No. 12-2673

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION; AUTOCAM MEDICAL, LLC; JOHN KENNEDY, III; PAUL KENNEDY; JOHN KENNEDY, IV; MARGARET KENNEDY; and THOMAS KENNEDY,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, in her official capacity as the Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:12-CV-1096, Hon. Robert J. Jonker

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN; THE ANTI-DEFAMATION LEAGUE; CATHOLICS FOR CHOICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; THE INTERFAITH ALLIANCE FOUNDATION; THE NATIONAL COALITION OF AMERICAN NUNS; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; THE RELIGIOUS INSTITUTE; THE UNITARIAN UNIVERSALIST ASSOCIATION; AND THE UNITARIAN UNIVERSALIST WOMEN'S FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

No *amici* have parent corporations or are publicly held corporations.

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STATEMENT OF *AMICI*

Amici are organizations that have a strong commitment to defending the fundamental right to religious liberty. *Amici* provide this brief to respectfully request that this Court affirm the District Court's denial of a preliminary injunction in this case. Specifically, *Amici* argue that Appellants are unlikely to succeed on the merits of their Religious Freedom Restoration Act claim because requiring an employer – particularly a for-profit corporation – to provide comprehensive health insurance to its employees does not substantially burden the company's owners' religious exercise.

IDENTITY OF *AMICI*

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 Fund of Michigan is the legal and educational wing of the ACLU of Michigan, and an affiliate of the national ACLU. The ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the ACLU regularly brings cases designed to protect individuals' right to worship and express their religious beliefs. At the same time, the ACLU vigorously protects reproductive freedom, and has

participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

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, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation and entanglement with religion, and strives to advance individual religious liberty. ADL counts among its core beliefs strict adherence to the separation of church and state embodied in the Establishment Clause, and also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. In striving to support a robust, religiously diverse society, 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 was founded in 1973 to serve as a voice for Catholics who believe that the Catholic tradition supports a woman's moral and legal right to follow her conscience in matters of sexuality and

reproductive health. It is dedicated to the principle of freedom of religion for all people and to quality health care for people of all faiths.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 members, associates and supporters nationwide. While traditionally known for its role in initiating 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. Hadassah strongly believes that women have the right to make family planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral and ethical values. Consistent with those commitments, Hadassah is a strong supporter of the contraceptive rule and an advocate for the position that the rule's implementation does not violate the Religious Freedom Restoration Act.

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 no faith tradition. Interfaith Alliance supports people who believe

their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

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. NCAN works for justice and peacemaking in our personal lives, ministries, congregations, churches and civil society. 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. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's Principles state that "[r]eligious liberty and the separation of religion and state are constitutional principles that must be protected and

preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") 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.

Founded in 2001, and an independent 501(c)(3) since 2012, the Religious Institute is a multi-faith organization dedicated to advocating within faith communities and society for sexual health, education, and justice. The Religious Institute is a national leadership organization working at the intersection of sexuality and religion. The Religious Institute staff provides clergy, congregations, and denominational bodies with technical assistance in addressing sexuality and reproductive health, and assists sexual and reproductive health organizations in their efforts to address religious issues and to develop outreach to faith communities. The Religious Institute is strongly committed to assuring that all women have equal access to

contraception and firmly believes that the contraceptive coverage rule does not create a substantial burden on religious exercise.

The Unitarian Universalist Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state. The UUA participates in this *amicus curiae* brief because it believes that the federal contraceptive rule does not create a substantial burden on religious exercise under the Religious Freedom Restoration Act.

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. As an affiliate organization of the Unitarian Universalist Association of Congregations, its membership of local Unitarian Universalist women's groups, alliances and individuals 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, with the affordable availability of birth control being essential and fundamental. The Unitarian Universalist Women's Federation has long recognized and will continue to oppose structural constraints posed when health care systems and health insurance providers limit or deny access to contraception and other reproductive health care.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* have obtained consent from all parties to file this brief.

AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF

No party's counsel authored this brief in whole or in part. With the exception of *amici*'s counsel, no one, including any party or party's counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Appellants are not likely to succeed on their claim that the federal contraceptive rule, which requires contraception to be offered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), substantially burdens their religious exercise under the Religious Freedom Restoration Act ("RFRA"). This Court already held as much when it denied Appellants' motion for an injunction pending appeal. *Autocam Corp. v. Sebelius*, 12-2673 (6th Cir. Dec. 28, 2012). In that decision, this Court relied on the District Court's "reasoned opinion," *id*. at 2, which properly held that the contraception rule did not likely substantially burden Appellants' religious beliefs. The District Court reached this decision in part because "[t]he incremental difference between providing the benefit

directly," such as a health plan that covers contraception, "rather than indirectly," like paying salary that can be used to purchase contraception, "is unlikely to qualify as a substantial burden on the Autocam Plaintiffs." *Autocam Corp. v. Sebelius*, No. 12-CV-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012).

In denying the motion for an injunction pending appeal, this Court also referenced another, almost identical case, called *Hobby Lobby*. *Autocam*, No. 12-2673, slip op. at 2 (citing *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice) (denying an injunction pending appellate review)). In *Hobby Lobby*, the Tenth Circuit denied a motion for an injunction pending appeal, agreeing with the district court's holding that the plaintiffs were unlikely to succeed on the merits of the RFRA claim because the relationship between the contraceptive rule and the plaintiffs' religious beliefs was "indirect and attenuated." *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)).

This Court should similarly affirm the District Court's holding. Indeed, Appellants have failed to show that the contraception rule likely places a "substantial burden" on their exercise of religion for two reasons.

First, the connection between the contraceptive rule and any impact on Appellants' religious exercise is simply too attenuated to rise to the level of a "substantial burden." The law does not require Appellants to use contraception themselves, to physically provide contraception to their employees, or to endorse the use of contraception. The contraceptive rule creates no more infringement on Appellants' religious exercise than many other actions that Appellants readily undertake, such as paying an employee's salary, which that employee could then use to purchase contraception. Second, the employee's independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellants' religious exercise.

Furthermore, RFRA does not permit Appellants to impose their religious beliefs on their employees. As another court has noted in upholding the federal contraceptive rule, RFRA "is a shield, not a sword." *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476-CEJ, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold

religious beliefs that differ from one's own." *Id*. Accordingly, this Court should affirm the decision below.

ARGUMENT

I. The Federal Contraceptive Rule Does Not Substantially Burden Appellants' Exercise of Religion Under the Religious Freedom Restoration Act.

RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to restore the strict scrutiny test for claims alleging substantial burdens on the exercise of religion. Specifically, 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.

Although RFRA does not define "substantial burden," this Court has held that it is a high "hurdle" to cross. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007).[1] In that case, this Court set out a framework to "measure" a "substantial burden,"

[1] Although *Living Water Church of God* is a Religious Land Use and Institutionalized Persons Act ("RLUIPA") case, cases under RLUIPA are instructive because that statute also prohibits government-imposed "substantial burdens" on religious exercise. 42 U.S.C. § 2000cc(a)(1).

asking, "does the government action place substantial pressure on a religious institution to violate its religious beliefs" even if "the government action may make religious exercise more expensive or difficult?" *Id*. at 737.

Thus, while a RFRA claim may proceed when the plaintiff alleges that he or she was forced by the government to act in a manner that is inconsistent with his or her religious beliefs, not "every infringement on religious exercise will constitute a substantial burden." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010). As the Eleventh Circuit has held, "a substantial burden must place more than an inconvenience on religious exercise," and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[2] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious

[2] Although some of the cases cited herein are free exercise cases decided prior to *Smith*, courts have held that those cases are instructive in the RFRA context "since RFRA does not purport to create a new substantial burden test" but rather restores the pre-*Smith* test. *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Living Water Church of God*, 258 F. App'x at 736 ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence[.]").

exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted).

The party claiming a RFRA violation must establish that the governmental policy at issue substantially burdens the sincere exercise of his or her religion. *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir. 2005); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006). Only after the plaintiff establishes a substantial burden does the burden shift to the government to prove that the challenged policy is the least restrictive means of furthering a compelling government interest. *Id*. Appellants here cannot meet their duty of demonstrating that their religious exercise is substantially burdened.

Appellants claim that District Court erred by determining the "substantiality" of their religious beliefs. Appellants' Principal Br. at 18. But the District Court did no such thing. To the contrary, the District Court repeatedly acknowledged that it did not doubt the sincerity of Appellants' religious opposition to contraception. *Autocam Corp.*, 2012 WL 6845677, at *6, *7. But the District Court correctly held that the mere assertion of a sincerely held religious belief does not mean that the courts cannot assess whether the contraceptive rule imposes a "substantial burden" on the exercise of that sincerely held religious belief. *Id*. at *6 ("the Court still has

a duty to assess whether the claimed burden – no matter how sincerely felt – really amounts to a substantial burden on a person's exercise of religion"). *See also Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (holding in a RFRA challenge that although the government conceded that the plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (although, on a motion to dismiss, courts assessing RFRA claims must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," whether the exercise of those beliefs is "substantially burdened" is a question of law properly left to the judgment of the courts). Indeed, accepting Appellants' argument would read the term "substantial burden" out of RFRA altogether, a drastic step already rejected by this Court. *Living Water Church of God*, 258 Fed. Appx. at 736. For example, if it were the case that the mere assertion of a sincerely held religious belief established that the government action substantially burdened religion, it "would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of

RFRA." *Autocam Corp*, 2012 WL 6845677, at *7. Such a rule would "paralyze the normal process of governing." *Id.*

A. The Connection Between the Contraceptive Rule and the Impact on Appellants' Religious Exercise Is Too Attenuated to Rise to the Level of "Substantial Burden."

The contraceptive rule does not render Appellants' religious exercise "effectively impracticable." As the District Court properly held, the rule does not compel the owners of Autocam "to do anything. They do not have to use or buy contraceptives for themselves or anyone else." *Id.* at *6. Appellants are also not forced to endorse the use of contraception. The contraception rule simply does not prohibit any religious practice or otherwise substantially burden Appellants' religious exercise, as the District Court found. The rule only requires Appellants to provide a comprehensive health insurance plan to their employees.

While that health insurance plan might be used by a third party to obtain health care that is inconsistent with Appellants' religious beliefs, such indirect financial support of a practice from which Appellants themselves wish to abstain according to religious principles does not constitute a substantial burden on Appellants' religious exercise. The District Court held that Appellants did not show a substantial burden on their religious beliefs in part because an "employee makes an entirely independent decision to

purchase" contraception. *Id*. Furthermore, as the Tenth Circuit explained in denying an injunction pending appeal in *Hobby Lobby Stores*:

> The particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the corporate plan, subsidize someone else's participation in an activity that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc., 2012 WL 6930302, at *3 (internal citations and quotations marks omitted). Thus, the court concluded that there was not a substantial likelihood that the court would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.*; *see also Conestoga Wood Specialties Corp. v. Sec'y U.S. Dep't of Health & Human Servs.*, No. 13-1144 (3d Cir. Feb. 7, 2013) (denying motion for injunction pending appeal in contraceptive rule challenge because the plaintiff was unlikely to succeed on the merits of their claims).

The District Court's decision is also consistent with other cases presenting similar facts. For example, in *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Appellants' claims here. 94 F.3d 1294 (9th Cir. 1996). In that case, public university students objected to paying a registration fee on the ground that the fee was used to

subsidize the school's health insurance program, which covered abortion care. *Id*. at 1297. The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious beliefs, but at most placed a "minimal limitation" on their free exercise rights. *Id*. at 1300. The court noted that the plaintiffs are not "required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services." *Id*.

In *Seven-Sky v. Holder*, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals maintain health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *affirming Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The district court held that inconsequential burdens on religious practice, like the requirement to have health insurance, "do[] not rise to the level of a substantial burden." *Mead*, 766 F. Supp. 2d at 42.

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by compliance with the Fair Labor Standards Act ("FLSA"). 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). The school paid married male, but not married female, teachers a "salary supplement" based on the school's religious belief that the husband is the head of the household. *Id*. at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers, and, accordingly, a violation of FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened the exercise of its religious beliefs, holding that compliance with FLSA imposed, "at most, a limited burden" on the school's free exercise rights. *Id*. at 1398. "The fact that [the school] must incur increased payroll expense to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id*.; *see also Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their

business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here. The mere fact that someone might have used the student health insurance in *Goehring* to obtain an abortion, or the fact that Appellants' employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on others' religious practice. Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their female employees does not substantially burden religious exercise. Appellants remain free to exercise their religious beliefs by not using contraceptives and by publicly advocating against the federal contraceptive rule.[3]

Indeed, as the District Court held, the burden on Appellants' religious exercise is just as remote as other activities they subsidize that are also at odds with their religious beliefs. For example, Appellants pay salaries to their employees and provide their employees with up to $1500 for their

[3] Moreover, the same would be true if a company owned by a Jehovah's Witness insisted on excluding blood transfusions from its employees' health plan because of the owner's beliefs, or if a Christian Scientist business owner refused, in violation of the ACA, to provide health insurance coverage based on his or her religious beliefs.

health savings account – money the employees may use to purchase contraceptives. The District Court held that the health insurance plan, salary, and the contribution to the health savings account, "involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and the money originating from the Autocam Plaintiffs will pay for it." *Autocam Corp.*, 2012 WL 6845677, at *6. The District Court held that Appellants cannot "draw a line between the moral culpability of paying directly for contraceptive services their employees choose, and of paying indirectly for the same services through wages or health savings account." *Id*.

Furthermore, just as the court recognized in *Mead*, Appellants "routinely contribute to other forms of insurance" via their taxes that include contraception coverage such as Medicaid, and they contribute to federally funded family planning programs. 766 F. Supp. 2d at 42. These federal programs "present the same conflict with their [religious] beliefs." *Id*. But like the federal contraceptive rule, the connection between these programs and Appellants' religious beliefs is too attenuated. The Eighth Circuit has also held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked

standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women). Thus, as the District Court held, "[t]he incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden." *Autocam Corp.*, 2012 WL 6845677, at *6.

B. An Employee's Independent Decision to Use Her Health Insurance to Obtain Contraception Breaks the Causal Chain Between the Government's Action and Any Potential Impact on Appellants' Religious Exercise.

It is a long road from Appellants' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for contraceptives. As the District Court held, the contraceptive rule "will keep the locus of decision-making" with each employee and not Appellants, and an employee makes the "entirely independent decision to purchase" contraception. *Autocam Corp.*, 2012 WL 6845677 at *6. Indeed, the independent action of an employee breaks the causal chain for any violation of RFRA. In this respect, the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is instructive.

In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause because parents' "genuine and independent private choice" to use the voucher to send their children to religious schools

broke "the circuit between government and religion." *Id*. at 652. Here, as the Tenth Circuit concluded, an employer may end up subsidizing activity with which it disagrees only after a "series of independent decisions by health care providers and patients" covered by the company's health plan. *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (citation omitted). Therefore, as in *Zelman*, this scenario involves an employee's independent and private choice, which breaks the causal chain between government mandate and the exercise of religion. Any slight burden on Appellants' religious exercise is far too remote to warrant a finding of a RFRA violation.

II. RFRA Does Not Grant Appellants a Right to Impose Their Religious Beliefs on Their Employees.

RFRA cannot be used to force one's religious practices upon others and to deny them rights and benefits. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *see Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *see Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, where only the plaintiffs' rights were at issue, Appellants here are attempting to invoke RFRA to deny equal health benefits to their employees, whose beliefs about contraception – religious or otherwise – may be different than those of their employers. *See Catholic*

Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004) ("[A]ny exemption from the [California contraceptive equity law] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We 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."). As the Tenth Circuit concluded, the instant action is different from "other cases enforcing RFRA," which were brought "to protect a plaintiff's *own* participation in (or abstention from) a specific practice required (or condemned) by his religion." *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (emphasis added). Furthermore, as another court has held, "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien*, 2012 WL 4481208, at *6. Finally, as the Supreme Court noted in rejecting an employer's religious objection to paying social security taxes: "Granting an exemption . . . operates to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S.

252, 261 (1982). RFRA cannot be invoked as "a sword" to impose Appellants' religious beliefs on their employees. *O'Brien*, 2012 WL 4481208 at *6.

CONCLUSION

Accordingly, this Court should affirm the decisions below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2013, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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