No. 12-1380

In the United States Court Of Appeals for the Tenth Circuit

William Newland, et al.,

Plaintiffs-Appellees.

v.

Kathleen Sebelius, in her official capacity as Secretary of the U.S. Department of Health and Human Services, et al.,

Defendants-Appellants,

On Appeal from the United States District Court for the District of Colorado, Judge John L. Kane

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Brief of *Amici Curiae* Americans United for Separation of Church and State, Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and the Hindu American Foundation In Support of Appellants and Reversal

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Corporate Disclosure Statement

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ERISA: Employee Retirement Income Security Act

RFRA: Religious Freedom Restoration Act

RLUIPA: Religious Land Use and Institutionalized Persons Act

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 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); 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 the recognition of exemptions for religious organizations or individuals when those exemptions would impose harm on innocent 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.

The Hindu American Foundation is an advocacy group providing a Hindu American voice. The Foundation addresses global and domestic issues concerning Hindus, such as religious liberty, hate crimes, and human rights. Although Hindus consider conception to be a revered duty for those in the householder stage of life, contraception is not banned. Indeed, Hindu scripture provides remedies for both preventing and facilitating conception.

Statement of Authorship/Source of Authority to File

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.

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

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 Hercules Industries, Inc.—a for-profit manufacturing 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 Plaintiffs' religious exercise is, at most, indirect and incidental. First, federal law imposes the insurance regulation on a for-profit corporate manufacturer of heating and air-conditioning equipment, Hercules Industries, rather than on the individual owners or officers who hold religious beliefs about contraception. Second, the group health plan provides the corporation's employees with a full menu of medical procedures and services, not just contraception alone, thereby distancing the corporation from any particular form of covered care. Third, the group health plan pays for contraception only if an employee makes a private, independent decision to use contraception, and even that decision is often preceded by an independent physician's decision to prescribe contraception. Although Plaintiffs may believe sincerely and intensely

that even this attenuated causal chain interferes with their religious exercise, RFRA does not call for strict scrutiny of such incidental harms.

Plaintiffs' alleged burden is not rendered substantial because Hercules Industries has decided to fund its own insurance plan, rather than to contract with a third-party insurance company. The group health plan is legally distinct from Hercules Industries, let alone its individual owners and officers. And to the extent that the company perceives a burden from self-funding a plan that includes coverage for contraception, Hercules Industries is free at any time to purchase comprehensive insurance policies from a third-party insurance company.

If RFRA were nonetheless interpreted to require an exemption for Hercules Industries, the statute would transform 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 Plaintiffs would significantly burden Hercules Industries's employees—many of whom do not share Plaintiffs' religious beliefs—by making it more difficult, and sometimes impossible, for them to obtain contraception. And if accepted, the rationale that Plaintiffs offer in this

case could allow other employers to withhold insurance coverage for 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.

Plaintiffs have every right to refrain from using contraception and to attempt to persuade others to do the same. But once they enter the secular market for labor to staff their secular, for-profit corporation, they may not force their religious choices on their employees, who are entitled to make their own "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Because nothing in RFRA or any other federal law requires otherwise, the district court's judgment should be reversed.

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 health care." *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 employers and accommodates concerns raised by nonprofit religious organizations. First, the preventive-care requirements do not apply to any employer already enrolled in a group health plan 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 Hercules Industries, Inc.; its four individual owners; and its Vice President. Although individual Plaintiffs is a practicing Catholic, Hercules Industries is a "for-profit, secular employer" engaged

in "the manufacture and distribution of heating, ventilation, and air conditioning … products and equipment." Appellants' App. 57.

Hercules Industries offers health insurance in the form of "a self-insured group plan for [its] employees, in which Hercules acts as its own insurer." *Id.* at 27. The company's group health plan is run by a third-party administrator. *Id.* at 38. In addition, the company contracts with a stop-loss carrier, *id.*, which insures against health expenses above a certain amount. *See* Bureau of Labor Statistics, *Definitions of Health Insurance Terms* 6, *available at* http://www.bls.gov/ncs/ebs/sp/healthterms.pdf.

Plaintiffs maintain that they cannot fulfill the contraception-coverage requirement without violating their religious beliefs, and that enforcing the contraception regulations against them would therefore violate the Religious Freedom Restoration Act and the Free Exercise Clause (among other provisions). *See* Appellants' App. 32, 40–47. Hercules Industries does not qualify for either the religious-organization exemption or the safe-harbor, because it is a secular, for-profit corporation with more than 50 employees. *Id.* at 58. The company is not exempt under the grandfathering provision, moreover, because

the company made significant changes to its plan during the 2010–2011 plan year. *See id.* at 37.

In July 2012, the district court granted Plaintiffs' motion for a preliminary injunction based on Plaintiffs' claims under RFRA. Although the district court failed to address whether the challenged regulation imposes a substantial burden on religious exercise—a threshold question that the district court acknowledged was "difficult" to answer—the court nonetheless issued a preliminary injunction after concluding that the government did not satisfy the compelling interest or least-restrictive means requirements (requirements that are triggered only after a plaintiff demonstrates a substantial burden on religious exercise). *See id.* at 65, 66–70.

In light of the basis for the district court's decision, this brief will focus on Plaintiffs' RFRA claim.

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, any burden that the regulations impose on Plaintiffs' 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 substantially burden their religious exercise, maintaining that "[o]nly the plaintiff can 'dr[a]w a line' over the burden, 'and it is not for [the court] to say that the line he drew was an unreasonable one.'" Pls.' Reply in Supp. of Mot. for a Prelim. Inj. [Dkt. 27] at 22 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (second alteration in original). 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 independently 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 serious 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 provides only to Government actions to 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 (RLUIPA), 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 a plaintiff's 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 asserted 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 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 indirect and incidental. As detailed below, Plaintiffs cannot do so.

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

Plaintiffs argue that the contraception regulations force them to "participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization, through health insurance coverage," in violation of their "sincerely held religious beliefs as formed by the moral teaching of the Catholic Church … that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage." Appellants' App. 20–21. But the Affordable Care Act's insurance provisions do not require Plaintiffs to directly support or promote the use of contraception, let alone abandon their religious beliefs or practices with respect to sexual activity for a purpose other than procreation. As this Court recently explained, in denying an injunction pending appeal in a nearly identical case, "[t]he 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." *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*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice).

As in *Hobby Lobby*, several circumstances render the relationship between the individual Plaintiffs and contraception "indirect and attenuated." *Id.* First, the contraception coverage must be provided by the individual Plaintiffs' secular, for-profit corporation, rather than by the individual Plaintiffs personally. Second, the corporation must provide coverage for a comprehensive set of healthcare procedures and services, not contraception alone. Third, the corporation would cover the cost of contraception only if 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 incorrectly concluded that Plaintiffs were likely to prevail in their claims under RFRA.

1. Employees' health insurance is provided not by the individual Plaintiffs, but by their secular, for-profit corporation.

Any purchase of comprehensive health insurance required by federal law is not paid for out of the individual Plaintiffs' pocket. Rather, the coverage requirements apply to their company, Hercules Industries, Inc., a "for-profit, secular employer" that engages in "the manufacture and distribution of heating, ventilation, and air conditioning … products and equipment." Appellants' App. 57. Each individual Plaintiff "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 the individual Plaintiffs and Hercules Industries is no mere technicality. The "substantial purpose" of the corporate structure "is to create an incentive for investment by limiting exposure to personal liability." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). In Colorado, where Hercules Industries is located and incorporated, a corporation "is

treated as a separate legal entity, unique from its officers, directors, and shareholders." *In re Phillips*, 139 P.3d 639, 643 (Colo. 2006).

Plaintiffs may not receive corporate benefits while shedding unwanted corporate obligations. The Supreme Court has 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). Similarly, the Second Circuit has 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 [imposed upon it] for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

Further, although churches and other houses of worship may well be subject to a different analysis, Hercules Industries engages in secular activity (the manufacture and distribution of heating and air-conditioning equipment) for secular ends (financial 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). For instance, in rejecting a RFRA challenge to endangered species laws, this Court 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).

In sum, the individual Plaintiffs have taken advantage of the unique benefits offered by the corporate form, and they have used that corporate form for the purpose of making money in a secular market for heating and air-conditioning equipment. Just as this choice shields the individual Plaintiffs' assets from liability incurred by the company, it

distances Plaintiffs and their religious beliefs from any insurance-related obligations applied to the corporation.

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

Hercules Industries 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 Affordable Care Act requires health plans to cover a wide variety of preventive services, including "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).[1] In a plan this comprehensive, the

[1] 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,"

connection between the corporation and any particular covered benefit is attenuated.

Indeed, 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 v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), 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. *See id.* 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 student religious groups to meet on public-school premises during noninstructional time—under the same terms as non-religious groups—in part because even "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.*

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and "tobacco cessation interventions." *USPSTF A and B Recommendations*, U.S. Preventive Servs. Task Force, http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Jan. 25, 2013).

at 250. The provision of comprehensive insurance coverage similarly attenuates the connection between Hercules Industries and any particular medical procedure or service ultimately covered by the insurance plan.

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

Any health-plan reimbursement for the 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—further distances Hercules Industries from any purchase or use of contraception.

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. Any advancement of religion, the Court explained, 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.

Courts have held that an intervening, independent decision of a private entity severs the causal connection 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 Supreme 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 restrictions properly advanced the goals of a government program, the Court explained that the government did not own or support everything it funded. Rather, 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.

Using this same analysis, courts have rejected RFRA-based challenges to regulations aimed at ensuring access to reproductive health services. 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," *id.*, 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.

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. Just as the employees of Hercules Industries may not direct how the corporation distributes its profits, the corporation may not control how its employees disburse their salaries and benefits.

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 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 "assessing the medical risks in light of the patient's needs." *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Ultimately, then, there is no use or purchase of contraception by an insurance provider without the independent decision of a covered employee and, in many cases, the covered employee's physician.

As this Court recently recognized, 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. 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).

C. Hercules Industries may at any time contract with a third-party insurance company to provide health coverage.

Plaintiffs may argue that they face a less indirect burden because Hercules Industries funds its own employee health plan, rather than providing its employees with health-insurance policies issued by a third-party insurance company. *See Tyndale House Publishers, Inc. v. Sebelius*, No. CIV.A. 12-1635, 2012 WL 5817323, at *13 (D.D.C. Nov. 16, 2012) (relying in part on this distinction in granting preliminary injunction against application of contraception regulations to company that self-funds its health-insurance plan). Yet under either scenario, the intervening factors discussed above remain in place: (1) the coverage obligation applies to the corporation, rather than to the individuals holding the religious beliefs; (2) the policy covers a comprehensive array of medical benefits, not contraception alone; and (3) contraception is used only after an employee's independent decisions, often in consultation with her physician.

In addition, the decision to self-insure does not mean that Hercules Industries is directly providing insurance to its employees. Rather, under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002, the group health plan is legally distinct from Hercules

Industries. *See* 29 U.S.C. § 1132 ("An employee benefit plan may sue or be sued under this subchapter as an entity."); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 373 (1990) (employee "[pension] fund and the [employer] are distinct legal entities").

This legal distinction between employer and employee benefit plan applies fully to self-funded health plans of the type provided by Hercules Industries. *See Sheahan v. Leahy*, 591 F. Supp. 629, 629–30 (E.D. Mo. 1984) (lawsuit for benefits by recipient of employer-funded group health plan must be brought against plan officials, not employer itself: "ERISA specifically provides that an employee benefit plan may be sued as an entity, in which case service of summons may be had upon a trustee or administrator of the plan *in his capacity as such*") (emphasis in original). As one district court recently explained, in denying a preliminary injunction against the contraception regulations sought by a for-profit corporation with a self-funded plan, "even if a health plan is self-insured, it remains a separate legal entity from the sponsoring employer." *Grote Indus., LLC v. Sebelius*, No. 4:12-CV-00134-SEB, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012),

reconsideration denied, 2012 WL 53736 (S.D. Ind. Jan. 3, 2013), *appeal docketed* No. 13-1077 (7th Cir. Jan. 9, 2013).

But even if Hercules Industries believed that it faced a greater burden because it has chosen to self-fund its group health plan, the company could avoid that perceived burden by obtaining health coverage for its employees from a third-party insurance company, which would further attenuate any link between Hercules Industries and contraception. *See, e.g.*, *Rosenberger*, 515 U.S. at 840, 843–45 (university's funding of expenses accrued by religious publication was indirect and permitted by Establishment Clause, in part because university did not reimburse religious publication directly, but instead paid third-party printing press with whom student group had contracted). Under this arrangement, if and when an employee chose to purchase contraception, the payment for that contraception would be made not by the individual Plaintiffs or Hercules Industries, but by the third-party insurance company. And the insurance company would make such a payment only after independently determining that the purchased contraception is medically appropriate and thus subject to reimbursement. The insurance company's intervening role would

provide Hercules Industries with "a further degree of separation," *id.* at 844, between the company and contraception.

Hercules Industries may have chosen to self-insure to save money, or for some other economic reason. But the expense incurred in avoiding a general legal obligation does not, as a matter of law, constitute a substantial burden. Thus, in *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the court rejected a religious school's claim that it could withhold from married females a salary supplement offered to married males, notwithstanding the religious school's belief that men should be the head of the household: "The fact that [the school] must incur increased payroll expense to conform … is not the sort of burden that is determinative." *Id.* at 1398. This decision reflects the well-settled understanding 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 (1961).

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 make it difficult (and

sometimes impossible) for employees of Hercules Industries to obtain and use 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 impose significant harms on third parties. When debating the law, Congress envisioned exemptions imposing few if any burdens on third parties. *See, e.g.*, 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."). 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 when 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 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).

A required exemption for Plaintiffs from the contraception regulations would also 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. *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 "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). For instance, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court held that the Establishment Clause prohibits a sales tax exemption limited to religious periodicals, because the 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." *Id.* at 15 (citation omitted). Likewise, in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), the Court invalidated a 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." *Id.* at 709. As in these cases, the exemption requested by Hercules Industries would disregard its employees' "convenience or interests." *Id.*

B. Plaintiffs' Argument, If Accepted, Would Enable Employers To Restrict Employees' Access to Medical Care Other Than Contraception and Could Undermine Other 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 corporation's health-insurance coverage. Catholic-owned corporations could deprive their employees of coverage for end-of-life hospice care and for medically necessary hysterectomies. Scientologist-owned corporations could refuse to offer their employees coverage for antidepressants or emergency psychiatric treatment. Christian Scientist-owned corporations could seek to avoid providing coverage for most if not all medical treatments.

Moreover, the burden claimed by Plaintiffs could extend to any indirect support (financial, or otherwise) for any activity at odds with an employer's or owner's religious beliefs, allowing company owners to seek

exemptions not just from benefits requirements, but from a wide array of other employment laws. For example, a corporation 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 corporation owned by a Jehovah's Witness could refuse to offer federally mandated medical leave to an employee who needed a blood transfusion.

By asking employees to adjust their behavior to accommodate the religious views of their employers, Plaintiffs have it backwards. As one court explained, in rejecting an employer's free-exercise claim to an exemption from Title VII's prohibition against religious discrimination, 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).

Finally, Plaintiffs' argument, if accepted, could undermine federal antidiscrimination laws in areas outside of employment. Notwithstanding the protections of the Fair Housing Act, 42 U.S.C.

§ 3604, a Jewish-owned apartment company might refuse to rent to individuals who celebrate Easter in their homes—on the ground that providing space to celebrate Christian holidays would violate the religious beliefs of the apartment company's owners. Notwithstanding the public accommodations laws, 42 U.S.C. § 2000a, a Christian-owned hotel chain might refuse to offer rooms to those who would use the space to study the Koran or Talmud. A Muslim-owned cab company might refuse to drive passengers to Hadassah meetings; a Christian-owned car service might refuse to haul clients to mosques; a Jewish-owned bus company might refuse to take customers to Sunday school.

Such a broad interpretation of RFRA would conflict not only with congressional intent, but with 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). Plaintiffs' employees are entitled to the same protection against trespass on their private rights.

Conclusion

The judgment of the district court should be reversed.

Respectfully submitted,

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Certificate of Compliance

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Certificate of Service

On January 25, 2013, I served a copy of this brief of *amici curiae* on all counsel of record through the Court's ECF system.

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