APPEAL NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,

PLAINTIFFS-APPELLANTS,

v.

TIMOTHY GEITHNER, Secretary of the Treasury of the United States, in his official capacity; KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, in her official capacity; HILDA L. SOLIS, Secretary of the Department of Labor in her official capacity; ERIC H. HOLDER, JR., Attorney General of the United States, in his official capacity,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA SUPPORTING APPELLEES AND URGING AFFIRMANCE OF THE RELIGIOUS FREEDOM AND RESTORATION ACT CLAIM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amici Curiae* American Civil Liberties Union and American Civil Liberties Union of Virginia state that none of *Amici Curiae* are a publicly held entity, none have a parent corporation, none have 10% or more of stock owned by a publicly held entity, none have a public entity that has a direct financial interest in the outcome of the litigation, and this case does not arise out of a bankruptcy proceeding.

Dated: February 25, 2011

s/ Andrew D. Beck
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STATEMENT OF INTERESTS OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The American Civil Liberties Union of Virginia is one of its statewide affiliates. The ACLU and the ACLU of Virginia have a long history of defending both the right to privacy—including the right to reproductive freedom—and the right to religious liberty. It is respectfully submitted that *Amici*'s analysis of the questions raised by Plaintiffs' Religious Freedom Restoration Act claim may assist this Court in resolving this case.

INTRODUCTION

In March 2010, Congress passed and the President signed into law the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). By its terms, ACA aims to "regulate[] . . . economic and financial decisions about how and when health care is paid for, and when

[1] Pursuant to Fed. R. App. P. 29(a), *Amici* have received consent from the parties to file this brief. No party has written any part of this brief, and no person apart from *Amici* contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

health insurance is purchased." § 1501(a)(2)(A), 124 Stat. at 133, 817. To that end, beginning in 2014, ACA requires non-exempt individuals to maintain a minimum level of health insurance coverage or pay a penalty on their tax returns. *See id.* § 1501(b). Likewise, ACA requires non-exempt employers of more than fifty full-time employees to provide a minimum level of health insurance coverage to their full-time employees or pay a civil fine. *See id.* at § 1513(a), (d). In its current form, the law would extend health care coverage to an estimated 32 million people, including more than 16 million women.

Plaintiffs contend, among other claims, that requiring them to comply with the minimum coverage requirements would violate their rights under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1 (2006) because it would contravene their "sincerely held religious beliefs against facilitating, subsidizing, easing, funding, or supporting abortions."[2] (*See* J.A. 40 (alleging that ACA's minimum coverage

[2] Appellants also assert claims under the Free Exercise and Establishment Clauses of the First Amendment, premised primarily on the fact that the statute limits religious exemptions to (1) members of religious groups that provide health care for their dependents and were formed before December 31, 1950, and (2) health care ministries formed before December 31, 1999. Pub. L. No. 111-148, § 1501(d)(2)(A), (B). Those claims are not addressed in this brief, however, because it appears, based on the record below, that those claims are not properly before the Court. The individual plaintiffs do not contend that they are members of a religious sect that provides for its dependents – a requirement that has been upheld by the federal courts in the similar context of religious exemptions from social security taxes. *See, e.g.*, *Droz v. Comm'r of Internal Revenue*

requirements will compel them to "choose between forced purchase of a private insurance product that does not protect their sincerely held religious beliefs or paying a punitive penalty for refusing to compromise their religious beliefs").) The District Court rejected their argument, reasoning that, as a factual matter, "the [Affordable Care] Act contains strict safeguards at multiple levels to prevent federal funds from being used to pay for abortion services beyond those in cases of rape or incest, or where the life of the woman would be endangered."[3] *Liberty University, Inc. v. Geithner*, No. 10-15, 2010 WL 4860299, at *24 (W.D. Va. Nov. 30, 2010).

Serv., 48 F.3d 1120, 1124 (9th Cir. 1995) (upholding identical religious exemption as "narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social security system or by their church"); *Hatcher v. Comm'r of Internal Revenue*, 688 F.2d 82, 84 (10th Cir. 1979) (same); *Varga v. United States*, 467 F. Supp. 1113, 1118-19 (D. Md. 1979) (rejecting plaintiff's Free Exercise and Establishment Clause challenge to membership requirement and holding that plaintiff was properly denied exemption because "[u]nlike the Amish, the Seventh-Day Adventist Church does not make reasonable provisions for its dependent members"). Appellants thus appear to have no valid claim to the authorized exemption. Similarly, neither the individual plaintiffs nor Liberty University contend that they are part of a health care ministry. While the cut-off dates cited by Appellants may raise constitutional concerns for individuals and groups who would otherwise qualify for the religious exemptions, *see generally Larson v. Valente*, 456 U.S. 228 (1982), and should be closely examined in any future case brought by such parties, they do not relieve Appellants here of their obligation to comply with the insurance mandate.

[3] As the District Court further explained, "at least one plan that does not cover non-excepted abortion services," abortions that are not necessary to save a woman's life or where the pregnancy is a result of rape or incest, "will be offered for enrollment through each of the state health benefit exchanges, as required by the [Affordable Care] Act." *Liberty University, Inc.*, 2010 WL 4860299, at *24. Moreover, even if a plan on the exchange does cover non-excepted abortion services, "a separate payment for non-excepted abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments." *Id.*

On appeal, Plaintiffs expand their RFRA claim, arguing not only that they object to subsidizing abortions, but also that they object to being required to purchase an insurance plan that covers medical services – including abortions – that Plaintiffs find objectionable.

Their argument is unavailing. Although Plaintiffs are correct that RFRA requires a more demanding review of free exercise claims than does the First Amendment under *Employment Division v. Smith*, 494 U.S. 872, 883-90 (1990), ACA nevertheless passes muster. The Court in *Smith* held that neutral and generally applicable laws that impose incidental burdens on religious practices do not violate the Free Exercise Clause. Recognizing the centrality of religious freedom to our democratic and constitutional ideals, Congress enacted RFRA (with the support of various civil rights groups, including *Amici* here) to restore the strict scrutiny standard that had served to protect religious exercise prior to *Smith*. But even the pre-*Smith* test did not sanction the sort of exemption from statutory programs that Plaintiffs seek in this case. To the contrary, such claims were routinely rejected by the federal courts, including the Supreme Court, even prior to *Smith*.

Plaintiffs' claims should be similarly rejected. Plaintiffs have not established that the mandate would substantially burden their religious exercise, and they cannot distinguish ACA from other comprehensive

statutory programs that have been upheld against free exercise challenge. In arguing that they should nevertheless be exempt under RFRA, Plaintiffs seek not merely a return to the pre-*Smith* strict scrutiny standard; they seek its replacement with a bar so low that RFRA would effectively trump any law that impinges, however slightly, on religious exercise or belief, provided that the complainant could demonstrate a sincere objection. Turning RFRA into a blanket religious exemption of this nature would threaten our most valued health, welfare, and civil rights protections, and would ultimately engender the very type of civic discord and sectarian strife that the Religion Clauses were meant to prevent.[4] Accordingly, the District Court's dismissal of Plaintiffs' RFRA claim should be affirmed.

ARGUMENT

Plaintiffs' claim—teased out—is nothing short of an argument that RFRA entitles them to pick and choose which medical procedures should be covered *for other paying patients* under ACA. It is an argument wholly

[4] *See*, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (noting that the Religion Clauses seek "to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike"); *id*. at 709 (Stevens, J., dissenting) ("Government's obligation to avoid divisiveness and exclusion in the religious sphere is compelled by the Establishment and Free Exercise Clauses."); *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in the result) (recognizing that Religion Clauses aim "to reduce or eliminate religious divisiveness or strife"); *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.").

unsupported by legal precedent that would transform RFRA from a shield that protects against non-vital governmental acts that truly burden religious exercise into a sword that could fell virtually any effort to enact comprehensive legislation. Plaintiffs have not proved that ACA requirements impose a substantial burden on their religious exercise, which is a necessary predicate to invoking RFRA. Even if they had made this showing, the Supreme Court has made clear that the government's interest in implementing its comprehensive health insurance program "free of 'myriad exceptions flowing from a wide variety of religious beliefs'" justifies the minimum coverage requirements. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699-700 (1989) (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

A. ACA Requirements Do Not Substantially Burden Plaintiffs' Religious Practices.

First and foremost, Plaintiffs' allegations fail to show that complying with the minimum coverage requirements would "substantially burden" their religious exercise. 42 U.S.C. § 2000bb-1 (a). Under RFRA, a "substantial burden exists when government action puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]'" *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)); *accord Goodall by Goodall v. Stafford*

County School Bd., 60 F.3d 168, 172 (4th Cir. 1995) (explaining that since RFRA does not create a new test to determine what constitutes a "substantial burden," courts look to pre-*Smith* free exercise cases for that analysis). But the fact that government action "is offensive to [an individual's] religious sensibilities" does not render the action a substantial burden. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

Plaintiffs here do not identify a cognizable substantial burden on their religious exercise. They describe the alleged burdens on their religious practice in this case as follows: Plaintiff Merrill "tr[ies] to ensure that her funds are not co-mingled in a way that would advance abortion of any kind" and that goal would allegedly be burdened by maintaining health insurance that covered medical treatment to which she objects. (J.A. 20-21.) Plaintiff Waddell's religious exercise would allegedly be burdened by maintaining health insurance that covered any unspecified "services to which she might have a conscientious or religious objection." (*Id.* at 19.) And Plaintiff Liberty University ("Liberty") would allegedly be burdened by providing its employees with health insurance that included coverage for "services which violate the University's and its employees' Christian values." (*Id.* at 18-19.)

As a matter of law, none of these objections constitutes a substantial burden under RFRA. Indeed, the federal courts have rejected similar claims

premised upon the theory that a person's religious exercise is burdened by payment of a generally applicable tax or an insurance fee that might facilitate another person's access to medical procedures considered to be sinful by the plaintiff.[5] *Goehring v. Brophy*, for example, addressed a RFRA claim nearly identical to Plaintiffs' claim here. 94 F.3d 1294, 1297 (9th Cir. 1996), *overruled on other grounds by City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997).[6] In that case, public university students objected to a university's requirement that they pay a registration fee on the ground that it was used to subsidize the school's health insurance program, which covered abortion care. *Id.* The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious exercise because "the plaintiffs [were] not required to accept, participate in, or advocate in any manner for the provision of abortion services." *Id.* at 1300.

Similarly, in *Tarsney v. O'Keefe*, the Eighth Circuit affirmed the dismissal of a free exercise challenge by taxpayers who objected on religious

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[5] Indeed, another court faced with a RFRA challenge to ACA recently found that the minimum coverage requirements did not impose a substantial burden upon the plaintiffs' religious practice under RFRA. *See Mead v. Holder*, No. 10-950, 2011 WL 611139, at *24 (D.D.C. Feb. 22, 2011).

[6] *Goehring* was decided before *Boerne v. Flores*, which held that RFRA does not apply to state laws. Accordingly, the court in *Goehring* subjected the university's rule to RFRA's strict scrutiny standard.

grounds to the state's use of their tax dollars to pay for Medicaid recipients' medically necessary abortions. 225 F.3d 929, 932 (8th Cir. 2000). The mere payment of taxes that may ultimately subsidize other individuals' Medicaid abortion coverage, the court explained, was too remote an injury even to accord standing upon the plaintiffs to assert a free exercise claim.[7] *Id.* at 936; *see also Kaemmerling*, 553 F.3d at 678 (because the challenged government action does not in any respect pressure the devout person to "modify his behavior and to violate his beliefs," there is no burden on their religious practices) (quotation marks and citation omitted); *accord Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389, 393 (Cal. Ct. App. 1982) ("[T]he fact [that] plaintiffs may object on religious grounds to some of the services the University provides is not a basis upon which plaintiffs can claim a constitutional right not to pay a part of the fees."); *cf. Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 232 (2000) (holding that a public university could require students to pay a student fee that funded a forum for speech, despite students' First Amendment claim that they should not be required to subsidize the speech of student groups that they found "offensive to their personal beliefs").

[7] As the court went on to explain in *Tarsney*, while under the Establishment Clause "every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution," a free exercise claim (and, by extension, a RFRA claim) requires that the plaintiff's own religious practice be burdened. *Tarsney*, 225 F.3d at 936 (quoting *Flast v. Cohen*, 392 U.S. 83, 114 (1968) (Stewart, J., concurring)).

Plaintiffs' reliance upon *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* is misplaced. In *Gonzales*, the plaintiffs' claim centered on their asserted right to access a hallucinogen that was banned by the Controlled Substances Act but was indispensable to their core religious practices. 546 U.S. 418, 423 (2006). The substantial and undisputed burden on religious practice at issue in *Gonzales* is distinguishable from Plaintiffs' objection at issue here. Most significant, the law in *Gonzalez* prevented the plaintiffs from engaging in sacramental activities. In the case at hand, in contrast, Plaintiffs cannot identify any comparable pressure to "modify [their] behavior and to violate [their] beliefs." *Kaemmerling*, 553 F.3d at 678 (citation omitted). Rather, they can only assert an objection to purchasing or subsidizing insurance coverage that would enable third parties to obtain medical procedures to which they object. This is simply not enough.

In short, Plaintiffs' objections to the medical procedures that other covered individuals may obtain with ACA-prescribed insurance do not give rise to a cognizable RFRA claim—the requirements simply do not impose a substantial burden on Plaintiffs' religious exercise within the meaning of RFRA.

B. Plaintiffs' Claim For a Religious Exemption from ACA Is Inconsistent With Well-Established Law.

Even assuming that RFRA applies, it does not entitle Plaintiffs to the religious exemption they seek. The Supreme Court and other federal courts have long rejected claims seeking exemptions from, or invalidation of, comprehensive and broadly applicable statutory programs like ACA's minimum coverage requirements.

United States v. Lee, 455 U.S. 252 (1982), is fatal to Plaintiffs' claim.[8] Like Plaintiffs here, the Amish taxpayer in *Lee* objected to participating in the Social Security system on religious grounds.[9] The Supreme Court unanimously rejected that free exercise claim, explaining:

> [I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs . . . . There is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the

[8] Although the Court in *Lee* found that the plaintiffs' religious beliefs in that case were burdened, there is no similar burden here. The plaintiffs in *Lee* objected to both paying and receiving Social Security benefits because their religion compelled them to take care of their own elderly population. Here, in contrast, Plaintiffs object to the use of their tax or premium dollars to support another, third party's medical care. An objection to medical procedures obtained by third parties simply does not substantially burden Plaintiffs' religious exercise.

[9] While *Lee* was decided pre-RFRA and pre-*Smith*, its strict scrutiny analysis applies to Appellants' RFRA claim, since RFRA was meant to restore the pre-*Smith* free exercise standard. *See Goodall*, 60 F.3d at 171; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 179 (3d Cir. 1999) ("[W]e cannot help but be guided by [the] reasoning [of *Lee* and *Hernandez*] in determining whether the least restrictive means have been employed to further the government's compelling interest [under RFRA].").

> federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.

Id. at 259-60 (citations omitted). Emphasizing that "mandatory participation is indispensable to the fiscal vitality of the social security system," the Court concluded that the burden placed on the plaintiff was justified by the interest in uniform administration of the system free of piecemeal exceptions for religious objectors. *Id.* at 258-59 (explaining that "[r]eligious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature") (quotation marks and citations omitted); *accord Hernandez*, 490 U.S. at 699-700.

Furthermore, as this Court has made clear, *Lee*'s holding extends beyond the Social Security context to similarly "comprehensive statute[s]" for which there is no "principled way" to accommodate myriad individualized religious objections without undermining the interests underlying the governmental program at issue. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) (applying the Fair Labor Standards Act to a sectarian school because exempting the school would "undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools"); *see South*

Ridge Baptist Church v. Industrial Com'n of Ohio, 911 F.2d 1203, 1207-08 (6th Cir. 1990) (applying *Lee*'s analysis to a workers' compensation statute).

In this case, ACA's minimum coverage requirement is indistinguishable from those other programs upheld by this Court and the Supreme Court. Under *Lee* and its progeny, Plaintiffs are not entitled to an exemption from ACA's minimum coverage requirements, nor are they entitled to invalidation of the statute.

Plaintiffs' contentions on appeal only reinforce this point. Although their pleadings do not specify a religious objections to any covered medical procedures apart from abortion, Plaintiffs fault the District Court for focusing exclusively on the issue of abortion, noting their objection to additional, unspecified "medical procedures . . . antithetical to their religious beliefs." (App. Br. at 48.) But as the Supreme Court stated in an analogous context, "[t]his argument knows no limitation." *Hernandez*, 490 U.S. at 700. In a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961), innumerable medical procedures will be disfavored by adherents of one religion or another.

For example, individuals whose faith proscribes sexual relations outside of marriage may object to health insurance coverage of erectile

dysfunction medication for unmarried men. Individuals who believe that contraception or sterilization is sinful may object to coverage for such care.[10] Jehovah's Witnesses, who "believe that the Bible prohibits blood transfusions," *Klassy v. Physicians Plus Ins. Co*., 371 F.3d 952, 954 (7th Cir. 2004), may object to coverage of blood transfusion procedures. These are, of course, sincere religious beliefs, and under no circumstances should individuals with such objections be forced to undergo medical treatments proscribed by their faith. But ACA does not require these individuals – or Plaintiffs – to undergo treatment that conflicts with their religious views. Exempting every person whose religious beliefs disfavor a medical procedure that *a third party* might conceivably obtain with ACA-prescribed health insurance would undermine the very comprehensive health insurance coverage that Congress deemed "essential" to the operation of ACA. Pub. L. No. 111-148, § 1501(a)(2)(G). RFRA does not require such a result. *See, e.g.*, *Lee*, 455 U.S. at 258; *Goehring*, 94 F.3d at 1301; *Dole*, 899 F.2d at

[10] *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006) (rejecting religiously based objection to state law requiring that certain insurance contracts provide coverage for prescription contraceptives); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73 (Cal. 2004) (same); Letter from Anthony R. Picarello, Jr., General Counsel, U. S. Conference of Catholic Bishops, to Dep't of Health & Human Services (Sept. 17, 2010), *available at* http://www.usccb.org/ogc/preventive.pdf (objecting to coverage for prescription contraception and sterilization in ACA).

1398; *accord Mead v. Holder*, No. 10-950, 2011 WL 611139, at *24-25 (D.D.C. Feb. 22, 2011) (upholding ACA against a RFRA challenge).

CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of Appellants' RFRA claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that:

1. The *Amici Curiae* Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because it contains 4,608 words, counted by Microsoft Word, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(C)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because its has been prepared in a proportionally spaced typeface using Microsoft Word 97-2003 in Times New Roman, 14-point font.

s/ Andrew D. Beck
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February 25, 2011

CERTIFICATE OF SERVICE

I certify that on February 25, 2011, the foregoing document was served on all counsel of record through the CM/ECF system.

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