IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-03326-REB-CBS

DR. JAMES C. DOBSON, and
FAMILY TALK,

Plaintiffs,

v.

KATHLEEN SEBELIUS, Secretary of the U.S. Department of Health and Human Services; *et al.*,

Defendants.

MOTION OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO TO PARTICIPATE AS *AMICI CURIAE* AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

American Civil Liberties Union and the American Civil Liberties Union of Colorado (collectively, "ACLU") file this motion for leave to file a brief as *amici curiae* in the above-captioned case.

The ACLU is a nationwide, nonpartisan organization of nearly 500,000 members, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by state and federal Constitutions. The ACLU of Colorado is a state affiliate of the national ACLU.

Amici are well-positioned to submit an *amicus* brief in this case. The ACLU and its state affiliates have long been committed to defending religious liberty, including the right of individuals to freely practice their faith. *See, e.g.*, Complaint, *Sheline v. Ortiz*, No. 05-cv-1978 (D. Colo. Oct. 11, 2005) (ACLU represented a prisoner seeking a

religious accommodation to receive kosher foods). At the same time, the ACLU and its affiliates protect the constitutional right to reproductive choice and women's right to live free from discrimination. *See, e.g.*, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (ACLU represented plaintiffs in challenge to a state law that required minor girls to obtain consent from their parents prior to obtaining an abortion); Complaint, *Hegar v. Panetta*, No. 12-cv-06005-EMC (N.D. Cal. Nov. 27, 2012) (ACLU represented women in the armed services challenging the Department of Defense's policy that categorically excluded women from assignment to units whose primary mission is to engage in direct ground combat).

Amici have a significant interest in the outcome of this case and in the other cases across the country seeking to invalidate the federal contraception rule. The intersection of the various civil liberties issues in this case makes *amici* uniquely positioned to offer an *amicus* brief. Most relevant to this case, the ACLU filed comments with the federal government about the constitutionality of the federal rule at issue in this case. Moreover, the ACLU has filed *amicus* briefs in this District and in the Tenth Circuit in support of the contraception rule in similar challenges brought by other employers. *See* Docket 32, *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611(D. Colo. Nov. 12, 2013) (granting *amicus* status); Docket 44, *Colorado Christian University v. Sebelius*, No. 13-cv-2105 (D. Colo. Nov. 5, 2013) (granting *amicus* status); Brief of American Civil Liberties Union, et al., *Hobby Lobby Stores, Inc. v. Sebelius*, No. 13-1218 (10th Cir. March 22, 2013). Finally, as a membership organization, the ACLU has an interest in ensuring that the federal contraception rule, which will benefit its members, is upheld.

Whether to permit *amicus* participation in the district court is in the sound discretion of the court. This Court has historically permitted *amici* participation. *See, e.g.*, *U.S. v. Bader*, No. 07-cr-338-MSK, 2009 WL 2219258 (D. Colo. July 23, 2009) (granting leave to file an *amicus* brief); *Colorado Christian University v. Weaver*, No. 04-cv-2512-MSK-BNB, 2006 WL 2255900 (D. Colo. Aug. 7, 2006) (same); *Planned Parenthood Fed'n of Am. v. Bowen*, 587 F. Supp. 540 (D. Colo. 1988) (same), *aff'd*, 913 F.2d 1492 (10th Cir. 1990), *vacated and remanded on other grounds*, 500 U.S. 949 (1991). This Court should exercise its discretion and permit the filing of the ACLU's *amicus* brief.

Counsel for *amici* has reached out to the parties concerning the filing of their *amicus* brief. Plaintiffs do not consent to the filing of the *amicus* brief, and Defendants take no position. The *amicus* brief follows this motion. If this motion is granted, there will be no delay in the proceedings.

PROPOSED *AMICUS* BRIEF

The ACLU submits this brief to support the government's argument that the final contraception rule promulgated by the U.S. Department of Health and Human Services ("HHS") under the Patient Protection and Affordable Care Act ("ACA") does not violate the Religious Freedom Restoration Act ("RFRA").

Amici do not repeat the arguments made by the parties in this litigation. Rather, *Amici* submit this brief to demonstrate that courts have long recognized that the right to religious liberty, while fundamental, does not give organizations or individuals *carte blanche* to interfere with the rights of others, to violate compelling government policies,

or to impose their religious beliefs on others. This Court should reject Plaintiffs' attempt to do the same here. The contraception rule is a significant advancement in women's equality. Access to contraceptive care has enabled women to control their reproductive lives and futures, including permitting them to attain higher levels of education and to achieve greater economic equality. But, as Congress recognized, not all women have been able to access contraception due to cost barriers, and the contraception rule ensures that millions of women—including those who work for Plaintiffs—have affordable access to this important healthcare. Allowing Plaintiffs to restrict their employees' contraceptive services would permit Plaintiffs to use their religious beliefs to disadvantage and discriminate against their female employees. Plaintiffs' claim should therefore be rejected.

FACTUAL BACKGROUND

The ACA requires that health insurance plans cover certain preventive services without cost-sharing. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C.A. § 300gg-13). Consistent with the historical practice of many health insurers, however, many preventive services that are unique to women were not included in the original preventive services coverage requirement. *See* 155 CONG. REC. S11,979, S11,987 (daily ed. Nov. 30, 2009) (statement of Sen. Barbara Mikulski) (noting that the ACA did not cover key preventive services for women). To address this inequality, Congress added the Women's Health Amendment ("WHA") to the ACA, which requires health insurance plans to cover additional preventive services that women need. § 2713(a)(4),

124 Stat. at 131. In passing the WHA, Senator Mikulski noted, "[o]ften those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ." 155 CONG. REC. at S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Barbara Mikulski). In particular, Congress intended to address gender disparities in out-of-pocket health care costs, which stem in large part from reproductive health care:

> Not only do [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men . . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 CONG. REC. S12,021-02, S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Kirsten Gillibrand). Thus the WHA sought to equalize health insurance coverage for men and women.

In implementing the WHA, HHS looked to the Institute of Medicine ("IOM"), an independent, nonprofit organization, to provide recommendations as to services that should be covered. Among other things, IOM recommended that the covered preventive services include "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." INST. OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 109-10 (July 2011) [hereinafter CLOSING THE GAPS]. On August 1, 2011, HHS adopted these recommendations, including the recommendation on contraceptive services. *See* 45 C.F.R. § 147.130(b)(1) (2013); Health Res. & Servs.

Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Feb. 18, 2014).

On June 28, 2013, HHS announced the final rule implementing the requirement that health insurance plans cover contraceptives. Under the final rule religious nonprofit organizations that object to covering contraceptives are exempt if the following requirements are satisfied:

> (1) The organization opposes providing coverage for some or all of the contraceptive services required to be covered . . . on account of religious objections. (2) The organization is organized and operates as a nonprofit entity. (3) The organization holds itself out as a religious organization. (4) The organization self-certifies . . . that it satisfies the criteria [in paragraphs (1)-(3)].

26 C.F.R. § 54.9815-2713A(a) (2013); 29 C.F.R. § 2590.715-2713A (2013); 45 C.F.R. § 147.131 (2013). The self-certification form identified in the fourth requirement simply requires an individual authorized by the organization to certify that the organization meets the requirements and to provide his or her contact information.

Nonprofit organizations must provide their issuer or, if they self-insure, third party administrator with a copy of the self-certification form. Once an issuer or third party administrator receives the self-certification form, it will provide, or arrange for, payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(b)(2), (c)(2); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2). The issuer or third party administrator will also notify the organization's employees that it—not the organization—will be providing payments for contraceptive services. 26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d). The final rule also explicitly prohibits an issuer or third party administrator from

"imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly on" the organizations or their employees for the separate contraception payments. 26 C.F.R. § 54.9815-2713A(b)(2), (c)(2); 29 C.F.R. § 2590.715-2713A(b)(2), (c)(2).

ARGUMENT

RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that application of the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1 (2013). While the right to religious liberty is one of our most cherished freedoms, it is not absolute and does not give claimants license to impose their religion on others, to harm others, or to deny others their rights and interests under the law. Here, Plaintiffs' RFRA claim has far-reaching consequences. Plaintiffs' call for an exemption would affect all of Plaintiffs' employees and their dependents and permit them to impose their beliefs on others.

Fortunately, courts have consistently reassured this country that one person's religious freedom cannot become another person's hardship. As the Supreme Court explained more than a century ago:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . *Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.*

Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (emphasis added). This fundamental promise that our rights and freedoms are guaranteed to all, and cannot be

infringed or violated by others, is one of the founding principles of this country. Abiding by this principle, when debating RFRA, Congress considered religious exemptions that would impose few, if any, burdens on third parties. *See, e.g.*, 139 CONG. REC. E1234-01 (daily ed. May 11, 1993) (statement of Rep. Benjamin L. Cardin) (citing as examples of government actions that infringe upon the free exercise of religion: the refusal to bury veterans in "veterans' cemeteries on Saturday and Sunday even if their religious beliefs require it"; the performance of autopsies "on individuals whose religious beliefs prohibit autopsies"; and the requirement that the Amish "display fluorescent orange emblems on their horse-drawn carriages"). Congress did not contemplate that RFRA would be used to deny other people their rights or benefits.

Even in cases where the Supreme Court has exempted claimants from complying with laws that substantially burden their religious exercise, the Court has been careful to note that such exemptions would not harm others. In *Sherbert v. Verner*—a case that Congress cited in RFRA, 42 U.S.C.A. § 2000bb(b)(1)—the Supreme Court granted a religious exemption from a state requirement for obtaining unemployment benefits but noted that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties." 374 U.S. 398, 409 (1963); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (in excusing students from reciting

the Pledge of Allegiance for religious reasons, noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so").[1]

The stakes are particularly high when, as here, the religious exercise claim conflicts directly with laws aimed at promoting equality and a religious exemption would foster discrimination. In times of social change, institutions have sought exemptions from civil rights laws based on religious beliefs and courts have consistently rejected such attempts to injure others. For example, in the 1960s, some restaurants refused to serve African-Americans, claiming religious opposition to "any integration of the races whatever." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). And after the adoption of civil rights measures, some Christian schools argued their religion would be burdened if they were forced to prohibit race segregation, claiming that "[c]ultural or biological mixing of the races is regarded as a violation of God's command." *Bob Jones Univ. v. United States*, 461 U.S. 574, 583 n.6 (1983); *see also Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 311 (5th Cir. 1977) (Christian school that refused to admit African-American students claimed a "sincerely held . . . religious belief that socialization of the

[1] Moreover, the Supreme Court has invalidated under the Establishment Clause some laws that granted religious exemptions, in part because the exemptions would favor religion at the expense of third party interests. For example, in striking down a sales tax exemption for religious periodicals, the Court explained that the government cannot provide a religious exemption that "either burdens nonbeneficiaries markedly or cannot be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). The Court similarly invalidated a statute requiring employers to accommodate Sabbatarians in all instances, because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

races would lead to racial intermarriage, and that this belief, sanctioned by the Free Exercise Clause, should prevail against private interests created by Congress.").

As the law advanced to prohibit unequal treatment based on gender, some Christian schools also resisted requirements that they provide equal benefits to men and women. *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (school officials paid married male teachers more than married female teachers because they believed the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family."); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (school offered unequal health benefits to female employees based on a similar "head of household" religious tenet).

In each of these cases, entities and individuals invoked religious freedom to try to avoid compliance with laws designed to advance equality. Each time their claims were rejected. As these cases recognized, in our cosmopolitan nation, religious freedom does not give institutions or individuals license to deny others their rights, to ignore important laws, or to impose their religious beliefs on their employees. *See O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) ("RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."), *stay granted pending appeal*, No. 12-3357 (8th Cir. Nov. 28, 2012).

Just as courts have held that religious exercise cannot be used to deny others equal treatment or to interfere with their rights and interests, this Court should also hold

that Plaintiffs cannot use their religious beliefs to interfere with the rights of women to have affordable access to contraceptive services provided by third party insurance companies. Health insurance coverage of contraceptive care with no cost-sharing is an important step toward promoting women's equality. Contraceptive care is fundamental women's health care, and 99% of women will use it at some point in their lifetime. Kimberly Daniels, William D. Mosher & Jo Jones, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT'L HEALTH STATS. R. 1, 4 (2013). The ability to control whether and when to have children has enabled women to achieve greater academic, professional, and economic success. With the advent of contraceptives, women have been able to plan their reproductive lives and futures, which has been instrumental in achieving gender equality. "[W]omen who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 1 GUTTMACHER R. ON PUB. POL'Y 5, 6 (2004). With greater professional advancement women have experienced a concomitant increase in economic equality and independence. Indeed, economists have estimated that contraceptives account for "roughly one-third of the total wage gains for women in their forties born from the mid-1940s to early 1950s . . . . [and] two thirds of these Pill-induced gains . . . can be attributed to increasing labor-market experience and another third is due to greater educational attainment and occupational upgrading." Martha J.

Bailey, Brad Hershbein & Amalia R. Miller, *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, at 26–27 (Nat'l Bureau of Econ. Research, Working Paper No. 17922, 2012), *available at* http://www.nber.org/papers/w17922 (last visited Feb. 18, 2014).

And yet the benefits of contraception cannot be fully realized so long as it remains unaffordable for millions of women. *See* Jennifer J. Frost, Stanley K. Henshaw & Adam Sonfield, *Contraceptive Needs and Services: National and State Data, 2008 Update*, GUTTMACHER INST. 3 (May 2010), *available at* http://www.guttmacher.org/pubs/win/contraceptive-needs-2008.pdf (last visited Feb. 18, 2014). Prior to the ACA and its implementing regulations, contraceptive care and other important preventive services that are unique to women were either excluded from health insurance coverage or had prohibitively high out-of-pocket costs, in the form of deductibles or co-pays. As the IOM noted, "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years." CLOSING THE GAPS, *supra,* at 109; *see also* Su-Ying Liang, Daniel Grossman & Kathryn A. Phillips, *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 CONTRACEPTION 528, 531 (June 2010) (finding that contraceptive co-pays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all). These cost barriers are aggravated by the fact that women

"typically earn less than men and . . . disproportionately have low incomes." CLOSING THE GAPS, *supra,* at 19.

The costs associated with this healthcare also affect contraceptive choice, driving women to less expensive and less effective methods of contraception. *See* Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible Contraception*, 117 OBST. & GYN'Y 1105, 1105-06 (May 2011) (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), because of the high upfront cost); Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBST. & GYN'Y 1291, 1293-95 (Dec. 2012) (showing that when women are provided contraceptives of their choice at no cost, more women choose highly effective, long-lasting contraceptive methods, such as IUDs, which are significantly more effective than alternative, less expensive methods). The contraception rule removes this cost barrier and ensures that women with health insurance are guaranteed affordable access to the most effective contraceptive that suits their medical needs.

Moreover, the contraception rule contributes to the federal government's goal of dismantling outmoded sex stereotypes. It offers women the tools to decide whether and when to become mothers and thus remedies the notion once endorsed by the government that "a woman is, and should remain the 'center of home and family life,'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). In recent decades, Congress and the courts have made significant progress in furthering women's equality. For example, in passing the

Family Medical Leave Act ("FMLA"), Congress found that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second" and sought to disrupt that stereotype by requiring employers to give all employees—male and female—guaranteed leave to tend to family and medical needs. *See Hibbs*, 538 U.S. at 736 (quoting legislative history of FMLA).

However, more work toward full equality is still needed. The contraception rule marks an important step toward allowing women to participate equally in society. To permit Plaintiffs to prevent third party health insurance companies from paying for contraceptive services for Plaintiffs' employees would undermine this important interest and allow them to discriminate against their women employees, contrary to a long line of cases. Plaintiffs' attempt to use the right to religious freedom as a sword, not a shield, must be rejected.

CONCLUSION

For the foregoing reasons, the ACLU requests that this Court accept and consider the Proposed *Amicus* Brief and deny Plaintiffs' motion for preliminary injunction.

Dated: February 18, 2014

Respectfully submitted,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, a true and correct copy of the foregoing was filed with this court by using this court's CM/ECF system, which will serve notice on the attorneys of record in this case who are registered with the CM/ECF system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

/s/ Brigitte Amiri
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