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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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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.

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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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## ARGUMENT

### I. THE MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

#### A. THE CORPORATE STATUS OF GROTE INDUSTRIES DOES NOT PRECLUDE APPLICATION OF RFRA.

The government incorrectly asserts that RFRA does not protect a for-profit corporation. *See* Government Brief (Opp.) at 15–22. Contrary to the government's assertion, RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A).

1. Several cases recognize corporations' free exercise claims.

In a case with an almost identical factual situation involving the same Mandate, the Eastern District of Michigan recently concluded that "a closely-held corporation may assert its owners' free exercise and RFRA rights where the corporate entity 'is merely the instrument through and by which the owners express their religious beliefs.'" *Monaghan v. Sebelius*, 2013 U.S. Dist. LEXIS 35144, No. 12-15488, at *11 (E.D. Mich. March 14, 2013) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009)). In *Monaghan*, the plaintiff was the owner and sole shareholder of a secular, for-profit property management company. *Id.* at *1. In instituting a preliminary injunction against application of the Mandate to the for-profit, secular corporation, the Court stated that it "sees no reason why a corporation cannot support a particular religious viewpoint by using corporate funds to support that viewpoint." *Id.* at *16.

Other courts have reached the same conclusion. In *Stormans*, a family-owned pharmacy objected to carrying the Plan B contraceptive pill for its customers

on religious grounds, claiming that the operation of the pharmacy was "an extension of the beliefs of the Stormans family," and that the beliefs of the family were also the beliefs of the pharmacy. 586 F.3d at 1116-20. The Ninth Circuit found that the pharmacy had standing to assert the free exercise rights of its owners, despite its operation as a secular, for-profit company. *Id.* Similarly, in *EEOC v. Townley Engineering & Manufacturing Co.,* a closely-held mining corporation, which was 94% owned by a husband and wife who were members of the Catholic Church, was permitted to assert the free exercise rights of its owners in a Title VII case. 859 F.2d 610, 619-20, n. 15 (9th Cir. 1988).

In *Monaghan*, *Stormans*, and *Townley*, the court did not preclude free exercise claims brought by corporations simply due to the for-profit, secular status of the corporation. In each case, it was found that secular, for-profit corporations were capable of asserting the free exercise rights of their owners. The Grotes, exactly as the plaintiffs in each of these cases, operate and control their corporation, and intend to run their business in a manner consistent with their religious beliefs. The for-profit, secular status of Grote Industries does not preclude the corporation from asserting its free exercise rights.

2. Indiana Law recognizes corporate religious exercise.

It has long been recognized that corporations have some religious and moral involvement that is broader than the legal identity of a corporation. Corporations regularly engage in conduct relating to morals, even though such conduct does not necessarily benefit the profitability of a company. Under Indiana corporate law, a

corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs…" INDIANA CODE § 23-1-22-2 (2012). This right to the same powers as a natural person includes the right to "make donations for the public welfare or for charitable, scientific, or education purposes." *Id.* at part (13). Furthermore, "[Indiana] corporations, along with the expressed power conferred by their charters, take by implication all the reasonable modes of execution which a natural person may adopt in the exercise of similar powers. They enjoy these powers as fully as natural persons, with incidental powers to do anything necessary to accomplish their corporate purposes…." *Weir v. United States*, 92 F.2d 634, 637 (7th Cir. 1937) (internal citations omitted).

Indiana corporate law establishes that any corporation incorporated under its laws, such as Grote Industries, is able to engage in activities which are greater than the legal identity of the corporation, and that the corporation has the same rights as a natural person. Courts have frequently found that such activities are consistent with the community interest of the corporation. *See, e.g. A.P. Smith Manufacturing Co. v. Barlow,* 98 A.2d 581, 590 (N.J. 1953) (holding that a corporation's donations to Princeton University were proper, stating that the contributions were made in "reasonable belief that it would aid the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates."). Community and moral involvement are an appropriate function of the corporate form, and Grote's exercise of religious beliefs is consistent with that principle.

3. Corporate form does not negate religious exercise.

That Grote Industries is a "separate and distinct" entity, Opp. at 23, does not remove the Mandate's substantial burden on religious exercise. "[T]he Grote Family's use of the corporate form is not dispositive of the claim." Grote v. Sebelius, 708 F.3d 850, 854–55 (7th Cir. 2013) (citing *Korte v. Sebelius*, 2012 WL 6757353, at *3, (2012) and *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010)). Laws which give such a "Hobson's choice" between compliance and religious beliefs substantially burden a plaintiff's free exercise of religion. The Supreme Court has held that a challenged law substantially burdens the free exercise of religion if it compels plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v.* Yoder, 406 U.S. 205, 218 (1972). The Supreme Court has also held that a choice between following the tenets of a religion and forfeiting governmental benefits or violating the religion in order to receive those benefits was an improper compulsion, and therefore a substantial burden on the plaintiff's free exercise rights. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). This is exactly the situation Grote faces here.

The government's "corporate form" argument is inconsistent with its own actions. Unlike those who operate for-profit corporations, the government recognizes that individuals who operate churches and religious non-profits need protection from the Mandate. See 45 C.F.R. 147.130(a)(1)(iv)(B) (exemption for houses of worship); 78 Fed. Reg. 8456-01, 8461 (Feb. 6, 2013) (proposing "accommodation" for religious non-profits). But non-profits receive many of the

same "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," *Citizens United*, 130 S. Ct. at 905—as for-profits. The government's "corporate form" theory cannot explain its different treatment of for-profit and non-profit organizations.

Moreover, the government's insistence that the Grotes cannot be substantially burdened in religious exercise through their business itself demonstrates the existence of a substantial burden here. The government's position essentially tells religious believers that if they want to practice business with the benefits of the corporate form they abandon their religious liberty; they can only exercise religion through a sole proprietorship. That choice itself, however, is a substantial burden on religious exercise, because it "forces [plaintiff] to choose between following the precepts of her religion and forfeiting benefits." *Sherbert*, 374 U.S. at 404.

RFRA nowhere excludes families in business from its definition of substantial burden. Nor would the First Amendment condone such a strained reading of RFRA. "It is rudimentary that [a] State cannot exact as the price of those special advantages [granted corporations] the forfeiture of First Amendment rights." *Citizens United*, 130 S. Ct. at 905 (emphasis added). Neither can the federal government itself.

The "substantial pressure" that exists here, *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008), need not involve any inquiry into the doctrine of corporate veil-piercing. Veil-piercing is about preventing abuses of the corporate form that would

perpetuate fraud or injustice. *See N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052-55 (10th Cir. 1993) ("Informality in the operation of a closely held corporation will not lead to disregard of the corporate entity if the informality neither prejudices nor misleads plaintiff." (quoting 18 C.J.S. Corporations, § 14 at 284)). Far from abusing the corporate form, the Grotes merely seek to use it in a manner that Indiana deems perfectly permissible: operating their business in accordance with their faith. It is outrageous to equate the Grote's efforts to do so with "treat[ing] the company's bank accounts as their own"; "co-mingling personal and corporate funds"; or "disregarding the corporate form and treating Grote as [an] alter ego." Opp. at 24. Corporate business owners regularly make value-based (not profit-exclusive) judgments that are not illegal and do not "disregard the corporate form."[1]

The government probably would not follow the implications of its position against corporate religious exercise. If a corporate owner challenged a business regulation that discriminated against him on the basis of race, gender, or national origin, it is unlikely that the government would say the corporate form bars that claim. This Circuit itself has recognized that a private corporation can present "a cognizable equal protection claim" in such circumstances. *Sherwin Manor Nursing*

[1] *See, e.g.,* http://www.huffingtonpost.com/2013/03/20/chipotle-cancels-boy-scout-event-sponsorship_n_2909391.html (describing Chipotle Mexican Grill, Inc.'s decision to withdraw sponsorship from Boy Scout event because the ban on gay scout leaders "is not consistent with our values"); http://www.wholefoodsmarket.com/mission-values/core-values/declaration-interdependence (describing how Whole Foods Market, Inc. strives to "balance [its] needs with the rest of the planet" by promoting "environmental stewardship so that the earth continues to flourish for generations to come").

*Cent., Inc. v. McAuliffe*, 37 F.3d 1216, 1221 (7th Cir. 1994) ("nursing care facility, owned and operated by orthodox Jews" that "allege[d] that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus."). Likewise, a corporation owned by minorities can assume an "imputed racial identity" from its shareholders, without somehow violating the propriety of the corporate form. *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004); *A.H. Employee Co., Ltd. v. Fifth Third Bank*, 2012 WL 686704, at *5 (N.D. Ill. 2012) (citing *Amber Pyramid, Inc. v. Buffington Harbor Riverboats, LLC*, 129 Fed. App'x 292, 295 (7th Cir. 2005)).

### B. THE MANDATE SUBSTANTIALLY BURDENS THE RELIGIOUS BELIEFS OF GROTE INDUSTRIES AND ITS OWNERS.

The Mandate violates the religious beliefs of the Grote family and Grote Industries, who object on religious grounds to providing contraceptives of any kind under their health plan.

#### 1. The Mandate substantially burdens religious exercise in business.

The government argues that the obligation to cover contraceptives lies with the Grote Industries health plan, and not the shareholders of the corporation, Opp. at 22-25. But this argument is misplaced for several reasons. First, the government fails to even set forth this Circuit's standard for a substantial burden. The standard merely requires that the government exert "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Koger*, 523 F.3d at 799 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). This standard does not exclude family owners of a business. The government misconstrues *United States v. Lee*, 455 U.S.

252, 257 (1982), as if the Court held that no substantial burden existed. But *Lee*, and later decisions by the Court, held the opposite: a mandate on a business, even a tax, is a substantial burden. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699–700 (1989) (explaining that "*Lee* establishes that *even a substantial burden* would be justified by the 'broad public interest in maintaining a sound tax system.'")

The Mandate imposes "substantial pressure" on the Grotes for several reasons. First of all, the government admits that the Mandate coerces Grote Industries itself. But that corporation is the property of the Grotes, as well as being their life's work and livelihood. Government fines and lawsuits against a person's property arising out of the manner in which that person uses his property are undoubtedly the exertion of "substantial pressure" on the owner. The very purpose of the Mandate and its penalties is to coerce the behavior of the people who own and operate the corporation. Telling religious believers that their business will be destroyed if they do not operate it against their religious beliefs is "substantial pressure" on those believers to "modify their behavior" against those beliefs.

The Mandate is also a substantial burden on the Grotes themselves because their company, and its health plan, act only at the Grotes' direction. *Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."). For this reason Grote Industries' corporate form does not insulate the Grotes from the Mandate. Grote Industries can comply with the Mandate only if the Grotes, against their consciences, make it do so. If the Grotes instead resist, their family business faces huge fines. See *Koger*,

523 F.3d at 799 (substantial burden if law exerts "substantial pressure" on believers to engage in prohibited activities).

2. Religious exercise includes insurance coverage.

The government argues that the Mandate should be upheld because the Grotes pay wages to employees, which they say is no different than providing them health insurance. But the government is not entitled to impose that moral distinction on the Grotes. The Grotes object specifically to their coverage of certain items in health insurance, not to other activities such as the use of such items by employees. The right to refrain from acts extends to the right to refrain from facilitating objectionable conduct by others. *See Thomas,* 450 U.S. at 714–16 (recognizing religious exercise in refusing to aid in production or "directly aid[] in the manufacture of items used in warfare").

On its own terms, the government's conflation of wages and insurance falls apart. The government has pledged to "accommodat[e] [the] religious liberty interests" of certain non-profit entities by "protect[ing]" them from "having to contract, arrange, or pay for contraceptive coverage." 77 Fed. Reg. 16501, 16503 (March 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013). That accommodation makes no sense if offering health coverage is no different than paying wages.[2] The

[2] Congress also recognizes the moral implications of insurance, such as by excluding abortion coverage even when the government itself pays a wage. See 32 C.F.R. § 199.4(e) (the government itself, as an employer, excluding abortion from Tricare military health program); Congressional Research Service, Laws Affecting the Federal Employees Health Benefits Program 4 (2013) (same in federal employee plans); see also 42 U.S.C. § 18023(b)(2) (Affordable Care Act restrictions on subsidies of abortion coverage); 42 C.F.R. § 441.202 (Medicaid exclusion of abortion

government's promise to accommodate non-profit entities betrays the government's recognition that providing insurance *does* implicate employers in the services offered. This is particularly true for self-funded plans like Grote's. "If anything, the Grote Family and Grote Industries have a more compelling case for an injunction pending appeal. Unlike the health-insurance plan at issue in Korte, the Grote Industries health plan is self-insured." *Grote*, 708 F.3d at 854.

The government misses the mark by relying on the Establishment Clause principle that parents may elect to use neutrally-allocated vouchers at religious schools. Opp. at 31 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)). What the Establishment Clause allows in terms of school funding is a secular matter properly determined by federal courts. What the Grotes' faith allows in terms of involvement with contraception and abortifacients, by contrast, is a matter of religious belief "not within 'the judicial function and judicial competence.'" *Lee*, 455 U.S. at 257 (quoting *Thomas*, 450 U.S. at 716). Moreover, *Zelman* is a poor analogy even on its own terms, because it involved fungible dollars that parents could direct to schools of their choosing, be they religious or not. *Zelman*, 536 U.S. at 645 ("Any private school, whether religious or nonreligious, may participate in the program and accept program students"). The Mandate, by contrast, requires the Grotes to earmark coverage for specific contraceptives, abortifacients and sterilization procedures prohibited by their faith.

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coverage); 42 C.F.R. § 136a.53 (same in Indian Health Service); *Harris v. McRae*, 448 U.S. 297, 318 (1980) (upholding federal ban on abortion funding).

The government also mistakenly relies on *Board of Regents v. Southworth*, 529 U.S. 217 (2000), which involved students' First Amendment objections to a university-created funding scheme for student organizations. Opp. at 31. But *Southworth* cuts against the government's argument. The Court recognized that the scheme did burden the students' rights not to be compelled to subsidize someone else's expression. *Id.* at 230–31 (citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)). But *Southworth* later turned on the narrow tailoring of the University's speech forum. 529 U.S. at 231. Thus the government cannot use *Southworth* to argue that no burden on religious exercise exists in the first place.

Equally irrelevant is the argument that HIPAA's "Privacy Rule . . . imposes a wall of confidentiality between an employee's health care decisions . . . and the employer." Opp. at 32. The Grotes are not suing to stop their employees from exercising their rights to purchase and use contraceptives. They are suing to avoid being forced to specifically participate in the process.

3. RFRA and the First Amendment protect religion in business.

The government's assertion that a profit-distinction is "rooted in the text of the First Amendment," Opp. at 12, 18, is plainly wrong. The First Amendment's text makes no distinctions about who may exercise religion; it simply forbids Congress from "prohibiting the free exercise [of religion]." U.S. CONST. Amend. I. The lone source for the government's claim about the First Amendment's "text"—the Supreme Court's *Hosanna-Tabor* decision—has nothing to do with a free

exercise claimant's profit-making status. Opp. at 12, 18 (relying on *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012)). Indeed, the respondent in *Hosanna-Tabor* repeatedly emphasized the "commercial" nature of the Lutheran school to minimize its protection under the religion clauses, a tactic the Supreme Court's unanimous opinion ignored.[3]

The decisions in *Citizens United v. Federal Elections Comm'n*, 130 S. Ct. 876 (2010), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), reject the categorical limitations the government urges here. *Bellotti* explained that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *Id. Citizens United* explained that "political speech does not lose First Amendment protection simply because its source is a corporation," and that the same rule applies to government "limits on the political speech of nonprofit or for-profit corporations." 130 S. Ct. at 913. The Court thus squarely rejected the notion of creating different constitutional rights for different corporations. *See also id.* at 906 (rejecting proposed special treatment of "media corporations" because "[t]his differential treatment cannot be squared with the First Amendment.").

[3] See Br. for Respondent Cheryl Perich, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553) 2011 WL 3380507 (referring to Lutheran school as "a commercial enterprise" and using the term "commercial" 28 times).

The government makes an equally spurious claim that Congress excluded profit-making entities from RFRA. Opp. at 16–22. Congress cannot possibly have "embodied" in RFRA a categorical distinction between for-profits and non-profits, Opp. at 12, without even mentioning it in RFRA's text. To the contrary, RFRA enacts a universal standard for all cases where government substantially burdens religious exercise. 42 U.S.C. § 2000bb-3 (RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993"). RFRA protects "any" exercise of religion, 42 U.S.C. 2000cc-5(7), by any "person," *Id.* § 2000bb-1(a), under one legal standard, strict scrutiny, *Id.* § 2000bb-1(b). See Douglas Laycock, "The Religious Freedom Restoration Act," 1993 B.Y.U. L. Rev. 221, 235 (1993) ("Like the Free Exercise Clause itself, RFRA is universal in its scope. RFRA singles out no claims for special advantage or disadvantage. It favors no religious claim over any other and no state interests over any other.").

The government offers no evidence that RFRA "carried forward" language in other statutes suggesting a distinction between for-profits and non-profits. Opp. at 16. It points to exemptions in Title VII and the ADA for a "religious corporation, association, educational institution, or society." See 42 U.S.C. § 2000e-1(a) (Title VII); id. § 12113(d)(1) (ADA); Opp. at 18-19. Non-profit status is one of many factors for determining whether an organization is a full-blown "religious corporation" qualifying for these blanket exemptions. *See, e.g., Spencer v. World Vision, Inc.*, 633 F.3d 732, 734–35 (9th Cir. 2010) (O'Scannlain, J., concurring). Unlike those

exemptions, however, RFRA is not limited to "religious corporations." Instead, RFRA protects any "person," and requires only that she "exercise . . . religion." 42 U.S.C. § 2000bb-1(b). "Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988).[4] Congress cannot have meant "any exercise of religion" in RFRA to actually mean "religious corporations" or other narrow, specific categories that existed in earlier statutes.

### C. THE MANDATE CANNOT SATISFY STRICT SCRUTINY

1. The government has fatally undermined its alleged interests.

The government asserts a compelling government interest in public health and gender equality and claims the Mandate achieves this interest by requiring certain preventative services be carried on an employer health plan without cost-sharing, stating that "[e]ven small increments in cost sharing have been shown to reduce the use of recommended preventative health services." Opp. at 35.

Yet the government has itself *voluntarily* elected to exempt tens of millions of employees and participants from the very coverage which they allege to be so vital to the public health. *See Newland v. Sebelius*, 2012 WL 3069154, No. 1:12-CV-1123-JLK, at *23 (D. Colo. July 27, 2012); *Tyndale House Publishers v. Sebelius*, 2012 WL 5817323, at *17 (D.D.C. Nov. 16, 2012). No law can "be regarded as protecting

[4] This principle is well-established. *Burrus v. Vegliante*, 336 F.3d 82, 89 (2d Cir. 2003); *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970); *Nalley v. Nalley*, 53 F.3d 649, 652 (4th Cir. 1995); *Dorris v. Absher*, 179 F.3d 420, 429 (6th Cir. 1999); *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 n.5 (10th Cir. 1990); *In re Bracewell*, 454 F.3d 1234, 1242 (11th Cir. 2006).

an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 547 (1993).

The government responds that it is standard practice that private insurance provide contraceptive coverage. Opp. at 38. However, this does not salvage the compelling nature of the government's supposed interests. An exemption does not cease to exist because some people may choose to forego it. The existence of the exemptions, not their popularity, is determinative. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (relying on fact of peyote exemption alone). On the face of the Mandate, the government has chosen not to determine whether and how much grandfathered plans cover contraception, or impose cost-sharing as most prescription drug plans do. The government cannot forcefully argue against such cost-sharing, when it sees no need to eliminate such cost-sharing in grandfathered plans. Congress itself, in PPACA, decided that the preventive services mandate (1) need not include contraception at all, and (2) whether or not it did, it was not among the *really* important mandate that grandfathered plans do need to satisfy. The government apparently has no interest in women's health and equality as such, but insists on one when religious people object to being forced to submit to the government's coercive notion of equality.

Even without this Mandate's many exceptions, the government's argument that it has a compelling interest in denying religious exemptions is devoid of evidence. The public health goals advanced by contraception generally are

irrelevant to Grote's narrow exemption request. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011) (noting that "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced"). Rather than produce actual evidence of a contraceptive-coverage-caused-crisis, the government asserts that women are entitled to use contraception and to make private medical decisions. This is perfectly true, and perfectly irrelevant. The government confuses the constitutional right to take a particular action, free from government interference, with a constitutional right to force a third party to facilitate and fund that action. See Opp. 34–35 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). But if the government is not constitutionally required to subsidize these services, *Harris*, 448 U.S. at 318 (upholding federal ban on abortion funding), surely there is no constitutional interest in forcing private individuals and business owners to do so. "[A] woman's right to an abortion or to contraception does not compel a private person or entity to facilitate either." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181 (Ariz. Ct. App. 2011). Grote's employees remain free to make whatever medical decisions they desire. Grote is simply asserting its own right not to be compelled to participate.

2. The Mandate does not follow the least restrictive means.

The Mandate is not the least restrictive means of achieving the interests alleged here. The narrow tailoring inquiry asks "whether there are other, reasonable ways to achieve the goals with a lesser burden on constitutionally

protected activity," and if there are such less restrictive means, the government "*may not choose the way of greater interference*. If it acts at all, it *must* choose less drastic means." *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (emphasis added) (internal citations omitted). The government has less restrictive alternatives at its disposal, including the ability to provide free coverage of contraceptives itself. Furthermore, the government *already subsidizes contraception* under federal law, as do many states.

The government does not substantially contend that its interests in free contraception would not be achieved if it offered free contraception itself. Instead it objects that for it to provide contraceptives itself would be to "subsidize private religious practices." Opp. at 40. This argument turns the First Amendment on its head. It defines the *mere absence of government coercion* as a "subsidy." But Grote asks for no money. It merely asks not to be coerced by the Mandate. To call this a subsidy is to define freedom as government largesse, which subdued citizens can only meekly request at their own peril. The First Amendment and RFRA declare that freedom trumps the government's desire to coerce when the government has alternatives available to it, even if those alternatives involve the government itself performing the actions that it wants to force citizens to perform. The least restrictive means standard is meant to require the government to pursue avenues which do not needlessly force people to violate their religious beliefs when other means could achieve the same result.

The government's objection to its duty to pursue less restrictive means is also in tension with several of the government's other actions. The government is quite willing to "subsidize private [] practices" when it already spends billions of dollars to subsidize family planning programs. The government's claim that contraceptive services are cost-neutral suggests that public health benefits if it were to provide contraception would save the government and society money in the long run anyway. And the government has already shown its willingness to provide exemptions and accommodations for other religious objectors, even churches themselves. The government cannot freely give churches what it here calls a "subsidy of private religious practices," but then object that doing so for an auto-lighting business is somehow intolerable. The least restrictive means test requires "serious, good faith consideration of workable . . . alternatives," *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 735 (2007), which the government has failed to undertake here.

The fact that the government would spend money in offering contraceptives by other means does not negate those alternatives. "[T]he government must show something more compelling than saving money…. That is the compelling interest test of *Sherbert* and *Yoder* and, therefore, of RFRA." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV 209. 226 (1994). In *Sherbert*, the Supreme Court stated that that even if it was possible that "spurious claims threatened to dilute the [government unemployment compensation] fund . . . it would plainly be incumbent upon the [government] to

*demonstrate no alternative forms of regulation would combat such abuses without infringing First Amendment rights*." 374 U.S. at 407 (emphasis added). The Court in *Riley* required the use of a variety of alternatives involving the government pursuing its goals itself, which necessarily involved government expenditures including in advertising and in criminal prosecutions. *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 799–800 (1988). Yet those options defeated the law under strict scrutiny.

Grote has therefore demonstrated a likelihood of success on the merits on their RFRA claim. *See Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012).

## II. THE MANDATE VIOLATES THE FREE SPEECH CLAUSE.

The Mandate requires the Grotes to fund speech to which they object. The government, however, contends that the regulations regarding the terms of group health plans regulate conduct, and not speech. Opp. at 46. The government tries to focus attention on the act of the doctor prescribing contraceptives, or the woman seeking contraceptive coverage under the health care plan, Opp. at 46, but this conduct is immaterial to the controversy at hand. The Mandate requires Grote to fund "education and counseling," which are undoubtedly forms of speech. Contrary to the government's assertion that mere conduct is being regulated, the Mandate impermissibly restricts the speech of plaintiffs in forcing them to fund speech to which they personally object.

Funding speech is a form of speech—one which is protected from compulsion by the government. *See, e.g., Abood,* 431 U.S. at 234-34 (forced contributions for

union political speech were found improper under the free speech clause). Compelled speech standards apply in situations when the government forces a speaker to fund objectionable speech. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and *the right to refrain from speaking at all*." (citing *W.V. State Bd. of Ed. V. Barnette*, 319 U.S. 624, 633-34 (1943) (emphasis added)).

## III. THE MANDATE VIOLATES THE APA.

The Mandate violates the Administrative Procedures Act claim that Grote has presented in this appeal. The Western District of Pennsylvania recently recognized the cognizability of that claim. *Geneva College v. Sebelius*, 2013 WL 838238 at *32–33 (W.D. Pa. Mar. 6, 2013) (denying the government's motion to dismiss).

## IV. THE MANDATE VIOLATES GROTE'S OTHER CLAIMS.

The Mandate violates Grote's other claims as set forth in the opening brief.

Respectfully submitted on this 1st day of April 2013,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 5,191words, excluding the parts of the brief exempted by Fed. R. App. P. 31(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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12 point font and Century type style.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 1, 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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