IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME, ***Appellant*,** **v.** **KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,** ***Appellees.***	**Case No.: 13-**

APPELLANT UNIVERSITY OF NOTRE DAME'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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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: University of Notre Dame.

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: Jones Day.

3. Appellant is a non-profit corporation and does not have a parent corporation. No publicly held company owns 10% or more of Appellant's stock.

Respectfully submitted, this the 23rd day of December, 2013.

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INTRODUCTION

Appellant, the University of Notre Dame, submits this emergency motion for injunction pending appeal pursuant to Fed. R. App. 8 and 7th Cir. R. 8. Notre Dame seeks an injunction against regulations set to take effect on January 1, 2014, which force Notre Dame to violate its religious beliefs by requiring it to participate in a regulatory scheme to provide its students and employees with insurance coverage for contraception, sterilization, abortion-inducing products, and related services (the "objectionable products and services"). 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130 ("The Mandate"). The Mandate violates the Religious Freedom Restoration Act ("RFRA"), which prohibits the Government from imposing a "substantial burden" on any exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest. 42 U.S.C. § 2000bb-1. Notre Dame exercises its religion by, among other things, refraining from actions that, in the University's view, involve and entangle the University in the provision of contraception and related services. Under the Mandate, however, the University is forced to take precisely those actions that its religion forbids.

The district court's decision cannot be reconciled with *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), which held that absent interests of the highest order, the Government cannot put religious believers to the choice between violating their religious beliefs or paying onerous penalties. *Korte* concluded that the Mandate (1) substantially burdened the religious exercise of business owners who believed the

Mandate required immoral facilitation of contraception, and (2) was not the least restrictive means to achieve a compelling interest.

The Government concedes that *Korte* forecloses any argument that the Mandate can satisfy strict scrutiny. *See Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Defs.' Opp. Br. (Doc. No. 13) at 16 (conceding that "a majority of the Seventh Circuit rejected [Defendants] arguments in *Korte*, and that [the Northern District of Indiana] is bound by that decision."). *See also Diocese of Ft. Wayne-South Bend, Inc., et al. v. Sebelius, et al.*, No. 1:12-cv-159-JD-RBC, N.D. Ind., Defs.' Surreply Br. (Doc. No. 105) at 2, n.1 ("Defendants recognize that *Korte* forecloses their arguments that the regulations satisfy strict scrutiny. Defendants . . . recognize that *Korte* controls this Court's consideration of that part of this case . . . .").

Thus, the only issue before this Court is whether the Mandate imposes a "substantial burden" on Notre Dame's exercise of religion. But *Korte* answers that question too. As *Korte* held—and as every appellate court to reach the question has held—the substantial burden analysis turns on whether the Mandate coerces Notre Dame into doing something contrary to its religious beliefs. *See Korte*, 735 F.3d at 682–85; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013); *Hobby Lobby Stores*, *Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc). In the words of *Korte*: "[A] burden on religious exercise [] arises when the government 'put[s] substantial pressure on an adherent to modify his

behavior and to violate his beliefs.'" 735 F.3d at 682 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)).

Here, the Government does not dispute that complying with the Mandate requires Notre Dame to take actions that violate its sincere religious beliefs. If Notre Dame does not take the required actions, it will be subject to crippling penalties. "That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

The court below ignored the plain import of *Korte* and held that the Mandate does not substantially burden Notre Dame's religious exercise because, under the so-called "accommodation" for non-profit organizations, Notre Dame is not required to "modify" its behavior or violate its religious beliefs. That is clearly incorrect. If not for the Mandate, Notre Dame would offer insurance to its students and employees through an insurance company or administrator that would be *precluded* from providing the objectionable coverage. The Mandate disallows that practice, and instead forces Notre Dame to execute a "self-certification" that "designates" its own third party administrator as the provider of contraceptive benefits. Notre Dame's faith prohibits it from designating its third party administrator in this way, and prohibits it from offering an insurance plan that ultimately leads to the provision of objectionable products and services. The Mandate thus coerces Notre Dame to act differently than it otherwise would, forcing Notre Dame to take numerous actions that are contrary to its religious beliefs, as explained below. *See infra* Part I.A.1.

Because the Mandate forces Notre Dame to violate its religious beliefs, Notre Dame is likely to succeed on the merits of its RFRA claim. And because Notre Dame likewise satisfies all of the other factors for preliminary injunctive relief, it is entitled to an injunction pending appeal.[1]

BACKGROUND

The Government promulgated the Mandate pursuant to its statutory authority to require group health plans to include coverage for women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4). By defining the category of "preventive care" to include all "FDA-approved contraception," the Mandate requires group health plans to cover contraception, sterilization, abortion-inducing drugs and products, and related services.[2]

The Mandate contains a so-called "accommodation" for non-profit religious organizations that object to providing coverage for contraception, abortion, sterilization, and related services. In reality, however, the "accommodation" is anything but. Under the "accommodation," eligible organizations like Notre Dame

[1] Notre Dame conferred with the Government prior to filing this motion. The Government did not consent. Appellants have also filed a motion for an injunction pending appeal in the district court, Fed. R. App. P. 8(a)(1)(C), but have received no ruling. In any event, given the impending enforcement deadline and the district court's prior adverse ruling, obtaining relief from the district court is "impracticable." Fed. R. App. P. 8(a)(2)(A)(i); *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

[2] *See* Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited Dec. 22, 2013). The category of mandatory FDA-approved contraceptives includes the morning-after pill (Plan B) and Ulipristal (HRP 2000 or Ella), as well as Intra-Uterine Devices (IUDs), all of which can induce abortions. *See also* 77 Fed. Reg. 8,725, 8,725–26 (Feb. 15, 2012).

with self-insured health plans are forced to provide a "self-certification" to the third party administrator for their health plan. That self-certification, in turn, has the perverse effect of requiring the insurance company or third party administrator to provide or arrange "payments for contraceptive services" for the organization's students or employees. *See* 78 Fed. Reg. 39,870, 39,892 (July 2, 2013) (codified at 26 C.F.R. § 54.9815-2713A(a)-(c)). These mandated "payments" are directly tied to the organization's health plan, and they last only as long as the students or employees remain on the eligible organization's health plan.[3]

Absent a self-certification submitted by an "eligible organization," the third party administrator has no authority to provide the contraceptive payments; the self-certification, therefore, constitutes a "permission slip" for the third party administrator to do so. Indeed, for self-insured entities, the "self-certification" actually "designat[es] . . . the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. The eligible organization, moreover, is barred from negating the permission slip, as it is prohibited from "directly or indirectly, seek[ing] to influence the [TPA's] decision to" provide the objectionable coverage. 26 C.F.R. § 54.9815–2713A(b)(1)(iii).

[3] *See* 29 C.F.R. § 54.9815–2713A(d) (for self-insured employers, the third party administrator "will provide or arrange separate payments for contraceptive services . . . for so long as [employees] are enrolled in [their] group health plan"); 45 C.F.R. § 147.131(c)(2)(i)(B) (for employers offering insured plans, the issuer must "[p]rovide separate payments for any contraceptive services . . . for plan participants and beneficiaries for so long as they remain enrolled in the plan").

Here, it is undisputed that these regulations—including, for example, the requirement to issue the "self-certification"—force Notre Dame to undertake specific actions that are contrary to its sincerely held religious beliefs. *See infra* Part I.A.1. The question before this Court, therefore, is whether these requirements are consistent with RFRA. They plainly are not.

Notre Dame filed this suit on December 3, 2013. *See Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Compl. (Doc. No. 1) (Exhibit B) and Supplemental Affidavit of John Affleck-Graves (Doc. No. 24) (Exhibit E) ¶¶ 4-14. Given the impending January 1 enforcement deadline and implementation acts that its third party administrator intended to take prior to the enforcement deadline, Notre Dame sought a preliminary injunction, *id.* (Doc. No. 9), which the district court denied on December 20, 2013 (Doc. No. 40), twelve days before the Mandate is scheduled to go into effect. Notre Dame is thus forced to seek emergency relief from this court.

ARGUMENT

Notre Dame is entitled to an injunction pending appeal because (1) it is likely to succeed on the merits, (2) it is "suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted"; (3) "there is no adequate remedy at law"; and (4) "an injunction would not harm the public interest." *Christian*

Legal Soc'y v. Walker, 453 F.3d 853, 859 (7th Cir. 2006).[4] Notably, in *Korte*, this Court entered an injunction pending appeal before the case was fully briefed and argued. *See Korte v. Sebelius*, 528 F. App'x 583, 587–88 (7th Cir. 2012). The same relief is warranted here.

I. NOTRE DAME IS LIKELY TO SUCCEED ON THE MERITS OF ITS RFRA CLAIM

Under RFRA, the Government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that 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; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006). This Court's decision in *Korte* sets the analytical framework for resolving the question presently before the Court.

In *Korte*, this Court held that the Mandate substantially burdened the religious exercise of two corporations and their Catholic owners by requiring those corporations to offer employee health insurance through an insurance company that would cover contraception and related services. In so holding, the Court rejected the Government's argument that the plaintiffs' participation in the provision of

[4] Plaintiffs also challenged the Mandate under the First Amendment and the Administrative Procedure Act. Plaintiffs do not abandon these arguments; to the contrary, they intend to pursue them on appeal. The present motion for preliminary relief, however, is limited to Plaintiffs' RFRA claim.

contraceptive coverage was "too attenuated" to constitute a substantial burden because contraception would be provided and used by someone else instead of directly by the plaintiffs. *Korte*, 735 F.3d at 684. What mattered is that the plaintiffs were required to take certain actions that *they believed* would make them complicit in a grave moral wrong. *Id.*

As this Court explained, it was not merely incorrect but wholly improper for the Government to argue that the level of complicity required by the Mandate was "insignificant or nonexistent," because "[t]his argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question." *Id.* at 685. Crucially, it was up to the plaintiffs themselves to draw the line as to what actions they believed were permissible according to their own religious beliefs. The salient point was that "[t]he contraception mandate force[d] [plaintiffs] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.*

Because the Mandate imposed a substantial burden on the plaintiffs' religious exercise, the Court evaluated it under strict scrutiny, which the Court held the Mandate could not satisfy. Here, the Government concedes that *Korte* forecloses the strict-scrutiny question, and thus the only question is whether the Mandate imposes a

substantial burden on Notre Dame's free exercise of religion. That analysis, however, is likewise controlled by *Korte*.

A. The Mandate Imposes a Substantial Burden on Notre Dame's Exercise of Religion

Where sincerity is not in dispute, RFRA's substantial burden test involves a straightforward, two-part inquiry: a court must (1) "identify the religious belief" at issue, and (2) determine "whether the government [has] place[d] substantial pressure" on the plaintiff to violate that belief. *Hobby Lobby*, 723 F.3d at 1140 (*en banc*); *see also Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216. The first step "does not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken." *Korte*, 735 F.3d at 685. After all, it is not "'within the judicial function'" to determine whether a belief or practice is in accord with a particular faith. *Thomas*, 450 U.S. at 716. Courts must therefore accept a plaintiff's description of its religious exercise. *Id.* at 714–15. Under the second step, the court must determine whether the Government has substantially burdened that exercise by compelling an individual to "perform acts undeniably at odds" with his beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), or putting "substantial pressure on [him] to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717–18; *Korte*, 735 F.3d at 682–84; *Gilardi*, 733 F.3d at 1216–18.

Here, it is clear that the Mandate substantially burdens Notre Dame's exercise of religion. The "exercise of religion" includes "the performance of (or abstention

from) physical acts." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Significantly, RFRA protects "'*any* exercise of religion . . . *whether or not compelled by, or central to, a system of religious belief*." *Korte*, 735 F.3d at 682 (quoting 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A)) (emphasis added). Here, Notre Dame exercises its religion by refusing to take certain actions that give rise to scandal by facilitating or appearing to facilitate coverage for contraceptives, sterilization, abortion-inducing products, or related education and counseling. In accordance with its religious beliefs, Notre Dame has always arranged health insurance for its employees and students through an insurance company or third party administrator that is not authorized to provide coverage for the objectionable products and services. The Mandate, however, disallows that arrangement and instead requires Notre Dame to take numerous steps to participate in a regulatory scheme for the delivery of contraceptive coverage to its employees and students. That is a substantial burden on Notre Dame's religious exercise.

1. The Mandate Requires Notre Dame to Act in Violation of Its Sincere Religious Beliefs

The Government does not dispute the critical question whether compliance with the Mandate would force Notre Dame to act in a way that is contrary to its sincerely held religious beliefs. As made clear in undisputed affidavits, Notre Dame sincerely believes that taking the actions required by the Mandate, even under the "accommodation," would be contrary to its sincerely held Catholic beliefs. In

accordance with these beliefs, Notre Dame may not provide the objectionable coverage directly, nor may it authorize or "designate" someone else to provide the coverage, nor may it maintain an arrangement with an insurance company or third party administrator that will provide the coverage to its employees and students. *Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Affidavit of John Affleck-Graves (Doc. No. 10) (Exhibit C) ¶¶ 36-61.

For example, in order to comply with the Mandate, Notre Dame would be required to undertake the following actions, each of which, alone and in combination, is contrary to its Catholic beliefs:

- Execute a "self-certification" that would authorize its insurance company or third party administrator to provide coverage for contraception, sterilization, abortion-inducing products, and related services.
- Pay premiums to an insurance company or third party administrator that is authorized to provide Notre Dame's students or employees with the objectionable coverage.
- Offer enrollment paperwork for students or employees to enroll in a health plan overseen by an insurance company or third party administrator that is authorized to provide the objectionable coverage.
- Send health-plan-enrollment paperwork (or tell students or employees where to send it) if its health plan is overseen by an insurance company or third party administrator that is authorized to provide the objectionable coverage.
- Identify for its insurance company or third party administrator which students or employees will participate in Notre Dame's health plan, if its insurance company or third party administrator is authorized to provide objectionable coverage to those participating students or employees.

- Refrain from canceling its insurance arrangement if it becomes aware that its insurance company or third party administrator is authorized to provide objectionable coverage to its students or employees.

Because complying with the Mandate requires Notre Dame to take all of these actions, it requires Notre Dame to act contrary to its religious beliefs. The only question under *Korte*, therefore, is whether Notre Dame faces "substantial pressure" to comply.

2. The Mandate Imposes a "Substantial Burden" on Notre Dame's Religious Exercise Because It "Substantially Pressures" Notre Dame to Comply

As this Court held in *Korte*, "[a] burden on religious exercise [] arises when the government 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 735 F.3d at 682 (quoting *Thomas*, 450 U.S. at 718). Here, the Mandate imposes "substantial pressure" on Notre Dame because it threatens substantial penalties if the University does not comply. Failure to take the actions required under the Mandate will subject Notre Dame to potentially fatal fines of $100 a day per affected beneficiary. *See* 26 U.S.C. § 4980D(b). If Notre Dame seeks to drop health coverage altogether, it will be subject to an annual fine of $2,000 per full-time employee after the first thirty employees, *see* 26 U.S.C. § 4980H(a), (c)(1), and/or face ruinous practical consequences due to its inability to offer a crucial healthcare benefit to employees and students. *See Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Affidavit of John Affleck-Graves (Doc. No. 10) (Exhibit C) ¶¶ 56, 59-61.

The threat of these severe costs and penalties clearly imposes "substantial pressure" on Notre Dame to comply with the Mandate. As this Court held in *Korte*, "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines, essentially forcing [plaintiffs] to choose between [ruinous fines] and following the moral teachings of [their] faith." 735 F.3d at 683–84; *see also Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met.") (quoting *Thomas*, 450 U.S. at 718); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic").

* * *

Because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), any attempt to distinguish this case from *Korte* is wholly unavailing. As *Korte* makes clear, the precise nature of the religious exercise at issue *is irrelevant* to the substantial burden analysis. 735 F.3d at 682–84. The court's only task is to determine whether the asserted exercise—whatever that may be—is sincere and religious and then to assess the "coercive effect of the governmental pressure on the adherent's religious practice." *Id.* at 683. Thus, it is immaterial that the plaintiffs in *Korte* exercised their religion by refusing to "purchase the required contraception

coverage," 735 F.3d at 668, while Notre Dame exercises its religion by refusing to become entangled in the process by which a third party will pay for the objectionable products and services: what matters is that in this case, as in *Korte*, the Mandate forces Notre Dame to act contrary to its religious beliefs. As Judge Sykes explained: "[t]he contraception mandate forces [plaintiffs] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Id.* at 685.

B. The District Court's Decision Was Erroneous

The decision below was fundamentally confused about both the applicable law and the nature of Notre Dame's religious beliefs. The district court's decision hinged on the notion that under the "accommodation," Notre Dame is not "required to modify its own behavior," because all Notre Dame must do is sign a "self-certification" stating its objection to contraception, and then Notre Dame's third party administrator will be the one to provide contraceptive coverage to Notre Dame's students and employees. Dist. Ct. at *18 (slip op.) (Exhibit A). In the district court's view, "the certification merely denotes Notre Dame's refusal to provide contraceptive care—a statement that is entirely consistent with what Notre Dame has told its TPA in the past." *Id.* Thus, according to the district court, Notre Dame's "own actions and speech are not required . . . to change in a manner contrary to its sincerely held religious beliefs." *Id.*

This analysis is flawed for several reasons. *First*, the district court is plainly incorrect in its factual description of the "self-certification," which does not "merely denote[] Notre Dame's refusal to provide contraceptive care." On the contrary, as the regulations clearly state, Notre Dame's completion and transmission of the "self-certification" actually "designat[es] . . . the third party administrator[] as plan administrator and claims administrator for contraceptive benefits." 78 Fed. Reg. at 39,879. This act of "designation" is not something that Notre Dame has ever done before. Indeed, this is precisely why Notre Dame has stated, in an undisputed affidavit, that it objects to completing and transmitting the self-certification.

Second, the Mandate forces Notre Dame to "modify" its behavior and take numerous actions that violate its religious beliefs. In the past, Notre Dame has always offered insurance to its students and employees through a third party administrator that was not designated or authorized to provide contraceptive benefits. Under the "accommodation," however, Notre Dame *must* offer insurance through a third party administrator that is designated and authorized to provide contraceptive benefits. In the past, Notre Dame has always insisted as a matter of contract that its third party administrator *not* provide coverage for contraception and related services. Now, Notre Dame is prohibited from entering such a contract, and is instead forced to submit a certification that *designates* its third party administrator as the claim administrator for contraceptive benefits. Previously, Notre Dame never paid premiums to a third party administrator that would provide its students and employees

with contraceptive benefits. Now, Notre Dame must do so. All of these newly-required actions are deeply objectionable to Notre Dame in light of its sincerely held Catholic beliefs.

Third, the district court's analysis wrongly assumes that attaching new consequences to conduct that Notre Dame has previously engaged in cannot impose a substantial burden on religious exercise. That is obviously incorrect. As *Korte* clearly held, the touchstone of the substantial burden analysis is whether the RFRA claimant is compelled to act in violation of his religious beliefs. 735 F.3d at 685. The question is not whether the believer must "modify" his behavior compared to actions he has taken in the past, but whether he must "modify" his behavior compared to what he would do if free to follow his religious conscience. For that reason, it is obviously a substantial burden to force someone to continue engaging in a course of action that was previously unobjectionable but, due to changed circumstances, has now become objectionable. For example, even if you have happily given your friend a ride to the bank every week for the past year, you might well decide to stop if you discovered that he was planning a robbery. *See also Zubik v. Sebelius*, 13-CV-1459, 2013 WL 6118696, at *25 (W.D. Pa. Nov. 21, 2013) (analogizing to "a neighbor who asks to borrow a knife to cut something on the barbecue grill, and the request is easily granted. The next day, the same neighbor requests a knife to kill someone, and the request is refused. It is the reason the neighbor requests the knife which makes it impossible for the lender to provide it on the second day.").

Fourth, RFRA protects "any" exercise of religion, and courts have repeatedly found that laws substantially burdened the exercise of religion even where the religious objection at issue could be characterized as an objection to an act because of its consequences. Indeed, in *Korte* itself, the plaintiffs' religious objection was premised on the fact that they did not want to facilitate contraceptive services that would be provided and used *by others*. Similarly, there is no indication that the pacifist plaintiff in *Thomas v. Review Board* had any inherent objection to the act of hammering steel into cylinders. Rather, he objected to hammering steel into cylinders when those cylinders would be put on top of military tanks that would be used to prosecute the war effort. *See Thomas*, 450 U.S. at 715. There is likewise no indication in *Lee* that the Amish plaintiff had an inherent objection to the payment of taxes; rather, he objected to the payment of taxes when the "consequence" of that action was to "enable other Amish to shirk their duties toward the elderly and needy." *Hobby Lobby*, 723 F.3d at 1139; *see United States v. Lee*, 455 U.S. 252, 257 (1982).

Fifth, the district court's opinion relies heavily on an erroneous application of the D.C. Circuit's decision in *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008). But *Kaemmerling* stands for nothing more than the principle that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Id.* at 679 (emphasis added). In *Kaemmerling*, the plaintiff did not object to any action he was being forced to take, but only "to the government extracting DNA information from . . . specimen[s]" they already had. *Id.* The

court thus concluded that Kaemmerling failed to state a claim under RFRA because he could not "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* Here, in contrast, the provision of contraceptive coverage is not an "activit[y] of [a third party], in which [Notre Dame] plays no role." *Id.* To the contrary, as described above, Notre Dame objects to the requirements the Mandate imposes *on Notre Dame* to take actions contrary to its religious beliefs.

In light of these deep flaws in the district court's analysis, the decision below cannot stand. On the contrary, this case involves a straightforward application of the long-settled principle that, absent interests of the highest order, the Government cannot force religious adherents—in their own conduct—to take actions that violate their religious beliefs.

II. THE OTHER FACTORS SUPPORT AN INJUNCTION PENDING APPEAL

In *Korte*, this Court entered an injunction pending appeal before the case was fully briefed and argued after tentatively concluding the plaintiffs were likely to prevail on their RFRA claims. *See Korte*, 528 F. App'x. at 587–88. The Government subsequently conceded that if the Mandate violated RFRA, then the equitable factors favored a preliminary injunction. *See Korte*, 735 F.3d at 666. The same is true here.

Whatever regulatory interests the Government may have, they pale in comparison to the serious harm that will be inflicted on Notre Dame's religious liberty if the Mandate is not enjoined pending the outcome of this litigation. *See Korte*, 528

F. App'x. at 587–88. As the *Korte* panel opinion explained, "RFRA protects First Amendment free exercise rights," and "the loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," 735 F.3d at 666, even if borne for only "minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The same fact explains why, under RFRA, "once the moving party establishes a likelihood of success on the merits, [1] the balance of harms 'normally favors granting preliminary injunctive relief'" and "[2] 'injunctions protecting First Amendment freedoms are always in the public interest.'" *Korte*, 735 F.3d at 666 (quoting *Christian Legal Soc'y*, 453 F.3d at 867). In short, just as in *Korte*, this case "turn[s] entirely on whether the plaintiff['s] RFRA claims are likely to succeed." *Id.* Because they are, an injunction is plainly warranted. If any further public interest were needed, it is clear that the public, including Notre Dame's students and employees, have a direct interest in the injunctive relief, without which Notre Dame could be subject to crippling fines.

CONCLUSION

In nine days, Notre Dame will be forced to choose between onerous penalties and violating its religious beliefs. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may a Catholic violate the moral law if in certain circumstances he facilitates or becomes otherwise entangled in the commission by others of acts contrary to Catholic beliefs. As Judge Gorsuch explained in *Hobby Lobby*,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.

723 F.3d at 1152 (Gorsuch, J., concurring). Notre Dame's faith has led it to the conclusion that the actions required of it by the Mandate cross the "line" between permissible and impermissible entanglement in wrongful conduct. *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably the University's to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Notre Dame to cross this line, the Government has substantially burdened Notre Dame's exercise of religion. As the Mandate cannot satisfy strict scrutiny, Notre Dame is entitled to injunctive relief.

Respectfully submitted, this the 23rd day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 23, 2013, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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