UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

AMERICAN PULVERIZER COMPANY, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 12-CV-3459-RED
	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,	)	
	)	
Defendants.	)	

***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI, AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS AND WESTERN MISSOURI IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Amici provide this brief to respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction because they have failed to demonstrate a likelihood of success on the merits. Specifically, *Amici* write on the issue of whether the federal contraception rule creates a substantial burden on Plaintiffs' religious exercise under the Religious Freedom Restoration Act ("RFRA"). It does not. Indeed, requiring employers – particularly a for-profit employer that already provides contraception coverage – to provide comprehensive health insurance to its employees does not substantially burden the company owner's religious exercise under RFRA.[1] RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment*

[1] The fact that Plaintiffs object to covering some, but not, all methods of contraception does not change the analysis. For example, Plaintiffs object to including emergency contraception ("EC") in its employees' health insurance plans. But EC is the primary method used by a woman to prevent pregnancy after intercourse (for example, in cases of rape or contraceptive failure). *See generally* http://ec.princeton.edu/. Removing EC from health plans hampers a woman's ability to make decisions about their reproductive lives, including the ability to select a highly effective contraception method to avoid unintended pregnancy.

Div. v. Smith, 494 U.S. 872 (1990), to restore the strict scrutiny test for claims alleging the substantial burden of the free exercise of religion. Specifically, 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," the Eighth Circuit has held that a "rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal citations and quotation marks omitted). Government action imposes a "substantial burden" when there is "no consistent and dependable way of exercising" one's faith. *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000). 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, *Ali*, 682 F.3d at 710-11, "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."[2] *Midrash Shephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious exercise must impose a significantly great

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

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); *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE, 2012 WL 5844972, *10 (W.D. Okla. Nov. 19, 2012) (in denying plaintiffs' motion for preliminary injunction against contraception rule, court noted that "RFRA's provisions do not apply to any burden on religious exercise, but rather to a "substantial" burden on that exercise").

The party claiming a RFRA violation "must establish" that the governmental policy at issue substantially burdens his or her sincerely held religious beliefs. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997). Only after 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. *Weir*, 114 F.3d at 820. Plaintiffs here cannot meet their burden of demonstrating a likelihood that they will succeed on the merits of their RFRA claim.

As another district court in Missouri recently held, the contraception rule does not rise to the level of placing a substantial burden on a company owner's religious beliefs. *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476 CEJ, 2012 WL 4481208 (Sept. 28, 2012). The connection between the rule and Plaintiffs' religious beliefs is simply too attenuated. *Id.*, at *5; *see also Hobby Lobby Stores*, 2012 WL 5844972, *11 (denying preliminary injunction against federal contraception rule under RFRA because relationship between the rule and the plaintiffs' religious beliefs was too attenuated). Indeed, the contraceptive rule neither requires employers to physically provide contraception to their employees, nor endorse the use of contraception, and therefore does not "prohibit" any religious practice or otherwise substantially

burden Plaintiffs' religious beliefs. *Ali*, 682 F.3d at 710-11. As the *O'Brien* court correctly found, the rule only requires Plaintiffs to provide a comprehensive health insurance plan "that might eventually be used by a third party" to obtain health care that is "inconsistent with [Plaintiffs'] religious values." *O'Brien*, at *7. But this "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. *Id*., at *6.

Moreover, the *O'Brien* court's decision that the contraception rule imposes a *de minimis* burden on Plaintiffs' religious practice, *id*. at, *7, is consistent with several cases analyzing similar governmental policies. For example, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals have health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4 (D.C. Cir. 2001), *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." 766 F. Supp. 2d at 42.

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

Id. at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers, and accordingly, a violation of 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., Inc.*, 722 F.2d 397, 403 (8th Cir. 1984) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

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

Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here. The 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 emergency contraception, does not impose a "substantial" burden on religious practice. Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their female employees does not substantially burden religion.[3] Plaintiffs "remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives."[4] *O'Brien*, 2012 WL 4481208, at *6.

Furthermore, RFRA "is a shield, not a sword." *Id*. It cannot be used to "force one's religious practices upon others" and to deny them rights and benefits. *Id*. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1963), and *Sherbert v. Verner*, 374 U.S. 398 (1972), 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 about contraception use from their employer, equal health benefits. "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

[3] As the government discusses in its brief, the rule was designed to eradicate gender disparities in health care costs. Defs.' Suggestions in Opp. to Pls.' Mot. for Prelim. Inj. at 13-17.

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

religious beliefs that differ from one's own." *O'Brien*, 2012 WL 4481208, at *6; *see also Hobby Lobby*, 2012 WL 5844972, at *11 (in rejecting preliminary injunction against contraception rule, the court noted that "many . . . employees are likely to have different religious views").

Indeed, it is a long road from Plaintiffs' own religious opposition to contraception use, to an independent decision by an employee to use her health coverage for contraceptives. *Id*. That is, the independent action of an employee breaks the causal chain for any violation of 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, just as the *O'Brien* court found, "the health care plan will offend plaintiffs' religious beliefs only if an [] employee (or covered family member) makes the independent decision to use the plan to cover counseling related to or the purchase of contraception." 2012 WL 4481208, *7. 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.

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, as the *O'Brien* court found, Plaintiffs "pay salaries to their employees – money the employees may use to purchase contraceptives." *Id*. And just as the 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. These federal

programs "present the same conflict with their [religious] beliefs." 766 F. Supp. 2d at 42. But like the federal contraception 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).

Moreover, the fact that Plaintiffs have been providing contraception coverage, including emergency contraception, Pls.' Suggestions in Supp. of Mot. for Prelim. Inj. at 3, also demonstrates that the burden to Plaintiffs' religious exercise is minimal. There is no dispute that Plaintiffs are sincere in their religious objection to emergency contraception. But courts have looked to compliance with objected-to laws to ascertain the *substantiality* of the burden involved. In *Shenandoah*, for example, the fact that the school had come into compliance with FLSA was one relevant factor in the court's determination that compliance with FLSA would not substantially burden the school's religious exercise. 899 F.2d at 1397-98. Here, prior to the passage of the ACA and the contraception rule, the health insurance Plaintiffs provided to their employees included coverage for contraception, including emergency contraception. The fact that Plaintiffs have been providing contraceptive coverage further demonstrates that any burden on Plaintiffs' religious beliefs that is imposed by the rule is minimal.

CONCLUSION

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

December 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 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