[NOT YET SCHEDULED FOR ORAL ARGUMENT]
No. 13-5069

In the United States Court Of Appeals for the District of Columbia Circuit

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Francis A. Gilardi, Jr., et al.,
Plaintiffs-Appellants,

v.

United States Department of Health and Human Services, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, Judge Emmet G. Sullivan

Brief In Support of Appellees and Affirmance by *Amici Curiae* Americans United for Separation of Church and State; American Civil Liberties Union; 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

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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)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234

Counsel for Amici Curiae

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rule 28, *amici* certify the following:

A. Counsel for *amici curiae* adopts Appellees' statement of parties and *amici*, with the addition of the following *amici*: National Women's Law Center; American Association of University Women; American Federation of State, County and Municipal Employees; Black Women's Health Imperative; Ibis Reproductive Health; Merger Watch; NARAL Pro-Choice America; NARAL Pro-Choice Ohio; National Organization for Women (NOW) Foundation; Population Connection; Planned Parenthood Federation of America; Planned Parenthood of Greater Ohio; Planned Parenthood Southwest Ohio Region; Raising Women's Voices for the Health Care We Need; and Service Employees International Union; Physicians for Reproductive Health; American College of Obstetricians and Gynecologists; American Society for Emergency Contraception; Association of Reproductive Health Professionals; American Society for Reproductive Medicine; Society for Adolescent Health and Medicine; American Medical Women's Association; National Association of Nurse Practitioners in Women's Health; Society of Family Planning; International Association of

Forensic Nurses; James Trussell; Susan F. Wood; Don Downing; Kathleen Besinque; Lambda Legal Defense and Education Fund, Inc.; National Health Law Program; Mexican American Legal Defense and Educational Fund; Asian Pacific American Legal Center; Black Women's Health Imperative; Forward Together; National Hispanic Medical Association; Ipas, Sexuality Information and Education Council of the U.S. (SIECUS); Campaign to End AIDS; HIV Law Project; National Women and AIDS Collective; Housing Works; Ovarian Cancer National Alliance; National Ovarian Cancer Coalition (NOCC); Bright Pink; and Dr. Anil K. Sood.

B. Counsel for *amici curiae* adopts Appellees' statement of rulings under review.

C. Counsel for *amici curiae* adopts Appellees' statement of related cases.

D. All pertinent statutes and regulations are contained in the Appellants' Brief.

/s/ Gregory M. Lipper

Gregory M. Lipper

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), counsel for *amici curiae* makes the following disclosures:

Americans United for Separation of Church and State; American Civil Liberties Union; Anti-Defamation League; Catholics for Choice; Central Conference of American Rabbis; Hadassah, The Women's Zionist Organization of American, 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 are organizations committed to advancing civil rights and civil liberties, including the freedom of religion provided by the First Amendment to the U.S. Constitution.

None of *amici* has any parent company. No publicly-held corporation has a 10% or greater ownership interest in any of *amici*.

Certificate In Support of Separate Brief

Pursuant to Circuit Rule 29(d), a separate brief is necessary to convey the specific interest of *amici* as organizations focused on protecting and advancing the freedom of religion and the separation of church and state, as secured by the First Amendment to the U.S. Constitution.

Amici include fifteen organizations representing the interests of diverse religious traditions, and who have substantial experience addressing the intersection of religious liberty and reproductive rights. Counsel for *amici* are unaware of any party or other *amicus* before the Court that can supply these unique perspectives.

/s/ Gregory M. Lipper

Gregory M. Lipper

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HIPPAA	Health Insurance Portability and Accountability Act
RFRA	Religious Freedom Restoration Act
RLUIPA	Religious Land Use and Institutionalized Persons Act

Statement of Identity, Interest in Case, and Source of Authority to File

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 ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no

[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.

religion, is a core component of our civil liberties. ACLU routinely brings cases designed to protect individuals' right to worship and express their religious beliefs, but also vigorously protects 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 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 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 Fresh Unlimited Incorporated and Freshway Logistics Incorporated (collectively, the "Freshway Companies")—for-profit processors, packers, and carriers of produce and other refrigerated products—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—even if experienced sincerely and intensely—constitute a "substantial burden" under RFRA. If courts were prohibited from making legal distinctions between substantial burdens and lesser

burdens, 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 the Freshway Companies—secular, for-profit processors, packers, and distributors of produce and other refrigerated products—rather than to the individual owners or officers who hold personal religious beliefs about contraception. Second, the group health plan must provide the Freshway Companies' employees with a full menu of medical treatments, not contraception alone, thereby distancing the corporations 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.

Plaintiffs' alleged burden is no less attenuated merely because the Freshway Companies have decided to fund their own insurance plan, rather than to contract with a third-party insurance company for coverage. The group health plan is legally distinct from the Freshway Companies, and even further removed from the companies' individual owners and officers. In any event, the companies are free at any time to purchase comprehensive insurance policies from a third-party carrier.

An interpretation of RFRA requiring an exemption for Plaintiffs would transform the statute from a shield (to protect persons against actual 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 the Freshway Companies' employees—who may not share the religious beliefs of their employers' individual owners—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 owners of the Freshway Companies have every right to maintain their deeply held religious beliefs, to refrain from using contraception, and to attempt to persuade others to do the same. But once they enter the secular market for labor to staff their secular, for-profit corporations, they may not force their religious choices on the companies' 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 the Freshway Companies, located in and incorporated under the laws of Ohio, and their individual owners, Francis and Philip Gilardi. App. 21–22. Plaintiffs allege that due to their religious beliefs, they "cannot arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling." App. 24. Plaintiffs refer to emergency contraception as an "abortifacient," but most scientific studies have concluded that emergency contraception

operates prior to fertilization and thus does not terminate a fertilized egg; Plaintiffs are not required to offer coverage for abortion. *See Tummino v. Hamburg*, __ F. Supp. 2d __, 2013 WL 1348656, at *5 (E.D.N.Y. Apr. 5, 2013) (discussing "scientifically unsupported speculation that [Plan B] could interfere with implantation of fertilized eggs"), *appeal docketed*, No. 13-1690 (2d Cir. May 2, 2013); 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.

Although the Gilardis adhere to their religious belief that artificial contraception is immoral, App. 19, the Freshway Companies "are secular, for-profit corporations that are engaged in the processing, packing, and shipping of produce and other refrigerated products." App. 69. The Freshway Companies "provide their full-time employees with a self-insured health plan that provides health insurance and prescription drug insurance through a third-party administrator and stop-loss provider." Appellants' Br. 13. This plan excludes contraception, including emergency contraception. *See id.* at 14.

To ease employers' transition and accommodate religious concerns, the Department of Health and Human Services has promulgated or proposed certain exemptions and accommodations from the contraception regulations. The Freshway Companies, however, are ineligible for these exemptions and accommodations. App. 61. Because the Freshway Companies operate for profit, *id.*, they are ineligible for exemptions or accommodations offered to nonprofit organizations with religious objections to the contraception rules. *See* 45 C.F.R. § 147.130(a)(iv); 77 Fed. Reg. 16,501, 16,503–04 (Mar. 21, 2012); 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). And because the Freshway Companies' group health plan materially changed in March 2010, App. 25, Plaintiffs are ineligible for the grandfathering exemption, 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. App. 34. The district court denied their motion, concluding that Plaintiffs had "failed to demonstrate a likelihood of

success in establishing a 'substantial burden' on their exercise of religion." App. 80. The Freshway Companies, the court explained, "are engaged in purely commercial conduct and do not exercise religion under the RFRA," and the Gilardis "remain free to personally oppose contraception and … even the regulations that are the subject of this lawsuit." App. 71, 78–79. Moreover, because the Gilardis "have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability," "[t]hey cannot simply disregard that same corporate status when it is advantageous to do so." App. 66–67.

Finally, the court rejected the notion that a plaintiff establishes a substantial burden merely by alleging one: "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed [that] it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." App. 76 (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, __ F. Supp. 2d __, No. 12-6744, 2013 WL

140110, at *13 (E.D. Pa. Jan. 11, 2013), *injunction pending appeal denied*, No. 13-1144 (3d Cir. Feb. 7, 2013)).

A motions panel of this Court initially denied Plaintiffs' motion for an injunction pending appeal, but later reconsidered its decision and granted the motion. *See* App. 84, 86.

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). 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.

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

Plaintiffs allege that their religious beliefs prohibit them from offering insurance coverage for any form of contraception. App. 24. Although *amici* have no reason to question the sincerity of Plaintiffs'

religious beliefs, the regulations do not impose a burden on Plaintiffs that is "substantial" as a matter of law.

Virtually any conduct by a particular plaintiff could, in some manner, be thought to 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 contraception; plaintiffs in another case might object to paying a salary 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. Lest the entire federal code submit to strict scrutiny, courts must independently assess whether a plaintiff's articulated 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, 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's lead. Under this Court's precedent, "[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). In the parallel context of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, the Seventh Circuit has explained that 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).

This Court, moreover, has consistently exercised its own legal judgment to determine whether an asserted legal burden significantly impedes one's ability to follow one's religion, or instead does so only incidentally. For instance, in *Kaemmerling*, the Court rejected the claim of a prisoner who challenged the DNA testing of his blood, because the plaintiff objected not to the extraction of his blood *per se*, but to the government's testing of that blood for DNA. *See* 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.*

This Court also 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." *See id.* at 16–17.

Under this Court's precedent, 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 the contraception regulations

incidental and attenuated. First, the contraception coverage must be provided by the Freshway Companies, which are secular, for-profit corporations, rather than by the Gilardis personally. Second, the corporations must provide coverage for a comprehensive set of healthcare services, not contraception alone. Third, the corporations' group health plan would cover the cost of contraception only if an employee chooses to purchase contraception, typically after receiving a prescription from her physician.

In other words, "[t]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the corporate plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion." *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal) (emphasis in original; quotation marks and alterations omitted), *appl. for injunction denied*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice). 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 the Gilardis, but by their secular, for-profit corporations.*

Any purchase of comprehensive health insurance required by federal law is paid for not by the Gilardis, but by the Freshway Companies, for-profit businesses "engaged in the processing, packing, and shipping of produce and other refrigerated products." App. 58. An individual owner 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). Here, the Gilardis' religious beliefs are one step removed from the regulations, which apply to the corporations; and the secular, for-profit corporations exercise religion only incidentally, if at all.

Plaintiffs urge this Court to disregard "the nuances of corporate law," Appellants' Br. 35, but the legal difference between the Gilardis and the Freshway Companies is more than a subtle technicality. The corporate form limits the responsibility of individual owners for the company's debts and liabilities. *See Dombroski v. WellPoint, Inc.*, 895

N.E.2d 538, 542 (Ohio 2008) ("The principle that shareholders, officers, and directors of a corporation are generally not liable for the debts of the corporation is ingrained in Ohio law."). And this grant of limited liability applies fully to the owners of companies, like the Freshway Companies, that are closely-held or family-owned: "It is well settled that a corporation is a separate legal entity from its shareholders, even when the corporation only has one shareholder." *My Father's House No. 1, Inc. v. McCardle*, 986 N.E. 2d 1081, 1089 (Ohio Ct. App. 2013).

The Gilardis may not receive 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).

Further, although churches and other houses of worship may well warrant a different analysis, the corporations in this case engage in secular activity (the processing, packing, and shipping of produce) for secular ends (financial profit). Plaintiffs contend that, notwithstanding

their overriding secular purpose and activity, the Freshway Companies exercise religion because the companies contribute to various charities, donate a truck for use at a Catholic parish's annual picnic, operate under a statement of values that references "ethics," and accommodate their employees' religious beliefs by allowing Muslim employees to adjust break periods during Ramadan. App. 23–24. But incidental charitable contributions and reasonable, statutorily required accommodations of employees' religious beliefs do not infuse religious exercise into the Freshway Companies' day-to-day commercial transactions—including commercial transactions with their employees—when performing their core activity of operating for-profit businesses.

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 operation of produce processing and packing companies, owned by individuals who happen 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 the processing, packing, and distribution of produce. 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 coverage is only one benefit within a comprehensive insurance plan.

The Freshway Companies are required to provide their employees with a comprehensive insurance policy that covers contraception as one item among a range of preventive 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). In a plan this comprehensive, the connection between the corporation and any particular covered 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 v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), 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 id.* at 841–43. The provision of a comprehensive insurance policy, rather than coverage for contraception alone, similarly attenuates the connection between the Freshway Companies 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 the Freshway Companies' 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." *Hobby Lobby Stores*, 2012 WL 6930302 at *3. That independent conduct—private medical decisions made by doctor and patient—further distances the Freshway Companies 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. This Court reached the same conclusion in *American Jewish Congress v. Corporation for National & Community Service*, 399 F.3d 351 (D.C. Cir. 2005), upholding the grant of education awards to AmeriCorps participants who taught in religious schools, because "those participants who choose to teach in religious schools do so only as a result of their own … private choice." *Id.* at 358.

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.

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]" who "balance the needs of patients against the risks and benefits of a particular drug or therapy." *Tracy v. Merrell Dow Pharm., Inc.*, 569 N.E.2d 875, 878 (Ohio 1991).

More generally, an employee's use of her employment benefits is a quintessential 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 argue, however, that "paying an employee's salary, which may be spent on any number of things, is morally distinguishable from Plaintiffs directly arranging and paying for specific objectionable products and services themselves." Appellants' Br. 31–32. Yet as detailed above in section I.B.2, Plaintiffs are required to offer policies that cover a broad array of services, not just contraception. And the argument asserted by Plaintiffs in this case—that employees' private decisions about the use of their employment benefits implicate their employer's religious beliefs—could easily be extended by another employer with sincere religious objections to paying employees who might use their salary to purchase contraception.

Rather than allow their employees to make their own decisions about the use of their own health benefits, Plaintiffs would require their employees to obtain contraception online, out of pocket, or "through Title X and Medicaid funding." Appellants' Br. 58, 62. This approach would require employees to compromise their own medical care—or to pay substantially more for it—to accommodate the religious preference

of their employers' owners. And 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).

C. The Freshway Companies May At Any Time Contract With A Third-Party Insurance Company To Provide Health Coverage.

Plaintiffs' burden is no more significant merely because the Freshway Companies fund their own employee health plan instead of providing health-insurance policies issued by a third-party insurance company. Under either scenario, the same intervening factors remain: (1) the coverage obligation applies to the corporations, 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, in consultation with her physician.

Nor does the decision to self-insure mean that the Freshway Companies directly fund their employees' medical care. Under the Employee Retirement Income Security Act, the group health plan is

legally distinct from the Freshway Companies. *See* 29 U.S.C. § 1132(d)(1) ("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 designed as a separate entity in part to create a barrier between employees and employers, consistent with federal regulations protecting the privacy of patients' medical information. *See* 45 C.F.R. §§ 164.508, 164.510.

Plaintiffs, moreover, can avoid any perceived burden associated with self-funding by providing health coverage to their employees through a third-party carrier. If Plaintiffs were to exercise their option to contract with a third-party carrier, any payment for contraception would be made not by the Freshway Companies, but by the third-party insurance provider, 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 (Establishment Clause permitted university to reimburse expenses accrued by campus religious publication, in part because university did not reimburse the religious

publication directly, but instead paid a third-party printing press with whom student group had contracted). Although the Freshway Companies may have chosen to self-insure to save money, 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 contraceptive-coverage requirements would make it difficult and sometimes impossible for the employees of the Freshway Companies 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.* (volunteering in nursing homes). The exemptions contemplated by Congress would not 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 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. The

exemption requested by the Freshway Companies would similarly disregard its employees' "convenience or interests." *Id.*

Although the Supreme Court upheld the Title VII religious exemption against Establishment Clause challenge, the exempted entity at issue was a nonprofit religious organization; the concurrence 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 that "[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." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343–44 (1987) (Brennan, J., concurring) (emphasis added). And in upholding RLUIPA against an Establishment Clause challenge, 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 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 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. 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 an 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 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)
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW; Suite 850E
Washington, DC 20005
(202) 466-3234

June 14, 2013

Certificate of Compliance

I hereby certify to the following:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,955 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in Microsoft Word, Century Schoolbook, 14-point font.

/s/ Gregory M. Lipper

Gregory M. Lipper

Certificate of Service

On June 14, 2013, I electronically filed this brief of *amici curiae* with the Clerk of this Court through the appellate CM/ECF system.

The participants in the case are registered CM/ECF users, and service will be accomplished through the appellate CM/ECF system.

/s/ Gregory M. Lipper

Gregory M. Lipper