No. 12-6294

In the United States Court Of Appeals for the Tenth Circuit

Hobby Lobby Stores, Inc., et al.,
Plaintiffs-Appellants,

v.

Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma, Judge Joe Heaton

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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 Appellees and Affirmance

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* certify that they are 501(c)(3) nonprofit corporations. None of the *amici* has a corporate parent or is owned in whole or in part by any publicly held corporation.

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ERISA: Employee Retirement Income Security Act

HIPAA: Health Insurance Portability and Accountability 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, which seeks to (1) advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters.[1]

Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief for Americans United for Separation of Church and State et al., as *Amici Curiae* Supporting Respondents, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (No. 04-1084), 2005 WL 2237539 (supporting exemption, for Native American religious practitioners, from federal drug laws). Consistent with its support for the separation of church and state, however, Americans United opposes

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[1] 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.

the recognition of religious exemptions for 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 healthcare 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.

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 Hobby Lobby Stores, Inc. and Mardel, Inc. (collectively "Hobby Lobby")—chains of for-profit craft stores and for-profit bookstores, respectively—from providing coverage for several types of contraception to which their owners object on religious grounds. 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. And the exemption they seek would authorize employers to intrude on private healthcare relationships,

subjecting employees' private medical decisions to employers' religion-based vetoes.

Both Congress and the courts have reiterated that not all asserted burdens on religion—even if experienced sincerely and intensely—constitute a "substantial burden" under RFRA. Were it otherwise, a range of essential federal laws that protect employees and prevent discrimination would be subject to strict scrutiny. Although Plaintiffs may object to providing insurance that might be used by employees to purchase certain forms of contraception, a substantial burden under RFRA does not arise from such incidental harms.

For several reasons, any burden imposed on Plaintiffs' religious exercise is incidental and attenuated, not substantial. First, federal law imposes the insurance regulation on Hobby Lobby, a chain of for-profit craft stores and for-profit bookstores, rather than on the individual owners or officers who hold personal religious beliefs about contraception. Second, the group health plan covers a full menu of medical procedures and services, not just contraception alone, thereby distancing Hobby Lobby 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.

These layers of attenuation have already led this Court to reject Plaintiffs' argument that the contraception regulations impose a substantial burden on religion. In denying Plaintiffs' request for an injunction pending appeal, the Court explained that "[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." Appellants' Addendum ("Add.") 14 (emphasis in original; quotation marks and alterations omitted), *aff'd*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice). Indeed, four of the six circuits to thus far consider requests for injunctions pending appeal have denied them, and allowed the contraception regulations to remain in force.

Plaintiffs' alleged burden is no less attenuated merely because Hobby Lobby has decided to fund its own insurance plan, rather than to

contract with a third-party insurance company. The health plan is legally distinct from Hobby Lobby, and thus even further removed from Hobby Lobby's individual owners. In any event, the company is free at any time to purchase comprehensive insurance policies from a third-party carrier.

If RFRA were interpreted to require an exemption for Plaintiffs, 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 Hobby Lobby's employees—many of whom do not share Plaintiffs' religious beliefs—by making it difficult if not impossible for them to obtain several types of contraception, and would insert employers into otherwise private medical decisionmaking by employees and their physicians. Moreover, if accepted, Plaintiffs' rationale could allow other employers to withhold insurance coverage for any number of other medical treatments—from blood transfusions to psychiatric care to the use of medicine ingested in the form of gelatin capsules—and could also require widespread exemptions from an array of federal employment and civil-rights laws. These results 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 certain types of 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 corporations, 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).

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). Group plans must provide access, without cost sharing, to comprehensive preventive care, including preventive care "related to

women's health." 42 U.S.C. § 300gg-13(a). In particular, the women's health coverage must include "[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).

Plaintiffs are Hobby Lobby and Mardel, and five members of the Green family who own and operate the two corporations. Although each individual Plaintiff is a practicing evangelical Christian, JA 13a, Hobby Lobby and Mardel are "for-profit, secular corporations." *Id.* at 206a. Hobby Lobby is engaged in the operation of "arts and crafts stores in 41 states," and Mardel "is a bookstore and educational supply company." *Id.* at 205a. Each company provides their employees with health insurance in the form of a self-insured plan. *Id.*

Plaintiffs maintain that they cannot provide insurance coverage for emergency contraceptives, such as Plan B and Ella, and for certain intrauterine devices, such as the copper intrauterine device, Appellants' Br. 4–5; they believe that these drugs or devices prevent a fertilized egg from implanting in the womb, and that offering insurance for these drugs and devices "entangles them and their business in the practice of

abortion." Appellants' Br. 1. Although Plaintiffs refer to emergency contraception as an "abortifacients" most scientific studies have concluded that emergency contraception operates prior to fertilization and thus does not induce abortion. *See, e.g.*, Julie Rovner, *Morning-After Pills Don't Cause Abortion, Studies Say*, All Things Considered (Feb. 21, 2013), http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say.

In order to ease employers' transition and accommodate religious concerns, the Department of Health and Human Services has promulgated or proposed certain exemptions from the contraception regulations. Hobby Lobby, however, is ineligible for any of these exemptions. Because Hobby Lobby operates for profit, Appellants' Br. 8, it does not qualify for accommodations offered to nonprofit religious organizations. *See* 45 C.F.R. § 147.130(a)(iv); 77 Fed. Reg. 16,501, 16,503–04 (Mar. 21, 2013); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). And Hobby Lobby is ineligible for the grandfathering provision, which exempts certain existing group health plans until the employer "enters into a new policy, certificate, or contract of insurance," 75 Fed. Reg. 34,538, 34,541 (June 17, 2010), because it recently made changes to its

health plan after learning that it had been covering two forms of emergency contraception, Plan B and Ella. *See* JA 26a–27a.

Plaintiffs argue that enforcement of the contraception regulations against them would violate the Religious Freedom Restoration Act and the Free Exercise Clause (among other provisions). *See id.* at 41a–43a. The district court denied Plaintiffs' motion for a preliminary injunction. In addition to rejecting Plaintiffs' claims under the First Amendment, *id.* at 211a–217a, the district court concluded that compliance with the contraception regulations would not substantially burden Plaintiffs' exercise of religion under RFRA, because they apply only to Hobby Lobby, "not to its officers or owners," and "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 … subsidize someone else's participation in an activity that is condemned by plaintiff's religion." *Id.* at 224a (emphasis in original, quotation marks omitted).

Plaintiffs appealed and filed a motion for an injunction pending appeal. This Court denied the motion, agreeing that Plaintiffs were unlikely to establish the necessary substantial burden on religious

exercise: "We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." Add. 15. Plaintiffs' request for an injunction from the Supreme Court was denied by Justice Sotomayor. *See id.* at 16–17.

Even after Justice Sotomayor denied Hobby Lobby's injunction request, Hobby Lobby's counsel stated that Plaintiffs would "defy the law and refuse to provide health coverage for contraception they considered to be 'abortion-inducing.'" Shan Li, *Hobby Lobby, Defying Health Law, Refuses to Cover Morning-After Pill*, L.A. Times, Dec. 31, 2012, http://articles.latimes.com/2012/dec/31/business/la-fi-mo-hobby-lobby-healthcare-20121231. Hobby Lobby is currently complying with federal law, but only because it later learned that it "could delay the effective date of the Mandate by retroactively modifying [its] health plan, so that it would now run on a July-to-July schedule." Appellants' Br. 11.

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, Attenuated 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 incidental and attenuated—not the type of substantial burden that triggers strict scrutiny under RFRA. And notwithstanding various plaintiffs' RFRA claims, four of the six circuits to consider requests for injunctions pending appeal, including this Court, have allowed the contraception regulations to remain in force.[2]

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[2] *Compare* Add. 14 (denying injunction pending appeal); *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. Mar. 21, 2013) (same); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013) (same); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012) (same), *with Grote v. Sebelius*, __ F.3d __, 2013 WL 362725 (7th Cir. Jan. 30, 2013) (granting injunction pending appeal); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (same); *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012) (same).

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

Plaintiffs insist that the Court must defer to their argument that the contraception regulations would substantially burden their religious exercise, maintaining that "the [district] court attempted to re-interpret the Greens' religious beliefs in violation of RFRA." Appellants' Br. 22. Yet the question is not the sincerity or scope of Plaintiffs' religious beliefs, but rather whether the contraception regulations impose a burden on their religious exercise in a manner that is substantial as a matter of law.

RFRA does not require the Court to accept Plaintiffs' open-ended definition of religious burden. Rather, the Court may and must draw legal lines, because virtually any conduct by a particular plaintiff can, in some manner, facilitate someone else's performance of an act offensive to that plaintiff's religious beliefs. Plaintiffs in this case object to offering comprehensive health insurance policies that cover certain types of contraception; plaintiffs in another case may object to paying a salary to an employee who would use the extra money to purchase contraception; plaintiffs in yet another case may object to compensating an employee who would use the funds to purchase books to learn about

contraception. Lest the entire federal code submit to strict scrutiny, courts must independently assess whether a plaintiff's articulated religious injury is "substantial" as a matter of law.

Indeed, whereas the initial draft of RFRA prohibited the government from imposing any "burden" on free exercise, substantial or otherwise, 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). In doing so, Congress ensured that RFRA "would not require [a compelling governmental interest] 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.

The courts have followed Congress' lead. As the Seventh Circuit 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). Accordingly, 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).

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 v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), 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, this particular ban on solicitation in one place imposed only an incidental burden on the plaintiffs' religious exercise. *See id.*

To prevail, then, Plaintiffs must establish that the challenged federal requirement burdens their religious exercise in a manner that the law recognizes as substantial, rather than incidental and attenuated. As detailed below, Plaintiffs cannot do so.

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

The burden that Plaintiffs experience subjectively is not substantial, as a matter of law, because several circumstances render

the relationship between Plaintiffs and contraception incidental and attenuated. First, the contraception coverage must be provided by the individual Plaintiffs' secular, for-profit corporations, rather than by the individual Plaintiffs personally. Second, the corporations must provide coverage for a comprehensive set of healthcare services, not contraception alone. Third, the corporations would cover the cost of contraception only if an employee chooses to purchase contraception, often after receiving a prescription from her physician.

In light of this series of intervening steps, the district court and this Court correctly concluded that Plaintiffs were unlikely to succeed with their RFRA claims, because "[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." Add. 14 (emphasis in original; quotation marks and alterations omitted).

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

Any purchase of comprehensive health insurance required by federal law is not paid for out of the individual Plaintiffs' pockets. Rather, the coverage requirements apply to Hobby Lobby, a for-profit corporation engaged in the business of selling craft supplies and books. 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 Hobby Lobby 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). This distinction between a for-profit corporation and its individual owners applies fully to companies, like Hobby Lobby, that are family-owned or closely held, as "even a family corporation is a separate and distinct legal entity from its shareholders." *Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966).

Plaintiffs, moreover, may not claim corporate benefits while shedding unwanted corporate obligations: "One 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). As Judge Garth explained, concurring in the Third Circuit's denial of an injunction pending appeal in another corporate challenge to the contraception regulations, "it would be entirely inconsistent to allow [Plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 7 (3d Cir. Feb. 7, 2013) (Garth, J., concurring).

Further, although churches and other houses of worship may well be subject to a different analysis, the corporations in this case engage in secular activity (the operation of craft stores and bookstores) for secular ends (financial profit). Plaintiffs argue that Hobby Lobby nonetheless exercises religion, noting that among other things that its statements of purpose reflect commitment to certain religious principles, and that its

stores play Christian music, are closed on Sundays, and provide "millions per year to Christian ministries around the world." Appellants' Br. 4.

But this sort of incidental religious activity does not mean that Hobby Lobby exercises religion in its day-to-day commercial transactions—including its commercial transactions with its employees—when performing its core activity of operating a for-profit business. For instance, in *Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *injunction pending appeal denied*, No. 13-5069 (D.C. Cir. Mar. 21, 2013), the court considered a challenge to the contraception regulations brought by a for-profit produce distributor that donates food to local nonprofit organizations, "including the YMCA, Habitat for Humanity, the American Legion, and Holy Angel's Soup Kitchen," "donates a trailer for use by the local Catholic parish for its annual picnic and uses its trucks to deliver food donated by [the corporation] to food banks." *Id* at *6. The company's incidental support for religion was "insufficient to establish religious activity taken by the [plaintiff corporation]," however, and the court concluded

that the corporation was "engaged in purely commercial conduct." *Id.* at *6, *7.

Plaintiffs cannot establish a religious identity even for Mardel, which "specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula." JA at 25a. Like Hobby Lobby, Mardel operates to make financial profit. *Compare Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323, at *3 (D.D.C. Nov. 16, 2012) (issuing preliminary injunction against application of contraception regulations to company that "is 96.5% owned by … a non-profit religious entity"). This Court too has refused to ascribe religious significance to for-profit commercial activity. For instance, in rejecting a RFRA challenge to the endangered species laws, the 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). Plaintiffs' decision to sell religious publications "for pure commercial gain," *id.*, likewise adds another step of removal between Hobby Lobby's activities and the actual exercise of religion.

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 secular markets for craft supplies and books. 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).

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

Hobby Lobby 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. Health plans must cover an extensive list 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).[3] In a plan this comprehensive, the connection between the corporation and any particular benefit is minimal.

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 religious-student-group publications to the same extent that the university funded the publications of non-religious groups. *See id.* at 841–43. Similarly, in *Board of Education v. Mergens ex rel. Mergens*, 496 U.S.

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[3] 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.us preventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Mar. 21, 2013).

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.* at 250. The provision of a comprehensive insurance policy, rather than coverage for contraception alone, similarly attenuates the connection between Hobby Lobby and any particular medical procedure or service that is 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 Hobby Lobby's employees chooses to use contraception; that is, as a result of "the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." Add. 15. That independent conduct—private medical decisions made by doctor and patient—further distances Hobby Lobby from any purchase or use of contraception.

The Supreme Court has determined 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 incidental advancement of religion, the Court concluded, "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652.

Courts have likewise pointed to the significance of independent medical decisions in rejecting 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. Any connection between Hobby Lobby and contraception is equally incidental and attenuated because of the intervening actions of the company's employees.

An employee's use of her employment benefits, moreover, is a quintessential 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). The provision of health insurance, knowing that the insurance might be used to purchase certain forms of contraception, would no more facilitate the use of such contraception than would the distribution of a paycheck with the same awareness.

Finally, with respect to any form of objected-to contraception that requires 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 recognized, RFRA does not empower Plaintiffs to impede "the independent conduct of third parties with whom [they] have only a commercial relationship." Add. 15. The need to preserve employees' control over their compensation and benefits is especially important when it comes to their medical decisions, which federal law entitles employees to keep private from their employers. *See* 45 C.F.R.

§§ 164.508, 164.510. Ultimately, 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. *Hobby Lobby May At Any Time Contract With a Third-Party Insurance Company To Provide Health Coverage.*

Plaintiffs observe that, unlike an employer whose "group plan [is] separately administered by an insurance company," Plaintiffs "directly fund their own insurance plan." Appellants' Motion for Inj. Pending Appeal 15 n.12. Yet in both circumstances, the intervening factors discussed above remain in place: (1) the coverage obligation applies to Hobby Lobby, 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 decision, often in consultation with her physician.

Nor does the decision to self-insure mean that Hobby Lobby is directly providing insurance to its employees. Rather, under the Employee Retirement Income Security Act (ERISA), the group health

plan is legally distinct from Hobby Lobby. *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"). Indeed, the plan is treated as a separate entity in part to create a barrier between employers and employees; federal regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d, ensure that information about employees' healthcare is kept private from their employers. *See* 45 C.F.R. §§ 164.508, 164.510.

Plaintiffs, moreover, can avoid any perceived burden associated with self-funding by providing health coverage for its employees through a third-party carrier: "the self-funding arrangement is one of the employer's making—and possibly one having little or nothing to do with the employer's religious beliefs." *Grote v. Sebelius*, __ F.3d __, 2013 WL 362725, at *11 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting from grant of injunction pending appeal). And if Plaintiffs exercise their option to contract with a third-party carrier, any payment for contraception would be made not by the individual Plaintiffs or Hobby

Lobby, but by the third-party insurance company, which itself would make the payment only after independently determining that the purchased contraception is medically appropriate and thus subject to reimbursement. *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). Although Hobby Lobby may have chosen to self-insure to save money, or for some other economic reason, 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 Incidental, Attenuated Burdens Would Risk Imposing Significant Hardship on Third Parties, In This and Other Cases.

A decision exempting Plaintiffs from the insurance-coverage requirements would make it difficult and sometimes impossible for Hobby Lobby's employees to obtain and use several forms of contraception, would allow employers to intrude upon their employees'

most private and sensitive medical decisions—including decisions about treatments other than 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). None of the exemptions contemplated by Congress would have required a third-party to forfeit federal protections or benefits otherwise available widely.

Likewise, in interpreting the Free Exercise Clause, the Supreme Court has long distinguished between religious 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 that 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).

Interpreting RFRA to require an 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. 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.[4] As in these cases, the exemption requested by Hobby Lobby would disregard its employees' "convenience or interests." *Id.*

[4] *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").

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. And corporations owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain porcine or bovine products—including anesthesia, intravenous fluids, prostheses, sutures, and pills coated with gelatin. *See* Catherine Easterbrook & Guy Maddern, *Porcine and Bovine Surgical Products*, 143 Archives of Surgery 366, 367 (2008); S. Pirzada Sattar, *To The Editor*, 53 Psychiatric Services 213, 213 (2002). Indeed, "[m]ore than 1000 medications contain inactive ingredients derived from pork or beef, the consumption of which is prohibited by several religions." Tara

M. Hoesli, et al., *Effects of Religious and Personal Beliefs on Medication Regimen Design*, 34 Orthopedics 292, 292 (2011).

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. 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. And any otherwise secular corporation with religious owners could refuse to hire someone from a different religion, so as to avoid paying a salary that might be used for a purpose offensive to the owner's religious views.

Finally, Plaintiffs' argument, if accepted, could undermine federal antidiscrimination laws in areas outside of employment. 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. 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 affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief was prepared in Microsoft Word, Century Schoolbook, 14-point font. According to the word-count function and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,989 words.

/s/ Gregory M. Lipper

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