No. 06-1706

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRANDI STANDRIDGE, *ET AL.*,

Plaintiffs-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nebraska

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

*Ann Elizabeth Reesman
Laura Anne Giantris
McGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, NW Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

May 15, 2006

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America make the following disclosures:

1) The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America have no parent corporations.

2) No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or the Chamber of Commerce of the United States of America.

May 15, 2006

____
Ann Elizabeth Reesman

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 1

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EMPLOYER'S PRESCRIPTION PLAN VIOLATED TITLE VII, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT, BY DENYING COVERAGE FOR CONTRACEPTIVES 8

A. The Prevention of Pregnancy Is Not Protected by the PDA Because It Is Not "Pregnancy, Childbirth, or [a] Related Medical Condition[]" 8

B. The PDA Requires Only That "Pregnancy, Childbirth, or Related Medical Conditions" Be Treated in a Neutral Way 14

II. THE ISSUE OF WHETHER EMPLOYER-SPONSORED PLANS SHOULD COVER CONTRACEPTIVES IS NOT A LEGAL ISSUE FOR THE COURTS TO DECIDE BUT A PUBLIC POLICY ISSUE TO BE DETERMINED BY THE PRIVATE MARKET FORCES OR, IN THE ALTERNATIVE, BY LEGISLATION 17

A. Any Increase in the Cost of Health Insurance Coverage Resulting from Either Judicial or Legislative Mandates Jeopardizes the Availability and Affordability of Plans to Employers and Their Employees 18

B. In Considering the Issue Before It, This Court Should Also Consider the Broader Impact of Any Decision That Requires Insurance Plans Provide Coverage of Any Prescription,

Treatment, or Medical Condition That Is Only Available to or Somehow Unique to One Sex 22

C. Because the PDA Does Not Mandate That an Employer's Prescription Plan Cover Contraceptives, if Coverage Is To Be Required, It Is for Congress To Decide 24

CONCLUSION..26

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)....................9

Erickson v. Bartell Drug Co., 141 F. Supp.2d 1266 (W.D. Wash. 2001)....................18

International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991)....................15

Krauel v. Iowa Methodist Medical Center, 95 F.3d 674 (8th Cir. 1996)....................5, 13

The Lottawanna, 88 U.S. 558 (1875)....................7

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)....................16

Norfolk & Western Railway v. American Train Dispatchers' Association, 499 U.S. 117 (1991)....................5, 9

Piantanida v. Wyman Center, Inc., 116 F.3d 340 (8th Cir. 1997)....................5, 11

FEDERAL STATUTES

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)....................*passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*....................*passim*

42 U.S.C. § 2000e-2(a)....................8

PENDING FEDERAL LEGISLATION

Equity in Prescription Insurance and Contraceptive Coverage Act of 2005, S. 1214, 109th Cong. (2005); H.R. 4651, 109th Cong. (2005)....................24

STATE STATUTES

Md. Code Ann., Ins. § 15-826....................24

REGULATIONS

29 C.F.R. pt. 1630 app. § 1630.2(h) 13

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 95-1786 (Oct. 13, 1978), *reprinted in* 1978 U.S.C.C.A.N. 4749 9

H.R. Rep. No. 95-948 (Mar. 13, 1978) 9

Senate Comm. on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1980) 9

OTHER AUTHORITIES

The American Heritage Stedman's Medical Dictionary (Houghton Mifflin Co. 2002) 6, 13

EEOC Compliance Manual § 902.2(c)(2), *Definition of the Term Disability* (Feb. 1, 2002) 13

Employee Benefits Research Institute, EBRI Issue Brief No. 284, *Employment-Based Health Benefits: Trends in Access and Coverage* (Aug. 2005) 21

Kaiser Family Foundation, *Prescription Drug Trends* (Nov. 2005) 19, 20

Kaiser Family Foundation/Health Research and Educational Trust, *Employer Health Benefits: 2005 Annual Survey* (2005) 19, 20, 21

National Conference of State Legislatures, *50 State Summary of Contraceptive Laws* (Apr. 2005) 25

Sarah E. Bycott, Note, Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra, 79 N.C. L. Rev. 779 (Mar. 2001) 19

The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of all parties. The brief urges the Court to reverse the District Court's ruling and thus supports the position of Defendant-Appellant Union Pacific Railroad before this Court.

STATEMENT OF THE ISSUE

Whether the exclusion of prescription contraceptives from Defendant-Appellant's employee prescription drug benefit plan constitutes discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended by the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k).

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 320 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal

employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to Title VII and other equal employment statutes and regulations. Member companies typically provide their employees (and the employees' dependents) with partially or fully paid group health insurance, often including coverage for prescription drugs. In fact, the vast majority of Americans, many of whom are employees of EEAC's and/or the Chamber's member companies, insure against health care costs by participating in employer-sponsored group health plans. For decades, employers have voluntarily provided health benefits designed to meet the health and financial needs of their workforces and their dependents. Because of the

importance of this employee benefit to employees and employers alike, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC and the Chamber represent.

EEAC and the Chamber thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of their significant experience in equal employment policy matters, EEAC and the Chamber are uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

This matter is proceeding as a class action on behalf of "[a]ll females employed by Union Pacific Railroad Company after February 9, 2001, enrolled in one of the [company's collectively bargained for health benefits plans] who used prescription contraception, at least in part for the purpose of preventing pregnancy, without insurance reimbursement from [the plan]." *In re: Union Pac. R.R. Empl. Prac. Litig.*, 378 F. Supp.2d 1139, 1140 (D. Neb. 2005). Plaintiffs assert that Union Pacific discriminated against them by providing health benefits that exclude coverage for prescription contraceptives, such as birth control pills, in violation of Title VII of the

Civil Rights Act (Title VII), as amended by the Pregnancy Discrimination Act (PDA). *Id.*

Union Pacific provides health insurance benefits to its union represented employees through five different plans. *Id.* at 1141. These plans provide prescription drug coverage only if "medically necessary and . . . given for the treatment of an injury, sickness, or pregnancy." Defendant's Brief In Opposition To Plaintiff's Motion For Partial Summary Judgment at 9. Accordingly, while the plans exclude coverage for contraceptive drugs, devices and procedures used solely for the purpose of preventing pregnancy, they do cover contraception that is "medically necessary," such as for the treatment of skin diseases or menstrual disorders or to avoid a known health risk associated with pregnancy. *Id.* at 10, 19.

In the court below, the Plaintiffs filed a Motion for Partial Summary Judgment. 378 F. Supp.2d at 1140. The District Court granted the Plaintiffs' motion, ruling that pregnancy is a "disease" and that Union Pacific's health benefits plans violate Title VII because they treat medical care needed to prevent pregnancy less favorably than medical care needed to prevent other diseases posing comparable health risks. *Id.* at 1147 n.20, 1149. Union Pacific filed a timely appeal of the District Court's ruling.

SUMMARY OF ARGUMENT

In the Pregnancy Discrimination Act (PDA) in 1978, Congress explicitly amended Title VII of the Civil Rights Act of 1964 (Title VII) to provide that discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The plain language of the PDA contains no specific reference to contraceptives and does not suggest that "related medical conditions" extend outside the context of "pregnancy" and "childbirth." *Id.* Indeed, canons of statutory construction (*see Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991)) dictate that "related medical conditions" should be understood as referring only to those related directly to "pregnancy" and "childbirth." This Court has similarly interpreted the PDA in this manner. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340 (8th Cir. 1997); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996). Pregnancy and childbirth, which occur *after* conception, are categorically different than efforts that are taken to prevent a pregnancy from occurring. Moreover, the decision to avoid pregnancy through the use of contraceptives does not involve a "medical condition" of any kind. Accordingly, the use of prescription contraceptives falls outside the purview of the PDA.

Contrary to the conclusion reached by the court below, pregnancy is not a "disease," and employers should not be required to treat it as such from the standpoint of health coverage. While pregnancy may (or may not) lead to a variety of physiological changes and health-related conditions, pregnancy itself refers to nothing more than "[c]arrying developing offspring within the body." The American Heritage Stedman's Medical Dictionary (Houghton Mifflin Co. 2002).[1] Women can experience a variety of medical conditions as a result of pregnancy, and Union Pacific's health plans cover those conditions on the same basis as non-pregnant employees in accordance with the requirements of the PDA.

Even if the prevention of pregnancy were covered by the PDA's protective language, the statute would not mandate coverage of every associated expense. Rather, the statute provides only that an employer must treat pregnancy, childbirth, or related medical conditions in a neutral way. The PDA does not require that an employer provide health insurance coverage for every method that avoids pregnancy (or even every method that enables pregnancy). A correct construction of the PDA, as supported by U.S. Supreme Court cases interpreting the statute, requires a determination by this Court that Union Pacific's health plans do not violate the PDA as all

[1] *Available at* http://dictionary.reference.com/search?q=pregnant

of its employees and their dependents are excluded from receiving contraceptive coverage.

It is for Congress to make the law, not the courts. *See The Lottawanna*, 88 U.S. 558, 576-77 (1875) ("[W]e must always remember that the court cannot make the law…. If … any change is desired in [a law], … it must be made by the legislative department"). As Congress has yet to pass legislation requiring employers to provide coverage of contraceptives within their prescription plans, the District Court erred in issuing this mandate. Moreover, any such mandate must come from Congress (or our state legislatures) only after giving this difficult issue a full and fair public debate, including a consideration of how such a mandate will impact the already escalating cost of health insurance and spending on prescription drugs; a consideration of the broader impact of any decision that requires health insurance plans to provide coverage of any prescription, treatment, or medical condition that is only available to or somehow unique to one sex; and a consideration of the other related politically charged issues—the resolution of which will have far reaching social consequences.

ARGUMENT

I. THE DISTRICT ERRED IN CONCLUDING THAT THE EMPLOYER'S PRESCRIPTION PLAN VIOLATED TITLE VII, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT, BY DENYING COVERAGE FOR CONTRACEPTIVES

A. The Prevention of Pregnancy Is Not Protected by the PDA Because It Is Not "Pregnancy, Childbirth, or [a] Related Medical Condition[]"

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act, passed in 1978, amended Title VII to provide that discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The PDA further provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

Under the plain language of the statute, prescription contraceptives are not within the purview of the PDA's protections and requiring employers to cover contraceptives under their prescription plans would impermissibly

extend the statute beyond its intended scope. First, there is no specific reference to contraceptives in the PDA. The absence of any specific reference to "contraception" underscores the statute's prime purpose of prohibiting discrimination against women who are pregnant, which is clearly different than efforts engaged in by men and women to *prevent* a pregnancy. *See* Senate Comm. on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Pregnancy Discrimination Act of 1978 (Comm. Print 1980); *see also* H.R. Rep. No. 95-948 (Mar. 13, 1978) (Education and Labor Comm.) *and* H.R. Conf. Rep. No. 95-1786 (Oct. 13, 1978), *reprinted in* 1978 U.S.C.C.A.N. 4749-67.

In addition, basic rules of statutory construction place prescription contraceptives outside the purview of the PDA. Under general rules of statutory construction, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("the application of the maxim *ejusdem generis* [requires] that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding

specific words'") (citing 2A N. Singer, Sutherland on Statutes and Statutory Construction 47.17 (1991)). Thus, "related medical conditions," a general phrase, should be understood only as referring to medical conditions resulting from "pregnancy" and "childbirth," the specific terms that precede it. Pregnancy and childbirth, which occur *after* conception are clearly not the same thing as trying to prevent conception from occurring.

The idea that the phrase "pregnancy, childbirth, or related medical conditions" broadly covers all things dealing with reproduction not only directly conflicts with the plain language of the statute, it is also at odds with Eighth Circuit precedent. In *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), this Court rejected arguments that infertility is a medical condition "related to" pregnancy and childbirth for the purposes of the PDA. Rather, this Court concluded, the PDA's general phrase "related medical conditions" should be understood as referring to medical conditions directly caused by "pregnancy" and "childbirth." *Id.* at 679. The decision also observed that neither the plain language of the PDA nor the legislative history reflected any legislative intent to include infertility (a condition that can affect both men and women) within the ambit of the PDA. *Id.*

If someone who *cannot* become pregnant due to infertility is not a person with a medical condition "related to" pregnancy or childbirth, then a

person who simply *elects* not to become pregnant by using contraceptives certainly cannot be. Indeed, unlike infertility, the decision to avoid pregnancy through the use of contraceptives does not involve a "medical condition" at all. In *Piantanida v. Wyman Center, Inc*., 116 F.3d 340 (8th Cir. 1997), for example, this Court held that "an individual's choice to care for a child is not a 'medical condition' related to childbirth or pregnancy," but rather a "social role" that both men and women choose to adopt. *Id*. at 342. Where alleged discriminatory treatment does not stem from pregnancy, childbirth or a related "medical condition," as is the case here, the PDA simply does not apply.

Moreover, while only women can become pregnant or personally experience childbirth, in our enlightened society both men and women take responsibility for avoiding unwanted pregnancies using a variety of methods. Accordingly, a policy of denying insurance benefits for drugs, devices or procedures to prevent pregnancy is gender-neutral. The fact that one form of contraception – prescription contraceptives – currently is used only by women does not change the analysis. Union Pacific's health insurance plans do not cover *any* drug, device or procedure used for the purpose of preventing pregnancy, including condoms or vasectomies for men. Defendant's Brief at 19. And when medical science has discovered

and marketed a prescription drug that can be used for contraceptive purposes by men, that drug also will fall within Union Pacific's exclusion for contraceptives.

In the face of this logic, the District Court below took the extraordinary step of declaring pregnancy a "disease." *Union Pacific*, 378 F. Supp.2d at 1147 n.20. Union Pacific's health plans violate Title VII, the court then reasoned, because they treat medical care needed to reduce the "risk" of pregnancy less favorably than medical care needed to prevent other diseases posing comparable health risks. *Id.* at 1149. The District Court offered no medical or legal support for the idea that pregnancy is a disease, but instead offered a "sex-neutral hypothetical" to help bridge the "gender gap-in-attitude" toward pregnancy. *Id.* at 1147. The hypothetical, which describes a fictional male patient who experiences various physiological changes (and medical conditions) associated with pregnancy, is apparently intended to educate less enlightened readers about the "disease-like" qualities of pregnancy and childbirth.

Notwithstanding the creativity of the hypothetical, we strongly disagree with the District Court's conclusion that pregnancy is itself a disease, like diabetes or cancer, or that employers should be required to treat it as such from a prevention standpoint. Many women desire pregnancy and

will go to great lengths to become pregnant, as the *Krauel* case illustrates, for example. And while pregnancy may (or may not) lead to a variety of physiological changes and health-related conditions, pregnancy itself refers to nothing more than "[c]arrying developing offspring within the body." The American Heritage Stedman's Medical Dictionary (Houghton Mifflin Co. 2002).[2] Even the Equal Employment Opportunity Commission (EEOC), which enforces the federal equal employment opportunity laws, does not view pregnancy as a disease *per se*. According to the agency, the Americans with Disabilities Act (ADA) does not cover pregnancy because "pregnancy is not the result of a physiological disorder" and "is not an impairment," let alone a disability. 29 C.F.R. pt. 1630 app. § 1630.2(h) (interpretive guidance); EEOC Compl. Man. § 902.2(c)(2), *Definition of the Term Disability* (Feb. 1, 2000).[3]

Of course, medical conditions that can occur in women as a result of pregnancy sometimes cause "impairments" under the ADA, and the PDA requires that employer-sponsored health benefit plans cover those conditions on the same basis as a non-pregnant employee. Union Pacific's health benefit plans fully comply with the PDA in this regard, with employees

[2] *Available at* http://dictionary.reference.com/search?q=pregnant
[3] *Available at* http://www.eeoc.gov/policy/docs/902cm.html

receiving health insurance coverage for the treatment for "injury, sickness and pregnancy," including prescription contraceptive coverage where "medically necessary" to avoid a known health risk associated with pregnancy.

An employer's health benefit plan that excludes prescription contraceptives is not discriminating on the gender-specific biological functions of pregnancy and childbirth, but affects all employees on a gender-neutral basis. Thus, the District Court erred in concluding that the use of contraceptives is within the purview of the PDA.

B. The PDA Requires Only That "Pregnancy, Childbirth, or Related Medical Conditions" Be Treated in a Neutral Way

Even if the prevention of pregnancy were covered by the PDA's protective language, the statute would not require that an employer provide insurance coverage for every associated expense. The PDA does not require that individuals receive special treatment regarding pregnancy, childbirth, or related medical conditions, but only that such conditions be treated in a neutral way.

The PDA merely requires that employment or access to an employer's fringe benefit program not be denied or limited on the basis of sex, including pregnancy, ability to bear children, or related medical conditions. Thus, as long as both men and women receive the same benefits and are subject to the

same exclusions under an employer's insurance plan, the plan does not discriminate on the basis of sex.

The U.S. Supreme Court's decision in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), does not compel a different result. In *Johnson Controls*, the Supreme Court was asked to determine the legality of Johnson Controls' "fetal-protection" policy, which prohibited women of child-bearing age from working in jobs where they could be exposed to levels of lead that are potentially damaging to a fetus. The Supreme Court ruled that the policy violated Title VII as amended by the PDA because the employer "has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex." *Id.* at 199. Such a policy, the Court reasoned, "is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females." *Id.*

The Court's holding in *Johnson Controls*, however, cannot be extended logically to require employers to fund prescription contraceptives. First, *Johnson Controls* dealt with an explicit policy that discriminated against women, but not men, based on their reproductive capacity. In contrast, the employer in this case is not providing lesser benefits to women because of their childbearing capacity. The fact that prescription

contraceptives are available only to women is due to the current status of medical research, not to discrimination against women.

Nor does the Supreme Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), compel a different conclusion. In *Newport News* the Supreme Court held that an employer's benefit plan that provided female employees with greater hospitalization benefits for pregnancy-related conditions than it did for spouses of male employees violated the PDA. The provision effectively gave male employees less coverage for their spouses than it gave female employees for the same condition. The Court held that "discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees." 462 U.S. at 684.

Thus, *Newport News* dealt with providing lesser coverage for one gender of employees by providing less benefits to the female dependents of male employees. In the instant case, in contrast, the employer provides the same levels of coverage for all employees. All employees and their dependents are excluded from receiving contraceptive coverage. Thus, under a *Newport News* analysis, male employees are affected in precisely the same way as female employees because their spouses are prohibited from receiving coverage for contraceptives.

An employer's prescription drug plan that does not cover contraceptives discriminates against those who use them only in the same sense that it discriminates against those who might need penile prosthetic implants (which may be medically necessary to cure impotence), Kerato-refractive eye surgery (which may be medically necessary to cure vision defects), or hearing aids (which may be medically necessary to overcome deafness). All of these exclusions are gender neutral. The law does not require that employers provide benefits to employees, but only that there be equality in whatever is (or is not) provided.

II. THE ISSUE OF WHETHER EMPLOYER-SPONSORED PLANS SHOULD COVER CONTRACEPTIVES IS NOT A LEGAL ISSUE FOR THE COURTS TO DECIDE BUT A PUBLIC POLICY ISSUE TO BE DETERMINED BY THE PRIVATE MARKET FORCES OR, IN THE ALTERNATIVE, BY LEGISLATION

The plaintiffs' argument below appears largely driven by broader social concerns having to do with the need for women to "control [their] biological potential for pregnancy" and the protection of "women's hard fought reproductive rights." Plaintiff's Reply In Support Of Motion For Partial Summary Judgment at 14-15, 19. While there may be some public policy considerations that would encourage employers to provide coverage for prescription contraceptives, there are even stronger reasons why the types and levels of health insurance coverage that an employer chooses to

provide to its employees and their dependents should not be mandated. In any event, Congress has yet to pass legislation requiring employers to provide such coverage, and the issue deserves a full and fair public debate before mandating such coverage.

A. Any Increase in the Cost of Health Insurance Coverage Resulting from Either Judicial or Legislative Mandates Jeopardizes the Availability and Affordability of Plans to Employers and Their Employees

Many who support mandating the coverage of prescription contraceptives argue that the availability of affordable and effective contraceptives will result in only a fractional increase in health plan premiums, while "help[ing] to prevent a litany of physical, emotional, economic, and social consequences." *Erickson v. Bartell Drug Co.*, 141 F. Supp.2d 1266, 1272-73 (W.D. Wash. 2001). Actually, the question of cost-benefit balance is far from settled in the controversy over mandated coverage of prescription contraceptives. Central to the argument that prevention of pregnancy and pregnancy-related costs through the use of contraceptives will result in substantial economic savings and social benefits, is the assumption that, if contraceptives were covered by insurance, individuals who do not use birth control because of its expense would begin practicing a covered contraceptive method. However, thus far, no studies have been conducted exploring the validity of this basic assumption upon

which much of the cost-benefit analysis in favor of contraceptive coverage hinges. *See* Sarah E. Bycott, Note, *Controversy Aroused: North Carolina Mandates Insurance Coverage of Contraceptives in the Wake of Viagra*, 79 N.C. L. Rev. 779, 784-85 n.32 (Mar. 2001) (citing Philip R. Lee & Felicia H. Stewart, Editorial, *Failing to Prevent Unintended Pregnancy is Costly*, 85 Am. J. Pub. Health 479, 479 (1995)).

On the other hand, evidence does exist to show that the growing cost of health insurance is a real concern to employers and their employees. The 2005 annual survey of employer health benefits conducted by the Kaiser Family Foundation (Kaiser) and the Health Research and Educational Trust (HRET) reported that job-based health insurance costs increased by 9.2 percent from the spring of 2004 to the spring of 2005. Kaiser/HRET, *Employer Health Benefits: 2005 Annual Survey* 16 (2005).[4] These rate increases translate to per-employee health plan costs of $4,024 a year for single coverage ($335 per month) and $10,880 a year for family coverage ($907 per month). *Id.* The majority of Americans (nearly 60% in 2004) obtain their health insurance through employer-sponsored health benefit plans. Kaiser, *Prescription Drug Trends* 2 (Nov. 2005).[5]

---

[4] *Available at* http://www.kff.org/insurance/7315/upload/7315.pdf
[5] *Available at* http://www.kff.org/insurance/upload/3057-04.pdf

In 2005, 98% of all workers in employer-sponsored health benefits plans had prescription drug benefits. Spending for prescription drugs has risen much faster than for other types of health care. *Id.* at 1. U.S. spending for prescription drugs was $179.2 billion in 2003, almost 4½ times larger than the $40.3 billion spent in 1990. *Id.* Although prescription drug spending is a relatively small proportion (11%) of personal health care spending, it is one of the fastest growing components, increasing at double-digit rates between 1995 and 2003. *Id.*

In the past, employers absorbed much of the rising cost of health care because a healthy economy brought in more revenue to pay these expenses and a tight labor market made the need for comprehensive, low-cost packages necessary to attract and retain employees. Most employers that offer health benefit coverage, for example, contribute between 75-100% of the premium for single coverage and between 50-100% for family coverage. Kaiser/HRET, *Employer Health Benefits: 2005 Annual Survey* 60 (2005). But rising health care costs have forced many employer to increase employee cost-sharing in the form of bigger monthly premiums, larger co-payments for doctor visits and prescription drugs, and higher out-of-pocket payments toward the deductible and coinsurance. Kaiser, *Prescription Drug Trends* 2 (Nov. 2005); Kaiser/HRET, *Employer Health Benefits: 2005*

Annual Survey 76 (2005). An even more troubling statistic is the recent dramatic decline in the number of employers offering any health benefits at all from 69% to 60% just in the last five years. Kaiser/HRET, *Employer Health Benefits: 2005 Annual Survey* 32 (2005). Not surprisingly, this decline is driven largely by the inability of smaller employers (with fewer than 200 workers) to offer health coverage. *Id*.

In addition, even as employer coverage has been expanding in recent years, the number of employees turning down their employers' offer of coverage has been steadily increasing. Employee Benefits Research Institute, EBRI Issue Brief No. 284, *Employment-Based Health Benefits: Trends in Access and Coverage* (Aug. 2005).[6] Many who turn down health insurance coverage by their employer do so because they find the coverage just too costly. *Id.* at 7. Any increase in the cost of health insurance coverage by imposing mandates either judicially or legislatively jeopardizes the availability and affordability of plans to employers and their employees.

So while some women would gain coverage for contraceptive drugs under the District Court's holding, other women and men predictably would lose their medical insurance entirely or pay considerably more money to obtain insurance. Employees who desire more comprehensive coverage for

---

[6] *Available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_08-20051.pdf

any purpose or condition are in danger of losing their health benefits altogether because the costs are rising for their employers and themselves, and insurers faced with rising costs are withdrawing from the market and leaving consumers with fewer alternatives. In addition, employers faced with increased premiums and the prospect of being liable for damages for the actions of the health plans they sponsor may determine not to provide this employee benefit.

B. In Considering the Issue Before It, This Court Should Also Consider the Broader Impact of Any Decision That Requires Insurance Plans Provide Coverage of Any Prescription, Treatment, or Medical Condition That Is Only Available to or Somehow Unique to One Sex

Because men and women are biologically different, a wide variety of physical characteristics, including but not limited to medical conditions, are unique to one gender or the other. As a result, a significant number of medical treatments are provided only to one gender, because the other gender does not need them.

Under the theory adopted by the District Court, a limitation on insurance coverage for treatment of any of these conditions potentially would violate Title VII, because the affected gender would be deprived of coverage while the unaffected gender would not. As a few examples,

potential challenges could be brought under this theory to try to force insurance coverage of:

- surgical contraception such as tubal ligations and vasectomies, and their reversal;
- in-vitro fertilization, artificial insemination, embryo transfer, fertility drugs, or any other artificial means of conception;
- treatment for male sexual dysfunction and impotence; and
- prescription coverage for Propecia, a male-pattern baldness remedy.

This is hardly an exhaustive list, but it demonstrates the issues that may arise in this debate. In considering the issue before it, this Court should also consider the broader impact of any decision that requires that insurance plans provide coverage of any prescription, treatment, or medical condition that is only available to or somehow unique to one sex. Such a decision has the potential of greatly increasing the cost of employer-provided insurance coverage.

C. Because the PDA Does Not Mandate That an Employer's Prescription Plan Cover Contraceptives, if Coverage Is To Be Required, It Is for Congress To Decide

The instant case involves politically charged issues with far-reaching social consequences. For these reasons, the proper forum for their consideration is Congress and not the courts.

Apparently aware that federal law does not currently mandate that an employer's prescription plan cover contraceptives, legislators have proposed the federal Equity in Prescription Insurance and Contraceptive Coverage Act of 2005 (EPICC) in both the Senate and the House of Representatives. S. 1214, 109th Cong. (2005); H.R. 4651, 109th Cong. (2005). Both bills would require coverage of prescription contraceptive drugs and devices and contraceptive services under health plans. Specifically, under the bills, a group health plan and a health insurance issuer providing group coverage, may not exclude or restrict benefits for prescription contraceptive drugs, devices, or outpatient services if the plan provides benefits for other outpatient prescription drugs, devices or outpatient services. *Id.*

In addition, a number of state legislatures have addressed the issue of contraceptive coverage. On April 28, 1998, Maryland became the first state to require private-sector insurance policies to cover contraceptive drugs or devices if they cover prescription drugs. *See* Md. Code Ann., Ins. § 15-826.

Since then, at least 24 states have passed legislation related to insurance coverage for contraceptives. For a listing of these states, *see* National Conference of State Legislatures, *50 State Summary of Contraceptive Laws* (Apr. 2005).[7] Indeed, contraceptive issues are a hot topic of debate in Congress and state legislatures across the country.

The legislative debate illustrates not only the understanding that the PDA does not address prescription contraceptives but also that there is not yet consensus concerning whether or not coverage of prescription contraceptives should be mandated.

---

[7] *Available at* http://www.ncsl.org/programs/health/50states.htm

CONCLUSION

For the foregoing reasons, *Amici Curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit that the decision below should be reversed.

Respectfully submitted,

____

*Ann Elizabeth Reesman
Laura Anne Giantris
McGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, NW Suite 1200
Washington, DC 20005
(202) 789-8600

*Counsel of Record

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

May 15, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States of America in Support of Defendants-Appellants and in Support of Reversal complies with Fed. R. App. P. 32(a)(7)(B) and pertinent provisions of Eighth Circuit Rule 28A. The brief has 4,997 words, from the Interest of the *Amici Curiae* through the Conclusion, according to the word processing program Microsoft Word 2000. A 3 ½ inch diskette containing this brief has been filed with the Court. It has been scanned for viruses and is virus-free.

____

Ann Elizabeth Reesman
Laura Anne Giantris
McGuiness Norris & Williams, LLP
1015 15th Street, NW Suite 1200
Washington, DC 20005
(202) 789-8600

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, two (2) paper copies of, and one (1) computer disk containing, this Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States of America in Support of Defendants-Appellants and in Support of Reversal were sent by first class U.S. mail, postage prepaid, on this day to each of the following:

Michael L. Schleich
Fraser & Stryker
409 S. 17th Street
Omaha, NE 68102-2663

Claire Cordon
T. David Copley
Keller & Rohrback
1201 Third Avenue, Suite 3200
Seattle, WA 93101-3029

Sylvester James, Jr.
802 Broadway, 7th Floor
Kansas City, MO 64105

Terry L. Fromson
Women's Law Project
125 S. Ninth Street, Suite 300
Philadelphia, PA 19107

Barbara C. Frankland
Rex A. Sharp
Gunderson & Sharp
4121 West 83rd St., Suite 256
Prairie Village, KS 66208

Kelly S. Reese
Roberta N. Riley
Planned Parenthood
2001 E. Madison
Seattle, WA 98122

Rick D. Holtsclaw
Defeo & Holtsclaw
2029 Wyandotte, Suite 100
Kansas City, MO 64108

Brian J. McGrath
Lamson & Dugan
10306 Regency Parkway Drive
Omaha, NE 68114

Donald J. Munro
Thomas J. Mikula
Jeffrey D. Fox
Goodwin & Proctor
901 New York Avenue, NW
Washington, DC 20001-4432

Brenda J. Council
Whitner Law Firm
1905 Harney Street, Suite 640
Omaha, NE 68102

John S. Chindlund
Prince & Yeates
175 E. 400 South
City Centre I, Suite 900
Salt Lake City, UT 84111

____
Ann Elizabeth Reesman