No. 12-3357

In the United States Court Of Appeals
for the Eighth Circuit

Frank R. O'Brien, Jr.; O'Brien Industrial Holdings, LLC,
Plaintiffs-Appellants,

v.

U.S. Department of Health and Human Services, et al.
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri

Brief of *Amici Curiae* Americans United for Separation of Church and State, Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism In Support of Appellees and Affirmance

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Corporate Disclosure Statement

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Interest of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to 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 across the country.

Americans United has long supported laws 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 from federal drug laws for Native American religious practitioners); Brief for Americans United for Separation of Church and State and American Civil Liberties Union as *Amici Curiae* Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2945402 (supporting religious accommodations for prisoners). Consistent with its support for the separation of church and

state, however, Americans United opposes exemptions from neutral, generally applicable laws when the exemptions would harm third parties.

The Union for Reform Judaism has 900 congregations across North America, and these congregations include 1.5 million Reform Jews. The membership of the Central Conference of American Rabbis includes more than 1,800 Reform rabbis. The Women of Reform Judaism represents more than 65,000 women in nearly 500 women's groups in North America and around the world. Each of these organizations believes that religious freedom has thrived throughout United States history due to the country's commitment to religious liberty, but each also supports women's access to healthcare and ability to make their own reproductive health decisions. Jewish tradition teaches that health care is the most important communal service, and therefore should be available to all without discrimination; every woman is entitled to access contraception as a matter of basic rights and fundamental dignity.

Source of Authority to File

Appellants and Appellees have consented to the filing of this brief.

Statement of Authorship

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Summary of Argument

Federal health-insurance regulations, adopted to implement the Patient Protection and Affordable Care Act, require most employers to provide employees with insurance that covers a full range of procedures and services, including contraception. Plaintiffs argue that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, should be interpreted to exempt O'Brien Industrial Holdings, a for-profit mining corporation, from this requirement. But Plaintiffs have failed to demonstrate that the requirement imposes a substantial burden on their religious exercise, as required to trigger strict scrutiny under RFRA.

For several reasons, any burden imposed on Mr. O'Brien's religious exercise is, at most, indirect and incidental. First, federal law imposes

the insurance regulation on Mr. O'Brien's for-profit mining corporation, O'Brien Industrial Holdings, rather than on Mr. O'Brien himself. Second, even O'Brien Industrial Holdings does not purchase contraception directly, but instead purchases insurance policies (that cover contraception) from a third-party insurance company that makes its own independent reimbursement decisions. Third, the insurance company provides the employees of O'Brien Industrial Holdings with a full menu of medical procedures and services, not just contraception alone, thereby distancing the corporation from any particular form of covered care. Fourth, even the insurance company pays for contraception only if an employee makes a private, independent decision to use contraception, and even that decision often is preceded by an independent physician's decision to prescribe contraception. Although Mr. O'Brien may believe sincerely and intensely that even this attenuated causal chain interferes with his religious obligations, RFRA does not call for strict scrutiny of such incidental harms.

If strict scrutiny were triggered by such indirect, incidental burdens, then RFRA would change from a shield (to protect persons against actual substantial burdens) to a sword (for persons to use to

impose their religious views on others). An exemption for Mr. O'Brien, even where many of the employees of O'Brien Industrial Holdings do not share his religious beliefs, would impose significant burdens on those employees by forcing them to forgo insurance coverage for contraception. And if accepted, the rationale offered by Plaintiffs in this case could allow other employers to refuse to provide insurance policies that cover any number of other medical procedures, and could also require widespread exemptions from an array of federal employment and civil-rights laws. Such a scheme would not only undermine Congress's intent in enacting RFRA, but would also raise serious concerns under the Establishment Clause.

Mr. O'Brien has every right to refrain from using contraception and to attempt to persuade others to do the same. But once he enters the secular market for labor to staff his secular, for-profit corporation, he may not force his religious choices on his employees. Because nothing in RFRA or any other federal law requires otherwise, the district court's judgment should be affirmed.

Background

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), in order to "increase the number of Americans covered by health insurance and decrease the cost of healthcare." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). Among other things, the Act requires employers with at least fifty employees to provide health-insurance coverage in the form of group health plans. *See* 26 U.S.C. § 4980H(a)–(d). The group plans must provide access to comprehensive preventive care without cost sharing, and "with respect to women, such additional preventive care and screenings not [otherwise listed] as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a). In implementing its delegated authority with respect to women's health, the Administration required insurance plans to cover a range of procedures and services, including "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (quotation marks omitted).

A series of regulatory provisions eases the transition for all employers and accommodates concerns raised by nonprofit religious organizations. First, the preventive-care requirements do not apply to any employer already enrolled in group health plans as of March 23, 2010; this exemption lasts until the employer "enters into a new policy, certificate, or contract of insurance." 75 Fed. Reg. 34,538, 34,541 (June 17, 2010). Second, the contraception regulations do not apply to any nonprofit religious organization (a) for whom "[t]he inculcation of religious values is [its] purpose," (b) that "primarily employs persons who share the religious tenets of the organization," and (c) that "serves primarily persons who share the religious tenets of the organization." 45 C.F.R. § 147.130(a)(iv). Finally, the Department of Health and Human Services has provided a safe harbor from enforcement against non-profit religious organizations until August 1, 2013, so that the Department can consider arrangements to "accommodat[e] non-exempt, non-profit religious organizations' religious objections to covering contraceptive services" while "assuring that participants and beneficiaries covered under such organizations' plans receive

contraceptive coverage without cost sharing." 77 Fed. Reg. 16,501, 16,503–04 (March 21, 2012).

Plaintiffs are Frank O'Brien and O'Brien Industrial Holdings, LLC. Mr. O'Brien is a practicing Catholic and the sole owner of O'Brien Industrial Holdings, a "secular, for-profit company" that engages "in the business of mining, processing, and distributing refractory and ceramic materials and products." JA 36. Plaintiffs allege that they cannot fulfill the contraception-coverage requirement without violating their religious beliefs. JA 25 ¶ 36. O'Brien Industrial Holdings does not qualify for the religious-organization exemption because it is a secular, for-profit corporation with more than 50 employees. JA 23 ¶ 24; JA 29 ¶ 68. The company is not exempt under the grandfathering provision, moreover, because it currently provides a group-health policy that covers contraceptives. JA 23 ¶ 28.

In September 2012, the district court granted the government's motion to dismiss. In addition to rejecting Plaintiffs' claims under the First Amendment and the Administrative Procedures Act, JA 47–63, the district court held that compliance with the contraception regulations would not substantially burden Plaintiffs' exercise of

religion under RFRA. JA 41–47. According to the district court, "[t]he 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 … subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion." JA 45 (emphasis in original).

This brief will focus on Plaintiffs' strongest argument, which arises under the Religious Freedom Restoration Act.

Argument

I. The Federal Insurance Regulations Impose Only an Incidental, Indirect Burden on Plaintiffs' Religious Exercise.

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(b). Here, the district court properly rejected Plaintiffs' claim that the federal coverage regulations violate RFRA. Any burden that the regulations impose on Mr. O'Brien's religious exercise is, at most,

indirect and incidental—not the type of substantial burden that triggers strict scrutiny under RFRA.

A. Plaintiffs Do Not Establish A Substantial Burden Merely By Alleging One.

Plaintiffs insist that the Court must defer to their allegation that the contraception regulations would impose a substantial burden on their religious exercise, maintaining that "it is no business of a secular court to decide that something is not really objectionable at all." Appellants' Br. at 20 (citation omitted). In so arguing, Plaintiffs misunderstand the courts' role in assessing claims of substantial burden under RFRA. Lest the entire federal code submit to strict scrutiny, RFRA does not contemplate exemptions from federal laws merely because a plaintiff finds compliance to be subjectively "objectionable." To the contrary, courts must conduct a rigorous review to determine whether a plaintiff's articulated religious injury—even if sincerely held and deeply felt—is "substantial" as a matter of law.

In enacting RFRA, Congress contemplated that courts would play a meaningful gatekeeping role. The initial draft of RFRA prohibited the government from imposing any "burden" on free exercise, substantial or otherwise. But Congress added the adjective "substantially," "mak[ing]

it clear that the compelling interest standards set forth in the act apply only to Government actions that place a substantial burden on the exercise of substantial [religious] liberty." 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy). The Senate Committee Report on RFRA reaffirmed that "substantial" was added for a reason: "The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions." S. Rep. No. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898. As the Seventh Circuit has explained in the parallel context of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, the word "substantial" cannot be rendered "meaningless": otherwise, strict scrutiny would arise from "the slightest obstacle to religious exercise"—"however minor the burden it were to impose." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

Courts, in turn, have taken Congress at its word. Even if "plaintiffs' beliefs are sincerely held, it does not logically follow … that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*,

94 F.3d 1294, 1299 n.5 (9th Cir. 1996). Although courts must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," the court must separately determine, as a matter of law, whether those beliefs are "substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008).

In determining whether a claimed burden is substantial, courts evaluate whether the challenged governmental action directly impedes one's ability to follow one's religion, or instead does so only incidentally. For instance, in *Kaemmerling*, the court rejected the claim of a prisoner who challenged the DNA testing of his blood, because the plaintiff objected not to the extraction of his blood per se, but to the government's testing of that blood for DNA. *See id.* at 679. Even though the government extracted the plaintiff's blood for the purpose of testing his DNA, and even though the plaintiff alleged a religious objection to having his blood drawn for such testing, the court concluded that the objected-to practice was one step removed from the plaintiff's religious exercise: "[t]he extraction and storage of DNA information are entirely activities of the FBI, in which [the plaintiff] plays no role and which occur after the [government] has taken his fluid or tissue sample." *Id.*

The court rejected plaintiffs' claims arising from a similarly incidental burden in *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). There, the D.C. Circuit upheld a federal regulation banning the sale of t-shirts on the National Mall, even though the plaintiffs maintained that they were "obligated by the Great Commission to preach the good news … to the whole world … by all available means." *Id.* at 16 (quotation marks omitted). Whatever the plaintiffs' general religious directive to preach at any time and any place, the court explained, their religious beliefs did not speak directly to the sale of t-shirts on the Mall, and so the ban imposed only an incidental burden on the plaintiffs' religious exercise. *See id.*

To prevail, then, Plaintiffs must establish that the challenged federal requirement actually burdens their religious exercise, and that it does so in a manner that is direct and substantial, rather than incidental. As detailed below, Plaintiffs cannot do so.

B. The Connection Between Plaintiffs and Contraception is Incidental and Indirect.

Mr. O'Brien is a Catholic who believes that all methods of artificial contraception are immoral. Plaintiffs argue in this case that "[a]lthough the Mandate does not force anyone to *use* contraception, it forces

Plaintiffs to *subsidize it directly*." Appellants Br. at 20 (emphasis in original). According to Plaintiffs, "what is at issue in this case is Plaintiffs' religious objection to *being forced to pay for objectionable goods and services* through OIH's group health plan." *Id.* (emphasis in original).

But the Affordable Care Act's insurance provisions require neither Mr. O'Brien nor O'Brien Industrial Holdings to directly subsidize, pay for, or purchase contraception. As the Tenth Circuit recently explained, in denying an injunction pending appeal in a nearly identical case, "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 by the corporate plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion." *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, slip op., at 7 (10th Cir. Dec. 20, 2012) (emphasis in original; quotation marks and alterations omitted), *aff'd*, 568 U.S. __, 2012 WL 6698888 (Sotomayor, Circuit Justice Dec. 26, 2012).

As in *Hobby Lobby*, the relationship between Plaintiffs and contraception is rendered "indirect and attenuated," *id.*, by the

following four circumstances: (1) Mr. O'Brien's secular, for-profit corporation, rather than Mr. O'Brien personally, (2) pays a premium to a third-party insurance company, (3) that, in turn, covers the cost of contraception, along with dozens of other medical procedures, tests, and services, (4) only when an employee chooses to purchase contraception, often after consulting and receiving a prescription from her physician. In light of this series of intervening steps, the district court correctly concluded that the coverage regulations do not substantially burden Plaintiffs' religious exercise.

1. Employees' health insurance premiums are paid for not by Mr. O'Brien, but by his secular, for-profit mining corporation.

Any purchase of comprehensive health insurance required by federal law is not paid for out of Mr. O'Brien's pocket. Rather, the coverage requirements apply to his company, O'Brien Industrial Holdings, LLC, a "secular, for-profit company in St. Louis, Missouri, that is engaged in the business of mining, processing, and distributing refractory and ceramic materials and products." JA 36. Mr. O'Brien, "a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal

status." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

The legal difference between Mr. O'Brien and O'Brien Industrial Holdings is no mere technicality. The "primary benefit, and often the primary purpose, of incorporating a closely-held business is to shield the shareholders from liability for the corporation's debts." *Trustees of the Graphic Comm'cns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 730 (8th Cir. 2008). In Missouri, where O'Brien Industrial Holdings is located and incorporated, "ordinarily[]a corporation will be regarded as a separate legal entity"—even where, as here, "there is but a single stockholder." *K.C. Roofing Ctr. v. On Top Roofing, Inc.*, 807 S.W.2d 545, 549 (Mo. Ct. App. 1991) (citation omitted).

The law does not allow Mr. O'Brien to claim corporate benefits while shedding unwanted corporate obligations. Thus, the Supreme Court refused to allow the sole owner of a corporation to treat, for tax purposes, the corporation's income as the individual's: "[T]he taxpayer had adopted the corporate form for purposes of his own. The choice of the advantages of incorporation to do business … required the

acceptance of the tax disadvantages." *Moline Props. v. Comm'r of Internal Revenue*, 319 U.S. 436, 439 (1943). The Second Circuit prohibited a bankrupt parent company from imbuing its subsidiary with the benefits of bankruptcy; after obtaining the advantages from creating a separate subsidiary, the parent "cannot 'have it both ways.'" *In re Beck Indus.*, 479 F.2d 410, 413–14, 418 (2d Cir. 1973). Ultimately, "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

Furthermore, although churches and other houses of worship may well be subject to a different analysis, O'Brien Industrial Holdings engages in secular activity (mining) for secular ends (profit). As the Supreme Court has explained, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on

others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982).[1] Likewise, in rejecting a RFRA challenge to endangered species laws, the Tenth Circuit observed that "a defendant may not claim First Amendment or RFRA protection for the taking and possession of a protected bird when he subsequently sells it for pure commercial gain." *United States v. Sandia*, 188 F.3d 1215, 1218 (10th Cir. 1999).

Mr. O'Brien has both taken advantage of the unique benefits offered by the corporate form, and he has used that corporate form for the purpose of making money in a secular mining market. Just as this choice shields his personal assets from liability incurred by the company, it distances his personal religious beliefs from any insurance-related obligations incurred by the corporation.

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[1] *See also Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (landlord "can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments"); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (plaintiff "made no showing of a religious belief which requires that he engage in the property-rental business" and any burden "is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws").

2. O'Brien Industrial Holdings does not buy contraception directly, but instead pays a third-party insurance company for that coverage.

The federal women's health regulations do not require even O'Brien Industrial Holdings to pay for contraception directly. Rather, the corporation contracts with an independent entity (an insurance company), to which it pays premiums for a full range of medical procedures and services. If and when an employee chooses to purchase contraception, the payment for that contraception would be made not by Mr. O'Brien or O'Brien Industrial Holdings, but by the third-party insurance company. And the company would make such a payment only after independently determining that the purchased contraception is medically appropriate and thus subject to reimbursement.

The intervening role of the insurance company attenuates any link between O'Brien Industrial Holdings and contraception. For instance, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Supreme Court observed that a university's funding of expenses accrued by a religious publication was indirect (and permitted by the Establishment Clause), in part because the university did not reimburse the religious publication directly, and instead paid

the third-party printing press with whom the student group had contracted. *See id.* at 840, 843–44. For an organization to use the university fund, it needed to "submit its bills to the Student Council, which [paid] the organization's creditors upon determining that the expenses are appropriate." *Id.* at 825. And "[b]y paying outside printers," rather than the organization itself, the university achieved "a further degree of separation from the student publication." *Id.* at 844.

O'Brien Industrial Holdings maintains a similar degree of separation from the funding of contraception. The corporation pays insurance premiums to a third-party insurance company. The insurance company later—upon the employee's submission of a claim for the coverage of contraception—independently "determin[es] that the expenses are appropriate." *Id.* And the insurance company then makes payment to yet another third party (a pharmacy or the woman who purchased the contraception) for the product.

The same analysis would apply even if O'Brien Industrial Holdings were to resume its previous practice of self-insuring, rather than contracting with a third-party insurance company. Any burden caused by self-insurance would be assumed voluntarily, and could be avoided

by turning to an outside insurer. And any additional cost imposed by use of a third-party insurer would not, as a matter of law, constitute a substantial burden; it is well settled that a law does not substantially burden religious exercise merely by "mak[ing] the practice of … religious beliefs more expensive." *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961).

3. Contraception is only one benefit within a comprehensive insurance plan.

O'Brien Industrial Holdings is required to provide its employees with a comprehensive insurance policy that covers contraception as one item among a much wider range of health care procedures and services. The health plan's comprehensiveness attenuates any connection between the corporation and any particular benefit covered by the plan.

The Affordable Care Act requires health plans to cover a wide variety of preventive services. These include "immunizations," "evidence-informed preventive care and screenings" for infants and children, and "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States

Preventive Services Task Force." 42 U.S.C. § 300gg-13(a).[2]

The Supreme Court has held that an entity authorizing a wide range of expenditures does not necessarily promote any particular item obtained with those funds. In *Rosenberger*, the Supreme Court held that a public university would not endorse religion by funding a religious student-group's publications to the same extent that the university funded non-religious groups' publications. 515 U.S. at 841–43. Similarly, in *Board of Education v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990), the Court held that the Establishment Clause permitted public secondary schools to allow student religious groups to meet on

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[2] Group health plans must cover, among many other services, "screening for abdominal aortic aneurysm," "behavioral counseling … to reduce alcohol misuse," "screening for iron deficiency anemia," "the use of aspirin for men age 45 to 79 … [and] for women age 55 to 79," "screening for asymptomatic [bacteria] … for pregnant women," "screening for high blood pressure," "screening for cervical cancer," "screening … for lipid disorders," "screening for colorectal cancer," "oral fluoride supplementation," "screening of adolescents … for major depressive disorder," "screening for type 2 diabetes," "behavioral dietary counseling," "screening for hearing loss in all newborn infants," "intensive counseling and behavioral interventions to promote sustained weight loss for obese adults," "screen[ing] for osteoporosis," and "tobacco cessation interventions." *USPSTF A and B Recommendations*, U.S. Preventive Servs. Task Force, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Dec. 28, 2012).

school premises during noninstructional time—under the same terms as non-religious groups—in part because "students … are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250.

The provision of comprehensive insurance coverage similarly attenuates the connection between O'Brien Industrial Holdings and any particular medical procedure or service ultimately covered by the insurance plan.

4. Contraception is used and financed only after an employee's independent decision.

Even the insurer's purchase of contraception takes place only after one or more of the company's employees chooses to use contraception. That employee's independent choice—often made in consultation with her physician—would further distance O'Brien Industrial Holdings from any purchase or use of contraception. *See Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012) ("Plaintiffs' objection presupposes that an insured will actually use the contraception coverage. Even assuming there is a substantial likelihood that [an] employee will do so, at that point the connection between the government regulation and the

burden upon the [Plaintiffs'] religious beliefs is too distant to constitute a substantial burden."), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012).

The Supreme Court has recognized that intervening private, independent action can break the chain between the original funding source and the ultimate use of the funds. For instance, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court upheld an Ohio school voucher program under which parents could use their vouchers at religious or non-religious schools, in part because "[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child." *Id.* at 646. The Court explained that its decisions have distinguished "between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citations omitted). Any advancement of religion, the Court held, was incidental to the exercise of private choice by private individuals to use the money to attend religious schools: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message,

is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652.

An intervening, independent decision of a private entity has been found to sever the connection between the funding source and the funded action even when the funding recipient uses the funds to oppose the funders' interests. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court considered a First Amendment challenge to restrictions on the use of federal funds provided to private legal-aid programs. The law at issue prohibited "legal representation funded by recipients of [federal] moneys if the representation involves an effort to amend or otherwise challenge existing welfare law." *Id.* at 536–37. Although the government argued that these were legitimate restrictions designed to facilitate the goals of a government program, the Court explained that the government did not own or support everything it funded. Rather, when the government funded a legal services program "designed to facilitate private speech, not to promote a governmental message," any connection between the government and the resulting legal advocacy was indirect and incidental: "[t]he lawyer is not the

government's speaker," and instead "speaks on the behalf of his or her private, indigent client." *Id* at 542.

And in *Goehring*, the Ninth Circuit rejected a RFRA challenge to a public university's mandatory student-activity fee, part of which subsidized student health-insurance plans that covered abortion services. *See* 94 F.3d at 1298. Although the plaintiffs argued that "their sincerely held religious beliefs prevent them from financially contributing to abortions," the court held that the mandatory fee did not violate RFRA; among other reasons, the insurance subsidy was "distributed only for those students who elect to purchase University insurance." *Id.* at 1300. And even among those students, of course, only a fraction would ultimately elect to use their insurance coverage to obtain abortion services. Any connection between O'Brien Industrial Holdings and contraception is equally indirect and incidental because of the employees' intervening, independent actions of employees.

An employee's use of her employment benefits, moreover, is a paradigmatic example of a decision to which an employer's connection is indirect and attenuated. In upholding a state-issued tuition grant to a blind person who used the grant to attend a religious school to become a

pastor, the Supreme Court noted that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486–87 (1986); *see also Agostini v. Felton*, 521 U.S. 203, 226 (1997) ("In our view, this transaction [upheld in *Witters*] was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution."). The provision of health insurance, knowing that the insurance will be used to purchase contraception, would no more facilitate the use of contraception than would the distribution of a paycheck with the same awareness. And O'Brien Industrial Holdings may no more control its employees' use of their salaries and benefits than those employees may dictate the manner in which the corporation uses its profits.

Finally, with respect to the many forms of contraception that require a prescription, there is yet another intervening influence: the employee's physician, who must prescribe the contraception before the

employee can obtain it. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (rejecting "the questionable assumption that doctors would prescribe unnecessary medications"). As reflected in virtually all states' product-liability laws, prescribing physicians act as "learned intermediaries" with independent responsibility for "evaluat[ing] a patient's needs and assess[ing] risks and benefits of a particular course of treatment." *Ehlis v. Shire Richwood, Inc.*, 367 F.3d 1013, 1016 (8th Cir. 2004) (quotation marks omitted).

Ultimately, then, there is no use or purchase of contraception by an insurance company without the independent decision of a covered employee and, in many cases, the covered employee's physician. RFRA does not empower Plaintiffs to impede "the independent conduct of third parties with whom [they] have only a commercial relationship." *Hobby Lobby*, No. 12-6294, at 7. And when an organization "chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit." *Catholic Charities v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006).

II. The Application of RFRA To Such Indirect, Incidental Burdens Would Risk Imposing Significant Hardship on Third Parties, In This and Other Cases.

A decision that exempts Plaintiffs from the Affordable Care Act's insurance-coverage requirements would strip employees of O'Brien Industrial Holdings (and similarly-situated employees) of access to insurance coverage for contraception, and would place RFRA in tension with the Establishment Clause. Moreover, the logic of Plaintiffs' argument, if accepted, would undermine enforcement of civil-rights statutes designed to protect employees, customers, and other members of the public.

A. RFRA Does Not Authorize Plaintiffs To Impose Their Religious Views on the Corporation's Employees.

RFRA does not authorize, let alone require, exemptions that significantly harm third parties. When debating the law, Congress envisioned exemptions imposing few if any burdens on third parties. *See, e.g.*, 137 Cong. Rec. E2422-01 (daily ed. June 27, 1991) (statement of Rep. Solarz) (allowing "Amish to withdraw their children from compulsory education"); *id.* ("use of wine in religious ceremonies"); *id.* ("deferments from conscription to accommodate religious [pacifism] even in times of war"); 139 Cong. Rec. E1234-01 (daily ed. May 11,

1993) (statement of Rep. Cardin) (burial of veterans in "veterans' cemeteries on Saturday and Sunday … if their religious beliefs required it"); *id.* (precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children); *id.* (volunteering in nursing homes); *id.* (precluding application of zoning laws "excluding all religious organizations from engaging in church-related activities in city's central business district"). None of the exemptions contemplated by Congress would have required a third-party to forfeit federal protections or benefits otherwise available to all.

Likewise, in interpreting the Free Exercise Clause, the Supreme Court has long distinguished between religious-based exemptions that burden third parties and those that do not. *See, e.g.*, *Lee*, 455 U.S. at 261 (rejecting request for religious exemption from the payment of social-security taxes, and observing that the desired exemption would "operate[] to impose the employer's religious faith on the employees"); *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not

to be condemned because it is different."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (objectors' desire to avoid compulsory recitation of the Pledge of Allegiance "does not bring them into collision with rights asserted by any other individual"). And in the context of Title VII, the Supreme Court has held that the statute's reasonable-accommodation requirement did not entitle an employee to an exemption from the seniority system, because the exemption would have burdened other employees, including "the senior employee [who would] have been deprived of his contractual rights under the collective-bargaining agreement." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977).

Courts have applied this principle—religious exemptions should not unduly burden third parties—with equal force in the context of women's access to reproductive healthcare. In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the court upheld a medical-residency accreditation standard that required hospitals to teach various obstetric and gynecological procedures. *See id.* at 321, 330. Applying strict scrutiny to the plaintiff's free-exercise claim (prior to the Supreme Court's decision in *Employment Division, Department of Human*

Resources of Oregon v. Smith, 494 U.S. 872 (1990)), the court observed that allowing the hospital to opt out would deprive the hospital's students of training, and that this lack of training would also harm those students' future patients. *See Riddick*, 748 F. Supp. at 330–32. Similarly, in upholding a state law requiring employers who provided prescription-drug insurance to include coverage for contraception, the California Supreme Court observed, "[w]e 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." *Catholic Charities v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004).

An exemption for O'Brien Industrial Holdings would detrimentally affect the interests of the company's employees who do not share the religious beliefs of the company's owner, by making it more difficult (and sometimes impossible) for them to obtain and use contraception. In so doing, the exemption would prevent employees from making their own "personal decisions relating to marriage, procreation,

contraception, family relationships, [and] child rearing." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

Indeed, construing RFRA to provide the Plaintiffs with an exemption from the Affordable Care Act would place RFRA in tension with the Establishment Clause, which prohibits the government from awarding religious exemptions that unduly interfere with the interests of third parties. *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (Establishment Clause prohibits sales tax exemption limited to religious periodicals because government may not provide an exemption that "either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion") (citation omitted); *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985) (same for statute requiring employers to accommodate sabbatarians in all instances, because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath"); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (upholding RLUIPA against an Establishment Clause challenge because, among other things, the statute contemplated that prison officials would "tak[e] adequate account of the

burdens a requested accommodation may impose on nonbeneficiaries"). Granting Plaintiffs' requested exemption would take "no account of the convenience or interests," *Caldor*, 472 U.S. at 709, of the company's employees.

B. *Plaintiffs' Argument, If Accepted, Would Enable Employers To Restrict Employees' Access to Medical Care Other Than Contraception and Could Undermine A Host of Civil Rights Laws.*

The logic of Plaintiffs' argument would transcend the provision of coverage for contraception. A Jehovah's Witness could choose to exclude blood transfusions from his company's health-insurance coverage. Catholic owners could deprive their companies' employees of coverage for end-of-life hospice care and for medically necessary hysterectomies. Scientologists could refuse to offer their employees coverage for antidepressants or emergency psychiatric treatment. Christian Scientists who own for-profit companies could seek to avoid providing coverage for most if not all medical treatments.

Moreover, the burden claimed by Plaintiffs and their *amici* extends to any indirect support (financial, or otherwise) for activity deemed wrongful. According to one *amicus*, "the Catholic Church believes and teaches that each member of the human family bears some

responsibility for his or her fellows, and that this responsibility includes an obligation to refrain from promoting, enabling or … *cooperating* with another's wrongful acts." Archdiocese of St. Louis Br. at 13 (emphasis in original). As a result, company owners would be in a position to seek exemptions not just from benefits requirements, but from a wide array of other employment laws.

For example, a company whose owner believes that mothers should not work outside the home could claim a "substantial burden" resulting from compliance with laws prohibiting discrimination on the basis of pregnancy. A company owned by a Jehovah's Witness could refuse to offer federally-mandated medical leave to an employee who needed a blood transfusion. By requiring employees to adjust their behavior to accommodate the religious views of their employers, Plaintiffs have it backwards: when the religious beliefs of employer and employee conflict, "it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988)

(rejecting employer's free-exercise claim to an exemption from Title VII prohibition against religious discrimination).

Finally, Plaintiffs' argument, if accepted, could undermine federal antidiscrimination laws in areas other than employment. Notwithstanding the protections of the Fair Housing Act, 42 U.S.C. § 3604, a landlord might refuse to rent to individuals who use their apartments to practice a different religion—and argue that providing shelter for this type of religious activity would violate the landlord's own religious beliefs. Owners of hotels and restaurants could refuse to comply with the public accommodations laws, 42 U.S.C. § 2000a, raising religious objections to providing nourishment and shelter to those who would use that sustenance and lodging to take actions that violate the owners' religious beliefs. A Christian-owned cab company could refuse to drive passengers to mosques; a Muslim-owned car service could refuse to haul clients to synagogues; a Jewish-owned bus company could refuse to take people to church.

Such a broad interpretation of RFRA would conflict not only with congressional intent, but the vision of the Founding Fathers, who recognized the need to cabin religious exemptions that impose

substantial harms on third parties. In the words of James Madison, "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights* or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 The Writings of James Madison 98, 100 (Gaillard Hunt ed. 1910), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions66.html (emphasis added). RFRA should be interpreted accordingly.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Gregory M. Lipper

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On December 28, 2012, I served a copy of this brief of *amici curiae* on all counsel of record using the Court's ECF system.

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