Nos. 12-3841 (Consolidated with 13-1077)

In the United States Court of Appeals for the Seventh Circuit

CYRIL B. KORTE, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois, No. 3:12-cv-01072.
The Honorable **Michael J. Reagan**, Judge Presiding.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Defendants only address one of the four factors considered in this Court's sliding scale analysis for preliminary injunction motions: likelihood of success on the merits. As explained in Plaintiffs' opening brief, the other three factors tip in their favor. Doc. 19 at 64-66.[1]/ And as explained herein, contrary to Defendants' view, Plaintiffs have established "some likelihood" or "a reasonable likelihood" of success on the merits such that the district court erred in denying their motion for a preliminary injunction. *See Planned Parenthood of Ind., Inc. v. Comm'r*, 699 F.3d 962, 972 (7th Cir. 2012); *Stuller v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).

[1]/ "Doc." citations refer to document numbers for briefs as they appear on this Court's docket. Plaintiffs decline to respond in detail to the amicus briefs supporting Defendants because they duplicate Defendants' arguments, which Plaintiffs address. *See Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003) (Posner, J., in chambers).

I. Plaintiffs Are Likely To Succeed On Their RFRA Claim

A. The Mandate substantially burdens Plaintiffs' religious exercise

1. K&L's objection to the Mandate is an act of religious exercise

RFRA does not categorically exclude for-profit corporations from its coverage (or any other category of persons for that matter). *See* Doc. 58 at 10-11, 15, 20. Defendants extensively rely upon Title VII, but while Title VII expressly differentiates between certain religious non-profit entities and other employers, *RFRA does not*. Congress, well aware of Title VII, declined to include language in RFRA limiting its coverage to religious or non-profit entities alone. Defendants' attempt to import language into RFRA from other statutory schemes runs counter to the maxim that a legislature's exclusion of language in a statute or statutory section is presumed to be intentional. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts").

RFRA provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether

adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3; *see United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (RFRA "amended all federal laws to include a statutory exemption" where RFRA's two-part test is satisfied). The Americans with Disabilities Act and the National Labor Relations Act are similarly irrelevant to this case. *See* Doc. 58 at 19. In short, Title VII must be read through the prism of RFRA, not the other way around.

As explained in Plaintiffs' opening brief, RFRA and the Free Exercise Clause protect the religious exercise of any person and do not solely protect the exercise of religious persons. Doc. 19 at 37-46. That the Free Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), does not mean that for-profit corporations are excluded from the Free Exercise Clause's protection. *See* Doc. 58 at 11, 17. Similarly, that the Fourteenth Amendment was adopted "with special solicitude" for the rights of African-Americans, *Nixon v. Condon*, 286 U.S. 73, 89 (1932), hardly means that the Fourteenth Amendment *only* protects

the rights of African-Americans; yet, applying Defendants' reasoning to that Amendment would require such a result.

Defendants' theory is quite similar to an argument concerning corporate free speech rights that the Supreme Court rejected in *First National Bank v. Bellotti*, 435 U.S. 765 (1978). The Court stated:

> The proper question . . . is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does. . . .
>
> The court below . . . held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests. In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not . . . address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment. . . .
>
> The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten. . . .
>
> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that

> cannot prove, to the satisfaction of a court, a material effect on its business or property. . . .
>
> If a legislature may direct business corporations to "stick to business," it also may limit other corporations -- religious, charitable, or civic -- to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Id. at 775-77, 781-85.

Similarly, Judge Noonan of the Ninth Circuit observed:

> The First Amendment does not say that only one kind of corporation enjoys this [free exercise] right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free.

EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).

Moreover, as a recent scholarly article explains,

> [a review of] corporate ethical decision-making, criminal law, Title VII discrimination law, tax law, and constitutional law . . . . [shows that] [f]or-profit businesses are widely understood as capable of forming subjective intentions for their actions. The law recognizes this capability in various ways, from allowing businesses to act on ethical principles, to finding them capable of forming mental intent for crimes, to holding them liable for racial, sexual, or religious

> discrimination, to acknowledging that they can speak with a particular viewpoint. There is no basis to view these same entities as incapable of forming and acting upon beliefs about religion. . . .
>
> Moreover, many areas of the law . . . operate on the assumption that business owners will be sensitive to pressures imposed on their businesses. There is no reason to believe for-profit businesses behave any differently in the religious liberty context, or that religious business owners will not feel pressure to abandon their religious practices when the government penalizes their businesses.

Mark Rienzi, *God and the Profits: Is There Religious Liberty for Money-Makers?* (Mar. 7, 2013), at 8-9, *available at* http://ssrn.com/abstract=2229632; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("[S]ome for-profit activities could have a religious character."); *Geneva College v. Sebelius*, No. 2:12-cv-00207, 2013 U.S. Dist. LEXIS 30265, at *62 (W.D. Pa. Mar. 6, 2013) ("[T]here is no contextual distinction in the language of the First Amendment between freedom of speech and freedom to exercise religion.").[2]/

Defendants misquote Plaintiffs' statement that "RFRA *does not* give businesses an unbounded right to ignore anti-discrimination laws, refuse

[2]/ For further discussion of why companies can exercise religion, see Doc. 38.

to pay payroll taxes, violate OSHA requirements, etc. in the name of religious freedom." Doc. 19 at 46 (emphasis added); *see* Doc. 58 at 10, 15, 16. Plaintiffs simply noted that holding that companies are capable of exercising religion, and that the Mandate substantially burdens K&L's religious exercise here, does *not* mean that all companies are entitled to exemptions from all legal requirements. The vast majority of requirements imposed upon businesses pose no conflict with anyone's religious exercise, and a finding that a claimant's religious exercise has been substantially burdened does not guarantee entitlement to an exemption; it simply triggers the application of strict scrutiny. In the relatively rare instances in which employers actually allege that a law substantially burdens their religious exercise, the requirement will often be the least restrictive means of achieving a compelling governmental interest (such as, for example, provisions combating racial discrimination).

Defendants' contrary position entirely forecloses a business and its owners from *ever* challenging the application of a law to the business on religious exercise grounds, regardless of how egregious the circumstances.

This position lacks any basis in law and should be rejected. Courts have addressed the merits of religion-based claims brought by a business and/or its owners in numerous cases. In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Court concluded that the employer's religious exercise was substantially burdened, *id.* at 257, before concluding that the requirement at issue survived strict scrutiny. *See* Doc. 19 at 44-45.[3]/

In addition, contrary to Defendants' position, *Townley* and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), did not *only* hold that the corporations at issue had standing to assert the free exercise rights of their owners. *See* Doc. 58 at 26-27. Rather, in *Townley*, the court concluded that

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[3]/ *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210-12 (2d Cir. 2012) (addressing a free exercise claim brought by a kosher deli and butcher shop and its owners); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that a housing anti-discrimination law substantially burdened the free exercise of a landlord who objected to facilitating the cohabitation of unmarried couples); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same); *Rasmussen v. Glass*, 498 N.W.2d 508, 515-16 (Minn. Ct. App. 1993) (application of anti-discrimination ordinance to prohibit deli owner's refusal to deliver food to an abortion clinic burdened his religious exercise and did not withstand strict scrutiny); *Cf. Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 495 (2008) (holding that corporations that owned pharmacies had "stated a cause of action that is ripe for judicial review").

application of the law to plaintiffs "would adversely affect their religious practices" and proceeded to apply strict scrutiny. 859 F.2d at 620-21. Similarly, in *Stormans*, the court addressed the merits of the claimants' free exercise arguments. 586 F.3d at 1127-38.

Moreover, Defendants incorrectly suggest that the court in *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), held that for-profit corporations cannot exercise religion. Doc. 58 at 27 (emphasis added) (quoting *McClure*, 370 N.W.2d at 853) (stating that the court "rejected the free exercise claim *because the corporate plaintiff was 'not a religious corporation*"). The quoted language from *McClure* was part of the court's observation that the corporate plaintiff did not fall within *a statutory exemption*. 370 N.W.2d at 853. The court held that *both the corporation and its owners* had standing to assert their free exercise arguments, *id.* at 850-51 & n.12, as the owners "exercise[ed] their first amendment rights through" the corporation. *Id.* at 850, n.12. The court held that the provision "infringe[d]

upon the appellant's exercise of religious beliefs" but ultimately withstood strict scrutiny. *Id.* at 854.[4]/

2. The Mandate substantially burdens the Kortes' religious exercise

The Kortes' implementation of their religious beliefs in their ownership and management of K&L is in keeping with their Catholic faith. For example, the Catholic Church's Pontifical Council for Justice and Peace recently stated that, for Catholics, "[t]he vocation of the businessperson is a genuine human and Christian calling."[5]/ According to the Council,

> [one of biggest obstacles to fulfilling this Christian calling] at a personal level is a *divided life*, or what Vatican II described as "the split between the faith which many profess and their daily lives." . . . Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or

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[4]/ Although Defendants refer to the Kortes as mere "shareholders," Doc. 58 at 28-31—as if they were akin to thousands of individuals who hold a fractional percentage point interest in a large, publicly traded corporation—this case involves a small, family-owned company that holds the same values as its owners. *Cf. Geneva College*, 2013 U.S. Dist. LEXIS 30265 at *68.

[5]/ *Vocation of the Business Leader: A Reflection* at ¶ 6 (Nov. 2012), http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf (last visited Mar. 11, 2013).

integrated; it is fundamentally disordered, and thus fails to live up to God's call.[6]/

Defendants attempt to redefine Plaintiffs' religious beliefs and/or demonstrate a perceived inconsistency by asserting that there is no difference between an objection to providing Mandate-compliant insurance coverage (which is at issue here) and a hypothetical objection to employees' decisions to pay for the relevant goods and services with their own money (which is not at issue here). Doc. 58 at 28, 36. *But see* Motions Panel decision, App. 26-27 ("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.").

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[6]/ *Id.* at ¶ 10. This position is shared by the United States Conference of Catholic Bishops, which views the Mandate as "unjust and illegal" because it violates the civil rights of those striving to act in accordance with their faith and moral values. U.S. Conf. of Catholic Bishops, *United for Religious Freedom: A Statement of the Administrative Committee of the United States Conference of Catholic Bishops*, at 1, 4 (Mar. 14, 2012), http://www.usccb.org/issues-and-action/religious-liberty/march-14-statement-on-religious-freedom-and-hhs-mandate.cfm.

Defendants' argument is quite similar to an argument that the Supreme Court rejected in *Thomas v. Review Board*, 450 U.S. 707 (1981).[7]/ The claimant did not object to producing the raw materials necessary to make tanks and war materials, regardless of how those raw materials were eventually used. *Id.* at 715. The Court stated:

> The [state] court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. *We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one*. Courts should not undertake to dissect religious beliefs . . .

Id. at 715-16 (emphasis added).[8]/

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[7]/ *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Thomas* are instructive concerning what constitutes a substantial burden; they cannot be disregarded simply because the laws did not target businesses. Doc. 58 at 26.

[8]/ Although Defendants draw a distinction between the Kortes' religious belief that life (and therefore pregnancy) begins at conception and federal regulations that state that pregnancy begins at implantation, Doc. 58 at 8, n.6., it is undisputed that the Mandate requires Plaintiffs to arrange and pay for drugs and devices that act after conception, see Doc. 29 at 7-16, and for purposes of substantial burden analysis, Plaintiffs' religious beliefs—not opposing viewpoints—are the relevant starting point.

Similarly, Plaintiffs have drawn a line between (1) their direct facilitation of immoral conduct by knowingly arranging and paying for the coverage of particular goods and services in their employee health plan and (2) the actions of others who decide to buy such goods and services with their own money, and it is improper for Defendants to question the reasonableness of that line. *See id.*; *see also* Doc. 28 at 18 (explaining that "Catholic employers like the Kortes reasonably could conclude that providing the coverage required by the HHS mandate is morally wrong because providing that coverage constitutes formal cooperation with evil").

In addition, Defendants' extensive reliance upon the law governing corporate structure and finances is misplaced. The Kortes do not dispute that K&L is a distinct legal entity that is directly subject to the Mandate, nor do they suggest that K&L's assets are, in fact, their own assets. Under the substantial burden test, however, courts examine the substantiality of "the coercive impact" on the claimant, 450 U.S. at 717, *not* how direct or indirect that coercive impact is. *Id.* at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Defendants do not contest that the imposition of approximately $730,000 in penalties *upon K&L* every year for non-compliance with the Mandate would significantly harm *both the Kortes and K&L.* Indeed, the specter of this significant harm substantially pressures *the Kortes* to take actions that violate their religious beliefs and those of K&L (by complying with the Mandate). In other words, although K&L is a distinct entity for purposes of corporate law, the threatened imposition of massive penalties against K&L has an undeniable "coercive impact" upon the Kortes for purposes of RFRA. *See id.* at 717.

Similarly, K&L's assets and articles of incorporation cannot take any action; corporations do not run themselves or comply with legal mandates except through human agency. The Kortes would themselves have to manage and operate K&L in a manner that they believe to be immoral for K&L to provide a Mandate-compliant health plan.

> Together [Plaintiffs Cyril and Jane Korte] own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. . . . [T]he Kortes

> would have to violate their religious beliefs to operate their company in compliance with it.

Motions Panel decision, App. 26; *see also* App. 10 ("Because K&L is a family-owned S corporation, the religious and financial interests of the Kortes are virtually indistinguishable.").

Federal law acknowledges that requiring individuals or entities to allow *their property* to be used to facilitate immoral conduct implicates their religious exercise. 42 U.S.C. § 300a-7(b)(2)(A) (the government cannot require a recipient of certain federal funds "to . . . make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions"); 20 U.S.C. § 1688 ("Nothing in this title shall be construed to require or prohibit any person . . . to provide or pay for any benefit or service, including the use of facilities, related to an abortion."). Regardless of whether the requirement is technically imposed upon the owner of the property or the property itself, the substantial burden that the religious objector experiences is identical.

Under Defendants' reading of the law, the religious exercise of the parents in *Yoder* would not have been substantially burdened if Wisconsin had penalized *their children*, rather than them, for the children's failure to attend school, as the parents would not themselves be directly burdened by a government sanction. Such a conclusion would be incorrect, however, because the parents are the ultimate decision-makers concerning whether the children attend school and would feel substantial pressure to modify their behavior (by sending the children to school) in a manner that violates their beliefs. As in various other areas of the law, the substantiality of the impact controls, rather than its directness. *See generally Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (citation omitted) ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."); *Grote v. Sebelius*, Amicus Brief of Archdiocese of Indianapolis, *et al.*, No. 13-1077, Doc. 30 at 6 ("The question for a federal court 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.").

In sum, it would improperly exalt form over substance to suggest that the Kortes are not directly and substantially affected by a threat to effectively destroy K&L if the Kortes do not operate it in a manner that requires them to take immoral action. The destruction of an asset that is a distinct legal entity, such as a corporation or a 401(k) plan, clearly harms the owner of that asset. *Geneva College*, 2013 U.S. Dist. LEXIS 30265 at 70 ("Regardless of who purchases the insurance . . . [it] will necessarily include coverage for the objected to services, thus imposing a substantial pressure on the [owners] to 'modify [their] behavior and to violate their beliefs' . . . This is a quintessential substantial burden.").[9]/

[9]/ Defendants do not contest the fact that Plaintiffs are exempted from Illinois's contraceptive mandate. Illinois Health Care Right of Conscience Act, 745 Ill. Comp. Stat. §§ 70/1 et seq.; Doc. 19 at 14, n.6; Cmplt. at 6, n.1.

3. The burden that the Mandate imposes upon Plaintiffs is substantial

Defendants attempt to discredit Plaintiffs' religious belief that they cannot directly facilitate and encourage contraception, abortion, and sterilization through their employee health plan by drawing an analogy to the government's provision of funding to private parties. Doc. 58 at 29-31. Defendants' argument is flawed, however, because the government's established practices and related case law recognize that *the government facilitates activities that it funds*, even through neutral programs that involve some level of independent private choice.

The government routinely excludes particular activities or entities from otherwise neutral funding programs because the government does not want to facilitate, directly or indirectly, certain activities. The existence of some element of third-party choice may have a bearing upon whether the government's facilitation of private conduct *is lawful*, but third-party choice does not negate the fact that any funding provided does, in fact, facilitate that conduct. For example, in both *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the funding

provider (the government itself) intentionally facilitated certain conduct by subsidizing it (enrollment in the school of a parent's choosing, and student expression), just as the Mandate forces the funding provider (the employer) to facilitate certain conduct by subsidizing it (the provision of certain medical goods and services).

Of particular relevance here, the federal government often excludes the funding of most elective abortions from otherwise neutral programs, *including through the provision of health insurance coverage*, to avoid facilitating such procedures and to promote the government's interest in encouraging childbirth.[10]/ Various Supreme Court cases have recognized that the government's refusal to subsidize medical expenses associated with most abortions is a proper means of encouraging childbirth and *declining to facilitate abortion*, and requiring individuals to pay for abortions

[10]/ *See, e.g.*, 42 U.S.C. § 1397ee(c) (prohibiting the use of certain federal funds to subsidize State-provided health insurance coverage for low-income children if that coverage includes abortion other than for instances in which the mother's life is endangered or the pregnancy resulted from rape or incest); 10 U.S.C. § 1093(a) (under the TRICARE program, no federal funds may be used to perform abortions except where the mother's life would be endangered).

themselves does not violate their rights or improperly interfere with the doctor-patient relationship.[11]/

In like manner, the federal government has taken numerous steps to ensure that federal funds are not used to directly or indirectly subsidize the provision of obscenity, whether through funding of the arts,[12]/ money provided to small businesses,[13]/ or the subsidization of computers or Internet services for schools and libraries.[14]/ All of these examples defeat

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[11]/ *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 200, 203 (1991) (concluding that regulations that required Title X funding recipients to ensure that any counseling in favor of abortion was conducted outside the funded program did not improperly interfere with the doctor-patient relationship); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (stating that, by subsidizing medical expenses of childbirth while not subsidizing medical expenses of most abortions, "Congress has established incentives that make childbirth a more attractive alternative than abortion"); *Maher v. Roe*, 432 U.S. 464, 478-79 (1977) ("The subsidizing of costs incident to childbirth [but not incident to most abortions] is a rational means of encouraging childbirth.").

[12]/ 20 U.S.C. §§ 954(d)(2) & (l)(1) (National Endowment for the Arts funding decisions); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding this statute); 20 U.S.C. § 9103(i)(3)(B) (projects funded by the Institute of Museum and Library Services).

[13]/ 15 U.S.C. § 633(e) (Small Business Administration funding).

[14]/ 20 U.S.C. §§ 6777, 9134(f) & 47 U.S.C. § 254(h)(6) (use of funds by educational agencies and school boards to buy computers used to access

(Footnote continues on following page.)

Defendants' argument that a funding provider does not facilitate funded conduct where there is some element of independent private choice.

Just as the government has declined to facilitate conduct that it does not want to encourage, Plaintiffs' faith requires them to refrain from facilitating conduct that Plaintiffs believe to be immoral through the provision of health insurance. In both situations, the funding provider seeks to avoid facilitating particular behavior that raises moral concerns because the fact that private individuals *choose* to use the funding for such behavior does not absolve the funding provider of culpability from a *moral* standpoint.

In any event, in *Thomas*, the existence of several layers of separation between the production of a weapon and, after various decisions of independent third parties, its possible use to take actions potentially inconsistent with the claimant's faith did not render the burden upon the claimant's religious exercise insubstantial. *Thomas* recognized that compelling even indirect facilitation of conduct to which one morally

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the Internet or pay for Internet service); *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (plurality opinion) (upholding provisions).

objects may substantially burden one's religious exercise.

The coercive impact that the Mandate will have upon both K&L and the Kortes is clear: absent injunctive relief, Plaintiffs must either act contrary to the teachings of their faith by directly subsidizing the provision of products and services that they believe are immoral or incur ruinous annual penalties that would significantly harm all of them. As such, the Mandate "put[s] substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs," *Thomas*, 450 U.S. at 717-18, and "bears direct, primary, and fundamental responsibility for rendering" Plaintiffs' ability to refrain from engaging in immoral conduct "effectively impracticable." *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008).

B. Defendants have failed to prove that applying the Mandate to Plaintiffs withstands strict scrutiny

1. Defendants have failed to prove that their stated interests are truly compelling in this context

In various respects, Defendants' own arguments undercut the assertion that there is a truly compelling need for the Mandate. Defendants suggest that the interests they offer in support of the Mandate are *not* compelling

enough to (1) outweigh other interests that supposedly underlie the decision to indefinitely allow grandfathered plans and small employers to not cover the services that Plaintiffs are required to cover, Doc. 58 at 38, or (2) justify the modification of existing programs through which the government already pays for contraceptives for many individuals, Doc. 58 at 38-39. In other words, increasing the availability of contraceptives for the small percentage of women who (1) want to use them, (2) are employed by, or are a dependent of an employee of, a non-exempt employer that does not already provide coverage for them, (3) are unable to afford them, and (4) are currently ineligible to receive them through existing government programs, is less important to the government than other "competing" interests.[15]/ The relatively low level of importance that the government has placed upon achieving the Mandate's stated goals stands in stark contrast

[15]/ Conversely, other interests were important enough to the government to justify the imposition of other Affordable Care Act requirements upon grandfathered plans. *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Mar. 11, 2013).

to the high level of importance that Plaintiffs place upon their ability to act in accordance with their religious principles.[16]/

Although Defendants allege that "[e]ven small increments in cost sharing" may reduce the use of the services covered by the Mandate, Doc. 58 at 34, the Supreme Court has held that "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741, n.9 (2011). The government's asserted need to require Plaintiffs to comply with the Mandate is further undercut by the fact that contraceptives such as Plan B and Ella are readily available online and at countless locations for less

[16]/ Defendants' reliance upon *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), is misplaced. Doc. 58 at 33-34. A right to be free from undue *governmental interference* does not include a legitimate expectation that others will subsidize the exercise of that right despite their conscientious objection. *Rust*, 500 U.S. at 193 (citation omitted) ("'A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.'"); *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

than fifty dollars.[17]/ *See also* Doc. 19 at 54 (explaining that cost is not a prohibitive factor in contraceptive access); Doc. 59 at 14 (amicus brief supporting Defendants notes that "[c]ontraception is widely available through federal laws and policies pre-dating the ACA"). There is also evidence suggesting that the Mandate does not further, and in fact may harm, the government's stated interests. *See, e.g.*, Doc. 37 at 3-24.

In addition, the grandfathered health plan exemption undercuts the assertion that the Mandate is justified by a compelling interest. Doc. 19 at 50-52. Defendants characterize the exemption as transitional and incremental, Doc. 58 at 37-38, but that is only partially correct. Although Defendants believe that some grandfathered plans will lose their status over time through specific changes that those plans will make, a plan is *entitled* to maintain its grandfathered status *indefinitely* if it so chooses.

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[17]/ *See, e.g.*, KwikMed, https://www.ella-kwikmed.com/default.asp (last visited Mar. 11, 2013) (offering Ella for $40 with free shipping); Family Planning Health Services, Inc., http://shop.fphs.org/plan-b-one-step-1/ (last visited Mar. 11, 2013) (offering Plan B for $35); Drugstore.com, http://www.drugstore.com/plan-b-one-step-emergency-contraceptive-must-be-17-or-over-to-purchase-without-a-prescription/qxp161395 (last visited Mar. 11, 2013) (offering Plan B for $47.99).

Under 42 U.S.C. § 18011, which is entitled, "Preservation of *right* to maintain existing coverage," individuals can indefinitely renew the coverage that they had as of the date the Affordable Care Act was enacted without change, except that certain requirements (not including the Mandate) apply even to those grandfathered plans. *Id.* (emphasis added).

As Defendant Department of Health and Human Services has explained, "[d]uring the health reform debate, President Obama made clear to Americans that 'if you like your health plan, you can keep it,'" and grandfathered plans are permitted "to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status."[18]/ The government has provided a mid-range estimate (relying upon data from 2008 and 2009) that 49% of grandfathered plans will maintain their grandfathered status at the end of 2013, and "to the extent that the 2008-2009 data reflect plans that are more likely to make

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[18]/ U.S. Dep't of Health and Human Servs., *Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans*, http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Mar. 11, 2013).

frequent changes in cost sharing, this assumption will overestimate the number of plans relinquishing grandfather status in 2012 and 2013." 75 Fed. Reg. 34552-53. And, small employers face no penalties if they decline to provide an employee health plan. Doc. 19 at 52-53.[19]/

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court found it significant that "hundreds of thousands" of Native Americans were exempted due to one exemption, *id.* at 433, while here there are millions of individuals who are not covered by the Mandate due to a host of exemptions. *See also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Tyndale House Publ'rs v. Sebelius*, 2012 U.S. Dist. LEXIS 163965, at *57-61 (D.D.C. Nov. 16, 2012); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *23 (D. Colo. July 27, 2012). Defendants have not demonstrated that exempting Plaintiffs from the Mandate would endanger a compelling governmental interest. *See Koger*, 523 F.3d at 800.

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[19]/ Similarly, *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004), is distinguishable because the provision at issue allowed any employer to avoid covering contraceptives without penalty by not offering any coverage for prescription drugs. *Id.* at 537, 562.

2. The government has failed to prove that applying the Mandate to Plaintiffs is the least restrictive means of furthering the government's asserted interests

The government has not met its burden of proving that requiring Plaintiffs to comply with the Mandate is the least restrictive means of achieving its stated interests.

> The narrow tailoring inquiry requires that we ask whether there are other, reasonable ways to achieve the goals with a lesser burden on constitutionally protected activity. If there are, the [government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Doe v. City of Lafayette, 377 F.3d 757, 773 (7th Cir. 2004) (en banc) (citations and quotation marks omitted); *see also St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 636 (7th Cir. 2007) (emphasis added) ("The City has . . . accommodated the religious concerns *as much as is physically possible* without compromising its compelling interests."); *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004) (noting, even in applying a *lower* level of scrutiny, that "the government [cannot] slide through the test merely because another alternative would not be quite as good").

Defendants effectively concede that the alternative means offered by Plaintiffs would further their stated interests by failing to dispute that fact. Doc. 58 at 38-39. For example, Plaintiffs have suggested that the government could further both of its stated interests by providing or paying for contraceptives itself, and the government already has existing schemes and programs in place that subsidize the provision of contraceptives. Doc. 19 at 57-60. Defendants offer no explanation, let alone actual proof as is their obligation, that the modification of existing schemes to broaden eligibility for contraceptives would not further the government's objectives or is impractical. Similarly, Plaintiffs have suggested that the government could further both of its stated interests by offering tax deductions or credits to individuals who purchase contraceptives, *id.*, which would not require the creation of any new schemes, programs, or bureaucracies. Again, Defendants do not address the merits of this proposed alternative or argue that it would not further the government's stated interests.

The government's sole argument is that the alternative means of furthering the government's interests cited by Plaintiffs would require the government to pay money if it decided to implement them. Doc. 58 at 39. The mere fact that the government will bear some cost if it decides to implement less burdensome means of furthering its interests does not categorically eliminate those means from being considered for purposes of strict scrutiny. To the contrary, "[t]he lesson of [the Supreme Court's] cases is that the government must show something more compelling than saving money. . . . That is the compelling interest test of *Sherbert* and *Yoder* and, therefore, of RFRA. Under this standard, most governmental interests are not compelling." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 226 (1994); *Sherbert*, 374 U.S. at 407 ("[E]ven if the possibility of spurious claims did threaten to dilute the fund . . . it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

Defendants challenge the nature of religious freedom itself, as virtually

every religious exemption from any law could be characterized as shifting some form of burden to others or as providing a special benefit or subsidy to the claimant. This characterization treats the religious exercise protected by RFRA and the First Amendment as mere subsidies and stands in sharp contrast to the robust view of religious exercise held by the Congress that enacted RFRA or, for that matter, the Continental Congress which exempted individuals with pacifist religious convictions from military conscription,[20]/ and Thomas Jefferson who once wrote that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority;"[21]/ *cf. Girouard v. United States*, 328 U.S. 61, 68 (1946) ("The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of

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[20]/ Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

[21]/ Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Conn., on Feb. 4, 1809 (Monticello ed. 1904) vol. XVI, pp. 331-32.

conscience there is a moral power higher than the State.").[22]/

In sum, even if one assumed that there is a tangible lack of access to contraceptives for those who desire them, and further assumed that such a lack of access implicated compelling governmental interests, the alternatives offered by Plaintiffs would directly further those interests without substantially burdening Plaintiffs' religious exercise. As such, Plaintiffs are likely to succeed on their RFRA claim.

II. Plaintiffs Are Likely To Succeed On Their Free Exercise Claim

A district court recently rejected the same Free Exercise Clause arguments that the government raises here in another Mandate case. In *Geneva College v. Sebelius*, the court denied the government's motion to dismiss with respect to a free exercise claim brought by a for-profit business (SHLC) and its owners. 2013 U.S. Dist. LEXIS 30265. The court stated that "[t]he process of implementing the objected to requirements has

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[22]/ One amicus brief's reliance upon international law to support Defendants' position is a red herring, Doc. 64 at 27-31; in any event, international law protects religious freedom as a fundamental right. *See, e.g.*, Universal Declaration of Human Rights, Art. 18; International Covenant on Civil and Political Rights, Art. 18.

been replete with examples of the government impermissibly exercising its discretion by exempting vast numbers of entities while refusing to extend the religious employer exemption to include entities like SHLC." *Id.* at *81. The court explained:

> The grandfathering exemption impacts secular employers to "at least the same degree"—and likely far more—than religious objections from entities like SHLC. The fact that the government saw fit to exempt so many entities and individuals from the mandate's requirements renders their claim of general applicability dubious, at best. . . . [T]he secular exemption for employers with fewer than fifty full-time employees that choose not to provide any insurance coverage remains. Taken together, these categorical exemptions for secular entities and individuals raise a concern that the mandate's requirements are not generally applicable. . . .
>
> [T]he government continues to engage in an impermissible "religious gerrymander" by extending exemptions to an increasing number of religiously-affiliated entities. . . . [W]here, as here, some religious conduct is exempted, the fact that defendants continue to carve out exemptions . . . while subjecting SHLC and other similarly-situated close corporate entities to the mandate's requirements, raises a suggestion of "discriminatory intent" against close corporate entities seeking to advance the religious beliefs of their owners. . . . [T]he Hepler plaintiffs [have] raised plausible claims that the sheer number of exemptions—both secular and religious—to the mandate's requirements burdened their free exercise rights to an extent sufficient to trigger strict scrutiny.

Id. at *81-83 (citations omitted).

The health and equality interests that Defendants rely upon in support of requiring Plaintiffs to comply with the Mandate *are identical* with respect to the countless millions of individuals not covered by the Mandate (those who are covered by grandfathered plans, employed by a small employer, employed by an otherwise exempt employer, unemployed, a dependent of one of the above, etc.). Although Defendants would like this Court to ignore the existence of the various exemptions, see Doc. 58 at 41, the exemptions take the Mandate outside the category of neutral and generally applicable requirements that are permissible under the Free Exercise Clause.

III. The Remaining Injunction Factors Favor Plaintiffs

Without continued injunctive relief, Plaintiffs will suffer irreparable harm because the Mandate will compel them to violate their faith or incur ruinous fines. As Plaintiffs have explained (and as Defendants do not contest), a preliminary injunction would preserve the status quo between the parties. Doc. 19 at 65-66. Such relief will not harm the interests of Defendants or of the public but would allow the parties to proceed with

this litigation to a final resolution of the important legal issues at hand in a way that protects Plaintiffs' rights in the process.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' opening brief, this Court should reverse the district court's decision and order the entry of a preliminary injunction as requested by Plaintiffs.

Respectfully submitted on this 15th day of March, 2013,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Reply Brief of Plaintiffs-Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Palatino Linotype font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, the Reply Brief of Plaintiffs-Appellants was filed with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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