

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WHEATON COLLEGE,

Plaintiff,

v.

KATHLEEN SEBELIUS, Secretary of
the United States Department of Health
and Human Services, *et al.*,

Defendants.

Case No. 1:13-cv-08910

Judge Robert M. Dow, Jr.

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION
AND AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT**

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 Plaintiff's 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 Plaintiff—have affordable access to this important health care. Allowing Plaintiff to restrict its employees' contraceptive services would permit Plaintiff to use its religious beliefs to disadvantage and discriminate against its female employees. Plaintiff's 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. § 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.

14, 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. 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, Plaintiff’s RFRA claim has far-reaching consequences. Plaintiff’s call for an exemption would affect all of Plaintiff’s employees and their dependents and permit Plaintiff to impose its beliefs on them.

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. § 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

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).

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 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 Plaintiff cannot use its 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 et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 NAT'L HEALTH STATS. R. 1, 4 (2013).² 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

² The fact that Plaintiff objects to some, but not all, methods of contraception does not change the analysis. For example, Plaintiff objects to including intrauterine devices ("IUDs") and emergency contraception ("EC") in its employees' health insurance plans. See Complaint [Doc. #1] ¶¶ 68, 164. As explained, *infra*, IUDs are part of a very limited class of what are known as long-acting reversible contraceptive methods, which have the highest effectiveness rate of any method of contraception other than permanent sterilization. Jeffery Peipert, *Continuation and Satisfaction of Reversible Contraception*, 117 OBST. & GYN'Y 1105, 1105–06 (2011). Yet many women do not choose IUDs because of the high upfront cost. *Id.* at 1105. When those cost barriers are removed, however, women choose IUDs in high numbers, resulting in fewer unintended pregnancies. Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBST. & GYN'Y 1291 (2012). Plaintiff also objects to including coverage for EC in its employees' plans. But EC is the primary method used by a woman to prevent pregnancy after intercourse (for example, in cases of rape or contraceptive failure). See generally Off. of Population Research, Princeton Univ., *What Is Emergency Contraception?*, EMERGENCY CONTRACEPTION WEBSITE, available at <http://ec.princeton.edu/> (last visited Feb. 14, 2014). Thus, removing IUDs and ECs from health plans hampers women's ability to make decisions about their reproductive lives, including the ability to select a highly effective contraception method to avoid unintended pregnancy.

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.” *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 549 (7th Cir. 2014) (quoting 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 et al., *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. 14, 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 et al., *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. 14, 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 et al., *Women’s Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 CONTRACEPTION 528, 531 (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 health care also affect contraceptive choice, driving women to less expensive and less effective methods of contraception. *See* Jeffrey Peipert, 117 OBST. & GYN’Y at 1105-06 (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., 120 OBST. & GYN’Y 1293-95 (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,'" *Nev. 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 on furthering women's equality. For example, in passing the Family and 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 Plaintiff to prevent third party health insurance companies from paying for contraceptive services for Plaintiff's employees would undermine this important interest and allow it to discriminate against its women employees, contrary to a long line of cases. Plaintiff's attempt to use the right to religious exercise as a sword, not a shield, must be rejected.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss or for summary judgment should be granted.

Dated: April 2, 2014

Respectfully submitted,

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* *Pro hac vice* application forthcoming.

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