No. 13-13879

In the United States Court Of Appeals
for the Eleventh Circuit

Beckwith Electric Company, Inc., et al.,
Plaintiffs-Appellees,

v.

Secretary, U.S. Department of Health and Human Services, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Judge Elizabeth A. Kovachevich

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Brief In Support of Appellants and Reversal by *Amici Curiae* Americans United for Separation of Church and State; American Civil Liberties Union; American Civil Liberties Union of Florida; 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 Association; Unitarian Universalist Women's Federation; and Women of Reform Judaism

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Circuit Rule 26.1-1, counsel for *amici curiae* certifies that none of the *amici* parties has any parent company. No publicly-held corporation has a 10% or greater ownership interest in any of the *amici* parties.

Counsel for *amici curiae* further certifies that, to the best of our knowledge, the following persons, firms, and associations may have an interest in the outcome of this case:

American Civil Liberties Union

American Civil Liberties Union of Florida

Americans United for Separation of Church and State

Anti-Defamation League

Association of Christian Schools International

Association of Gospel Rescue Missions

Beckwith Electric Company, Inc.

Beckwith, Thomas R.

Brinkmann, Beth C.

C12 Group

Catholics for Choice

Central Conference of American Rabbis

Christian Legal Society

Delery, Stuart F.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

Fowler White Boggs P.A.

Gannam, Roger K.

Gershengorn, Ian Heath

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

Hindu American Foundation

Institutional Religious Freedom Alliance

Interfaith Alliance Foundation

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National Coalition of American Nuns

National Council of Jewish Women

O'Neill, Robert E.

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Prison Fellowship Ministries

Religious Coalition for Reproductive Choice

Religious Institute

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Thompson, Richard

Union for Reform Judaism

Unitarian Universalist Association

Unitarian Universalist Women's Federation

United States Department of Health & Human Services

United States Department of Justice

United States Department of Labor

United States Department of the Treasury

Winship, Blaine H.

Women of Reform Judaism

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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 and the nation's civil rights laws. **The American Civil Liberties Union of Florida** is one of its state affiliates. The

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

ACLU has a long history of defending the fundamental right to religious liberty, and routinely brings cases designed to protect the right to religious exercise and expression. 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 Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state, and believes that the federal contraceptive rule does not substantially burden 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. 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 Beckwith Electric Company—a secular, for-profit company that designs and manufactures microprocessors for power-system generators—from the requirement to make coverage

available for emergency contraception. 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, conditioning employees' private medical decisions on their employers' religious beliefs.

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 face strict scrutiny. Although Plaintiffs may genuinely object to providing insurance that employees might use to purchase emergency contraception, a substantial burden under RFRA does not arise from such incidental effects.

Indeed, any burden imposed on Plaintiffs' religious exercise is attenuated in several respects. First, federal law applies the insurance regulations to Beckwith Electric, rather than to the individual owner who holds personal religious beliefs about contraception. Second, even Beckwith Electric does not buy emergency 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 Beckwith Electric's employees with a full menu of medical treatments, not emergency contraception alone, thereby distancing the corporation from any particular form of covered care. Fourth, the insurance company pays for emergency 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 Beckwith Electric's employees—who may not share the religious beliefs of their employer's individual owner—by interfering with their ability to obtain the full range of affordable contraception.

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 Beckwith Electric 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 Beckwith Electric Company, a for-profit manufacturer of microprocessor-based technology for electric power generators, and the company's Chief Executive Officer, Thomas Beckwith, who also owns 93% of its shares. Doc. 1 (Complaint) ¶¶ 28, 30, 34. Mr. Beckwith believes that emergency contraception "is a grave sin," *id.* ¶ 60, and he does "not believe that emergency contraception, abortion, [and] abortifacients … are properly understood to constitute

medicine, health care, or a means of providing for the well being of persons," *id.* ¶ 52.

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. Beckwith Electric, however, is ineligible for these exemptions and accommodations. Because Beckwith Electric operates for profit, *id.* ¶ 70, 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 Beckwith Electric is ineligible for the grandfathering exemption, Doc. 1 (Complaint) ¶ 86, 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).

The employee insurance policies at issue are purchased not by Mr. Beckwith, but by Beckwith Electric—"a secular, for-profit property corporation." Doc. 39 (Order), pg. 3. Beckwith Electric, in turn, provides

its employees with insurance policies issued by Humana. Doc. 1 (Complaint) ¶ 45. Plaintiffs alleges that in August 2012, Humana "added coverage for emergency contraception and abortifacients to its group health plans." Doc. 10 (Plaintiffs' Motion for Preliminary Injunction) pg. 4.

In December 2012, Plaintiffs investigated its employees' use of emergency contraception under the company health plan. Mr. Beckwith allegedly confirmed with the company's insurance agent "that not one participant in Plaintiffs' insurance plan has ever used the plan for emergency contraception, abortion, abortifacients, and any drugs, devices, and services that are capable of killing innocent human life." Doc. 1 (Complaint) ¶ 80 (emphasis in original).[2] Plaintiffs' plan currently "excludes abortifacient pills (i.e. Plan B, Ella, or any

[2] Plaintiffs contend that emergency contraception acts as an abortifacient. *See id.* ¶ 74. But most scientific studies conclude that emergency contraceptive pills and intrauterine 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.

alternative) and copper IUDs." Doc. 38 (Plaintiffs' Notice of Clarification to Record) pg. 1.

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* Doc. 10 (Plaintiffs' Motion for Preliminary Injunction) pgs. 7–22. The district court granted a preliminary injunction on the basis of Plaintiffs' RFRA claim. Doc. 39 (Order) pg. 36. The district court believed that Beckwith Electric "is merely the instrument through and by which Beckwith expresses his religious beliefs," *id.* at 25, 26, but acknowledged that "no court has expressly held that a secular, for-profit corporation can assert its own right to exercise religion." *Id.* at 10.

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, however, 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 insurance policies that cover emergency contraception; plaintiffs in another case might object to paying minimum wage to an employee who might use the money to buy emergency contraception; plaintiffs in yet another case might object to compensating an employee who might use the funds to purchase books to learn about emergency contraception.

Because almost any rule or regulation 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, while RFRA's first draft prohibited the government from imposing any burden on free exercise, Congress added the adverb "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.

This court has followed Congress's lead, recognizing that a "'substantial burden' requires something more than an incidental effect on religious exercise." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). 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 v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), 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 id.* at 679. Even though the government extracted the plaintiff's blood for the purpose of testing his DNA, and even though the plaintiff asserted a religious objection to having his blood drawn for such testing, the court concluded that the objected-to practice was one step removed from the plaintiff's religious exercise: "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 they 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 Beckwith Electric—a secular, for-profit manufacturer of microprocessing technology—rather than by Mr. Beckwith personally.

Second, emergency contraception is paid for by a third-party insurance company, not by either Mr. Beckwith or Beckwith Electric. Third, the insurance company must provide coverage for a comprehensive set of healthcare services, not emergency contraception alone. Fourth, the insurance company pays for emergency contraception only if an employee independently chooses to purchase it, often after receiving a prescription from her physician.

Given this series of intervening steps, the district court incorrectly concluded that Plaintiffs were likely to demonstrate a substantial burden under RFRA.

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

Any required purchase of comprehensive health insurance is paid for not by Mr. Beckwith, but by Beckwith Electric, "a secular, for-profit corporation." Doc. 39 (Order) pg. 3. As an individual owner, Mr. Beckwith 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. Beckwith'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, Beckwith Electric, is not exercising religion.

Plaintiffs assert that "[t]he corporate form cannot be a reason to declare an entity incapable of exercising religion." Doc. 10 (Plaintiffs' Motion for Preliminary Injunction) pg. 9. But the laws of Florida, where Beckwith Electric is incorporated, state that "[t]he general rule is that corporations are legal entities separate and distinct from the persons comprising them." *Corporate Express Office Prods., Inc. v. Phillips*, 847 So. 2d 406, 411–12 (Fla. 2003) (quotation marks omitted). This legal distinction between owner and corporation applies fully to companies, like Beckwith Electric, that are closely held or family-owned: "[T]he law is clear that mere ownership of a corporation by a few shareholders, or even one shareholder, is an insufficient reason to pierce the corporate veil...." *Beltran v. Miraglia*, __ So. 3d __, 2013 WL 1442239, at *2 (Fla. Dist. Ct. App. Apr. 10, 2013).

In recently rejecting similar challenges to the contraception regulations by for-profit corporations and their owners, both the Third and Sixth Circuits stressed the distinction between individual owner and for-profit company: "The decision to comply with the mandate falls

on [the company], not the [owner]." *Autocam Corp. v. Sebelius*, __ F.3d __, 2013 WL 5182544, at *5 (6th Cir. Sept. 17, 2013). This reasoning applies fully here: "Since [Beckwith Electric] is distinct from [Mr. Beckwith], the Mandate does not actually require [Mr. Beckwith] to do anything. All responsibility for complying with the Mandate falls on [Beckwith Electric]." *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).

Nor may Mr. Beckwith 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. Beckwith] chose to incorporate and conduct business through [Beckwith Electric], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, 2013 WL 3845365, at *8.

Moreover, Beckwith Electric, to which the contraception regulations actually apply, does not exercise religion here. 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 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 Beckwith Electric exercises religion in the first place.

Whether or not a "person" under RFRA includes a for-profit corporation, Beckwith Electric is not engaging in "religious exercise" here. 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." *Conestoga Wood*, 2013 WL 3845365, at *5. And although churches and other houses of worship may well be subject to a different analysis, Beckwith Electric engages in secular activity (the design and manufacture of microprocessor-based technology) for secular ends (financial profit).

Plaintiffs disagree, on the ground that, in addition to offering its employees secular amenities such as a gym membership, the company

provides a corporate chaplain and donates to charitable causes, including a pregnancy crisis center. *See* Doc. 1 (Complaint) ¶¶ 36–38, 40–44. But neither the provision of a corporate chaplain nor incidental charitable contributions suffices to impart a religious purpose in Beckwith Electric's core business activity: the manufacture of microprocessor-based technology for electric power generators. *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 the company is certainly not exercising religion during routine 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 technology for electric power generators is an even more secular pursuit.

Mr. Beckwith has taken advantage of the unique benefits offered by the corporate form, and he has used that corporate form to make money in the secular market for microprocessor-based technology. 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. Beckwith Electric does not buy emergency 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 Beckwith Electric to pay for emergency contraception directly. Rather, Beckwith Electric contracts with an independent company (Humana), to which it pays premiums for the coverage of a full range of medical procedures and services. If and when an employee chooses to purchase

emergency contraception, the payment for such contraception would be made not by Mr. Beckwith or Beckwith Electric, 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 Beckwith Electric and the use of emergency 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, but 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.

Beckwith Electric maintains a similar degree of separation from the funding of contraception. The corporation pays insurance premiums to a third-party insurance company. Later on, the insurance company—upon the employee's submission of a claim for the coverage of emergency 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. Emergency contraception coverage is only one benefit within a comprehensive insurance plan.

The insurance company hired by Beckwith Electric is required to provide its employees with a comprehensive insurance policy that covers emergency contraception as one item within 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 Beckwith Electric and any particular medical product or service ultimately covered by the insurance plan.

4. Emergency 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 Beckwith Electric's employees choose to use contraception. That independent conduct—a private medical decision made by doctor and patient—further distances Beckwith Electric 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. *Hoffmann-La Roche Inc. v. Mason*, 27 So. 3d 75, 77 (Fla. Dist. Ct. App. 2009) (per curiam).

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 Beckwith Electric'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 Beckwith Electric to obtain and use emergency 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) (allowing 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 fully 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 id.* 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).

An interpretation of RFRA requiring an exemption for Plaintiffs from the contraception regulations would also place the statute 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 Beckwith Electric 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 in that case 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 *Amos* 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 "[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 prison officials would need to "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.

Plaintiffs seek to downplay the burden on the company's employees, alleging that Mr. Beckwith has investigated the company's employees' use of contraception and that "none of Plaintiffs' plan participants have used their group insurance plan for abortifacient or emergency contraceptive coverage." Doc. 10 (Plaintiffs' Motion for Preliminary Injunction) pg. 4. But that is no reason to deprive Plaintiffs' employees of the option to use these services—Plaintiffs offered this coverage for just a few months, and the very purpose of insurance is to ensure that medical treatments are covered if and when they are needed. Nobody would suggest that Plaintiffs should stop covering chemotherapy merely because none of the company's employees got cancer during the previous four months; coverage for reproductive healthcare should be treated no differently.

More generally, Plaintiffs' investigation into its employees' reproductive healthcare underscores the dangers of granting employers a legal interest in their employees' healthcare decisions. Even when it pays for health insurance, "the employer acquires no right to intrude upon the employee's relationship with her physician and participate in her medical decisions...." *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting from grant of injunction pending appeal). If accepted, Plaintiffs' argument would compromise the independence of employees' medical decisions and make them an ongoing subject of inquiry from employers.

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 certain kinds of end-of-life 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).

The burden claimed by Plaintiffs could also 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 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 reversed.

Respectfully submitted,

/s/ Gregory M. Lipper

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Certificate of Compliance

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Certificate of Service

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