No. 12-6294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, MART GREEN, STEVE GREEN, and DARSEE LETT,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (NO. 12-01000, HON. JOE HEATON)

BRIEF AMICUS CURIAE OF THE ARCHDIOCESE OF OKLAHOMA CITY IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Archdiocese of Oklahoma City discloses that it has no parent corporation and is a nonprofit entity that issues no stock. Accordingly, no publicly held corporation owns 10% or more of its stock.

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
STATEMENT OF INTEREST 1
STATEMENT OF THE CASE 2
INTRODUCTION AND SUMMARY OF ARGUMENT 4
ARGUMENT 8
I. THE DISTRICT COURT FUNDAMENTALLY MISUNDERSTOOD THE NATURE OF THE SUBSTANTIAL BURDEN INQUIRY 8
A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion 10
B. The Mandate Imposes a Substantial Burden on Appellants' Religious Beliefs 21
II. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY 23
A. The Government Cannot Demonstrate a Compelling Interest 23
B. The Government Cannot Demonstrate That the Mandate Is Narrowly Tailored to Accomplish Its Asserted Interests 26
CONCLUSION 28
CERTIFICATE OF COMPLIANCE 30
CERTIFICATE OF SERVICE 32
ADDENDUM OF UNPUBLISHED CASES/ORDERS

TABLE OF AUTHORITIES

Page(s)

CASES

Abdulhaseeb v. Calbone,
600 F.3d 1301 (10th Cir. 2010) 12, 15, 21

Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.,
No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) 5

Annex Med., Inc. v. Sebelius,
No. 12-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013) 6

Annex Med., Inc. v. Sebelius,
No. 13-1118 (8th Cir. Feb. 1, 2013) 4

Autocam Corp. v. Sebelius,
No. 12-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012),
appeal docketed, No. 12-2673, slip op. (6th Cir. Dec. 28, 2012).....6, 17

Brown v. Entm't Merchs. Ass'n,
131 S. Ct. 2729 (2011).....26

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....4, 24, 27

Citizens United v. FEC,
558 U.S. 310 (2010).....4

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 23

Conestoga Wood Specialties Corp. v. Sebelius,
No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013),
appeal docketed, No. 13-1144, slip op. (3d Cir. Jan. 29, 2012).....6, 9

Dunn v. Blumstein,
405 U.S. 330 (1972).....26

Employment Division v. Smith,
494 U.S. 872 (1990).....8, 10, 12

Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006).....4, 23, 24, 25

Grote Indus., LLC v. Sebelius,
No. 12-00134, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012).....6, 9

Grote v. Sebelius,
No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013).....4

Grutter v. Bollinger,
539 U.S. 306 (2003).....28

Hernandez v. Comm'r of Internal Revenue,
490 U.S. 680 (1989).....11, 13

Hobby Lobby Stores, Inc. v. Sebelius,
870 F. Supp. 2d 1278 (W.D. Okla. 2012).....*passim*

Hobby Lobby Stores, Inc. v. Sebelius,
No. 12-6294, 2012 WL 6930302 (10th Cir. 2012).....4, 14

Hodgkins v. Peterson,
355 F.3d 1048 (7th Cir. 2004).....27

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
132 S. Ct. 694 (2012).....12

Jolly v. Coughlin,
76 F.3d 4687 (2d Cir. 1996).....11

Kaemmerling v. Lappin,
553 F.3d 669 (D.C. Cir. 2008).....27

Kedroff v. St. Nicholas Cathedral,
344 U.S. 94 (1952).....12

Kikumura v. Hurley,
242 F.3d 950 (10th Cir. 2001).....9, 12

Koger v. Bryan,
523 F.3d 789 (7th Cir. 2008).....11

Korte v. Sebelius,
No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) 4, 18

Korte v. U.S. Dep't of Health & Human Servs.,
No. 3:12-CV-01072, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012).....6, 9

Legatus v. Sebelius,
No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) 5

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988).....15

Merced v. Kasson,
577 F.3d 578 (5th Cir. 2009) 11

Monaghan v. Sebelius,
No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012).....5, 16

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964).....4

Newland v. Sebelius,
881 F. Supp. 2d 1287 (D. Colo. 2012).....5, 24, 25, 28

O'Brien v. U.S. Dep't of Health & Human Servs.,
No. 12-3357 (8th Cir. Nov. 28, 2012) 5

O'Brien v. U.S. Dep't of Health & Human Servs.,
No. 4:12-cv-00476, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012).....6, 17, 19

Patrick v. LeFevre,
745 F.2d 153 (2d Cir. 1984) 11, 12

Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.,
No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012).....5

Sherbert v. Verner,
374 U.S. 398 (1963).....8, 20

St. John's United Church of Christ v. City of Chicago,
502 F.3d 616 (7th Cir. 2007) 11

Thomas v. Review Bd. of the Ind. Employment Sec. Div.,
450 U.S. 707 (1981).....*passim*

Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.,
No. 12-6756 (N.D. Ill. Jan. 3, 2013).....5

Tyndale House Publishers, Inc. v. Sebelius,
No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012).....*passim*

United States v. Ali,
682 F.3d 705 (8th Cir. 2012).....10

United States v. Lee,
455 U.S. 252 (1982).....7, 11, 14

United States v. Wilgus,
638 F.3d 1274 (10th Cir. 2011).....26

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871).....12

Wisconsin v. Yoder,
406 U.S. 205 (1972).....8, 21, 22, 23

STATUTES

18 U.S.C. § 2.....18

26 U.S.C. § 4980D.....2, 20, 22

26 U.S.C. § 4980H.....2, 22

42 U.S.C. § 2000bb.....8

42 U.S.C. § 2000bb-1.....9, 19, 21, 23

42 U.S.C. § 2000bb-2.....10

42 U.S.C. § 2000cc-5.....10

OTHER AUTHORITIES

75 Fed. Reg. 41,726 (July 19, 2010).....2, 26

76 Fed. Reg. 46,621 (Aug. 3, 2011).....2

77 Fed. Reg. 16,501 (Mar. 21, 2012).....3

78 Fed. Reg. 8456 (Feb. 6, 2013) 3

139 Cong. Rec. 9685 (1993) 20

Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html.....23

Press Release, U.S. Dep't of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html. 3, 26

Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html 24

The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) 20

White House, Office of the Press Secretary, FACT SHEET: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.....3

STATEMENT OF INTEREST[1]

The Archdiocese of Oklahoma City (the "Archdiocese") is a community of Roman Catholics under the leadership of Archbishop Paul S. Coakley that provides a wide range of spiritual and educational services to residents in central Oklahoma. The regulations at issue here (the "Mandate"), which require the provision of insurance coverage for abortion-inducing drugs and devices, contraception, sterilization, and related education and counseling, force faithful Catholics and other like-minded Christian business owners to choose between facilitating services and speech that violate their religious beliefs or exposing their businesses to devastating penalties. As the authority responsible for the accurate proclamation of Catholic teaching within its borders, the Archdiocese is deeply troubled by the manner in which courts, including the lower court here, have improperly and erroneously delved into matters of religious doctrine when addressing the issue of substantial burden under the Religious Freedom Restoration Act ("RFRA"). Because the Constitution ensures that private citizens and institutions such as the Archdiocese—not federal courts or government officials—are the ultimate arbiters

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person, other than the amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

of matters of faith, the Archdiocese has a unique interest in ensuring the proper application of the substantial burden test.

STATEMENT OF THE CASE

Under the auspices of the Patient Protection and Affordable Care Act, Appellees enacted a Mandate requiring group health plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 75 Fed. Reg. 41,726 (July 19, 2010). Failure to provide the mandated coverage is punishable by annual fines of $2,000 per employee, 26 U.S.C. § 4980H(a), (c)(1), or daily fines of $100 per affected beneficiary, *id.* § 4980D(b). Although a narrow category of "religious employers" is exempt from the Mandate, that exemption cannot benefit for-profit corporations, such as Appellants Hobby Lobby Stores, Inc. and Mardel, Inc., or their owners, such as Appellants David Green, Barbara Green, Mart Green, Steve Green, and Darsee Lett.

In response to the public uproar over the Mandate, the Government announced (1) a temporary safe harbor for non-exempt, non-profit religious

employers,[2] and (2) an intention to "propose and finalize a new regulation" "address[ing] the religious objections of the non-exempted non-profit religious organizations."[3] The Government thereafter issued an Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16,501 (Mar. 21, 2012), followed by a Notice of Proposed Rulemaking ("NPRM"), 78 Fed. Reg. 8456 (Feb. 6, 2013), seeking comments on how to structure this proposed "accommodation." Neither the ANPRM nor the NPRM, however, offers any relief to for-profit institutions.

Appellants' suit alleges violations of RFRA, the First Amendment, and the Administrative Procedure Act. In particular, they claim that the Mandate requires them to sponsor coverage of "abortion-causing drugs and devices" in violation of their sincerely held religious beliefs. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012) (internal quotation marks omitted). The district court, however, denied their request for a preliminary injunction. With respect to the owners' RFRA claim, the court held that the burden to their religious

[2] Press Release, U.S. Dep't of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

[3] White House, Office of the Press Secretary, FACT SHEET: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

exercise is insufficiently direct to be substantial.[4] *Id.* at 1294 (observing that the burden is "indirect and attenuated"). Appellants sought an injunction pending appeal, but a two-judge panel denied the motion. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's holding that the Mandate does not substantially burden the religious exercise of objecting individuals or the businesses they own rests on a fundamentally flawed understanding of the substantial burden test. Although a minority view,[5] the court's analysis nonetheless mirrors that of several courts that

[4] The district court rejected the First Amendment and RFRA claims of the corporate entities Hobby Lobby and Mardel on the ground that secular, for-profit companies "do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion." *Hobby Lobby*, 870 F. Supp. 2d at 1291–92. This is clearly wrong: It is tantamount to saying that the New York Times, a for-profit company, cannot assert Free Speech claims. The Supreme Court, however, has long rejected that proposition. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Citizens United v. FEC*, 558 U.S. 310 (2010). Nor does the First Amendment or RFRA distinguish between for-profit and non-profit organizations. The district court's holding, therefore, would imply that non-profit organizations—indeed, that churches themselves—are outside the protection of the First Amendment and RFRA. *But see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Although these other fatal flaws in the district court's decision likewise warrant reversal, this brief focuses on the district court's erroneous application of RFRA's substantial burden analysis.

[5] Courts in eleven cases have accorded preliminary relief to plaintiffs like Appellants. *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Korte v.*

have improperly conflated RFRA's "religious exercise" and "substantial burden" inquiries. RFRA requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In identifying the relevant exercise of religion, a court must accept the "line" drawn by the plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After the plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures the plaintiffs to violate those beliefs.

Here, however, the district court ignored this straightforward two-step analysis and instead claimed that the burden on Appellants' religious belief is insubstantial because the Appellants' monetary contribution to their group health plan is too indirect and attenuated from an employee's decision to use abortion-

(continued…)

Sebelius, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357 (8th Cir. Nov. 28, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012).

inducing drugs and devices that are covered by the plan. *See Hobby Lobby*, 870 F. Supp. 2d at 1294. This, however, is not an evaluation of the pressure placed on Appellants to modify their behavior, but is instead a *religious* judgment that compliance with the Mandate does not really violate Appellants' beliefs—or at least, that it only violates those beliefs in an "indirect and attenuated" way. Other courts have made similar mistakes, erroneously concluding—despite plaintiffs' protestations to the contrary—that compliance with the Mandate does not violate objectors' religious beliefs, or at least, that it does not *substantially* violate those beliefs.[6]

Whatever the merits of the courts' moral views may be, these quintessentially religious inquiries lie well beyond judicial competence and

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[6] *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *10–14 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144, slip op. at 3 (3d Cir. Jan. 29, 2012) (denying injunction pending appeal); *Grote Indus., LLC v. Sebelius*, No. 12-00134, 2012 WL 6725905, at *5–7 (S.D. Ind. Dec. 27, 2012); *Korte v. U.S. Dep't of Health & Human Servs*., No. 3:12-CV-01072, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012). Some courts have even suggested plaintiffs' religious beliefs would not be violated so long as they themselves refrain from using the objectionable items. *See, e.g.*, *Annex Med., Inc. v. Sebelius*, No. 12-2804, 2013 WL 101927, at *4 (D. Minn. Jan. 8, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476, 2012 WL 4481208, at *4–6 (E.D. Mo. Sept. 28, 2012). Others have reasoned that providing the mandated coverage is no more morally problematic than providing employees a salary with which they can obtain contraceptives. *See, e.g.*, *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *appeal docketed*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *O'Brien*, 2012 WL 4481208, at *7.

authority. In each case, the error is the same: the courts viewed the word "substantial" as requiring an inquiry into the nature of the employer's religious beliefs, rather than an inquiry into the degree of pressure the Mandate places on the objecting employer to violate its beliefs as defined by the employer. The question, however, is not whether compliance with the Mandate is a substantial violation of an objecting employer's beliefs; instead, the question is whether compliance with the Mandate substantially pressures the objecting employer to violate its beliefs.

This subtle, yet radical, transformation of the substantial burden analysis from an evaluation of the level of coercion into a judicial exploration of moral theology runs contrary to long-established law. Simply put, "[i]t is not within the judicial function and judicial competence . . . to determine whether" a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982) (internal quotation marks omitted). Although courts can question whether the *pressure* placed on individuals to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action in fact transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Once Appellants' beliefs are properly identified, it becomes readily apparent that the Mandate puts substantial pressure on them to violate those beliefs. Appellants believe that sponsoring a health insurance plan that covers abortion-

inducing drugs and devices violates their religion. In this respect, their beliefs are not dissimilar from Catholic doctrine, which likewise prohibits providing, paying for, or facilitating access to (among other things) abortion-inducing drugs and devices. Requiring Appellants to provide this coverage, as the Mandate does, requires them to do precisely what their religious beliefs forbid. It therefore is beyond question that the Mandate imposes a substantial burden on their religious beliefs. This burden, moreover, cannot possibly be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

Accordingly, the district court's denial of the requested injunction should be reversed.

ARGUMENT

I. THE DISTRICT COURT FUNDAMENTALLY MISUNDERSTOOD THE NATURE OF THE SUBSTANTIAL BURDEN INQUIRY

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral and generally applicable laws burdening religious practices do not violate the Free Exercise Clause. Repudiating *Smith*, Congress enacted RFRA "to restore the compelling interest test" 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). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)-(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* This initial inquiry necessarily requires courts to (1) identify the particular exercise of religion at issue, (2) determine whether it is sincerely held, and then (3) assess whether the law substantially burdens the identified exercise of religion. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

Here, the court below, like several others, improperly merged these steps. Instead of first identifying the sincere religious beliefs at issue, and then assessing whether the Mandate pressures objectors to violate those beliefs, these courts have purported to assess whether the Mandate in fact requires objectors to violate their religious beliefs at all—or at least whether it violates them to a "substantial" degree. In doing so, they have concluded that the burden on free exercise imposed by the Mandate is too "indirect and attenuated" to be cognizable. *Hobby Lobby*, 870 F. Supp. 2d at 1294; *see also Conestoga*, 2013 WL 140110, at *14; *Grote*, 2012 WL 6725905, at *5; *Korte*, 2012 WL 6553996, at *10. By failing to accept Appellants' own characterization of their beliefs and, even more egregiously, by

making an inherently religious judgment about the extent to which the Mandate violates those beliefs, the district court has run roughshod over well-established Supreme Court precedents that have repeatedly warned courts not to delve into religious matters. Accepting at face value Appellants' sincerely held belief that sponsoring insurance coverage of abortion-inducing drugs and devices violates their religion, it becomes all too apparent that the Mandate imposes a substantial burden on the free exercise thereof.

A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion

RFRA defines "exercise of religion" broadly 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), 2000cc-5(7)(A) (emphasis added). An exercise of religion is a precept or practice "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted). Religious exercise involves "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

Whether a particular belief or practice is religious, and thus entitled to protection, is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept the

plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by the plaintiff); *see also Lee*, 455 U.S. at 257 (same); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (stating that plaintiffs' representations brought his "dietary request squarely within the definition of religious exercise"); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) ("accept[ing]" plaintiffs' representation that condemnation of a cemetery would be a "sacrilege"); *Jolly v. Coughlin*, 76 F.3d 468, 476–77 (2d Cir. 1996) (rejecting the government's efforts to dispute plaintiff's representation that a medical test would violate his religion).

The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It is not "within the judicial function and judicial competence" to determine whether a belief or practice accords with a particular faith. *Id.*; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."); *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so."); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs.").

For this reason, "[r]epeatedly and in many different contexts" the Supreme Court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of, or enforce, religious doctrine or beliefs. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As the Supreme Court recently reiterated, each religion is entitled to "shape its own faith," free of secular judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

Given the "profound limitation" of courts to make judgments about religious matters, courts have recognized that judicial competence only "extends to determining 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick*, 745 F.2d at 157 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens *Mr. Abdulhaseeb*'s own exercise of his sincerely held religious beliefs"); *Kikumura*, 242 F.3d at 960 (noting that a religious belief must be sincere in order to establish a prima facie claim under RFRA). The notion that a federal court may

don ecclesiastical robes and purport to tell citizens that they do not correctly perceive the tenets of their faith is entirely foreign to American legal practice and experience.

Yet that is exactly what the court below purported to do in this case. The district court did not dispute that Appellants sincerely believe that providing insurance coverage for abortion-inducing drugs and devices would violate their religion. *Hobby Lobby*, 870 F. Supp. 2d at 1293. Because actions rooted in sincerely held religious beliefs constitute an exercise of religion, Appellants' sincere religious objection to providing the mandated coverage of abortion-inducing drugs and devices should have sufficed to established the relevant exercise of religion. If Appellants interpret their religion to prohibit the mandated coverage, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699. Put simply, Appellants drew a line, and "it is not for [a court] to say that the line [they] drew [is] an unreasonable one." *Thomas*, 450 U.S. at 715.

Despite acknowledging the sincerity of Appellants' beliefs, the court nevertheless held that the burden on those beliefs is "indirect and attenuated," and thus insubstantial, because the money that Appellants pay for insurance would subsidize someone else's use of abortion-inducing drugs or devices only "after a series of independent decisions by health care providers and patients covered by

[Appellant's] plan." *Hobby Lobby*, 870 F. Supp. 2d at 1294 (internal citation and quotation marks omitted); *see also Hobby Lobby*, 2012 WL 6930302, at *3 (quoting the district court's language with approval).[7] The district court, however, had no authority to disregard Appellants' religious beliefs simply because those beliefs prohibit them from "indirectly" facilitating access to abortion-inducing drugs and devices. Indeed, the Supreme Court has squarely rejected such analysis.

For example, in *Thomas*, the Court held that the denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his pacifist convictions as a Jehovah's Witness. 450 U.S. at 713–18. Rather than questioning whether working in a factory—as opposed to being handed a gun and sent off to war—was too "attenuated" a breach of those beliefs, the Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

Likewise, in *Lee*, the Court rejected the Government's contention that payment of social security taxes into the general treasury was too indirect a

[7] The district court also found the burden to be insubstantial because the Mandate "applies only to Hobby Lobby and Mardel, not to its officers or owners." *Hobby Lobby*, 870 F. Supp. 2d at 1294. But the fact that the Mandate operates directly against the corporate entities and only indirectly against the owners is of little significance so long as the Mandate has the effect of substantially pressuring the owners to act against their religious beliefs. Supreme Court precedent makes clear that a burden is not insubstantial simply because it is indirect. *See Thomas*, 450 U.S. at 717–18 (noting that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

violation to "threaten the integrity of" the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the Amish's own representation that "the payment of the taxes . . . violate[d] [their] religious beliefs." *Id.* at 257; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."); *Abdulhaseeb*, 600 F.3d at 1316 (same).

Like the Supreme Court in *Thomas* and *Lee*, here, the district court should have accepted at face value Appellants' earnest belief that providing insurance coverage of abortion-inducing drugs and devices would violate the tenets of their faith. The question that the district court should have asked and answered, therefore, is whether the penalties for failing to provide that mandated coverage will substantially pressure Appellants to abandon their religious convictions and provide the objectionable coverage. But instead of assessing whether the Mandate substantially *burdens* Appellants' religious beliefs, the court assessed whether the Mandate substantially *violates* those beliefs.[8] In other words, rather than analyzing

[8] This error is confirmed by the court's emphasis on the point that "RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a 'substantial' burden on that exercise." *Hobby Lobby*, 870 F. Supp. 2d at 1293. This is, of course, entirely true. But the court proceeds to use this point as a basis

whether the Mandate puts substantial pressure on Appellants to abandon their religious opposition to providing insurance coverage for abortion-inducing drugs and devices—as it should have done—the court evaluated whether the Mandate amounted to a significant violation of Appellants' religious objection to abortion-inducing drugs and devices.

This distinction is not without a difference: The former analysis involves an exercise of *legal* judgment, while the latter analysis involves an inherently *religious* inquiry into whether, in the court's view, providing the objectionable coverage constitutes a slight, as opposed to a substantial, violation of Appellants' beliefs. "The Court," however, "is in no position to declare that acting through [their] company to provide certain health care coverage to [their] employees does not violate [Appellants'] religious beliefs. They are, after all, [*their*] religious beliefs." *Monaghan*, 2012 WL 6738476, at *3. The question of whether providing insurance coverage for abortion-inducing drugs and devices constitutes impermissible facilitation of a prohibited practice is one for religious authorities and individuals, not for the courts, to decide. *See supra* pp. 11–12. Here,

(continued…)

to evaluate the substance of Appellants' religious beliefs—namely, whether, in the court's mind, Appellants would be deemed substantially responsible for their employees' use of contraceptives—not to determine whether the Mandate "put[s] substantial pressure on [Appellants] to modify [their] behavior and to violate [their] beliefs" as Appellants understand them. *Thomas*, 450 U.S. at 717–18.

Appellants' answer to that question must be respected, regardless of whether a court finds it to be "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714.[9]

To be sure, Appellants are not "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 2012 WL 4481208, at *6, but for

[9] For similar reasons, courts lack authority to make the moral claim that "the contribution to a health care plan has no more than a de minimus [sic] impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees," which they may then use to purchase abortion-inducing drugs and devices. *O'Brien*, 2012 WL 4481208, at *7; *see also Autocam Corp.*, 2012 WL 6845677, at *6. Again, even were the line between salary and health insurance "unreasonable," it would not be for a court to question a line drawn by an employer that refuses on religious grounds to provide insurance coverage of objectionable services. *See Thomas*, 450 U.S. at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate turrets for tanks); *Tyndale*, 2012 WL 5817323, at *14 ("[T]he Supreme Court has cautioned courts to avoid parsing a plaintiff's religious beliefs for inconsistency . . . .").

And even if the district court were authorized to evaluate the line that Appellants have drawn, it would have to conclude that that line is at least reasonable. Employees may use their paycheck to purchase abortions, cocaine, cotton candy, or anything in between. An employee's salary simply belongs to the employee, and the employer has no input into its use. But when an employer purchases coverage for abortion-inducing drugs and devices, it effectively hands its employees a free ticket that can only be redeemed for those drugs or devices. Under those circumstances, there is a specific line item in the health plan provided by the employer entitling its employees to abortion-inducing drugs and devices, and the employer's premiums necessarily go toward paying for them. The employer is made complicit in the purchase of products to which it objects. In that respect, mandating that employers purchase objectionable coverage for their employees, whether the employees want it or not, is qualitatively different from leaving it up to the employees to use their paychecks as they see fit.

purposes of this Court's inquiry, *it is equally improper* to require them to facilitate through insurance coverage the use of abortion-inducing drugs and devices by others. It is wholly irrelevant that the actual use of those drugs or devices depends on the independent decisions of others "[b]ecause it is the coverage, not just the use, of [abortion-inducing drugs and devices] to which the plaintiffs object." *Tyndale*, 2012 WL 5817323, at *13; *see id.* (rejecting "the proposition that a plaintiff can never demonstrate that its religious exercise is substantially burdened by a law that forces it to pay for services to which it objects that are ultimately chosen and used by third parties"); *see also Korte*, 2012 WL 6757353, at *3 ("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 contraceptives or related services.").[10] For this reason, the district court's attempt to cast the burden on Appellants' religious beliefs as indirect or attenuated is entirely misplaced. Because Appellants believe that sponsoring insurance coverage of abortion-inducing drugs and devices violates their religion, the Mandate, which requires

[10] This concept of responsibility for an illicit act committed by another is not unique to moral theology. Indeed, it is the basis for the federal statute criminalizing acts that "aid" or "abet" the commission of a crime by another. 18 U.S.C. § 2.

them to provide that coverage or pay substantial monetary penalties, is a *direct* burden on Appellants' religious exercise.

The district court similarly erred in suggesting, as other courts have done, that the burden should be treated as insubstantial because exempting employers from covering religiously-objectionable services would be tantamount to imposing the employers' beliefs on their employees. *See Hobby Lobby*, 870 F. Supp. 2d at 1295–96 (stating that the term "substantial burden" should be given "meaningful application" due to "the impact of the employer's faith-based decisions on his employees"); *see also O'Brien*, 2012 WL 4481208, at *6 (stating that RFRA "is not a means to force one's religious practices upon others"). Needless to say, the mere refusal to pay for services that violate one's religion is not tantamount to forcing one's religious practices upon others. Indeed, the court's suggestion gets things exactly backwards. Appellants' employees remain free to use whatever objectionable services they want whether Appellants pay for it or not. But the Mandate forces Appellants to pay for the choices of their employees, even though doing so conflicts with Appellants' sincerely held religious beliefs.

It should come as no surprise, therefore, that the district court's misguided reading of RFRA runs contrary to the statute's legislative history, which confirms that Congress enacted RFRA precisely to prevent the Government from compelling persons and organizations to provide religiously-objectionable services

to others. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute safeguarded "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of Nadine Strossen, President, Am. Civ. Liberties Union). Members of Congress made similar statements on the floor. *See* 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same).

In short, by concluding that the link between Appellants' opposition to abortion and providing insurance coverage for abortion-inducing drugs and devices was too "indirect" and "attenuated," the district court engaged in a fundamentally religious inquiry. This was clear error. Instead, the district court should have accepted Appellants' representation that their religious beliefs precluded them from providing such insurance coverage. The only relevant question for the Court,

therefore, should have been whether the Mandate imposes substantial pressure on Appellants to violate those beliefs.[11] As explained below, it plainly does.

B. The Mandate Imposes a Substantial Burden on Appellants' Religious Beliefs

Once Appellants' religious exercise is properly identified, the substantial burden analysis is straightforward. Although RFRA does not itself define "substantial burden," courts routinely apply the standard found in pre-*Smith* cases like *Yoder* and *Sherbert.* Thus, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs" on threat of penalty, *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18; *see also Abdulhaseeb*, 600 F.3d at 1315 (explaining that a law substantially burdens religious exercise by "require[ing] participation" in objectionable activities or by "substantial[ly] pressur[ing]" participation in those activities).

[11] This does not give religious actors carte blanche to exempt themselves from federal law. Courts must still evaluate (1) whether the religious belief is sincerely held, (2) whether the law places "substantial pressure" on adherents to modify their beliefs; (3) whether the Government has a "compelling interest" in the law; and (4) whether the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b); *supra* p. 12. Likewise, courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715. None of those circumstances, however, is at issue here.

Here, the Mandate puts substantial pressure on Appellants to violate their religious convictions by forcing them to choose between providing coverage for abortion-inducing drugs and devices or paying onerous monetary penalties. If Appellants offer their employees health care but fail to include the mandated coverage, then they face a penalty of $100 per affected beneficiary for each day of noncompliance. 26 U.S.C. § 4980D(b). If they altogether forgo offering their employees health care coverage, then they face annual fines of roughly $2,000 per employee. *Id.* § 4980H(a), (c)(1). Although Appellants face millions of dollars in fines, they need not show that the penalty the Government seeks to impose is overwhelming. Substantial pressure, not duress, is the standard. Indeed, the Supreme Court has found that a penalty as low as $5 was enough to impose a substantial burden. *See Yoder*, 406 U.S. at 208, 218.[12]

In short, putting Appellants to the choice of violating their faith or paying a penalty creates precisely the sort of pressure to abandon sincerely held religious beliefs that constitutes a substantial burden. Indeed, it is the very epitome of a substantial burden, and the district court was wrong to conclude otherwise.[13]

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[12] The absence of this analysis from the district court's opinion provides further evidence that it erroneously assessed the substance of Appellants' beliefs, rather than the pressure placed on them to violate those beliefs.

[13] Here, the result is no different if the Seventh Circuit's articulation of the substantial burden test for use in RLUIPA cases is applied. By putting Appellants to the inescapable choice of financial ruin or violating their beliefs, the Mandate

II. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY

Because the Mandate substantially burdens Appellants' religious exercise, the Government must prove that the Mandate furthers "a compelling governmental interest" through "the least restrictive means." 42 U.S.C. § 2000bb-1(b). As Appellants persuasively explain, the Government has not remotely carried its burden of proof here. *See* Appellants' Br. at 39-49.

A. The Government Cannot Demonstrate a Compelling Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). "[B]roadly formulated" or "sweeping" generalized interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption" to the religious objector. *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, cannot rely on blithe assertions of generalized interests, but rather must show that

(continued…)

has a "direct, primary, and fundamental responsibility for rendering [their] religious exercise" "effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 799 (7th Cir. 2003).

it has a compelling interest in dragooning Appellants—"the particular claimant[s] whose sincere exercise of religion is being substantially burdened"—into being the instruments by which its purported goals are advanced. *O Centro*, 546 U.S. at 430–31; *Tyndale*, 2012 WL 5817323, at *15 (same). Ultimately, the Government must demonstrate that its interest is so compelling that it can require Appellants to take actions they would otherwise find anathema. This, it cannot begin to do.

At the most basic level, "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 547; *see also O Centro*, 546 U.S. at 433; *Newland*, 818 F. Supp. 2d at 1297–98. Here, however, the Government cannot possibly claim that it is furthering an interest of the "highest order," where it has exempted millions of employees from the Mandate through the Act's grandfathering provisions. In other words, the Government cannot plausibly maintain that Appellants' employees must be provided with the mandated coverage when it has already exempted millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "if you like your plan, you can keep it."[14] An interest is hardly compelling if it can be trumped for

[14] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

reasons of political expediency. As the *Newland* and *Tyndale* courts recognized, such broad exemptions "completely undermine[] any compelling interest in applying the preventive care coverage mandate." *Newland*, 818 F. Supp. 2d at 1298; *Tyndale*, 2012 WL 5817323, at *18.

The Mandate's narrow "religious employer" exemption, moreover, further undermines the Government's claim that its interests here are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use *hoasca*—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [was] difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of *hoasca*. *Id.* Likewise, "everything the Government says" about its interests in requiring Appellants to provide the mandated coverage "applies in equal measure" to entities that meet the Mandate's definition of "religious employer."

Finally, the Government's interest cannot be compelling where, at best, the Mandate would only "[f]ill [a] modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). Indeed, the Government's own admissions demonstrate that the Mandate creates a solution in search of a problem. The Government acknowledges that contraceptives are widely available and covered by "over 85 percent of employer-sponsored health insurance plans," 75 Fed. Reg. at 41,732; Press Release, *supra* note 2. In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

B. The Government Cannot Demonstrate That the Mandate Is Narrowly Tailored to Accomplish Its Asserted Interests

The Mandate also fails strict scrutiny because the Government cannot show that it is the least restrictive means of achieving its interests. Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (noting that "'least restrictive means' is a severe form

of the more commonly used 'narrowly tailored' test" (citation omitted)); *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) ("A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" (quoting *Sherbert*, 374 U.S. at 407)); *Lukumi*, 508 U.S. at 546 (invalidating local ordinance in part because the asserted "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree"). "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).

Here, the Government has at its disposal myriad ways to achieve its stated interest without burdening Appellants' religious beliefs. The Archdiocese in no way recommends or promotes these alternatives, and indeed, it opposes many of them as a matter of policy. The fact, however, that the Government failed even to consider them before adopting the Mandate demonstrates how the Mandate could not possibly survive RFRA's narrow tailoring requirement. For example, the Government could: (1) directly provide the objectionable services to the relatively small number of individuals who do not already receive those services under their health plans; (2) offer grants to entities that already provide the objectionable services at free or subsidized rates and/or working with these entities to expand

delivery of the services; (3) directly offer insurance coverage for the objectionable services; or (4) grant tax credits or deductions to women who purchase the objectionable services. Indeed, as the *Newland* court noted, the Government is *already* providing "free contraception to women," including through the Title X Family Planning Program. 881 F. Supp. 2d at 1299.

Despite the availability of numerous alternative ways to achieve its interests, the administrative record demonstrates that the Government failed even *to consider* these alternatives before adopting the Mandate. This fact alone is fatal, as strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives that will achieve" the Government's stated goal. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

CONCLUSION

The district court's position is clearly, and dangerously, wrong. Under its analysis, federal courts, not individuals or religious entities, would be the ultimate arbiters of matters of faith and morals. If correct, the Government in principle would be free not only to require religious organizations to cover abortion-inducing drugs and devices, but to force them to cover surgical abortions or assisted suicide as well. Such gross infringements of religious liberty would likewise apparently be deemed "too attenuated" to be a substantial burden. This is not, and cannot possibly be, the law. Indeed, RFRA was enacted precisely to

prevent such oppressive governmental action. The district court's judgment below should therefore be reversed.

February 19, 2013

Respectfully submitted,

/s/ Noel J. Francisco

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1. I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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February 19, 2013

/s/ Noel J. Francisco
NOEL J. FRANCISCO

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CERTIFICATE OF SERVICE

I hereby certify that, on the 19th day of February, 2013, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which served all case participants at their designated electronic mail addresses.

I also certify that on February 19, 2013, I caused seven paper copies of the foregoing brief to be sent by for delivery within two business days, to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, 1823 Stout Street, Denver, Colorado 80257.

February 19, 2013

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Addendum
of
Unpublished Cases/Orders

Table of Contents

Annex Med., Inc. v. Sebelius,
No. 13-1118 (8th Cir. Feb. 1, 2013) 1

Autocam Corp. v. Sebelius,
No. 12-2673 (6th Cir. Dec. 28, 2012) 7

Conestoga Wood Specialties Corp. v. Sebelius,
No. 13-1144 (3d Cir. Jan. 29, 2012) 11

O'Brien v. U.S. Dep't of Health & Human Servs.,
No. 12-3357 (8th Cir. Nov. 28, 2012) 28

Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.,
No. 12-6756 (N.D. Ill. Jan. 3, 2013) 30

United States Court of Appeals
For the Eighth Circuit

No. 13-1118

Annex Medical, Inc.; Stuart Lind; Tom Janas,

Plaintiffs - Appellants,

v.

Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services; Seth D. Harris, in his official capacity as acting Secretary of the United States Department of Labor[1]; Timothy F. Geithner, in his official capacity as Secretary of the United States Department of Treasury; United States Department of Health and Human Services; United States Department of Labor; United States Department of Treasury,

Defendants - Appellees.

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Before WOLLMAN, LOKEN, and COLLOTON, Circuit Judges.

ORDER

Appellants Annex Medical, Inc. and Stuart Lind have moved for a preliminary injunction pending appeal against enforcement of certain mandatory coverage

[1]Pursuant to Federal Rule of Appellate Procedure 43(c)(2), acting Secretary of Labor Seth D. Harris is automatically substituted for Hilda Solis.

provisions of the Patient Protection and Affordable Care Act of 2010. In their complaint filed in the district court, the appellants challenged provisions of the statute and implementing regulations that require group health plans (with certain exemptions not applicable here) to include coverage, without cost-sharing, for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education counseling for all women with reproductive capacity." 77 Fed. Reg. 8725 (Feb. 15, 2012); *see* 42 U.S.C. § 300gg-13(a)(4), 45 C.F.R. § 147.130(a)(1)(iv). They argued that the mandatory coverage provisions violated their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. The district court denied a motion for a preliminary injunction, and the appellants seek a preliminary injunction pending resolution of their appeal of the district court's decision. *See* Fed. R. App. P. 8(a)(2). The appellees oppose the motion.[2]

Lind owns and operates Annex Medical, Inc., a Minnesota-based corporation that manufactures medical devices. Annex Medical has sixteen full-time and two part-time employees. According to the complaint, Lind is a devout Catholic who is steadfastly committed to biblical principles and the teachings of the Catholic Church. Lind alleges that his religious beliefs compel him to provide for the physical health of the employees at Annex Medical. To that end, Lind has provided a group health plan for Annex Medical's employees. Lind recently discovered, however, that Annex Medical's group health plan provides coverage for abortifacient drugs, sterilization, and contraception supplies and prescription medications. Lind believes that paying for a group health plan that includes such coverage is "sinful and immoral," because it requires him or the business he controls "to pay for contraception, sterlization, abortifacient drugs and related education and counseling, in violation of his sincere and deeply-held religious beliefs and teachings of the Catholic Church." Lind was

[2]A third plaintiff, Tom Janas, did not join the motion for preliminary injunction in the district court, and he does not join the motion on appeal.

unable to secure a plan without the objectionable coverage, because the statute and regulations require all insurers to include such coverage in all group health plans. As a result, Lind arranged to discontinue Annex Medical's group health plan, effective January 31, 2013.

Even though the Affordable Care Act does not require a business with fewer than fifty employees to provide employees with a health insurance plan, 26 U.S.C. § 4980H(c)(2)(A), Lind avers that his religion requires him to do so. Lind complains, however, that the mandate prevents him from offering a group health plan to Annex Medical employees that he can purchase without violating his religious beliefs. Lind and Annex Medical contend that the statute and regulations constitute a substantial burden on their exercise of religion, without furthering a compelling governmental interest by the least restrictive means, and thus violate their rights under RFRA, 42 U.S.C. § 2000bb-1. They seek an injunction preventing the defendants from enforcing the requirement that all group health plans must include coverage for FDA-approved contraceptive methods, sterilization procedures, and patient education counseling.

Another panel of this court considered a similar motion for preliminary injunction pending appeal in No. 12-3357, *O'Brien v. U.S. Dept. of HHS*. There, a district court denied a motion for preliminary injunction against enforcement of the same mandatory coverage provisions. *See O'Brien v. U.S. Dept. of HHS*, No. 4:12-CV-476, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012). The plaintiffs in *O'Brien*, a for-profit corporation with more than 50 employees and its managing member, complained that the statute and regulations violated their rights under RFRA. The plaintiffs argued that the law forced them to choose between violating their religious beliefs by purchasing a group health plan and paying large fines for failure to comply with the statute. In support of a motion for injunction pending appeal, the appellants in *O'Brien* argued that (1) there was a likelihood of success on the merits of their claim that the mandatory coverage provisions violated their rights under RFRA, (2)

they would suffer irreparable harm without an injunction, (3) the balance of harms weighed in their favor, and (4) granting the injunction was in the public's interest.

To demonstrate likelihood of success, the *O'Brien* appellants argued that (1) either O'Brien Industrial Holdings or Frank O'Brien, as chairman and managing member of the corporation, had standing to bring a claim under RFRA based on the application of the mandatory coverage provisions to the company, *see Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at * 3 (7th Cir. Dec. 28, 2012); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119-21 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988), (2) the mandate imposed a substantial burden on the appellants' exercise of religion by requiring them to provide insurance coverage contrary to their religious beliefs, *see Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); (3) the government could not demonstrate a compelling governmental interest for the mandate, because there are numerous exceptions to the mandate, *see Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *17-18 (D.D.C. Nov. 16, 2012); *Newland v. Sebelius*, No. 1:12-cv-1123-JLK, 2012 WL 3069154, at *7 (D. Colo. July 27, 2012); and (4) the mandate was not the least restrictive means to achieving the government's asserted interest, *see Newland*, 2012 WL 3069154, at *7-8. They requested that "the status quo, *i.e.*, their freedom to choose a health plan consistent with their religious beliefs pursuant to Missouri law, remain in place until the final disposition of their appeal." The government opposed the motion.

The *O'Brien* panel filed an order that stated in its entirety: "Appellants' motion for stay pending appeal has been considered by the court, and the motion is granted. Judge Arnold dissents." Since then, one district court in this circuit has construed the *O'Brien* order as granting the appellants' motion for preliminary injunction pending appeal. *American Pulverizer Co. v. U.S. Dept. of HHS*, No. 12-3459-CV-S-RED, slip op. at 1 (W.D. Mo. Dec. 20, 2012). On that basis, the district court in *American*

Pulverizer concluded that the *O'Brien* order established precedent that plaintiffs who present comparable facts are likely to succeed on the merits. *See also Sharpe Holdings, Inc. v. U.S. Dept. of HHS*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *6 (E.D. Mo. Dec. 31, 2012) (concluding that plaintiffs challenging the mandatory coverage provision of 42 U.S.C. § 300gg-13(a)(4) had shown "a reasonable likelihood of success on the merits," citing *O'Brien* and *American Pulverizer*).

The district court in this case construed the *O'Brien* order differently. After noting that the *O'Brien* appellants requested the issuance of a preliminary injunction pending appeal, the district court observed that "[i]nstead of granting the injunction, the Eighth Circuit – in a one-sentence divided motions panel opinion – issued a stay pending appeal." The district court concluded that it could not, "with a reasonable level of certainty, interpret the stay pending appeal as indicating a likelihood of success on the merits" in a comparable case.

We appreciate the district court's uncertainty about the *O'Brien* order, and we think the meaning should be clarified. Although the *O'Brien* order referred to a "motion for stay pending appeal," we interpret the panel's order as granting the only motion that was pending before the court: a motion for an injunction pending appeal. *Accord Korte*, 2012 WL 6757353, at *4 (noting that "the Eighth Circuit granted a motion for an injunction pending appeal, albeit without discussion") (citation omitted); *cf.* Fed. R. App. P. 8(a) (including both motion for stay of a district court's judgment or order and motion for an injunction under the single heading, "Motion for Stay"). To grant the pending motion, the *O'Brien* panel necessarily concluded that the appellants satisfied the prerequisites for an injunction pending appeal, including a sufficient likelihood of success on the merits and irreparable harm. While the *O'Brien* panel issued the order without discussion, and an unpublished order is not binding precedent, there is a significant interest in uniform treatment of comparable requests for interim relief within this circuit. We therefore conclude, consistent with

the *O'Brien* order, that the appellants' motion for preliminary injunction pending appeal in this case should be granted.[3]

For the foregoing reasons, the appellants' motion for a preliminary injunction pending appeal is granted. The appellees are enjoined, pending resolution of this appeal, from enforcing the mandate of 42 U.S.C. § 300gg-13(a)(4) and its implementing regulations against Lind, Annex Medical, and any health insurance issuer when offering group health insurance coverage to Annex Medical.

February 1, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

[3]The appellants here and the appellants in *O'Brien* both say a requirement that they purchase group health insurance with objectionable coverage provisions constitutes a substantial burden on their exercise of religion. The nature of the "requirement," however, is different in the two cases. The *O'Brien* appellants were required by statute to purchase health insurance for employees on pain of substantial financial penalties; Lind and Annex Medical (as a smaller employer) are not required by statute to purchase insurance, but Lind alleges that his religion compels him to purchase health insurance for Annex Medical's employees. In the limited briefing on the motion for injunction pending appeal, the appellees do not urge that this distinction is material, and we conclude that further exploration of that point is best reserved for plenary review after full briefing and argument.

No. 12-2673

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUTOCAM CORPORATION, et al.,)
)
Plaintiffs-Appellants,)
)
v.) O R D E R
)
KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al.,)
)
Defendants-Appellees.)

Before: MOORE, ROGERS, and GRIFFIN, Circuit Judges.

Autocam Corporation, Autocam Medical, and their owners appeal the denial of a preliminary injunction in their action before the district court challenging the implementation of the contraception-coverage provisions in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "ACA"), under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The plaintiffs move for an injunction pending appeal and to expedite the appeal.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the

injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002); *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (2002).

To demonstrate a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted).

The Supreme Court has never considered similar RFRA or free-exercise claims. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Dec. 26, 2012). But, applying a more demanding standard, it denied an injunction pending appeal in a case involving similar issues. *Id.* No circuit court has considered these claims. Although no district court has issued a final decision on these issues, the district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare Korte* , 2012 WL 6553996, at *6-11 (denying a preliminary injunction), *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290-96 (W.D. Okla. 2012) (same), *with Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012) (granting a preliminary injunction), *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) (same), and *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012) (same). Certainly, the divergence of opinion by the district courts establishes the possibility of success on the merits. But, in light of the lower court's reasoned opinion in this case and the Supreme Court's recent denial of an injunction pending appeal in *Hobby Lobby*, the plaintiffs have not demonstrated more than a possibility of relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (parsing the meaning of "likely" relative to the "irreparable harm" requirement for issuance of a preliminary injunction).

The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). But, as discussed above, it is not clear that the contraceptive requirement violates the plaintiffs' constitutional rights. And purely monetary damages generally do not warrant an injunction. *Id.* at 578-79. Further, the district court noted that the contraceptive requirement was codified as a tax, which if it is, would bar its preliminary or permanent enjoinment. 26 U.S.C. § 7421(a); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). The remaining factors do not weigh in favor of either side.

The plaintiffs also move to expedite the appeal. The appeal focuses on purely legal issues that have already been briefed below. Further, the district court's decision on appeal conflicts with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) (granting a preliminary injunction on similar issues). Under these circumstances, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **DENIED**. The motion to expedite the appeal is **GRANTED**, and the clerk shall expedite this appeal for briefing and submission.

ENTERED BY ORDER OF THE COURT

Clerk

ROGERS, J., dissenting.

I would grant the injunction pending appeal, for the following reasons.

There is a reasonable likelihood of success on the merits for the plaintiffs in this case on their RFRA claim, essentially for the reasons given in *Tyndale House Publishers, Inc. v. Sebelius*,

No. 12-1635, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012). *See also Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012).

Both RFRA and the applicable standard for a preliminary injunction in this case require in some sense a balancing between the burden on the religious conscience of plaintiffs and the interests furthered by the regulation in question. Plaintiffs assert that it would violate their sincere religious beliefs to direct the company that they control to cut checks to pay directly for contraceptive services. They are okay, however, with giving discretionary healthcare money to their employees, who may then choose to buy such services. If walking this fine line is sincerely accepted as a condition for salvation, it is not up to the government to say that the line is too fine. Lots of religious lines are fine. Of course government is not bound by every religious fine line. But RFRA requires that the government interest be strong before forcing people to cross the line.

At this stage of this litigation, the government interest does not appear particularly weighty. Arguments about the government's interest in the consistent application of the law lack force where the Government has apparently not appealed or requested a stay in a similar case in which a preliminary injunction was entered. *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012). Also, we are not informed that the Government has sought or obtained a stay in two other very similar cases where a preliminary injunction has been entered (*Tyndale, supra;* and *Newland, supra*). Moreover, the interests of the employees in obtaining contraceptive services do not appear weighty in the context of this case, where such services can be paid for through individual health care accounts provided by the employer.

The burden on the plaintiffs, assuming their sincerity, is in contrast large. It is that they must take a chance on huge fines or act contrary to their conscience.

For these reasons, I would grant the injunction against the enforcement of the regulation in question pending appeal. Because the majority denies the injunction pending appeal, I agree that the appeal should be expedited.

January 29, 2013
CCO-046-E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1144

CONESTOGA WOOD SPECIALITIES CORPORATION;
NORMAN HAHN; NORMAN LEMAR HAHN;
ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,
Appellants

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF THE TREASURY;UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENTOF THE TREASURY
(E.D. Pa. No. 5-12-cv-06744)

Before: RENDELL, JORDAN and GARTH, Circuit Judges

OPINION/ORDER RE EXPEDITED MOTION FOR INJUNCTION

Before us is a motion for a stay pending appeal, which, in our Court, is an extraordinary remedy. *See United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978). This case involves a challenge to the enforcement provisions of the Patient Protection and Affordable Care Act (the "ACA") and related regulations that require Conestoga to include coverage for contraception – including abortifacients and sterilization – in its employee health insurance plan. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). In essence, Plaintiffs Conestoga Wood Specialties Corporation, a secular, for-profit corporation, and five of its shareholders, the Hahns, claim that providing the mandated coverage would violate their religious beliefs. Plaintiffs brought suit in the Eastern District of Pennsylvania and filed a motion for a preliminary injunction to enjoin enforcement of the regulations. After holding an evidentiary hearing, the District Court issued a 34-page opinion on January 11, 2013, detailing its reasons for denying injunctive relief to Plaintiffs. *See Conestoga Wood Specialties Corp. v. Sebelius*, --- F. Supp. 2d ---, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013). Plaintiffs subsequently filed a motion for a stay pending appeal in this Court.

As Judge Jordan notes, the standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). To qualify for preliminary injunctive relief, a party must demonstrate "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Therefore, in assessing the present motion for a stay pending appeal, we must consider the same four factors that the District Court considered after an evidentiary hearing, ultimately concluding that preliminary relief was not warranted.

Such stays are rarely granted, because in our Court the bar is set particularly high. Indeed, we have said that an "injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) (citation omitted). In other words, "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enter., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). This standard distinguishes the present case from most of the cases cited by Judge Jordan in his dissent, in which those courts applied a "sliding scale" standard, whereby preliminary injunctive relief may be granted upon particularly strong showing of one factor. In those cases, "[t]he more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012).[1]

[1] *See also Grote v. Sebelius*, --- F.3d ---, 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013) (adopting the reasoning of *Korte* and applying the same "sliding scale" standard); *Monaghan v. Sebelius*, --- F. Supp. 2d ---, No. 12-15488, 2012 WL 6738476, at *3 (E.D. Mich. Dec. 30, 2012) (applying a standard that "[c]ourts . . . may grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of success on the merits, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued"); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, slip op. at 8 (W.D. Mo. Dec. 20, 2012) (applying a sliding scale standard and finding that "the balance of equities tip strongly in favor of injunctive relief in this case and Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, --- F. Supp. 2d ---, No. 12-1635, 2012 WL 5817323, at *4 (D.D.C. Nov. 16, 2012) (applying a sliding scale standard by which "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor").

To be sure, the law requires us to balance the factors against each other; however Judge Jordan overstates the significance of *Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir. 1978), in favor of applying a less stringent standard. The fact of the matter is that this Court has not sanctioned the "sliding scale" standard employed in other courts of appeals. Accordingly, we must examine each factor and determine whether Plaintiffs have met their burden as to each element.

We agree with the District Court's ruling that Plaintiffs have not met their burden in demonstrating likelihood of success on the merits. We find the District Court's reasoning persuasive and we incorporate it by reference herein. In short, it determined that Plaintiffs had not demonstrated their likelihood of success on the merits of their claims under either the First Amendment or the Religious Freedom Restoration Act ("RFRA"). *Conestoga Wood Specialties Corp.*, 2013 WL 140110 at *18. The District Court determined that, as a secular, for-profit corporation, Conestoga has no free exercise rights under the First Amendment, *id.* at *6-8, and is not a "person" under the RFRA, *id.* at *10.

Concerning the Hahns' rights under the Free Exercise Clause of the First Amendment, the District Court concluded that the ACA regulations are generally applicable because they are not specifically targeted at conduct motivated by religious belief, and are neutral because the purpose of the regulations is to promote public health and gender equality instead of targeting religion. *Id.* at *8-9. Because a neutral law of generally applicability need only be "rationally related to a legitimate government objective" to be upheld – and the government demonstrated that the regulations are just that – the District Court concluded that the Hahns' challenge to the regulations under the Free Exercise Clause were not likely to succeed. *Id.* (citing *Combs v. Home-Ctr. Sch. Dist.*, 540 F.3d 231, 243 (3d Cir. 2008)). Likewise, the District Court found that the Hahns' claims under the RFRA were not likely to succeed because the burden imposed by the regulations does not constitute a "substantial burden" under the RFRA. While this question presents a close call, *id.* at *12, the District Court ultimately concluded that any burden imposed by the regulations would be too attenuated to be considered substantial and that any burden on the Hahns' ability to exercise their religion would be indirect, *id.* at *14.

Furthermore, regarding Plaintiffs' claim under the Establishment Clause of the First Amendment, the District Court found that the "religious employer exemption" of the ACA does not violate the Establishment Clause because it applies equally to organizations of every faith and does not favor one denomination over another, and does not create excessive government entanglement with religion. *Id.* at *15-16. Finally, the District Court found that Plaintiffs' Free Speech claim had little likelihood of success because the ACA regulations "affect[] what [Plaintiffs] must *do* . . . not what they may or may not say," *id.* at *17 (quoting *Rumsfeld v. Forum for Academic and Institutional*

Rights, 547 U.S. 47, 60 (2006)), and the regulations do not interfere with Plaintiffs' expression of their opinions regarding contraceptives.

While we note that the issues in this case have not been definitively settled by this Court or the Supreme Court, we nonetheless find that Plaintiffs failed to prove a "reasonable likelihood of success on the merits," as required by law. *See Assoc. N.J. Rifle and Pistol Clubs v. Governor of the State of New Jersey*, --- F.3d ---, No. 12-1624, 2013 WL 336680, at *2 (3d Cir. Jan. 30, 2013). Judge Goldberg's reasoning comports with that of other courts who analyzed the issue of whether a stay should be granted pending appeal in the same situation based on the same factors, and the same standard, that we do. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (concluding that the reach of the RFRA does not "encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship"). Plaintiffs and Judge Jordan take issue with certain aspects of Judge Goldberg's analysis and view of the case law; however, we conclude that his reasoning is sound and is not likely to be overturned on appeal.

While we recognize that, as Judge Jordan urges, the rights at stake are important, we do not, unlike other courts, relax our standard depending on the nature of the right asserted. Given our standard, because Plaintiffs failed to prove their likelihood of success on the merits, we DENY their request for extraordinary relief. Judge Garth is filing a concurrence and Judge Jordan is filing a dissent.

By the Court,

/s/Marjorie O. Rendell
Circuit Judge

Dated: 2/7/13
MB/cc: Charles W. Proctor, III, Esq.
Randall L. Wenger, Esq.
Michelle Renee Bennett, Esq.
Alisa B. Klein, Esq.
Mark B. Stern, Esq.
Michelle Renee Bennett, Esq.

Conestoga Wood v. Sect'y Dept. HHS January 29, 2013
No. 13-1144 CCO-046-E

GARTH, *Circuit Judge*, concurring.

I concur wholeheartedly in Judge Rendell's majority opinion, which correctly outlines this Court's standard of review in motions seeking an injunction pending appeal and which denies the plaintiffs'[1] motion to enjoin the Affordable Care Act's furnishing of contraceptives to women. I also agree with Judge Rendell that Conestoga has failed to carry its burden of demonstrating that it is likely to be successful in any of its claims under the First Amendment or the RFRA. In reaching this conclusion, as Judge Rendell points out, the District Court convincingly disposed of Conestoga's arguments.

I write separately in order to highlight what I have found to be particularly persuasive reasoning advanced both by District Court Judge Goldberg's thorough and comprehensive opinion in this case[2] and by our sister Circuits, most notably the Tenth Circuit in Hobby Lobby Stores, Inc. v. Sebelius, 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012).[3] I have also found the opinion of Judge Judge Ilana Rovner of the Seventh Circuit, writing in dissent in Grote v. Sebelius, 13-1077, 2013 WL 362725 at *4-15 (7th Cir. Jan. 30, 2013), to dispositively answer all of the arguments of Conestoga and Judge Jordan. I conclude, as Judge Rovner's opinion does, that Conestoga's complaint is flawed and without the likelihood of success necessary to warrant an injunction.

I begin by noting that Conestoga moved for an injunction pending appeal before the District Court. That motion was denied; Conestoga Wood Specialities Corp. v. Sebelius, No. 12-6744, 2013 WL 140110 at *18 (E.D. Pa. Jan. 11, 2013); and Conestoga renewed the motion before us. See F. R. App. P. 8 (a). As Judge Rendell has discussed

[1] For purposes of identification, except as otherwise specified I will refer to the plaintiffs as "Conestoga," inasmuch as the for-profit corporation Conestoga is the only entity that has any direct obligations under the ACA.

[2] Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013).

[3] See also *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. (6th Cir. Dec. 28, 2012). I also note, as an aside, that Justice Sotomayor, sitting as a single Circuit Justice for the Tenth Circuit, denied the plaintiffs in Hobby Lobby an injunction pending review, reasoning that "Applicants do not satisfy the demanding standard for the extraordinary relief they seek." Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice Dec. 26, 2012).

(Maj. Op. at 2), the analytic framework governing such requests is well established: "In ruling on a motion for a preliminary injunction, the district court must consider: (1) the likelihood that the plaintiff will prevail on the merits at final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." Merch. & Evans, Inc. v. Roosevelt Bldg. Products Co., Inc., 963 F.2d 628, 632-33 (3d Cir. 1992) (citations omitted).

I focus my attention in this concurrence on the first factor; i.e, whether Conestoga has shown a likelihood of success on the merits. Because this Court requires that all four factors be satisfied, Conestoga must demonstrate first that it is "likely to prevail on the merits." Constructors Ass'n of W. Pennsylvania v. Kreps, 573 F.2d 811, 814 (3d Cir. 1978). See also Delaware River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974) ("[A]s a prerequisite to the issuance of a preliminary injunction the moving party must generally show: (1) a reasonable probability of eventual success in the litigation . . . ."). I conclude that Conestoga has demonstrated no such likelihood of success.

Conestoga seeks to demonstrate that it, Conestoga Wood Specialties Corporation—the *for-profit corporate entity* that would be required under the ACA to participate in an insurance plan for its employees that includes coverage of various contraceptives—has religious views that are entitled to legal protection and that these religious views are identical with those of its owners, the Hahns.

As the District Court properly recognized, this argument fails to account for the fact that *for-profit corporate entities*, unlike religious *non-profit organizations*, do not—and cannot—legally claim a right to exercise or establish a "corporate" religion under the First Amendment or the RFRA. As the District Court noted, "[g]eneral business corporations … do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." Contestoga 2013 WL 140110 at *7 (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F.Supp.2d 1278, 1291 (W.D. Okla. 2012)). Unlike religious *non-profit corporations or organizations*, the religious liberty relevant in the context of for-profit corporations is the liberty of its individuals, not of a *profit-seeking* corporate entity.[4]

[4] I also note in this connection that President Obama has recently proposed permitting a broad range of *religious nonprofit organizations* who object to providing contraception coverage to decline to do so. Coverage of Certain Preventive Services Under the Affordable Care Act, http://www.ofr.gov/OFRUpload/OFRData/2013-02420_PI.pdf (proposed Jan. 30, 2013).

Conestoga further claims that it should be construed as holding the religious beliefs of its owners. This claim is belied by the fact that, as the District Court correctly noted, "'[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs' . . . . It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." Contestoga, 2013 WL 140110 at *8 (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)). As Judge Rovner put it in Grote, "the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere. In short, the only religious freedoms at issue in this appeal are those of the Grotes, not the companies they own." Grote, 13-1077, 2013 WL 362725 at *5. Similarly, the purpose—and only purpose—of the plaintiff Conestoga is to make money! Despite Judge Jordan's objection to this statement (see Diss. Op. at n. 8), the record clearly reveals that Conestoga Wood Specialties Corporation is no more than a for-profit corporation designed for commercial success and is without membership in any church, synagogue, or mosque and without religious convictions.

I will not reiterate at length the defects in the claims brought by the individual plaintiffs as distinct from the corporate entity Contestoga, which as discussed above cannot claim its own "corporate" right to free exercise of religion. The flaw in this aspect of Conestoga's argument is more than sufficiently articulated in Judge Rovner's opinion in Grote, which is as completely applicable to Conestoga as it is to Grote: "it is the corporation, rather than its owners, which is obligated to provide the contraceptive coverage to which the owners are objecting. [Conestoga Wood Specialties Corporation] is a closely-held, family-owned firm, and I suspect there is a natural inclination for the owners of such companies to elide the distinction between themselves and the companies they own. . . . [Nevertheless the Hahns] are, in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." Grote v. Sebelius, 13-1077, 2013 WL 362725 at *6-7 (7th Cir. Jan. 30, 2013) (citation omitted).

Suffice it to say that there is no argument advanced by Conestoga, or by Judge Jordan in dissent here, that convinces me that Conestoga's motion for an injunction should be granted. I am confident that Conestoga's appeal will not succeed, and I—as does Judge Rendell—therefore deny their expedited motion for an injunction pending appeal.

Conestoga Wood v. Sect'y Dept. HHS
No. 13-1144

January 29, 2013
CCO-046-E

JORDAN, *Circuit Judge*, dissenting.

Conestoga Wood Specialties Corporation ("Conestoga"), and five of its owners, Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn, and Kevin Hahn, appeal the denial of their motion for a preliminary injunction against the enforcement of provisions of the Patient Protection and Affordable Care Act (the "ACA") and related regulations that require Conestoga to purchase an employee health insurance plan that includes coverage for contraception, including abortifacients and sterilization services. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). They have moved for an injunction pending appeal.[1] *See* Fed. R. App. P. 8(a). Because I believe an injunction is warranted, I respectfully dissent from the order denying the motion.

Conestoga is a privately held, for-profit Pennsylvania corporation that manufactures wood cabinets and wood specialty products and employs approximately 950 full-time employees. (Am. Compl. ¶¶ 11-16, 37.) It is owned entirely by members of the Hahn family, who, the District Court acknowledges, "are practicing Mennonite Christians whose faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *3 (E.D. Pa. Jan. 11, 2013).

In the midst of the public debate about the propriety of the Obama Administration's decision to create regulations requiring (with possible exceptions not applicable here) all for-profit businesses to provide health insurance to their employees to pay for abortifacients and sterilization services, Conestoga's Board of Directors adopted, on October 31, 2012, a "Statement on the Sanctity of Human Life," which, among other things, proclaims that

> [t]he Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life

[1] The procedural history is essentially as follows. On December 4, 2012, Appellants filed suit and requested a preliminary injunction prohibiting the government from applying the contraception mandate to Conestoga. On January 11, 2013, the District Court denied Appellants' request for a preliminary injunction. On January 14, 2013, Appellants filed their notice of appeal, *see* 28 U.S.C. § 1292(a)(1), and on January 22, 2013, they filed the present expedited motion for an injunction pending appeal.

> through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.

Id. at *3 n.5.

Accordingly, the Hahns believe that facilitating contraception, including particularly abortifacients, by providing insurance coverage will violate their religious beliefs. (Am. Compl. ¶¶ 30, 32.) Conestoga, at the Hahns' direction, previously provided health insurance that omitted coverage for contraception (Am. Compl. ¶ 3), but, as of January 1, 2013,[2] the company is required under the ACA either to provide health insurance plans that cover contraception or to face enforcement actions and substantial financial penalties.[3] *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H (approximately $2,000 per employee annual tax assessment for noncompliance). The Hahns estimate that, if they do not comply with the mandate to provide coverage for contraception, Conestoga could be subject to daily fines of approximately $95,000.[4] (Expedited Mot. for Inj. Pending Appeal at 5.) They have therefore brought the present action against the Secretary of the U.S. Department of Health and Human Services, Kathleen Sebelius, seeking declaratory and injunctive relief against the enforcement of the contraception mandate. They allege that the mandate violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1; the First Amendment's Free Exercise, Establishment, and Speech Clauses; the Fifth Amendment's Due Process Clause; and the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 706(2)(A), (D).

Before turning to the government's arguments for why enforcement of its mandate cannot wait for a fair opportunity to review the merits of the constitutional and statutory claims asserted by the Hahns and Conestoga, it is perhaps well to note what is not contested in this case. The government does not dispute the sincerity of the Hahns' religious beliefs or the District Court's finding that the Hahns' faith requires them to operate their business in accordance with those beliefs. The government does not contend that the regulations at issue are anything less than anathema to the Hahns because of those deeply held religious beliefs. Nor does it take issue with the Hahns'

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[2] On December 28, 2012, the District Court granted a temporary stay, but on January 11, 2013, the Court denied Appellants' motion for a preliminary injunction.

[3] Conestoga's health insurance renewal date was January 1, 2013. It is unclear from the record whether Conestoga is now risking enforcement or paying for the offending coverage.

[4] The government offers no disagreement with the Hahns' assessment of the sanctions they face for noncompliance.

assertion that, unless they submit to the offending regulations, Conestoga will be fined on a scale that will rapidly destroy the business and the 950 jobs that go with it. Finally, the government does not argue that the choice being pressed upon Conestoga and the Hahns – namely, to pay for what those parties view as life-destroying drugs and procedures or to watch their business be destroyed by government fines – is somehow merely theoretical. It is uncontested that Conestoga's health insurance renewal date has arrived and that the Hahns and their company are thus faced with the immediate and highly consequential choice which is at the center of this lawsuit.

What the government does assert, and what the District Court decided, is that the Hahns and the business they own and operate lack a reasonable likelihood of succeeding in their challenge to the government's threatened actions against them because Conestoga is a for-profit corporation. In the District Court's words, "It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8. Despite the evident care invested by the District Court in its decision, that conclusion is highly questionable.

To qualify for preliminary injunctive relief, a litigant must demonstrate "(1) a likelihood of success on the merits; (2) that [they] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). "The injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). Importantly, however, although the four factors provide structure for the inquiry, "in a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required." *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978).[5]

[5] While we have not ruled on the matter definitively, the standard for obtaining an injunction pending appeal is essentially the same as that for obtaining a preliminary injunction. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (evaluating "a motion for an injunction pending appeal using the same factors and … approach that govern an application for a preliminary injunction"); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) ("In ruling on … a request [for a stay or an injunction pending appeal], this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction."); *LaRouche v. Kezer*, 20 F.3d 68, 73 (2d Cir. 1994) ("The standard for preliminary injunctions, similar to the standard for injunctions pending appeal, dictates a weighing of the

likelihood of success on the merits, irreparable injury, the balance of equities and the public interest.").

The District Court disregarded the several precedents from other courts granting injunctions to companies and their owners like Conestoga and the Hahns because, it said, those courts "applied a less rigorous standard" for the granting of preliminary injunctive relief. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *4. In particular, the Court said that those other courts "applied a 'sliding scale approach,' whereby an unusually strong showing of one factor lessens a plaintiff's burden in demonstrating a different factor." *Id.* Then, citing *Pitt News v. Fisher*, 215 F.3d 354, 365-66 (3d Cir. 2000), it contrasted that approach with what it characterized as our Court's approach, saying, "the Third Circuit ... has no 'sliding scale' standard, and plaintiffs must show that all four factors favor preliminary relief." *Id.*

The District Court was mistaken on two fronts in that analysis. First, it ignored the import of cases like *Kreps*, in which we have indicated that "balancing" means just that, so that one can succeed in gaining injunctive relief if the threatened harm is particularly great, despite a showing on "likelihood of success" that is less than would usually be required. 573 F.2d at 815. Even if *Pitt News* stood for the proposition for which the District Court cites it, that case could not be controlling because it is a panel opinion and cannot overrule those earlier precedents. *See United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004) ("This Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents."). But, and this is the second mistake, *Pitt News* does not say, as the District Court implied, that a balancing among factors is not permitted. It said, rather, that "all four factors [must] favor preliminary relief." 215 F.3d at 366. To say that one must make a positive showing on all four preliminary injunction factors is not to say that there cannot be a balancing among them that would allow greater or lesser strength, depending on the facts.

The majority disparages my reliance on *Kreps*, asserting that I have "overstate[d] the significance" of that case and am "applying a less stringent standard." (Maj. Op. at 4.) But, with all due respect, that criticism is not sound. *Kreps* has not been overturned and is, accordingly, the law of this Circuit. It speaks in terms of balancing, and plainly states that a stronger showing on one factor may allow for a less forceful showing on another. If there were any ambiguity about that, it was removed by our later holding in *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987), in which we said that "[a] decision on an application for a preliminary injunction requires a delicate exercise of equitable discretion," and that "the strength of [a] plaintiff's showing with respect to one [preliminary injunction factor] may affect what will suffice with respect to another." My colleagues in the majority acknowledge that the central holding of *Kreps* is that "the law requires us to balance the [preliminary injunction] factors against each other" (Maj. Op. at 4), but they simply decline to do so, focusing their attention solely on the first factor. I am left to wonder what "balancing" means, if we are not to take into consideration the other factors, including the significance of the rights at stake, which the majority

The harm threatened here is great. "It is well-established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If government action presents such a threat, it is no answer to cite, as the government does, a litany of laudatory things that the government may also be doing at the same time. The government is at pains to point out, for example, that the "preventive health services provisions [of the ACA] require coverage of an array of recommended services including immunizations, blood pressure screening, mamograms, cervical cancer screening, and cholesterol screening." (Gov't Opp. at 5.) The question posed by the Hahns and Conestoga, however, is not whether mamograms or screening for high cholesterol or cervical cancer are valuable health services. The question is not even whether the abortifacient drugs and sterilization procedures that they view as life-destroying and therefore impossible to support can rightly be viewed by other people as praiseworthy. The Hahns and Conestoga pose a very different and precise question: they turn to their government and ask, can you rightly make us pay for something poisonous to our religious beliefs or face the destruction of our business. It evidently matters not one whit to them how healthful the banquet they are told to buy may otherwise be, if the menu contains a toxic item too. "There's just one fatal dish," is non-responsive to their point, which is that their religious liberty is directly threatened by the government's edict. We are thus dealing with the prospect of grievous harm, and the threshold for showing a likelihood of success on the merits may be correspondingly relaxed.[6]

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concedes in this case are "important" (Maj. Op. at 6) and I would say are of absolutely fundamental importance. The threatened deprivation here is profound.

[6] I note the relaxed measure for likelihood of success only to emphasize that, in light of the threatened harm, this case seems clearly to meet the requirements for an injunction pending appeal. Even were the harm less severe and the threshold showing for likelihood of success accordingly higher, though, I would still think that the Hahns and Conestoga had made the necessary showing. To meet that threshold, a "plaintiff need only prove a prima facie case, not a certainty that he or she will win." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001); *see also Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980) ("It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather the burden is on the party seeking relief to make a prima facie case showing a reasonable probability that it will prevail on the merits." (internal quotation marks omitted)). "[L]ikelihood of success on the merits" means that a plaintiff has "a reasonable chance, or probability, of winning." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). It "does not mean more likely than not." *Id.* In the sense pertinent here, the term "likelihood" embodies "[t]he quality of offering a *prospect* of success" or "promise." Oxford English Dictionary, Vol. I, at 1625 (compact ed., 1986) (emphasis added). The Plaintiffs in this case have that kind of chance, as the numerous courts that have granted injunctions

In addition to showing irreparable harm, the Hahns and Conestoga have adequately demonstrated that they meet the other requirements for an injunction pending appeal, including having a sufficient likelihood of success on the merits. Several courts, as noted by the District Court itself, have already looked at facts like the ones before us and held that at least some temporary injunctive relief is in order. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (granting motion for injunction pending appeal because appellants "have established both a reasonable likelihood of success on the merits and irreparable harm, and [because] the balance of harms tips in their favor"); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting "[a]ppellants' motion for stay pending appeal," without further comment); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-92, 2012 WL 6738489, at *7 (E.D. Mo. Dec. 31, 2012) (holding that "plaintiffs are entitled to injunctive relief that maintains the status quo until the important relevant issues have been more fully heard"); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *6 (E.D. Mich. Dec. 30, 2012) (granting preliminary injunction because "[t]he Government has failed to satisfy its burden of showing that its actions were narrowly tailored to serve a compelling interest," and plaintiffs therefore "established at least some likelihood of succeeding on the merits of their RFRA claim"); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, slip op. at 8 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction because "the balance of equities tip strongly in favor of injunctive relief in this case and [because] Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *18 (D.D.C. Nov. 16, 2012) (granting preliminary injunction to publishing corporation and its president because they had "shown a strong likelihood of success on the merits of their RFRA claim," and because

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involving the ACA contraception mandate have necessarily found. *See* cases cited *infra*, in the text following this footnote.

Having said that, it bears repetition that the hardship the Plaintiffs allege is severe. The government has put the Hahns and Conestoga in a terrible position by insisting that, under threat of ruinous fines, they capitulate now, before their rights have been fully adjudicated through appeal. The equities favor granting a preliminary injunction when the owners of a company stand to lose their business unless the status quo is maintained. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling, Co.*, 749 F.2d 124, 126 (2d Cir. 1984). And injunctive relief has been found appropriate in circumstances much less onerous than the ones here. *See Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355, 1363-65 (Fed. Cir. 2011) (concluding that there was irreparable harm and that the equities favored granting an injunction when a company was required to litigate in two forums in violation of a contractual forum selection clause). Given the balance of hardships here – with, on one hand, the government being asked merely to wait until the case can be fully adjudicated, and, on the other, the Plaintiffs being told to forego their rights of religious conscience – and given the issues at stake, an injunction is warranted.

the other preliminary injunction factors favored granting the motion); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *14 (E.D. Mich. Oct. 31, 2012) (granting preliminary injunction to for-profit, family-owned and operated corporation and holding that "[t]he harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs"); *Newland v. Sebelius*, No. 12-1123, 2012 WL 3069154, at *8 (D. Colo. July 27, 2012) (granting preliminary injunction, holding that "[t]he balance of the equities tip strongly in favor of injunctive relief in this case"). *But see Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 3 (6th Cir. Dec. 28, 2012) (denying motion for injunction pending appeal); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (denying motion for injunction pending appeal, stating, "We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship").

The two Courts of Appeals to view the issue the other way are the Sixth and Tenth Circuits. The Sixth Circuit issued an order acknowledging "conflicting decisions," but denying injunctive relief because the district court in that case issued a "reasoned opinion" and because "the Supreme Court [had] recent[ly] deni[ed] … an injunction pending appeal in *Hobby Lobby*." *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012). The Supreme Court opinion the *Autocam* court referred to was an in-chambers decision by Justice Sotomayor, acting alone, denying the plaintiffs' motion for an injunction pending appellate review. *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (Sotomayor, Circuit Justice Dec. 26, 2012). She denied the motion under the particular standard for issuance of an extraordinary writ by the Supreme Court, *id.* at 643, which differs significantly from our standard for evaluating a motion for a preliminary injunction. Under that more demanding standard, the entitlement to relief must be "'indisputably clear.'" *Id.* (quoting *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers)). The *Autocom* court's reliance on her opinion is therefore misplaced, and its decision is otherwise devoid of explanation. Its conclusion may also be viewed as disregarding the point of RFRA, which is to put the onus on the government when the government seeks to restrict fundamental rights.[7]

[7] Congress enacted RFRA to overturn the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court rejected a challenge to an Oregon statute that denied unemployment benefits to drug users, including Native Americans engaged in the sacramental use of peyote, holding that "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (citing *Smith*, 494 U.S. at 890). In so doing, the Court rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and returned to the doctrine of earlier cases that held that "the Constitution does not require judges to

The Tenth Circuit provided more explanation. It found the position of the plaintiffs in that case wanting because "'the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion.'" *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (alteration in original) (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)). As the Seventh Circuit rightly pointed out, though, that description "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 or related services." *Korte*, 2012 WL 6757353, at *3.

The government brushes that aside by saying that the "dichotomy between religious and secular employers" (Gov't Opp. at 11) is case dispositive. Because Conestoga is a business, the government's argument, to which the District Court subscribed, is that there is nothing that can be done to Conestoga, or through it to its owners, that implicates religious liberty. That conclusion seems to rest on two premises which are at the very least open to such serious question that it is unjust to deny an injunction while the matter is more fully considered.

One is that the corporate form itself, whether the enterprise involved is for-profit or not, places an enterprise outside the realm of First Amendment rights. *See Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8 (reasoning that a business owner cannot enjoy the protection of the corporate veil while also asking that the owner's religious interests be considered for First Amendment purposes). An entity's incorporated status does not, however, alter the underlying reality that corporations can and often do reflect the particular viewpoints held by their flesh and blood owners – a fact that has been recognized in the great many cases holding that corporations can indeed assert First Amendment rights. Religious bodies frequently operate through corporations. *See, e.g.,*

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engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Gonzales*, 546 U.S. at 424 (citing *Smith*, 494 U.S. at 883-90).

"Congress responded by enacting [RFRA], ... which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Id.* RFRA provides that the government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), unless it can demonstrate that the government regulation "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA thus "restore[s] 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 "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b).

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 439 (2006) (affirming the grant of a preliminary injunction to a religious sect, which was also a corporation, enjoining the enforcement of federal drug laws against the sect for its importation of a drug used in religious rituals); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525-26 (1993) (recognizing that the petitioner was a corporation whose congregants practiced the Santeria religion and concluding that city ordinances violated the corporation's, and its members', free exercise of their religion); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (recognizing the petitioner as a corporation in a case concerning First Amendment free exercise rights). And corporations have been held to have free speech rights, *see generally Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010), including the right to frame their own message where abortion is concerned. *See Greater Balt. Ctr for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 554 (4th Cir. 2012) (holding that the plaintiff "pregnancy centers are not engaged in commercial speech and that their speech cannot be denied the full protection of strict scrutiny"). Ironically (given the character of the constitutional and statutory claims being made here), many an abortion rights case has been brought by corporations like Planned Parenthood and has resulted in the granting of preliminary injunctive relief. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. Dept. of Health*, 699 F.3d 962, 968 (7th Cir. 2012) (affirming grant of preliminary injunction to prevent enforcement of a state statute prohibiting a medical provider (a corporation) that also performed abortions from receiving any state-administered funding, because the state law required the provider to choose between providing abortion services and receiving public money for other services besides abortions); *Planned Parenthood of S.E. Pa. v. Casey*, 686 F. Supp. 1089, 1137-38 (E.D. Pa. 1988) (granting preliminary injunction to several corporations, both for-profit and not-for-profit, and an individual to enjoin state law requiring, *inter alia*, unduly burdensome record keeping and reporting requirements that were determined to be likely to result in an unconstitutional impediment to a woman's right to have an abortion). There is thus ample precedent indicating that the corporate form itself does not prevent a corporation from asserting constitutional rights, including First Amendment rights.

The other questionable premise pressed by the government and adopted by the District Court is that the distinction between for-profit and not-for-profit corporations justifies holding the Hahns' and Conestoga's claims to be untenable. Asserting that RFRA was "enacted … against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion in setting the terms and conditions of employment" (Gov't Opp. at 11), the government says Conestoga, as a for-profit enterprise, "must provide the employee benefits that federal law requires." (*Id.*) Leaving aside that the government's demand that employers provide insurance coverage for abortifacients and other contraceptives is unprecedented and hence cannot have formed the backdrop for RFRA or anything else, the distinction that the government points to has been rejected by other courts, *see, e.g., Stormans Inc. v. Selecky*, 586 F.3d 1109, 1120

(9th Cir. 2009) ("We have held that a corporation has standing to assert the free exercise right of its owners."); *Tyndale House Publishers, Inc. v. Sebelius*, 2012 WL 5817323, at *7 (D.D.C. Nov. 16, 2012) ("[T]he beliefs of Tyndale and its owners are indistinguishable."); *Legatus v. Sebelius*, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012) ("For the purposes of the pending motion, however, Weingartz Supply Co. may exercise standing in order to assert the free exercise rights of its president, Daniel Weingartz, being identified as 'his company.'"), and in other First Amendment contexts, *cf. Citizens United*, 558 U.S. at __, 130 S.Ct. at 907 ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."); *Transp. Alts., Inc. v. City of New York*, 218 F. Supp. 2d 423, 444 (S.D.N.Y. 2002) ("[D]rawing distinctions between organizations based on for-profit or non-profit sponsorship in determining how much to charge to hold an event [in a public park] runs afoul of the First Amendment."). It is therefore only reasonable to hold in place the status quo in this case while the parties' arguments can be fully considered, rather than to make a hasty decision that risks denying fundamental rights.[8]

In short, while the District Court's opinion and the government's response to the motion for injunctive relief provide some answers to the important questions raised by the Hahns' and Conestoga's motion for preliminary injunctive relief, they are not nearly persuasive enough, in my judgment, to warrant cutting off all debate before those questions can be given a full airing and a decision on the merits. The simple fact is that, if the Hahns and Conestoga are forced to kneel before the government's regulation now, they have already lost. The government's view of what is and is not a valid exercise of religion will have prevailed before appellate rights have been vindicated. I am convinced that the threatened harm we are dealing with here is particularly grievous, that the appropriate threshold for showing a likelihood of success on the merits has been met, along with the remaining requirements for relief, and that preserving the status quo with an injunction is the appropriate course. I therefore respectfully dissent from the order denying the expedited motion for an injunction pending appeal.

[8] Judge Garth asserts that "the purpose – and only purpose – of the plaintiff Conestoga is to make money!" (Concurrence at 4.) That assumes the answer to the question the Hahns have posed. As a factual matter, it is unrebutted that Conestoga does not exist solely to make money. This is a closely held corporation which is operated to accomplish the specific vision of its deeply religious owners, and, while making money is part of that, it has been effectively conceded that they have a great deal more than profit on their minds. To say that religiously inclined people will have to forego their rights of conscience and focus solely on profit, if they choose to adopt a corporate form to conduct their business, is a controversial position and certainly not one already established in law.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3357

Frank R. O'Brien, Jr. and O'Brien Industrial Holdings, LLC

Appellants

v.

U.S. Department of Health and Human Services, et al.

Appellees

Institutional Religious Freedom Alliance

Amicus on Behalf of Appellants

Liberty, Life, and Law Foundation, et al.

Amici on Behalf of Appellants

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:12-cv-00476-CEJ)

ORDER

Appellants' motion for stay pending appeal has been considered by the court, and the motion is granted.

Judge Arnold dissents.

November 28, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	12 C 6756	DATE	1/3/2013
CASE TITLE	Triune Health Group, Inc vs. United States Dept of Health & Human Services et al		

DOCKET ENTRY TEXT

The Court grants Plaintiffs' motion for a preliminary injunction [36].

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Before the Court is Plaintiffs' motion for a preliminary injunction. (R. 36, Inj. Mot.) Plaintiffs filed a memorandum of law supporting both their motion for preliminary injunction and in opposition to Defendants' motion to dismiss. (R. 37, Inj. Mem.) The Court addresses only the preliminary injunction at this time. For the following reasons, the Court grants Plaintiffs' motion.

BACKGROUND

"Plaintiffs[] Christopher and Mary Anne Yep are ardent and faithful adherents of the Roman Catholic religion." (R. 21, Amend. Compl. ¶ 2.) The Yeps own and control Plaintiff Triune Health Group, Inc., a for-profit corporation. (*Id.* ¶¶ 3, 12.) Triune is a corporation that specializes in facilitating the re-entry of injured workers into the workforce. (*Id.* ¶ 19.)

The 2010 Patient Protection and Affordable Care Act ("the PPACA") included regulations mandating that employers include in their group health benefit plans coverage for preventative care for women that Plaintiffs deem "wholly at odds with their religious and moral values and sincere religious beliefs and sacred commitments." (*Id.* ¶ 5); *see also* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs specifically believe that abortion, contraception (including abortifacients), and sterilization are "gravely wrong and sinful." (*Id.* ¶ 33.) "Plaintiffs believe that providing their employees with coverage for drugs and services that facilitate such immoral practices constitutes cooperation with evil that violates the laws of God." (*Id.* ¶ 34.) Under the PPACA's mandate, however, Triune would be required to provide a group health plan covering the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and to provide education and counseling with respect to these matters for all women with reproductive capacity. (*Id.* ¶ 40); *see also* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130.

Courtroom Deputy Initials:	KF

The PPACA provides exemptions for religious employers and exempts some organizations through a "grandfathering" provision, however, Triune does not qualify for any exemption. (*Id*. ¶¶ 43-45.) Triune's health plan was due for renewal on January 1, 2013. (*Id*. ¶ 47.) According to Plaintiffs, they, therefore, must "either choose to comply with the federal mandate's requirements in violation of their religious beliefs, or pay ruinous fines that would have a crippling impact on their business and force them to shut down." (*Id*. ¶ 53.) As a result, Plaintiffs allege that the PPACA's mandate violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA"), the First and Fifth Amendments of the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Triune's current group health plan includes coverage for contraceptives, sterilization, and abortion. (Inj. Mem. at 9.) According to Plaintiffs, this coverage is an error and contrary to what Plaintiffs want based on their religious beliefs. (*Id*.) Plaintiffs have been unable to find a group healthcare policy that comports with both the PPACA and their religious beliefs. (*Id*. at 9-10.) Plaintiffs, therefore, seek an injunction from the PPACA's mandate so that they may purchase an insurance policy that excludes coverage for drugs and services to which they object based on their religious convictions. (Amend. Compl. ¶ 48.)

LEGAL STANDARD

"To obtain a preliminary injunction, the moving party must demonstrate a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the injunction." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. Health,* 699 F.3d 962, 972 (7th Cir. 2012) (citing *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 619 (7th Cir. 2004)). "If the moving party makes this threshold showing, the court 'weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.'" *Alvarez*, 679 F.3d at 589 (quoting *Ezell v. City of Chi*., 651 F.3d 684, 694 (7th Cir. 2011)).

ANALYSIS

The Seventh Circuit recently granted a preliminary injunction pending appeal in favor of a for-profit employer challenging the PPACA's preventative care mandate on the same grounds as presented here. *See Korte et al. v. Sebelius et al*., No. 12-3841 (7th Cir. Dec. 28, 2012). The plaintiffs in *Korte*, as here, challenge the PPACA under the RFRA, the First and Fifth Amendments, and the Administrative Procedure Act. Similar to Triune and the Yeps, the plaintiffs in *Korte* discovered this summer that the company's health insurance plan covered women's health services that contradict the owners' deeply-held religious beliefs, and therefore sought an injunction from the application of the PPACA in order to enroll in a conscience-compliant plan on January 1, 2013. The Seventh Circuit concluded that the *Korte* plaintiffs established a reasonable likelihood of success on the merits and irreparable harm, with the balance of harms tipping in their favor. In light of this binding precedent, the Court grants Triune's motion for a preliminary injunction.