CASE NO. 10-2347

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTY UNIVERSITY, a Virginia Nonprofit Corporation; MICHELE G. WADDELL; JOANNE V. MERRILL,
Plaintiffs-Appellants,

v.

JACOB J. LEW, in his official capacity as the Secretary of the United States Department of the Treasury; 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; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; THE ANTI-DEFAMATION LEAGUE; THE INTERFAITH ALLIANCE FOUNDATION; THE NATIONAL COALITION OF AMERICAN NUNS; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; THE RELIGIOUS INSTITUTE; THE UNITARIAN UNIVERSALIST ASSOCIATION; AND THE UNITARIAN UNIVERSALIST WOMEN'S FEDERATION SUPPORTING DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

REBECCA GLENBERG
American Civil Liberties Union of Virginia
530 E. Main St., Suite 310
Richmond, VA 23219
804-644-8080 (Telephone)
804-649-2733 (Facsimile)

DANIEL MACH
American Civil Liberties Union Foundation
915 15th Street, 6th Floor
Washington, DC 20005
202-675-2330 (Telephone)
202-546-0738 (Facsimile)

ANDREW D. BECK
BRIGITTE AMIRI
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2633 (Telephone)
212-549-2650 (Facsimile)

CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Statutes

STATEMENT OF *AMICI*

Amici are organizations that have a strong commitment to defending the fundamental right to religious liberty. *Amici* provide this brief to respectfully request that this Court affirm the District Court's dismissal of Appellants' challenge to the Affordable Care Act under the Religious Freedom Restoration Act ("RFRA"). In its supplemental brief, the Government argues that Appellants' religion claims should be dismissed for reasons related to jurisdiction and justiciability. Should this Court reach the merits of Appellants' religion claims, however, they should nonetheless be dismissed. While *Amici* believe that these claims fail for a multitude of reasons, in this brief *Amici* argue that the RFRA claim was properly dismissed because Appellants cannot show that the Affordable Care Act or its implementing regulations impose a substantial burden on their religious exercise.

IDENTITY OF *AMICI*

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 American Civil Liberties Union of Virginia is one of its statewide affiliates. 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 regularly 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.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization, which seeks to (1) advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters. Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief for Americans United for Separation of Church and State, et al., as Amici Curiae Supporting Respondents, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2237539 (supporting exemption, for Native American religious practitioners, from federal drug laws). Consistent with its support for the separation of church and state, however, Americans

United opposes religious exemptions that would impose harm on innocent third parties.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation and entanglement with religion, and strives to advance individual religious liberty. ADL counts among its core beliefs strict adherence to the separation of church and state embodied in the Establishment Clause, and also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. In striving to support a robust, religiously diverse society, ADL believes that efforts to impose one group's religious beliefs on others are antithetical to the notions of religious freedom on which the United States was founded.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization, which celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith

Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The National Coalition of American Nuns ("NCAN") is an organization that began in 1969 to study and speak out on issues of justice in church and society. NCAN works for justice and peacemaking in our personal lives, ministries, congregations, churches and civil society. NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to

pay." NCJW's Principles state that "[r]eligious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

Founded in 2001, and an independent 501(c)(3) since 2012, the Religious Institute is a multi-faith organization dedicated to advocating within faith communities and society for sexual health, education, and justice. The Religious Institute is a national leadership organization working at the intersection of sexuality and religion. The Religious Institute staff provides clergy, congregations, and denominational bodies with technical assistance in addressing sexuality and reproductive health, and assists sexual and reproductive health organizations in their efforts to address religious issues and to develop outreach to faith communities. The Religious Institute

is strongly committed to assuring that all women have equal access to contraception and firmly believes that the contraceptive coverage rule does not create a substantial burden on religious exercise.

The Unitarian Universalist Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state. The UUA participates in this *amicus curiae* brief because it believes that the federal contraceptive rule does not create a substantial burden on religious exercise under the Religious Freedom Restoration Act.

The Unitarian Universalist Women's Federation has had an abiding interest in the protection of reproductive rights and access to these health services since its formation nearly 50 years ago. As an affiliate organization of the Unitarian Universalist Association of Congregations, its membership of local Unitarian Universalist women's groups, alliances and individuals has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights, with the affordable availability of birth control being essential and fundamental. The Unitarian Universalist Women's Federation has long recognized and will continue to oppose structural constraints posed when

health care systems and health insurance providers limit or deny access to contraception and other reproductive health care.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* have obtained consent from all parties to file this brief.

AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF

No party's counsel authored this brief in whole or in part. With the exception of *Amici*'s counsel, no one, including any party or party's counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The District Court correctly dismissed Appellants' claim that the Affordable Care Act ("ACA") substantially burdens their religious exercise under the Religious Freedom Restoration Act. Appellants' RFRA claim fails in multiple respects. First, in arguing that the ACA substantially burdens their religious exercise, Appellants grossly mischaracterize the ACA's requirements, straining to invent burdens where none exist. In particular, Appellants Liberty University and two individual Appellants (the "Individual Appellants") contend that the ACA will force them to violate their religious beliefs by making monthly insurance payments specifically

designated to pay for abortions. However, the statutory provision upon which Appellants base this contention does not affect Appellants in any way whatsoever. It does not affect Liberty University, because it applies only to insurance sold on the state insurance exchange, where Liberty University is ineligible to purchase insurance, and it does not affect the Individual Appellants, because they will be free to purchase insurance on the exchange that does not require the payments to which they object.

Appellants' remaining RFRA arguments fare no better. Although Appellants' Second Amended Complaint did not mention contraception or Appellants' objections thereto, Appellants now seek to bootstrap a challenge to the federal contraceptive rule to their arguments here.[1] But that rule, which requires that contraception be covered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), does not substantially burden their religious exercise. To state a claim under RFRA, Appellants must show that the contraceptive rule places a substantial burden on their free exercise of religion. *See* 42 U.S.C. § 2000bb-1. Appellants have failed to meet that burden in two ways.

[1] While Appellants 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., Dkt. # 180-1, filed on April 10, 2013.

First, the connection between the contraceptive rule and any impact on Appellants' religious exercise is simply too attenuated to rise to the level of a "substantial burden." *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (concluding that plaintiffs were unlikely to prevail in RFRA challenge to the contraceptive rule because the relationship between the contraceptive rule and the plaintiffs' religious beliefs was "indirect and attenuated"), *application for injunction pending appeal denied*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice); *accord Conestoga Wood Specialities Corp. v. Sec'y of United States Dept. of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012). The law does not require any Appellant to use contraception or endorse contraception use, and it does not require Liberty University to physically provide contraception to its employees. The contraceptive rule creates no more infringement on Appellants' religious exercise than many other actions that Appellants readily undertake, such as Liberty University paying its employees' salaries, which an employee could then use to purchase contraception, and the Individual Appellants paying federal taxes, which contribute to programs like Medicaid that provide insurance coverage for contraception. Second, the independent decision by a third party about

whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellants' free exercise.

Moreover, RFRA does not permit Liberty University to impose its religious beliefs on its employees by invoking its own faith to deny contraceptive coverage to employees who may not share its religious objections to contraception. As another court has noted in upholding the federal contraceptive rule, RFRA "is a shield, not a sword." *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476-CEJ, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 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." *Id*. Accordingly, this Court should affirm the decision below.

ARGUMENT

I. In Contending that the Affordable Care Act Burdens Their Religious Exercise, Appellants Mischaracterize the Act's Requirements.

As an initial matter, in their effort to argue that complying with the ACA would burden their religious exercise, Appellants mischaracterize the ACA's requirements, inventing burdens that the statute itself does not

impose on Appellants. In particular, Appellants contend that under the ACA, Liberty University and the Individual Appellants would be forced to pay a monthly per-person assessment to cover what they call "elective abortions,"[2] and that Liberty University would be forced, under the federal contraceptive rule, to "provide abortifacients" to its employees. Appellants' Br. at 37, 39. In so arguing, Appellants misstate the requirements of the ACA and the contraceptive rule.

First, Appellants are totally incorrect when they argue that under the ACA, the Individual Appellants would have to "purchas[e] insurance that requires payments of at least one dollar per month for the 'abortion premium,'" *id.* at 44, and Liberty University would have to "pay directly into an account to cover elective abortions," *id.* at 38. This argument is meritless—the ACA requires neither the Individual Appellants nor Liberty University to make the payments they complain of here.

The statutory provision upon which Appellants build this fallacious contention, 42 U.S.C. § 18023(b)(2)(B), applies only under limited

[2] The ACA does not contain the term "elective abortions." It instead addresses "[a]bortions for which public funding is prohibited." 42 U.S.C. § 18023(b)(1)(B)(i). Under the Hyde Amendment, federal public funding for abortions is currently prohibited except in instances "where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest." *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112–74, §§ 506–507, 125 Stat. 786, 1111–12 (2011).

circumstances that are entirely inapplicable to both the Individual Appellants and Liberty University. Specifically, § 18023(b)(2)(B) applies *only* in the case of a health insurance plan (1) that is sold on the state health insurance exchange, *see* 42 U.S.C. §§ 18023(b)(2)(A), (B); *and* (2) for which the insurer has voluntarily chosen to provide coverage for abortion services beyond cases of rape, incest, and life endangerment, *see* 42 U.S.C. §§ 18023(b)(1)(A)(i), (b)(2)(B). Only in the case of insurance plans that meet these two criteria does the ACA require that an insurer collect from enrollees a separate payment reflecting the actuarial value of these abortion services, which the insurer must deposit in separate allocation accounts. *See* 42 U.S.C. §§ 18023(b)(2)(B), (C), (D).

Neither the Individual Appellants nor Liberty University will be compelled to make such payments. As an initial matter, the Commonwealth of Virginia has banned the sale on its exchange of health insurance plans that include coverage for abortion services beyond cases of rape, incest, and life endangerment. *See* Va. H.B. 1900 (2013). This means that no Virginian can purchase insurance that includes coverage for such abortion services on the exchange, and that no Virginian—including Appellants—will make the separate abortion payments to which Appellants object.

Even before Virginia enacted this law, however, Appellants would not have been required to make the payments they complain of here. The ACA mandates that in each exchange, "there is at least one such plan that does not provide coverage of [abortion] services [beyond cases of rape, incest, and life endangerment]," 42 U.S.C. § 18054(a)(6), meaning that the Individual Appellants would have been free to purchase an insurance policy that does not require the very § 18023(b)(2)(B) payments to which they object. And Liberty University could never have been affected or burdened by § 18023(b)(2)(B)'s abortion payment provision, because, as an employer of more than 100 employees, it is ineligible to purchase insurance on the exchange at all. *See* 42 U.S.C. § 18031(d)(2)(A) (only "qualified employers" may purchase insurance on the exchange); 42 U.S.C. §§ 18024(b)(2), 18032(f)(2)(A) ("qualified employer" must have 100 or fewer employees). In other words, the statutory provision to which Liberty University objects, which applies only to insurance sold on the state exchange, will have no possible impact on Liberty University.[3] In sum,

[3] Appellants argue that this provision applies off the exchange and will affect Liberty University, but this contention is false. The abortion payment requirement applies only to a "qualified health plan" that provides coverage for abortions. *See* 42 U.S.C. § 18023(b)(2)(B) (payments required only "[i]n the case of a plan to which subparagraph (A) applies"); 42 U.S.C. § 18023(b)(2)(A) (subparagraph (A) applies only to "a qualified health plan" that provides coverage for certain abortion care). A "qualified health plan"

Appellants' contention that they will be burdened by 42 U.S.C. § 18023's abortion payment provision is utterly erroneous—the provision will have no impact whatsoever on Appellants.

Similarly, Appellants mischaracterize the federal contraceptive rule when they repeatedly complain that Liberty University would be forced, under that rule, "to provide abortifacient drugs or devices" to its employees. Appellants' Br. at 39. The rule does not compel Liberty University to provide contraceptive drugs or devices to its employees. To the contrary, the rule merely requires that an employer provide its employees with a comprehensive health insurance plan that includes coverage for contraception without cost-sharing.[4] 45 C.F.R. § 147.130(a)(1)(iv). Those

---

is, by definition, one that is sold on a state insurance exchange. *See* 42 U.S.C. §§ 18021(a)(1)(A), 18021(a)(1)(C)(iv) (defining "qualified health plan" as one that, *inter alia*, has been certified to be sold on the state's insurance exchange and that "complies with the regulations developed by the Secretary under section 18031(d) of this title and such other requirements as an applicable Exchange may establish"); *accord Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1255 (11th Cir. 2011), *reversed in part on other grounds by National Federation of Independent Business v. Sebelius*, --- U.S. ----, 132 S. Ct. 2566 (2012) ("A 'qualified health plan' is a health plan that . . . is certified as a qualified health plan in each Exchange through which the plan is offered . . . .").

[4] Appellants' contention that Liberty University would be compelled to "provide" contraception to its employees is inaccurate for an additional reason as well. The Departments of the Treasury, Labor, and Health and Human Services have issued a Notice of Proposed Rulemaking that indicate that non-profit, religious organizations opposed to contraception would be

employees, through their own independent actions and decisions, may in turn use that coverage to obtain a wide range of health care products and services—including contraception—that they need. Liberty University is in no way compelled to purchase, supply, or otherwise "provide abortifacient drugs or devices" to its employees. Appellants' Br. at 39.

Of the purported burdens on religious exercise that Appellants complain of, then, the only provisions that even remotely affect them are the requirements under the federal contraceptive rule that Liberty University provide its employees with health insurance that includes coverage for contraception (although Liberty University will not have to arrange or pay for such coverage, *see* Note 4, *supra*), and that the Individual Appellants purchase health insurance that includes contraceptive coverage. As is explained in detail below, these requirements do not substantially burden Appellants' religious exercise, and this Court should thus affirm the dismissal of Appellants' RFRA claim.

II. The Federal Contraceptive Rule Does Not Substantially Burden Appellants' Exercise of Religion Under the Religious Freedom Restoration Act.

---

exempt from covering contraceptive costs for their employees. *See* 78 Fed. Reg. 8,456, 8,475 (Feb. 6, 2013). While the final rule (including for employers with self-insured plans like Liberty University) has yet to be promulgated, the Notice shows that Liberty University will likely qualify for an exemption "from having to contract, arrange, pay, or refer for [contraceptive] coverage." *Id.* at 8,463.

Appellants' RFRA claim fails because Appellants cannot show that the federal contraceptive rule substantially burdens their religious exercise. As multiple courts faced with substantially the same issue have held, any burden that the contraceptive rule imposes on Appellants is too attenuated to constitute a substantial burden.

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 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.

To state a RFRA claim, the plaintiff must first establish that the governmental policy at issue substantially burdens the exercise of his or her religion.[5] *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006). Although RFRA does not define

[5] Where, as here, the plaintiff fails to show a substantial burden on religious exercise, that is the end of the inquiry. *See Goodall*, 60 F.3d at 171.

"substantial burden," courts, including this Court, have recognized that it is a demanding requirement, and that merely showing a "limited burden" on free exercise will not suffice to state a claim under RFRA. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990);[6] *accord Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (a substantial burden is "'a significantly great restriction or onus upon [religious] exercise'") (quoting *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)).[7] A substantial burden on religious exercise exists only where the government "'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Lovelace*, 472 F.3d at 187 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)).

Thus, while a RFRA claim may proceed when the plaintiff alleges that he or she was forced by the government to act in a manner that is inconsistent with his or her religious beliefs, not "every infringement on

---

[6] *Dole*, like some of the cases cited herein, is a free exercise case decided before RFRA was enacted. However, "[s]ince RFRA does not purport to create a new substantial burden test," this Court has made clear that courts "may look to pre-RFRA cases in order to assess the burden on [plaintiffs asserting a] . . . RFRA claim." *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995).

[7] Although *Lovelace* and *San Jose Christian College* are Religious Land Use and Institutionalized Persons Act ("RLUIPA") cases, cases under RLUIPA are instructive because that statute also prohibits government-imposed "substantial burdens" on religious exercise. 42 U.S.C. § 2000cc(a)(1).

religious exercise will constitute a substantial burden." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010); *accord Dole*, 899 F.2d at 1398. As the Eleventh Circuit has held, a substantial burden is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *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).

Appellants here have not demonstrated that their religious exercise is substantially burdened. While there is no question as to the sincerity of Appellants' religious opposition to some forms of contraception, a litigant's assertion of a sincerely held religious belief is only half the equation. To find a RFRA violation, a court must also find that the contraceptive coverage rule substantially burdens the Appellants' religious exercise. *See, e.g.*, *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); *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 the exercise of those beliefs is "substantially burdened" is a question of law properly left to the judgment of the courts). Indeed, as other courts addressing similar challenges to the contraceptive rule have recognized, "[i]f every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial . . . , then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard," and would "'read "substantial" out of the statute.'" *Conestoga Wood Specialities Corp. v. Sebelius*, --- F. Supp. 2d ----, 2013 WL 140110, at *13 (E.D. Pa. Jan. 11, 2013) (quoting *Washington v. Klem*, 497 F.3d 272, 279–81 (3d Cir. 2007)); *Autocam Corp. v. Sebelius*, No. 1:12–cv–1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012).

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

The contraceptive rule does not substantially burden either Liberty University's or the Individual Appellants' religious exercise. Neither Liberty University nor the Individual Appellants are required "to use or buy contraceptives for themselves or anyone else." *Autocam Corp.*, 2012 WL 6845677 at *6. Nor are they forced to endorse the use of contraception. The

contraceptive rule does not prohibit any religious practice or otherwise substantially burden Appellants' religious exercise. The rule requires only that Liberty University provide a comprehensive health insurance plan to its employees, and that the Individual Appellants obtain health insurance that meets a minimum coverage threshold.

It is true that the health insurance plan Liberty University provides to its employees might be used by a third party to obtain health care that is inconsistent with Liberty University's religious beliefs (although, as noted in Note 4, *supra*, as a religious non-profit organization, Liberty University will be exempt from having to arrange or pay for contraception, *see* 78 Fed. Reg. at 8,463). It is likewise true that the health insurance policy to which the Individual Appellants pay premiums must include coverage for contraception, and that other individuals who purchase the same insurance policy might use their insurance to obtain health care that the Individual Appellants oppose, including contraception. But such an indirect financial connection to a practice from which Appellants wish to abstain according to religious principles does not constitute a substantial burden on Appellants' religious exercise. As the Tenth Circuit explained in denying an injunction pending appeal in *Hobby Lobby Stores*:

> 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, emphasis in original); *Conestoga*, 2013 WL 140110, at *14 ("any burden imposed by the regulations is too attenuated to be considered substantial" because a series of independent decisions and actions by third parties must transpire in order for a third-party insured to obtain contraception).

In cases presenting similar facts, courts have not hesitated to conclude that the plaintiffs failed to demonstrate a substantial burden on their religious exercise. For example, in *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Appellants' claims 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 were not themselves

"required to accept, participate in, or advocate in any manner for the provision of abortion services." *Id*.

Similarly, in *Seven-Sky v. Holder*, 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. 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.

Moreover, this Court in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by a law requiring the school to make payments to its employees in contravention of the school's religious beliefs. 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). In *Dole*, the school violated the

Fair Labor Standards Act ("FLSA") by paying a "head of the household" supplement to married male, but not married female, teachers based on the school's religious belief that the husband must be 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. This Court rejected the school's claim that compliance with FLSA burdened the exercise of 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).

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 Liberty University's employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on anyone's religious practice. Similarly, the fact that other insureds who purchase the same insurance policy as the Individual Appellants might use their insurance to obtain contraception for themselves does not substantially burden the Individual Appellants' religious exercise. *See Goehring*, 94 F.3d at 1300. Moreover, just as in *Shenandoah*, a requirement that employers like Liberty University provide comprehensive, equal benefits to their female employees does not substantially burden religious exercise. Appellants remain free to exercise their religious beliefs, for example, by not using contraceptives and by publicly advocating against the federal contraceptive rule.

Indeed, the burden on Appellants' religious exercise is just as remote as other activities they already subsidize that are no less at odds with their religious beliefs. For example, Liberty University pays salaries to its employees and provides its employees with a health savings account, *see* Second Amended Compl. ¶ 29 – money the employees may use to purchase contraceptives. *See, e.g.*, *Autocam Corp.*, 2012 WL 6845677, at *6 (in concluding that the contraceptive rule did not substantially burden

employer's religious exercise, explaining that the employer could not "draw a line between the moral culpability of paying directly for contraceptive services their employees choose, and of paying indirectly for the same services through wages or health savings account").

Furthermore, just as the court recognized in *Mead*, by paying federal taxes, Liberty University and the Individual Appellants "routinely contribute to other forms of insurance" that include contraception coverage, such as Medicaid, and they likewise contribute to federally funded family planning programs through tax payments. 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 Appellants' religious beliefs is too attenuated to constitute a substantial burden on Appellants' religious exercise. 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 sufficient to confer standing because the "perceived moral injury" of paying taxes that may ultimately contribute to abortion is insufficiently "direct." *See 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. A Third Party'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 Appellants' Religious Exercise.

It is a long road from Appellants' own religious opposition to contraception use, to an independent decision by a third party—whether an employee of Liberty University or an individual who has purchased the same insurance plan as the Individual Appellants—to use her health insurance coverage to obtain contraceptives. That is, the independent action of a third party 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 concluded, 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, Inc.*, 2012 WL 6930302, at *3 (citation omitted). And to the extent that persons who purchase the same health insurance policy can be thought to "subsidize" one another's health care at all, the Individual

Appellants may end up subsidizing activities to which they object only after an equally independent series of actions and decisions by other patients and health care providers. *See id.* Therefore, as in *Zelman*, this scenario involves third parties' independent and private choices, which break any causal chain between government mandate and the exercise of religion. Any slight burden on Appellants' religious exercise is far too remote to warrant a finding of a RFRA violation.

III. RFRA Does Not Grant Liberty University a Right to Impose Its Religious Beliefs on Its 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 Dole*, 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, Liberty University here is attempting to invoke RFRA to deny equal health benefits to its female employees, whose beliefs about contraception – religious or otherwise – may be different than those of their employer. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004) ("[A]ny exemption from the

[California contraceptive equity law] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). As the Tenth Circuit concluded, 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. Finally, as the Supreme Court noted in rejecting an employer's religious objection to paying social security taxes: "Granting an exemption . . . operates to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982). RFRA cannot be invoked as "a sword" to impose

Appellants' religious beliefs on others who may not share those beliefs. *O'Brien*, 2012 WL 4481208, at *6.

CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's dismissal of Appellants' RFRA claim.

April 11, 2013

Respectfully submitted,

S/ANDREW D. BECK
ANDREW D. BECK
BRIGITTE AMIRI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 BROAD STREET, 18TH FLOOR
NEW YORK, NY 10004
TELEPHONE: (212) 549-2633
ABECK@ACLU.ORG
BAMIRI@ACLU.ORG

DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15TH STREET, 6TH FLOOR
WASHINGTON, DC 20005
TELEPHONE: (202) 675-2330
DMACH@DCACLU.ORG

REBECCA GLENBERG
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA
530 E. MAIN ST, SUITE 310
RICHMOND, VA 23219
(804) 644-8080
RGLENBERG@ACLUVA.ORG

ATTORNEYS FOR AMICI

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

   This brief contains 6,310 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: April 11, 2013

s/Andrew D. Beck
Andrew D. Beck
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2013, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: April 11, 2013

s/Andrew D. Beck
Andrew D. Beck
Counsel for *Amici Curiae*