No. 13-1677

In the United States Court Of Appeals
for the Sixth Circuit

Eden Foods, Inc., et al.,
Plaintiffs-Appellants,
v.
Kathleen Sebelius, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan, Judge Denise P. Hood

Brief In Support of Appellees and Affirmance by *Amici Curiae* Americans United for Separation of Church and State; American Civil Liberties Union; American Civil Liberties Union Fund of Michigan; Anti-Defamation League; Catholics for Choice; Central Conference of American Rabbis; Hadassah, The Women's Zionist Organization of America, Inc.; Hindu American Foundation; Interfaith Alliance Foundation; National Coalition of American Nuns; National Council of Jewish Women; Religious Coalition for Reproductive Choice; Religious Institute; Union for Reform Judaism; Unitarian Universalist Women's Federation; and Women of Reform Judaism

---

Daniel Mach (dmach@aclu.org)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

Ayesha N. Khan (khan@au.org)
Gregory M. Lipper (lipper@au.org)
Caitlin E. O'Connell (oconnell@au.org)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-1677 Case Name: Eden Foods, Inc. v. Sebelius

Name of counsel: Gregory M. Lipper

Pursuant to 6th Cir. R. 26.1, Please see attached page.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

N/A

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

N/A

CERTIFICATE OF SERVICE

I certify that on 7/29/13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Gregory M. Lipper

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

Amici Curiae

Americans United for Separation of Church and State

American Civil Liberties Union

American Civil Liberties Union Fund of Michigan

Anti-Defamation League

Catholics for Choice

Central Conference of American Rabbis

Hadassah, The Women's Zionist Organization of America, Inc.

Hindu American Foundation

Interfaith Alliance Foundation

National Coalition of American Nuns

National Council of Jewish Women

Religious Coalition for Reproductive Choice

Religious Institute

Union for Reform Judaism

Unitarian Universalist Women's Federation

Women of Reform Judaism

Table of Contents

Table of Authorities

Cases

Statutes, Regulations, and Legislative Materials

Other

Identity and Interests of *Amici Curiae*

Appellants and Appellees have consented to the filing of this brief, which is joined by the following organizations.[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization founded in 1947. It seeks to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United has long supported legal exemptions that reasonably accommodate religious practice, but opposes religious exemptions that would interfere with the rights of innocent third parties.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The American Civil Liberties Union Fund of Michigan is one of its state affiliates. The ACLU has a long history of

---

[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.

defending the fundamental right to religious liberty, and routinely brings cases designed to protect individuals' right to worship and express their faith. At the same time, the ACLU is deeply committed to fighting gender discrimination and inequality and protecting reproductive freedom.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. ADL believes that efforts to impose one group's religious beliefs on others are antithetical to the notions of religious freedom on which the United States was founded.

Catholics for Choice shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the moral capacity of women and men to make decisions about their lives.

Hadassah, The Women's Zionist Organization of America, Inc. was founded in 1912, and has over 330,000 Members, Associates,

and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the fundamental principle of the free exercise of religion.

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.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization, which celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as to no faith tradition.

The National Coalition of American Nuns ("NCAN") is an organization that began in 1969 to study and speak out on issues of justice in church and society. Among other things, NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial

matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families, and by safeguarding individual rights and freedoms, including freedom of religion and access to family planning and reproductive health services.

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

The Religious Institute is a multifaith organization advocating for sexuality education, reproductive justice, and the full inclusion of women and LGBT people in faith communities and society.

The Union for Reform Judaism has 900 congregations across North America, and these congregations include 1.5 million Reform Jews. **The Central Conference of American Rabbis** has a membership that 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.

The Unitarian Universalist Women's Federation has had an abiding interest in the protection of reproductive rights and access to these health services since its formation nearly 50 years ago. It has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights.

Each organization believes that in a diverse society, employers should not have the right to force their owners' religious beliefs on employees, who have the right to make their own medical decisions consistent with their own religious beliefs.

Summary of Argument

Federal regulations, adopted to implement the Patient Protection and Affordable Care Act, require most employers to provide employees with health insurance that covers a full range of preventive 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 Eden Foods—a for-profit manufacturer of dry grocery organic foods—from this requirement. But Plaintiffs fail 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 constitute a "substantial burden" under RFRA.

Were it otherwise, a range of essential federal laws that protect employees and prohibit discrimination would be subject to strict scrutiny. Although Plaintiffs may genuinely object to providing insurance that employees might use to purchase contraception, a substantial burden under RFRA does not arise from such incidental harm.

Any burden imposed on Plaintiffs' religious exercise is attenuated in several respects. First, federal law applies the insurance regulations to Eden Foods—a secular, for-profit manufacturer of dry grocery organic foods—rather than to the individual owner who purports to hold personal religious beliefs about contraception. Second, even Eden Foods does not buy contraception directly, but instead purchases insurance policies from a third-party insurance company that makes its own independent reimbursement decisions. Third, the insurance company must provide Eden Foods's employees with a full menu of medical treatments, not contraception alone, thereby distancing the corporation from any particular form of covered care. Fourth, the insurance company 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 write a prescription.

An interpretation of RFRA requiring an exemption for Plaintiffs would transform the statute from a shield (to protect persons against substantial burdens on their religious exercise) to a sword (for persons to use to impose their religious views on others). Such an exemption would significantly burden Eden Foods's employees—who may not share the religious beliefs of their employers' individual owner—by interfering with their ability to obtain affordable contraception. And it would insert employers into otherwise private medical decisions made by employees in consultation with their physicians.

If accepted, moreover, 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.

The individual owner of Eden Foods has every right to refrain from using contraception, and to attempt to persuade others to do the same. But once he enters the secular market for labor to staff his secular, for-profit corporation, he may not force his choices on the company's 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), 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). 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 Eden Foods, a for-profit organic-food manufacturer incorporated under the laws of Michigan, and Michael Potter, the company's "Chairman, President, and sole shareholder." R. 27, First Am. Compl. ("FAC") ¶¶ 21, 25, 35, PageID# 632, 633. According to his complaint, Mr. Potter believes that contraception "is immoral and unnatural," *id.* ¶ 168, PageID# 655, and does "not believe that contraception or abortifacients are properly understood to constitute medicine, health care, or a means of providing for the well being of persons," *id.* ¶ 62, PageID# 637.[2]

---

[2] Although Plaintiffs claim that emergency contraception acts as an abortifacient, most scientific studies conclude that emergency contraceptive pills and intra-uterine devices "do not act *after* implantation, so they do not terminate a 'pregnancy' as defined in [FDA regulations]." *Liberty Univ., Inc. v. Lew*, __ F.3d __, 2013 WL 3470532, at *19 n.11 (4th Cir. July 11, 2013) (emphasis in original); *see also* 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.

The employee insurance policies at issue are purchased not by Mr. Potter, however, but by Eden Foods—a for-profit corporation and an "independent manufacturer of dry grocery organic foods." *Id.* ¶ 35, PageID# 633. Eden Foods, in turn, provides its employees with insurance policies issued by Blue Cross/Blue Shield of Michigan.

To ease employers' transition and accommodate religious concerns, the Department of Health and Human Services has promulgated certain exemptions and accommodations from the contraception regulations. Eden Foods, however, is ineligible for these exemptions and accommodations. Because Eden Foods operates for profit, R. 27, FAC ¶ 76, PageID# 640, it is ineligible for exemptions or accommodations offered to nonprofit organizations whose sponsors assert religious objections to the contraception rules. *See* 45 C.F.R. § 147.130(a)(iv); 78 Fed. Reg. 39,870, 39,872–86 (July 2, 2013). Plaintiffs also acknowledge that Eden Foods is ineligible for the grandfathering exemption, R. 27, FAC ¶ 88, PageID# 642, which governs 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).

Plaintiffs moved for a preliminary injunction on the ground that enforcement of the contraception regulations against them would violate RFRA and the First Amendment's Free Exercise Clause. *See* R. 10, Pls.' Br. in Supp. of Mot. for TRO and Prelim. Inj., PageID# 101–09. The district court denied their motion, concluding that Plaintiffs failed to demonstrate a likelihood of success on the merits for either claim. R. 22, Order, PageID# 611–17.

With respect to RFRA, the district court explained that because the contraception regulation "applies only to the corporate entity, not to its officers or owners," any burden imposed on Mr. Potter "is remote and too attenuated to be considered substantial for purposes of the RFRA." *Id.*, PageID# 612. Moreover, "an employee's participation (specifically women), after consultation with healthcare providers as to whether to take advantage of the birth control choices in the Mandate, is indirect and attenuated to the Plaintiffs' religious beliefs." *Id.*, PageID# 613. The district court also rejected Plaintiffs' claim under the Free Exercise Clause. *See id.*, PageID# 616.

A unanimous motions panel of this Court denied Plaintiffs' motion for an injunction pending appeal. The Court was "not persuaded, at this

stage of the proceedings, that a for-profit corporation has rights under the RFRA." Order at 2, *Eden Foods, Inc. v. Sebelius*, No. 13-1677 (6th Cir. June 28, 2013). Moreover, "the burden Potter claims is too attenuated," because "[t]he contraceptive mandate is imposed on Eden Foods, not Potter." *Id.*

Plaintiffs' appeal is limited to their claim under RFRA.

Argument

I. The Contraception 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).

At the outset, it is unclear that Plaintiffs can establish a substantial burden on religious exercise because their objections do not appear to relate to religion. The owner of Eden Foods, Plaintiff Michael Potter, recently stated, "I don't care if the federal government is telling me to buy my employees Jack Daniel's or birth control. What gives them the right to tell me I have to do that? That's my issue, that's what

I object to, and that's the beginning and end of the story." Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, Salon, Apr. 15, 2013, http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/. A RFRA claim, however, requires a "claimant whose sincere exercise of *religion* is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006) (emphasis added).

Even if Plaintiffs did have sincere religious objections to the contraception regulations, any burden imposed on Plaintiffs' religious exercise is incidental and attenuated—not the type of substantial burden that triggers strict scrutiny under RFRA.

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

Virtually any legal protection for employees could be construed to facilitate behavior offensive to their employer's religious beliefs. Plaintiffs in this case object to offering comprehensive health insurance policies that cover contraception; plaintiffs in another case might object to paying minimum wage to an employee who would use the money to buy contraception; plaintiffs in yet another case might object to

compensating an employee who would use the funds to purchase books to learn about contraception.

Because virtually any law could be said to impose an incidental burden on someone's religious exercise, courts must independently assess whether a plaintiff's articulated injury is "substantial" as a matter of law. 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).

Indeed, whereas the initial draft of RFRA prohibited the government from imposing any burden on free exercise, Congress added the adjective "substantially" to make clear that "the compelling interest required by the Religious Freedom Act applies only where there is a substantial burden placed on the individual free exercise of religion," and that RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14350-01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). Congress reiterated 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's lead, recognizing that "[a] substantial burden exists when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs," but "[a]n inconsequential or *de minimis* burden on religious practice does not rise to this level." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quotation marks omitted). Accordingly, even if Plaintiffs' beliefs "are sincerely held, it does not logically follow … that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion." *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996).

Moreover, in evaluating an asserted burden, courts can and do exercise their own legal judgment to determine whether the burden at issue is substantial or merely incidental. For instance, in *Kaemmerling*, the D.C. Circuit rejected the claim of a prisoner who asserted a religious objection to the government's DNA testing of his blood. *See* 553 F.3d 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: "The 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 D.C. Circuit rejected claims arising from a similarly incidental burden in *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001). There, the court upheld a federal regulation banning the sale of t-shirts on the National Mall, even though the plaintiffs maintained that they had a religious obligation to preach "to the whole world … by all available means." *Id.* at 16 (quotation marks omitted). Whatever the plaintiffs' general religious obligation to preach anywhere and everywhere, this particular ban on solicitation in one place imposed only an incidental burden on the plaintiffs' religious exercise, because the plaintiff could still "distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall." *Id.* at 16–17.

Lest the entire federal code submit to strict scrutiny, 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 The Purchase Of Contraception Is Incidental And Attenuated.

The burden that Plaintiffs may experience subjectively is not substantial, as a matter of law, because several circumstances render the relationship between Plaintiffs and the contraception regulations incidental and attenuated. First, insurance policies must be purchased by Eden Foods—a secular, for-profit corporate manufacturer of dry grocery organic food—rather than by Mr. Potter personally. Second, contraception is paid for by a third-party insurance company, not by either Mr. Potter or Eden Foods. Third, the insurance company must provide coverage for a comprehensive set of healthcare services, not contraception alone. Fourth, the insurance company pays for contraception only if an employee independently chooses to purchase contraception, often after receiving a prescription from her physician.

Given this series of intervening steps, the district court correctly concluded that Plaintiffs' RFRA claims were unlikely to succeed.

1. *Employees' health insurance is provided not by Mr. Potter, but by his secular, for-profit corporation.*

Any required purchase of comprehensive health insurance is paid for not by Mr. Potter, but by Eden Foods, a for-profit corporate "manufacturer of dry grocery organic foods." R. 27, FAC ¶ 35, PageID# 633. As an individual owner, Mr. Potter 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). Mr. Potter's religious beliefs are one step removed from the regulations, which apply only to the secular, for-profit corporation. And the secular, for-profit corporation, Eden Foods, does not exercise religion.

Plaintiffs claim that with respect to obligations to provide insurance policies that cover contraception, "[t]he corporate form does not isolate Plaintiff Michael Potter." Appellants' Br. 29. But the corporate form is designed to do exactly that. In Michigan, where Eden Foods is incorporated, "the general rule … is that separate entities, including that of corporation and shareholder, will be respected." *Clark v. United Tech. Auto., Inc.*, 594 N.W.2d 447, 451 (Mich. 1999). This legal distinction between owner and corporation applies fully to companies,

like Eden Foods, that are closely held or family-owned: A corporation is "an entity distinct and separate from its owners, even when a single shareholder holds ownership of the entire corporation." *Hills & Dales Gen. Hosp. v. Pantig*, 812 N.W.2d 793, 797 (Mich. Ct. App. 2011).

In recently rejecting a similar challenge to the contraception regulations by a for-profit corporation and its owners, the Third Circuit stressed the distinction between individual owner and for-profit corporation. The Third Circuit's reasoning applies fully here: "Since [Eden Foods] is distinct from [Mr. Potter], the Mandate does not actually require [Mr. Potter] to do anything. All responsibility for complying with the Mandate falls on [Eden Foods]." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, __ F.3d __, 2013 WL 3845365, at *8 (3d Cir. July 26, 2013).

Plaintiffs resist settled corporate law, maintaining that "corporate papers cannot implement the HHS Mandate, nor can its brick-and-mortar buildings." Appellants' Br. 28. But the same is true of any act that could subject the corporation to financial liability, from which Mr. Potter is insulated. For example, Mr. Potter would not be personally liable for a tort or contract judgment requiring Eden Foods to pay

money damages, even if Mr. Potter—rather than "corporate papers" or "brick-and-mortar buildings"—personally performed the acts that triggered a financial judgment against his company.

Nor may Mr. Potter enjoy corporate benefits while shedding unwanted corporate obligations. As explained by the Supreme Court, "[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). In other words, "[Mr. Potter] chose to incorporate and conduct business through [Eden Foods], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, 2013 WL 3845365, at *8.

Moreover, Eden Foods, to whom the contraception regulations actually apply, does not exercise religion. In the words of the Third Circuit, "we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights." *Id.* at *5.

The key question is not, as Plaintiffs argue and the Tenth Circuit recently held, whether RFRA's definition of "person" excludes for-profit corporations. *See* Appellants Br. 21; *Hobby Lobby Stores, Inc. v. Sebelius*, __ F.3d __, 2013 WL 3216103, at *9–10 (10th Cir. June 27, 2013) (en banc). Rather, the Court must evaluate whether Eden Foods engages in religious exercise in the first place. *See Conestoga Wood*, 2013 WL 3845365, at *8 ("Since Conestoga cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a 'person' under the RFRA."). Here, whether or not a "person" under RFRA includes a for-profit corporation, Eden Foods does not engage in "religious exercise."

Although churches and other houses of worship may well be subject to a different analysis, Eden Foods engages in secular activity (the manufacture of dry grocery organic food) for secular ends (financial profit). Plaintiffs do not explain how Eden Foods exercises religion in the course of making and selling food for money. *See Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, 2013 WL 3546702, at *11 (E.D. Mich. July 11, 2013) (rejecting challenge to contraception regulations: "nor does [plaintiffs'] core business product, i.e. ground water control systems,

reflect in any way a religious purpose"). And Plaintiffs certainly fail to explain how religious exercise is infused into Eden Foods's day-to-day commercial transactions, including commercial transactions with its employees.

Indeed, even a house of worship does not necessarily exercise religion when running a purely commercial enterprise. For instance, in *Christ Church Pentecostal v. Tennessee State Board of Equalization*, No. M2012-00625-COA-R3-CV, 2013 WL 1188949 (Tenn. Ct. App. Mar. 21, 2013), the court held that a state religious-accommodation law did not require extension of a property tax exemption to a church's "retail establishment housed within the walls of the [church building], complete with paid staff, inventory control, retail pricing, and a wide array of merchandise for sale to the general public." *Id.* at *10. The manufacture of dry grocery organic foods, using a for-profit corporation owned by an individual who happens to possess certain religious beliefs, is an even more secular pursuit.

Plaintiffs have taken advantage of the unique benefits offered by the corporate form, and they have used that corporate form to make money in the secular market for organic food. 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. Eden Foods does not buy contraception directly, but instead pays a third-party insurance company for coverage that includes access to contraception.

The federal women's health regulations do not require even Eden Foods to pay for contraception directly. Rather, the corporation contracts with an independent entity (Blue Cross/Blue Shield of Michigan), to which it pays premiums for a full range of medical procedures and services. If and when an employee chose to purchase contraception, the payment for such contraception would be made not by Mr. Potter or Eden Foods, but by the insurance company. And the insurance company would make such a payment only after independently determining that the purchased contraception is subject to reimbursement.

The intervening role of the insurance company attenuates any link between Eden Foods and contraception. For instance, in

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995), the Supreme Court observed that a university's funding of expenses accrued by a religious publication was indirect (and permitted by the Establishment Clause), in part because the university did not reimburse the religious publication directly, and instead paid the third-party printing press with whom the student group had contracted. *See id.* at 840, 843–44. For an organization to use the university fund, it needed to "submit its bills to the Student Council, which [paid] the organization's creditors upon determining that the expenses are appropriate." *Id.* at 825. And "[b]y paying outside printers," rather than the organization itself, the university achieved "a further degree of separation from the student publication." *Id.* at 844.

Eden Foods maintains a similar degree of separation from the funding of contraception. The corporation pays insurance premiums to a third-party insurance company. The insurance company later—upon the employee's submission of a claim for the coverage of contraception—independently "determin[es] that the expenses are appropriate." *Id.* And the insurance company then pays yet another third party (a

pharmacy or the woman who purchased the contraception) for the product.

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

The insurance company hired by Eden Foods is required to provide its employees with a comprehensive insurance policy that covers contraception as one item among a range of preventive health care products 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). In a plan this comprehensive, the connection between the corporation and any particular benefit is minimal.

The Supreme Court has concluded that an entity authorizing a wide range of expenditures does not necessarily promote any particular item obtained with those funds. In *Rosenberger*, the 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* 515 U.S. at 841–43. The provision of a comprehensive insurance policy, rather than coverage for contraception alone, similarly attenuates the connection between Eden Foods and any particular medical product or service that is ultimately covered by the insurance plan.

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

Any reimbursement by the insurance company for the purchase of contraception takes place only after one or more of Eden Foods's employees chooses to use contraception. That independent conduct—a private medical decision made by doctor and patient—further distances Eden Foods from any purchase or use of contraception.

Courts have determined that intervening private, independent action can break the chain between the original funding source and the ultimate use of the funds. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court rejected an Establishment Clause challenge to 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, was "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652.

In addition, courts have specifically 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.

To the extent that Plaintiffs' employees wish to use prescription contraception, there is yet another intervening influence: the employee's physician, who must prescribe such 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 intermediar[ies]" with independent responsibility for evaluating the medical risks in light of the patient's needs. *Meridia Prods. Liab. Litig., Steering Comm. v. Abbott Labs.*, 447 F.3d 861, 867 (6th Cir. 2006).

More generally, an employee's use of her employment benefits is a quintessentially private decision to which an employer's connection is remote. Thus, in upholding a state-issued tuition grant to a student who used the grant to attend a religious school to become a pastor, the Supreme Court explained 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).

Plaintiffs would require Eden Foods's employees to compromise their own medical care—or to pay substantially more for it—to accommodate the asserted religious preference of their employer's

owner. But in suggesting this alternative, Plaintiffs have it backwards: When an organization "chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit." *Catholic Charities v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006).

II. The Application Of RFRA To Such Incidental, Attenuated Burdens Would Risk Imposing Significant Hardship On Third Parties, In This And Other Cases.

A decision exempting Plaintiffs from the contraception regulations would make it difficult and sometimes impossible for the employees of Eden Foods to obtain and use 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 laws designed to protect employees, customers, and other members of the public.

A. RFRA Does Not Authorize Plaintiffs To Impose Their Religious Views On The Corporations' 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 others. *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.* (allowing individuals to volunteer at nursing homes). None of these contemplated exemptions would have required third parties 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").

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. 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 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 rights 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. The exemption requested by Eden Foods would similarly disregard its

employees' "convenience or interests." *Id.*

Although the Supreme Court has upheld the Title VII religious exemption against Establishment Clause challenge, the exempted entity at issue in that challenge was a nonprofit religious organization. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987). The concurrence in *Amos* added that "the authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation, and has the effect of furthering religion in violation of the Establishment Clause," and "[t]he fact that an operation *is not* organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation." *Id.* at 343–44 (1987) (Brennan, J., concurring) (emphasis added).

Finally, in rejecting an Establishment Clause challenge to accommodations for prisoners' religious exercise required by the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court observed that the statute contemplated that prison officials would "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*,

544 U.S. 709, 720 (2005). Plaintiffs' employees are entitled to the same consideration.

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 exemptions from the provision of insurance 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 might 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, Letter to the Editor, *When Taking Medications Is a Sin*, 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).

In addition, 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 employee benefits requirements, but also from an 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. Corporations could refuse to hire unionized employees whose collective-bargaining agreements provided for contraception coverage. *Cf.* Sharon Otterman, *Archdiocese Pays for Health Plan That Covers Birth Control*, N.Y. Times, May 26, 2013, at A15 ("the archdiocese's own money is used

to pay for a union health plan that covers contraception and even abortion for workers at its affiliated nursing homes and clinics"). And a 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 a Hindu temple; a Christian-owned car service might refuse to transport clients to mosques; a Jewish-owned bus company might refuse to take customers to Mass.

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

would 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,

/s/ Gregory M. Lipper

Daniel Mach (dmach@aclu.org)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

Ayesha N. Khan (khan@au.org)
Gregory M. Lipper (lipper@au.org)
Caitlin E. O'Connell (oconnell@au.org)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234

July 29, 2013

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 6,929 words.

/s/ Gregory M. Lipper

Gregory M. Lipper

Designation of Relevant District Court Documents

Document Name	*Record No.*	*PageID# Range*
Plaintiffs' Brief in Support of Motion for TRO and Preliminary Injunction	10	82–114
Order Denying Motion for Preliminary Injunction	22	606–618
First Amended Complaint	27	627–666

Certificate of Service

On July 29, 2013, I electronically filed this brief of *amici curiae* on all counsel of record through the Court's ECF system.

/s/ Gregory M. Lipper

Gregory M. Lipper