reflected elsewhere in New York's human and civil rights law. For example, "[t]he opportunity to obtain employment without discrimination because of," *inter alia*, sex, "is hereby recognized as and declared to be a civil right." N.Y. Exec. Law § 291(1). N.Y. Civ. Rights Law § 40-c(2) provides that "[n]o person shall, because of . . . sex, . . . be subjected to any discrimination in his or her civil rights . . . by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state." In addition, it is deemed an "unlawful discriminatory practice" for an employer to discriminate against an individual in compensation or in the terms, conditions or privileges of employment because of his or her sex. N.Y. Exec. Law § 296(1)(a).

Moreover, sex discrimination is specifically prohibited in a wide range of contexts under New York law. In light of these broad and far-ranging legal protections, it cannot be disputed that, as this Court has held, the "governmental policy against discrimination enjoys the highest statutory priority" in New York State. Beame v. DeLeon, 87 N.Y.2d 289, 296 (1995). See also, e.g., N.Y. Exec. Law § 312(1) ("All state contracts and all documents soliciting bids . . . for state

contracts shall contain" a provision that "[t]he contractor will not discriminate against employees or applicants for employment because of . . . sex" and "will . . . ensure that . . . women are afforded equal employment opportunities."); N.Y. Educ. Law § 313(1) (It is "the policy of the state that the American ideal of equality of opportunity requires" full access to educational programs without discrimination based on sex.); N.Y. Educ. Law § 3026 ("There shall be no discrimination in . . . the amount to be paid . . . to persons employed as teachers in the public schools in any city, union free or common school district in this state, based on sex."); N.Y. Educ. Law § 3201-a ("[N]o person shall be refused admission into or be excluded from any course of instruction" or "school athletic teams, by reason of that person's sex."); N.Y. Ins. Law § 2607 ("No individual or entity shall refuse to issue any policy of insurance . . . because of the sex . . . of the applicant or policyholder."); N.Y. Lab. Law § 220-e(a) ("[N]o contractor, sub-contractor, nor any person acting on behalf of such . . . shall by reason of . . . sex . . . discriminate against any citizen of the state of New York.").

Given that contraceptive exclusions discriminate against women and that the "governmental policy against discrimination enjoys the highest statutory priority" in this State, Beame, *supra*, the Appellate Division was correct in concluding that the State has a compelling interest in eliminating sex discrimination in prescription

drug coverage by enacting the WHWA, and that this interest is cognizable under the New York Constitution's free exercise protections.

D. New York's Interest In Promoting Gender Equality Is Not Undercut By a Hypothetical Risk of Employers Eliminating Prescription Drug Coverage

Plaintiffs makes much of their argument that the WHWA actually undermines the state interests it seeks to advance by encouraging employers who do not qualify as "religious" to eliminate prescription drug coverage altogether. *If* that happened, their employees would lose all prescription coverage, not just contraceptive coverage. Plaintiffs urge that this hypothetical result could have been avoided had the Legislature expanded the category of exempt "religious employers." Had it done so, Plaintiffs argue, their employees would retain existing prescription coverage and would also have the right to purchase contraceptive prescription coverage through the statutory rider program.[10]

This argument misses the mark. As the Appellate Division points out, the Legislature has already made its determination on this issue—and did so based on full and complete findings of fact that Plaintiffs offer no reason to disturb:

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[10] The WHWA provides that employees of "religious employers" that claim exemption from the contraceptive coverage mandate must be allowed to purchase contraceptive coverage directly at the "prevailing small group community rate." N.Y. Ins. Law §§ 3221(l)(16)(B)(i). This provision does not apply to employees of employers who, like Plaintiffs, do not qualify as "religious employers" under the Act.

> Reasonable minds may differ with respect to whether the WHWA and its exemption take the best path toward meeting the Legislature's stated goals, and whether the benefits of the statute will be outweighed by the potential for harm to women if employers choose not to provide prescription coverage. However, and as noted above, in the absence of a showing to the contrary, we must presume that the Legislature conducted adequate fact-finding to satisfy itself that sufficient numbers of women would be benefited by the WHWA even if significant numbers of employers – both religious and nonreligious – chose to opt out of prescription coverage altogether.

App. Div. Dec. at 13 (internal citation omitted). As the Appellate Division pointed out, Plaintiffs have not raised legitimate questions about the adequacy of the Legislature's fact-finding. Id. at 12.

Notably, the specter Plaintiffs raise—of defection from providing prescription drug coverage—is purely hypothetical. Plaintiffs have brought forward no indication that they or any similarly-situated groups have, in fact, *ever* chosen to eliminate prescription drug coverage rather than provide coverage for contraception—either here (where the WHWA has been in effect since 2003) or in other jurisdictions with similar requirements.[11] The Court should not reject the

[11] Indeed, from Plaintiffs' own words it appears that at least some of the Plaintiffs would consider themselves morally and religiously unable to do so. See Pl. Br. at 26-27 ("[T]he Catholic Church teaches that all employers are obligated to provide just wages and benefits to their employees. This principle . . . requires that all workers, regardless of their circumstances, receive adequate health care coverage . . . . The moral and religious obligation to provide adequate health insurance benefits to employees necessarily includes providing them with access to prescription medications.") (affidavit citations omitted).

Legislature's well-founded fact-finding and policy determinations on the basis of a purely hypothetical risk.

Moreover, the argument that this hypothetical risk weakens the state's interests in enacting the WHWA to the degree that it cannot survive even rational basis review, much less any higher scrutiny, all but ignores the state's interest in gender equality. The state's compelling interest in gender equality recognized by the Appellate Division (App. Div. Dec. at 17) is rooted in the central role the availability (including affordability) of contraception plays in women's lives—in ensuring their and their children's health; in reducing the frequency of unwanted or unplanned pregnancies; in reducing the discrepancy in out-of-pocket healthcare expenditures between men and women; and in allowing women's full participation and advancement in the workplace. See Factual Background and Sections IA-IC, *supra*. Requiring women who want contraceptive coverage to purchase an insurance rider separate from their other prescription coverage will inevitably result in fewer women obtaining this coverage than if it were automatically provided by their employer, thereby undermining the state's interest in ensuring access to contraceptives.

Indeed, even if the contraceptive rider were relatively inexpensive (and there is no record evidence it is), inevitably some employees who use, or would like to use, prescription contraceptives would not enroll and pay for this separate

insurance coverage.[12] Studies from other areas of medicine suggest that even where insurance costs are relatively low, any increased administrative and financial burden can significantly reduce the number of people taking advantage of available coverage. See, e.g., Bruce Stuart & Christopher Zacker, Who Bears the Burden of Medicaid Drug Copayment Policies?, Health Affairs, March/April 1999 at 201-212 (Medicaid recipients in states with copayment provisions have significantly lower rates of prescription use, even where copayment is very low); C.E. Reeder & Arthur A. Nelson, The Differential Impact of Copayment on Drug Use in a Medicaid Population, Inquiry, Winter 1985 (institution of small copayments for prescription medication decreased number of prescriptions issued and filled among South Carolina Medicaid recipients). Thus, it was entirely reasonable for the Legislature to conclude that the best way to ensure contraceptive coverage is to mandate it, not to leave it to individual women to have to purchase a separate insurance rider.

Moreover, treating contraception (a prescription needed only by women) differently from all other prescriptions is certainly a less-than-optimal means of advancing the state's interest in gender equality. If anything, requiring women to

[12] It is unclear from the record what obstacles women might face if they sought to purchase the contraceptive rider. For example, the record does not show whether an employee's purchase of a contraceptive coverage rider would be confidential from the "religious employer," who might disfavor the employee's decision to use prescription contraception.

obtain contraceptive coverage—and coverage of no other prescription—through a the rider purchased *at their own expense* is itself discriminatory.

E. New York State Has a Long-Standing Commitment to Ensuring the Right of Reproductive Choice

Not only is the WHWA supported by New York's longstanding, compelling interest in eliminating sex discrimination, it is also supported by the State's compelling—and indeed constitutionally-mandated—interest in ensuring the right of reproductive choice.

The United States Supreme Court has ruled that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey, 505 U.S. at 847; see also Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). This "realm of personal liberty" includes a woman's "right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

Central to this constitutional right is the right to purchase and use contraception. Griswold v. Connecticut, 381 U.S. 479 (1965) (married couples have constitutional right to purchase and use contraceptives); Eisenstadt, 405 U.S.

at 454-44 (unmarried couples have constitutional right to purchase and use contraceptives). This is because "decisions whether to accomplish or to prevent conception are among the most private and sensitive." Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977). As the Court explained in Carey,

> access [to contraceptives] is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade [410 U.S. 113 (1973)].

431 U.S. at 688-89. Indeed, as noted above, the U.S. Supreme Court has recognized that a woman's ability to control her capacity for pregnancy is central to whether she can function on an equal basis with men. It stated: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Casey, 505 U.S. at 856.

New York State has recognized that under the New York Constitution, too, individuals enjoy a "fundamental right of reproductive choice." Hope v. Perales, 83 N.Y.2d 563 (1994). In Hope, this Court described the State's acknowledgement that "the fundamental right of reproductive choice inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right." Id. at 575; see also Doe v. Coughlin, 71 N.Y.2d 48, 52 (1987) (plurality opinion) (the constitutional right to privacy includes "freedom of choice, the broad, general right to make decisions concerning oneself and to

conduct oneself in accordance with those decisions free of governmental restraint or interference"). Accordingly, New York State has determined that the New York Constitution, like the federal Constitution, protects the rights of individuals to purchase and use contraception.

Given that reproductive choice is a "fundamental right" under the New York Constitution, Hope, 83 N.Y. 2d at 575, New York State has a compelling interest in ensuring that women can exercise that right. Indeed, courts in New York have previously held that government has a significant interest in ensuring access to reproductive health care. See, e.g., United States v. Weslin, 964 F. Supp. 83, 87 (W.D.N.Y. 1997) (finding important government interest in protecting the public health by promoting unobstructed access to reproductive heath services), aff'd, 156 F.3d 292 (2d Cir. 1998); see also, e. g., United States v. Wilson, 154 F.3d 658, 664 (7th Cir. 1998) (recognizing government interest in protecting women who require reproductive health services); Am. Life League, Inc. v. Reno, 47 F.3d 642, 656 (4th Cir. 1995) (finding compelling government interest in protecting public health by promoting unobstructed access to reproductive health facilities); United States v. Scott, 958 F. Supp. 761, 775 (D. Conn. 1997) (finding significant government interest in protecting access to health care).

Because lack of insurance coverage interferes with women's ability to effectuate their constitutionally protected right to reproductive choice, see Factual

Background, *supra*, at 13-18, New York has a compelling interest in increasing insurance coverage for contraceptives in order to promote its interest in enabling women to decide whether and when to have a child.

F. New York State's Laws and Policies Reflect a Compelling Interest in Ensuring Access to Contraception

Not only does New York State have a compelling interest in eliminating sex discrimination and ensuring reproductive choice *in general*, its policies demonstrate that the specific goal of ensuring access to contraceptives is of the highest level of importance in this state. New York State has long recognized the special role that contraceptives play in enabling women to "participate equally in the economic and social life of the Nation," Casey, 505 U.S. at 856, and in allowing women to make freely "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." Id. at 851. Accordingly, New York State devotes significant resources to improving and ensuring that the women of this State have access to contraceptives.

For example, in the upcoming fiscal year (SFY 2006-2007), the Governor and the Legislature have allocated $21.8 million to the New York State Family Planning Program of the State Department of Health. This program, which is administered through a network of family planning provider agencies, provides low-income, uninsured, and under-insured women with a range of contraceptive options, basic preventive screening services, and testing for sexually transmitted

infections.[13] In the present fiscal year, New York State also chose to allocate over $5 million of the Maternal-Child Health Block Grant that it receives from the federal government under Title V of the Social Security Act to family planning services. An additional $500,000 was allocated for Rapid HIV Testing at family planning clinics.

New York State also funds several pregnancy prevention programs aimed at teens. For example, the Community-Based Adolescent Pregnancy Prevention Program (CBAPP), the Adolescent Pregnancy Prevention Services (APPS), and the Teenage Services Act (TASA) either provide free family planning services, or make referrals for such services. State funding for CBAPP, APPS and TASA this fiscal year exceeds $13 million.

In addition to the significant amount of direct state funding for family planning services, several state insurance programs explicitly cover contraceptives. For example, contraception for many years has been part of the package of benefits in the health plan offered to New York State employees. See, e.g., New York State Dep't of Civ. Serv., NYSHIP Empire Plan at a Glance, available at

[13] In addition to these state family planning funds, New York State spends $10 million on family planning services that is allocated under the federal Temporary Assistance for Needy Families (TANF) program. New York also is the grantee of over $10 million (FY 2005-2006) in federal family planning funds under Title X of the Public Health Service Act, 42 U.S.C. § 300 et seq. In many states, the State chooses not to be the grantee under Title X. The fact that New York State has chosen to be the grantee of these funds is further evidence of the importance it places on family planning.

http://www.cs.state.ny.us/ebd/ebdonlinecenter/gold/epglance/dc37/dc37_06.cfm (listing contraception coverage as a benefit under state employees' Empire Plan for civil servants); http://www.cs.state.ny.us/ebd/ebdonlinecenter/gold/epglance/nyscopba/nyscopba05.cfm (same for Correctional Officers and Police Benevolent Association); http://www.cs.state.ny.us/ebd/ebdonlinecenter/gold/epglance/pef/pef06.cfm (same for public employees) (all last accessed June 8, 2006).

In addition, the mandated package of benefits under Child Health Plus and Family Health Plus—an insurance plan offered by New York State to children and families who are low-income but whose incomes are too high to qualify for Medicaid—include family planning services. See New York State Dep't of Health, Child Health Plus: What benefits can you get for your kids?, available at http://www.health.state.ny.us/nysdoh/chplus/what_benefits_can_you_get.htm (last accessed May 29, 2006 ("Prescription and non-prescription drugs if ordered," with no limitations).

Moreover, under two separate programs in New York State—the Family Planning Expansion Program (FPEP) and the Family Planning Benefit Program (FBPB)—certain low-income individuals whose incomes are too high to qualify for Medicaid generally, are nonetheless eligible for a full range of family planning

services under Medicaid. Smith Aff. ¶ 3 (R. 1154). Under FPEP, the state offers coverage for comprehensive family planning for up to 26 months after childbirth for women who lost Medicaid eligibility with the end of their pregnancy. See New York State Dep't of Health, Comprehensive Family Planning and Reproductive Health Care Services Program, available at http://www.health.state.ny.us/community/pregnancy/family_planning/index.htm (last accessed June 8, 2006). Under FPBP, women whose income exceeds the general Medicaid eligibility cut-off, but which is no greater than 200% of the federal poverty level, are eligible for limited Medicaid benefits. These limited Medicaid benefits include comprehensive family planning services. Id. New York State has demonstrated its continued commitment to these programs by applying to the Center for Medicare and Medicaid Services for authorization to extend them for an additional three years. New York State Dep't of Health, Section 1115 Demonstration Project Extension Request, available at http://www.health.state.ny.us/health_care/managed_care/appextension/index.htm, last accessed June 8, 2006.

In addition, the law and regulations governing several New York agencies contain additional evidence of the State's compelling interest in ensuring that women have access to family planning services. For example, the staff at facilities operated by the Department of Mental Hygiene and the staff at facilities receiving

state funds through that Department must "arrange for the availability of family planning services for all patients and shall make known to such patients the existence of these services." N.Y. Comp. Codes R. & Regs. tit. 14, § 27.6(a). As another example, each local social services department must require that "appropriate members of [its] staff personally advise eligible needy persons periodically of the availability at public expense of family planning services for the prevention of pregnancy and inquire whether such persons desire to have such services furnished to them." N.Y. Soc. Servs. Law § 131-e. New York's commitment to ensuring access to contraceptives is further demonstrated by the inclusion of emergency contraception in its Medicaid coverage. See, e.g., New York State Dep't of Health, New York State Dep't of Health, DOH Medicaid Update June 2004 Vol. 19, No. 6 (June 2004), available at http://www.health.state.ny.us/health_care/medicaid/program/update/2004/jun2004.htm#cov, last accessed June 8, 2006.

Given the extraordinary level of resources that New York State has invested in ensuring that its citizens have access to family planning services, there can be no doubt that the State has a compelling state interest in ensuring access to contraceptives to the broadest possible range of women. Moreover, given the level of state commitment to ensuring access to contraception, it only makes sense that the State would seek to extend the responsibility for promoting access to

contraception to the private employers of this State to the maximum extent possible.

CONCLUSION

It is precisely because of the State's strong interests in eliminating sex discrimination, preserving the constitutionally protected status of the right to reproductive choice, and ensuring access to contraception, that the New York Legislature passed the WHWA. The WHWA is designed to ensure that health plans issued in this State are non-discriminatory and to eliminate barriers to women's ability to exercise the fundamental right to reproductive choice. These compelling goals justify any incidental burdens on the religious freedom of some employers in the State.

Accordingly, the Amici urge the Court to affirm the Appellate Division Decision, finding that the WHWA is constitutional in all respects.

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ADDENDUM