

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANK R. O'BRIEN, JR., and
O'BRIEN INDUSTRIAL HOLDINGS, LLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES; KATHLEEN
SEBELIUS, in her official capacity as the
Secretary of the United States Department of
Health and Human Services; UNITED STATES
DEPARTMENT OF THE TREASURY;
TIMOTHY GEITHNER, in his official capacity
as Secretary of the United States Department of
the Treasury; UNITED STATES DEPARTMENT
OF LABOR; HILDA SOLIS, in her official
capacity as Secretary of the United States
Department of Labor,

Defendants.

Civil Action No.
4:12-cv-00476-CEJ

**BRIEF OF THE AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED
COMPLAINT**

The American Civil Liberties Union and the American Civil Liberties Union of Eastern Missouri (collectively "ACLU") submit this amicus brief in support of the government's motion to dismiss the Plaintiffs' complaint. The right to practice one's religion, or no religion, is a core component of our civil liberties and is of vital importance to the ACLU. For this reason, *Amici* routinely bring cases designed to protect individuals' right to worship and express their religious beliefs. The ACLU is also fiercely committed to fighting discrimination and inequality,

including discrimination based on gender. Indeed, since 1972, the ACLU has been working to secure gender equality and ensure that all women and girls are able to lead lives of dignity, free from violence and discrimination. An important component of gender equality is the ability of women to have full control of their reproductive lives, and to be able to decide whether and when to have children.

Amici do not repeat the arguments presented by Defendants. Rather, *Amici* submit this brief to provide historical context for Plaintiffs' claims. The claims raised by Plaintiffs – that they have a right to discriminate against women and deny them benefits because of Mr. O'Brien's religious beliefs – are, unfortunately, not new. Regrettably, not so very long ago, businesses similarly claimed that their right to religious liberty entitled them to discriminate against African-American customers in public accommodations; universities claimed a religious liberty right to discriminate against African-American students; and employers claimed their right to religious freedom entitled them to pay men – who they considered to be the head of household based on their religious beliefs – more than women. Fortunately, in each of these cases, the courts squarely rejected the claims, recognizing that the right to religious liberty does not encompass the right to discriminate against others. This Court should come to the same conclusion here. Indeed, acceptance of Plaintiffs' claims would not only contravene this clear and consistent precedent, but would also open the door for arguments that countless anti-discrimination statutes should be unenforceable in the face of a claim that the discrimination is mandated by a religious belief.

FACTUAL BACKGROUND

The Patient Protection and Affordable Care Act (“ACA”) provides that certain preventive services must be provided in health insurance plans without cost-sharing. Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 131 (2010). In an effort to help eliminate some forms of gender inequality by equalizing men and women’s health care coverage, Congress added the Women’s Health Amendment (“WHA”) to the ACA which requires health insurance plans to cover additional preventive services for women. Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 131 (2010).

The WHA was crucial to ensuring that women receive coverage for preventative services. Indeed, prior to its introduction, coverage for these services was absent from the ACA. *See* 155 Cong. Rec. S11979, S11987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (noting that the ACA did not cover key preventive services for women). In passing the WHA, Senator Reid explained that the WHA was necessary for “millions of women who are being discriminated against” 155 Cong. Rec. at S12020 (daily ed. Dec 1, 2009) (statement of Sen. Reid). As Senator Mikulski noted: “Often 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 S11988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (emphasis added). In particular, Congress intended to address gender disparities in out-of-pocket health care costs, much of which stem 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. at S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

To implement the WHA, the Institute of Medicine (“IOM”), an independent, nonprofit organization that works outside of government to provide unbiased and authoritative advice to decision makers and the public, “review[ed] what preventive services are necessary for women’s health and well-being” and developed recommendations for comprehensive guidelines.

INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 1 (prepublication ed.) (2011) (“CLOSING THE GAPS”). Among other things, the report recommended that the preventative 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.” *Id.* at 94. On August 1, 2011, the Department of Health and Human Services (“HHS”) adopted these recommendations, including the recommendation on contraceptive services. *See* 45 C.F.R. § 147.130(b)(1); Health Resources and Services Administration, U.S. Dep’t of Health & Human Services, *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, <http://www.hrsa.gov/womensguidelines/>.

In announcing the final rule, the government recognized that the ability to access contraception plays is essential to women’s ability to participate fully in society. Indeed, as the government explained, the inability of women to access contraception

places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women. Contraception coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventative services, including contraceptive services.

77 Fed. Reg. 8725, 8728. In addition, the government recognized that cost is a real barrier to contraceptive access. The IOM 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.” CLOSING THE GAPS at 94. Contraceptive copays can be so expensive that women can pay almost as much out-of-pocket as they would without coverage at all. 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). Cost barriers are aggravated by the fact that women “typically earn less than men and [] disproportionately have low incomes.” CLOSING THE GAPS at 19. Women who lack access to contraception face “barriers . . . that prevent women from achieving health and well-being for themselves and their families.” *Id.* at 20. The federal contraception rule, if undisturbed, will ensure that millions of women have access to contraception without cost barriers, thereby equalizing the health insurance costs between women and men and ensuring women’s ability to equally participate in society.

ARGUMENT

The question in this case is whether a secular, for-profit corporation can discriminate against its female employees by denying to them the benefits the government has found to be a critical means of helping to promote women’s equality and eradicating discrimination. While today’s controversy centers around health insurance benefits for contraception, the fundamental question – whether religious objections can trump neutral laws designed to promote equality – is not unique to this context. Indeed, it has arisen in numerous other contexts over the last five decades. For example:

- In 1966, three African-American residents of South Carolina brought a suit against Piggie Park restaurants, and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964's public accommodations provision violated his religious freedom "since his religious beliefs compel[ed] him to oppose any integration of the races whatever." *Newman v. Piggie Park Enter., 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).

- In 1976, Roanoke Valley Christian Schools added a "head of household" supplement to their teachers' salaries – but only for heads of household as determined by scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, "[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). When sued under the Equal Pay Act, Roanoke Valley claimed a right to an exemption from equal pay laws because its "head-of-household practice was based on a sincerely-held belief derived from the Bible." *Id.* at 1397.

- In the 1980s, Bob Jones University, a religiously affiliated school in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The "sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage," and it was school policy that students engaged in interracial relationships, or advocacy thereof, would be expelled. *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 580 (1983). Bob Jones's lesser known co-plaintiff, Goldsboro Christian Schools, even opposed integration of the classroom. According to their interpretation of the Bible, "[c]ultural or

biological mixing of the races is regarded as a violation of God's command." *Id.* at 583 n.6 (citations omitted).

In each of these cases, entities and individuals tried to invoke the mantle of religious freedom to avoid compliance with laws designed to advance equality, and each time their claims were rejected. As these cases recognized, the right to religious liberty is not absolute. It does not give businesses or individuals carte blanche to discriminate against others or deny others their rights. As the District Court in South Carolina explained in rejecting the free exercise claim of a restaurant owner who refused to serve African-American customers:

Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

Newman, 256 F. Supp. at 945.

One of the ways in which religious liberty is not absolute, as these cases make clear, is that religious liberty must yield to laws that were passed to further a compelling government interest, including the promotion of equality and the eradication of discrimination. *See, e.g., Shenandoah Baptist Church*, 899 F.2d at 1398 (religious school must comply with the Equal Pay Act, which was passed to address "serious and endemic problem of employment [gender] discrimination," which is a compelling government interest); *Bob Jones Univ.*, 461 U.S. at 604 (religious school could not be exempt from IRS policy that required such schools to have nondiscriminatory policies, because eradication of racial discrimination in education is a compelling government interest). The same is true here. As discussed above, and as the government points out in its brief, in passing the Women's Health Amendment, Congress sought

to eradicate gender discrimination in the context of the provision of health care. *See* Defs.’ Mem. of Law in Supp. of Their Mot. to Dismiss the First Am. Compl. (“Def.’s Br.”) at 21-23. Women of child-bearing age pay more for out-of-pocket health care than their male counterparts, in part because of the costs of contraception. As Congress recognized, women of childbearing age pay 68% more for out-of-pocket health care than men. *See supra* at 5. These costs are not insignificant, are a true barrier to women’s access to effective birth control, and the financial barriers are aggravated by the fact that women typically learn less than men. *Id.* As Congress found, ensuring women receive the same benefits as men, and equalizing the existing health care disparities between men and women, is crucial. *Id.*

This is particularly true where, as here, the benefit at issue is part and parcel to women’s equality in other aspects of their life. The impact of the inability to access contraception falls primarily on women. Access to contraception gives women control of their fertility, enabling them to decide whether and when to become a parent, allowing women to make educational and employment choices that benefit themselves and their families. For example, researchers have found that the availability of oral contraception has played a significant role in allowing women to attend college and choose post-graduate paths, including law, medicine, dentistry, and business administration. *See* Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. of Pol. Econ., 730 (2002), available at <http://www.nber.org/papers/w7527>. Indeed, professional degree programs saw a sharp increase in women applicants around the time that oral contraceptives became widely available in 1970. *Id.* The ability to enter into these and other professions because of the ability to control whether and when to have children significantly closed the wage gap between men and women. One study attributes the pill to one-third of the total wage gains for women born in the

mid-1940s to early 1950s. Martha J. Bailey, et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages*, 26 (2012), available at http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf. 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); *see also id.* at 975 (recognizing the importance of accessing contraception on the ability to participate in the work force, and without “the means to control and limit reproduction, the average woman would bear twelve to fifteen children in her lifetime”). The Supreme Court has also recognized the direct relationship between women’s reproductive health decisions and their equal participation in society: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

The federal government is not the only one to recognize and act on these gender disparities and the importance of access to contraception to women’s equality. Indeed, 28 states have passed laws requiring employers to cover contraception. 77 Fed. Reg. at 8728. Two of those states, California and New York, faced legal challenges similar to the one at issue here. The high courts of both states rejected those challenges in part because the laws were designed to eradicate gender discrimination. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92 (Cal. 2004) (recognizing that the statute was passed to equalize health insurance costs between men and women); *Catholic Charities of Diocese of Albany v. Seri*, 859 N.E.2d 459, 461, 468 (N.Y. 2006) (noting that the purpose of the statute was to advance equal treatment of women). Those courts acknowledged legislative history similar to that here: that women pay

as much as 68% more than men in out-of-pocket health care costs, due in part to the cost of prescription contraception. *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92; *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468. Eradicating gender discrimination and disparities in health costs is undoubtedly a compelling government interest, as recognized by the line of cases discussed above.¹ *See also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that insurance plan offered only to “head of households,” namely men or single persons, violated Title VII and the Equal Pay Act, and rejecting the school’s free exercise claims because of the compelling government interest in eradicating gender discrimination).

Not only do these neutral anti-discrimination laws further a compelling government interest, but as courts have held, they also minimally – if at all – burden religion. For example, in *Shenandoah*, the court recognized that it would be – at most – a “limited” burden to require the school to comply with the Fair Labor Standards Act (“FLSA”) and pay their female teachers the same as men. As the court recognized, “[t]he fact that [the school] must incur increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim.” 899 F.2d at 1398. So too here. Requiring Plaintiffs to provide their employees with a health plan that includes contraception coverage does not burden Plaintiffs’ religious exercise. The link between the contraceptive coverage requirement and the religiously prohibited behavior is simply too attenuated to amount to a substantial burden. *See* Defs.’ Br. at 18-20. The contraceptive coverage requirement does not require that Plaintiffs physically provide contraception to their employees nor does it require them to endorse the use of contraception. It merely requires Plaintiffs – like the employer in *Shenandoah* – to provide a nondiscriminatory benefit to its employees.

¹ As the government discusses, the rule also furthers the compelling interest in ensuring that women have appropriate health care. Defs.’ Br. at 20-21.

Furthermore, another line of cases makes clear that Plaintiffs' claimed injury – an objection to contributing to a health plan that provides coverage for a health care services that they find objectionable – is not cognizable. In *Goehring v. Brophy*, for example, the court addressed a RFRA claim similar 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). 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 beliefs. *Id.* at 1300. Moreover, in *Tarsney v. O'Keefe*, the Eighth Circuit affirmed the dismissal of a free exercise challenge by taxpayers who objected on religious 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 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. *Id.* at 936; *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.”). Accordingly, just like those who have objected to paying insurance premiums for an insurance plan that others may use to access abortion care, or taxes that pay for Medicaid, which may be used to cover another's abortion, Plaintiffs here cannot claim any cognizable injury by providing their employees with a health plan that covers contraception, which some employees may use.

*

*

*

History has a way of repeating itself. Plaintiffs are attempting to resurrect the long-discredited notion that religion can be used to trump anti-discrimination laws. Unfortunately, others have recently tried to do so in other contexts. For example, much like the restaurant in Piggie Park, an inn recently cited their religious objections to same sex marriage when it refused to rent a reception hall to a same-sex couple for their wedding reception in violation of a state anti-discrimination law. *Baker v. Wildflower Inn*, No. 183-7-11 (Vt. Super. Ct.).² In another case, a religious school claimed that firing a teacher for asking to take maternity leave was justified by its religious beliefs that she should not have conceived a child outside of marriage. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012). Each of these arguments is based on the incorrect notion that religion can be used as a license to discriminate. This Court should follow the wise words from the district court in South Carolina five decades ago, and refuse to “lend credence or support” to the position that entities have a constitutional right to refuse to comply with laws designed to eradicate discrimination. *Newman*, 256 F. Supp. at 945.

² See <http://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn-third-amended-complaint>.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Respectfully submitted,

/s/ Anthony E. Rothert

Anthony E. Rothert

Bar No. 44827MO

Grant R. Doty

Bar No. 60788MO

ACLU OF EASTERN MISSOURI

454 Whittier Street

St. Louis, Missouri 63108

Telephone: (314) 652-3114

Facsimile: (314) 652-3112

Email: tony@aclu-em.org

Brigitte Amiri

Pro hac vice pending

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

125 Broad Street, 18th Floor

New York, NY 10004

Telephone: 212-549-2633

Facsimile: 212-549-2650

Email: bamiri@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Anthony E. Rothert