



**“Do New Health Law Mandates Threaten Conscience Rights and  
Access to Care?”**

**Testimony submitted by**

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Subcommittee on Health**

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Members of the House Energy & Commerce Subcommittee on Health: we are honored to submit this testimony on behalf of the National Partnership for Women & Families and the women and families we represent.

That National Partnership for Women & Families is a nonprofit, nonpartisan 501(c)3 organization located in Washington, D.C. We have worked tirelessly for the last forty years to expand access to quality, affordable health care that includes comprehensive reproductive health services for all Americans; to eliminate discrimination in the workplace; and to enable women to meet the dual demands of work and family. The National Partnership for Women & Families strongly supports contraceptive coverage for all women and opposes efforts that would undermine this vital health care for many women. Efforts to restrict contraceptive access for some women by allowing employers to impose their own religious views on their employees undermine the important purposes of the Patient Protection and Affordable Care Act (ACA) and violate federal anti-discrimination law.

***All Women Deserve Equal Access to the Important Health Benefits of Contraceptive Coverage***

Virtually all women (99%) will use contraception during their reproductive lives.<sup>i</sup> Those numbers remain constant for Catholics (98%) and only 2% of Catholics use natural family planning as their method of contraception.<sup>ii</sup> These women deserve access to the same preventive health services as all other women. As the IOM Committee convened by HHS to assist it in making a determination about coverage under the women's health amendment to the ACA noted in its report, access to contraceptive coverage is vital to women's health. Unintended pregnancy has serious implications for women and babies and for public health. As the IOM Committee explained:

The risk factors for unintended pregnancy are female gender and reproductive capacity.

...

[A]ll sexually active women with reproductive capacity are at risk for unintended pregnancy. ... 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). Short interpregnancy intervals in particular have been associated with low birth weight, prematurity and small for gestational age births. In addition, women with certain chronic medical conditions (e.g., diabetes and obesity) may need to postpone pregnancy until appropriate weight loss or glycemic control has been achieved. Finally, pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension (etiologies can include idiopathic pulmonary arterial hypertension and others) and cyanotic heart disease, and for high-risk women with the Marfan Syndrome. ...

The IOM Committee on Women's Health Research recently identified unintended pregnancy to be a health condition of women for which little progress in prevention has been made, despite the availability of safe and effective preventive methods. This report also found that progress in reducing the rate of unintended pregnancy would be possible by "making contraceptives more available, accessible, and acceptable through

improved services. Another IOM report on unintended pregnancy recommended that “all pregnancies should be intended” at the time of conception and set a goal to increase access to contraception in the United States. ...

Family planning services are preventive services that enable women and couples to avoid an unwanted pregnancy and to space their pregnancies to promote optimal birth outcomes.<sup>iii</sup>

The IOM Committee was made up of a wide variety of medical experts, including specialists in disease prevention, women’s health issues, adolescent health issues, and evidence-based guidelines. The IOM Committee thoroughly examined the scientific evidence over a period of six months. As noted above, their scientific findings made clear that contraceptive coverage is a critical aspect of women’s health care and thus to the public health of the United States. Currently, 28 states require that insurance plans include coverage of contraceptives if other similar services are covered. Eight of those states do not provide any sort of exemption.<sup>iv</sup>

### ***Allowing Certain Employers to Opt Out of Comprehensive Coverage Requirements Undermines the Promise of the ACA***

The ACA requires that women’s preventive health services be covered without cost-sharing. As you are well aware, the Women’s Health Amendment to the ACA, section 2713(a)(4), was approved by Congress to remedy past discrimination against women in the provision of health care and to ensure that all women’s health care needs were met under the act.<sup>v</sup> The Congressional record makes clear that contraceptive coverage was contemplated as part of this important provision.<sup>vi</sup>

Neither the Women’s Health Amendment, nor any other portion of the ACA, contemplates allowing certain employers to discriminate against women in the provision of contraceptive services. Rather section 2713 of the ACA applies to *all* group health plans and plan issuers and states: “A group health plan and a health insurance issuer offering group or individual health insurance coverage *shall*, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.”<sup>vii</sup> Nothing in this provision allows certain religious employers to be treated differently than all other employers.

This is even more notable because Congress has included refusal provisions in many laws. In fact, another section of the ACA includes a refusal clause. Section 1303 of the ACA establishes “Special Rules” for coverage of abortion in health plans. Among other provisions, this section specifically allows individuals and entities to refuse to provide abortion care.<sup>viii</sup> It also incorporates other federal laws that allow individuals and entities to refuse to provide some care to which they object.<sup>ix</sup> None of the refusal provisions in these federal laws extend to provision or coverage of contraception.<sup>x</sup> Moreover, the statute explicitly states that “Nothing in section 1303(c) of the Affordable Care Act shall alter the rights and obligations of employees

and employers under Title VII of the Civil Rights Act of 1964.”<sup>xi</sup> As explained in greater detail below, allowing certain employers to fail to provide contraceptive coverage to their employees violates Title VII.

One of the important goals of the ACA was to eliminate the discrimination against women that had so long interfered with their ability to get all of their health care needs met. Several important provisions were included in the law to ensure that these goals would be achieved. Section 1557 prohibits discrimination in health care on the basis of – among other things – sex.<sup>xii</sup> Since the burdens of pregnancy fall entirely on women and most contraceptive methods are available only to women, failure to provide equal access to contraception constitutes discrimination on the basis of sex. Furthermore, access to contraception is essential to gender equality, as it is only when women can control their fertility that they are able to participate equally in society.

Allowing some employers to opt out of contraceptive coverage requirements would also violate Section 1554 of the ACA, which states that the “Secretary of Health and Human Services shall not promulgate any regulation that ... (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services ... or (6) limits the availability of health care treatment for the full duration of a patient’s medical needs.”<sup>xiii</sup> Providing a religious exemption means that some women seeking legal reproductive healthcare services will be subjected to unnecessary and sometimes prohibitive financial obstacles in accessing the services. The exemption would create an unreasonable barrier for women seeking appropriate medical care by requiring those who work for certain religious employers to bear the substantial costs of contraceptive counseling and services.

### ***Allowing Some Employers to Opt Out of Comprehensive Coverage Requirements Violates Federal Non-Discrimination Law***

Section 1557, detailed above, makes clear that it does nothing to modify employers’ obligation to comply with other civil rights laws.<sup>xiv</sup> One of those laws is Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), which prohibits sex discrimination in employment.<sup>xv</sup> The PDA specifically prohibits discrimination against women “affected by pregnancy, childbirth, or related medical conditions” in all aspects of employment, including the receipt of fringe benefits.<sup>xvi</sup> The Supreme Court has long held that it is discrimination under this section to treat women differently, not just because they are pregnant, but because of their potential to become pregnant.<sup>xvii</sup> Just as it is discrimination prohibited under section 1557, it is a violation of Title VII to allow some employers to refuse to provide contraceptive coverage for their female employees.

The specific issue of failing to provide contraceptive coverage along with other related health services was addressed by the Equal Employment Opportunity Commission in 2000. Two registered nurses filed complaints with the EEOC against their employers for their employers’ refusal to cover prescription contraception while covering a wide array of other prescription drugs and preventative health care services. The EEOC panel noted that pregnancy discrimination included discrimination based on the potential to become pregnant and found

that the PDA clearly prohibited discrimination in benefits, including prescription contraception. They based their decision on the language of the PDA, Supreme Court cases interpreting it, and Congress' legislative intent. The EEOC rejected the employers' arguments that they could exclude contraception for strictly financial reasons or because it was not used to treat "something abnormal about [the employee's] mental or physical health." They found that the employers had treated contraception differently than other preventative services and had, thereby, "discriminated on the basis of pregnancy." Because prescription birth control is only available for women, the EEOC also rejected the employers' argument that they did not explicitly distinguish between men and women. The EEOC ordered the employers to cover the expenses of prescription contraceptives, including "the full range of prescription contraceptive choices."<sup>xviii</sup> The few courts that have addressed this issue have reached varied results, with a number of federal courts agreeing that failing to provide contraceptive coverage violates Title VII.<sup>xix</sup>

## Conclusion

The National Partnership for Women & Families urges Congress to ensure that all women have access to comprehensive health services, including contraceptive methods. Attempts to dismantle these requirements discriminate against certain women because of where they are employed and endanger their health. Congress should reject all attempts to undermine the promise of the Women's Health Amendment to the ACA.

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<sup>i</sup> Rachel K. Jones and Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, Guttmacher Institute (April 2011), available at <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf>.

<sup>ii</sup> *Id.*

<sup>iii</sup> Committee on Preventive Services for Women Board on Population Health and Public Health Practice; *Clinical Preventive Services for Women: Closing the Gaps*; Institute of Medicine 90-91 (July 2011) (internal citations omitted).

<sup>iv</sup> See, State Policies In Brief: Insurance Coverage of Contraceptives, Guttmacher Institute (Sept. 1, 2011), at [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf)

<sup>v</sup> See, David Herszenhorn and Robert Pear, *Senate Passes Women's Health Amendment*, Prescriptions: The Business of Health Care, New York Times blogs, at <http://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/>

<sup>vi</sup> Sen. A. Franken, *Congressional Record*, Dec. 3, 2009, p. S.12271; Sen. B. Boxer, *Congressional Record*, Dec. 1, 2009, p. S.12025; Sen. D. Feinstein, *Congressional Record*, Dec. 2, 2009, p. S. 12114; Sen. B. Nelson, *Congressional Record*, Dec. 3, 2009, p. S.12277.

<sup>vii</sup> Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 2713, codified at 42 U.S.C. 300gg-13 (2010) (emphasis added).

<sup>viii</sup> Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 1303(a)(3), codified at 42 U.S.C. § 18023 (2010).

<sup>ix</sup> §1303(b)(2).

<sup>x</sup> See, Church Amendment, an amendment to the Health Programs Extension Act of 1973 §401, 42 U.S.C. §300a-7; Coats Amendment, an amendment to the Public Health Services Act of 1996 §245, 42 U.S.C. §238n; Weldon Amendment, Consolidated Appropriations Act of 2010 §508.

<sup>xi</sup> §1303(b)(3).

<sup>xii</sup> "Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et

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seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).” Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 1557(a), codified at 42 U.S.C. § 18116 (2010).

<sup>xiii</sup> Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 1554, codified at 42 U.S.C. § 18114 (2010).

<sup>xiv</sup> “Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).” Patient Protection and Affordable Care Act, Pub L. No. 111-148, § 1557(b), codified at 42 U.S.C. § 18116 (2010).

<sup>xv</sup> 42 U.S.C. § 2000e et seq.

<sup>xvi</sup> 42 U.S.C. § 2000e(k).

<sup>xvii</sup> See *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991).

<sup>xviii</sup> Equal Employment Opportunity Commission (EEOC), Decision on Coverage of Contraception (Dec. 14, 2000), at <http://www.eeoc.gov/policy/docs/decision-contraception.html> (last visited Sept. 21, 2011).

<sup>xix</sup> *Compare*, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (holding that failure to provide contraceptive coverage resulted in less comprehensive coverage for women than for men and violated Title VII); *Cooley v. DaimlerChrysler Corp.*, 281 F.Supp.2d 979 (E.D. Mo. 2003); *Mauldin v. Wal-Mart*, 89 Fair Empl. Prac. Cas. (BNA) 1600 (N.D. Ga. 2002) (certifying plaintiff class of contraceptive-using women and citing *Erickson*. Wal-Mart ultimately settled the case by agreeing to provide contraceptive coverage); *with*, *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007) (holding that the potential to become pregnant is not “related to pregnancy” under the PDA and that contraceptives did not have to be compared with other preventive health services, an argument in direct contrast to the WHA and IOM Committee findings); *Stocking v. AT&T*, No. 03-0421, 2007 U.S. Dist. LEXIS 78188 (W.D. Mo. 2007) (controlled by *Union Pacific*); *Cummins v. Illinois*, No. 02-4201, 2005 U.S. Dist. LEXIS 42634 (S.D. Ill 2005).