UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK; CATHOLIC HEALTH CARE SYSTEM; CARDINAL SPELLMAN HIGH SCHOOL; MONSIGNOR FARRELL HIGH SCHOOL; and CATHOLIC HEALTH SERVICES OF LONG ISLAND, Plaintiffs, -against- KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF TREASURY, Defendants.	No.: 1:12-cv-2542-BMC

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

The American Civil Liberties Union and the New York Civil Liberties Union (collectively, "ACLU") submit this brief to support the government's argument that the final contraception rule does not violate the Religious Freedom Restoration Act

("RFRA"). The right to practice one's faith, or no religion, is one of our most treasured liberties and is of vital importance to the ACLU. For this reason, *amici* routinely bring cases designed to protect the right to worship and express religious beliefs. The ACLU is also fiercely committed to fighting discrimination and inequality, including discrimination based on gender. Indeed, since 1972, the ACLU has worked to secure gender equality and to ensure that women and girls are able to lead lives of dignity, free from discrimination. An important component of gender equality is the ability of women to have full control of their reproductive lives and to be able to decide whether and when to have children.

Plaintiffs' RFRA claim fails for several reasons. First, the final contraception rule does not substantially burden Plaintiffs' religious exercise. All that the rule requires is that Plaintiffs – all of which provide health insurance to their employees on a self-insured basis – send a two-page form to their third party administrator, stating that they hold religious objections to covering contraceptives. The onus is then on the third party administrators to provide or arrange for payments for contraceptive services for the organizations' employees. Simple provision of this notice in no way constitutes a substantial burden on Plaintiffs' religious exercise. Indeed, it is likely that Plaintiffs provided such notice to their third party administrators before the announcement of the final rule, as health insurance policies administered by companies like United HealthCare and Empire BlueCross BlueShield – some of Plaintiffs' third party

administrators – often included contraceptive coverage unless the organization specifically requested that such coverage be excluded.

Second, 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, violate compelling government policies, or impose their religious beliefs on others. This Court should reject Plaintiffs' attempts 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 the ability to attain higher levels of education and 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 the thousands of women who work for Plaintiffs – have affordable access to this important healthcare. Allowing Plaintiffs to prevent their third party administrators from paying for Plaintiffs' employees' contraceptive services would permit Plaintiffs to use their religious beliefs to disadvantage and discriminate against their female employees. Plaintiffs' claims should therefore be rejected.

FACTUAL BACKGROUND

The Patient Protection and Affordable Care Act ("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.

131, 131–32 (2010) (codified at 42 U.S.C.A. § 300gg-13). However, consistent with the historical practice of many health insurance policies, 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. Mikulski). In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stem 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. at S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Kirsten Gillibrand). Thus the WHA sought to equalize health insurance coverage across men and women.

To implement the WHA, the U.S. Department of Health and Human Services ("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*, http://www.hrsa.gov/womensguidelines/ (last visited Sept. 12, 2013).

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 do not have to cover contraceptives in their health plans 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 provide his or her contact information. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., CMS FORM NO. CMS-10459: COVERAGE OF CERTAIN PREVENTIVE SERVICES UNDER THE AFFORDABLE CARE ACT (2013) (attached hereto as Exhibit A).

Nonprofit organizations that self-insure – including Plaintiffs – must provide their third party administrators with a copy of the self-certification form. In reality, this requirement is likely no different materially from what many organizations that objected to contraception had to do prior to the rule. As HHS noted in issuing the rule: "Even prior to the proposed regulations, because contraceptive benefits are typically in standard product designs, many eligible organizations directed their issuers and third party administrators not to make payments for claims for medical services to which they object on religious grounds." *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) (codified at 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131); *see also* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, & in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 12 [Doc. #70]. Under the final rule, once a third party administrator – in this case large insurance

companies such as United HealthCare and Empire BlueCross BlueShield, Amended Complaint ¶¶ 48, 95 [Doc. #69] – receives the self-certification form, it will either provide payments for contraceptive services directly or arrange for another entity to provide such payments. 26 C.F.R. § 54.9815-2713A(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The 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 the 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(b)(2)(i), (ii); 29 C.F.R. § 2590.715-2713A (b)(2)(i), (ii).

ARGUMENT

I. THE FEDERAL CONTRACEPTION RULE DOES NOT SUBSTANTIALLY BURDEN PLAINTIFFS' RELIGIOUS EXERCISE.

RFRA prohibits the federal government from "substantially burdening 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). The party claiming a RFRA violation "must demonstrate" that the governmental policy at issue substantially burdens its sincerely held religious beliefs. *See Adams v. C.I.R.*, 170 F.3d 173, 176 (3d Cir. 1999). Only after the plaintiff establishes a substantial burden must the government

demonstrate that the challenged policy furthers a compelling government interest and is narrowly tailored to that interest. *Id*.

By its express terms, RFRA does not protect against minimal or abstract burdens on religion. *See* 42 U.S.C. § 2000bb-1(a) (2013); *see also Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012) (explaining that a substantial burden "must have more than a minimal impact on religious exercise") (citation omitted).[1] Rather, RFRA guards against only *substantial* burdens on religious exercise.[2] "[T]o impose a substantial burden, government interference must be more than an inconvenience." *Alameen v. Coughlin*, 892 F. Supp. 440, 448 (E.D.N.Y. 1995). "[A] substantial burden . . . [is] akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g., Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456

[1] *Fortress Bible Church* and several other cases cited herein were decided under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), but these cases are instructive because that statute also prohibits government-imposed "substantial burdens" on religion. 42 U.S.C. § 2000cc(a)(1) (2013); *see also Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010) (finding the difference between RLUIPA and RFRA "immaterial" in a religious freedom claim brought by a prisoner and noting that the Second Circuit has "applied case law under RFRA to issues that arise under RLUIPA").

[2] While RFRA does not define the term "substantial burden," the legislative history shows that Congress intended "that term as used in the Act [to] be interpreted by reference to Supreme Court jurisprudence . . . . The term 'substantial burden' as used in the Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise." 146 Cong. Rec. S7,774, 7,776 (July 26, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Person Act of 2000); s*ee also Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) ("Since substantial burden is a term of art in the Supreme Court's free exercise jurisprudence, we assume that Congress, by using it, planned to incorporate the cluster of ideas associated with the Court's use of it.") (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004)). Thus, references and citations to free exercise cases are instructive when interpreting the term "substantial burden" under RFRA.

F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted). RFRA thus does not protect against "any incidental effect of a government program which may have some tendency to coerce individuals into acting contrary to their religious beliefs," but rather applies only in those cases where government puts "substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007).

That test is plainly not satisfied here. The challenged rule requires Plaintiffs to do one thing: inform their third party administrators that they wish to exclude contraceptive coverage from their health insurance policies. That's it. They simply submit a form that exempts Plaintiffs from having to cover contraceptives in their group health insurance. It is Plaintiffs' third party administrators, which include such health insurance companies as United HealthCare and BlueCross BlueShield, which must then pay for, or arrange for payments of, contraceptive services for Plaintiffs' employees. The delivery of payments for contraceptive services operates entirely outside of Plaintiffs' business operations. Accordingly, the final rule does not "put[] substantial pressure on" Plaintiffs to violate their belief that the use of contraception is sinful because all that is required of them is to notify their third party administrator that, consistent with their

religious beliefs, they object to covering contraception. *Id*.[3] Indeed, the rule provides Plaintiffs with an opportunity to express their opposition to contraception by informing their third party administrators of their objection. And certainly they are free to advocate against the contraception rule or contraceptive services in general in other ways, as well.

This case is similar to other cases in which courts have rejected RFRA claims where the burden on religion was either nonexistent or too slight to rise to the level of "substantial." For example, in *Kaemmerling v. Lapin*, the D.C. Circuit rejected a prisoner's RFRA challenge to the Bureau of Prison's ("BOP") policy of extracting DNA from federal inmates' bodily tissue. The plaintiff did not object to the collection of any tissue sample, such as hair, saliva, or skin, but only to the subsequent extraction and analysis of DNA from that tissue sample. The court held that BOP's policy did not substantially burden the plaintiff's religious exercise because the policy did not require the plaintiff to do anything that violated his religious beliefs, though he was

[3] Although Plaintiffs have a sincere religious objection to contraceptives, it does not automatically follow that their religious exercise is substantially burdened under RFRA. *See, e.g., Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court "accept[s] as true the factual allegations that [the plaintiff's] beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened . . ."); *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (observing that even if the government does not dispute that the plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). To abandon this inquiry would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) (citing *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001).

nonetheless offended by the general policy. 553 F.3d 669, 678–80 (D.C. Cir. 2008). The court observed,

> [The plaintiff] cannot identify any "exercise" which is the subject of the burden to which he objects. The extraction and storage of DNA information are entirely activities of the FBI, in which Kaemmerling plays no role and which occur after the BOP has taken his fluid or tissue sample (to which he does not object). The government's extraction, analysis, and storage of Kaemmerling's DNA information does not call for Kaemmerling to modify his religious behavior in any way—it involves no action or forbearance on his part, nor does it otherwise interfere with any religious act in which he engages. Although the government's activities with his fluid or tissue sample after the BOP takes it may offend Kaemmerling's religious beliefs, they cannot be said to hamper his religious exercise because they do not "pressure [him] to modify his behavior and to violate his beliefs."

Id. at 679 (citing *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). The same is true here. The final rule distinguishes between the submission of the self-certification that provides notice of Plaintiffs' religious objection and the separate payments for contraceptive services provided by third party health insurance companies. Plaintiffs "play[] no role" in the coverage of contraceptives. *Id*. Payment of contraceptive services "are entirely activities" of third party administrators and Plaintiffs are not forced to modify their behavior in any way. *Id*.

Similarly, in *Goehring v. Brophy*, students at a university objected to paying a generally applicable registration fee because it would be used to subsidize the school's health insurance program, which covered abortion care. 94 F.3d 1294, 1297 (9th Cir. 1996). The court rejected the plaintiffs' RFRA and free exercise claims, reasoning in part

that the health insurance subsidy is "distributed only for those students who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services." *Id.* at 1300; *see also Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011) (affirming district court's holding that the ACA's individual mandate to carry health insurance imposed only a *de minimis* burden on the plaintiff's religious belief that God will provide for their health), *affirming Mead v. Holder*, 766 F. Supp. 2d 16, 42 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *cf. Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) ("incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not trigger strict scrutiny). Plaintiffs' RFRA claim is even more attenuated than that in *Goehring* and must therefore be rejected.

Plaintiffs are left with only one argument: Because the final rule requires them to submit a certification, which "triggers" the third party health insurance payments and is the "but-for" cause for the possible, eventual use of contraceptives, the final rule substantially burdens their religious exercise. *See* Am. Compl. ¶¶ 10, 11 [Doc. #69]. But really this amounts to a general complaint that because their employees will receive affordable access to contraceptives from separate health insurance companies, the policy still substantially infringes Plaintiffs' religious beliefs. This contention merits

little attention. Under the same formulation, the requirement that Plaintiffs pay social security taxes for their employees could be said to substantially burden the religious exercise of an employer who opposes same-sex relationships because a gay or lesbian employee's partner may collect those social security benefits upon the death of his or her spouse. But courts have recognized that such "abstract injur[ies]" do not amount to burdens on the free exercise of religion. *Tarsney v. O'Keefe*, 225 F.3d 929, 936 (8th Cir. 2000) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (taxpayers lack standing to assert free exercise challenge to expenditure of state funds to cover abortion care for low-income women because they could not show an injury from the use of state funds, as the taxpayers were "not affected by the allegedly unconstitutional expenditure.").

A RFRA violation simply does not occur when individuals have a religious objection to requirements imposed by the government on others, or government action generally. The government action instead must substantially burden the *plaintiffs'* religious exercise. To hold otherwise would give "each citizen . . . an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008); *see also Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

II. PLAINTIFFS CANNOT USE THEIR RELIGIOUS BELIEFS TO DENY THEIR WOMEN EMPLOYEES THE PROTECTIONS OF LAWS AIMED AT PROMOTING GENDER EQUALITY.

In this case, the claims have consequences for more than Plaintiffs. Plaintiffs' call for an exemption would affect all of Plaintiffs' employees and their employees' dependents. An exemption would allow Plaintiffs to impose their beliefs on others. Fortunately, courts have consistently reassured this country that while the right to religious freedom is of paramount importance, it is not absolute and does not give claimants *carte blanche* to impose their religion on others, harm others, or deny others their rights and interests under the law. 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. Commonwealth of 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 on 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 held that the right to religious exercise exempts claimants from complying with laws that substantially burden religious exercise, the Court was careful to note that such exemptions did not harm others. In *Sherbert v. Verner* – a case that Congress referenced approvingly in RFRA, 42 U.S.C.A. § 2000bb(b)(1) (2013) – the Supreme Court, in granting a religious exemption from a state unemployment benefits policy, was also careful to note 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); *see also 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."); *cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (in a free speech challenge to a law requiring students to recite the Pledge of Allegiance, noting that the

First Amendment claim "does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so.").[4]

The stakes are particularly high when the religious exercise claim runs into direct conflict 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

[4] Moreover, the Supreme Court has invalidated laws that granted religious exemptions under the Establishment Clause, in part because the exemptions would favor religion at the expense of third party interests. For example, in invalidating 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).

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. U.S.*, 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 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 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, ignore important laws, or impose their religious beliefs on their employees.

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. The inclusion of contraceptive care in health insurance policies is an important step towards 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 STAT. 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 towards 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, studies have calculated 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.

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), http://www.guttmacher.org/pubs/win/contraceptive-needs-2008.pdf (last visited Sept. 12, 2013). 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, be it 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 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 at 19.

The costs associated with this healthcare also affect contraceptive choice, driving women to less expensive and less effective methods of contraception. *See* Jeffery Peipert, Continuation and Satisfaction of Reversible Contraception, 117 Obstetrics & Gynecology 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); Brooke Winner et al., *Effectiveness of Long-Acting Reversible Contraception*, 366 N. ENG. J. OF MED. 1998 (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 contraceptives that suit 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 Resources 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 on 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 towards full equality is still needed. The contraception rule marks an important step towards 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, Plaintiffs' motion for a preliminary injunction should be denied and Defendants' motion for summary judgment should be granted.

Dated: September 13, 2013
New York, New York

Respectfully submitted,

/s/ Jennifer Lee

Jennifer Lee (JL-0248)
Brigitte Amiri (BA-8497)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2633
Facsimile: (212) 549-2650
jlee@aclu.org
bamiri@aclu.org

Daniel Mach*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, 6th Floor
Washington, DC 20005
Telephone: (202) 675-2330
Facsimile: (202) 546-0738
dmach@dcaclu.org

Arthur Eisenberg (AE-2012)
Erin Beth Harrist (EH-2608)
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
Telephone: (212) 607-3399
Facsimile: (212) 607-3318
aeisenberg@nyclu.org
eharrist@nyclu.org

Attorneys for proposed Amici Curiae American Civil Liberties Union and New York Civil Liberties Union

*Application for admission *pro hac vice* to

be filed.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2013, 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:

Charles Michael Carberry
Patrick J. Smith
Todd R. Geremia
Julie Ann Rosselot
Toni-Ann Citera
JONES DAY
222 E 41st Street
New York, NY 10017
Counsel for Plaintiffs

Benjamin Berwick
U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, FEDERAL PROGRAMS
20 Massachusetts Avenue, NW
Room 7306
Washington, DC 20530
Counsel for Defendants

Neil Matthew Merkl
KELLEY, DRYE & WARREN, LLP
101 Park Avenue
New York, NY 10178

Cecilia D. Noland-Heil
AMERICAN CENTER FOR LAW AND JUSTICE
Po Box 90555
Washington, DC 20090
Counsel for Amicus Curiae American Center for Law & Justice

/s/ Jennifer Lee
Jennifer Lee
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2633
Facsimile: (212) 549-2650
jlee@aclu.org

Exhibit A

CERTIFICATION

(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (each within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan must provide a copy of this certification to the plan's health insurance issuer(s) (for insured health plans) or third party administrator(s) (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a plan's third party administrator that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that:

(1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) Obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This certification is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is **0938-XXXX**. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: CMS, 7500 Security Boulevard, Attn: PRA Reports Clearance Officer, Mail Stop C4-26-05, Baltimore, Maryland 21244-1850.