IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYRIL B. KORTE., et al.,

Plaintiffs-Appellants,

vs. APPEAL NO. 12-3841

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

Defendants-Appellees.
_____/

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE JANUARY 1, 2013

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December 18, 2012

DISCLOSURE STATEMENT

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

1. The full name of every party that the attorney represents in this case: Plaintiffs-Appellants Cyril B. Korte, Jane E. Korte, and Korte & Luitjohan Contractors, Inc.
2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this court: American Center for Law & Justice.
3. Korte & Luitjohan Contractors, Inc., is a closely-held family owned S-Corporation that has no parents, trusts, subsidiaries, and/or affiliates that have issued shares or debt securities to the public, and there is no publicly held company that owns 10% or more of Korte & Luitjohan Contractors, Inc.

December 18, 2012

/s/ Edward L. White III

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INTRODUCTION

Pursuant to Fed. R. App. P. 8, Plaintiffs-Appellants move this court for the entry of an order *before January 1, 2013*, granting them an injunction pending appeal against Defendants-Appellees' enforcement of the preventive services coverage provision of the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and related regulations ("the Mandate"). Without such relief, Cyril and Jane Korte and the family business they own will be forced to make a stark and inescapable choice *just days from now*, on January 1, 2013: either arrange for and pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of their religious beliefs and the ethical standards of their company, or face crippling penalties imposed by the federal government. Contrary to the decision of the court below, which denied Plaintiffs' motion for a preliminary injunction on December 14, 2012, the Mandate substantially burdens Plaintiffs' religious exercise and violates their rights under the Religious Freedom Restoration Act ("RFRA").[1]/

A party must ordinarily move first in the district court for an injunction pending appeal. Fed. R. App. P. 8(a)(1). Yet, because of the district court's decision to deny Plaintiffs' motion for a preliminary injunction on Friday, December 14, 2012, and

[1]/ Owing to constraints of time and page limitations, Plaintiffs' motion is based on their RFRA claim alone, since full relief can be provided through that statute.

also because of the impending January 1, 2013, date when Plaintiffs will be coerced into acting against their religious beliefs on pain of financial penalties, filing first in the district court would be "impracticable." *Id.* at 8(a)(2)(A)(i).

On November 28, 2012, the Eighth Circuit granted a motion for injunction pending appeal filed by a for-profit plaintiff challenging the same Mandate at issue here. *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012). Plaintiffs ask this court to do the same.[2]/

Attached to this motion are the relevant parts of the district court record: the complaint, (Ex. B); the declarations of Cyril and Jane Korte and their company's ethical guidelines, (Exs. C-D); and the district court's order denying their motion for a preliminary injunction, (Ex. A). Fed. R. App. 8(a)(2)(B)(ii)-(iii).

On December 14, 2012, the undersigned informed counsel for Defendants, Alisa Klein, that this emergency motion would be filed. *Id.* at 8(a)(2)(C).

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[2]/ Referred to as a "motion to stay" in the Eighth Circuit's order, (Ex. E), the plaintiffs in *O'Brien* asked the court to "enter a preliminary injunction against Defendants' enforcement of the Mandate against them pending their appeal of the decision of the court below." (Ex. F at 20.) To date, three district courts have granted preliminary injunctions to for-profit employers challenging the Mandate. *See Tyndale House Publ'rs. v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012). Other than the district court below, only one other district court has denied a similar motion. *See Hobby Lobby Stores v. Sebelius*, 2012 U.S. Dist. LEXIS 164843 (W.D. Okl. Nov. 19, 2012), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 20, 2012). The *Hobby Lobby* plaintiffs have filed a motion for injunction pending appeal, and a ruling on the motion is expected at any moment.

PROCEDURAL BACKGROUND

On October 9, 2012, Plaintiffs brought suit alleging that the Mandate violates their rights under RFRA and the First Amendment and violates the Administrative Procedure Act. (Ex. B.) The following day, Plaintiffs filed a motion for a preliminary injunction on their RFRA and Free Exercise claims, preserving their other claims for further proceedings. The district court denied the motion on Friday, December 14, 2012. (Ex. A.) Plaintiffs appealed on December 17th and filed this motion soon after this court docketed the appeal on December 18th.

INJUNCTION PENDING APPEAL STANDARD

In deciding a motion for an injunction pending appeal pursuant to Fed. R. App. P. 8, this court uses the same sliding-scale approach used to decide a motion for a preliminary injunction. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 549 (7th Cir. 2007). This approach "amounts simply to weighting harm to a party by the merit of his case." *Id*. at 547. The question is not whether the movant has "a winning case or even a good case . . . but only that it has a good enough case on the merits for the balance of harms to entitle it" to the injunction. *Id*. at 549.

As explained herein, because the merits of Plaintiffs' claim under RFRA "are better than negligible," *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 502 (7th Cir. 2008) (citation omitted), and because the public interest and balance of harms weigh greatly in favor of Plaintiffs, this court should issue injunctive relief

before January 1, 2013, when the Mandate will compel Plaintiffs to violate their religious faith or incur significant fines should they choose to follow their faith. *See State of Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011) (outlining factors for granting a preliminary injunction).

FACTUAL BACKGROUND

I. The Mandate, Its Exceptions, and Penalties

The statutory and regulatory background of the Mandate is set forth in the district court opinion. (Ex. A at 1-3.) In sum, all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage must provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. These services have been defined by the Health Resources and Services Administration to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Dec. 17, 2012).

Not all employers are required to comply with the Mandate. Grandfathered health plans, *i.e.*, plans in existence on March 23, 2010, that have not undergone

any of a defined set of changes, are exempt from compliance with the Mandate.[3]/ Even though the Mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34538, 34542. One court has estimated that "*191 million* Americans belong to plans which may be grandfathered under the ACA." *Newland*, 2012 U.S. Dist. LEXIS 104835 at *4; *accord Tyndale House Publ'rs.*, 2012 U.S. Dist. LEXIS 163965 at *57-61.[4]/

Also exempt from the Mandate are "religious employers," defined as organizations whose "purpose" is to inculcate religious values, that "primarily" employ and serve co-religionists, and that qualify as churches or religious orders under the tax code. 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4). In addition, because employers with fewer than fifty full-time employees have no obligation to provide health insurance for their employees under the ACA, they have no obligation to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A).

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[3]/ *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; 75 Fed. Reg. 41726, 41731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[4]/ The government considers the ability to maintain grandfathered coverage to be a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34538, 34540, 34562, 34566. Moreover, according to the Congressional Research Service, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets. . . . Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added).

Non-exempt employers that fail to comply with the Mandate or fail to provide any insurance at all face severe penalties. Non-exempt employers that fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee (not counting the first thirty employees). *See* 26 U.S.C. §§ 4980H(a), (c)(1). Employers with non-compliant insurance plans are subject to an assessment of $100 per day, per employee and potential enforcement suits. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).

II. Cyril and Jane Korte and Korte & Luitjohan Contractors, Inc.

Plaintiff Korte & Luitjohan Contractors, Inc. (hereafter "K&L") is a family owned, full-service construction contractor serving Central and Southern Illinois for over fifty years. Plaintiffs Cyril and Jane Korte own a controlling interest in K&L, and they set the policies governing the conduct of all phases of the company. They adhere to the teachings, values, and mission of the Catholic Church, including the Church's teachings regarding the sanctity of human life, contraception, and sterilization. Cyril and Jane Korte seek to manage and operate K&L in a way that reflects their Catholic faith. (Exs. C-D at ¶¶ 1-5.)

K&L currently has about ninety full-time employees: about seventy belong to unions and about twenty are non-union. K&L provides a group health insurance plan only for non-union employees because their union employees have their own plans. Base on their religious beliefs, Cyril and Jane Korte have established ethical

guidelines for their company stating that they will not arrange for, pay for, provide, facilitate, or otherwise support employee health coverage for contraceptives, sterilization, abortion, abortion-inducing drugs, or related education and counseling except in limited circumstances. (Exs. C-D at ¶¶ 6, 10 & ethical guidelines.)

As was discovered in or about August 2012, K&L's current group health plan includes coverage for contraceptives, sterilization, and abortion—an error contrary to Plaintiffs' religious beliefs and the company's ethical guidelines. The company is investigating ways to obtain a group plan that complies with the Kortes' Catholic faith and the company's ethical guidelines. (Exs. C-D at ¶¶ 11-12.) *Time, however, is running short. The plan renewal date for K&L's group health plan is January 1, 2013*. (Exs. C-D at ¶ 14.) Should K&L implement a health plan that excludes the services to which Plaintiffs religiously object to providing, it will face steep monetary penalties—up to $730,000 per year. Plaintiffs seek injunctive relief that will allow K&L to operate in a manner that is consistent with their religious beliefs during the pendency of this appeal.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their RFRA Claim

A. The Mandate imposes a substantial burden on Plaintiffs' religious exercise

The purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205

(1972)" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden *to the person* (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). Thus, the government must satisfy strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006).

To trigger RFRA's strict scrutiny, Plaintiffs must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *United States v. Israel,* 317 F.3d 768, 771 (7th Cir. 2003). A regulation that substantially burdens religious exercise "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (quoting *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003)). Religious exercise becomes "effectively impracticable," when the government exerts "substantial pressure on an adherent to modify his behavior and violate his beliefs." *Id*. (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

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

requires), and (2) incurring financial penalties, the loss of a government benefit, or criminal prosecution. For example, in *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Saturday, substantially burdened her exercise of religion. The regulation

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. at 404. Also, in *Yoder*, the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." 406 U.S. at 218.

Plaintiffs here face a similar, inescapable choice. Under the Mandate, they must either facilitate, subsidize, and encourage the use of drugs and services they believe are immoral or suffer severe penalties. The Mandate is akin to the hypothetical "fine imposed against appellant for her Saturday worship" referenced in *Sherbert*, 374 U.S. at 404, and, as in *Yoder*, the Mandate requires Plaintiffs "to perform acts undeniably at odd with fundamental tenets of their religious belief." 406 U.S. at 218. Thus, contrary to the district court's decision, the Mandate bears

"direct responsibility" for placing "substantial pressure" on Plaintiffs to offer a health plan that violates their religious and ethical beliefs, rendering their religious exercise—refraining from immoral acts and operating K&L in a manner consistent with their faith—effectively impracticable. *Koger,* 523 F.3d at 799.

Defendants themselves have expressly acknowledged the burden that the Mandate imposes upon religious exercise. Recognizing that paying for, providing, or subsidizing contraceptive and sterilization services would conflict with "the religious beliefs of certain religious employers," Defendants have granted a wholesale exemption for a class of employers, *e.g.*, churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46621, 46623; 77 Fed. Reg. 8725. In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a *non-profit* organization that meets certain criteria.[5]/ During the time of this temporary safe harbor, Defendants are considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost

[5]/ Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor 3 (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Dec. 17, 2012).

sharing." 77 Fed. Reg. 16501, 16503. Defendants are also considering whether "for-profit religious employers with [religious] objections should be considered as well," *id.* at 16504, thus underscoring the government's acknowledgment that the Mandate even burdens the religious exercise of some for-profit corporations.

Although the district court properly considered Cyril and Jane Korte and K&L to be "persons" under RFRA, the court wrongly determined that the Mandate does not substantially burden their religious exercise. (Ex. A at 17, 21.) The district court determined that any burden on Plaintiffs' religious exercise was "too distant" because there is a corporate veil separating Cyril and Jane Korte from K&L, K&L's group plan is technically a distinct legal entity, and employees may or may not *use* the objectionable goods and services.

The instant action, however, is *not* based upon an objection to employees' life choices or the use of their own money; rather, this litigation stems from Plaintiffs' objection, based on their Catholic faith and their ethical guidelines, to arranging for, paying for, providing, facilitating, or otherwise supporting insurance coverage for behavior that they believe to be gravely immoral. (Exs. C-D at ¶¶ 4-6, 10, 12-15, 17-19.) Their religious faith does not excuse their participation in, and direct facilitation of, immoral behavior because of a corporate veil or other legal technicalities; for purposes of substantial burden analysis, the dictates of Plaintiffs' religious and moral code control, not the nuances of corporate law.

Under the district court's rationale, a governmental mandate requiring Catholic hospitals to provide ready access to surgical abortions would not substantially burden the religious exercise of such Catholic entities, as the burden would be negated by the independent decisions of individuals seeking the abortion. The absurdity of this logic is readily apparent. The Mandate requires that Plaintiffs pay for a health plan that makes contraception and sterilization freely available to employees—precisely what Plaintiffs' religious beliefs and ethical guidelines forbid. The burden directly imposed on Plaintiffs by the Mandate is not alleviated by an employee's decision whether to make use of these drugs or services. Indeed, forcing Plaintiffs to pay for a health plan that includes emergency contraception is tantamount to forcing Plaintiffs to provide employees with coupons for free emergency contraception paid for by Plaintiffs themselves. There is nothing *de minimis* about that. (*See* Ex. A at 20.)[6]/

The Mandate imposes the same substantial burden on K&L as it does on Cyril and Jane Korte. The Mandate requires the Kortes to manage their closely-held, family company in a way that violates the company's ethical guidelines and their

[6]/ As the district court in *Tyndale* correctly noted, "*Because it is the coverage,* not just the use, *of the contraceptives at issue to which the plaintiffs object*, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Tyndale*, 2012 U.S. Dist. LEXIS 163965 at *44 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

religious faith. Because K&L is an S corporation, all financial penalties paid by K&L for refusing to comply with the Mandate will have a direct financial impact on the Kortes—solely because of their Catholic beliefs. As the district court correctly noted, "[b]ecause K&L is a family-owned S corporation, the religious and financial interests of the Kortes are virtually indistinguishable." (Ex. A at 10.)

Just because the Kortes and K&L have entered the commercial marketplace, they have not abandoned all rights to the exercise of religion, as the district court suggested. (Ex. A at 20-21.) In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Supreme Court held that the requirement to pay social security taxes substantially burdened a for-profit Amish employer's religious exercise. Noting that courts "are not arbiters of scriptural interpretation," the Court held that it is beyond "the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *Id.* at 257 (quoting *Thomas*, 450 U.S. at 716). The Court therefore accepted Lee's interpretation of his own faith and held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* Although the *Lee* Court ultimately held that the tax survived strict scrutiny, it did not deny—as the district court did here—the existence of a substantial burden. *Id.* Following the logic of the Supreme Court in *Lee* leads to one conclusion: forcing Plaintiffs to subsidize coverage of

objectionable goods and services directly, as required by the Mandate, imposes a substantial burden on Plaintiffs' religious exercise.[7]/

Although K&L is a distinct legal entity under Illinois law from Cyril and Jane Korte for liability purposes, a corporation does not think, act, and establish business values and practices except through human agency. It is the human agency of the corporation that defines the purposes of the corporation, gives it its character, and gives shape to its ethos—in addition to fulfilling the business's commercial mission. K&L is owned, operated, and controlled by human agency—ultimately by Cyril and Jane Korte, who wish to run their family company pursuant to the tenets of their Catholic faith. The Mandate will prevent them from doing so.

The district court also wrongly concluded that corporations cannot exercise religion. (Ex. A at 12-13.) Corporations, whether for-profit or non-profit, can, and often do, engage in a plethora of quintessentially religious acts, such as tithing, donating money to charities, and committing oneself to act and speak in accordance with the teachings of a religious faith. Even the State of Illinois, where

[7]/ The district court cited *Lee* for its conclusory observation that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (Ex. A at 20-21 (quoting *Lee*, 455 U.S. at 261).) This statement, however, relates to the Court's holding that the tax survived strict scrutiny, *not* to whether a substantial burden was present, because the Court had concluded that the tax did, in fact, substantially burden the employer's religious exercise.

K&L is incorporated, recognizes the conscience rights of corporations. 745 Ill. Comp. Stat. § 70/2 ("It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons . . . whether acting individually [or] corporately. . . ."). Neither RFRA nor Illinois law makes a distinction regarding the protection of religious exercise rights based on the *form* of the corporation. K&L, which is a for-profit corporation that is governed by ethical guidelines and by the Catholic faith of its owners, is no less substantially burdened by the Mandate than is a non-profit corporation that is also run by human agency in accordance with the same religious principles.

Lastly, the district court improperly chided Plaintiffs for currently having a soon-to-expire group plan that provides for contraceptives and sterilization. (Ex. A at 18-19.) According to Cyril and Jane Korte's uncontested testimony, they realized in August 2012 that their group plan included these things *in error*. (Exs. C-D at ¶ 11.) Once they discovered the error, they could not correct it due to the Mandate's requirements. To change their group plan to correct this error, they need an injunction; hence the filing of this action. A religious adherent's assertion of a claim that a law substantially burdens his religious exercise cannot be rejected on the ground that the claimant's actions have not, for one reason or another, always aligned with his currently-expressed religious tenets. *See, e.g., Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (holding that one may

raise a religious objection to conduct that one previously engaged in without objection).

B. RFRA imposes strict scrutiny

1. The government lacks a compelling interest as to Plaintiffs

Because the district court held that the Mandate does not impose a substantial burden on Plaintiffs' religious exercise, it did not apply RFRA's strict scrutiny test to Plaintiffs' religious claims. Defendants have proffered two compelling governmental interests for the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests is the massive number of employees, tens of millions in fact, whose health and equality interests are completely unaffected by the Mandate. *See Newland*, 2012 U.S. Dist. LEXIS 104835 at *23; *Tyndale*, 2012 U.S. Dist. LEXIS 163965 at *57-61. For example, Defendants cannot explain how these interests can be compelling in this context when employers with fewer than fifty employees[8]/ have no obligation to provide health insurance for their employees and thus no obligation to comply with the Mandate. With respect to Plaintiffs, Defendants cannot sufficiently explain how

[8]/ More than 20 million individuals are employed by firms with fewer than 20 employees. Statistics about Business Size (including Small Business) from the U.S. Census Bureau, U.S. Census Bureau, http://www.census.gov/econ/smallbus.html (last visited Dec. 17, 2012).

there is a compelling need to coerce Plaintiffs into violating their religious principles with regard to insuring their approximately twenty full-time, non-union employees, when businesses with fewer than fifty full-time employees can avoid the Mandate entirely by not providing any insurance. (Plaintiffs' approximately seventy additional full-time employees are covered by their union health plans, over which Plaintiffs have no control. (Exs. C-D at ¶ 6.))

Defendants also cannot explain how these interests can be of the highest order when the Mandate does not apply to plans grandfathered under the ACA. The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732. When this figure is added to the number of employees of businesses with fewer than fifty employees, more than 100 million employees are left untouched by the Mandate. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citations and internal quotation marks omitted). Because there is little that is uniform about the Mandate, as demonstrated by the massive number of employees that are untouched by it, this is not an instance where there is "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436.

In sum, Defendants cannot demonstrate a compelling need to require Plaintiffs to comply with a mandate for their approximately twenty full-time, non-union employees that does not apply to the employers of millions of employees nationwide. *Id.* at 431 (in analyzing asserted compelling interests, courts "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants").

2. The Mandate is not the least restrictive means of achieving any interest

Assuming *arguendo* that the interests proffered by Defendants are compelling, the Mandate is not the least restrictive means of furthering those interests. If Defendants wish to further the interests of health and equality by means of free access to contraceptive services, Defendants could do so in a myriad of ways without coercing Plaintiffs, in violation of their religious exercise, into doing so. For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services; (2) reimburse citizens who pay to use contraceptives, allowing citizens to submit receipts to the government for payment; (3) provide these services to citizens itself; and (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products through pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with religious objections to contraceptive services, such as Plaintiffs. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

Thus, Plaintiffs have shown a likelihood of success on the merits on their RFRA claim. *Stuller v. Steak N Shake Enterp.*, 695 F.3d 676, 678 (7th Cir. 2012).

II. Plaintiffs Satisfy the Remaining Injunction Factors

Because Plaintiffs have shown a likelihood of success on the merits, "the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *See ACLU v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012). Absent injunctive relief, the Mandate will violate Plaintiffs' rights beginning on January 1, 2013. Plaintiffs have no adequate remedy at law. *Id.* at 589. Enjoining the Mandate would cause no harm to Defendants, who have no legitimate interest in infringing Plaintiffs' rights. *See Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004). Enjoining application of the Mandate to

Plaintiffs will impose no monetary requirements on Defendants, and no bond should be required of Plaintiffs. *See* Fed. R. App. P. 8(a)(2)(E).

CONCLUSION

Plaintiffs request that this court grant this emergency motion *before January 1, 2013*, and enter an injunction pending appeal to prohibit Defendants, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them, from applying and enforcing against Plaintiffs any statutes or regulations that require Plaintiffs to include in their employee health plan coverage for all FDA-approved contraceptives methods, sterilization procedures, and related patient education and counseling, including the substantive requirement imposed in 42 U.S.C. § 300gg-13, as well as any penalties and fines for non-compliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. § 1132, and from making any determination that the requirements apply to Plaintiffs.

Respectfully submitted on this 18th day of December, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012, I electronically filed the foregoing and its exhibits with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the court's CM/ECF system, through which counsel who are registered users will receive notice of the filing and will be served with copies of the foregoing and exhibits, including:

Alisa B. Klein
Mark B. Stern
United States Department of Justice
[redacted]

/s/ Edward L. White III
Edward L. White III
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYRIL B. KORTE, et al.,
Plaintiffs-Appellants,

v. APPEAL NO. 12-3841

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES; et al.,
Defendants-Appellees.
_____/

PLAINTIFFS-APPELLANTS' INDEX OF EXHIBITS FILED IN SUPPORT OF THEIR EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Exhibit A Memorandum and Order Denying Plaintiffs' Motion for a Preliminary Injunction in *Korte v. HHS*, Case No. 3:12-CV-01072-MJR (S.D. Ill. Dec. 14, 2012).

Exhibit B Complaint for Declaratory and Injunctive Relief in *Korte v. HHS*, Case No. 3:12-CV-01072-MJR (S.D. Ill., filed Oct. 9, 2012).

Exhibit C Declaration of Cyril B. Korte, dated October 9, 2012, with attached ethical guidelines of Korte & Luitjohan Contractors, Inc.

Exhibit D Declaration of Jane E. Korte, dated October 9, 2012.

Exhibit E Order Granting Motion for Injunction On Appeal in *O'Brien v. HHS*, 8th Cir., No. 12-3357 (Nov. 28, 2012).

Exhibit F Motion for Injunction On Appeal in *O'Brien v. HHS*, 8th Cir., No. 12-3357.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, JANE E. KORTE, and KORTE & LUITJOHAN CONTRACTORS, INC.,	)	
Plaintiffs,	)	
vs.	)	
	)	**Case No. 3:12-CV-01072-MJR**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, TIMOTHY F. GEITHNER, UNITED STATES DEPARTMENT OF LABOR, and HILDA L. SOLIS,	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

Plaintiffs Cyril B. Korte and Jane E. Korte (husband and wife) are equal shareholders who together own a controlling interest in Plaintiff Korte & Luitjohan Contractors, Inc., a secular, for-profit construction business.[1] On October 9, 2012, the three Plaintiffs filed a complaint for declaratory judgment and injunctive relief regarding whether they have to comply with the Preventive Health Services coverage provision in the Women's Health Amendment (42 U.S.C. § 300gg–13(a)(4) (Mar. 23, 2010)) to the Patient Protection and Affordable Care Act of 2010, ("the ACA"), Pub. L. No. 111–148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Heath Care and Education Reconciliation Act, Publ. L. No. 111–152, 124 Stat. 1029 (Mar. 30

[1] Cyril B. Korte, as President, and Jane E. Korte, as Secretary, each hold a 43.674 % ownership interest in Korte & Luitjohan Contractors, Inc., an Illinois corporation.

EXHIBIT A

2010). Plaintiffs name as defendants the three agencies charged with implementing and administering the mandate, and their respective heads: the Department of Health and Human Services and Secretary Kathleen Sebelius; the Department of the Treasury and Secretary Timothy F. Geithner; and the Department of Labor and Secretary Hilda L. Solis.

As a general matter, the ACA "aims to increase the number of Americans covered by health insurance and decrease the cost of health care." *National Federation of Independent Business v. Sebelius*, __U.S.__, 132 S.Ct. 2566, 2580 (Jun. 28, 2012). In deciding to include a contraception coverage mandate, Congress found that: (1) the use of preventive services, including contraception, results in a healthier population and reduces health care costs (for reasons related and unrelated to pregnancy); and (2) access to contraception improves the social and economic status of women. *See* 77 Fed. Reg. 8725, 8727-8728 (Feb. 15, 2012).

According to the contraception coverage mandate, unless grandfathered or otherwise exempt (which Korte & Luitjohan is not), commencing in plan years after August 1, 2012, employee group health benefit plans and health insurance issuers[2] must include coverage, without cost sharing, for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity," "[a]s prescribed."[3] *See* Health Resources and Services Administration ("the HRSA"), *Women's Preventive Services: Required Health Plan Coverage Guidelines (*available at

[2] The mandate is directed at "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage." 42 U.S.C. § 300gg-13(a). Group health plans include insured and self-insured plans. 76 Fed. Reg. 46,621, 46,622 (Aug. 3, 2011).

[3] Employers with fewer than 50 employees are not required to provide any health insurance plan. 26 U.S.C. § 4980H(c)(2)(A).

http://www.hrsa.gov/womensguidelines/).[4] FDA-approved contraceptive medicines and devices include barrier methods, implanted devices, hormonal methods, and emergency contraceptive "abortifacients," such as "Plan B" (which prevents fertilization of the egg) and "Ella" (which stops or delays release of the egg). *See* FDA, Birth Control Guide (Aug. 2012) (available at http://www.fda.gov/ForConsumers/ByAudience/ForWomen/ucm18465). Employers with at least 50 employees that do not comply with the mandate face "fines, penalties [in the form of a tax], and enforcement actions for non-compliance. *See* 29 U.S.C. § 1132(a) (civil enforcement actions by the Department of Labor and insurance plan participants); 26 U.S.C. § 4980D(a), (b) (penalty of $100 per day per employee for noncompliance with coverage provisions of the ACA); 26 U.S.C. § 4980H (annual tax assessment for noncompliance with requirement to provide health insurance)." *Tyndale House Publishers, Inc. v. Sebelius*, __F.Supp.2d__, 2012 WL 5817323, *2 (D.D.C., Nov. 16, 2012). *See also* 77 Fed. Reg. 8725, 8729 (Fed. 15, 2012).

Plaintiffs Cyril B. Korte and Jane E. Korte ("the Kortes") are Catholic and have concluded that complying with the contraception coverage mandate would require them to violate their religious beliefs because the mandate requires them, and/or the corporation they control, to arrange for, pay for, provide, facilitate, or otherwise support not only contraception and sterilization, but also abortion. By "abortion," the Kortes are referring to the fact that the "Food and Drug Administration approved contraceptive methods" include drugs and devices that are abortifacients, such as the "morning-after pill," "Plan B," and "Ella." According to the Kortes, they personally adhere to the Catholic Church's teachings that artificial means of

[4] The HRS guidelines and rationale are based on recommendations from the Institute of Medicine (IOM) (available at http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx). The IOM estimates that 47 million women would be guaranteed access to preventive services under the mandate (excluding those who were covered by Medicare and those "grandfathered" and not covered by the ACA).

contraception, sterilization and actions intended to terminate human life are immoral and gravely sinful.[5] Also, the Kortes seek to manage and operate Korte & Luitjohan Contractors, Inc. ("K & L") in a way that reflects the teachings, mission and values of their Catholic faith.[6] As of September 27, 2012 (13 days before this action was filed), K&L established written "Ethical Guidelines" to that effect, but an exception is made when a physician certifies that certain sterilization procedures or drugs commonly used as contraception are prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy (Doc. 7-2, p. 6).[7] However, Plaintiffs acknowledge that in August 2012 they learned that their current group health plan covers contraception. The Kortes investigated ways to obtain coverage that would comply with their beliefs and corporate policy, but they have yet to find an insurer that will issue a policy that does not cover contraception.[8] Plaintiffs acknowledge that they could self-insure, but that does not relieve them of their legal obligation to comply with the ACA mandate.

K&L currently has approximately 90 full-time employees; about 70 of those employees belong to unions and about 20 employees are nonunion. As a "noncash benefit," K&L provides group health insurance for its nonunion employees. Union employees are covered by

[5] In furtherance of their Catholic faith, the Kortes both "strongly support, financially and otherwise, Catholic fundraisers and other events, including, but not limited to, the STYDEC Ghana project, restoration of their parish church, annual church picnic, and annual parish school auction." (Doc. 2, p. 5 ¶ 22).

[6] The Articles of Incorporation make no reference to the Catholic faith in K&L's stated purpose; only secular construction, excavating and contracting are mentioned (Doc. 22-1).

[7] During oral argument, Plaintiffs indicated that the physician's characterization would control, even if a contraceptive had a dual use.

[8] "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson v. Schuler*, 666 F.3d 450, 454 -455 (7th Cir. 2012).

separate health insurance through their respective unions, over which Plaintiffs have no control.[9] If K&L does not provide the mandated contraceptive coverage, it estimates that it will be required to pay approximately $730,000 per year as a tax and/or penalty, which it considers "ruinous." K&L does not want to abandon providing health coverage because it would severely impact K&L's ability to compete with other companies that offer such coverage, and K&L employees would have to obtain expensive individual policies in the private marketplace.[10]

Plaintiffs have brought suit contending that the ACA mandate violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–1 (2006), the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(b)-(c), 706(2)(A), 706(2)(D) (2006).

Plaintiffs now move for a preliminary injunction relative to Counts I and II of the complaint, their RFRA and Free Exercise Clause claims (Docs. 6 and 7). Defendants filed a memorandum in opposition (Doc. 22), to which Plaintiffs replied (Doc. 26). The Court has also received briefs *amicus curiae* from: the American Civil Liberties Union and American Civil Liberties Union of Illinois, in support of Defendants (Doc. 32); the Liberty, Life and Law Foundation, in support of Plaintiffs (Doc. 39); and Women Speak for Themselves, Bioethics Defense Fund and Life Legal Defense Foundation, in support of Plaintiffs (Doc. 48). Plaintiffs filed a reply to the American Civil Liberties' brief (Doc. 43). In addition, oral argument was heard on December 7, 2012.

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[9] Plaintiffs and Defendants agree that the fact that the union/nonunion distinction cannot be used to qualify K&L as a small business with under 50 employees.

[10] Pursuant to the Illinois Health Care Right of Conscience Act, 745 ILCS 70/3, K&L is exempt from a similar Illinois coverage mandate.

Defendants assert that K&L, a secular, for-profit corporation, is not a "person" and cannot exercise religion; therefore, the ACA mandate does not violate the Free Exercise Clause or RFRA. From Defendants' perspective, K&L is attempting to eliminate the legal separation provided by the corporate form in order to impose the personal religious beliefs of its directors upon K&L's employees. Defendants further fear opening the door to for-profit corporations claiming a variety of exemptions from untold general commercial laws, obviating the government's ability to tackle national problems by way of rules of general applicability.

I. Applicable Legal Standards

A. Injunctive Relief

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; and (3) irreparable harm absent the injunction. *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, 699 F.3d 962, 972 (7th Cir. 2012). *See also American Civil Liberties Union of Illinois v. Alvarez,* 679 F.3d 583, 589–590 (7th Cir. 2012); *Christian Legal Society v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Village of Washington Park, Illinois,* 378 F.3d 613, 619 (7th Cir. 2004). If this threshold showing is made, the Court balances the harm to the parties if the injunction is granted or denied, as well as the effect of an injunction on the public interest. *See Alvarez,* 679 F.3d at 589–590; *Christian Legal Society,* 453 F.3d at 859. "The more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, Inc.,* 549 F.3d 1079, 1100 (7th Cir. 2008).

The Court of Appeals for the Seventh Circuit has advised that, relative to preliminary injunctions in First Amendment cases:

> "[T]he likelihood of success on the merits will often be the determinative factor." *Joelner v. Village of Washington Park, Ill.,* 378 F.3d 613, 620 (7th Cir.2004). This is because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion), and the "quantification of injury is difficult and damages are therefore not an adequate remedy," *Flower Cab Co. v. Petitte,* 685 F.2d 192, 195 (7th Cir. 1982). Moreover, if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional. *Joelner,* 378 F.3d at 620. Stated differently, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006).

Alvarez, 679 F.3d at 589-590 (footnote omitted).

B. Free Exercise Clause

The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, __U.S.__, 132 S.Ct. 694, 702 (Jan. 11, 2012). However, the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 879 (1990) (internal punctuation omitted). The Court of Appeals for the Seventh Circuit has observed, "[i]f they were excused, this might be deemed favoritism to religion and thus violate the establishment clause." *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois,* 611 F.3d 367, 370 (7th Cir. 2010).

C. RFRA

The Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* prohibits the federal government from substantially burdening "a

person's" exercise of religion, "even if the burden results from a rule of general applicability" (§ 2000bb-1(a)), except when the government can "demonstrat[e] that application of the burden to the person-(1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest," (§ 2000bb-1(b)). A statutory cause of action is created under 42 U.S.C. § 2000bb-1(c), and standing to bring such a suit is determined under the general rules for standing under Article III of the Constitution.

RFRA affords more protection than the Free Exercise Clause. Congress enacted RFRA in response to *Employment Division, Department of Human Resources of Oregon. v. Smith,* 494 U.S. 872, 883-890 (1990), where, in upholding a generally applicable law that burdened a religious practice, the Supreme Court held that the Free Exercise Clause does not require a case-by-case assessment of the burdens imposed by facially constitutional laws. *See Sossamon v. Texas*, __U.S.__, 131 S.Ct. 1651, 1656 (2011); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). RFRA was designed to restore the "compelling interest" test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), where free exercise of religion is substantially burdened.

II. Issues and Analysis

A. Standing and Ripeness

Defendants' contentions that K&L is a secular corporation that cannot exercise religion, and that any burden on religious exercise is too attenuated to be actionable, along with the uncertainty regarding whether any K&L employee will ever seek coverage for contraception, beg the questions of standing and ripeness.

> An Article III court enjoys jurisdiction over a case only if the plaintiff demonstrates that he suffered an injury in fact, the defendant's actions caused the injury, and the remedy he seeks would redress his injury. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d

> 556 (1984); *see also [American Civil Liberties Union of Illinois v.] Alvarez,* 679 F.3d [583,] 590–91[(7th Cir. 2012)]. When the plaintiff applies for prospective relief against a harm not yet suffered—or one he believes he will suffer again—he must establish that he "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct [,] and [that] the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted). Otherwise, he fails to allege an actual case or controversy before the court. *See* U.S. CONST. art. III, § 2, cl. 1.

Bell v. Keating, 697 F.3d 445, 451 (7th Cir. 2012); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

In *520 Michigan Avenue Associates. Ltd. v. Devine*, 433 F.3d 961, 962-963 (7th Cir. 2006), the Court of Appeals for the Seventh Circuit recognized that courts have frequently found standing for pre-enforcement actions based on the potential cost of complying and/or penalties for noncompliance. As already noted, K&L must secure its group health plan in approximately two weeks and, if the plan does not cover contraception, there will be a substantial monetary assessment.

Relative to whether K&L has standing, in *Citizens United v. Federal Election Commission*, __U.S.__, 130 S.Ct. 876, 899 (2010), the Supreme Court broadly stated that "First Amendment protection extends to corporations." Drawing from *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978), the high court specifically found that, even though they are not natural persons, corporations can exercise political speech because, like individuals, corporations contribute to discussion, debate and the distribution of ideas and information. Religious institutions have long been organized as corporations at common law and under the King's charter. *Citizens United*, 130 S.Ct. at 926-927 (Scalia, J., concurring; joined by Alito, J., and

Thomas, J.)). However, whether secular corporations can exercise religion is an open question. This Court does not need to specifically decide whether a secular, for-profit corporation can exercise religion. A corporation may engage in activities to advance a belief system, and may assert constitutional rights on its own behalf and on behalf of its members. *See generally National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 428-430 (1963).

Relative to the Kortes, in *Powers v. Ohio,* 499 U.S. 400 (1991), the Supreme Court explained that, in certain limited exceptions, it has "recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied": (1) "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant must have a close relation to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id*. at 410–411 (citations omitted). In *Rothner v. City of Chicago*, 929 F.2d 297, 301 (7th Cir. 1991) the appellate court observed that courts have viewed assertions of third-party standing "quite charitably," and this Court will do the same. Because K&L is a family-owned S corporation[11], the religious and financial interests of the Kortes are virtually indistinguishable. Therefore, the Kortes satisfy the third-party standing test for purposes of presenting the Free Exercise Clause and RFRA claims of K&L. Consequently, the Kortes *and*

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[11] S corporations are "pass-through" organizations that do not pay income tax themselves, but pass their income, gain, deduction, loss and credit (collectively referred to as "tax items") through to their owners. Pass-through organizations report their tax items on a tax return in the name of the organization and report those items to their owners who, in turn, report the tax items on their returns.

Robert R. Keatinge and Ann E. Conaway, *Keatinge and Conaway on Choice of Business Entity: Selecting Form and Structure of a Closely Held Business* § 14:2 (2012).

K&L have standing to sue; their injuries are sufficiently concrete. Further, more rigorous analysis of the merits of Plaintiffs' claims will follow.

Although K&L has yet to violate the statute, the monetary assessment that awaits if it does not comply with the mandate is certain, and the deadline for securing insurance is fast approaching. This imminent, substantial threat is sufficient for ripeness. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-153 (1967) (a declaratory judgment action is ripe if the regulation at issue requires "immediate and significant" conduct).

B. Likelihood of Success on the Merits

Adhering to the analytical framework for securing a preliminary injunction, Plaintiffs' likelihood of success on their Free Exercise Clause and RFRA claims must be addressed. Plaintiffs contend that "*some* likelihood of success on the merits" is all that is required—suggesting a very light burden. *See Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (emphasis added); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012). However, the court of appeals' most recent iteration of the standard specifies a "*reasonable* likelihood of success on the merits." *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, 699 F.3d 962, 972 (7th Cir. 2012) (emphasis added). Furthermore, in the context of securing such an extraordinary remedy, a "possibility" has been found to be less than a "likelihood." *Winter v. Natural Resources Defense 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). As already noted, the stronger the chance of success on the merits, the less the balance of harms must tip in Plaintiffs' favor. *Planned Parenthood of Indiana, Inc.,* 699 F.3d at 972.

Plaintiffs have moved for summary judgment on the merits, but the time for Defendants to respond has not passed. However, during oral argument on the motion for a preliminary injunction Plaintiffs indicated that the arguments currently before the Court relative to the injunction are all that they have to present. The Court's analysis regarding the likelihood of success is, therefore, less speculative and more in-depth than is often the case. Of course, the Court's ruling on the motion for an injunction is not dispositive of Plaintiffs' motion for summary judgment.

1. Free Exercise

As in *Hobby Lobby Stores, Inc., v. Sebelius*, __F.Supp.2d__, 2012 WL 5844972, at *5 (W.D. Okla. Nov. 19, 2012), the undersigned district judge views the exercise of religion as a "purely personal" guarantee that cannot be extended to corporations. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n. 14 (1978) (observing that corporate identity has been determinative of why corporations are denied, for example, the privilege against self-incrimination (*see Wilson v. United States*, 221 U.S. 361, 382-386 (1911)), or the right to privacy on a par with individuals (*see California Bankers Association v. Shultz*, 416 U.S. 21, 65-67 (1974)). In *Bellotti*, 435 U.S. at 778 n. 14, the Supreme Court indicated that whether a constitutional guarantee is "purely personal" "depends on the nature, history, and purpose of the particular provision." In *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985), the Supreme Court explained: "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." James Madison eloquently stated, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Hein v. Freedom from Religion*

Foundation, Inc., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (quoting 2 Writings of James Madison 184 (G. Hunt ed. 1901)). Thus, a corporation may be able to advance a belief system, but it cannot exercise religion. In any event, Plaintiffs' Free Exercise Clause claim has little or no chance of success on its merits, regardless of whether a corporation can exercise religion.

From Plaintiffs' perspective, the mandate is not a neutral law of general applicability, and it substantially burdens their exercise of religion; therefore, strict scrutiny should apply (similar to the RFRA analysis). Plaintiffs note that nonprofit churches and religious institutions are exempted under the government's definition of a "religious employer," but no exemption is afforded to for-profit religious employers like K&L. Plaintiffs perceive a religious preference in favor of religious entities that fall within the statute's definition, as opposed to religious neutrality. Also, Plaintiffs see the mandate as targeting religiously motivated conduct. Plaintiffs further argue that the mandate is not generally applicable because it does not apply to employers with fewer than 50 full-time employees (26 U.S.C. § 4980H(c)(2)(A)), "grandfathered" plans in existence since March 23, 2010 (75 Fed. Reg. 41726, 41731 (Jul. 19, 2010)), nonprofit religious employers (76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012)), or health care sharing ministries (26 U.S.C. §§ 5000A(d)(2)(A)(i), (ii), (B)(ii)). Plaintiffs highlight that in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court stated that, where the government "has in place a system of individual exemptions, it may not refuse to extend the system to cases of 'religious hardships' without compelling reasons." *Id.* at 568 (internal citations omitted).

Relative to the neutrality of the mandate, in *Church of the Lukumi Babalu Aye* the Supreme Court recognized that whether a law has an impermissible object may be discerned by looking at the face of the law, its "real operation," as well as the legislative history of the law.

Id. at 534, 535, 540. On its face, the ACA mandate makes no mention of religion whatsoever. The legislative history does not reflect any impermissible object; rather, the purpose was tied to public health and gender equality, not religion. *See* 77 Fed. Reg. 8725, 8727-8728 (Feb. 15, 2012).

Plaintiffs contend that, because there are so many exemptions, the mandate is not generally applicable. Plaintiffs cite projections that there are as many as 193 million grandfathered plans that may be exempted from the mandate. *See Legatus v. Sebelius*, __F.Supp.2d__, 2012 WL 5359630, at *9 (E.D. Mich. Oct. 31, 2012) (citing 75 Fed. Reg. 34,538, 34,540 (Jun. 17, 2010)). The government asserts that the grandfathering mechanism helps ease the transition of the mandate.[12] Like the district court in *Legatus*, this Court does not perceive how a gradual transition undercuts the neutral purpose or general applicability of the mandate. And, Plaintiffs do not link the grandfathering mechanism to any sort of religious preference.

According to the associated regulations, to qualify as an exempted "religious employer," an employer must meet all of the following criteria: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization; and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B). The "religious" exemption is not targeted to a particular religion or belief. However, Plaintiffs perceive that the exemption

[12] The mid-range estimate is that 66 percent of small employer plans and 45 percent of large employer plans will relinquish their grandfather status by the end of 2013. *See* 75 Fed. Reg. 34,538, 34,552 (Jun. 17, 2010).

impermissibly favors nonprofit religious organizations, and excludes for-profit organizations, such as K&L, that are operated consistent with religious beliefs.

The Supreme Court has long recognized that one's religious beliefs cannot exempt one from complying with an otherwise valid law; otherwise, every citizen's beliefs would trump the law of the land—exceptions would swallow every rule. *See Reynolds v. United States*, 98 U.S. 145, 166-167 (1878); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-879 (1990) (in response to *Smith*, RFRA was passed, requiring the least restrictive means be used). Furthermore, "the course of constitutional neutrality in this area cannot be an absolutely straight line." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). Accordingly, statutory accommodations and exemptions for nonprofit religious organizations have been permitted as a mere accommodation of, and attempt to balance, the Free Exercise and Establishment Clauses. *See generally Walz*, 397 U.S. at 659-672 (discussing the First Amendment "tight rope" that must be traversed relative to tax exemptions for nonprofit religious organizations).

Plaintiffs see no difference between their efforts to run the for-profit K&L construction business in a manner consistent with religious principles and a traditional nonprofit, religious organization. Most recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, __U.S.__, 132 S.Ct. 694 (Jan. 11, 2012), the Supreme Court recognized a fine line between religious and secular associations. First Amendment analysis for a religious organization, such as the Lutheran Church, was found to be different than the analysis that would be used relative to, for example, a labor union or social club. *Id*. at 706. The high court distinguished between teachers with a formal religious imprimatur and lay teachers. A religious exemption from compliance with the Americans with Disabilities Act was applied to the "called"

teacher, despite the fact that all teachers were performing the same duties at the same religious school. Thus, a corporation that has primarily a secular purpose, such as construction, can be distinguished from a "religious" corporation (as defined by statute).

Lastly, even if in practice the law incidentally impacts Plaintiffs' religious beliefs (or prefers those who do not hold such religious convictions), it does not necessarily follow that Plaintiffs have been impermissibly burdened. *See City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). The law is not so narrowly drawn as to "target" Plaintiffs' religious beliefs. The mandate applies to a broader range of contraception than just the abortifacients Plaintiffs' find objectionable.

For these reasons, there is a substantial likelihood the ACA contraception mandate will be found to be a neutral law of general applicability that only incidentally burdens Plaintiffs' religious exercise. Therefore, at this juncture, the Court will not address Plaintiffs' assertions that the mandate substantially burdens their free exercise of religion.

2. RFRA

RFRA prohibits the federal government from substantially burdening "a person's" exercise of religion, "even if the burden results from a rule of general applicability" (§ 2000bb-1(a)), except when the government can "demonstrat[e] that application of the burden to the person-(1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest," (42 U.S.C. § 2000bb-1(b)). RFRA potentially affords Plaintiffs greater protection than the First Amendment because the mandate must withstand strict scrutiny—the compelling interest test. Accordingly, during oral argument the parties focused exclusively on the RFRA claim.

a. The Applicability of RFRA

By its terms, RFRA is applicable to "persons." 42 U.S.C. § 2000bb-1(b). Defendants argue that K&L, as a secular, for-profit corporation, cannot exercise religion. Defendants further observe that the ACA mandate applies only to group health plans[13] and health insurance issuers, not individuals or corporations, unless self-insured (42 U.S.C. § 300gg-13(a)). Plaintiffs counter that, pursuant to 1 U.S.C. § 1, in determining the meaning of any statute, a corporation is a "person" unless the context indicates otherwise.[14]

The Kortes, obviously, are "persons," and, as already discussed, because K&L is a closely held S corporation, the Kortes fall within the ambit of RFRA. K&L also qualifies as a "person" under RFRA. Again, this is consistent with the fact that religious institutions have long been organized as corporations (*see Citizens United v. Federal Election Commission*, __U.S.__, 130 S.Ct. 876, 926-929 (2010) ((Scalia, J., concurring; joined by Alito, J., and Thomas, J.)), and with the notion that corporations can engage in activities to advance a belief system (s*ee generally National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 428-430 (1963)). This sort of symbiotic relationship is not inconsistent with the advancement of a belief system. However, the RFRA "substantial burden" inquiry makes clear that business forms and so-called "legal fictions" cannot be entirely ignored—in this situation, they are dispositive.

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[13] A group health plan is legally distinct from the company that sponsors it. 29 U.S.C. § 1132(d)).

[14] "[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961), and we "do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense," *Gonzales v. Oregon,* 546 U.S. 243, 282, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (SCALIA, J., dissenting)." *Johnson v. United States,* __*U.S.*__, 130 S.Ct. 1265, 1270 (2010).

b. Substantial Burden

Plaintiffs must initially show a substantial burden on their religious beliefs. *See Gonzales v. O Centro Espirita Beneficent Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

While neither dispositive nor determinative, the Court again notes the Plaintiffs' current health insurance plan covers the very preventive health services they seek to enjoin. There is a palpable inconsistency in claiming the ACA contraception mandate substantially burdens their religious beliefs while they currently maintain the same coverage in their existing pre-ACA health plan.

Plaintiffs claim that the ACA contraception coverage mandate forces them to choose between adhering to their religious beliefs and paying "ruinous" penalties for non-compliance. K&L foresees losing their employees' goodwill, and being placed at a competitive disadvantage in the business marketplace. During oral argument, Plaintiffs emphasized that they do not seek to impose their religious beliefs upon others; rather, they just do not want to be forced to foster or sponsor a plan that is contrary to their religious beliefs.[15] As evidence that the government recognizes the substantial burden the mandate imposes, Plaintiffs cite the current exemption for nonprofit religious employers (76 Fed. Reg. 46621, 46626 (Aug. 3, 2011)), and the temporary "safe harbor" from enforcement afforded to non-grandfathered group health plans sponsored by nonprofit organizations with religious objections to contraception coverage (77 Fed. Reg. 8725, 8726-8727 (Feb. 15, 2012)).

Defendants do not challenge the sincerity of the Kortes' religious beliefs, but they do question the burden imposed under the mandate, particularly in light of the fact that K&L's

[15] Under the RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *See* 42 U.S.C. § 2000bb–2 (defining "exercise of religion" as defined in 42 U.S.C. § 2000cc–5).

current insurance plan covers contraception. From Defendants' perspective, any burden is *de minimus* and too attenuated to trigger strict scrutiny. This Court agrees, albeit for more nuanced reasons.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a compulsory school-attendance law was found to violate the Free Exercise Clause because parents were forced to choose between endangering their salvation and criminal penalties (a fine of not less than $5, nor more than $50, and imprisonment for up to three months). In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the plaintiff was denied unemployment benefits after he felt compelled to leave his job in a foundry because his religious beliefs. The tenets of his religion forbade his involvement in the production of weapons, and his employer had just started manufacturing military tank parts. The Supreme Court explained that, where the receipt or denial of an important benefit is conditioned upon conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon religion exists. *Id*. at 717-718. *Sherbert v. Verner*, 374 U.S. 398 (1963), similarly illustrates that the pressure does not have to be direct. In *Sherbert*, a Free Exercise Clause violation was found relative to an individual whose religious beliefs prevented work on Saturdays and consequently disqualified that person from state unemployment compensation benefits, which required one to accept work when offered.

In *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-761 (7th Cir. 2003), relative to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, the Court of Appeals for the Seventh Circuit looked to RFRA and Free Exercise precedents and concluded that the burden *must* be "substantial" to trigger strict scrutiny:

> [I]n the context of RLUIPA's broad definition of religious exercise, a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable.

Civil Liberties for Urban Believers, 342 F.3d at 761. *See also Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (looking to *Thomas*, 450 U.S. at 718, to define "effectively impracticable"). From this Court's perspective, the ACA mandate (and its penalty/tax) will not be directly, primarily and fundamentally responsible for rendering the Kortes' adversity to abortifacients effectively impracticable.

Any inference of support for contraception stemming from complying with the neutral and generally applicable mandate is a *de minimus* burden. It appears that Plaintiffs' objection presupposes that an insured will actually use the contraception coverage. Even assuming that there is a substantial likelihood that a K&L employee will do so, at that point the connection between the government regulation and the burden upon the Kortes' religious beliefs is too distant to constitute a substantial burden.

Plaintiffs see their situation as being analogous, if not identical, to *Yoder*, *Thomas* and *Sherbert*. However, in *Yoder*, *Thomas* and *Sherbert* individuals *personally* faced a choice, even when the pressure was indirect. K&L is not a person and only reflects the Kortes' religious beliefs. The fact that a "corporate veil" (regardless of how thin) stands between the Kortes and K& L, and another legal "veil" is between K&L and the group health plan, cannot be ignored.

In *U.S. v. Lee,* 455 U.S. 252, 261 (1982), the Amish plaintiff was self-employed and did not qualify for a religious exemption from paying social security taxes. Social Security runs counter to the Amish religious belief in providing for themselves. Although Lee involved a self-employed person, the Supreme Court still recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own

conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." Similarly, by assuming the corporate form, the Kortes chose to accept the limitations of that form. Plaintiffs would rather obliterate any distinction between business entities and individuals. Specific to the ACA contraception coverage mandate, two other district courts have acknowledged how an individual can become distanced by what are often characterized as "legal fictions.

In *Tyndale House Publishers, Inc. v. Sebelius*, __F.Supp.2d __, 2012 WL 5817323 at *13 (D.D.C. Nov. 16, 2012), the plaintiff prevailed; a substantial burden was found and a preliminary injunction was issued. Nevertheless, the district court considered it a "crucial distinction" that the plaintiff corporation was self-insured, "thereby removing one of the 'degrees' of separation." *Id.* The court in *Tyndale* was attempting to distinguish *O'Brien v. United States Department of Health and Human Services*, __F.Supp.2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), where a secular, for-profit limited liability corporation was contributing to a health insurance plan. In *O'Brien*, the district court concluded: "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id*. at *6.[16]

Because this Court does not perceive that the ACA contraception mandate imposes a substantial burden on Plaintiffs' free exercise of religion, the Court must find that Plaintiffs have failed to satisfy their burden, which leads to the conclusion that Plaintiffs do not

[16] During oral argument, Plaintiffs made much of the fact that the district court's order in *O'Brien* had just been stayed pending appeal, in effect granting the plaintiff corporation a preliminary injunction. *O'Brien v. United States Department of Health and Human Services*, No. 12-3357 (8th Cir. Nov. 28, 2012). Plaintiffs seem to consider the appellate court's one-sentence order as being tantamount to a holding that a substantial burden and successful RFRA claim had been found, which remains to be seen.

have a reasonable likelihood of success on the merits of their RFRA claim. Consequently, no further analysis of the RFRA claim is necessary.

III. Conclusion

For the reasons stated, the Court finds that Plaintiffs Cyril B. Korte, Jane E. Korte, and Korte & Luitjohan Contractors, Inc., have failed to show a reasonable likelihood of success on the merits of either their Free Exercise Clause or RFRA claims, which is necessary to secure a preliminary injunction. In *Legatus v. Sebelius*, __F.Supp.2d __, 2012 WL 5359630 at *14 (E.D. Mich. Oct. 31, 2012), the district court concluded that, although neither party had failed to show a substantial likelihood of success on the merits, because of the possibility of serious harm to the plaintiffs' religious exercise, the balance tipped in favor of an injunction. The Supreme Court, however, has cautioned that, "[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (emphasis added)). Therefore, Plaintiffs' motion for a preliminary injunction (Doc. 6) is **DENIED**.

IT IS SO ORDERED.

DATED: December 14, 2012

s/ *Michael J. Reagan*
MICHAEL J. REAGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, **JANE E. KORTE**, and **KORTE & LUITJOHAN CONTRACTORS**, **INC**.,
Plaintiffs,

v. **CASE NO. 3:12-CV-01072-MJR-PMF**

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

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Cyril B. Korte, Jane E. Korte, and Korte & Luitjohan Contractors, Inc., by and through their attorneys, bring this complaint against Defendants United States Department of Health and Human Services; Kathleen Sebelius; United States Department of the Treasury; Timothy F. Geithner; United States Department of Labor; and Hilda L. Solis, and their successors in office, and in support thereof allege the following on information and belief:

INTRODUCTION

1. Plaintiffs seek judicial review concerning Defendants' violations of constitutional and statutory provisions in connection with Defendants' promulgation and implementation of certain regulations adopted under the Patient Protection and Affordable Care Act of 2010

EXHIBIT B

(hereafter "Affordable Care Act"), specifically those regulations mandating that employers include in employee health benefit plans coverage of services that violate an employer's religious and moral values.

2. Specifically, Plaintiffs ask this court for declaratory and injunctive relief from the operation of the Final Rule confirmed and promulgated by Defendants on or about February 15, 2012, mandating that employee health benefit plans include coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012, (hereafter "Mandate," "Final Rule," or "Mandate/Final Rule"). 45 CFR § 147.130(a)(1)(iv), as confirmed at 77 Fed. Reg. 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (hereafter "HRSA") Guidelines found at http://www.hrsa.gov/womensguidelines.

3. Plaintiffs Cyril B. Korte and Jane E. Korte are adherents of the Catholic faith. As equal shareholders who together own a controlling interest in Plaintiff Korte & Luitjohan Contractors, Inc., Plaintiffs Cyril B. Korte and Jane E. Korte wish to conduct business in a manner that does not violate their religious faith.

4. Plaintiffs Cyril B. Korte and Jane E. Korte have concluded that complying with the Mandate would require them to violate their religious beliefs because the Mandate requires them and/or the corporation they control to arrange for, pay for, provide, facilitate, or otherwise support not only contraception and sterilization, but also abortion, because certain drugs and devices such as the "morning-after pill," "Plan B," and "Ella" come within the Mandate's and HRSA's definition of "Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action.

5. Plaintiffs contend that the Mandate requires them either to comply with the

Mandate and violate their religion or not comply with the Mandate, in order to conduct their business in a manner consistent with their religion, and pay ruinous fines and penalties. Accordingly, the Mandate violates their rights under the Religious Freedom Restoration Act and the First Amendment and also violates the Administrative Procedure Act.

JURISDICTION AND VENUE

6. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2) because it is a civil action against agencies and officials of the United States based on claims arising under the Constitution, laws of the United States, and regulations of executive departments and it seeks equitable or other relief under an Act of Congress, and also pursuant to 28 U.S.C. § 1361 as this court may compel officers and agencies of the United States to perform a duty owed Plaintiffs.

7. This court has jurisdiction to render declaratory and injunctive relief pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 2000bb-1, and Federal Rules of Civil Procedure 57 and 65.

8. Venue is appropriate in this district pursuant to 28 U.S.C. §1391(e)(1)(B)-(C) because Plaintiffs reside in this district, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

9. This court has the authority to award Plaintiffs their costs and attorneys' fees pursuant to 28 U.S.C. § 2412 and 42 U.S.C. § 1988.

PLAINTIFFS

10. Plaintiffs Cyril B. Korte and Jane E. Korte are individuals and citizens of the State of Illinois and the United States.

11. Plaintiffs Cyril B. Korte and Jane E. Korte each hold 43.674% ownership in Plaintiff Korte & Luitjohan Contractors, Inc., and are equal shareholders who together own a

controlling interest in Plaintiff Korte & Luitjohan Contractors, Inc.

12. Plaintiff Cyril B. Korte is the President of Korte & Luitjohan Contractors, Inc., and Plaintiff Jane E. Korte is the Secretary. They are the only Directors of Plaintiff Korte & Luitjohan Contractors, Inc., and together they set the policies governing the conduct of all phases of Plaintiff Kotre & Luitjohan Contractors, Inc.

13. Plaintiff Korte & Luitjohan Contractors, Inc., is a family owned, full-service construction contractor serving Central and Southern Illinois for over fifty years. Its main offices are located at [redacted], which is in Madison County. It is incorporated under the laws of the State of Illinois.

DEFENDANTS

14. Defendant United States Department of Health and Human Services (hereafter "HHS"), is an agency of the United States and is responsible for administration and enforcement of the Mandate/Final Rule.

15. Defendant Kathleen Sebelius is Secretary of HHS and is named as a party only in her official capacity.

16. Defendant United States Department of the Treasury is an agency of the United States and is responsible for administration and enforcement of the Mandate/Final Rule.

17. Defendant Timothy F. Geithner is Secretary of the Treasury and is named as a party only in his official capacity.

18. Defendant United States Department of Labor (hereafter "DOL") is an agency of the United States and is responsible for administration and enforcement of the Mandate/Final Rule.

19. Defendant Hilda L. Solis is Secretary of DOL and is named as a party only in her official capacity.

FACTUAL ALLEGATIONS

20. Plaintiffs Cyril B. Korte and Jane E. Korte hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They believe that actions intended to terminate an innocent human life by abortion are gravely sinful.

21. Plaintiffs Cyril B. Korte and Jane E. Korte adhere to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

22. Plaintiffs Cyril B. Korte and Jane E. Korte seek to manage and operate Plaintiff Korte & Luitjohan Contractors, Inc., in a way that reflects the teachings, mission, and values of their Catholic faith. Also, in furtherance of their Catholic faith, they both strongly support, financially and otherwise, Catholic fundraisers and other events, including, but not limited to, the STYDEC Ghana project, restoration of their parish church, annual church picnic, and annual parish school auction.

23. Plaintiff Korte & Luitjohan Contractors, Inc. currently has about ninety full-time employees. About seventy of those employees belong to unions and about twenty of those employees are non-union. Plaintiff Korte & Luitjohan Contractors, Inc. provides a group health insurance plan only for its non-union employees. Union employees are covered by separate health insurance through their respective unions over which Plaintiffs have no control.

24. The annual renewal date of the company's group health plan for its non-union employees is January 1.

25. Like other non-cash benefits provided by Plaintiff Korte & Luitjohan Contractors, Inc., Plaintiffs consider the provision of employee health insurance an integral component of furthering the company's mission and values.

26. Plaintiffs Cyril B. Korte and Jane E. Korte believe that they cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for

contraceptives, sterilization, abortion, or related education and counseling without violating their religious beliefs and have established an ethical guideline for Plaintiff Korte & Luitjohan Contractors, Inc. setting forth those beliefs.

APPLICABLE PROVISIONS OF THE MANDATE

27. Under the Mandate or Final Rule being challenged herein, employers with more than fifty full-time employees, such as Plaintiff Korte & Luitjohan Contractors, Inc., are required to include in group health plans coverage for all FDA-approved contraceptive methods, sterilization, and education and counseling for same.

28. The Mandate went into effect on August 1, 2012, and applies to the first health insurance plan-year starting after August 1, 2012.

29. The group health plan for Plaintiff Korte & Luitjohan Contractors, Inc.'s non-union employees is due for renewal on January 1, 2013. As was discovered in or about August 2012, Korte & Luitjohan's current group health plan includes coverage for contraceptives, sterilization, and abortion, which is an error that is contrary to what Plaintiffs want based on their religious beliefs and contrary to the ethical guidelines of Plaintiff Korte & Luitjohan Contractors, Inc. The company is investigating ways to obtain employee health insurance coverage that complies with their Catholic faith and the company's ethical guidelines.[1]/

30. Plaintiffs wish to renew health insurance coverage for their non-union employees

[1]/ The State of Illinois requires coverage for outpatient contraceptive services and drugs in individual and group health insurance policies. 215 Ill. Comp. Stat. § 5/356z.4. Yet, the Illinois Health Care Right of Conscience Act, 745 Ill. Comp. Stat. § 70/1, *et seq*., provides "health care payers," 745 Ill. Comp. Stat. § 70/3(f), such as Plaintiffs, with an exemption from having to pay for, or having to arrange for the payment of, any health care services, including "family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment," 745 Ill. Comp. Stat. § 70/3(a), that violates the health care payer's conscience as documented in its ethical guidelines or the like, 745 Ill. Comp. Stat. §§ 70/2, 70/3(e), 70/11.2.

while, at the same time, exclude coverage for all FDA-approved contraceptive methods, abortion, sterilization procedures, and patient education and counseling regarding such procedures.

31. Under the terms of the Mandate, Plaintiffs will not be permitted to obtain coverage that excludes the aforementioned drugs and services. On the contrary, the Mandate will require that Plaintiffs continue to provide their employees with coverage of those services, activities, and practices that Plaintiffs consider sinful and immoral.

32. It takes about sixty days of planning for Plaintiffs to change or modify a group health care plan.

33. Plaintiffs, as for-profit employers, do not qualify for the "religious employer" exemption contained in the Final Rule. *See* 45 CFR § 147.130(a)(1)(A) and (B).

34. Because Plaintiffs do not qualify for the "religious employer" exemption, they are not permitted to take advantage of the "temporary enforcement safe-harbor" provision as set forth by Defendants at 77 Fed. Register 8725 (Feb. 15, 2012).

35. Health insurance plans in existence as of the enactment of the Affordable Care Act, on or about March 23, 2010, that do not include coverage for all FDA-approved contraceptive methods, sterilization, and related education and counseling and that have not since been materially changed are considered "grandfathered" plans that do not have to comply with the Mandate.

36. The Mandate coerces Plaintiffs into complying with its requirements and abandoning integral components of Plaintiffs' religiously inspired mission and values.

37. Failure to comply with the Mandate may cause Plaintiff Korte & Luitjohan Contractors, Inc. to have to pay annual fines and penalties to the federal government.

38. Plaintiffs are confronted with choosing between complying with the Mandate's

requirements in violation of their religious beliefs, or paying ruinous fines that would have a crippling impact on their ability to survive economically.

39. Any alleged interest Defendants have in providing free FDA-approved contraceptives, abortifacients, and sterilization and related education and counseling services, without cost sharing, could be advanced by Defendants through other more narrowly tailored means that do not burden the religious beliefs of Plaintiffs and do not require them to arrange for, pay for, provide, facilitate, or otherwise support coverage of such items through their employee health care plan.

40. Plaintiffs lack an adequate or available administrative remedy or, in the alternative, any effort to obtain an administrative remedy would be futile.

CAUSES OF ACTION

COUNT I
(Violation of the Religious Freedom Restoration Act)

41. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 40 above and incorporate those allegations herein by reference.

42. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, facilitating, or otherwise supporting coverage for "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling related to such procedures."

43. The Mandate/Final Rule, by requiring Plaintiffs to provide said coverage, imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between conducting their business in accordance with their religious beliefs or paying substantial penalties to the government.

44. The Mandate/Final Rule furthers no compelling governmental interest.

45. The Mandate/Final Rule is not narrowly tailored to furthering any compelling interest.

46. The Mandate/Final Rule is not the least restrictive means of furthering the Defendants' stated interests.

47. The Mandate/Final Rule and Defendants' threatened enforcement of same violate rights secured to Plaintiffs by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

48. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed, and they request the relief set forth below in their prayer for relief.

COUNT II
(Violation of the Federal Free Exercise Clause)

49. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 40 above and incorporate those allegations herein by reference.

50. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, facilitating, or otherwise supporting coverage for "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling related to such procedures."

51. The Mandate/Final Rule, by requiring Plaintiffs to provide said coverage imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between conducting their business in accordance with their religious beliefs or paying substantial penalties to the government.

52. The Mandate/Final Rule furthers no compelling governmental interest.

53. The Mandate/Final Rule is not narrowly tailored to furthering any compelling

interest.

54. The Mandate/Final Rule is not the least restrictive means of furthering the Defendants' stated interests.

55. The Mandate/Final Rule is neither neutral nor generally applicable.

56. The Mandate/Final Rule and Defendants' threatened enforcement of same violates Plaintiffs' rights to free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

57. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed, and they request the relief set forth below in their prayer for relief.

COUNT III
(Violation of the Federal Establishment Clause)

58. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 40 above and incorporate those allegations herein by reference.

59. The First Amendment's Establishment Clause prohibits the establishment of any religion and/or excessive government entanglement with religion.

60. The provisions of the Mandate, including the "religious employer exemption," require the government to examine and evaluate the religious beliefs of Plaintiffs, require the government to discriminate among religious beliefs and organizations, and require the government to adopt particular theological viewpoints and discriminate against others.

61. The Mandate/Final Rule thus violates the Establishment Clause of the First Amendment.

62. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed, and they request the relief set forth below in their

prayer for relief.

COUNT IV
(Violation of the Federal Free Speech Clause)

63. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 40 above and incorporate those allegations herein by reference.

64. The First Amendment protects organizations as well as individuals against compelled speech.

65. Expenditures of money are a form of protected speech.

66. Plaintiffs believe that the aforementioned services, activities, and practices covered by the Mandate/Final Rule are contrary to their religious beliefs.

67. The Mandate/Final Rule compels Plaintiffs to subsidize services, activities, and practices Plaintiffs believe to be immoral.

68. The Mandate/Final Rule compels Plaintiffs to arrange for, pay for, provide, facilitate, or otherwise support coverage for education and counseling related to contraception, sterilization, and abortion.

69. Defendants' actions thus violate Plaintiffs' free speech rights as guaranteed by the First Amendment to the United States Constitution.

70. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs have been and will continue to be harmed, and they request the relief set forth below in their prayer for relief.

COUNT V
(Violation of the Administrative Procedure Act)

71. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 40 above and incorporate those allegations herein by reference.

72. The Affordable Care Act expressly delegates to an agency within Defendant

United States Department of Health and Human Services, the Health Resources and Services Administration, the authority to establish "preventive care" guidelines that a group health plan and health insurance issuer must provide.

73. Given this express delegation, Defendants were obliged to engage in formal notice and comment rulemaking as prescribed by law before Defendants issued the guidelines that group health plans and insurers must provide.

74. Proposed regulations were required to be published in the Federal Register and interested persons were required to be given a chance to take part in the rulemaking through the submission of written data, views, or arguments.

75. Defendants promulgated the "preventive care" guidelines without engaging in the formal notice and comment rulemaking as prescribed by law. Defendants delegated the responsibilities for issuing "preventive care" guidelines to a non-governmental entity, the Institute of Medicine, which did not permit or provide for broad public comment otherwise required by the Administrative Procedure Act.

76. Defendants also failed to engage in the required notice and comment rulemaking when Defendants issued the interim final rules and the final rule that incorporates the "preventive care" guidelines.

77. Moreover, the Mandate/Final Rule violates Section 1303(b)(1)(A) of the Affordable Care Act, which provides that "nothing in this title" . . . "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." 42 U.S.C.A. § 18023(b)(1)(A)(i) (codification of Section 1303 of the Affordable Care Act).

78. The Mandate/Final Rule violates the Religious Freedom Restoration Act.

79. The Mandate/Final Rules violates the First Amendment to the United States

Constitution.

80. Defendants, in promulgating the Mandate/Final Rule, failed to consider the constitutional and statutory implications of the Mandate on for-profit employers such as Plaintiffs.

81. Accordingly, the Mandate/Final Rule is arbitrary and capricious, not in accordance with law or required procedure, and is contrary to constitutional right, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

82. Absent injunctive and declaratory relief against the Mandate/Final Rule, Plaintiffs' have been and will continue to be harmed, and they request the relief set forth below in their prayer for relief.

PRAYER FOR RELIEF

83. Plaintiffs repeat and re-allege all allegations made above and incorporate those allegations herein by reference, and Plaintiffs request that this court grant them the following relief and enter final judgment against Defendants and in favor of Plaintiffs:

A. Enter a declaratory judgment that the Mandate/Final Rule and Defendants' enforcement of same against Plaintiffs violates the Religious Freedom Restoration Act;

B. Enter a declaratory judgment that the Mandate/Final Rule and Defendants' enforcement of same against Plaintiffs violates the Free Exercise Clause of the First Amendment to the United States Constitution;

C. Enter a declaratory judgment that the Mandate/Final Rule and Defendants' enforcement of same against Plaintiffs violates the Establishment Clause of the First Amendment to the United States Constitution;

D. Enter a declaratory judgment that the Mandate/Final Rule and Defendants' enforcement of same against Plaintiffs violates the Free Speech Clause of the First Amendment

to the United States Constitution;

E. Enter a declaratory judgment that the Mandate/Final Rule and Defendants' enforcement of same against Plaintiffs violates the Administrative Procedure Act;

F. Enter preliminary and permanent injunctions prohibiting Defendants, their officers, agents, servants, employees, successors in office, attorneys, and those acting in active concert or participation with them, from enforcing the Mandate/Final Rule against Plaintiffs and others not before this court who have religious objections to providing health insurance coverage under the Mandate/Final Rule for "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling";

G. Award Plaintiffs their costs and attorney's fees associated with this action; and

H. Award Plaintiffs any further relief this court deems equitable and just.

Respectfully submitted,

/s/ Edward L. White III

Edward L. White III (MI P62485)
Admitted to S.D. Ill. Bar
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[redacted]

*Applications for admission forthcoming

Dated: October 9, 2012

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, et al.,

Plaintiffs,

v. **CASE NO. 3:12-CV-01072-MJR-PMF**

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

Defendants.
_____/

DECLARATION OF CYRIL B. KORTE

I, Cyril B. Korte, an adult resident of the State of Illinois, make the following declaration, pursuant to 28 U.S.C. § 1746, based on my personal knowledge, unless otherwise noted:

1. Korte & Luitjohan Contractors, Inc. is a family owned, full-service construction contractor serving Central and Southern Illinois for over fifty years. Its main offices are located at 12052 Highland Road, Highland, Illinois, which is in Madison County. It is incorporated in the State of Illinois.

2. My wife, Jane, and I each hold 43.674% ownership in Korte & Luitjohan Contractors, Inc. and, as equal shareholders, together we own a controlling interest in the company.

3. I am the President of Korte & Luitjohan Contractors, Inc., and my wife, Jane, is the Secretary. We are the only Directors of Korte & Luitjohan Contractors, Inc., and together we set the policies governing the conduct of all phases of the company.

EXHIBIT A

EXHIBIT C

4. I hold to the teachings, values, and mission of the Catholic Church, including the Church's teaching regarding the sanctity of human life from conception to natural death. I believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also adhere to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

5. I seek to manage and operate Korte & Luitjohan Contractors, Inc. in a way that reflects my Catholic faith. Also, in furtherance of my Catholic faith, I strongly support, financially and otherwise, Catholic fundraisers and other events, including, but not limited to, the STYDEC Ghana project, restoration of my parish church, annual church picnic, and annual parish school auction.

6. Korte & Luitjohan Contractors, Inc. currently has about ninety full-time employees. About seventy of those employees belong to unions and about twenty of those employees are non-union. Korte & Luitjohan Contractors, Inc. provides a group health insurance plan only for our non-union employees. Union employees are covered by separate health insurance through their respective unions over which we have no control.

7. Like other non-cash benefits provided by Korte & Luitjohan Contractors, Inc., I consider the provision of employee health insurance an integral component of furthering the company's mission and values.

8. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires group health plans, such as the plan provided by Korte & Luitjohan Contractors, Inc., to include coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after

August 1, 2012. (Hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

9. I understand that Korte & Luitjohan Contractors, Inc. is not exempt from the Mandate. In particular, I understand that we do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and we do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities.

10. Pursuant to my religious faith, I have established ethical guidelines for Korte & Luitjohan Contractors, Inc., that explain that we cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, abortion-inducing drugs, or related education and counseling, except in the limited circumstances where a physician certifies that certain sterilization procedures or drugs commonly used as contraceptives are being prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy. A true and correct copy of our ethical guidelines is attached to this declaration.

11. As was discovered in or about August 2012, Korte & Luitjohan Contractors, Inc.'s current group health plan includes coverage for contraceptives, sterilization, and abortion, which is an error that is contrary to what I want based on my religious beliefs and contrary to our company's ethical guidelines. We are investigating ways to obtain employee health insurance coverage that complies with my Catholic faith and the company's ethical guidelines.

12. To operate and manage Korte & Luitjohan Contractors, Inc. consistent with my Catholic faith and values, I want to be able to provide high quality, broad coverage health insurance for my non-union employees that excludes coverage for things I believe are morally wrong for me and my company to arrange for, pay for, provide, facilitate, or otherwise support.

13. I understand that on January 1, 2013, which is the renewal date for our group health plan, the Mandate will require Korte & Luitjohan Contractors, Inc. to arrange for, pay for, provide, facilitate, or otherwise support a group health plan that includes contraceptives, including abortion-inducing drugs, sterilization and related patient education and counseling and will prevent us from obtaining an employee health plan that comports with my faith and the company's ethical guidelines.

14. I understand that it takes about sixty days for us to explore whatever options, if any, are available to us to have a new health plan in place by January 1, 2013. Thus, we are in need of immediate relief from the Mandate to allow us time to obtain group health coverage by January 1, 2013, that complies with our religious beliefs and to prevent a coverage lapse.

15. I understand that if my company fails to comply with the Mandate or drops its employee group health coverage, then my company could be subjected to significant annual fines and/or penalties payable to the federal government.

16. In addition to fines and penalties, stopping all health coverage for our non-union employees would have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

17. In my view, the Mandate requires me and my company to choose between (a) complying with the Mandate and violating our religious beliefs and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs.

18. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Korte & Luitjohan Contractors, Inc., and it violates the

religious-based principles and the ethical guidelines I have established for the company.

19. In my view, the Mandate is violating my rights and those of my company, and the Mandate will continue to violate those rights unless we obtain immediate relief from this court.

I declare under penalty of perjury under the laws of the United States of America that the above statements are true and correct to the best of my knowledge.

Executed on October 9, 2012, in Highland, Illinois.

Cyril B Korte 1/
Cyril B. Korte

1/ The declaration electronically filed with the court bears the scanned original signature of Cyril B. Korte. The original declaration, bearing the original signature, is being retained by his counsel in this action and is available for review on request by the court and counsel for Defendants.

Ethical Guidelines of Korte & Luitjohan Contractors, Inc.

1. As adherents of the Catholic faith, we hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. We believe that actions intended to terminate an innocent human life by abortion, including abortion-inducing drugs, are gravely sinful. We also adhere to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

2. As equal shareholders who together own a controlling interest in Korte & Luitjohan Contractors, Inc., we wish to conduct the business of Korte & Luitjohan Contractors, Inc. in a manner that does not violate our religious faith and values.

3. Accordingly, we and Korte & Luitjohan Contractors, Inc. cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, abortion-inducing drugs, or related education and counseling, except in the limited circumstances where a physician certifies that certain sterilization procedures or drugs commonly used as contraceptives are being prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy, without violating our religious beliefs.

Cyril B Korte
Cyril B. Korte
President, Korte & Luitjohn Contractors, Inc.

9/27/2012
Date

Jane E Korte
Jane E. Korte
Secretary, Korte & Luitjohn Contractors, Inc.

9/27/2012
Date

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, et al.,

Plaintiffs,

v. **CASE NO. 3:12-CV-01072-MJR-PMF**

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

Defendants.
_____/

DECLARATION OF JANE E. KORTE

I, Jane E. Korte, an adult resident of the State of Illinois, make the following declaration, pursuant to 28 U.S.C. § 1746, based on my personal knowledge, unless otherwise noted:

1. Korte & Luitjohan Contractors, Inc. is a family owned, full-service construction contractor serving Central and Southern Illinois for over fifty years. Its main offices are located at 12052 Highland Road, Highland, Illinois, which is in Madison County. It is incorporated in the State of Illinois.

2. My husband, Cyril, and I each hold 43.674% ownership in Korte & Luitjohan Contractors, Inc. and, as equal shareholders, together we own a controlling interest in the company.

3. I am the Secretary of Korte & Luitjohan Contractors, Inc., and my husband, Cyril, is the President. We are the only Directors of Korte & Luitjohan Contractors, Inc., and together we set the policies governing the conduct of all phases of the company.

EXHIBIT B

EXHIBIT D

4. I hold to the teachings, values, and mission of the Catholic Church, including the Church's teaching regarding the sanctity of human life from conception to natural death. I believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also adhere to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

5. I seek to manage and operate Korte & Luitjohan Contractors, Inc. in a way that reflects my Catholic faith. Also, in furtherance of my Catholic faith, I strongly support, financially and otherwise, Catholic fundraisers and other events, including, but not limited to, the STYDEC Ghana project, restoration of my parish church, annual church picnic, and annual parish school auction.

6. Korte & Luitjohan Contractors, Inc. currently has about ninety full-time employees. About seventy of those employees belong to unions and about twenty of those employees are non-union. Korte & Luitjohan Contractors, Inc. provides a group health insurance plan only for our non-union employees. Union employees are covered by separate health insurance through their respective unions over which we have no control.

7. Like other non-cash benefits provided by Korte & Luitjohan Contractors, Inc., I consider the provision of employee health insurance an integral component of furthering the company's mission and values.

8. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires group health plans, such as the plan provided by Korte & Luitjohan Contractors, Inc., to include coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after

August 1, 2012. (Hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

9. I understand that Korte & Luitjohan Contractors, Inc. is not exempt from the Mandate. In particular, I understand that we do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and we do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities.

10. Pursuant to my religious faith, I have established ethical guidelines for Korte & Luitjohan Contractors, Inc., that explain that we cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, abortion-inducing drugs, or related education and counseling, except in the limited circumstances where a physician certifies that certain sterilization procedures or drugs commonly used as contraceptives are being prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy.

11. As was discovered in or about August 2012, Korte & Luitjohan Contractors, Inc.'s current group health plan includes coverage for contraceptives, sterilization, and abortion, which is an error that is contrary to what I want based on my religious beliefs and contrary to our company's ethical guidelines. We are investigating ways to obtain employee health insurance coverage that complies with my Catholic faith and the company's ethical guidelines.

12. To operate and manage Korte & Luitjohan Contractors, Inc. consistent with my Catholic faith and values, I want to be able to provide high quality, broad coverage health insurance for my non-union employees that excludes coverage for things I believe are morally wrong for me and my company to arrange for, pay for, provide, facilitate, or otherwise support.

13. I understand that on January 1, 2013, which is the renewal date for our group

health plan, the Mandate will require Korte & Luitjohan Contractors, Inc. to arrange for, pay for, provide, facilitate, or otherwise support a group health plan that includes contraceptives, including abortion-inducing drugs, sterilization and related patient education and counseling and will prevent us from obtaining an employee health plan that comports with my faith and the company's ethical guidelines.

14. I understand that it takes about sixty days for us to explore whatever options, if any, are available to us to have a new health plan in place by January 1, 2013. Thus, we are in need of immediate relief from the Mandate to allow us time to obtain group health coverage by January 1, 2013, that complies with our religious beliefs and to prevent a coverage lapse.

15. I understand that if my company fails to comply with the Mandate or drops its employee group health coverage, then my company could be subjected to significant annual fines and/or penalties payable to the federal government.

16. In addition to fines and penalties, stopping all health coverage for our non-union employees would have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

17. In my view, the Mandate requires me and my company to choose between (a) complying with the Mandate and violating our religious beliefs and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs.

18. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Korte & Luitjohan Contractors, Inc., and it violates the religious-based principles and the ethical guidelines I have established for the company.

19. In my view, the Mandate is violating my rights and those of my company, and the Mandate will continue to violate those rights unless we obtain immediate relief from this court.

I declare under penalty of perjury under the laws of the United States of America that the above statements are true and correct to the best of my knowledge.

Executed on October 9, 2012, in Highland, Illinois.

Jane E. Korte [1]/

[1]/ The declaration electronically filed with the court bears the scanned original signature of Jane E. Korte. The original declaration, bearing the original signature, is being retained by her counsel in this action and is available for review on request by the court and counsel for Defendants.

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.

EXHIBIT E

_____
/s/ Michael E. Gans

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRANK R. O'BRIEN JR., et al.,	)	
	)	
APPELLANTS,	)	
	)	
vs.	)	CASE NO. 12-3357
	)	
U.S. DEPT. OF HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
	)	
APPELLEES.	)	
	)	

APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION PENDING APPEAL

Pursuant to FED. R. APP. P. 8, Appellants move this Court for preliminary injunctive relief pending appeal of the district court's dismissal of their statutory and federal claims against the preventive services coverage provision of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) ("the Mandate"). In the absence of such relief, Frank O'Brien and the business he manages will be forced to make a stark and inescapable choice on ***January 1, 2013***: either pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of O'Brien's religious beliefs and company policy, or face crippling penalties imposed by the federal government. Contrary to the decision of the court below, the preventive services mandate at issue in this case substantially burdens Plaintiffs' religious exercise and violates

EXHIBIT F

the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. § 2000bb *et seq*.), the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, and the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*).

Plaintiffs filed a motion for a preliminary injunction with the district court on their RFRA and First Amendment claims. That motion became moot, however, upon a ruling of the court granting Defendants' motion to dismiss the entirety of Plaintiffs' Amended Complaint. The district court thus "failed to afford the relief requested." FED. R. APP. P. 8(a)(2)(A)(ii). *See Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998) (granting an injunction pending appeal pursuant to FED. R. APP. P. 8); *Walker v. Lockhart*, 678 F.2d 68 (8th Cir. 1982) (same).

Plaintiffs seek preliminary relief from this Court based on their RFRA claim alone. Given the current briefing schedule for the appeal and the impending January 1, 2013 date when Plaintiffs will be coerced into acting contrary to their religious principles and beliefs upon pain of financial penalties, the instant motion is necessarily of an immediate nature. Plaintiffs merely request that the status quo, *i.e.*, their freedom to choose a health plan consistent with their religious beliefs

pursuant to Missouri law,[1] remain in place until the final disposition of their appeal.

PROCEDURAL BACKGROUND

On June 11, 2012, Plaintiffs filed their Amended Complaint alleging that the preventive services mandate violated their rights under RFRA and the First Amendment and violated the Administrative Procedure Act. On July 16, Defendants filed a motion to dismiss Plaintiff's Amended Complaint and on August 23 Plaintiffs filed a motion for a preliminary injunction on their RFRA and First Amendment claims.

On September 28, the district court granted Defendants' motion to dismiss Plaintiffs' Amended Complaint in its entirety, thus rendering Plaintiffs' motion for a preliminary injunction moot. Plaintiffs filed their notice of appeal on October 1, 2012 and the case was docketed in this Court on October 4. Plaintiffs have appealed, and thus preserved, all claims dismissed by the district court.

[1] Missouri's own contraception mandate includes a complete exemption — not limited to religious or non-profit employers — for any employer for whom "the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity." Mo. Rev. Stat. § 376.1199(4)(1).

FACTUAL BACKGROUND

A. The Mandate, Its Exceptions, and Penalties

The statutory and regulatory background to the preventive services mandate is set forth in the district court opinion.[2] In sum, all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage must provide coverage for certain preventive services without cost-sharing. 42 U.S.C. § 300gg-13. These services have been defined by the Health Resources and Services Administration to include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Health Resources and Services Administration, WOMEN'S PREVENTIVE SERVICES: REQUIRED HEALTH PLAN COVERAGE GUIDELINES, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Oct. 22, 2012).

Not all employers are required to comply with the Mandate. Grandfathered health plans, *i.e.*, a plan in existence on March 23, 2010 that has not undergone any of a defined set of changes,[3] are exempt from compliance with the Mandate. *See* 75

[2] The decision of the court below, granting Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, is attached hereto as EXHIBIT A.

[3] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

Fed. Reg. 41726, 41731 (July 19, 2010).[4] Even though the Mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34538, 34542 (June 17, 2010).[5]

Also exempted from the Mandate are "religious employers," defined as organizations whose "purpose" is to inculcate religious values, that "primarily" employ and serve co-religionists, and that qualify as churches or religious orders under the tax code. 45 C.F.R. § 147.130(a)(iv)(B)(1)-(4). In addition, because employers with fewer than fifty full-time employees have no obligation to provide health insurance for their employees under the ACA, they have no obligation to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A).

Non-exempt employers who fail to comply with the Mandate or fail to provide any insurance at all face severe penalties. Non-exempt employers who fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Non-exempt employers who fail to provide certain required services in their plans are

[4] *See also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[5] A summary of which ACA provisions apply to grandfathered health plans and which do not, can be found here: *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, *available at* http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Oct. 22, 2012).

subject to an assessment of $100 a day per employee, as well as potential private enforcement suits. *See* 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1).

This case is one of thirty-five others currently pending in federal courts challenging the constitutionality of the Mandate.[6]

B. Frank O'Brien and O'Brien Industrial Holdings

Frank O'Brien is the Chairman and Managing Member of O'Brien Industrial Holdings ("OIH"). Declaration of Frank O'Brien, ¶ 4.[7] He is responsible for setting all policies governing the conduct of all phases of the business of OIH and its related companies. *Id*. OIH and its subsidiaries currently have eighty-seven employees. *Id*. at 13. O'Brien is a Catholic who has the religious duty to conduct himself and his business in a manner consistent with the Catholic faith. *Id*. at ¶ 7. Pursuant to these beliefs, O'Brien has "established as company policy that OIH cannot pay for and provide coverage for contraceptives, sterilization, abortion or related education and counseling." *Id*. at ¶ 15. To do so would violate his religious beliefs. *Id.*

When OIH switched from a self-insured plan to a fully insured plan in 2006, coverage of contraceptive services was inadvertently included in OIH's health plan

[6] *See* The Becket Fund for Religious Liberty, HHS MANDATE INFORMATION CENTRAL, *available at* http://www.becketfund.org/hhsinformationcentral/ (last visited October 23, 2012).

[7] The Declaration of Frank O'Brien is attached hereto as EXHIBIT B. It is the same declaration filed with the court below in support of Plaintiffs' Motion for a Preliminary Injunction.

contrary to longstanding practice and O'Brien's intentions. *Id*. at ¶ 17. Since discovering this error, OIH has been investigating ways to obtain insurance coverage that would exclude coverage for contraceptive services, including abortifacient drugs, and sterilization. *Id*. at ¶ 18.

Time, however, is running short. The renewal date for OIH's employee insurance plan is January 1, 2013. *Id*. at 20. Should Plaintiffs implement a health plan that does not include those services that violate O'Brien's religious beliefs and OIH's religious based policy, it will face steep monetary penalties, up to $3,175,500 per year. Should Plaintiffs discontinue health insurance for OIH employees entirely, it will face penalties in excess of $100,000 per year. Either way, Plaintiffs will face a stiff price for following the dictates of their religious principles and beliefs.

REASONS FOR GRANTING RELIEF

I. PRELIMINARY INJUNCTION STANDARD.

To obtain injunctive relief, a movant must establish the following factors: (1) a likelihood of success on the merits; (2) irreparable harm; (3) that the balance of the harms of granting or denying the injunction are in its favor; and (4) that granting the injunction is in the public's interest. *CDI Energy Servs. v. West River Pumps, Inc*., 567 F.3d 398, 401-02 (8th Cir. 2009) (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

II. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR RFRA CLAIM.

A. The Mandate Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

The purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)" and "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b); *see Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011) (explaining that RFRA restored "the pre-*Smith* status quo of requiring the Government to show a compelling interest for any law that substantially burdened the free exercise of religion").

The federal government may only substantially burden a person's exercise of religion under RFRA if "it demonstrates that application of the burden ***to the person***[8] (1) is in furtherance of a compelling governmental interest; and (2) is the

[8] That corporations are legal "persons" that enjoy First Amendment rights worthy of protection cannot be gainsaid. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). Case law also makes clear that the First Amendment rights enjoyed by businesses include the right to the free exercise of religion. *U.S.United States v. Lee*, 455 U.S. 252 (1982) (adjudicating free exercise claim of for-profit employer); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (adjudicating, *inter alia*, free exercise claims of secular, for-profit businesses); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (adjudicating free exercise claim of for-profit pharmacy corporation); *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006) ("corporations possess Fourteenth Amendment rights" including, through incorporation doctrine, "the free exercise of religion"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (for-profit corporation could assert free exercise rights of owners).

least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). In other words, the government must satisfy strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) (RFRA imposes the "strict scrutiny test").

To trigger RFRA's protections, Plaintiffs must show that a federal policy or action substantially burdens their sincerely held religious beliefs. *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (citing *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)). A regulation substantially burdens religious exercise "if it prohibits a practice that is both sincerely held by and rooted in [the] religious belief[s] of the party asserting the claim." *Id*. (citation and internal quotation marks omitted).

Several Supreme Court cases illustrate what constitutes a substantial burden upon religious exercise. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Sunday, substantially burdened her exercise of religion. The regulation "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court held that a state's denial of unemployment benefits to a Jehovah's Witness, whose religious beliefs prohibited him from participating in the production of armaments,

substantially burdened his religious beliefs. "[T]he employee was put to a choice between fidelity to religious belief or cessation of work." *Id*. at 717. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id*. at 218.

Plaintiffs face the same inescapable burden faced by the religious claimants in these cases. In the wake of the Mandate, and beginning on January 1, 2013, Plaintiffs must either pay, in violation of their religious beliefs, for a health plan that includes abortion-inducing drugs, contraception, or sterilization or suffer severe financial penalties, as described above.

Remarkably, even though it acknowledged that "[l]aws substantially burdening the exercise of religion often discourage free exercise by exacting a price for religious practice," the court below held that the Mandate does not substantially burden Plaintiffs' religious exercise. Ex. A, at 10. Despite the uncontested religious belief of Plaintiffs that paying for the services required by the Mandate directly impacts their religious exercise and principles, the court below opined that that the Mandate does "not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting

in accordance with their religious beliefs." *Id.* at 11. The court observed that the Mandate does not prohibit O'Brien from attending Mass or raising his children in the Catholic faith, and that any burden the Mandate imposes is merely a minimal one. *Id.*

The district court's ruling on this issue is fundamentally flawed for several reasons. For purposes of the instant motion, two will suffice. First, at issue in this case is not simply a general or abstract objection to abortion, contraception, and sterilization. What is at issue is Plaintiffs' religious objection to *paying for these goods and services* through OIH's group health plan — exactly what the Mandate forces Plaintiffs to do under pain of financial penalties. The Mandate does not force anyone to use contraception, but it forces Plaintiffs to subsidize it directly against their religious beliefs and principles.

What is extraordinary about the court's holding on this point is that Defendants themselves have acknowledged that the Mandate directly implicates religious belief and practice. Recognizing that paying for, providing, or subsidizing contraceptive services would conflict with "the religious beliefs of certain religious employers," Defendants have granted a wholesale exemption for a class of employers, *i.e.*, churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012).

In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by a non-profit organization that meets certain criteria.[9] During the time of this temporary safe harbor, Defendants are considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16501, 16503 (Mar. 21, 2012). Defendants are even considering whether "for-profit religious employers with [religious] objections should be considered as well." *Id.* at 16504. This Advance Notice of Proposed Rulemaking was issued after President Obama announced on February 10, 2012 that the administration would attempt to accommodate objecting religious organizations so that they "won't have to pay for these services, and no religious institution will have to provide these services directly."[10] As such, although the government contends in this litigation that paying for contraceptive

[9] Department of Health and Human Resources, GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR 3 (2012), *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Oct. 22, 2012).

[10] REMARKS BY THE PRESIDENT ON PREVENTIVE CARE, February 10, 2012, *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited Oct. 18, 2012).

services through a group health plan does not substantially burden religious exercise, the authors of the Mandate have suggested otherwise.

The second flaw in the district's court's decision is that it is not within the province of courts to evaluate the religiosity of a claim of religious exercise. But that is exactly what the court below did here. Though the court said it did not question the sincerity of Plaintiffs' beliefs, it weighed O'Brien's religious-based objection to the payment for contraceptive methods and sterilization through OIH's group health plan against religious exercises such as keeping the Sabbath and receiving communion — as though the former is less a religious exercise than the latter. Case law does not allow courts to make such theological judgments. *See Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'"). Nor does RFRA itself allow it. *See* 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4) (the term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

For these reasons, the court's ruling flatly contradicts *United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, a for-profit religious employer challenged on religious grounds the requirement to pay social security taxes. Similar to the rationale of the court below here, the government in *Lee* did not question the

sincerity of Lee's religious, specifically Amish, beliefs, but nonetheless "contend[ed] that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance." *Id.* at 257. The Supreme Court rejected that contention. Noting that courts "are not arbiters of scriptural interpretation," the Court held that it is beyond "the judicial function and judicial competence" to determine the proper interpretation of religious faith or belief. *Id*. (quoting *Thomas*, 450 U.S. at 716). The Court therefore accepted Lee's interpretation of his own faith and held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* Had the court below followed the constitutional logic of *Lee*, as it should have, it would have found that Mandate imposes a substantial burden on Plaintiffs' religious exercise.

B. RFRA Imposes Strict Scrutiny.

Because the court below held that the Mandate does not impose a substantial burden on Plaintiffs' religious exercise, it did not apply RFRA's strict scrutiny test to Plaintiffs' religious claim. This test, which requires "the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The government must demonstrate that the challenged law serves "a compelling governmental interest" *and* is the "least

restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Moreover, in the RFRA context, the test must be conducted "through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430-31.

C. Defendants Cannot Demonstrate A Compelling Governmental Interest.

A compelling governmental interest involves "only those interests of the highest order." *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984). In fact, in this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. The government must demonstrate "some substantial threat to public safety, peace, or order" in not exempting the religious claimant. *Yoder*, 406 U.S. at 230.

Defendants have proffered two compelling governmental interests for the Mandate: public health and gender equity goals. 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012). What radically undermines the government's claims of compelling interests, however, is the massive number of employees, millions in fact, whose health and equality are completely unaffected by the Mandate. *See Newland v. Sebelius*, 1:12-cv-1123, 2012 U.S. Dist. LEXIS 104835, *23 (D. Colo. July 27, 2012) (granting preliminary injunction to for-profit business from having to comply with the

Mandate).[11] For example, Defendants cannot explain how their alleged interests can be compelling when employers with fewer than fifty employees[12] have no obligation to provide health insurance for their employees and thus no obligation to comply with the Mandate. With respect to Plaintiffs, Defendants cannot sufficiently explain how there is a compelling interest in coercing Plaintiffs, with their eighty-seven employees, into violating their religious principles when businesses with fewer than fifty employees can avoid the Mandate entirely by not providing any insurance at all.

Defendants also cannot explain how these interests can be of the highest order when the Mandate does not apply to plans grandfathered under the ACA. The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (July 19, 2010).[13] When this figure is added to the number of employees of businesses with fewer than fifty employees, it is fair to say that well over 100 million employees are left untouched by the government's claim of compelling interests. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as

[11] The currently unpublished *Newland* opinion is attached hereto as EXHIBIT C.

[12] More than 20 million individuals are employed by firms with fewer than twenty employees. U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE (INCLUDING SMALL BUSINESS) FROM THE U.S. CENSUS BUREAU, http://www.census.gov/econ/smallbus.html (last visited Oct. 22, 2012).

[13] According to the district court in *Newland*, "191 million Americans belong to plans which may be grandfathered under the ACA." *Id.* at *4.

protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (citations and internal quotation marks omitted).

In sum, Defendants cannot demonstrate a compelling interest in requiring Plaintiffs to comply with a mandate for their eighty-seven employees that does not apply to the employers of over 100 million employees nationwide. Defendants cannot show a "substantial threat to public safety, peace or order" should Plaintiffs be excused from compliance with the Mandate. *Yoder*, 406 U.S. at 230.

D. The Mandate Is Not The Least Restrictive Means to Achieving any Interest.

The existence of a compelling interest in the abstract does not give Defendants *carte blanche* to promote that interest through any regulation of their choosing. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

Even assuming *arguendo* that the interests proffered by Defendants are compelling, the Mandate is not the least restrictive means of furthering those interests. If Defendants wish to further the interests of health and equality by means of free access to contraceptive services, Defendants could do so in a myriad of ways without coercing Plaintiffs, in violation of their religious exercise, into

doing so. For example: 1) offer tax deductions or credits for the purchase of contraceptive services; 2) reimburse citizens who pay to use contraceptives, allowing citizens to submit receipts to the government for payment; 3) provide these services to citizens itself; and 4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products through pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. *See Newland*, at *23-27 (rejecting government's claim that the Mandate furthers a compelling governmental interest through the least restrictive means). Indeed, of the various ways the government could achieve its interests, it has chosen a path with clear and undeniable adverse consequences to employers with religious objections to paying for contraceptive services, such as Plaintiffs.

Although Defendants may contend that any or all of these options would prove difficult to establish or operate, "least restrictive means" does not mean the most convenient way for the government. Even if *the government* claims these or other options would not be as effective or efficient as the Mandate, "*a court* should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 824 (2000). In fact, if a less restrictive alternative would serve the government's purpose, "the legislature must

use that alternative." *Id.* at 813. The asserted interests of health and equality "cannot be invoked as a talismanic incantation to support any [law]." *United States v. Robel*, 389 U.S. 258, 263 (1967).

In sum, Plaintiffs have a substantial likelihood of success on the merits of their RFRA claim.

III. PLAINTIFFS SATISFY THE REMAINING PRELIMINARY INJUNCTION FACTORS.

An injunction should be issued because Plaintiffs' rights under RFRA are being violated by the Mandate as discussed previously. Moreover, and more immediately, O'Brien and OIH must act as soon as possible to have a new health plan in place by the plan renewal date of January 1, 2013. Without an injunction in place by this date, Plaintiffs will be unable to arrange for a health insurance plan consistent with their religious beliefs and principles.

Any argument that the Defendants would be harmed by the issuance of a Preliminary Injunction in this case would be frivolous. The Defendants themselves have already stayed their hand for thousands upon thousands of employers of 100 million employees. An order requiring them to refrain from applying the Mandate to O'Brien and OIH while this case is pending on appeal could not conceivably be said to cause harm to any of the Defendants' interests.

Finally, as discussed previously, the Mandate violates Plaintiffs' statutory rights under RFRA. The public has no interest in having Defendants violate those

rights and, as such, an injunction will not negatively impact the interests of the public.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court enter a preliminary injunction against Defendants' enforcement of the Mandate against them pending their appeal of the decision of the court below.

Respectfully submitted this 23rd day of October, 2012.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(b), the undersigned counsel for Frank O'Brien, Jr., and O'Brien Industrial Holdings, LLC, hereby certifies that neither appellant is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

/s/ Francis J. Manion
Francis J. Manion

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Francis J. Manion
Francis J. Manion