NO. 13-1077
[Consolidated with No. 12-3841]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GROTE INDUSTRIES, LLC, an Indiana limited liability company, GROTE INDUSTRIES, INC., an Indiana corporation, WILLIAM D. GROTE, III, WILLIAM DOMINIC GROTE, IV, WALTER F. GROTE, JR., MICHAEL R. GROTE, W. FREDERICK GROTE, III, and JOHN R. GROTE,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, No. 4:12-cv-00134
The Honorable **Sarah Evans Barker**, Judge Presiding

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February 19, 2013

DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, the undersigned makes the following disclosures:

1. The full name of every party that the attorney represents in this case: Plaintiffs-Appellants Grote Industries, LLC; Grote Industries, Inc.; William D. Grote, III; William Dominic Grote, IV; Walter F. Grote, Jr.; Michael R. Grote; W. Frederick Grote, III; John R. Grote.

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this court: Broyles Kight & Ricafort, P.C.; Bamberger Foreman Oswald & Hahn, LLP; Sturgill, Turner, Barker, & Moloney, PLLC, and Alliance Defending Freedom.

3. Grote Industries, Inc. is a closely-held family owned corporation owned by the individually-named Plaintiffs. Grote Industries, Inc. is the parent corporation of Grote Industries, LLC. No parents, trusts, subsidiaries, and/or affiliates of either entity have issued shares or debt securities to the public, and there is no publicly held company that owns 10% or more of either entity.

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JURISDICTIONAL STATEMENT

1. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 & 1361, jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 & 2202, 42 U.S.C. § 2000bb-1, 5 U.S.C. § 702, and Fed. R. Civ. P. 65, and to award reasonable attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, and 42 U.S.C. § 1988.

2. This Court has jurisdiction over the Grotes' appeal under 28 U.S.C. §1292(a)(1). On December 27, 2012, the district court entered its Order Denying Plaintiffs' Motion for Preliminary Injunction. (R. 40; Short App. Tab 1). On December 31, 2012, the Grotes filed a Motion to Reconsider Order Denying Plaintiffs Injunctive Relief. (R. 41). And on January 3, 2013, the district court entered its Order Denying Motion to Reconsider. (R. 44; Short App. Tab 2). The Grotes filed a notice of appeal on January 9, 2013. (R. 45).

STATEMENT OF ISSUES

The Grote Family members are Catholic and operate their business, Grote Industries, in accordance with their faith, including the Catholic Church's teachings regarding the moral wrongfulness of abortifacient drugs, contraception, and sterilization. The Grote Family and Grote Industries (collectively "Grote"), appeal the district court's order denying their motion for a preliminary injunction against the enforcement of the Patient Protection and Affordable Care Act and its related regulations that require Grote Industries' group health-insurance plan to provide coverage for abortifacient drugs, contraception and sterilization procedures (the (Mandate").

The issues presented are:

Does the Mandate substantially burden Grote's religious exercise? Can the government establish the high standard of strict scrutiny in support of implementing the Mandate against Grote, especially when the government exempts millions of other Americans and has a variety of alternative measures available? Is the Mandate a neutral law of general applicability that does not implicate First Amendment Free Exercise protections for Grote? Does the Mandate violate the due process protections of the Constitution and the Administrative Procedures Act? Does Grote establish a reasonable likelihood of success on the merits of their claims? Will Grote suffer irreparable harm absent injunctive relief? Does the harm to Grote's religious-liberty rights outweigh the temporary harm to the government's interest in providing greater access to cost-free contraception and related services?

STATEMENT OF CASE

On October 29, 2012, Grote brought suit alleging that the Mandate violates their rights under RFRA and the First and Fifth Amendments and violates the Administrative Procedure Act. (R. 1). The next day, Grote filed a motion for a preliminary injunction, which the District Court denied on December 27, 2012. (R 40). After this Court's injunction pending appeal in *Korte*, Grote filed a Motion to Reconsider, which the District Court denied on January 3, 2013. (R. 44). On January 9, 2013, Grote filed a Notice of Appeal. (R. 45). Grote sought an injunction pending appeal on January 11, 2013. (CA7 Doc. 4). On January 30, 2013, this Court granted an injunction pending appeal. (CA7 Doc. 10). The panel also consolidated this case with *Korte v. Sebelius,* No. 12-3841. (*Id.*) In the Order granting an injunction pending appeal in this case, the panel noted the similarities of this case with *Korte* and held "nothing presented here requires us to reconsider that prior ruling." (*Id.*. p. 5).

STATEMENT OF FACTS

The material facts are based on Grote's Verified Complaint and are undisputed. Appellants are six members of the Grote family ("Grote Family") and are practicing and believing Catholic Christians. (R. 1[1], ¶¶ 2, 18-23). The Grote Family owns and operates Plaintiffs, Grote Industries, Inc. and Grote Industries, LLC ("Grote Industries"), a privately held, for profit business manufacturing vehicle safety systems, headquartered in Madison, Indiana.[2] (R. 1, ¶¶ 3, 16-17, 24). Grote currently has approximately 464 full-time employees in the United States. (R. 1, ¶ 3).

The Grote Family seeks to run Grote Industries in a manner that reflects their sincerely held religious beliefs. (R. 1, ¶¶ 4, 34-35). The business philosophy of Grote Industries is defined as "a set of beliefs on which all of its policies and actions are based," and its management guidelines strive to maintain the highest ethical standards and operate with "personal integrity" as the foundation of success. (R. 1, ¶ 40). The Grote Family, based upon these sincerely held religious beliefs as formed by the moral teachings of the Catholic Church, believes that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage. (R. 1, ¶¶ 4, 36-37). Grote and its owners adhere to the centuries-old biblical view of Christians around the world, that every human being is made in the image and likeness of God from the moment of its

1 References to record evidence are by document number and page.

2 Unless context indicates otherwise, throughout this Brief "Grote" refers collectively to the Grote Family and Grote Industries.

conception/fertilization, and that to help destroy such an innocent being, including in the provision of coverage in health insurance, would be an offense against God. (R. 1, ¶ 5). Applying this religious faith and the moral teachings of the Catholic Church, the Grote Family has concluded that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization through health insurance coverage they offer at Grote Industries. (R. 1, ¶¶ 5, 38-39). As a consequence, the Grote Family provides health insurance benefits to their employees that omits coverage of abortifacient drugs, contraception, and sterilization. (R. 1, ¶¶ 6, 47). The Grote Industries health insurance plan is self-insured, and the plan year renews each year on January 1, the last renewal date thus occurred on January 1, 2013. (R. 1, ¶¶ 6, 46-47).

With full knowledge that many religious citizens hold the same or similar beliefs, in February 2012, the Appellees finalized rules through the Departments of HHS, Labor and Treasury that force Grote to pay for and otherwise facilitate the insurance coverage and use of abortifacient drugs, contraception, sterilization and related education and counseling.[3] (R. 1, ¶ 7).

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[3] The rules in question are collectively referred to hereinafter as the "Preventive Services Mandate" or the "Mandate." The Mandate consists of a conglomerate of authorities, including: "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," 77 Fed. Reg. 8725–30 (Feb. 15, 2012); the prior interim final rule found at 76 Fed. Reg. 46621–26 (Aug. 3, 2011) which the Feb. 15 rule adopted "without change"; the guidelines by Appellee HHS's Health Resources and Services Administration (HRSA), http://www.hrsa.gov/womensguidelines/, mandating that health plans include no-cost-sharing coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with

The Mandate applies to Appellants solely because they wish to operate their business in the United States of America. The Grote Family has concluded that compliance with the Mandate would require them to violate their deeply held religious beliefs. This would force them to disobey God Himself through His Church. It would penalize them for contributing to society through business in a way that is consistent with their Catholic religious beliefs. (R. 1, ¶¶ 8, 9).

As set forth in detail below, the government's refusal to accommodate Grote's conscience is highly selective. The government expressly exempts a variety of health plans from the Mandate and has provided thousands of specific exemptions from the Patient Protection and Affordable Care Act of 2010 (PPACA) for various entities such as large corporations. (R. 1, ¶¶ 79-91). However, Grote is not exempt from the Mandate and is therefore left with a choice of complying with the Mandate in violation of their religious beliefs or ignoring the Mandate and facing substantial penalties. (R. 1, ¶¶ 62-66).

The PPACA requires employers with over 50 full-time employees to provide a certain minimum level of health insurance to their employees. (R. 1, ¶ 50). PPACA requires health plans to include coverage of preventive health services at no cost-sharing to patients, but does not define what it includes in those services. 42 U.S.C.

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reproductive capacity" as part of required women's "preventive care"; regulations issued by Appellees in 2010 directing HRSA to develop those guidelines, 75 Fed. Reg. 41726 (July 19, 2010); the statutory authority found in 42 U.S.C. § 300gg-13(a)(4) requiring unspecified preventive health services generally, to the extent Appellees have used it to mandate coverage to which Appellants and other employers have religious objections; penalties existing throughout the United States Code for noncompliance with these requirements; and other provisions of PPACA or its implementing regulations that affect exemptions or other aspects of the Mandate.

§ 300gg-13(a)(4). Pursuant to regulations, 75 Fed. Reg. 41726–60 (July 19, 2010), Appellee HHS's Health Resources and Services Administration (HRSA) issued guidelines in July 2011 mandating coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, "Women's Preventive Services," *available at* http://www.hrsa.gov/womensguidelines/.

Within the category of "FDA-approved contraceptives" which must be covered under the Mandate are several drugs or devices that may cause the demise of an already-conceived-but-not-yet-implanted human embryo, such as "emergency contraception" or "Plan B" drugs (the so-called "morning after" pill). Also included is the drug "ella" (the so-called "week after" pill), which studies show can function to kill embryos even after they have implanted in the uterus, by a mechanism similar to the abortion drug RU-486. The manufacturers of some such drugs, methods and devices in the category of "FDA-approved contraceptive methods" indicate that they function to cause the demise of an early human embryo. (R. 1, ¶¶ 54-56). The Mandate also requires group health care plans to pay for the provision of counseling, education, and other information concerning contraception (including the aforementioned abortifacients) and sterilization for all women beneficiaries who are capable of bearing children. (R. 1, ¶ 57).

To Grote and its owners, this coverage is not morally different than surgical abortion. Appellees have now mandated that the Grotes violate their deeply held religious beliefs by immediately inserting coverage of abortifacients (and education

and counseling in favor of the same) into the employee health plan. This is something Grote cannot comply with in good conscience. (R. 1, ¶ 9).

The Mandate applies to the first health insurance plan-year beginning after August 1, 2012. (R. 1, ¶ 58). As a result, Grote was required to provide coverage of the above-described items starting with their January 1, 2013 plan. (R. 1, ¶ 92). Grote cannot avoid the Mandate by simply refusing to provide health insurance to its employees, because the PPACA imposes monetary penalties of approximately $2,000 per employee per year on entities that would so refuse. PPACA would also impose monetary penalties of approximately $100 per day per employee if Grote Industries continued to offer its self-insured plan but omitted abortifacients, contraceptives and sterilization from coverage under that plan. (R. 1, ¶¶ 62-65). In addition, if Grote does not submit to the Mandate it could be subject to a range of enforcement mechanisms that exist under ERISA. These could include (but are not limited to), civil actions by the Secretary of Labor or by plan participants for judicial orders mandating that the Grote Family and Grote Industries violate their sincerely held religious beliefs and provide coverage for items to which they have a religious objection. (R. 1, ¶ 66).

This case is one of nearly four dozen across the country challenging the Mandate. Of these, 14 cases involving for-profit entities and their owners have ruled on requests for injunctive relief. Including the injunctions granted by this Court here and in *Korte*, 11 injunctions have been granted and three denied.

SUMMARY OF ARGUMENT

The Mandate violates RFRA and should be enjoined. Because RFRA protects "any" exercise of religion, a family can and does exercise religion when it seeks to follow its sincerely held beliefs in business. There is no business exception in RFRA or the Free Exercise Clause, and the Supreme Court has recognized free exercise claims both by corporations and by businesses.

The Mandate is a quintessential "substantial burden" on that exercise. The Mandate directly prohibits this religious exercise: insuring employees without abortifacient or contraceptive coverage. There is nothing indirect about it. The government invites this Court to engage in moral theologizing about how "attenuated" the Mandate is in relation to Grote's beliefs. The Supreme Court has repeatedly declared such theologizing to be outside the court's competence. "Substantial burden" has nothing to do with theology and everything to do with how much "pressure" the government applies. This Mandate is not mere pressure; it is an outright ban with heavy fines and lawsuits attached.

RFRA therefore requires strict scrutiny, and the Mandate fails the test miserably. In particular, the Mandate cannot claim a compelling interest against Grote's employees when the government has voluntarily decided not to apply it to tens of millions of women across the country through PPACA's patchwork of rules. Congress thus made it clear that this Mandate is a low priority within PPACA. It cannot be construed as an interest "of the highest order." For non-profit groups the government even granted its own equivalent of injunctive relief by promising not to

enforce The Mandate against them until as late as 2014. It is also clear that the government could pursue its interests in less restrictive means, namely in giving free contraception to women itself instead of by coercing the Grotes to do it. The government already engages in massive contraception handouts and subsidies.

The Mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable, due to the aforementioned ways PPACA has exempted tens of millions of people from this Mandate in various kinds of health plans. The Mandate violates the Establishment Clause for picking and choosing who is religious enough to deserve an exemption. It violates the Due Process Clause for giving the government carte blanche to make and remake its exemptions with no standards guiding its discretion. And it violates the APA for being illegal as well as for failing to give entities the statutorily required year after its finalization prior to their required compliance. Each of these claims form independent grounds on which to reverse the District Court's denial of Grote's injunction request.

STANDARD OF REVIEW

A district court's denial of a motion for a preliminary injunction is reviewed for abuse of discretion. *United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011). Questions of law are reviewed de novo while questions of fact are reviewed for clear error. *U.S. Army Corps of Eng'rs*, 667 F.3d at 769; *Stuller v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012).

"Plaintiffs seeking a preliminary injunction must establish that they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and issuing an injunction is in the public interest." *NCR Corp.*, 688 F.3d at 837. Plaintiffs need only show "some likelihood" or "a reasonable likelihood" of success on the merits under the first factor. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012); *Stuller*, 695 F.3d at 678; *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). A "sliding scale analysis" is used to balance the harms and weigh the various factors. *Stuller*, 695 F.3d at 678.

ARGUMENT

I. GROTE IS LIKELY TO SUCCEED ON THE MERITS.

A. THE MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

Congress passed RFRA to subject government burdens on religious exercise to "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1); *see generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006) (describing origin and intent of RFRA, 42 U.S.C. § 2000bb *et seq.*). Under RFRA, the federal government may not "substantially burden" a person's exercise of religion unless the government "'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)). Once a plaintiff demonstrates a substantial burden on religious exercise, RFRA requires that the compelling interest test be satisfied not generically, but with respect to "the particular claimant." *O Centro*, 546 U.S. at 430–31.[4]

Thus, there are four elements to a RFRA claim: Is the plaintiff exercising religion? Is the law a substantial burden on that exercise? Then, under strict scrutiny, can the government show a compelling interest regarding that specific burden? And, can the government prove its approach is the least restrictive means of achieving its interest? 42 U.S.C. § 2000bb-1. Here, the government knows it will

[4] The government's burden to satisfy strict scrutiny under RFRA is the same at the preliminary injunction stage as at trial. *See O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

fail the final two prongs of the strict scrutiny test. The government's only path to sustain the Mandate is to propose the unprecedented view that the thoroughly religious Grote family and their business Grote Industries cannot exercise religion and face no substantial burden thereon.

1. Grote's health care coverage decisions qualify as "religious exercise."

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A). A plaintiff's "[r]eligious belief must be sincere to be protected by the First Amendment, but it does not have to be orthodox." *Cf. Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (applying same standard under Free Exercise Clause).

To *refrain* from morally objectionable activity is part of the exercise of religion. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (explaining under the Free Exercise Clause that "the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts"). Thus, a person exercises religion by *avoiding* work on certain days (*see Sherbert*, 374 U.S. at 399), or by *refraining* from sending children over a certain age to school (*see Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972)). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* in RFRA). Similarly, a person's religious convictions may compel her to *refrain* from facilitating prohibited conduct by others. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 714–16 (1981) (recognizing religious

exercise in refusing to "produc[e] or directly aid[] in the manufacture of items used in warfare").

The Grote Family operates Grote Industries in a manner that reflects their sincerely held religious beliefs. As Catholics, the Grotes believe that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage. As a result, the Grote Family has concluded that it would be sinful and immoral for them offer health insurance coverage for abortifacient drugs, contraception, or sterilization through Grote Industries. As a self-insurer, if Grote's plan covered these items Grote itself would be buying them for its employees, in clear violation of its sincerely held religious beliefs. Therefore, Grote's abstention from the mandate's requirements qualifies as "religious exercise" under RFRA.

a. Grote Industries can exercise religious beliefs.

Before the District Court, the government argued that a for-profit entity is categorically incapable of exercising religion. The District Court declined to rule on this issue. (R. 40, p. 8). The government's position is flawed on multiple levels. First, "free exercise of religion" in RFRA, and in the First Amendment RFRA seeks to enhance, has always been recognized as including the exercise of religion in all areas of life, including in business and "profitable" enterprise. There is simply no "business exception" in RFRA or the First Amendment. RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A); *see also United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy employee's wages

was an exercise of religion under RFRA). And "persons" protected by RFRA include corporations. 1 U.S.C. § 1. The government's claim that a corporation is incapable to exercise religion is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985). Cases such as *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), recognize that a for-profit and even "secular" corporation can assert free exercise claims.

Judicially, the context of free exercise has usually involved the pursuit of financial gain. In *Sherbert*, 374 U.S. at 399, and *Thomas*, 450 U.S. at 709, an employee's religious beliefs were burdened by not receiving unemployment benefits. In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were sufficiently burdened by paying taxes for workers so as to require the government to justify its burden. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules. Other cases have recognized that corporations can exercise religion. *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard to profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business); *Morr-Fitz, Inc. et al. v. Blagojevich*, No. 2005-CH-000495, slip

op. at 6–7, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners). A court analyzing a free exercise claim does not ask whether the claimant is the right category of person; it asks "whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Congress has rejected the government's restrictive view in many ways. PPACA itself lets employees and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions generally, without requiring them to be non-profits. 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[5] These protections cannot be reconciled with the government's view that commerce excludes religion.

The government has tended to confuse the protection of "any" "exercise of religion" under RFRA, with narrower categories such as "religious employer" in Title VII employment discrimination. See 42 U.S.C. § 2000e–1(a). This argument is unavailing here. The text Congress used in RFRA did not limit its protections to a "religious corporation, association, or society" as stated in Title VII. Congress instead protected "any" "exercise of religion," period, by anyone. To read a "religious employer" limit into RFRA would violate the statute's text. RFRA

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[5] *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); and Pub. L. 112-74, Title V, § 507(d). See also 48 C.F.R. § 1609.7001(c)(7).

protects "free exercise of religion," which does not turn on whether the plaintiff is a "religious corporation."

The Supreme Court recognizes the ability of corporations to exercise religion. "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010). The lead plaintiff in *O Centro Espirita* was a corporation rather than a natural person, as was the *Church of the Lukumi Babalu Aye, Inc.v. City of Hialeah,* 508 U.S. 520 (1993). Courts have frequently recognized that constitutional rights apply to corporations. This Court has expressly recognized that "a corporation, rather than a natural person" may assert First Amendment rights. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 826 n. 2 (7th Cir. 1999). "[I]t is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978). "That corporations are in law, for civil purposes, deemed persons is unquestionable." *United States v. Amedy*, 24 U.S. 392, 11 Wheat. 392 (1826). "[C]orporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006). If for-profit corporations have no First Amendment "purpose," for-profit companies such as the New York Times could not have won seminal cases. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

When Congress passed RFRA it was aware of the centuries-old judicial interpretation that corporations are "persons" with constitutional rights. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . ." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975))).

b. Grote's religious owners can exercise religion under RFRA.

Grote is bringing religious free exercise claims for not only itself, but its religious owners. The Grote Family owns and runs Grote Industries consistent with their religious beliefs. Their rights are equally at stake.

Several cases recognize a corporation can assert religious beliefs on behalf of its owners when the government requires the corporation to do things in violation of the owners' religious beliefs. This is because a business is an extension of the moral activities of its owners and operators. Both *Stormans*, 586 F.3d at 1119–20 & n.9, and *Townley*, 859 F.2d at 620 n.15, affirm that the owners of a for-profit, "secular" corporation had their religious beliefs burdened by regulation of that corporation, and that the corporation could sue on behalf of its owners to protect those beliefs. *See also McClure*, 370 N.W.2d at 850; *Commack*, 680 F.3d at 194, 200 (allowing a corporate kosher deli and its owners to bring Free Exercise and Establishment Clause claims). The laws under which the Grote entities were formed provide them with "… the same powers as an individual to do all things necessary or convenient to carry out its business and affairs …." Ind. Code §§ 23-1-22-2, 23-18-2-2. And since Grote Industries is the property of the Grote family, the Mandate forces the Grote

family to use their property in religiously objectionable ways. The Supreme Court has stated that coercion against an individual's financial interests is a substantial burden on religion. *Sherbert*, 374 U.S. at 403–04. The Mandate imposes not only a substantial but an intense burden.

2. THE MANDATE IMPOSES A SUBSTANTIAL BURDEN ON THE RELIGIOUS BELIEFS OF GROTE INDUSTRIES AND ITS OWNERS.

The District Court's denial of injunctive relief for Grote's RFRA claim was based upon the court's legal conclusion that any burden to Grote was "too remote and attenuated to be considered substantial." (R. 40, p. 10). The Order granting Grote's injunction pending appeal properly disagreed. (CA7 Doc. 10).

A regulation that substantially burdens religious exercise "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008). Religious exercise becomes "effectively impracticable," when the government exerts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Id.* (quoting *Thomas,* 450 U.S. at 718), *see also Mack v. O'Leary,* 80 F.3d 1175, 1179 (7th Cir.1996) (vacated on other grounds) (a substantial burden on religious exercise "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs").

Therefore a law substantially burdens religious exercise where one is required to choose between (1) doing something his faith forbids (or not doing something his

faith requires), and (2) incurring financial penalties, legal enforcement by the government, or even the loss of a government benefit. For example, in *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Saturday, substantially burdened her exercise of religion. The regulation forced her to choose between following her religion and forfeiting benefits, or abandoning her religion in order to accept work. 374 U.S. at 404; *see also Yoder*, 406 U.S. at 208 (sufficient burden when the government imposed a $5 fine).

Grote faces a direct and inescapable burden. The Mandate explicitly makes their religious exercise illegal. It is not indirect at all. It "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Under the Mandate, Grote must either provide coverage it believes to be immoral or suffer severe penalties. 26 U.S.C. § 4980D(a), (b) ($100/employee/day fines); 29 U.S.C. § 1132(a) (lawsuits by Secretary of Labor, others); 26 U.S.C. § 4980H ($2,000/employee/year fines). Thus the Mandate forces Grote and its owners to choose between violating their sincerely held beliefs and religious integrity and subjecting themselves to substantial fines and competitive disadvantages.

The Mandate is a "fine imposed against appellant for her" religious practice, *Sherbert*, 374 U.S. at 404, and requires Grote "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Thus, the Mandate bears "direct responsibility" for placing "substantial pressure" on Grote to offer a health plan that violates their religious and ethical beliefs. It renders their

religious exercise—refraining from the immoral action of offering objectionable coverage—illegal and punishable. *Koger,* 523 F.3d at 799.

The government has expressly acknowledged the burden that the Mandate imposes upon "the religious beliefs of certain religious employers," and has granted a wholesale exemption for a class of employers, *e.g.*, churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg. 8,725. Also, the government has provided a temporary non-enforcement safe harbor for non-profit organizations that meet certain criteria.[6] During the time of this temporary safe harbor, the government will refrain from enforcing the Mandate against qualifying entities, thereby providing such entities with the basic equivalent of the injunction Grote seeks here. Appellees are also considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 78 Fed. Reg. 8456. "On January 20, 2012, Defendant Secretary Sebelius admitted that "religious freedom" is at stake in balance against

6 Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Jan. 9, 2013).

the interests of the Mandate."[7] Likewise, in his February 10, 2012 press conference President Obama acknowledged that religious liberty is "at stake here."[8] [9]

The District Court mistakenly issued the legal ruling that any burden on Grote's religious exercise was "too remote and attenuated to be considered substantial," (R. 40, p. 10) because the employees' "independent decisions" to use the offensive services insulated the Grote family from the impact on their religious beliefs. (*Id.*, at 13). This argument was rejected by this Court's earlier Order granting an injunction pending appeal in *Korte* and, correspondingly, in the injunction pending appeal here. In *Korte*, this Court held:

> With respect, we think this misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception related services.

Korte, Slip Op. at 5 (emphasis in original).

There is no gap between the Grote's beliefs and what the Mandate forces them to do. This case is *not* based upon an objection to employees' life choices, or to employees' use of their own money. Rather, this litigation stems from Appellants'

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[7] The Secretary's statement regarding the one-year extension can be found at: http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited October 6, 2012).

[8] A transcript of the President's remarks is available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited October 6, 2012).

[9] Congress has elsewhere recognized the need to accommodate the same burden. *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (District of Columbia must respect religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

religious and moral objections to providing insurance coverage for drugs and information, because they believe providing such coverage is immoral. (R. 1, ¶¶ 35–40). Their religious faith does not merely object to their own use of such items, but also prohibits them from providing health insurance coverage for such items. (*Id.*) Neither a corporate veil nor other legal technicalities give Appellants moral absolution to providing coverage for items that they have religious beliefs against covering.

This realization underscores the District Court's fundamental error: conceiving of the substantial burden analysis as an exercise in moral theology. A "substantial burden" measures the government's penalties—which need only exert "pressure" to violate one's beliefs. *Koger*, 523 F.3d at 799. The analysis does *not* measure moral beliefs, or weigh how morally "attenuated" one's theological objection is in relation to other immoral activity. It analyzes a "substantial burden," not "substantial beliefs."

The Supreme Court has explicitly rejected the kind of moral theologizing employed by the District Court. In *Thomas v. Review Board*, 450 U.S. 707, 714–16 (1981), a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected the idea that it is the court's business to draw moral lines at all. *Id.* Here the measure

of substantiality is fines and lawsuits; it is not a measure of supposed "attenuation" between the Grote's beliefs and what its employees do.

The District Court's error is not limited to for-profit plaintiffs. Under its rationale, even churches themselves, as well as Catholic hospitals, religious non-profit groups and others, would not be able to bring RFRA claims against the Mandate. Its rationale would also apply far beyond contraception and early abortifacients, allowing the government to force churches and others to include surgical abortions, through late terms of pregnancy, in their health insurance coverage, on the theory that insurance is too "attenuated" to merit moral offense.[10]

The Mandate compels Grote to pay for a health plan that freely provides contraception, early abortifacients and sterilization to employees. Forcing Grote to pay for a health plan that includes free emergency contraception is tantamount to forcing Grote to provide employees with coupons for free emergency contraception paid for by Grote. This is exactly the type of burden RFRA was enacted to scrutinize.

As the District Court in *Tyndale* noted, "*Because it is the coverage, not just the use*, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden."

[10] Because Grote's health insurance plan is self-insured, there is no insurer-mediary that insulates Grote and its provision of services that the plan covers.

Tyndale, 2012 WL 5817323 at *13 (D.D.C. Nov. 16, 2012) (citing *Thomas*, 450 U.S. at 718) (emphasis added).

Accordingly, courts recognize that that even where a burden is "indirect" it still may qualify as substantial if the law merely imposes "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas*, 450 U.S. at 718). As explained above, the Mandate here is as direct as a requirement can be. In *Lee*, the Supreme Court found a sufficient burden in a less direct circumstance. Grote is being forced to buy objectionable coverage directly, whereas in *Lee* the plaintiff paid taxes that the government then spent objectionably. Yet the burden imposed on the plaintiffs in *Lee* required a scrutiny analysis. 455 U.S. at 257. In *Sherbert*, there was no "direct" order to work on the Sabbath, but the burden was substantial merely because the plaintiff was denied unemployment benefits for refusing such work. 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits"); *see also Thomas*, 450 U.S. at 717–18 ("the compulsion may be indirect [but] the infringement upon free exercise is nonetheless substantial"). Here "the compulsion" is direct.

As discussed above, the government also poses the theory that a government burden on a business is "attenuated" from burdening its closely held family owners. This is incompatible not only with common sense but with the extensive free exercise jurisprudence found in *Stormans*, *Townley*, *McClure*, and other cases. *Accord Tyndale House Publishers*, 2012 WL 5817323 at *8. The Grote Family are

the people who operate the business in compliance with laws, and the company that the government threatens to penalize is their property.

When plaintiffs complain that a "law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," their burden is sufficient. *Yoder,* 406 U.S. at 218. This describes the Mandate's civil penalties exactly: it "affirmatively compels" Grote, under threat of severe consequences—government lawsuits, fines, regulatory penalties, a prohibition on providing employee health benefits, competitive disadvantage—"to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Id.*

The government is also foreclosed from arguing that merely because a corporation provides its owners limited liability, there is no religious burden on the owners. Limited liability is merely one characteristic of a corporation, and it is not the morally relevant one here. Grote's religious owners have adopted beliefs that make it immoral for them to implement the Mandate's commands through the entity they own. This is why *Stormans* and other cases conclude that a government burden on a corporation is a burden on its close holding family owners and directors. 586 F.3d at 1119–20; *McClure*, 370 N.W.2d at 850; *Jasniowski v. Rushing*, 678 N.E.2d 743, 749 (Ill. App. 1 Dist., 1997); *Morr-Fitz, Inc.*, No. 2005-CH-000495, slip op. at 6–7. Limited liability is not a talisman by which the government may trample on the religious beliefs of business owners. Moreover, if religious families were forced to choose between corporate liability protection or the freedom to

exercise religious beliefs in business, that rule itself would constitute a substantial burden on religious beliefs under RFRA.

3. THE MANDATE CANNOT SATISFY STRICT SCRUTINY.

The government cannot establish that its coercion of Grote is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Appellees cannot satisfy strict scrutiny by showing a generalized interest "in the abstract," but instead must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Grote to comply with the law in violation of its religious beliefs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). If the government's "evidence is not compelling," it fails its burden. *Id.* at 2739. To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Id.*

a. The government cannot identify a compelling interest.

. . "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520. The government argues that two compelling governmental interests exist for the Mandate: health and gender equality. 77 Fed. Reg. 8,725, 8,729. What radically undermines the government's claim is the massive number of employees and participants, tens of millions in fact, for whom the government has voluntarily decided to omit what they call a compelling need to protect health and equality. *See Newland v. Sebelius*, 2012 WL 3069154 at *23 (D. Colo. July 27, 2012); *Tyndale*, 2012 WL 5817323 at *17.

The Mandate does not apply to thousands of plans that are "grandfathered" under PPACA. See 76 Fed. Reg. at 46623 & n.4. The government cannot explain how its interests can be compelling against Grote when, by the government's own choice in not applying this Mandate to grandfathered plans, tens of millions of American women will not receive the Mandate's benefits, including "most" large health plans of comparable size to Grote's. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Grote is exempted too. *O Centro Espirita*, 546 U.S. at 434.

Additionally, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private

insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the Mandate exempts from its requirements "religious employers," defined as churches or religious orders. 78 Fed. Reg. 8456. And the government itself has granted the equivalent of a preliminary injunction to non-profit companies satisfying the one-year non-enforcement "safe harbor," so that their employees too are omitted from the Mandate's allegedly compelling benefits. And small employers are able to avoid the Mandate by dropping insurance coverage entirely. Because there is little that is uniform about the Mandate, as demonstrated by the massive number of employees that are untouched by it, this is not an instance where there is "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436.

Notably, the Affordable Care Act *does* impose multiple requirements on grandfathered health plans. However, the government has decided that *this* Mandate is not of a high enough order to apply to those plans. The preventive services Mandate, listed at § 2713 of PPACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. See list at 75 Fed. Reg. 34,538, 34,542. The government cannot demonstrate a compelling need to require Grote to comply with a Mandate that it has chosen not to apply to millions of employees nationwide. As in *O Centro*, where government exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception for the [hundreds] or so" implicated by Grote here. *Id.* at 433.

The flaw of the government's supposed compelling interest is even more fatal here because Grote is a large employer of 464 employees and, according to Appellees, "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." [11] In other words, Appellees have voluntarily excluded most Americans situated alongside the employees of Grote. They cannot demonstrate they have a paramount interest to force Grote to comply with the Mandate in violation of its beliefs.

Appellees are actually contradicting decisions made by Congress when they tell this Court that the Mandate is compelling. Grote's employees represent a mere fraction of a "marginal percentage point" of persons supposedly within the government's interest—this cannot raise a compelling interest. *Brown*, 131 S. Ct. at 2741. As in *O Centro*, where government exclusions applied to "hundreds of thousands" (here, millions), RFRA requires "a similar exception" for the comparatively few people affected here. 546 U.S. at 433. And under RFRA, Grote cannot be denied a religious exemption on the premise that the government can pick and choose between religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" other exemptions).

The government admits that the interest behind the Mandate can be and has been trumped ("balanced") by "other significant interests supporting the complex administrative scheme created by the ACA." (R. 15, p. 24). The government

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11 HealthCare.Gov, "Grandfathered Health Plans" (January 27, 2012) http://www.healthcare.gov/law/features/rights/grandfathered-plans/

therefore admits that if another compelling interest exists, the Mandate should give way. *RFRA requires that Grote's religious exercise be considered no less compelling an interest*. The government cannot, under RFRA, deem "complex administrative" interests sufficient to trump the Mandate, but religious exercise insufficient.

b. There is no "business exception" to RFRA's compelling interest test.

In other cases the government has attempted to use *United States vs. Lee* to characterize RFRA's scrutiny as not being very strict in commercial contexts. But *O Centro Espirita* does not allow the Court to apply a "strict scrutiny lite" for a business RFRA claim, or indeed for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test," such as in speech cases. 546 U.S. at 430. *O Centro* explicitly limited *Lee* to its context of a tax that was nearly universal, and the court did not allow the government to claim "that a general interest in uniformity justified a substantial burden on religious exercise." *Id.* at 435.

Lee does discuss "statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the Mandate here is emphatically not "binding on others in th[e] activity" of large employers providing insurance. Whereas *Lee*'s tax contained only a tiny exemption for some Amish, the Mandate here excludes:

- Tens of millions of women in "grandfathered" plans are not subject to the Mandate, including "most" large employers, of which Grote is one. "Keeping the Health Plan You Have."

- Members of certain objecting religious groups need not carry insurance at all. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a) ("recognized religious sect or division"); *id.* § 5000A(d)(2)(b)(ii) ("health care sharing ministries").

- Small employers (*i.e.*, those with fewer than 50 employees) can drop employee insurance with no government penalty. 26 U.S.C. § 4980H(c)(2).

- Churches, church auxiliaries, and religious orders enjoy a blanket exemption from the mandate. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

- Certain religiously affiliated non-profits were recently given an additional year before the mandate would be enforced against them. *See* HHS Bulletin, *supra* note 1.

Lee's universal tax is not comparable to the Mandate and its exceptions. The law upheld in *Lee* was a tax to raise government funding. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. But the United States has functioned for over 200 years without a federal mandate compelling Grote or anyone else to cover contraception and abortifacients in insurance. The Mandate is not a "government program," as discussed in *Lee*. It requires Grote to give specific contraception and abortifacient services to private citizens, not to pay money to the government for use in the government's own activities. This Mandate is private, not governmental. In fact, the government has decided *not* to pursue its goals with a government program offering contraception—of which many exist—but instead to conscript religiously objecting citizens.

Moreover, *Lee* does not apply the scrutiny test applicable under RFRA. RFRA specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *Lee* from

this list. *Lee* itself never says it is requiring a "compelling interest" or "least restrictive means." But *Sherbert* and *Yoder* ***did*** apply RFRA's test.

c. The government cannot meet its evidentiary burden.

The government also fails the compelling interest test because its "evidence is not compelling." *Brown,* 131 S. Ct. at 2739. At best, Appellees can point only to generic interests, marginal benefits, correlation not causation, and uncertain methodology.

The government cannot satisfy the compelling interest prong by asserting its interests generically ("health" and "equality"). *O Centro*, 546 U.S. at 431. Nor can it fail to offer compelling *evidence* that grave harm will be caused by exempting Grote. *Brown*, 131 S. Ct. at 2738–39. Generic evidence that contraception benefits women does not prove that this particular Mandate is needed against religious objectors. Despite 28 similar state mandates, the government has cited zero evidence—not one study—showing that even a single state mandate yielded health and equality benefits, much less that one did so more than "marginal[ly]." *See id.* at 2741.

The Institute of Medicine Report on which the Mandate is based ("2011 IOM"),[12] does not demonstrate the government's conclusions. At best, its studies argue for a generic health benefit from contraception. But the Mandate's evidence must be tailored to prove the necessity of compelling Grote to participate, not to mere generic health interests. *O Centro*, 546 U.S. at 430–31. The government cites no pandemic of unwanted births at Grote or similar entities, which cause catastrophic

[12] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited October 5, 2012).

consequences for health and employees. It could be that employees of such entities experience zero negative health consequences absent the Mandate, for any number of reasons. At best, Appellees do not know. But Appellees "bear the risk of uncertainty," *Brown,* 131 S. Ct. at 2739. Speculation and generalizations will not suffice.

The government cannot show that the Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that the very concept of "unintended pregnancy" is amorphous, and that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103.

The Supreme Court insists that the government has the burden to establish compelling "evidence", and the Court scrutinizes and rejects non-compelling scientific evidence even when the government relies on it in passing a law. *Brown*, 131 S. Ct. at 2739.

Even if contraception and abortifacient drugs are assumed to provide health and equality to women, Appellees have not shown a compelling interest to deliver those benefits by means of coercing Grote to do so. The government already delivers and subsidizes contraception and abortifacients to women and could do so here as well without forcing Grote to do it. No evidence shows that the Mandate is the only method to provide the items in question. In fact, such evidence would not be

possible since government-provided abortifacients are just as free and effective as any other kind.

d. Appellees cannot show the Mandate is the least restrictive means of furthering their interests.

Even if a compelling interest existed, the government cannot show that the Mandate against Grote is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. The fact that the government could subsidize contraception itself to give it to employees at exempt entities, and that it already does so on a wide scale, shows that the government fails RFRA's least restrictive means requirement. The government bears the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30.

If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). Strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives that will achieve" the alleged interests. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). "[W]ithout some affirmative evidence that there is no less severe alternative," the Mandate cannot survive RFRA's requirements. *Johnson v. City of Cincinnati*, 310 F.3d 484, 505 (6th Cir. 2002).

Appellees fail the least restrictive means test because the government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. Rather than coerce Grote to provide contraception and

abortifacient coverage in their plan, the government could create its own plan covering the few items to which Grote objects, and then allow free enrollment in that plan for whomever the government seeks to cover. Or the government could directly compensate providers of contraception and abortifacients. Or the government could offer tax credits or deductions for contraception and abortifacient purchases. Or the government might impose a mandate on the contraception and abortifacient manufacturing industry to give its items away for free.[13] These and other options could fully achieve the government's goal while being less restrictive of Grote's beliefs.

Appellees cannot deny that the government could pursue its goal more directly. The government *already* subsidizes contraception extensively.[14] Many states already do as well.[15] Thus the Court's RFRA inquiry could end here: the Mandate is not the least restrictive means of furthering the government's interest.

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[13] By virtue of Appellees' attempts to quell political backlash by claiming they may create an "accommodation" for some additional religious entities (but still not for Grote), Appellees are necessarily admitting that the Mandate is not the least restrictive means to achieve their goals. See 77 Fed. Reg. 16501–08 (Mar. 21, 2012).

[14] *See, e.g.,* Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

[15] See *Facts on Publicly Funded Contraceptive Services in the United States* (Guttmacher Inst. May 2012) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited October 6, 2012).

Each of the above options would further Appellees' proffered compelling interests in a direct way that would not impose a substantial burden on religious beliefs. . Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Grote. *Anderson*, 460 U.S. at 806 (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

Other options may be more difficult to pass as a political matter (which further illustrates the public's disbelief that the Mandate's interest is "compelling"). Indeed PPACA itself does not require the Mandate. 42 U.S.C. § 300gg-13(a)(4). But political difficulty does not exonerate the Mandate's burdens on Grote's religious beliefs, nor can it allow the Mandate to pass RFRA's strict scrutiny. The availability of many alternative methods fatally undermines Appellees' burden under RFRA.

The government cannot propose a watered-down least restrictive means test. RFRA requires the Mandate to be "the least restrictive means," not the least restrictive means among only what the government wants to select. RFRA requires the Mandate to be "the least restrictive means," not the least restrictive means the government chooses. And it imposes its burden on the government, not the Plaintiffs. 42 U.S.C. § 2000bb-1. "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004). The least restrictive means test does

not mean that the government need only show its chosen alternative is the best or most efficient one: it means that "no alternative forms of regulation" can exist that accomplishes the proffered interest. *Kaemmerling*, 553 F.3d at 684 (quoting *Sherbert*, 374 U.S. at 407). Here, the option of women getting contraceptives and abortifacients from the government *fully* achieves the health and equality interests that the government asserts. Not an iota of those interests would be left unaccomplished.

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court required alternative means instead of fundamental rights violations. Here RFRA similarly requires full consideration of other ways the government can and does provide women free contraception and abortifacients.

The government cannot claim that it has an alleged need to impose the Mandate within the employer-based insurance market. This argument would fail the compelling interest/least restrictive means test because it *redefines the government's interest* from securing health and equality to accomplishing those goals in a specific way. The government has zero evidence, much less compelling evidence, that it has a "paramount" and "grave" need to achieve its alleged health and equality interests *by coercion of* employers like Grote, instead of by providing contraception and abortifacients itself. It is impossible for the government to show that, even if all women in Grote's plan received the Mandated items free from the government, rather than from Grote, the items would be less effective in achieving the government's goals. "[T]he Government has not offered evidence

demonstrating" compelling harm from an alternative that is available and less restrictive of religion. *O Centro*, 546 U.S. at 435–37.

The government also cannot claim that honoring Grote Industries' rights under RFRA would involve the government in "subsidizing private religious practices." Grote is not asking the government to subsidize it or any religious group or practice. It is not even asking the government to buy contraceptives and abortifacients. It is simply asserting the self-evident fact that if the government wants to give private citizens contraceptives and abortifacients, it can do so itself instead of forcing Grote to do it. The existence of such an alternative renders the Mandate a violation of RFRA. To call Grote's *freedom from coercion* "subsidizing private religious practices" is an Orwellian attempt to characterize coercion as the default in America. This would render the First Amendment itself a government "subsidy." The Declaration of Independence instead emphatically declares that the right to Liberty belongs to citizens as "endowed by their Creator," not "subsidized by their government." *See Declaration of Independence,* ¶ 2.

The Mandate substantially burdens the religious exercise of Grote and its owners, and Appellees fail strict scrutiny. Thus, Grote has shown a likelihood of success on the merits on their RFRA claim. *Stuller*, 695 F.3d at 678.

B. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

In addition to violating RFRA, the Mandate violates the Free Exercise Clause because it is not "neutral and generally applicable." *Lukumi*, 508 U.S. 20 at 545

(citing *Smith*, 494 U.S. at 880. The Mandate is therefore subject to strict scrutiny, *Lukumi*, 508 U.S. at 546, which as discussed above, it cannot meet.[16]

The Mandate is not neutral on its face because it explicitly discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of facial neutrality. *See, e.g., Lukumi*, 508 U.S. at 533 (explaining that "the minimum requirement of neutrality is that a law not discriminate on its face"). Indeed, the Mandate is a more patent violation of neutrality than the animal cruelty laws unanimously struck down in *Lukumi.* By contrast, on its face the religious employer exemption to the Mandate divides religious objectors into favored and disfavored classes, forgetting *Lukumi*'s warning that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533 (emphasis added).

The religious employer exemption protects the consciences of only *certain* religious bodies, which it defines with reference to their internal *religious* characteristics. Namely, it proposes to exempt only groups who qualify as churches or religious orders under the tax code. *See* 45 C.F.R. § 147.130(a)(iv)(B)(1)–(4); 78 Fed. Reg. 8456. It then declares that another set of groups, religious non-profits, will be "accommodated" but not exempt, *id.*, and families in business will receive neither status. These criteria practice religious "discriminat[ion] on [their] face" and therefore trigger strict scrutiny. *Lukumi*, 508 U.S. at 533.

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16 Neutrality and general applicability overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531.

The Mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable. A law is not generally applicable if it regulates religiously-motivated conduct, yet leaves unregulated similar secular conduct. *See, e.g., Lukumi*, 508 U.S. at 544–45. As explained above, the Mandate here exempts tens of millions of women on a variety of grounds, including those covered by "most" large employers like Grote, but refuses to exempt Grote based on its religious objections. In *Fraternal Order of Police*, the Third Circuit held that a police department's no-beard policy was not generally applicable because it allowed a medical exemption but refused religious exemptions. "[T]he medical exemption raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d at 366 (Alito, J.). *See also Blackhawk v. Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches).

The religious exemption from the Mandate in particular is not generally applicable because PPACA itself awards Appellees unlimited discretion to shape its scope. Appellees "*may* establish exemptions," 45 C.F.R. § 147.130 (emphasis added),

and pursuant to 42 U.S.C. § 300gg-13 Appellees' discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46623 (asserting that § 300gg-13 grants HHS/HRSA "authority to develop comprehensive guideless" under which Appellees believe "it is appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers"). Using their unfettered assessments, the government continues to change its exemptions and accommodations. This is evidenced by two different versions of a "safe harbor" they issued, and continuing evolution of the exemption and "accommodations" offered under federal regulations. Appellees are exercising broad discretion to create exemptions based on an "individualized … assessment of the reasons for the relevant conduct," a feature that deprives the Mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

C. THE MANDATE VIOLATES THE ESTABLISHMENT CLAUSE.

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption, as discussed above, sets forth Appellees' notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the Mandate. But the government may not adopt a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982). The Mandate's religious exemptions and accommodations create various castes of religious

pervasiveness, deeming some entitled to "exemptions," others to "accommodations" and others still to no respect for their religious freedom at all. This is religious gerrymandering that violates the Establishment Clause.

D. THE MANDATE VIOLATES THE FREE SPEECH CLAUSE.

The Mandate additionally violates the First Amendment by coercing Grote to provide for speech that is contrary to its and its owners' religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted).

The Mandate compels expressive speech. It requires Grote to cover "education and counseling" in favor of abortifacients. Education and counseling are, by definition, speech. As a self-insurer, Grote is required to pay for this speech directly. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g, Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234–35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest/least restrictive means test. *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012).

Here there is no "mandated association" because the government omits many employers from the Mandate; therefore, the Mandate violates the compelling interest test.

E. THE MANDATE VIOLATES THE DUE PROCESS CLAUSE.

The Mandate violates the rights of Grote and its owners under the Due Process Clause of the Fifth Amendment. As referenced in the Free Exercise Clause argument, the Mandate creates a standardless, blank check for Appellees to discriminatorily select whatever they want to call "religious" and offer or withhold whatever accommodations they choose. When a law is so "standardless that it authorizes or encourages seriously discriminatory enforcement," the law does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304. That is exactly what Appellees have done, creating different rules for different levels of religiosity, and changing those rules constantly without any standard to constrain their choices.

42 U.S.C. § 300gg-13 gives Appellees unlimited discretion to pick and choose what religious groups to impose its Mandate against, and to what extent. 76 Fed. Reg. at 46623. The statute literally contains no standards regarding these decisions; it offers zero guidance, not even key words or phrases, about who counts as religious and what kind of accommodation such religious persons or entities should be

provided. No person can read 42 U.S.C. § 300gg-13 and have any notion of whom Appellees may impose their Mandate against, and to what extent.

Section 300gg-13 is therefore a quintessential law that encourages discriminatory enforcement based on a lack of standards. Appellees could literally decide that Buddhists get exemptions while Sikhs do not, without running afoul of the standards of that section, because the section has no standards. The law practically invites discriminatory enforcement, and that is exactly what Appellees have done with it. Appellees have used their discretion to create: an arbitrary four-part "religious employer" exemption, which they recently proposed to change to a church-only exemption; two different "safe harbors" of non-enforcement; a proposed "accommodation" for some non-exempt entities whose details are yet to be finalized and in some respects yet to even be proposed, 78 Fed. Reg. 8456; and denial of any religious protection for families in business. Grote has suffered exclusion from all these discretionary decisions. These discriminatory decisions involve the government deciding who the religious are and what religion is; what levels of moral participation should be acceptable to conscience; whose religion gets put into different levels of accommodation; and who is allowed to convert to religious views against birth control based on whether they did so by an arbitrary deadline.

F. THE MANDATE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The government finalized the Mandate while transparently, even admittedly, refusing to satisfy its statutory duty to actually "consider" objections issued during the comment period. Section 706 of the APA provides that courts "shall hold

unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Appellees must follow the procedure found in § 553, which requires administrative agencies to: (1) publish notice of proposed rulemaking in the Federal Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose. 5 U.S.C. § 553(b) & (c).

"An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them." *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) (citing *McLouth Steel Products Corporation v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988)); *Cf. Northwest Tissue Center v. Shalala*, 1 F.3d 522, 531 (7th Cir. 1993) ("An agency should not be able to avoid the notice-and-comment process with fancy interpretive footwork."). The Court need not engage in any subjective judgment about whether Appellees provided due consideration to objections to the Mandate. In this case Appellees essentially admit that they did not do so. Central to this implicit concession are facts acknowledged by Appellees themselves:

(1) PPACA prohibits the Mandate from going into effect until one year after it is in final, unchanged form. 75 Fed. Reg. at 41726; 76 Fed. Reg. at 46624.

(2) Appellees themselves insisted, in August 2011, prior to the comment period, that they believed the Mandate must exist in final form unchanged from as it was written on August 1, 2011,

in order to deliver Mandated items to college women by August 2012. 76 Fed. Reg. 46621–26.

(3) Appellees delivered on their promise to ignore comments by finalizing their rule "without change" in February 2012. 77 Fed. Reg. 8725–30

(4) Due to public outcry Appellees then admitted in a new regulatory process in March 2012, 77 Fed. Reg. 16501, that the same objections offered in the 2011 comment period actually did require alterations that they had refused to consider in 2011 but would now pursue.

(5) Yet the government continues to impose its Mandate on Grote and others as if its rule had actually been finalized in August 2011 *in a process that meaningfully considered suggested changes prior to finalization*.

If Appellees had not been close-minded about their Mandate, it would not have been finalized without change in February 2012, and would still not be finalized (because the latest proposal will not be complete at least until August 2013, 78 Fed. Reg. 8456). Thus if the government had complied with the APA, Grote would not be subject to it now; instead Grote would be more than a year away from its effect.

Appellees' mockery of the notice and comment process has led to palpable injury to Grote. The Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Appellee agencies until they actually finalize a Mandate after meaningful consideration, and *then* wait an additional year to impose it.

The Mandate also violates the APA for being "contrary to law" and "constitutional right" under 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971). It is contrary to law and

constitutional right for all the reasons stated above: its violation of RFRA, the First Amendment clauses, and the Due Process Clause.

II. GROTE WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

Because Grote has shown a likelihood of success on the merits, "the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *See ACLU v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012). Granting preliminary injunctive relief is necessary to prevent Grote from suffering harm that is irreparable and imminent. Application of the Mandate to Grote will violate its rights under the First Amendment and RFRA. It is settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord ACLU,* 679 F.3d at 589. Deprivation of rights secured by RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes irreparable harm. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (explaining under RFRA that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"). The District Court in Colorado reached the same conclusion. *See Newland*, 2012 WL 3069154 at *4 (noting "it is well-

established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted).

Finally, these irreparable harms apply to Grote already. Grote does not qualify for any of the exemptions or non-enforcement. Grote is therefore subject to the Mandate with its policy year, which began January 1, 2013. However, the religious beliefs of the Grote Family prohibit them from complying with the Mandate. Thus, Grote faces an imminent likelihood of lawsuits from the Secretary of Labor, fines and regulatory penalties. The imminent risk of harm and the need for clarification of Grote's rights in time to secure appropriate insurance coverage means Grote will suffer irreparable harm in the absence of injunctive relief.

III. THE BALANCE OF EQUITIES TIPS IN GROTE'S FAVOR.

Granting preliminary injunctive relief will merely prevent Appellees from enforcing the Mandate against one entity. This will simply preserve the *status quo* between the parties, counseling in favor of granting preliminary relief. The government has already exempted a number of churches and church-related entities from the mandate. More notably, Appellees have granted what nearly amounts to its own voluntary "injunction" by granting delayed enforcement of the Mandate against a broad array of religious organizations until their first plan years start after August 2013. HHS Bulletin, *supra* note 1. Omission of Grote from that "safe harbor" is arbitrary and unwarranted in the first place. Appellees cannot possibly show that applying the Mandate to *one* entity would "substantially injure" others' interests.

Balanced against this *de minimis* injury to Appellees is the real and immediate threat to Grote's and its owners' integrity of religious belief. Grote faces the imminent prospect of penalties that Appellees obstinately declare they intend to apply. Without an injunction, Grote would be coerced to provide health coverage that violates its religious beliefs in order to avoid crippling penalties. Grote has no adequate remedy at law. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *ACLU,* 679 F.3d at 589 (internal citations omitted). In sum, any minimal harm in not applying the Mandate against one additional entity, in light of the government's willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon [Grote's] constitutional and statutory rights." *Newland*, 2012 WL 3069154 at *4.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a preliminary injunction will serve the public interest by protecting Grote's First Amendment and RFRA rights. The public can have no interest in enforcement of a regulation against a business that coerces it to violate its own faith. *See, e.g., See Joelner v. Vill. of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004); Newland*, 2012 WL 3069154 at *5 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *O Centro*, 546 U.S. 418). Furthermore, any interest of Appellees in uniform application of the mandate "is … undermined by the creation of exemptions for

certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland*, 2012 WL 3069154 at *4.[17]

17 Enjoining application of the Mandate will impose no monetary requirements on Appellees, so no bond should be required of Plaintiffs. *See* Fed. R. App. P. 8(a)(2)(E).

CONCLUSION

For all of the reasons discussed above, this Court should reverse the District Court's decision denying Plaintiffs' Motion for Preliminary Injunction and remand this case with instructions that the District Court enter a preliminary injunction enjoining Defendants from enforcing the Mandate against Grote.

Respectfully submitted on this 19th day of February 2013,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,096 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) (as modified by Seventh Circuit Rule 32(b)) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point font and Century type style.

s/ Michael A. Wilkins
Michael A. Wilkins

CERTIFICATE REGARDING CIRCUIT RULE 30(d)

The undersigned certifies that the appellant's short appendix contains all materials required by Circuit Rule 30(a) and (b).

s/ Michael A. Wilkins
Michael A. Wilkins

SHORT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

GROTE INDUSTRIES, LLC an Indiana limited liability company, GROTE INDUSTRIES, INC. an Indiana corporation, WILLIAM D. GROTE, III, WILLIAM DOMINIC GROTE, IV, WALTER F. GROTE, JR., MICHAEL R. GROTE, W. FREDERICK GROTE, III, JOHN R. GROTE, Plaintiffs, vs. KATHLEEN SEBELIUS in her official capacity as Secretary of the United States Department of Health and Human Services, HILDA L. SOLIS in her official capacity as Secretary of the United States Department of Labor, TIMOTHY GEITHNER in his official capacity as Secretary of the United States Department of the Treasury, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	)	No. 4:12-cv-00134-SEB-DML

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This cause is before the Court on Plaintiffs' Motion for Preliminary Injunction [Docket No. 7], filed on October 30, 2012. Plaintiffs, Grote Industries, LLC; Grote Industries, Inc.;

William D. Grote III; William Dominic Grote, IV; Walter F. Grote, Jr.; Michael R. Grote; W. Frederick Grote, III; and John R. Grote bring this claim against Kathleen Sebelius in her official capacity as Secretary of the United States Department of Health and Human Services ("HHS'); Hilda S. Solis in her official capacity as Secretary of the United States Department of the Treasury; the United States Department of Health and Human Services; United States Department of Labor; and the United States Department of the Treasury, challenging preventive care coverage regulations ("the mandate") issued under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA"), which Plaintiffs allege require them "to pay for and otherwise facilitate the insurance coverage and use of abortifacient drugs, contraception, sterilization, and related education and counseling." Compl. ¶ 7. Plaintiffs contend that the mandate violates their statutory rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA") as well as their constitutional rights under the First and Fifth Amendments to the United States Constitution. Plaintiffs seek both declaratory and injunctive relief.

Presently before the Court is the Plaintiffs' Motion for Preliminary Injunction seeking an order prohibiting Defendants from enforcing the mandate against them and others similarly situated when it goes into effect on January 1, 2012. After review of the parties' submissions, we DENY Plaintiffs' request for injunctive relief.

Factual Background

The Affordable Care Act, signed into law on March 23, 2010, effected a variety of significant changes to the healthcare system, including in the area of preventive care services.

Section 1001 of the Act, which includes the preventative services coverage provision relevant to the case at bar, requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings … as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4).

The Health Resources and Services Administration ("HRSA") commissioned the Institute of Medicine ("IOM") to develop recommendations for implementing such preventive care for women. Upon review, the IOM issued a report recommending that the HRSA guidelines include, *inter alia*, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM Report"), *available at* http://iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Report-Brief.aspx (last visited December 20, 2012). Contraceptive methods approved by the Food and Drug Administration ("FDA") include diaphragms, oral contraceptive pills, emergency contraceptives, such as Plan B and Ella, and intrauterine devices. FDA, Birth Control Guide, *available at* www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last visited December 20, 2012).

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final regulations issued the same day. *See* 76 Fed. Reg. 46621; 45 C.F.R. § 147.130. On February 15, 2012, HHS, the Department of Labor, and the Department of Treasury published rules finalizing

the HRSA guidelines. There are certain exemptions to the preventive services provision of the Affordable Care Act. Grandfathered health plans, to wit, plans that were in existence on March 23, 2010 and have not undergone any of a defined set of changes, are not subject to the mandate. *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. Certain religious employers are exempt from providing plans that cover contraceptive services. To qualify as a "religious employer" under the exemption, an employer must satisfy the following criteria:

> (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B).[1] There is also a temporary enforcement safe-harbor provision applicable to non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage (and any associated group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). Finally, employers with fewer than fifty employees are not required to provide any health insurance plan. 26 U.S.C. § 4980H(c)(2)(A).

The individual plaintiffs (collectively, "the Grote Family") are members of a family that owns and operates Grote Industries, LLC and Grote Industries, Inc. ("Grote Industries"), a privately held, for-profit business that manufactures vehicle safety systems, headquartered in Madison, Indiana. Grote Industries currently employs approximately 464 full-time employees in the United States. The members of the Grote Family are believing and practicing Catholic Christians. Although Grote Industries is a for-profit, secular corporation, the Grote Family seeks

[1] The religious employer exemption was modeled after the religious accommodation used in multiple states already requiring health insurance issuers to cover contraception. 76 Fed. Reg. at 46,623.

to run Grote Industries in a manner that reflects their religious beliefs and believes that their operation of Grote Industries "must be guided by ethical social principles and Catholic religious and moral teachings." Compl. ¶ 36. The Grote Family follows the moral teachings of the Catholic Church and "believes that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage." *Id.* ¶ 4. The Grote Family "adhere[s] to the centuries-old biblical view of Christians around the world, that every human being is made in the image and likeness of God from the moment of conception/fertilization, and that to help destroy such an innocent being, including in the provision of coverage in health insurance, would be an offense against God." *Id.* ¶ 5. Accordingly, the Grote Family believes that "it would be immoral and sinful for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs,[2] contraception, sterilization, and related education and counseling" as required by the preventive care provision of the Affordable Care Act. *Id.* ¶ 39.

Consistent with their religious beliefs, the Grote Family provides health insurance benefits to their employees that omit coverage of abortifacient drugs, contraception, and sterilization. *Id.* ¶¶ 6, 47. The health insurance plan provided by Grote Industries is self-insured, and the plan year renews each year on January 1. It is not grandfathered under the Act. As a secular, for-profit corporation, Grote Industries does not fall within the Act's definition of a "religious employer" and is ineligible for the protection of the safe-harbor provision. Thus, the mandate takes effect as to the corporation's employee health plan on January 1, 2013.

Plaintiffs contend that Grote Industries is unable to simply avoid the mandate by refusing to provide health care insurance to its employees because it would incur a penalty of approximately $2,000 per employee per year by doing so. Nor can it continue to offer its current

[2] Plaintiffs use the term "abortifacients" to refer to contraceptives which they state "may cause the demise of an already conceived … human embyo." Pls.' Compl. ¶¶ 54-55.

self-insured plan that omits abortifacients, contraceptives, and sterilization because that course of action would subject Grote Industries to penalties of approximately $100 per employee, per day. If they fail to comply with the mandate, Grote Industries could also be subject to a range of enforcement mechanisms, including civil actions by the Secretary of Labor or by plan participants and beneficiaries. Plaintiffs seek a preliminary injunction to prevent Defendants from enforcing the mandate against them, arguing that the mandate violates their First and Fifth Amendment rights as well as their statutory rights under the RFRA and the APA.

Legal Analysis

I. Standard of Review

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; and (3) irreparable harm absent the injunction. *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health*, 699 F.3d 962, 972 (7th Cir. 2012). If the moving party fails to demonstrate any one of these three threshold requirements, the injunctive relief must be denied. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbot Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). However, if these threshold conditions are met, the Court must then assess the balance of the harm – the harm to Plaintiffs if the injunction is not issued against the harm to Defendants if it is issued – and determine the effect of an injunction on the public interest. *Id.* "The more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Id.* at 1100.

II. Discussion

This lawsuit is one of a number of similar suits that have been filed in various venues throughout the country challenging the preventive services coverage provision of the Affordable Care Act. We have found recent decisions rendered by district courts both in the Seventh Circuit as well as in other circuits to be instructive and find the analysis set forth in *O'Brien v. United States Department of Health and Human Services*, ___ F. Supp. 2d ___, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012),[3] and *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 20, 2012), particularly persuasive.

In the case at bar, Plaintiffs have advanced numerous theories of relief and the Court is required to address them within a very brief span of time. The motion for injunctive relief did not become fully briefed until December 6, 2012. In addition, there is nothing about these complex issues that lends them to superficial review and analysis. The rulings below reflect our best efforts under these challenging circumstances.

A. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act of 1993 ("RFRA") prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA was enacted by Congress in response to

[3] In their reply brief, Plaintiffs stress that the district court's order in *O'Brien* was recently stayed pending appeal, in effect granting the plaintiff corporation a preliminary injunction. *O'Brien v. United States Department of Health and Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012). Plaintiffs apparently believe that the Eighth Circuit's one-sentence order constitutes a holding that a substantial burden and successful RFRA claim had been found, which, of course it does not.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), where the Supreme Court held that, under the First Amendment, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (internal quotations omitted). Congress intended RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

In the case at bar, Defendants contend that Grote Industries, as a secular, for-profit corporation, cannot "exercise" a religion, and thus, cannot assert claims under RFRA or the First Amendment Free Exercise Clause. While we too have doubts regarding whether a secular, for-profit corporation can be deemed to possess free exercise rights as expressed by the district court in *Hobby Lobby*, 870 F. Supp. 2d at 1288, 1291-92 (holding that secular, for-profit corporations do not have rights under the Free Exercise Clause and are not "persons" for purposes of the RFRA), for the reasons detailed below, we find that the preventive services coverage mandate does not place a "substantial burden" on either Grote Industries or the individual plaintiffs, and does not violate Plaintiffs' rights under the Free Exercise Clause. Thus, we decline to reach the issue of whether a secular, for-profit corporation is capable of exercising a religion within the meaning of RFRA or the First Amendment.

In order to show a likelihood of prevailing on the merits of their RFRA claim, Plaintiffs must initially show that a substantial burden has been placed by the challenged action on their religious exercise. Under the RFRA, "exercise of religion" is defined broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5. We do not question that Plaintiffs' religious beliefs are sincerely held. Nor

is it within the purview of this Court to make an assessment as to the centrality of Plaintiffs' opposition to contraception coverage to their exercise of the Catholic religion, as the RFRA "makes clear that it does not matter whether the particular exercise of religion at issue is or is not central to the individual's religious beliefs." *Hobby Lobby*, 870 F. Supp. 2d at 1293 (citing 42 U.S.C. § 2000cc-5(7)(A); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 n.6 (10th Cir. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 469 (2010)); *see also Employment Div. v. Smith*, 494 U.S. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'") (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)). However, the sincerity of one's beliefs and whether those beliefs have been substantially burdened are two separate inquiries. At this preliminary stage, Plaintiffs have failed to establish that they have a reasonable likelihood of establishing that the mandate substantially burdens their practice of religion.

Neither the RFRA nor the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which adopted RFRA's same "substantial burden" test, defines the term. However, the Seventh Circuit has held that a substantial burden is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise … effectively impracticable." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (RLUIPA case); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."). That sort of direct connection is missing here.

The conclusion that a substantial burden requires an element of directness is also supported by the free exercise jurisprudence predating *Employment Division v. Smith*. Courts look to such case law in determining whether a particular burden on religious exercise is substantial. *See O'Brien*, 2012 WL 4481208, at *5 (citing *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("[S]ince RFRA does not purport to create a new substantial burden test, we may look to pre-RFRA cases in order to assess the burden on the plaintiffs for their RFRA claim); *Living Water Church of God v. Charter Twp. of Meridian*, 2007 WL 4322157, at *7 (6th Cir. Dec. 10, 2007) ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence, which suggests that 'substantial burden' is a difficult threshold to cross.")). Two such cases, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1975), present the test that RFRA was intended to restore and thus are especially relevant. Both cases support the view that the burden on religious exercise "must be more than insignificant or remote." *O'Brien*, 2012 WL 4481208, at *5. The plaintiff in *Sherbert* was forced to "choose between following the precepts of her religion [by resting, and not working on her Sabbath] and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Similarly, in *Yoder*, the state compulsory-attendance law at issue "affirmatively compel[led] [plaintiffs], under threat of criminal sanction, to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218.

In line with the analysis set forth in *O'Brien* and *Hobby Lobby*, we conclude that the burden the mandate imposes on Plaintiffs here is likely too remote and attenuated to be considered substantial. As explained in *O'Brien*,

> [T]he challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. … [P]laintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives. The 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 company's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion. The Court rejects the proposition that requiring indirect financial support of a practice, from which plaintiff himself abstains according to his religious principles, constitutes a substantial burden on plaintiff's religious exercise.

2012 WL 4481208, at *6; *accord Hobby Lobby*, 870 F. Supp. 2d at 1294. Plaintiffs' advocacy of their beliefs opposing contraceptives can continue much as we assume it did before this statute was enacted. Since we have not been informed as to Grote Industries's employees' intentions with respect to obtaining such coverage, and have no information with respect to Grote Industries's employment policies, there is no argument or evidence to indicate that any change will necessarily be effected by this statute in terms of Grote Industries's concerns as a self-insured business.

We acknowledge that Plaintiffs object not just to the *use* of contraceptives, but to the *coverage* itself, and thus, argue that the fact that the use of contraceptives depends on the independent decisions of third parties is irrelevant. But, as recognized in *O'Brien*,

> RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others. 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.

2012 WL 4481208, at *6. We can imagine a wide variety of individual behaviors that might give rise to religiously-based scruples or opposition, such as alcohol consumption or using drugs or tobacco, or homosexual-related behaviors, all of which can threaten health conditions requiring treatment and care. If the financial support for health care coverage of which Plaintiffs complain constitutes a substantial burden, secular companies owned by individuals objecting on religious grounds to such behaviors, including those businesses owned by individuals objecting on religious grounds to *all* modern medical care, could seek exemptions from employer-provided health care coverage for a myriad of health care needs, or for that matter, for any health care at all to its employees. While distinguishable on other grounds, the holding in *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), rejected a RFRA challenge to the individual mandate of the Affordable Care Act as applied to plaintiffs whose religion forbids seeking medical care. The court held that the individual mandate's requirement that the plaintiffs contribute to a health care plan that does not align with their religious beliefs "does not rise to the level of a substantial burden … Plaintiffs have failed to allege any facts demonstrating that this conflict is more than a de minimis burden on their Christian faith." *Id.* at 42.

Nor do we find, particularly on the basis of this preliminary record, that the fact that the group health plan at issue here is self-insured changes our analysis. Plaintiffs maintain that their self-insured status is determinative because it removes one of the levels of separation discussed in *O'Brien*, resulting in a more direct burden on their religious freedom. Plaintiffs cite the recent district court decision holding that the mandate substantially burdened the plaintiff's religious exercise under the RFRA, where the fact that the plaintiff corporation was self-insured was a "crucial distinction." *Tyndale House Publishers, Inc. v. Sebelius*, ___ F. Supp. 2d ___, 2012 WL 5817323, at *13 (D.D.C. Nov. 16, 2012). *But see Hobby Lobby*, 870 F. Supp. 2d at 23 (holding

that any burden on plaintiffs who were self-insured was too attenuated to be substantial under RFRA).

We disagree with that conclusion. Regardless of whether the corporation is self-insured, it remains the fact that any burden on Plaintiffs' religious exercise rests on "a series of independent decisions by health care providers and patients covered by [Grote Industries's plan]." *O'Brien*, 2012 WL 4481208, at *6. Further, even if a health plan is self-insured, it remains a separate legal entity from the sponsoring employer. *See Korte v. U.S. Dept. of Health and Human Servs.*, 2012 WL 6553996, at *9 (S.D.Ill. Dec. 14, 2012) (recognizing that "the RFRA 'substantial burden' inquiry makes clear that business forms and so-called 'legal fictions' cannot be entirely ignored"). Thus, we cannot say, at least without further factual development of the exact structure of Plaintiffs' self-insured plan, that the fact that the plan is self-insured alone bridges the attenuated gap between payment into the fund and the eventual use of the funds discussed in *O'Brien* and *Hobby Lobby*.

Because we are not persuaded that the mandate imposes a substantial burden on Plaintiffs' free exercise of religion, we conclude that Plaintiffs have failed to establish a reasonable likelihood of success on the merits of their RFRA claim, and thus, we need not proceed to determine whether the mandate satisfies strict scrutiny.

B. First Amendment – Free Exercise Clause

The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. However, the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion

prescribes (or proscribes). *Employment Div. v. Smith*, 494 U.S. at 879 (internal punctuation omitted). In line with the other district courts who have addressed this question and found the mandate neutral and generally applicable, we find that Plaintiffs have failed to establish a reasonable likelihood of success on their free exercise claim.

A law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). In determining whether a law has such an impermissible object, courts look to the law's text, legislative history, and the actual effect of the law in operation. *Lukumi*, 508 U.S. at 534, 535, 540. Here, the text of the mandate contains no mention of religion, nor is an impermissible object reflected in the legislative history, as the purpose of the regulations is a secular one, to wit, to promote public health and gender equality.

Although Plaintiffs do not dispute these facts, they contend that the mandate is nonetheless not neutral because the exemption for religious employers divides religious objectors into favored and disfavored groups without any discernible secular reason, exempting "only those religious organizations whose 'purpose' is to inculcate religious values; who 'primarily' employ and serve co-religionists; and who qualify as churches or religious orders under the tax code." Pls.' Br. at 36 (citing 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4)). However, as recognized by the district court in *Hobby Lobby*, "[c]arving out an exemption for defined religious entities does not make a law nonneutral as to others." 870 F. Supp. 2d at 1289. In fact, it tends to support an argument in favor of neutrality. *Id.* ("Using well established criteria to determine eligibility for an exemption based on religious belief, such as the nonsecular nature of the organization and its nonprofit status, the ACA, through its implementing rules and regulations, both recognizes and

protects the exercise of religion.") (citing *O'Brien*, 2012 WL 4481208, at *8). The mandate is not rendered nonneutral merely because the exception does not extend as far as Plaintiffs wish.

To be generally applicable, a law must not "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Plaintiffs argue that the mandate is not generally applicable because "it exempts 191 million Americans on a variety of grounds." Pls.' Br. at 37. Plaintiffs contend that, because the Affordable Care Act provides Defendants "unlimited discretion" to establish and craft exemptions, it deprives the mandate of general applicability. *Id.* at 37 (citing 42 U.S.C. § 300gg-13). Again, we disagree. General applicability does not require universal application and the mandate here does not "pursue[] … governmental interest only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 545. As recognized by the district court in *O'Brien*, "[t]he regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations." 2012 WL 4481208, at *8. Thus, "it is just not true … that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536).

For the foregoing reasons, we hold that there is a substantial likelihood that the mandate will be found to be a neutral law of general applicability that does not offend the First Amendment's Free Exercise Clause. Accordingly, Plaintiffs have failed to establish a reasonable likelihood of success on this claim.

C. First Amendment – Establishment Clause

The "clearest command of the Establishment Clause" is that the government must not show preference to any religious denomination over another. *Larson v. Valente*, 456 U.S. 228,

244 (1982). The Establishment Clause also protects against "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (internal quotations omitted). Plaintiffs contend that the mandate's exemption for "religious employers" violates the First Amendment's Establishment Clause, because it impermissibly "adopt[s] a caste system of different religious organizations and belief-levels" and requires the government to unlawfully scrutinize an organization's religious tenets in determining whether the exemption is applicable. Pls.' Br. at 38-39.

Here, the religious employer exemption applies equally to all denominations and does not prefer one religion over another or otherwise discriminate among religions. An employer is eligible for the exemption, regardless of denomination, if its purpose is to inculcate religious values, it primarily employs and serves persons sharing those values, and it is a nonprofit religious organization as defined in certain provisions of the Internal Revenue Code. 45 C.F.R. § 147.130(a)(1)(iv)(B). It is true, as Plaintiffs allege, that the exemption does differentiate between types of religious organizations based on their structure and purpose. But the Establishment Clause does not prohibit the government from making such distinctions when granting religious accommodations as long as the distinction drawn by the regulations between exempt and non-exempt entities is not based on religious affiliation. *See, e.g.*, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (rejecting Establishment Clause challenge to law exempting from property taxes property of religious organizations used exclusively for religious worship); *Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995) (upholding a Social Security tax exemption only for members of organized religious sects, despite the fact that "some individuals receive exemptions, and other individuals with identical beliefs do not," because the purpose of the exemption was not to discriminate among religious denominations).

Given that the exemption's definition of "religious employer" does not refer to any particular denomination, the criteria for the exemption focus on the purpose and structure of the organization rather than its affiliation, and the exemption is available to any and all religions, the mandate clearly does not prefer certain religions over others, and thus, is not likely to be found to violate the Establishment Clause in this manner.

Plaintiffs have also failed to establish any likelihood of success in showing excessive entanglement. Plaintiffs concede that they do not satisfy the non-profit criteria required for religious employer status. Because that alone would disqualify Grote Industries from being a "religious employer" under the exemption's definition, the government would not be required reach an assessment of whether the company's purpose is to inculcate religious values and whether it primarily employs and serves persons sharing those values nor engage in any other inquiry that would pose a potential entanglement issue.

D. First Amendment – Free Speech Clause

Plaintiffs allege that the mandate violates their rights protected by the First Amendment's Free Speech Clause by coercing Grote Industries to subsidize speech that is contrary to Plaintiffs' religious beliefs. Specifically, Plaintiffs argue that the mandate compels expressive speech by requiring Grote Industries to cover "education and counseling" that Plaintiffs contend will be in favor of abortifacients.

The First Amendment protects not only the freedom to speak, but also the freedom from compelled speech. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding unconstitutional a statute requiring recitation of the pledge of allegiance). It also encompasses the right to refuse financial support to fund speech with which one disagrees.

United States v. United Foods, Inc., 533 U.S. 405 (2001) (holding a statute requiring mushroom producers to contribute towards advertisements promoting mushroom sales unconstitutional). However, as recognized by the district court in *O'Brien*, the problem with Plaintiffs' argument is that the mandate does not require Plaintiffs to subsidize speech and instead only regulates conduct. Although it is true that the mandate expressly requires subsidization for education and counseling services and the receipt of health care usually involves a conversation between a doctor and a patient, "this speech is merely incidental to the conduct of receiving health care."[4] *O'Brien*, 2012 WL 4481208 at *12 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

In assessing the constitutionality of speech subsidies, the Supreme Court has recognized that, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United Foods*, 533 U.S. at 411. However, again, as recognized by the district court in *O'Brien*, here, the subsidized speech "is an unscripted conversation between a doctor and a patient, not political propaganda in favor of one candidate, an amicus brief espousing one side of an issue, or advertisements in favor of a particular product." 2012 WL 4481208, at *12. Although Plaintiffs contend that the subsidy for "education and counseling" the mandate requires them to provide will be "in favor of abortifacients," Plaintiffs simply cannot know this to a certainty. Adoption of Plaintiffs' argument "would mean that an employer's disagreement with the subject of a discussion between an employee and her physician would be a basis for precluding all government efforts to regulate health coverage." *Id.*

[4] This is another way of saying that there is no substantial burden on religious exercise.

Nor are we convinced by Plaintiffs' argument that the conduct the mandate requires them to subsidize is "inherently expressive" so as to entitle it to First Amendment protection. *See Rumsfeld*, 547 U.S. at 66. An employer who provides a health plan which covers contraceptive services along with a myriad of other medical services because it is required by law to do so is simply not engaged in the same type of conduct that the Supreme Court has recognized as inherently expressive. *Compare id.* at 65-66 (making space for military recruiters on campus is not conduct that indicates a college's support for, or sponsorship of, recruiters' message) *with Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568-70 (1995) (openly gay, lesbian, and bisexual group marching in parade is expressive conduct) *and Barnette*, 319 U.S. 624 (1943) (refraining from saluting American flag is expressive conduct); *see also O'Brien*, 2012 WL 4481208, at *12 ("Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning an American flag.") (internal citations omitted).

Plaintiffs here remain free to say whatever they would like to express about contraceptives and abortifacients, including to discourage their employees' use of such products and services. Plaintiffs have failed to persuade us that they have a reasonable likelihood of establishing that the mandate unlawfully compels them to speak, to subsidize speech, or to subsidize expressive conduct in violation of the Free Speech Clause of the First Amendment.

E. Fifth Amendment – Due Process

Plaintiffs next allege that the mandate violates the Fifth Amendment's Due Process Clause because it "creates a standardless, blank check for Defendants to discriminatorily select whatever they want to call 'religious' and offer or withhold whatever accommodations they

choose." Pls.' Br. at 40. Although the exact scope of Plaintiffs' due process challenge is not entirely clear, it appears Plaintiffs contend that "the statute," 42 U.S.C. § 300gg-13, is unconstitutionally vague because it contains no standards or guidance regarding "who counts as religious and what kind of accommodation such religious persons or entities should be provided." Pls.' Br. at 40.

A law is not unconstitutionally vague unless it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (citations omitted). It is clear that Plaintiffs are not suffering from any misapprehensions as to the meaning of the regulations or what the mandate requires of them, and thus, we simply cannot find that Plaintiffs have a reasonable likelihood of establishing that the regulations as applied to them are vague. *See Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2720 (2010) ("[T]he dispositive point here is that the statutory claims are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

Nor can there be a due process violation based simply on the fact that the statute delegates to administrative agencies the responsibility to promulgate implementing regulations. *See Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," and upholding "Congress' ability to delegate power under broad standards"). Plaintiffs cite no precedent to the contrary. Accordingly, at this early stage of the litigation, we find that Plaintiffs have failed to establish a likelihood of success on their Fifth Amendment Due Process claim.

F. Administrative Procedures Act

Finally, Plaintiffs claim that Defendants violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, by failing to follow the procedure set forth in § 553, which requires administrative agencies to: (1) publish notice of proposed rulemaking in the Federal Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or argument"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose.[5] 5 U.S.C. § 553(b), (c). Section 706 of the APA provides that courts "shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Specifically, Plaintiffs contend that Defendants "refus[ed] to satisfy their statutory duty to actually 'consider' objections issued during the comment period." Pls.' Br. at 41.

We are not persuaded that Plaintiffs have established a reasonable likelihood of success on this claim. On July 19, 2010, Defendants published the interim final regulations. Although comments on the anticipated guidelines were not requested in the interim final regulations, Defendants received "considerable feedback" regarding which preventive series for women should be covered without cost sharing. In response to these comments, on August 1, 2011, Defendants issued an amendment to the interim final regulations which authorized the religious employer exemption. 76 Fed. Reg. 46,621. That amendment was issued pursuant to express statutory authority granting Defendants discretion to promulgate regulations relating to health

[5] In their Complaint, Plaintiffs also allege that the mandate violates the APA because: (1) Defendants arbitrarily and capriciously failed to consider the impact of the mandate on secular, for-profit employers and failed to exempt Plaintiffs and other similar organizations from the scope of the regulations; and (2) it conflicts with two federal prohibitions relating to abortions. However, Plaintiffs failed to develop these allegations in their briefing in support of their motion for preliminary injunction, and thus, we do not consider them at this time.

coverage on an interim final basis, which means without requiring prior notice and comment. *Id.* at 46,624. Defendants also made a determination that issuance of the regulations in interim final form was in the public interest, and thus, there was "good cause" to dispense with the APA's notice-and-comment requirements. *Id.*

Defendants subsequently requested comments on the amendment for a period of 60 days and specifically on the definition of "religious employer" contained in the exemption authorized by the amendment and after receiving comments, adopted the definition contained in the amended interim final regulations and created the temporary enforcement safe harbor period during which they would consider additional amendments to the regulations to further accommodate the religious objections to providing contraception coverage of certain religious organizations. 77 Fed. Reg. at 8726-27. Plaintiffs have pointed to nothing that would suggest such actions are violative of the APA, and thus, we cannot find that Plaintiffs have a reasonable likelihood of establishing that Defendants failed to satisfy the APA's procedural requirements.

III. Conclusion

For the reasons detailed in this entry, we find that Plaintiffs have failed to establish a reasonable likelihood of success on the merits of any of their claims. Because likelihood of success is a threshold requirement for injunctive relief, we need not proceed further in our analysis. Accordingly, Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

Date: 12/27/2012

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

GROTE INDUSTRIES, LLC an Indiana limited liability company, GROTE INDUSTRIES, INC. an Indiana corporation, WILLIAM D. GROTE, III, WILLIAM DOMINIC GROTE, IV, WALTER F. GROTE, JR., MICHAEL R. GROTE, W. FREDERICK GROTE, III, JOHN R. GROTE, Plaintiffs, vs. KATHLEEN SEBELIUS in her official capacity as Secretary of the United States Department of Health and Human Services, HILDA L. SOLIS in her official capacity as Secretary of the United States Department of Labor, TIMOTHY GEITHNER in his official capacity as Secretary of the United States Department of the Treasury, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	)	No. 4:12-cv-00134-SEB-DML

ORDER DENYING MOTION TO RECONSIDER

This cause is back before the Court on Plaintiffs' December 31, 2012 Motion to Reconsider [Docket No. 41], directed towards our December 27, 2012 Order Denying Plaintiffs' Motion for Preliminary Injunction [Docket No. 40]. There we ruled *inter alia* that Plaintiffs had

failed to establish a reasonable likelihood of success on the merits of their claim that the preventive care coverage regulations ("the Mandate") issued under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act"), violate their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"). We also held that Plaintiffs had failed to establish a likelihood of success on the merits of their constitutional and other statutory claims, brought respectively under the First and Fifth Amendments to the United States Constitution and the Administrative Procedures Act.

Plaintiffs now request that we reconsider that Order in light of the late-breaking emergency ruling by a motions panel of the Court of Appeals for the Seventh Circuit in *Korte v. Sebelius*, No. 12-3841 (7th Cir. Dec. 28, 2012), which decision was handed down the day following the issuance of our Order. In *Korte*, the panel majority, over the dissent of Judge Rovner, issued an injunction pending appeal on issues similar to those presented in the case before us, holding that "the Kortes have established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise" under RFRA. *Id.* at 5.

In their motion for reconsideration, Plaintiffs seek an order, which they characterize as warranted by the Seventh Circuit's *Korte* decision, entering the following injunctive directives: "(1) a for-profit corporation and its owners may assert a religious exercise claim; (2) the mandate imposes a substantial burden on the religion of objecting businesses and owners; (3) the government defendants do not establish that the Mandate is the least restrictive means to further a compelling governmental interest; (4) irreparable harm will result to objecting businesses and

owners; and (5) the balancing of harms weighs in favor of the objecting businesses and owners." Pls.' Mot. at 5.

As our Order made clear, we found that the Mandate did *not* impose a substantial burden on Plaintiffs' free exercise of religion under the RFRA and further found that Plaintiffs *failed* to establish a likelihood of success on the merits of their constitutional and other statutory claims. Accordingly, we did not address whether the Mandate is the least restrictive means to further a compelling governmental interest nor did we assess irreparable harm or the balance of the harms.

We acknowledge that there are substantial similarities between the facts and legal issues presented in the case before us and those in *Korte* and, of course, while we are entirely respectful of the Seventh Circuit panel's opinion, we are not bound by it as a precedential ruling because the appellate ruling was not a plenary decision of the Court on the merits, but a grant of emergency relief, based on its preliminary determination. The Court of Appeals order in *Korte* thus serves in effect as a stay rather than a reversal of the district court's decision. As recognized by Judge Sykes in writing for the Court in a prior case, *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008): "Often a motions panel must decide an issue 'on a scanty record,' and its ruling is 'not entitled to the weight of a decision made after plenary submission.'" *Id.* at 778 (quoting *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991)); *see also Homans v. City of Albuquerque*, 366 F.3d 900, 905 (10th Cir. 2004) ("[A] motions panel's decision is often tentative because it is based on an abbreviated record and made without the benefit of full briefing and oral argument.") (quotations and citations omitted). The panel majority took pains in the *Kortes* order to emphasize that the motions panel decision did not constitute a plenary ruling by the Court on the merits, specifically, referencing the "early juncture" at which the issues before the panel were being considered, and stating that resolution of the question of

"[w]hether the government's interests qualify as 'compelling' remains for later in this interlocutory appeal" and is a "judgment [reserved] for our plenary consideration of the appeal …." *Korte*, No. 12-3841, at 6.

At the time we issued our Order, we relied on the legal authorities in place at that time, explicating in detail our reasoning and analysis and final decision in light of the existing facts and applicable precedent. Indeed, our analysis closely tracks the reasoning in Judge Rovner's dissent in *Korte*, including, for example, the references to concerns that, if secular, for-profit employers have the right to decline to pay for particular types of medical care to which they object, despite neither the corporation nor the individual owners being involved with the decision to use the objectionable services, "it is not clear … what limits there might be on the ability to limit the insurance coverage the employer provides to its employees, for any number of medical services (or decisions to use particular medical services in particular circumstances) might be inconsistent with an employer's (or its individual owners') individual religious beliefs." *Id.* at 7; *see Grote Indus., LLC v. Sebelius*, No. 4:12-cv-134, 2012 WL 6725905, at *6 (S.D. Ind. Dec. 27, 2012) ("We can imagine a wide variety of individual behaviors that might give rise to religiously-based scruples or opposition, such as alcohol consumption or using drugs or tobacco, or homosexual-related behaviors, all of which can threaten health conditions requiring treatment and care. If the financial support for health coverage of which Plaintiffs complain constitutes a substantial burden, secular companies owned by individuals objecting on religious grounds to such behaviors, including those businesses owned by individuals objecting on religious grounds to *all* modern medical care, could seek exemptions from employer-provided health care coverage for a myriad of health care needs, or for that matter, for any health care at all to its employees.").

Despite the obvious similarities between *Korte* and our case, and despite the usual, required deference due appellate rulings by a district court, we find that it would be improvident to grant the broad-based requests as framed by Plaintiffs in their motion to reconsider. Their motion for reconsideration requests substantive findings on issues that not only conflict with our prior determinations, they also exceed the scope of the Seventh Circuit's rulings in *Korte*. For example, Plaintiffs' request that we rule that the government cannot establish that the Mandate is the least restrictive means to further a compelling governmental interest does not comport with our prior analysis or that set out in *Korte*. The panel expressly stated that whether the government's interests were compelling "remains for later in this interlocutory appeal." *Korte*, No. 12-3841, at 6. In addition, Plaintiffs' request that we find that a for-profit corporation and its owners may assert a religious exercise claim exceeds the Seventh Circuit's decision, which lacked any substantive ruling as to whether for-profit, secular corporations can be deemed to exercise religion.

Thus, we deny Plaintiffs' motion for reconsideration. Given the preliminary nature of the Seventh Circuit's ruling in *Korte* as well as the procedural posture of our case, Plaintiffs' only viable avenue to the relief they seek must be through an appeal, which we anticipate will be filed by them forthwith. The Motion to Reconsider accordingly is DENIED.

IT IS SO ORDERED.

Date: 01/03/2013

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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