UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ANNEX MEDICAL, INC.; STUART LIND, and **TOM JANAS,** *Plaintiffs,* v. **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; **HILDA SOLIS**, in her official capacity as Secretary of the United States Department of Labor; **TIMOTHY GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES**; **UNITED STATES DEPARTMENT OF LABOR**; and **UNITED STATES DEPARTMENT OF THE TREASURY**, *Defendants*.	Case No.12-CV-02804 (DSD/SER)

***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Amici respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction because Plaintiffs' have failed to demonstrate a likelihood of success on the merits. Plaintiffs cannot demonstrate a likelihood of success on the merits because the federal preventative services coverage regulations do not create a substantial burden on

Plaintiffs' religious exercise under the Religious Freedom Restoration Act ("RFRA"). Specifically, requiring employers—particularly a for-profit employer that already provides contraception coverage—to provide comprehensive health insurance to its employees does not substantially burden the company owner's religious exercise under the RFRA.

II. ARGUMENT

A party claiming a RFRA violation "must establish" that the governmental policy at issue substantially burdens his or her sincerely held religious beliefs. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997). Only after that party establishes a substantial burden does the burden shift to the government to prove that the challenged policy is the least restrictive means of furthering a compelling government interest. *Weir*, 114 F.3d at 820. Here, Plaintiffs cannot meet their burden of establishing that the preventative services coverage regulations substantially burden their sincerely held religious beliefs.

A. Plaintiffs Cannot Establish That the Regulations Substantially Burden Their Sincerely Held Religious Beliefs.

The preventative services coverage regulations do not violate the RFRA. The RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to restore the strict scrutiny test for claims alleging the substantial burden of the free exercise of religion. Specifically, the RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a

compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

Although the RFRA does not define "substantial burden," the Eighth Circuit has held that 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 belief[s] of the party asserting the claim." *U.S. v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal 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). Put another way, "a substantial burden must place more than an inconvenience on religious exercise," and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[1] *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also 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); *Civil*

[1] Although some of the cases cited herein are Free Exercise cases decided prior to *Smith*, courts have held that those cases are instructive in the RFRA context "since RFRA does not purport to create a new substantial burden test" but rather restores the pre-*Smith* test. *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007) ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence"). Moreover, Religious Land Use and Institutionalized Persons Act (RLUIPA) cases are also instructive because that statute also prohibits government imposed "substantial burdens" on religion. 42 U.S.C. § 2000cc(a)(1).

Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (the word "substantial" in the "substantial burden" test cannot be rendered "meaningless," otherwise "the slightest obstacle to religious exercise . . . however minor the burden it were to impose," could trigger a RLUIPA violation); *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV.-12-1000-HE, 2012 U.S. Dist. LEXIS 164843, at *34 (W.D. Okla. Nov. 19, 2012) (in denying plaintiffs' motion for preliminary injunction against contraception rule, court noted that "RFRA's provisions do not apply to any burden on religious exercise, but rather to a 'substantial' burden on that exercise"); *Jihad v. Fabian*, 680 F. Supp. 2d 1021, 1026 (D. Minn. 2010) (Doty, J.) (holding in the prison context that "substantial burden" exists if the government policy "inhibits or constrains religious conduct, meaningfully curtails an inmate's ability to express adherence to his faith, or denies an inmate reasonable opportunities to engage in fundamental religious activities").

As a district court in Missouri recently held, the contraception coverage regulation does not place a substantial burden on a company owner's religious beliefs. *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476-CEJ, 2012 U.S. Dist. LEXIS 140097 (Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012). This is because the regulation neither requires employers to physically provide contraception to their employees, nor endorse the use of contraception. It therefore does not "prohibit" any religious practice or otherwise substantially burden Plaintiffs' religious beliefs. *Ali*, 682 F.3d at 710-11. In fact, as the *O'Brien* court correctly found, the rule only requires Plaintiffs to provide a comprehensive health insurance plan "that might eventually be used by a third party" to obtain health care that is "inconsistent with [Plaintiffs'] religious

values." 2012 U.S. Dist. LEXIS 140097, at *21. But this "indirect financial support of a practice" from which Plaintiffs wish to abstain "according to [their] religious principles" does not constitute a substantial burden on Plaintiffs' religious exercise. *Id*. at *19.

B. The Regulations Impose Only a *De Minimis* Burden, if Any, on Plaintiffs' Religious Practice.

The *O'Brien* court decided that the preventive services coverage regulations impose a *de minimis* burden on Plaintiffs' religious practice. *Id*. at *21. That decision is consistent with several cases analyzing similar governmental policies. For example, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals have health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *aff'g Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The district court held that "inconsequential burdens" on religious practice, like the requirement to have health insurance, do "not rise to the level of a substantial burden." *Mead*, 766 F. Supp. 2d at 42.

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by compliance with the Fair Labor Standards Act ("FLSA"). 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 131 (1990). The school paid married male, but not married

female, teachers a "salary supplement" based on the school's religious belief that the husband is the head of the household. *Id.* at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers, and accordingly, a violation of the FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened its religious beliefs, holding that compliance with the FLSA imposed, "at most, a limited burden" on the school's free exercise rights. *Id*. at 1398. "The fact that [the school] must incur increased payroll expense to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id*.; *see also Donovan v. Tony & Susan Alamo Found., Inc.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

In yet another case, *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Plaintiffs' claim here. 94 F.3d 1294 (9th Cir. 1996), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). In that case, public university students objected to paying a registration fee on the ground that the fee was used to subsidize the school's health insurance program, which covered abortion care. *Id*. at 1297. The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious beliefs, but at most placed a "minimal limitation" on their free exercise rights. *Id*. at 1300. The court

noted that the plaintiffs are not "required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services." *Id*.

Just as the plaintiffs in *Goehring* failed to state a claim under the RFRA because the burden on religion was minimal, the same is true here. The fact that Plaintiffs' employees might use their health insurance to obtain contraception coverage simply does not impose a "substantial" burden on the Plaintiffs' religious practice. Moreover, nothing would prohibit Plaintiffs from advocating their religious beliefs to employees and encouraging them not to take advantage of the contraception benefit. In addition, Plaintiffs are exempt from the requirement that they provide health insurance coverage at all—so to the extent that there is a *de minimis* burden on their religious practices, it is a burden they could avoid altogether by deciding not to provide health insurance benefits to their employees.

C. The Regulations Have Only an Attenuated Impact on Plaintiffs' Religious Beliefs

As the *O'Brien* court found, the connection between the preventative services coverage regulations and Plaintiffs' religious beliefs is simply too attenuated to place a substantial burden on Plaintiffs' religious beliefs. 2012 U.S. Dist. LEXIS 140097, at *15; *see also Hobby Lobby Stores*, 2012 U.S. Dist. LEXIS 164843, at *37 (denying preliminary injunction against federal contraception rule under the RFRA because relationship between the rule and the plaintiffs' religious beliefs was too attenuated). Indeed, it is a long road from Plaintiffs' own religious opposition to contraception use, to an independent decision by an employee to use her health coverage for contraceptives.

Id. That is, the independent action of an employee breaks the causal chain for any violation of the RFRA.

The Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is instructive. In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause because parents' "genuine and independent private choice" to use the voucher to send their children to religious schools broke "the circuit between government and religion." *Id*. at 652. Here, as the *O'Brien* court found, "the health care plan will offend plaintiffs' religious beliefs only if an [] employee (or covered family member) makes the independent decision to use the plan to cover counseling related to or the purchase of contraception." 2012 U.S. Dist. LEXIS 140097, at *21. Therefore, as in *Zelman*, this scenario involves an employee's independent and private choice, which breaks the causal chain between government mandate and free exercise of religion. Any slight burden on Plaintiffs' religious exercise is far too remote to warrant a finding of a RFRA violation.

Plaintiffs' own conduct emphasizes just how remote the burden on Plaintiffs is. Plaintiffs were not even aware of the preventative services coverage requirement until it was publicized and, only then, did Plaintiffs realize that their current health care plan also provides for contraceptive coverage. (Declaration of Stuart Lind, Docket No. 11, ¶¶ 20, 22.)

Moreover, the burden on Plaintiffs' religious exercise is just as remote as other activities that they subsidize that are also at odds with their religious beliefs. For example, as the *O'Brien* court found, Plaintiffs "pay salaries to their employees—money

the employees may use to purchase contraceptives." *Id*. And just as the *Mead* court recognized, Plaintiffs "routinely contribute to other forms of insurance" via their taxes that include contraception coverage such as Medicaid, and they contribute to federally funded family planning programs. These federal programs "present the same conflict with their [religious] belief[s]." 766 F. Supp. 2d at 42. But like the preventative services coverage regulations, the connection between these programs and Plaintiffs' religious beliefs is too attenuated. Indeed, the Eighth Circuit has held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women).

D. Plaintiffs Cannot Use the RFRA to Impose Their Religious Beliefs on Their Third Party Female Employees

The RFRA "is a shield, not a sword." *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *19. It cannot be used to "force one's religious practices upon others" and to deny others rights and benefits. *Id*. As the government discusses in greater detail, (*see* Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 22-25), the preventative services coverage regulations were designed to further gender equality, just like the FLSA. In recommending that contraception coverage be included in women's preventative care under the ACA, an independent organization found that "[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." INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 94 (prepublication ed.) (2011). Contraceptive copays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all. *See, e.g.*, Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 Contraception 491, 531 (June 2010).

Access to contraception is important for women's equal participation in society. Succinctly put, "[w]omen cannot participate in society, learn, earn, govern, and thrive equally without the ability to determine whether and when to become mothers." Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 Emory L.J. 941, 976 (2007). As the district court in *Hobby Lobby Stores* recognized in holding that the plaintiffs were not likely to succeed on the merits of their RFRA claim because they could not show a substantial burden on their religious beliefs, "the employees' rights being affected are of constitutional dimension—related to matters of procreation, marriage contraception, and abortion." 2012 U.S. Dist. LEXIS 164843, at *41. Thus, the preventative services coverage regulations ensure that women have access to a critical health benefit, while at the same time Plaintiffs "remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives." *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *19.

This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *Shenandoah*, or ensuring that health

insurance benefits of others are not diminished, *Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, where only the plaintiffs' rights were at issue, Plaintiffs here are attempting to invoke the RFRA to deny their female employees, who may have different beliefs about contraception use from their employer, equal health benefits. Indeed, it would be unworkable public policy to allow employers such as Plaintiffs to pick and choose what health care benefits to provide their employees based upon their own personal religious beliefs rather than accepted medical practice. And the "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."[2] *O'Brien*, 2012 U.S. Dist. LEXIS 140097, at *19-20; *see also Hobby Lobby Stores*, 2012 U.S. Dist. LEXIS 164843, at *40-41 (in rejecting preliminary injunction against contraception rule, the court noted that "many . . . employees are likely to have different religious views").

III. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for a preliminary injunction.

[2] Moreover, the same would be true if a company owned by a Jehovah's Witness attempted to exclude blood transfusions from its employees' health plan because of her religious beliefs, or a Christian Scientist business owner refused to provide health insurance coverage at all based on his religious beliefs, in violation of the ACA.

December 14, 2012

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND, LLP

By: s/Haley N. Schaffer
William Z. Pentelovitch (#85078)
Haley N. Schaffer (#313099)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
Telephone: (612) 672-8200
Facsimile: (612) 672-8397

and

Teresa Nelson (#269736)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2300 Myrtle Ave., Suite 180
St. Paul, MN 55114
Telephone: (651) 645-4097 x.122

and

Brigitte Amiri
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
25 Broad Street, 18th Floor
New York NY 10004
Telephone: (212) 519-7897

ATTORNEYS FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA