IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

THE SCHOOL OF THE OZARKS, INC. d/b/a COLLEGE OF THE OZARKS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*., Defendants.	)	Case No.: 6:13-cv-03157-BP

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MISSOURI IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

American Civil Liberties Union and American Civil Liberties Union of Missouri (collectively, "ACLU") submit 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"). 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. 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 decide whether and when to have children.

Plaintiff's RFRA claim fails for several reasons. First, the final contraception rule does not substantially burden Plaintiff's religious exercise. The rule requires only that Plaintiff send a two-page form to its health insurance provider, Anthem Blue Cross/Blue Shield ("Anthem"), stating that it has a religious objection to covering contraceptives. The onus is then on Anthem to provide payments for contraceptive services for the Plaintiff's employees. Simple provision of this notice

in no way constitutes a substantial burden on Plaintiff's religious exercise. Moreover, Plaintiff is already in compliance with the law.

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, 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 that work for Plaintiff—have affordable access to this important healthcare. Allowing Plaintiff to restrict its health insurance company from paying for Plaintiff's employees' contraceptive services would permit Plaintiff to use its religious beliefs to disadvantage and discriminate against its female employees. Plaintiff's claims 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 Servs.: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 5, 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 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.

See Ctrs. for Medicare & Medicaid Servs., CMS Form No. CMS-10459: Coverage of Certain Preventive Services under the Affordable Care Act (2013).

Nonprofit organizations must provide their issuer or third party administrator 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). Once an issuer or third party administrator receives the self-certification form, it will provide 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 provide 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

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

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. Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1 (2013). The plaintiff bears the initial burden of demonstrating the challenged government action substantially burdens religious exercise. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010). Only after the plaintiff establishes a substantial burden, does the burden shift to the government to demonstrate that the challenged policy is the least restrictive means of furthering a compelling government interest. *Weir,* 114 F.3d at 820.

By its express terms, RFRA protects against only substantial—not minimal or abstract—burdens on religion. *See* 42 U.S.C. § 2000bb-1(a). Although RFRA does not define "substantial burden," the Eighth Circuit has held a "rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal citations and quotation marks omitted). Government action imposes a "substantial burden" when there is "no consistent and dependable way of exercising" one's faith. *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000); *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); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) (noting that "the substantial burden hurdle is high" to cross) (internal quotation marks and citations omitted); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 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); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("substantial burden requires something more than an incidental effect on religious exercise").[1] 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, 279-80 (3d Cir. 2007).[2]

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[1] 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 (daily ed. July 26, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Person Act of 2000); *see also Midrash Sephardi*, 366 F.3d at 1226 ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA."). Thus, references and citations to free exercise cases are instructive when interpreting the term "substantial burden" under RFRA.

[2] Although Plaintiff has a sincere religious objection to contraceptives, it does not automatically follow that its religious exercise is substantially burdened under RFRA. *See, e.g., Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (the 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

That test plainly is not satisfied here. The challenged rule requires Plaintiff to do one thing: inform its health insurance company that it wishes to exclude contraceptive coverage from its health insurance policies. That's it. Plaintiff must simply submit a form that exempts Plaintiff from having to cover contraceptives in their group health insurance. It is Plaintiff's health insurance company that must then provide payments for contraceptive services for Plaintiff's employees. *See Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 554 (7th Cir. 2014) (in a similar challenge to the contraception rule, holding that the rule does not substantially burden the plaintiff's religious exercise: "[T]he university has not yet shown that there is a substantial burden. The form is two pages long—737 words, most of it boring boilerplate; . . . the only ones of consequence, consist of only 95 words. Signing the form and mailing it to Meritain and Aetna could have taken no more than five minutes. The university claims that there are other paperwork requirements; there aren't."). The delivery of payments for contraceptive services takes place entirely outside of Plaintiff's business operations. Accordingly, the final rule does not "put[] substantial pressure on" Plaintiff to violate its belief that the use of contraception is sinful because all that is required of it is to notify Anthem that, consistent with their religious beliefs, they object to covering contraception. *Klem*, 497 F.3d at 280. Indeed, the rule provides Plaintiff with an opportunity to express its opposition to

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plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *overruled on other grounds by Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007). 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, 17 (D.C. Cir. 2001)).

contraception by informing their Anthem of its objections. This is precisely what Plaintiff did before the rule took effect: it notified Anthem that it objected to coverage of certain forms of contraception. Suggestions in Supp. Of Pl.'s Mot. for Summ. J. at 23. Therefore, the rule does not actually require Plaintiff to modify its behavior. Additionally, Plaintiff is free to advocate against the contraception rule or contraceptive services in general in other ways, as well.

Courts have rejected RFRA claims where, as here, the burden on religion is nonexistent or too slight to rise to the level of "substantial." For example, in *Kaemmerling v. Lappin*, 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. 553 F.3d at 678-80. The plaintiff did not object to the collection of tissue samples, such as hair, saliva, or skin, but only to the subsequent extraction and analysis of DNA from that tissue sample. *Id.* 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 nonetheless offended by the general policy. *Id.* 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 Ind. Emp't 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 Plaintiff's religious objection and the separate payments for contraceptive services provided by third party health insurance companies. Plaintiff "plays no role" in the coverage of contraceptives. *Id.* Payments for contraceptive services "are entirely activities" of issuers, and Plaintiff is not forced to modify its 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 at 1297. The court rejected the Plaintiff's 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), *aff'g 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, 450 (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). Plaintiff's RFRA claim is even more attenuated than that in *Goehring* and must therefore be rejected.

Plaintiff is left with only one argument: Because the final rule requires Plaintiff to submit a certification, it "triggers" contraceptive coverage, and therefore the rule substantially burdens Plaintiff's religious exercise. In short, Plaintiff complains that since under the final rule—where it is exempt from having to provide coverage for contraceptives—its employees will nonetheless receive affordable access to contraceptives from separate health insurance companies, it still substantially infringes Plaintiff's religious beliefs. This contention merits little attention. 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) (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.") (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974)). The Seventh Circuit crystalized the absurdity of this argument in rejecting an identical argument by the University of Notre Dame:

> Suppose it is wartime, there is a draft, and a Quaker is called up. Many Quakers are pacifists, and their pacifism is a tenet of their religion. Suppose the Quaker who's been called up tells the selective service system that he's a conscientious objector. The selective service

> officer to whom he makes this pitch accepts the sincerity of his refusal to bear arms and excuses him. But as the Quaker leaves the selective service office, he's told: "you know this means we'll have to draft someone in place of you"—and the Quaker replies indignantly that if the government does that, it will be violating his religious beliefs. Because his religion teaches that no one should bear arms, drafting another person in his place would make him responsible for the military activities of his replacement, and by doing so would substantially burden his own sincere religious beliefs. Would this mean that by exempting him the government had forced him to "trigger" the drafting of a replacement who was not a conscientious objector, and that the Religious Freedom Restoration Act would require a draft exemption for both the Quaker and his non-Quaker replacement? That seems a fantastic suggestion.

Notre Dame, 743 F.3d at 556.

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 *plaintiff's* 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."). Here, Plaintiff has already complied with the rule. As in *Notre Dame*, it's unclear what relief Plaintiff seeks now but it is clear that Plaintiff wants to block Anthem from providing contraceptive coverage to its employees. But as the *Notre Dame* court held, "a religious institution … has no right to prevent

other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution." 743 F.3d at 552.

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

In this case, Plaintiff's claims have far-reaching consequences. Plaintiff's call for an exemption would affect all of Plaintiff's employees and their dependents. An exemption would allow Plaintiff to impose its 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, to harm others, or to 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. Mass., 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 did 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").[3]

[3] 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 striking down a sales tax exemption for religious periodicals, the Court explained that the government cannot provide a religious exemption that "either burdens

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 Schs., 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

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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).

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. *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 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 STATS. REPORTS 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 REPORT ON PUB. POL'Y 5, 6 (2004); *see also Notre Dame*, 743 F.3d at 549 (same). 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 Apr. 3, 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 Apr. 3, 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 94; *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); *see also Notre Dame*, 743 F.3d at 549. 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 18.

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

CONCLUSION

For the foregoing reasons, Plaintiff"s motion for summary judgment should be denied, and Defendants' motion to dismiss or for summary judgment should be granted.

Dated this 7th day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Anthony E. Rothert