IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

W.L. (BILL) ARMSTRONG; JEFFREY S. MAY; WILLIAM L. (WIL) ARMSTRONG III; JOHN A. MAY; DOROTHY A. SHANAHAN; and CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor; JACOB LEW, 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.

Civil Action No. 1:13-cv-00563-RBJ-BNB

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

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The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Colorado, the organization's affiliate in Colorado, was founded to protect and advance civil rights and civil liberties, and currently has over 9,500 members in the state. The ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the ACLU routinely brings cases designed to protect individuals' right to worship and express their religious beliefs. At the same time, the ACLU vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

Amici provide this brief to respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction. Specifically, *Amici* argue that Plaintiffs are unlikely to succeed on the merits of their Religious Freedom Restoration Act claim because requiring an employer – particularly a for-profit employer – to provide comprehensive health insurance to its employees does not substantially burden the company's owners' religious exercise.

SUMMARY OF ARGUMENT

Plaintiffs are unlikely to succeed on their claim that the federal contraceptive rule, which requires contraception to be offered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), substantially burdens their religious exercise under the

Religious Freedom Restoration Act ("RFRA").[1] Indeed, the Tenth Circuit Court of Appeals has already held as much in another materially indistinguishable case, denying a request for an injunction pending appeal in a challenge to the same contraceptive rule at issue here. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 690302 (10th Cir. Dec. 20, 2012), *application for injunction pending appeal denied*, 133 S. Ct. 641 (Sotomayor, Circuit Justice).

Plaintiffs have failed to show that the contraception rule likely places a "substantial burden" on their free exercise of religion in two ways. First, the connection between the contraceptive rule and any impact on Plaintiffs' religious exercise is simply too attenuated to rise to the level of a "substantial burden." The law does not require Plaintiffs to use contraception themselves, to physically provide contraception to their employees, or to endorse the use of contraception. The contraceptive rule creates no more infringement on Plaintiffs' religious exercise than many other actions that Plaintiffs readily undertake, such as paying an employee's salary, which that employee could then use to purchase contraception. Second, the employee's independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Plaintiffs' free exercise.

Furthermore, RFRA does not permit Plaintiffs to impose their religious beliefs on their employees. As another court has noted in upholding the federal contraceptive rule, RFRA "is a shield, not a sword." *O'Brien v. Dep't of Health & Human Servs.*, 2012 WL

[1] Although Plaintiffs are entitled to their religious beliefs that certain forms of contraception cause an abortion, as a scientific matter no form of contraception disrupts an established pregnancy. *See, e.g., Amicus Curiae* Brief of Physicians for Reproductive Health, et al., filed in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 690302 (10th Cir., Docket # 10056452, March 21, 2013).

4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). Indeed, "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." *Id*. Accordingly, this Court should deny Plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. The Federal Contraceptive Rule Does Not Substantially Burden Plaintiffs' Free Exercise of Religion Under the Religious Freedom Restoration Act.

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 substantial burdens on the free exercise of religion. Specifically, 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 RFRA does not define "substantial burden," this Court has held that "religious exercise is substantially burdened" when the government:

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice – an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.

Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010).[2]

While a RFRA claim may proceed when the plaintiff alleges that she was forced by the government to act in a manner that is inconsistent with her religious beliefs, this Court has made clear that not "every infringement on religious exercise will constitute a substantial burden." *Id*. at 1316. As the Eleventh Circuit has held, "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."[3] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g., 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 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).

[2] Although *Abdulhaseeb* is a Religious Land Use and Institutionalized Persons Act ("RLUIPA") case, cases under RLUIPA are instructive because that statute also prohibits government-imposed "substantial burdens" on religion. 42 U.S.C. § 2000cc(a)(1). *See, e.g., Abdulhaseeb*, 600 F.3d at 1313 n.5.

[3] 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 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[.]").

The party claiming a RFRA violation must establish that the governmental policy at issue substantially burdens his or her sincerely held religious beliefs. *Abdulhaseeb*, 600 F.3d at 1318. Only after the plaintiff 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. *Id*. Plaintiffs here cannot meet their duty of demonstrating that their religious exercise is substantially burdened.

There is no doubt as to the sincerity of Plaintiffs' religious opposition to contraception. But that does not mean that the courts need not assess whether the contraceptive rule imposes a "substantial burden" on that sincerely held religious belief. To the contrary, that is the proper function of the courts. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (although, on a motion to dismiss, courts assessing RFRA claims must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," whether those beliefs are "substantially burdened" is a question of law properly left to the judgment of the courts); *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (holding in a RFRA challenge that although the government conceded that the plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

A. The Connection Between the Contraceptive Rule and the Impact on Plaintiffs' Religious Beliefs Is Too Attenuated to Rise to the Level of "Substantial Burden."

The contraceptive rule neither requires employers to physically provide contraception to their employees, nor endorse the use of contraception, and does not

prohibit any religious practice or otherwise substantially burden Plaintiffs' religious beliefs. *See Abdulhaseeb*, 600 F.3d at 1315-16. The rule only requires Plaintiffs to provide a comprehensive health insurance plan. While that health insurance plan might be used by a third party to obtain health care that is inconsistent with Plaintiffs' faith, such indirect financial support of a practice from which Plaintiffs wish to abstain according to religious principles does not constitute a substantial burden on Plaintiffs' religious exercise. Indeed, the Tenth Circuit, in denying a motion for an injunction pending appeal in the *Hobby Lobby* case, held that:

> The particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the corporate plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc., 2012 WL 6930302, at *3 (internal citations and quotations marks omitted), *application for injunction pending appeal denied*, 133 S. Ct. 644 (2012) (Sotomayor, Circuit Justice). Thus, the Tenth Circuit concluded that there was not a substantial likelihood that it would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id*.; *see also Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012) (denying motion for injunction pending appeal in challenge to federal contraception rule, holding that the plaintiffs were unlikely to succeed on the merits of their claims); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Jan. 29, 2013) (same).

The Tenth Circuit's holding is consistent with other cases presenting similar facts. For example, in *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Plaintiffs' claim here. 94 F.3d 1294 (9th Cir. 1996). 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*.

Moreover, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals maintain 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), *affirming 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*, 498 U.S. 846 (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 FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened its religious beliefs, holding that compliance with 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.*, 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).

There are strong parallels to the cases cited above and the instant action. Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here. The mere fact that someone might have used the student health insurance in *Goehring* to obtain an abortion, or the fact that Plaintiffs' employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on others' religious practice. Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their

female employees does not substantially burden religious exercise. Plaintiffs remain free to exercise their faith, by not using contraceptives and by discouraging employees from using contraceptives.[4]

Indeed, 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, Plaintiffs pay salaries to their employees – money the employees may use to purchase contraceptives. And just as the court recognized in *Mead*, 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. 766 F. Supp. 2d at 42. These federal programs "present the same conflict with their [religious] beliefs." *Id*. But like the federal contraceptive rule, 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).

B. An Employee's Independent Decision to Use Her Health Insurance to Obtain Contraception Breaks the Causal Chain Between the Government's Action and Any Potential Impact on Plaintiffs' Religious Beliefs.

It is a long road from Plaintiffs' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for

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

contraceptives. That is, the independent action of an employee breaks the causal chain for any violation of RFRA. In this respect, 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 Tenth Circuit held, an employer may end up subsidizing activity with which it disagrees only after a "series of independent decisions by health care providers and patients" covered by the company's health plan. *Hobby Lobby Stores*, 2012 WL 6930302, at *3 (internal citations and quotation marks omitted). 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.

II. RFRA Does Not Grant Plaintiffs a Right to Impose Their Religious Beliefs on Their Employees.

RFRA cannot be used to force one's religious practices upon others and to deny them rights and benefits. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *see Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *see 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 RFRA to deny their female employees, who may have different beliefs – religious or otherwise – about contraception use from their

employer, equal health benefits. As the Tenth Circuit has already held, the instant action is different from "other cases enforcing RFRA," which were brought "to protect a plaintiff's *own* participation in (or abstention from) a specific practice required (or condemned) by his religion." *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (emphasis added). Furthermore, as another court has held, "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." *O'Brien*, 2012 WL 4481208, at *6.

CONCLUSION

Accordingly, this Court should deny Plaintiffs' motion for a preliminary injunction.

April 24, 2013

Respectfully submitted,

/s/ Mark Silverstein

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2013 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's 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/ Jessica Howard

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Jessica Howard
Legal Assistant