IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM D. GROTE, III, et al.,

Plaintiffs-Appellants,

vs. APPEAL CASE NO. 13-1077

KATHLEEN SEBELIUS, et al.,

Defendants-Appellees.

PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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January 11, 2013

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 Grote Industries, LLC; Grote Industries, Inc.; William D. Grote, III; William Dominic Grote, IV; Walter F. Grote, Jr.; Michael R. Grote; W. Frederick Grote, III; John R. Grote.

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: Broyles Kight & Ricafort, P.C.; Bamberger Foreman Oswald & Hahn, LLP; Sturgill, Turner, Barker, & Moloney, PLLC, and Alliance Defending Freedom.

3. Grote Industries, Inc. is a closely-held family owned corporation owned by the individually-named Plaintiffs. Grote Industries, Inc. is the parent corporation of Grote Industries, LLC. No parents, trusts, subsidiaries, and/or affiliates of either entity have issued shares or debt securities to the public, and there is no publicly held company that owns 10% or more of either entity.

January 10, 2013

s/ Michael A. Wilkins
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INTRODUCTION

Pursuant to Fed. R. App. P. 8, Plaintiffs-Appellants move this court for the entry of an order granting them an injunction pending appeal against Defendants-Appellees' enforcement of a portion 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"). This Court recently granted the same relief in *Korte v. Sebelius*, No. 12-3841 (December 28, 2012). Without such relief here, the Grote family and the business they own are being forced to pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of their religious beliefs and the ethical standards of their company in order to avoid 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 27, 2012, and denied their motion for reconsideration on January 3, 2013, 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 decisions to deny Plaintiffs' motion for a preliminary injunction and motion for reconsideration (which cited *Korte*), and because the Plaintiffs are now being coerced into violating their religious beliefs to avoid substantial financial penalties, filing first in the District Court would be "impracticable." *Id.* at 8(a)(2)(A)(i).

[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.

In addition to this Court's own injunction pending appeal in *Korte*, the Eighth Circuit granted an injunction pending appeal on November 28, 2012, in favor of a for-profit plaintiff challenging this Mandate. *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] Likewise, five District Courts have granted preliminary injunctions to similar employers, and three more have granted temporary restraining orders.[3]

Attached to this motion are the relevant parts of the District Court record: the Verified Complaint (Ex. 1), the District Court's Order Denying Plaintiffs' Motion for Preliminary Injunction, (Ex. 2), and the District Court's Order Denying Motion to Reconsider (Ex. 3). Fed. R. App. 8(a)(2)(B)(ii)–(iii). On January 8, 2013, the undersigned informed counsel for Defendants, Jacek Pruski, Esq., that this emergency motion would be filed. *Id.* at 8(a)(2)(C).

PROCEDURAL BACKGROUND

On October 29, 2012, Plaintiffs brought suit alleging that the Mandate violates their rights under RFRA and the First and Fifth Amendments and violates the

[2] Referred to as a "motion to stay" in the Eighth Circuit's order, 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." Motion for Injunction Pending Appeal, *O'Brien*, No. 12-3357, Entry ID # 3966728 (8th Cir. filed Oct. 23, 2012). Two Courts of Appeals have denied requests for injunctions against the Mandate pending appeal. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012).

[3] *See Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs.*, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius,* 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744-MSG (E.D. Pa. Dec. 28, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health and Human Servs.*, No. 6:12-cv-03459 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publ'rs. v. Sebelius*, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, 2012 WL 3069154 (D. Colo. July 27, 2012).

Administrative Procedure Act. (Ex. 1.) The next day, Plaintiffs filed a motion for a preliminary injunction. The District Court denied the motion on December 27, 2012. (Ex. 2.) After this Court's injunction pending appeal in *Korte*, Plaintiffs filed a Motion to Reconsider, which the District Court denied on January 3, 2013. (Ex. 3).

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 pending appeal preventing Defendants from enforcing the Mandate against Plaintiffs. *See State of Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011).

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. 2 at 2–4.) In sum, most 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 Jan. 9, 2013).

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.[4] Even though the Mandate does not apply to grandfathered health plans, many provisions of the ACA do. 75 Fed. Reg. 34,538, 34,542. Courts have estimated that "191 million Americans" are in grandfathered plans to which the government does not apply the Mandate. *See Newland*, 2012 WL 3069154 at *1; *accord Tyndale House Publ'rs.*, 2012 WL 5817323 at *18.[5]

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[4] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; 75 Fed. Reg. 41,726, 41,731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46,621, 46,623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans.").

[5] The government calls the ability to maintain grandfathered coverage to be a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34,538, 34,540, 34,562, 34,566. Moreover, "[e]xisting plans may continue to offer coverage as grandfathered plans in the individual and group markets . . . *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added). The government asserts that "most" plans from employers the size of Grote will maintain grandfathered status (and therefore not be subject to the Mandate). http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Jan. 9, 2013).

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, employers with fewer than fifty full-time employees will not be fined by Defendants if they opt not to provide any health insurance for their employees, which may allow them to avoid the Mandate as employers. 26 U.S.C. § 4980H(c)(2)(A).

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. The Grote Family and Grote Industries

The individual members of the Grote Family own and operate Plaintiffs Grote Industries, Inc. and Grote Industries, LLC ("Grote Industries") a privately held, for profit business manufacturing vehicle safety systems, headquartered in Madison, Indiana. (Ex. 1, ¶¶ 3, 16–17, 24). Grote Industries currently has approximately 464 full-time employees in the United States. (Ex. 1, ¶ 3).

The Grote Family seeks to run Grote Industries in a manner that reflects their sincerely held religious beliefs. (Ex. 1, ¶¶ 4, 34–35). The business philosophy of

Grote Industries is defined as "a set of beliefs on which all of its policies and actions are based" and its management guidelines strive to maintain the highest ethical standards and operate with "personal integrity" as the foundation of success. (Ex. 1, ¶ 40). The Grote Family, based upon these sincerely held religious beliefs as formed by the moral teachings of the Catholic Church, believes that God requires respect for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage. (Ex. 1, ¶¶ 4, 36–37). Applying this religious faith and the moral teachings of the Catholic Church, the Grote Family has concluded that it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support abortifacient drugs, contraception, or sterilization through health insurance coverage they offer at Grote Industries. (Ex. 1, ¶¶ 5, 38–39). As a consequence, prior to January 1, 2013, the Grote Family provided health insurance benefits to their employees that omits coverage of abortifacient drugs, contraception, and sterilization. (Ex. 1, ¶¶ 6, 47).

The Grote Industries health insurance plan is self-insured, and the plan year renews each year on January 1, the next renewal date thus occurred on January 1, 2013. (Ex. 1, ¶¶ 6, 46–47). Once the District Court denied Grote's Motion for Preliminary Injunction just before January 1, it became mandatory for Grote to include the offensive provisions in their health insurance policy in order to avoid the crushing penalties imposed by the Mandate, which would have devastated the company. Therefore the Mandate is presently coercing Grote to violate its religious beliefs on the pain of draconian penalties.

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). 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)).

Therefore 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, legal enforcement by the government, or even the loss of a government benefit. 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. For their violation the parents "were fined the sum of $5 each." 406 U.S. at 208. 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 here face a direct and inescapable burden. Under the Mandate, they must either provide coverage they believe to be immoral or suffer severe penalties. This is an archetypal burden: to "make unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Mandate explicitly makes unlawful Plaintiff's religious practice of refraining from covering contraceptives. The Mandate is a "fine imposed against appellant for her" religious practice,

Sherbert, 374 U.S. at 404, and requires Plaintiffs "to perform acts undeniably at odd with fundamental tenets of their religious belief." *Yoder*, 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 Grote Industries 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 providing insurance coverage of 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. 46,621, 46,623; 77 Fed. Reg. 8,725. 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.[6] During the time of this temporary safe harbor, Defendants will refrain from enforcing the Mandate against qualifying entities, thereby providing such entities with the basic equivalent of the injunction Grote seeks here. Defendants are also considering ways of "accommodating non-

[6] Dep't of Health & Human Servs., Guidance on the Temporary Enforcement Safe Harbor (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Jan. 9, 2013).

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. 16,501, 16,503. 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.

In denying the preliminary injunction, the District Court wrongly determined that the Mandate does not place a substantial burden on the Plaintiffs. (Ex. 2 at 8–13.) The District Court determined that any burden on Plaintiffs' religious exercise was "too remote and attenuated to be considered substantial," (Ex. 2 at 10) because the employees' "independent decisions" to use the offensive services insulated the Grote family from the impact on their religious beliefs. (Ex. 2 at 13).

This exact argument was rejected by this Court's Order in *Korte*:

> With respect, we think this misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception related services.

Korte, Slip Op. at 5 (emphasis in original).

The instant action is *not* based upon an objection to employees' life choices, or to employees' use of their own money. Rather, this litigation stems from Plaintiffs' objection, based on their Catholic faith and their ethical guidelines, to providing insurance coverage for drugs and information, because they believe providing such

coverage is immoral. (Ex. 1 at ¶¶ 35–40). Their religious faith does not merely object to their own use of such items, but also prohibits them from providing health insurance coverage for such items. (*Id.*) Neither a corporate veil nor other legal technicalities give plaintiffs moral absolution to providing coverage for items that they have religious beliefs against covering.

This realization underscores the District Court's fundamental error: conceiving of the substantial burden analysis as an exercise in moral theology. A "substantial burden" measures the government's penalties—which need only exert "pressure" to violate one's beliefs. *Koger*, 523 F.3d at 799. The analysis does *not* measure moral beliefs, or weigh how morally "attenuated" one's theological objection is in relation to other immoral activity. It analyzes a "substantial burden," not "substantial beliefs."

The Supreme Court has explicitly rejected the kind of moral theologizing that the District Court employed here. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714–16 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.* Likewise here, the notion that direct penalties

and lawsuits are somehow not "substantial" burdens on an explicit religious belief (objecting to certain insurance coverage), because the court deems that activity *morally* insulated or attenuated from the use of contraceptives, is plain legal error.

The District Court's error is not limited to for-profit plaintiffs. Under its rationale, churches themselves, as well as Catholic hospitals, religious non-profit groups and others, would not even be able to bring RFRA claims against the Mandate. Its rationale would also apply far beyond contraception and early abortifacients, allowing the government to force churches and others to include surgical abortions, through late terms of pregnancy, in their health insurance coverage, on the theory that insurance is too "attenuated" to merit moral offense.[7]

The Mandate requires that Plaintiffs pay for a health plan that freely provides contraception, early abortifacient items and sterilization to employees. Plaintiffs' religious beliefs forbid providing such coverage—not just Plaintiffs' own use of the items. (Ex. 1, ¶¶ 5, 38–39.) The burden is directly imposed on Plaintiffs by the Mandate, and 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 free emergency contraception is tantamount to forcing Plaintiffs to provide employees with coupons for free emergency contraception paid for by Plaintiffs themselves. This is exactly the type of direct burden RFRA was enacted to prevent.[8]

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[7] In fact, because Grote's health insurance plan is self-insured, there is no insurer-mediary that comes between Grote and its provision of services that the plan covers.

[8] 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

(Text of footnote continues on the following page).

In *Korte*, this court also rejected the district court's inclination to find an insufficient burden on the Plaintiffs' religious beliefs arising out of the distinction between the Grote family members as individuals and their corporate entities. Korte, Slip Op. at 8. As the court found in *Korte*, the Mandate imposes the same substantial burden on Grote Industries as it does on the individual members of the Grote family. The Mandate requires the Grote family to manage their closely-held, family company in a way that violates their religious faith. All penalties assessed against Grote Industries under the Mandate would have a direct financial and practical impact on the Grote family. The Mandate on Grote Industries applies unquestionably "substantial pressure" on the Grote family to violate its beliefs. As in the many injunctions issued against this Mandate, multiple other courts have recognized that family business owners can bring religious exercise claims, because they are impacted by government burdens on their businesses without a moral distinction between themselves and their companies. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988); *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985).

Just because Grote Industries and its owners have entered the commercial marketplace, they have not abandoned their rights to the exercise of religion. In *Lee*, for example, the Supreme Court held that the requirement to pay social

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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 WL 5817323 at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

security taxes sufficiently 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. *U.S. v. Lee*, 455 U.S. 252 at 257 (1982) (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 the scrutiny it applied,[9] it did not deny—as the District Court did here—the existence of a substantial burden. *Id.*

The fact that Grote Industries is a distinct legal entity from the Grote family is also not relevant. The violation at issue in this case is moral and religious, not strictly legal. The Grote family members are morally the same actors vis-à-vis the Mandate, even if for some purposes the company is legally distinct. Grote Industries as such does not think, act, and establish business values and practices, except through the human agency of the Grote family. Their human agency is moral: it defines the purposes of the corporation, gives it its character, and complies with applicable laws. The Mandate forces the individual Plaintiffs as owners and

[9] *Lee* never called the scrutiny level it was applying "strict" or "compelling." *Lee* was instead a precursor to *Smith*'s lower level of scrutiny that RFRA later rejected. *See Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA itself, when referring to the compelling interest test, cites *Sherbert* and *Yoder* but notably omits *Lee*. 42 U.S.C. § 2000bb. The point for present purposes is that whatever level of scrutiny applies in a particular case, *Lee* teaches that it cannot be sidestepped on a theory that the burden is not substantial. Under RFRA, full strict scrutiny must be imposed.

directors to violate their belief that they must run their family company pursuant to the tenets of their Catholic faith. The Mandate prohibits them from doing so, on pain of destruction of their family business, which is also property that they own.

B. RFRA imposes strict scrutiny.

RFRA, with "the strict scrutiny test it adopted," *Gonzales*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). A compelling interest is an interest of "the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

1. The government lacks a compelling interest as to Plaintiffs.

Defendants have proffered two compelling governmental interests for the Mandate: health and gender equality. 77 Fed. Reg. 8,725, 8,729. 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 and participants, tens of millions in fact, for whom the government has voluntarily decided to omit what they call a compelling need to protect health and equality. *See Newland*, 2012 WL 3069154 at *23; *Tyndale*, 2012 WL 5817323 at *17. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Defendants cannot explain how their interests can be compelling against Grote when, by the government's own choice in not applying this Mandate

to grandfathered plans, nearly 200 million Americans will not receive the Mandate's benefits, including "most" large health plans of comparable size to Grote's. The Mandate also does not apply to plans meeting the religious exemption.

The government itself has granted the equivalent of a preliminary injunction to additional non-profit companies satisfying the one-year non-enforcement "safe harbor," so that their employees too are omitted from the Mandate's allegedly compelling benefits. And small employers are not faced with a Mandate penalty if they are able to avoid the Mandate by dropping insurance coverage entirely. 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.

Notably, the Affordable Care Act does impose multiple requirements on grandfathered health plans, but the government has decided that this Mandate is not of a high enough order to be imposed. The preventive services Mandate, listed at § 2713 of PPACA, is conspicuously omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. See list at 75 Fed. Reg. 34,538, 34,542. These include such requirements as dependent coverage until age 26, and restrictions on preexisting condition exclusions and annual or lifetime limits. Thus Congress itself has deemed that many interests are of the "highest order" to impose on 2/3 of the nation covered in grandfathered plans, but not this Mandate. (The statutory text of § 2713 does not

even mention contraception.) It is therefore necessarily true that Congress deemed the Mandate to be of a lower order, which fails the compelling interest standard. The government cannot demonstrate a compelling need to require Plaintiffs to comply with a Mandate that it has chosen not to apply to millions of employees nationwide. As in *O Centro*, where government exclusions applied to "hundreds of thousands" (here, tens of millions), RFRA requires "a similar exception for the [hundreds] or so" implicated by plaintiffs here. *Id.* at 433.

Finally, the government cannot satisfy the compelling interest prong by asserting its interests generically ("health" and "equality"). *O Centro*, 546 U.S. 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"). Nor can it fail to offer compelling *evidence* that grave harm will be caused by exempting Plaintiffs. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011) (the government must "specifically identify an 'actual problem' in need of solving," show that coercing the plaintiff is "actually necessary to the solution," show a "caus[al]" nexus, "bear[] the risk of uncertainty" and avoid "ambiguous proof"). Generic evidence that contraception benefits women does not prove that this particular Mandate is needed against religious objectors. Despite 28 similar state mandates, the government has cited zero evidence—not one study—showing that even a single state mandate yielded health and equality benefits, much less that one did so more than "marginal[ly]." *See id.* at 2741.

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

The Mandate is also not the least restrictive means of furthering the cited 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. For example, the government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical companies to provide such products free of charge. The government *already* subsidizes contraception extensively.[10] In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to achieve the goal.

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.*

[10] *See, e.g.,* Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74 (125 Stat 786, 1080); the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; 42 U.S.C. § 247b-12; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13, 42 U.S.C. § 2001(a), & 25 U.S.C. § 1601, et seq.; Health center grants, 42 U.S.C. § 254b(e), (g), (h), & (i); the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

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 Enters.*, 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). Plaintiffs are today being coerced to provide health coverage that violates their religious beliefs in order to avoid crippling penalties. Plaintiffs have no adequate remedy at law. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 589 (internal citations omitted). Enjoining the Mandate would cause no harm to Defendants, who have no legitimate interest in infringing Plaintiffs' rights. *See Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). No harm exists where the government is voluntarily omitting 2/3 of the nation from its Mandate by its exceptions, and has granted its own equivalent of a preliminary injunction to thousands more non-profits who meet the non-enforcement "safe harbor." Enjoining application of the Mandate will impose no monetary requirements on Defendants, so no bond should be required of Plaintiffs. *See* Fed. R. App. P. 8(a)(2)(E).

CONCLUSION

Plaintiffs request that this Court grant this motion 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 10th day of January, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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