

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MOST REVEREND DAVID A. ZUBIK,
BISHOP OF THE ROMAN CATHOLIC
DIOCESE OF PITTSBURGH, as
Trustee of the Roman Catholic Diocese of
Pittsburgh, a Catholic Trust; *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official
capacity as Secretary of the U.S.
Department of Health and Human
Services; *et al.*,

Defendants.

Case No.: 2:13-cv-01459-AJS

**MOTION OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN
CIVIL LIBERTIES UNION OF PENNSYLVANIA FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE***

The American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania (collectively, “ACLU”) file this motion for leave to file a brief as *amici curiae* in the above-captioned case.

1. The ACLU is a private, non-profit, non-partisan, membership-based public interest organization. The ACLU is dedicated exclusively to defending and protecting civil rights and civil liberties. The ACLU defends against civil liberties violations through litigation in federal and state courts, lobbying of legislative and executive officials at the national, state, county and municipal government levels, and by attempting to influence public opinion. The national ACLU has more than

500,000 members. The ACLU of Pennsylvania has over 17,000 dues paying members.

2. This case raises important questions under the Religious Freedom Restoration Act (“RFRA”) regarding whether Plaintiffs’ religious exercise is substantially burdened by a federal regulation that requires Plaintiffs to self-certify to their third party administrator that they object to providing contraceptive coverage. *Amici* seek to provide this Court with an additional perspective on these issues. A copy of the *amicus* brief that *amici* seek leave to file has been submitted with this motion.

3. *Amici* are well-positioned to submit an *amicus* brief in this case. The ACLU and its state affiliates have long been committed to defending religious liberty, including defending the right of individuals to freely practice their religion. *See, e.g., K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013) (ACLU participating as *amici* in support of a fifth grade student’s right to share her religious beliefs by distributing invitations to a Christmas party hosted by a local church).¹ At the same time, the ACLU and its affiliates protect the constitutional right to reproductive choice² and women’s right to live free from discrimination.³ *See, e.g., Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (ACLU representing plaintiffs in challenge to state law that required minor

¹ For a full history of the ACLU’s free exercise work, see <http://www.aclu.org/aclu-defense-religious-practice-and-expression>.

² More information about the ACLU’s reproductive freedom work can be found at <http://www.aclu.org/reproductive-freedom>.

³ More information about the ACLU’s women’s rights work can be found at <http://www.aclu.org/womens-rights>.

girls to require consent from parents prior to obtaining an abortion); Complaint, *Hegar v. Panetta*, No. 12-cv-06005-EMC (N.D. Cal. Nov. 27, 2012) (ACLU representing women in the armed services challenging the Department of Defense's policy that categorically excluded women from assignment to units whose primary mission is to engage in direct ground combat).

4. *Amici* have a significant interest in the outcome of this case and in the other cases across the country seeking to invalidate the federal contraception rule. The intersection of the various civil liberties issues in this case makes *amici* uniquely positioned to offer an *amicus* brief. Most relevant to this case, the ACLU filed comments with the federal government about the constitutionality of the federal rule at issue in this case. Moreover, the ACLU filed *amicus* briefs in two cases challenging on religious grounds state statutes requiring contraception coverage. In both cases, the statutes were upheld. *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004). More recently, the ACLU filed an *amicus* brief in the Third Circuit in support of the contraception rule in a challenge brought by a for-profit corporation. *See* Brief of American Civil Liberties Union, et al., *Conestoga v. Sebelius*, No. 13-1144 (3d Cir. April 22, 2013).

5. For the reasons more fully discussed in the *amicus* brief, *amici* urge this Court to reject Plaintiffs' claim that the contraception rule—which requires only that Plaintiffs submit a self-certification form to their issuer stating that they object to covering contraceptives in their group health plan—violates RFRA.

Further, to permit Plaintiffs to interfere with payments for contraceptive services provided by third-party health insurance corporations would permit Plaintiffs to interfere with an important employee benefit that promotes gender equality and thus to discriminate against their female employees.

6. Whether to permit *amicus* participation is “solely within the broad discretion of the district court.” *Waste Mgmt. of Pa. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). “A court may grant leave to appear as an *amicus* if the information offered is ‘timely and useful.’” *Id.* (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d mem.*, 782 F.2d 1033 (3d Cir. 1986)). “The Third Circuit has said that ‘permitting persons to appear in court . . . as friends of the court . . . may be advisable where third parties can contribute to a court's understanding.’” *Avellino v. Herron*, 991 F. Supp. 730, 732 (E.D. Pa. 1998) (quoting *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir.1987)).

7. The brief tendered by *amici* meets this criteria and the Court should exercise its discretion and permit the filing of the ACLU’s *amicus* brief. The ACLU has a long history of protecting the right to free exercise of religion and protecting the right of women to be free from discrimination. The intersection of these and other civil liberties issues in this case makes the ACLU uniquely positioned to offer an *amicus* brief here. Moreover, the ACLU has a significant interest in the outcome of this case and in the other cases across the country that are seeking invalidation of the federal contraception rule. As a membership organization, the ACLU has an

interest in ensuring that the federal contraception rule, which will benefit our members, is upheld.

8. Counsel for *amici* has reached out to the parties concerning the filing of their *amicus* brief. Plaintiffs neither consent nor object to the filing of the *amicus* brief, and Defendants take no position. The *amicus* brief has been submitted with this motion along with a proposed order; if this motion is granted there will be no delay in the proceedings.

WHEREFORE, the ACLU requests that this Court accept and consider the Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania in Opposition to Plaintiffs' Motion for Preliminary Injunction submitted with this motion.

Respectfully submitted this 31st day of October, 2013.

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF PENNSYLVANIA

/s/ Witold J. Walczak

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2013, a true and correct copy of the foregoing was filed with this court by using this court's CM/ECF system, which will serve notice on the attorneys of record in this case who are registered with the CM/ECF system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

/s/ Witold J. Walczak

Witold J. Walczak

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Case No.: 2:13-cv-01459-AJS

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania (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 to 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.

Plaintiffs' RFRA claim fails for several reasons. First, the final contraception rule does not substantially burden Plaintiffs' religious exercise. The rule requires only that Plaintiffs send a two-page form to its third party administrator stating that they have religious objections to covering contraceptives. The onus is then on Plaintiffs' third party administrator to provide payments for contraceptive services for the organizations' employees. Simple provision of this notice in no way constitutes a substantial burden on Plaintiffs' religious exercise. Indeed, Plaintiffs likely already provided such notice to third party administrator before the announcement of the final rule in order to request that coverage for contraceptives and sterilizations be excluded from its policy.

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 Plaintiffs' 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 women who work for Plaintiffs—have affordable access to this important healthcare. Allowing Plaintiffs to restrict their employees' contraceptive services would permit Plaintiffs to use their religious beliefs to disadvantage and discriminate against their female employees. Plaintiffs' 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. 131, 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 Services: Required Health Plan Coverage Guidelines*, available at <http://www.hrsa.gov/womensguidelines/> (last visited Oct.

30, 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) (attached hereto as Exhibit A).

Nonprofit organizations must provide their issuer or, if they self-insure, 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, 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

I. THE FEDERAL CONTRACEPTION RULE DOES NOT SUBSTANTIALLY BURDEN PLAINTIFFS’ 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. 42 U.S.C. § 2000bb-1 (2013). The plaintiff bears the initial burden of demonstrating “whether the challenged practice or law substantially burdens the plaintiff’s exercise of religion.” *Washington v. Klem*, 497

F.3d 272, 277 (3d Cir. 2007).¹ Only after the plaintiff meets this initial burden does the burden then shift to the government to demonstrate that the challenged action furthers a compelling interest using the least restrictive means. *Id.*; *see also Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 613 (5th Cir. 2008).

RFRA guards against only substantial—not minimal or abstract – burdens on religious exercise.² “In order to show a substantial burden, the plaintiff must show that the challenged action ‘truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.’” *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013) (citing *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). 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.” *Klem*, 497 F.3d at 280; *Adkins*, 393

¹ *Klem* and several other cases cited herein were decided under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), but these cases are instructive because that statute also prohibits government-imposed “substantial burdens” on religious exercise. 42 U.S.C. § 2000cc(a)(1) (2013); *see also Norwood v. Strada*, 249 Fed. App'x 269, 271 n.4 (3d Cir. 2007) (noting that “the provisions of the RLUIPA are nearly identical to the RFRA”); *see also Thompson v. Scott*, 86 Fed. App'x 17, 18 (5th Cir. 2004) (noting that the reasoning applied in RFRA cases can be considered in a challenge under RLUIPA because the two statutes involve “very similar” tests).

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

F.3d at 570. “An inconsequential or *de minimis* burden on religious practice does not rise to this level,” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008), otherwise, that would risk “read[ing] ‘substantial’ out of the statute.” *Klem*, 497 F.3d at 281. *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”); *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”).

That test plainly is not satisfied here. The challenged rule requires Plaintiffs to do but one thing: inform their issuer or third party administrator that they wish to exclude contraceptive coverage from their health insurance policy. That’s it. Plaintiffs simply submit a form that exempts it from having to cover contraceptives in their group health insurance. It is the issuer or third party administrator which must then pay for, or arrange for payments for, contraceptive services for Plaintiffs’ employees. The delivery of payments for contraceptive services operates entirely outside of Plaintiffs’ business operations. Accordingly, the final rule does not “put[] substantial pressure on” Plaintiffs to violate their belief that the use of contraception is sinful because all that is required of it is to notify their issuer that, consistent with their religious beliefs, they object to covering contraception. *Id.*

Indeed, the rule provides Plaintiffs with an opportunity to express their opposition to contraception by informing their issuer or third party administrator of their objection. And they are free to advocate against the contraception rule or contraceptive services in general in other ways, as well.³

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*, 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

³ Plaintiffs claim that they are being “compel[led]” to “engage in speech that triggers provision of the objectionable products and services” and that they are “deprive[d] . . . of the freedom to speak on the issue of abortion and contraception on their own terms.” Mem. of Law in Sup. of Pl.’s Mot. for Expedited Prelim. Inj. [Doc. #6] 35. To the contrary, Plaintiffs are free to advocate against contraceptive use or the contraception rule in many ways. All that Plaintiffs are required to do to take advantage of the accommodation is sign a form that simply states, consistent with their religious beliefs, that they object to covering contraceptives. Moreover, under Plaintiffs’ theory, the form that the Internal Revenue Service requires clergy to submit in order to claim the clergy tax deduction would similarly be compelled speech. INTERNAL REVENUE SERVICE, FORM NO. 4361: APPLICATION FOR EXEMPTION FROM SELF-EMPLOYMENT TAX FOR USE BY MINISTERS, MEMBERS OF RELIGIOUS ORDERS AND CHRISTIAN SCIENCE PRACTITIONERS, *available at* <http://www.irs.gov/pub/irs-pdf/f4361.pdf> (last visited Sept. 23, 2013).

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*, 450 U.S. at 718). The same is true here. The final rule distinguishes between the submission of the self-certification that provides notice of Plaintiffs’ religious objection and the separate payments for contraceptive services provided by third party health insurance companies. Plaintiffs “play[] no role” in the coverage of contraceptives. *Id.* Payments for contraceptive services “are entirely activities” of the issuer or third party administrator and Plaintiffs are not forced to modify their behavior in any way. *Id.*

Similarly, in *Goehring v. Brophy*, students at a university objected to paying a generally applicable registration fee because it would be used to subsidize the school’s health insurance program, which covered abortion care. 94 F.3d at 1297. The court rejected the plaintiffs’ RFRA and free exercise claims, reasoning in part that the health insurance subsidy is “distributed only for those students who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services.” *Id.* at 1300; *see also Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2011) (affirming district court’s holding that the ACA’s individual mandate to carry health insurance imposed only a *de minimis* burden on the plaintiff’s religious belief that God will provide for their health), *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.

Plaintiffs are left with only one argument: Because the final rule requires them to submit a certification, which “triggers” the third party payments for the possible, eventual use of contraceptives, the final rule substantially burdens its religious exercise. *See* Complaint [Doc. #1] ¶¶ 112, 115, 137; Mem. of Law in Supp. of Pl.’s Mot. for Expedited Prelim. Inj. [Doc. #6] at 16, 44, 52. In short, Plaintiffs complain that because its employees will receive affordable access to contraceptives from separate health insurance companies, the policy substantially burdens Plaintiffs’ religious exercise. This contention merits little attention. By that same logic, the requirement that employers pay social security taxes for their employees could be said to substantially burden the religious exercise of an employer who opposes same-sex relationships because a gay or lesbian employee’s partner may collect those social security benefits from the government upon the death of his or her spouse. But courts have recognized that such “abstract injur[ies]” do not amount to burdens on the free exercise of religion. *Tarsney v. O’Keefe*, 225 F.3d 929, 936 (8th Cir. 2000) (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)).

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

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

In this case, the claims have consequences for persons beyond Plaintiffs. Plaintiffs’ call for an exemption would affect all of Plaintiffs’ employees and their employees’ dependents. An exemption would allow Plaintiffs to impose their beliefs on others. Fortunately, courts have consistently reassured this country that while the right to religious freedom is of paramount importance, it is not absolute and does not give claimants *carte blanche* to impose their religion on others, 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. 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 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. 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”).⁴

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

⁴ Moreover, the Supreme Court has invalidated laws that granted religious exemptions under the Establishment Clause, in part because the exemptions would favor religion at the expense of third party interests. For example, in invalidating a sales tax exemption for religious periodicals, the Court explained that the government cannot provide a religious exemption that “either burdens nonbeneficiaries markedly or cannot be seen as removing a significant state-imposed deterrent to the free exercise of religion.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). The Court similarly invalidated a statute requiring employers to accommodate Sabbatarians in all instances, because “the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.” *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

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 claimed a “sincerely held . . . religious belief that socialization of the races would lead to racial intermarriage, and that this belief, sanctioned by the Free Exercise Clause, should prevail against private interests created by Congress.”).

As the law advanced to prohibit unequal treatment based on gender, some Christian schools also resisted requirements that they provide equal benefits to men and women. *See, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (school officials paid married male teachers more than married female teachers because they believed the “Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (school offered unequal health benefits to female employees based on similar “head of household” religious tenet).

In each of these cases, entities and individuals invoked religious freedom to try to avoid compliance with laws designed to advance equality. Each time their claims were rejected. As these cases recognized, in our cosmopolitan nation, religious freedom does not give institutions or individuals license to deny others their rights, ignore important laws, or impose their religious beliefs on their employees. *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 Plaintiffs cannot use their religious beliefs to interfere with the rights of women to have affordable access to contraceptive services provided by third party insurance companies. 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. R. 1, 4 (2013). The ability to control whether and when to have children has enabled women to achieve greater academic, professional, and economic success. With the advent of contraceptives, women have been able to plan their reproductive lives and futures, which has been instrumental towards achieving gender equality. “[W]omen who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community.” Susan A. Cohen, *The*

Broad Benefits of Investing in Sexual and Reproductive Health, 1 GUTTMACHER R. ON PUB. POL'Y 5, 6 (2004). With greater professional advancement women have experienced a concomitant increase in economic equality and independence. Indeed, 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 Sept. 30, 2013).

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 Sept. 12, 2013). Prior to the ACA and its implementing regulations, contraceptive care and other important preventive services that are unique to women were either excluded from health insurance coverage or had prohibitively high out-of-pocket costs, 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, Daniel Grossman & Kathryn A. Phillips, *Women’s Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills between 1996 and 2006*, 83 CONTRACEPTION 528, 531 (June 2010) (finding that contraceptive co-pays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all). These cost barriers are aggravated by the fact that women “typically earn less than men and . . . disproportionately have low incomes.” CLOSING THE GAPS, *supra*, at 19.

The costs associated with this healthcare also affect contraceptive choice, driving women to less expensive and less effective methods of contraception. *See* Jeffrey 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, 1293-1295 (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 contraceptive that suits their medical needs.⁵

⁵ Plaintiffs claim that the contraception rule will not increase contraceptive use by making it more affordable “because the group of women with the highest unintended pregnancy rates (the

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 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 Medical Leave Act ("FMLA"), Congress found that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second" and sought to disrupt that stereotype by requiring employers to give all employees—male and female—guaranteed leave to tend to family and medical needs. *See Hibbs*, 538 U.S. at 736 (quoting legislative history of FMLA).

However, more work towards full equality is still needed. The contraception rule marks an important step towards allowing women to participate equally in society. To permit Plaintiffs to prevent third party health insurance companies from paying for contraceptive services for Plaintiffs' employees would undermine this important interest and allow it to discriminate against its women employees,

poor) are not addressed or affected by the Mandate [because they are unemployed], and are already amply supplied with free or low-cost contraception." Doc. #6 at 6 (citing Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 380 (2013)). Not only does Plaintiffs' statement play fast and loose with the law review article's substance, but the article itself does not cite a single research study to support its assertions, and focuses on the unintended pregnancy rates of *teenagers*. Alvare, 58 VILL. L. REV. at 402-04. In sharp contrast, the studies cited *supra* make clear that when cost is not a barrier, women choose a highly effective method of birth control that results in a lower unintended pregnancy rate. *See Peipert et al.*, 120 OBST. & GYN'Y at 1293, 1295.

contrary to a long line of cases. Plaintiffs' attempt to use the right to religious freedom as a sword, not a shield, must be rejected.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

Dated: October 31, 2013

Respectfully submitted,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
PENNSYLVANIA

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2013, a true and correct copy of the foregoing was filed with this court by using this court's CM/ECF system, which will serve notice on the attorneys of record in this case who are registered with the CM/ECF system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

/s/ Witold J. Walczak

Witold J. Walczak

Exhibit A

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

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

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

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

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

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

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

Signature of the individual listed above

Date

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

Notice to Third Party Administrators of Self-Insured Health Plans

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

- (1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
- (2) Obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

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

PRA Disclosure Statement

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MOST REVEREND DAVID A. ZUBIK,
BISHOP OF THE ROMAN CATHOLIC
DIOCESE OF PITTSBURGH, as
Trustee of the Roman Catholic Diocese of
Pittsburgh, a Catholic Trust; *et al.*,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official
capacity as Secretary of the U.S.
Department of Health and Human
Services; *et al.*,

Defendants.

Case No.: 2:13-cv-01459-AJS

**ORDER GRANTING MOTION OF THE AMERICAN CIVIL LIBERTIES
UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA FOR LEAVE TO APPEAR AS *AMICI CURIAE***

AND NOW, this _____ day of November, 2013, upon
consideration of the Motion of the American Civil Liberties Union and the American
Civil Liberties Union of Pennsylvania for Leave to Appear as *Amici Curiae* and any
opposition filed thereto, it is ORDERED that the Motion is GRANTED.

It is FURTHER ORDERED that the Clerk of Court docket the
proposed brief submitted with the ACLU's Motion for Leave.

By the Court:

Honorable Arthur J. Schwab, U.S.D.J.