UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

GROTE INDUSTRIES, LLC, an Indiana limited liability company,
GROTE INDUSTRIES, INC., an Indiana corporation,
WILLIAM D. GROTE, III,
WILLIAM DOMINIC GROTE, IV,
WALTER F. GROTE, JR.,
MICHAEL R. GROTE,
W. FREDERICK GROTE, III, and
JOHN R. GROTE,

Plaintiffs,

v. Civil Action No. 4:12-cv-134-SEB-DML

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

STATEMENT OF ISSUES

Can the federal government force Plaintiffs to provide insurance coverage for their employees that include contraception, sterilization, and abortifacients, and education and counseling related thereto, despite the valid religious objections of the Plaintiffs to such services?

Does the Defendants' mandate substantially burden Plaintiffs' religious beliefs and fail to satisfy the strict scrutiny required under the Religious Freedom Restoration Act, the First and Fifth Amendments to the United States Constitution, or the Administrative Procedure Act where Defendants, among other reasons: 1) do not exempt Plaintiffs from the requirement but have exempted tens of millions of other Americans; 2) stayed enforcement against many others; and 3) could pursue, and already do pursue, the less restrictive means of directly delivering the drug items at issue here?

Table of Authorities

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This action arises because the federal government has recently determined that certain employers must provide insurance coverage for their employees that include contraception, sterilization, and abortifacients, despite the valid religious objections of the employers to such services. Grote Industries is a family owned business whose owners object to providing such coverage, because the coverage requires them to provide services that violate their sincerely held religious beliefs. As Catholics, the Grote family believes that it would be sinful and immoral for them to provide insurance coverage for abortifacient drugs, contraception, or sterilization to their employees. Defendants have already been the subject of a preliminary injunction against this mandate, so as to protect a company owned by religious believers. *See Newland v. Sebelius*, 2012 WL 3069154 (D. Colo. July 27, 2012).

Defendants' mandate of insurance coverage subjects Grote to draconian penalties, including lawsuits by Defendant Secretary of Labor as well as fines and penalties accruing in the millions. Forcing Grote to choose between its faith and such penalties is a blatant violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (RFRA), the First and Fifth Amendments to the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. Defendants cannot satisfy the strict scrutiny required under RFRA and these laws. Defendants "completely undermine[d]" their alleged interests by exempting tens of millions of Americans and staying enforcement against many others, *Newland*, 2012 WL 3069154 at *7–*8, yet they refuse to exempt Grote. And the government could pursue, and

already does pursue, the less restrictive means of directly delivering the drug items at issue here. *Id.*

Grote is faced with imminent harm under Defendants' mandate. Immediate injunctive relief is needed to protect Grote's religious freedom and preserve the status quo.

FACTUAL BACKGROUND

As is set forth in Plaintiffs' Verified Complaint (which is evidentiary support for this motion), Plaintiffs William D. Grote, III; William Dominic Grote, IV; James L. Braun; Michael R. Grote; W. Frederick Grote, III; and John R. Grote ("the Grote Family") are practicing and believing Catholic Christians. (Verified Complaint, ¶¶ 2, 18-23). The Grote Family owns and operates Plaintiffs Grote Industries, Inc. and Grote Industries, LLC ("Grote Industries") a privately held, for profit business manufacturing vehicle safety systems, headquartered in Madison, Indiana.[1] (Verified Complaint, ¶¶ 3, 16-17, 24). Grote currently has approximately 464 full-time employees in the United States. (Verified Complaint, ¶ 3).

The Grote Family seeks to run Grote Industries in a manner that reflects their sincerely held religious beliefs. (Verified Complaint, ¶¶ 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. (Verified Complaint ¶ 40). The Grote Family, based upon these sincerely held religious

[1] Unless context indicates otherwise, throughout this Brief "Grote" refers collectively to the Grote Family and Grote Industries.

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. (Verified Complaint, ¶¶ 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. (Verified Complaint, ¶¶ 5, 38-39). As a consequence, the Grote Family provides health insurance benefits to their employees that omits coverage of abortifacient drugs, contraception, and sterilization. (Verified Complaint, ¶¶ 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 occurring on January 1, 2013. (Verified Complaint, ¶¶ 6, 46-47). Grote and its owners adhere to the centuries-old biblical view of Christians around the world, that every human being is made in the image and likeness of God from the moment of its conception/fertilization, and that to help destroy such an innocent being, including in the provision of coverage in health insurance, would be an offense against God. (Verified Complaint, ¶ 5).

With full knowledge that many religious citizens hold the same or similar beliefs, in February 2012, the Defendants finalized rules through the Departments of HHS, Labor and Treasury that force Plaintiffs to pay for and otherwise facilitate the insurance

coverage and use of abortifacient drugs, contraception, sterilization and related education and counseling. [2] (Verified Complaint, ¶ 7).

The Mandate applies to Plaintiffs solely because they wish to operate their business in the United States of America. As have many entities organized by people of faith, the Grote Family has concluded that compliance with the Mandate would require them to violate their deeply held religious beliefs they believe are decreed by God Himself through His Church, and to contribute through society through business in a way that is consistent with their religious ethics, deeply held religious beliefs, and the moral teachings of the Catholic Church. (Verified Complaint, ¶¶ 8, 9).

As set forth in detail below, Defendants' refusal to accommodate Grote's conscience is highly selective. PPACA expressly exempts a variety of health plans from the Mandate, and the government has provided thousands of specific exemptions from the PPACA for various entities such as large corporations. (Verified Complaint, ¶¶ 79-91). However, Grote is not exempt from the Mandate and is therefore left with a choice of complying with the Mandate in violation of their religious beliefs or ignoring the Mandate and facing substantial penalties. (Verified Complaint, ¶¶ 62-66).

[2] The rules in question are collectively referred to hereinafter as the "Preventive Services Mandate" or the "Mandate." The Mandate consists of a conglomerate of authorities, including: "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," 77 Fed. Reg. 8725–30 (Feb. 15, 2012); the prior interim final rule found at 76 Fed. Reg. 46621–26 (Aug. 3, 2011) which the Feb. 15 rule adopted "without change"; the guidelines by Defendant HHS's Health Resources and Services Administration (HRSA), http://www.hrsa.gov/womensguidelines/ , mandating that health plans include no-cost-sharing coverage of "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" as part of required women's "preventive care"; regulations issued by Defendants in 2010 directing HRSA to develop those guidelines, 75 Fed. Reg. 41726 (July 19, 2010); the statutory authority found in 42 U.S.C. § 300gg-13(a)(4) requiring unspecified preventive health services generally, to the extent Defendants have used it to mandate coverage to which Plaintiffs and other employers have religious objections; penalties existing throughout the United States Code for noncompliance with these requirements; and other provisions of PPACA or its implementing regulations that affect exemptions or other aspects of the Mandate.

The Patient Protection and Affordable Care Act of 2010 (PPACA) requires employers with over 50 full-time employees to provide a certain minimum level of health insurance to their employees. (Verified Complaint, ¶ 50). PPACA requires health plans to include coverage of preventive health services at no cost-sharing to patients, but does not define what is includes in those services. 42 U.S.C. § 300gg-13(a)(4). Defendants issued regulations ordering HHS's Health Resources and Services Administration (HRSA) to decide what would be mandated as women's preventive care. 75 Fed. Reg. 41726–60 (July 19, 2010). HRSA issued such guidelines in July 2011, mandating coverage of "All 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," *available at* http://www.hrsa.gov/womensguidelines/.

Within the category of "FDA-approved contraceptives" which must be covered under the Mandate are several drugs or devices that may cause the demise of an already-conceived-but-not-yet-implanted human embryo, such as "emergency contraception" or "Plan B" drugs (the so-called "morning after" pill). Also included is the drug "ella" (the so-called "week after" pill), which studies show can function to kill embryos even after they have implanted in the uterus, by a mechanism similar to the abortion drug RU-486. The manufacturers of some such drugs, methods and devices in the category of "FDA-approved contraceptive methods" indicate that they function to cause the demise of an early human embryo. (Verified Complaint, ¶¶ 54-56). The Mandate also requires group health care plans to pay for the provision of counseling, education, and other information concerning contraception (including devices and drugs

such as Plan B and ella that cause early abortions or harm to human embryos) and sterilization for all women beneficiaries who are capable of bearing children. (Verified Complaint, ¶ 57).

To Grote and its owners, this coverage is not morally different than surgical abortion. Defendants have now mandated that the Grotes violate their deeply held religious beliefs by immediately inserting coverage of abortifacients (and education and counseling in favor of the same) into the employee health plan. This is something Grote cannot comply with in good conscience. (Verified Complaint, ¶ 9).

The Mandate applies to the first health insurance plan-year beginning after August 1, 2012. (Verified Complaint, ¶ 58). As a result, Grote will be required to provide coverage of the above-described items consistent with the Mandate starting with Grote Industries' January 1, 2013 plan. (Verified Complaint, ¶ 92). Grote cannot avoid the Mandate by simply refusing to provide health insurance to its employees, because the PPACA imposes monetary penalties of approximately $2,000 per employee per year on entities that would so refuse. PPACA would also impose monetary penalties of approximately $100 per day per employee if Grote Industries were to continue to offer its self-insured plan but continued to omit abortifacients, contraceptives and sterilization from coverage under that plan. (Verified Complaint, ¶¶ 62-65). In addition, if Grote does not submit to the Mandate it could be subject to a range of enforcement mechanisms that exist under ERISA, including but not limited to civil actions by the Secretary of Labor or by plan participants and beneficiaries, which would include but not be limited to relief in the form of judicial orders mandating that the Grote Family and Grote Industries violate their sincerely held religious beliefs and

provide coverage for items to which they have a religious objection. (Verified Complaint, ¶ 66).

This Court is the only recourse to protect Grote and its owners from the Mandate's assault on the religious freedom. Otherwise, Grote has no adequate remedy at law. (Verified Complaint, ¶ 98). It faces immediate threat of the Mandate's penalties, and endangerment of its employees' health plan, unless this Court orders preliminary injunctive relief as soon as possible. Grote is suffering irreparable harm by Defendants' coercion, which blatantly violates longstanding religious conscience, speech and other protections found in federal statutes and the constitution.

ARGUMENT

In order to obtain a preliminary injunction, Grote is required to "show that its case has some likelihood of success on the merits and that it has no adequate remedy at law and will suffer irreparable harm if an injunction is denied. *Stuller, Inc. v. Steak N Shake Enterprises*, 2012 U.S. App. Lexis 17921 at *5 (7th Cir. Aug. 24, 2012), *quoting Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). If Grote meets these threshold requirements, then the Court must balance the harm Grote would suffer without an injunction against the harm Defendants would suffer if the injunction were granted and consider whether an injunction is in the public's interest. *Stuller, supra*. When balancing the harms, "the court weighs these factors against one another in a sliding scale analysis . . . which permits district courts to weigh the competing considerations and mold appropriate relief." Id. at *6. Grote meets all of these requirements and is therefore entitled to a preliminary injunction.

I. GROTE IS LIKELY TO SUCCEED ON THE MERITS.

A. THE MANDATE VIOLATES THE RELIGIOUS FREEDOM RESTORATION ACT.

Congress passed RFRA to subject government burdens on religious exercise to "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)." 42 U.S.C. § 2000bb(b)(1); *see generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 431 (2006) (describing origin and intent of RFRA, 42 U.S.C. § 2000bb *et seq.*). Under RFRA, the federal government may not "substantially burden" a person's exercise of religion unless the government "'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (quoting 42 U.S.C. § 2000bb-1(b)). Once a plaintiff demonstrates a substantial burden on his religious exercise, RFRA requires that the compelling interest test be satisfied not generically, but with respect to "the particular claimant." *O Centro*, 546 U.S. at 430–31.[3]

1) GROTE'S ABSTENTION FROM PROVIDING CONTRACEPTION AND ABORTION-INDUCING DRUGS IN ITS EMPLOYEE HEALTH CARE COVERAGE QUALIFIES AS "RELIGIOUS EXERCISE" UNDER RFRA.

RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A). A plaintiff's "[r]eligious belief must be sincere to be protected by the First Amendment, but it does not have to

[3] The government's burden to satisfy strict scrutiny under RFRA is the same at the preliminary injunction stage as at trial. *See O Centro*, 546 U.S. at 429-30 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

be orthodox." *Cf*. *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) (applying same standard under Free Exercise Clause).

To *refrain* from morally objectionable activity is part of the exercise of religion. The "exercise of religion" encompasses a belief that one must avoid participation in certain acts. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (explaining under the Free Exercise Clause that that "the 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts"). Thus, a person exercises religion by *avoiding* work on certain days (*see Sherbert*, 374 U.S. at 399), or by *refraining* from sending children over a certain age to school (*see Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972)). *See* 42 U.S.C. § 2000bb(b)(1) (incorporating *Sherbert* and *Yoder* in RFRA). Similarly, a person's religious convictions may compel her to *refrain* from facilitating prohibited conduct by others. *See, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 714–16 (1981) (recognizing religious exercise in refusing to "produc[e] or directly aid[] in the manufacture of items used in warfare"). As the Seventh Circuit has held, a substantial burden on religious exercise "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack v. O'Leary,* 80 F.3d 1175, 1179 (7th Cir.1996) (vacated on other grounds).

As explained above, the Grote Family seeks to run Grote Industries in a manner that reflects their sincerely held religious beliefs. The Grote Family bases its beliefs on the teachings of the Catholic Church, and therefore believes that God requires respect

for the sanctity of human life and for the procreative and unitive character of the sexual act in marriage. As a result, 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. To offer such coverage through its employee insurance policy would violate Grote's faith. As a self-insurer, if Grote's plan covered abortifacient drugs, contraception and sterilization procedures, Grote itself would be buying those items for its employees, in clear violation of its sincerely held religious beliefs. Therefore, Grote's abstention from doing what the mandate requires qualifies as "religious exercise" within the meaning of RFRA.

a. Grote Industries can exercise religious beliefs.

In several lawsuits against the Mandate, the government has argued that a for-profit entity is categorically incapable of exercising religion. This position is flawed on a number of levels. First, "free exercise of religion" in RFRA, and in the First Amendment that RFRA explicitly seeks to enhance, has always been recognized as including the exercise of religion in all areas of life, including in business and "profitable" enterprise. There is simply no "business exception" to RFRA to the First Amendment. RFRA protects "any" exercise of religion. 42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A); *see also United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004) (Quaker Church's refusal to levy its employee's wages was an exercise of religion under RFRA). The government's proposal that a business corporation has no capability to exercise religion is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d

844, 850 (Minn. 1985). Both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009), and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988), recognized that a for-profit and even "secular" corporation could assert free exercise claims.

The government's premise seems to be that one cannot exercise religion while engaging in business. But judicially the context of free exercise has usually involved the pursuit of financial gain. In *Sherbert*, 374 U.S. at 399, and *Thomas*, 450 U.S. at 709, an employee's religious beliefs were burdened by not receiving unemployment benefits. In *United States v. Lee*, 455 U.S. 252, 257 (1982), the Court held an employer's religious beliefs were sufficiently burdened by paying taxes for workers so as to require the government to justify its burden. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999), an employee's bid to continue his employment was burdened by discriminatory grooming rules. Many other cases have recognized that business corporations can exercise religion. *Roberts v. Bradfield*, 12 App. D.C. 453, 464 (D.C. Cir. 1898) (recognizing that the right of "free exercise of religion" inheres in "an ordinary private corporation"). *See also Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D.N.Y. 2011) (analyzing free exercise claims without regard to profit motive); *Maruani v. AER Services, Inc.*, 2006 WL 2666302 (D. Minn. 2006) (analyzing religious First Amendment claims by a for-profit business); *Morr-Fitz, Inc. et al. v. Blagojevich*, No. 2005-CH-000495, slip op. at 6–7, 2011 WL 1338081 (Ill. Cir. Ct. 7th, Apr. 5, 2011) (ruling in favor of the free exercise rights of three pharmacy corporations and their owners). A court analyzing a free exercise claim does not ask whether the claimant is the right category of person; it asks "whether [the challenged

statute] abridges [rights] that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Congress has rejected the government's restrictive view in many ways. PPACA itself lets employees and "facilit[ies]" assert religious beliefs for or against "provid[ing] coverage for" abortions generally, without requiring them to be non-profits. 42 U.S.C. § 18023. Congress has repeatedly authorized similar objections, including to contraceptive insurance coverage.[4] These protections cannot be reconciled with the government's view that anything connected with commerce excludes religion.

Second, the government has tended to confuse the protection of "any" "exercise of religion" under RFRA, with narrower categories such as "religious employer" in Title VII employment discrimination. See 42 U.S.C. § 2000e–1(a). This argument cannot help the government in this case, for two reasons. Initially, the text Congress used in RFRA did not limit its protections to a "religious corporation, association, or society" as stated in its previously enacted statute of Title VII. Congress instead protected the "exercise of religion," period, by anyone. To read a "religious employer" limit into RFRA would violate the text of the statute. RFRA protects "free exercise of religion," which does not turn on whether the plaintiff is a "religious corporation."

Third, to the extent that the government might argue RFRA only protects religious exercise by "persons," and that persons do not include corporations, this argument contradicts clear Supreme Court precedent. "First Amendment protection

[4] *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727; *id.* at Title VIII, Div. C, § 808; *see also* 42 U.S.C. § 300a-7; 42 U.S.C. § 2996f(b)(8); 20 U.S.C. § 1688; 42 U.S.C. § 238n; 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); and Pub. L. 112-74, Title V, § 507(d). See also 48 C.F.R. § 1609.7001(c)(7).

extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010). The lead plaintiff in *O Centro* itself was an entity rather than a natural person, and the Supreme Court vindicated free exercise rights on behalf of an entity in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.520 (1993) (emphasis added). In fact, Courts have frequently recognized that constitutional rights apply to corporations. The Seventh Circuit has expressly recognized that "a corporation, rather than a natural person" may assert a First Amendment right. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 826 n. 2 (7th Cir. 1999). "[I]t is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978). "That corporations are in law, for civil purposes, deemed persons is unquestionable." *United States v. Amedy*, 24 U.S. 392, 11 Wheat. 392 (1826). "[C]orporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006). It must be presumed that when Congress passed RFRA to build on the First Amendment's protection of free exercise of religion, it was aware of the centuries-old judicial interpretation that corporations are "persons" with constitutional rights. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation . . . ." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975))). If for-profit corporations can have no First Amendment "purpose," this would overturn the Supreme

Court's vindication of First Amendment rights for for-profit companies such as the New York Times. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

b. Grote's religious owners can exercise religion under RFRA.

Grote can and is bringing free exercise of religion claims on behalf of not only itself but its religious owners. The Grote Family owns Grote Industries. The Grote Family runs Grote Industries consistent with the religious beliefs of the individual family members. Therefore, the rights of the Grote Family are at stake here, just as much as the religious beliefs of Grote Industries.

Several cases recognize a corporation can assert religious beliefs on behalf of its owners when the government requires the corporation to do things in violation of the owners' religious beliefs. This is because a business is an extension of the moral activities of its owners and operators. Both *Stormans*, 586 F.3d at 1119–20 & n.9, and *Townley*, 859 F.2d at 620 n.15, affirm that the owners of a for-profit, "secular" corporation had their religious beliefs burdened by regulation of that corporation, and that the corporation could sue on behalf of its owners to protect those beliefs. *See also McClure*, 370 N.W.2d at 850.

2) THE MANDATE IMPOSES A SUBSTANTIAL BURDEN ON THE RELIGIOUS BELIEFS OF GROTE INDUSTRIES AND ITS OWNERS.

Not only does the Mandate burden Grote's and its owners' exercise of religious beliefs, but the burden is substantial. The government "substantially burdens" religious exercise when it puts "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Thomas*, 450 U.S. at 718; see also *Mack v. O'Leary,* 80 F.3d 1175, 1179 (7th Cir.1996) (vacated on other grounds) (holding that a substantial burden on religious exercise "is one that forces adherents of a religion to refrain from religiously

motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs"). The mandate requires Grote to provide employees with insurance coverage that Grote and its owners believe violate their religious beliefs. If Grote continues to offer insurance lacking the mandated coverage, as it has for years, it faces a penalty of $100 per day per employee, as well as the prospect of lawsuits by the Defendant Secretary of Labor and by its own plan participants. 26 U.S.C. § 4980D(a), (b) (financial penalties); 29 U.S.C. § 1132(a) (providing for civil enforcement actions by the Secretary of Labor, as well as by plan participants). Alternatively, if Grote ceased offering employee insurance altogether, this would not only harm its 464 employees but subject it to an annual assessment of $2,000 per employee. 26 U.S.C. § 4980H. Thus the Mandate forces Grote and its owners to choose between violating their sincerely held beliefs and religious integrity and subjecting themselves to substantial fines and competitive disadvantages.

To call these burdens "substantial" is an understatement. The Supreme Court has struck down religious burdens far less dramatic. For instance, *Sherbert* involved a plaintiff who was not required to work on the Sabbath, but was merely denied unemployment benefits for refusing such work, and the Court deemed this an "unmistakable" substantial pressure on the plaintiff to abandon that observance. 374 U.S. at 404 (reasoning that the law "force[d] [plaintiff] 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," and that "the pressure on her to forego that practice is unmistakable"); *see also Thomas*, 450 U.S. at

717–18 (finding burden on religious exercise "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith. . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). *Sherbert* and *Thomas* therefore declared even "indirect" pressure to be a substantial burden. *See Thomas*, 450 U.S. at 718 (explaining "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

With "direct" pressure, the Supreme Court has been even more exacting. For instance, *Yoder* struck down a *five dollar fine* on Amish parents for not sending their children to high school. The Court reasoned that "[t]he [law's] impact" on religious practice was "not only severe, but inescapable, for the. . . law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. This exactly describes the Mandate on its face: it "affirmatively compels" Grote, under threat of severe consequences—lawsuits by the Defendants, fines, regulatory penalties, a prohibition on providing employee health benefits, competitive disadvantage—"to perform acts undeniably at odds with the fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. Grote could avoid this steep price, of course, by abandoning its religious convictions. But this puts Grote squarely within the definition of "substantial burden" set forth in Thomas because it faces substantial pressure to modify its behavior and violate its beliefs.

Defendants themselves have acknowledged the extent of this burden. The Mandate contains an exemption for certain churches and religious orders, in order to "take[] into account the effect on the religious beliefs of certain religious employers." 76

Fed. Reg. at 46623. And both Defendant Sebelius and President Obama have publicly recognized that the Mandate burdens religious believers. In her January 20 announcement previewing the one-year safe harbor, Secretary Sebelius stated that the extension "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services."[5] Likewise, in his February 10 press conference President Obama acknowledged that religious liberty is "at stake here" because some institutions "have a religious objection to directly providing insurance that covers contraceptive services."[6] The President explained that this religious liberty interest is why "we originally exempted all churches from this requirement." Finally, the basic premise of the Defendants' most recent rule-making on the Mandate is to explore alternate insurance arrangements that would avoid burdening religious organizations' consciences. *See* 77 Fed. Reg. 16501, 16503. These statements candidly acknowledge that coercing religious objectors substantially burdens their religious exercise.[7]

The United States District Court for the District of Colorado ruled that the Mandate threatens a substantial burden on the religious beliefs of a for-profit company run by religious believers, such that a preliminary injunction is warranted. *Newland v. Sebelius*, 2012 WL 3069154 at *6 (D. Colo. July 27, 2012). A court in Missouri

[5] The Secretary's statement regarding the one-year extension can be found at: http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited October 6, 2012).

[6] A transcript of the President's remarks is available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited October 6, 2012).

[7] Congress has elsewhere recognized the need to accommodate the same burden. *See, e.g.,* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, Title VII, Div. C, § 727 (protecting religious health plans in the federal employees' health benefits program from being forced to provide contraceptive coverage); *id.* at Title VIII, Div. C, § 808 (affirming that the District of Columbia must respect the religious and moral beliefs of those who object to providing contraceptive coverage in health plans).

disagreed, however, and accepted the government's argument that health insurance provision of abortion-inducing pills, contraception or sterilization is not a substantial burden. *O'Brien v. U.S. Dep't of Health & Human Srvs.*, 2012 WL 4481208 (E.D. Mo. 2012). The *O'Brien* decision is both incorrect and inapplicable to Grote.

O'Brien found that payment into a health insurance plan that covers objectionable practices is merely "indirect financial support of a practice," in contrast to "directly and inevitably prevent[ing] plaintiffs from acting in accordance with their religious beliefs." *Id.* at *6. This is not factually true regarding Grote, because while the plaintiff in *O'Brien* paid an insurance company, Grote's health plan is self-insured. The Mandate is forcing Grote to directly pay for objectionable items itself, not to pay an external insurance company for coverage—there is no factual separation from the payment. And Grote contends that being forced to provide insurance coverage for the objectionable items— not merely their use—is a violation of their religious beliefs. More fundamentally, *O'Brien* is an impermissible judicial decision of moral theology: a determination that promotion of contraception and abortifacients is morally acceptable if it is not *too* proximate. The Supreme Court rejected the same attempt in *Thomas*, where the government claimed the armament manufacturing activity to which the plaintiff objected was "sufficiently insulated" from his objection to war. 450 U.S. at 715. "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.*

O'Brien likewise contradicts *U.S. v. Lee*, which explicitly held that the for-profit religious plaintiff had met its showing to establish a sufficient burden on its religious beliefs to support a free exercise of religion claim. 455 U.S. at 257. In doing so, the

Court rejected the government's attempt to insist that there was no substantial burden on "the integrity of the Amish religious belief or observance." *Id.* Instead the Supreme Court found the burden sufficiently "interferes with the free exercise rights of the Amish." *Id.* *Lee* said that for the Court to conclude that the burden on the plaintiff did not sufficiently violate the faith in order to satisfy a free exercise claim would require an interpretation of faith that is "not within 'the judicial function and judicial competence'" *Id.* (quoting *Thomas*, 450 U. S. at 716). *O'Brien*'s attempt to judge between different levels of moral culpability is incompatible with the Supreme Court's definition of substantial burden, which does measure the religious beliefs, but the "pressure" the government applies against those beliefs. *Thomas*, 450 U.S. at 718. As explained above, the Mandate here explicitly orders a violation of beliefs and imposes intense penalties as direct pressure to force Grote do so.

The Mandate here is even more proximate than the substantial burden found in *Lee*, because here Grote must provide objectionable coverage directly to other private citizens, whereas in *Lee* the plaintiffs sent the money to a multi-trillion dollar budget in Washington. Likewise, the argument that there is no substantial burden on Grote because it is merely being required to provide insurance coverage for sterilization, birth control, and abortifacient drugs, while the objectionable items are actually purchased by Grote's employees, not Grote, is a theological distinction that does not reduce the extent of the burden on religious exercise. *O'Brien* would constrain free exercise to "ritual," the "Sabbath" and child-rearing, but would allow the government to coerce believers to help other people engage in objectionable activities. *O'Brien*, 2012 WL 4481208 at *6. This idea severely constricts the First Amendment and RFRA (which

protects "any" free exercise of religion, not merely freedom of worship). Instead, *Lee* requires that the Court recognize a sufficient burden showing and apply the applicable scrutiny level, which is strict scrutiny under RFRA and *O Centro*.

The government is also foreclosed from arguing that merely because a corporation provides its owners limited liability, there is no religious burden on the owners. That conclusion does not follow. Limited liability is merely one characteristic of a business corporation, and it is not the morally relevant one here. Grote's religious owners have adopted beliefs that make it immoral for them to implement the Mandate's commands through the entity they own for religious purposes. This is why *Stormans* and several other cases concluded matter-of-factly that a government burden on a business corporation is a burden on its close holding family owners and directors. 586 F.3d at 1119–20; *McClure*, 370 N.W.2d at 850; *Jasniowski*, 678 N.E.2d at 749; *Morr-Fitz, Inc.*, No. 2005-CH-000495, slip op. at 6–7. Limited liability is not a talisman by which the government may trample on the religious beliefs of business owners.

3) THE MANDATE CANNOT SATISFY STRICT SCRUTINY.

Defendants cannot establish that their coercion of Grote is "in furtherance of a compelling governmental interest." RFRA, with "the strict scrutiny test it adopted," *O Centro Espirita*, 546 U.S. at 430, imposes "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Defendants cannot satisfy strict scrutiny by showing a generalized interest "in the abstract," but instead must show a compelling interest "in the circumstances of this case" by looking at the particular "aspect" of the interest as "addressed by the law at issue." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000); *O Centro Espirita*, 546 U.S. at 430–32 (RFRA's test can only be satisfied "through application of the challenged law 'to the person'—the particular claimant"); *see also Lukumi,* 508 U.S. at 546 (rejecting the assertion that protecting public health was a compelling interest "in the context of these ordinances"). The government must "specifically identify an 'actual problem' in need of solving" and show that coercing Grote to comply with the law in violation of its religious beliefs is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). If Defendants' "evidence is not compelling," they fail their burden. *Id.* at 2739. To be compelling, the government's evidence must show not merely a correlation but a "caus[al]" nexus between their Mandate and the grave interest it supposedly serves. *Id.* The government "bears the risk of uncertainty . . . ambiguous proof will not suffice." *Id.*

Defendants' interest in coercing Grote to provide coverage of contraception, sterilization, and abortifacients is not compelling. In other cases the government has attempted to identify two interests—women's health and equality by reducing unintended pregnancy—as justifying the Mandate under RFRA. But these interests are generic and abstract. In *O Centro Espirita*, the Court held evidence to be insufficient showing that Schedule I controlled substances were "extremely dangerous," because that "categorical" support could not meet the government's RFRA burden to consider the "particular" exception requested by Grote. *Id.* at 432.

The simple fact is that even if contraception and abortifacient drugs are assumed to provide health and equality to women, Defendants have not shown a compelling interest to deliver those benefits by means of coercing Grote to do so. As discussed below, the government already delivers and subsidizes contraception and abortifacients to women and could do so here as well without forcing Grote to do it.

a. Defendants cannot identify a compelling interest.

The most striking obstacle to Defendants' assertion of a compelling interest is that the government itself has voluntarily omitted 191 million people from the Mandate. *Newland*, 2012 WL 3069154 at *1. This amounts to nearly two-thirds of the nation, and is being offered by the government for secular reasons.

The Mandate does not apply to thousands of plans that are "grandfathered" under PPACA. See 76 Fed. Reg. at 46623 & n.4. Also, the Mandate does not apply to members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds. 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii). And the Mandate exempts from its requirements "religious employers," defined as churches or religious orders that primarily hire and serve their own adherents and that have the purpose of inculcating their values. 76 Fed. Reg. at 46626. The federal government has decided that employers in any of these categories simply do not have to comply with the Mandate.

These are massive exemptions that belie any claim that the government has a compelling interest in coercing Grote to violate its religious beliefs. "[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 520.

Defendants cannot claim a "grave" or "paramount" interest to impose the Mandate on Grote or other religious objectors while allowing the identical "appreciable damage" to 191 million people. No compelling interest exists when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id*. at 546–47. The exemptions to the Mandate "fatally undermine[] the Government's broader contention that [its law] will be 'necessarily . . . undercut'" if Grote is exempted too. *O Centro Espirita*, 546 U.S. at 434.

Defendants' immense grandfathering exemption has nothing to do with a determination that those 191 million exempted people do not need contraceptive coverage, whereas Grote's employees somehow do. The exemption was instead a purely political maneuver to garner votes for PPACA by letting "President Obama ma[k]e clear to Americans that 'if you like your health plan, you can keep it.'"[8] The grandfathering rule is in no way temporary. There is no sunset on grandfathering status in PPACA or its regulations. Instead, a plan can keep grandfathered status in perpetuity, even if it raises fixed-cost employee contributions and, for several items, even if the increases exceed medical inflation plus 15% every year. *Id.* The government repeatedly calls it a "right" for a plan to maintain grandfathered status. See 75 Fed. Reg. 34,538, at 34,540, 34,558, 34,562, & 34,566.

Notably, grandfathered plans *are* subject to a variety of mandates under PPACA: no lifetime limits on coverage; extension of dependent coverage to age 26; no

[8] HHS, HealthCare.Gov, "Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans," *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited October 5, 2012).

exclusions for children with pre-existing conditions; and others.[9] But Congress deemed the insurance Mandate at issue here *not important enough* to impose it on grandfathered plans. Defendants therefore contradict the text of PPACA when they take a litigation position, contrary to Congress, that the Mandate of abortifacient coverage is an interest "of the highest order."

The flaw of Defendants' supposed compelling interest is even more fatal here because Grote is a large employer of 464 employees and, according to Defendants, "[m]ost of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today." *Id.* In other words, Defendants have voluntarily excluded most Americans situated alongside the employees of Grote. They cannot demonstrate they have a paramount interest to force Grote to comply with the Mandate in violation of its beliefs. Defendants are completely content to leave 2/3 of the nation's women without "health and equality" flowing from this Mandate. Yet they would insist those same interests can pass the most demanding test known to constitutional law. They cannot. If the government can toss aside such a massive group of employees for political expediency, their "interest" in mandating cost-free birth control coverage cannot possibly be "paramount" or "grave" enough to justify coercing Grote to violate its and its owners' religious beliefs. *See O Centro Espirita*, 546 U.S. at 434 ("Nothing about the unique political status of the [exempted peoples] makes their members immune from the health risks the Government asserts").

In *O Centro Espirita*, the Supreme Court held that no compelling interest existed behind a law that had a much more urgent goal—regulating extremely dangerous

[9] HealthCare.Gov, *supra* note 10.

controlled substances—and that had many fewer exemptions than the broad swath of omissions from the Mandate. In that case the Court dealt with the Controlled Substances Act's prohibition on "all use," with "no exception," of a hallucinogenic ingredient in a tea, along with other Schedule I substances. 546 U.S. at 423, 425. But because elsewhere in the statute there was a narrow religious exemption for Native American use of a different substance, peyote, the Court held that the government could not meet its compelling interest burden even in its generalized interest to regulate Schedule I substances as applied to the plaintiffs in that case. *Id.* at 433. Even more so here, the government cannot satisfy its burden by pointing to general health benefits of contraception. Halting the use of extremely dangerous drugs is far more urgent than forcing religious objectors to provide contraception coverage. Defendants' grant of secular and religious exemptions for millions of other employees betrays any alleged compelling interest they may have in forcing Grote and its owners to comply with the Mandate against their religious beliefs.

The government cannot satisfactorily explain why employees of Grote must be subject to its Mandate while the government itself voluntarily omits 191 million people. The government has no data showing how many religious employers objecting to the Mandate exist, but their total number of employees could constitute only a fraction of a percent of the tens of millions of employees the government is voluntarily omitting. This is a quintessential illustration of *Brown v. Entm't Merchs.*'s insistence that the "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." 131 S. Ct. at 2741. As in *O Centro*, where government

exclusions apply to "hundreds of thousands" (here, millions), RFRA requires "a similar exception" for the comparatively few people affected here. 546 U.S. at 433.

The Mandate on its face also is inconsistent with a compelling interest rationale. Defendants have used their discretion to write a "religious employer" exemption into the Mandate for certain churches. 76 Fed. Reg. at 46626. But there is no nexus between the Mandate exemption's criteria and Defendants' alleged interest, such that a compelling interest exists for non-exempt religious entities like Grote but is absent for exempt ones like churches. On the contrary, Defendants have simply engaged in political line-drawing based on what the president's political base will accept, weighed against how much election-year resistance he may encounter.[10] Under RFRA, Grote cannot be denied a religious exemption on the premise that Defendants can pick and choose between religious objectors. *See O Centro Espirita*, 546 U.S. at 434 (since the law does "not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider" other exemptions).

b. There is no "business exception" to RFRA's compelling interest test.

In other cases the government has attempted to use *United States vs. Lee* to characterize RFRA's scrutiny as not being very strict in commercial contexts. But *O Centro Espirita* does not allow the Court to apply a "strict scrutiny lite" for a business RFRA claim, or indeed for any RFRA claim. "[T]he compelling interest test" of "RFRA challenges should be adjudicated in the same manner as constitutionally mandated

[10] The New York Times describes in great detail the politically-driven deliberation that led to the Mandate. Helene Cooper & Laurie Goodstein, "Rule Shift on Birth Control Is Concession to Obama Allies" (Feb. 10, 2012), *available at* http://www.nytimes.com/ 2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html?pagewanted=all (last visited Oct. 6, 2012).

applications of the test," such as in speech cases. 546 U.S. at 430. *O Centro* explicitly limited *Lee* to its context of a tax that was nearly universal, and the court did not allow the government to claim "that a general interest in uniformity justified a substantial burden on religious exercise." *Id.* at 435.

Lee does discuss "statutory schemes which are binding on others in that activity." 455 U.S. at 261. But the Mandate here is emphatically not "binding on others in th[e] activity" of large employers providing insurance. Whereas *Lee*'s tax contained only a tiny exemption for some Amish, the Mandate here excludes:

- 191 million Americans in "grandfathered" plans are not subject to the Mandate, including "most" large employers, of which Grote is one. "Keeping the Health Plan You Have," *supra* note 8.
- Members of certain objecting religious groups need not carry insurance at all. *See*, *e.g.*, 26 U.S.C. § 5000A(d)(2)(a) ("recognized religious sect or division"); *id.* § 5000A(d)(2)(b)(ii) ("health care sharing ministries").
- Small employers (*i.e.*, those with fewer than 50 employees) can drop employee insurance with no government penalty. 26 U.S.C. § 4980H(c)(2).
- Churches, church auxiliaries, and religious orders enjoy a blanket exemption from the mandate. 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).
- Certain religiously affiliated non-profits were recently given an additional year before the mandate would be enforced against them. *See* HHS Bulletin, *supra* note 1.

The Mandate is many things, but "uniform" is not one of them. *O Centro* was impatient with the government's uniformity argument:

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."

546 U.S. at 436. *Lee*'s universal tax is not comparable to the Mandate and its exceptions.

The law upheld in *Lee* was a tax to raise government funding. Governments cannot function without taxes. *Lee* ruled that if exemptions were allowed "[t]he tax system could not function." 455 U.S. at 260. But the United States has functioned for over 200 years without a federal mandate compelling Grote or anyone else to cover contraception and abortifacients in insurance. The Mandate is not a "government program," as discussed in *Lee*. It requires Grote to give specific contraception and abortifacient services to private citizens, not to pay money to the government for use in the government's own activities. This Mandate is private, not governmental. In fact, the government has decided *not* to pursue its goals with a government program offering contraception—of which many exist—but instead to conscript religiously objecting citizens.

Moreover, *Lee* does not apply the scrutiny test applicable under RFRA. *Lee* was a precursor to *Smith*, which expanded on *Lee* to adopt the standard that RFRA affirmatively rejected. RFRA specifies that it is codifying its test "as set forth in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb. RFRA omits *Lee* from this list. *Lee* itself never says it is requiring a "compelling interest" or "least restrictive means." But *Sherbert* and *Yoder* ***did*** apply RFRA's test. *Sherbert* involved a plaintiff's bid for financial gain, despite the government's generally applicable law. As scholars note:

> The standard thus incorporated [by RFRA] is a highly protective one. . . . The cases incorporated by Congress explain "compelling" with superlatives: "paramount," "gravest," and "highest." Even these interests

> are sufficient only if they are "not otherwise served," if "no alternative forms of regulation would combat such abuses". . . .

Douglas Laycock and Oliver S. Thomas, "Interpreting the Religious Freedom Restoration Act," 73 TEX. L. REV. 209, 224 (1994).

c. The government cannot meet its evidentiary burden.

The government also fails the compelling interest test because its "evidence is not compelling." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739. At best, Defendants can point only to generic interests, marginal benefits, correlation not causation, and uncertain methodology. The Institute of Medicine Report on which the Mandate is based ("2011 IOM"),[11] does not demonstrate the government's conclusions. At best, its studies argue for a generic health benefit from contraception. But the Mandate's evidence must be tailored to prove the necessity of compelling Grote to participate, not to mere generic health interests. *O Centro*, 546 U.S. at 430–31. The government cites no pandemic of unwanted births at Grote or similar entities, which cause catastrophic consequences for health and employees. It could be that employees of such entities experience zero negative health consequences absent the Mandate, for any number of reasons. At best, Defendants do not know. But Defendants "bear the risk of uncertainty," *Brown,* 131 S. Ct. at 2739. Speculation and generalizations will not suffice.

Nowhere does the IOM cite evidence showing that the Mandate would even increase contraception use—which is a necessary corollary to saying health and equality from unintended births would result. Instead, the IOM's sources show: 89% of

[11] Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited October 5, 2012).

women avoiding pregnancy are already practicing contraception;[12] among the other 11%, lack of access is not a statistically significant reason why they do not contracept;[13] even among the most at-risk populations, cost is not the reason those women do not contracept.[14] The studies cited at 2011 IOM pp. 109 do not show that cost leads to non-use generally, but relate only to women switching from one contraception method to another.

The government cannot show that the Mandate would prevent negative health consequences. "Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown v. Entm't Merchs.*, 131 S. Ct. at 2739 (quotation marks omitted). The IOM admits that for negative outcomes from unintended pregnancy, "research is limited." 2011 IOM at 103. The IOM therefore cites its own 1995 report, which similarly emphasizes the fundamental flaws in determining which pregnancies are "unintended," and "whether the effect is caused by or merely associated with unwanted pregnancy."[15] The 1995 IOM admits that no causal link exists for most of its alleged factors. This

12 The Guttmacher Institute, "Facts on Contraceptive Use in the United States (June 2010)," *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited October 6, 2012).

13 Mosher WD and Jones J, "Use of contraception in the United States: 1982–2008," Vital and Health Statistics, 2010, Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/sr_23/sr23_029.pdf (last visited October 6, 2012).

14 R. Jones, J. Darroch and S.K. Henshaw "Contraceptive Use Among U.S. Women Having Abortions," *Perspectives on Sexual and Reproductive Health* 34 (Nov/Dec 2002): 294–303 (*Perspectives* is a publication of the Guttmacher Institute). The Centers for Disease Control released a study this year showing that even among those most a risk for unintended pregnancy, only 13% cite cost as a reason for not using contraception. CDC, "Prepregnancy Contraceptive Use Among Teens with Unintended Pregnancies Resulting in Live Births — Pregnancy Risk Assessment Monitoring System (PRAMS), 2004–2008," Morbidity and Mortality Weekly Report 61(02);25-29 (Jan. 20, 2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ mm6102a1.htm?s_cid=mm6102a1_e (last visited October 6, 2012).

15 Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), available at http://books.nap.edu/openbook.php?record_id=4903&page=64 (last visited October 6, 2012).

makes sense, since the intendedness or unintendedness of a pregnancy cannot itself physiologically change its health effect. Thus, a delay in seeking prenatal care upon unintended pregnancy is "no longer statistically significant" for women not already disposed to delay or who have a "support network."[16]. The IOM's recital of possible health consequences shows that the evidence is not compelling:

- The alleged increase in smoking and drinking drops significantly where studies control for other causes; while data on domestic violence and depression "provide little systematic assessment" and merely "suggest" association (not causation).[17]

- The alleged reduction in low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (1995 IOM at 70; 2011 IOM at 103). Several studies show no connection between it and pregnancy-spacing in the U.S.[18] And several studies show that low birth weight is associated not with contraception but with shorter pregnancy *intervals*, further distancing itself from a contraception connection. 2011 IOM at 103

- Evidence is not compelling that the Mandate against Grote would certainly cause pregnancy-prevention. In 48% of all unintended pregnancies, contraception was used.[19] Multiple peer-reviewed studies demonstrate that there is no scholarly consensus that increased contraception use reduces either abortion (which occurs upon pregnancy) or sexually transmitted diseases.[20]

[16] *Id.* at 68.

[17] *Id.* at 69, 73, 75.

[18] *Id.* at 70–71.

[19] Finer, L. B., and S. K. Henshaw, "Disparities in rates of unintended pregnancy in the United States, 1994 and 2001," 38(2) *Perspectives on Sexual & Reprod. Health* 90–96 (2006) *available at* http://www.guttmacher.org/pubs/journals/3809006.html (last visited October 6, 2012).

[20] K. Edgardh, et al., "Adolescent Sexual Health in Sweden," Sexual Transmitted Infections 78 (2002): 352-6 (http://sti.bmjjournals.com/cgi/content/full/78/5/352); Sourafel Girma, David Paton, "The Impact of Emergency Birth Control on Teen Pregnancy and STIs," Journal of Health Economic, (March 2011): 373-380; A. Glasier, "Emergency Contraception," British Medical Journal (Sept 2006): 560-561; 37 J.L. Duenas, et al., "Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population During 1997–2007," Contraception (January 2011): 82-87

Notably, no evidence shows that the Mandate is the only method to provide the items in question. Grote suggests that such evidence would not be possible, since government-provided abortifacients are just as free and effective as any other kind.

d. Defendants cannot show the Mandate is the least restrictive means of furthering their interests.

Even if a compelling interest existed, the government could not possibly show that the Mandate against Grote is "the least restrictive means of furthering" it under 42 U.S.C. 2000bb-1. The fact that the government could subsidize contraception itself to give it to employees at exempt entities, and that it already does so on a wide scale, shows that the government fails RFRA's least restrictive means requirement. Defendants bear the burden to show both of these elements—compelling interest and least restrictive means—including at the preliminary injunction stage. *O Centro Espirita*, 546 U.S. at 428–30.

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). Strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives that will achieve" the alleged interests. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). "[W]ithout some affirmative evidence that there is no less severe alternative," the Mandate cannot survive RFRA's requirements. *Johnson*, 310 F.3d at 505.

Defendants fail the least restrictive means test because the government could, if the political will existed, achieve its desire for free coverage of birth control *by providing that benefit itself*. Rather than coerce Grote to provide contraception and abortifacient

coverage in their plan, the government could possibly create its own plan covering the few items to which Grote objects, and then allow free enrollment in that plan for whomever the government seeks to cover. Or the government could directly compensate providers of contraception and abortifacients. Or the government could offer tax credits or deductions for contraception and abortifacient purchases. Or the government might impose a mandate on the contraception and abortifacient manufacturing industry to give its items away for free.[21] These and other options could fully achieve Defendants' goal while being less restrictive of Grote's beliefs. There is no essential need to coerce Grote to provide the objectionable coverage itself.

Defendants cannot deny that the government could pursue its goal more directly. This conclusion is not only dictated by common sense, but is also proven because the federal government and many states already directly subsidize birth control coverage for many citizens through Title XIX (Medicaid) and Title X (Family Planning Services) funding, among others.[22] Thus the Court's RFRA inquiry could end here: the Mandate is not the least restrictive means of furthering Defendants' interest. Other options may be more difficult to pass as a political matter (which further illustrates the public's disbelief that the Mandate's interest is "compelling"). Indeed PPACA itself does not require the Mandate. 42 U.S.C. § 300gg-13(a)(4). But political difficulty does not exonerate the Mandate's burdens on Grote's religious beliefs, nor can it allow the Mandate to pass

[21] By virtue of Defendants' recent attempts to quell political backlash by claiming they may create an "accommodation" for some additional religious entities (but still not for Plaintiffs), Defendants are necessarily admitting that the Mandate is not the least restrictive means to achieve their goals. See 77 Fed. Reg. 16501–08 (Mar. 21, 2012)

[22] See *Facts on Publicly Funded Contraceptive Services in the United States* (Guttmacher Inst. May 2012) (citations omitted), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited October 6, 2012).

RFRA's strict scrutiny. The availability of many alternative methods fatally undermines Defendants' burden under RFRA and the Mandate from applying to Grote.

The government cannot propose a watered-down least restrictive means test. RFRA requires the Mandate to be "the least restrictive means," not the least restrictive means among only what the government wants to select. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court required alternative means instead of fundamental rights violations. There, North Carolina sought to curb fraud by requiring professional fundraisers to disclose during solicitations how much of the donation would go to them. 487 U.S. at 786. Applying strict scrutiny, the Supreme Court declared that the state's interest could be achieved by publishing the same disclosures itself online, and by prosecuting fraud. *Id.* at 799–800. Although these alternatives would be costly, less directly effective, and a restructuring of the governmental scheme, strict scrutiny demanded they be prioritized. *See id.* Here RFRA similarly requires full consideration of other ways the government can and does provide women free contraception and abortifacients. "The lesson" of RFRA's pedigree of caselaw "is that the government must show something more compelling than saving money." Laycock at 224.

The government attempted in *Newland* to argue that it has an alleged need to impose the Mandate within the employer-based insurance market. But this argument fails the compelling interest/least restrictive means test because it *redefines the government's interest* from securing health and equality to accomplishing those goals in a specific way. The government has zero evidence, much less compelling evidence, that it has a "paramount" and "grave" need to achieve its alleged health and equality

interests *by coercion of* Grote, instead of by providing contraception and abortifacients itself. The government does not even have a hint of evidence that its interests would *not* be served if the government itself provided the contraception and abortifacients it desires. In other words, the government cannot possibly show that even if all women in Grote's plan received the Mandated items free from the government, they would *still* suffer adverse health consequences and an inability to be free from work-interrupting pregnancy. "[T]he Government has not offered evidence demonstrating" compelling harm from an alternative that is available and less restrictive of religion. *O Centro*, 546 U.S. at 435–37.

The Mandate substantially burdens the religious exercise of Grote and its owners, and Defendants fail strict scrutiny. Therefore, Grote has a likelihood of success on its RFRA claim.

B. THE MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

In addition to violating RFRA, the Mandate violates the Free Exercise Clause because it is not "neutral and generally applicable." *Lukumi*, 508 U.S. 20 at 545 (citing *Smith*, 494 U.S. at 880. The Mandate is therefore subject to strict scrutiny, *Lukumi*, 508 U.S. at 546, which as discussed above, it cannot meet.[23]

The Mandate is not neutral on its face because it explicitly discriminates among religious organizations on a religious basis. It thus fails the most basic requirement of

[23] Neutrality and general applicability overlap and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531; *see also id.* (noting that "[n]eutrality and general applicability are interrelated"); *id.* at 557 (Scalia, J., concurring) (observing that the concepts "substantially overlap"). Still, each merits separate analysis, and "strict scrutiny will be triggered" if the law at issue "fails to meet *either* requirement." *Rader v. Johnston*, 924 F. Supp. 1540, 1551 (D. Neb. 1996) (emphasis supplied) (citing *Lukumi*, 508 U.S. at 531-33, 544-46).

facial neutrality. *See, e.g., Lukumi*, 508 U.S. at 533 (explaining that "the minimum requirement of neutrality is that a law not discriminate on its face"). Indeed, the Mandate is a more patent violation of neutrality than the ordinances unanimously struck down in *Lukumi.* That case involved ostensibly neutral animal cruelty laws structured to target religiously-motivated practices only. By contrast, on its face the religious employer exemption to the mandate divides religious objectors into favored and disfavored classes, forgetting *Lukumi*'s warning that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533 (emphasis added).

The religious employer exemption protects the consciences only of *certain* religious bodies, which it defines with reference to their internal *religious* characteristics. Namely, it exempts only those organizations whose "purpose" is to inculcate religious values; who "primarily" employ and serve co-religionists; and who qualify as churches or religious orders under the tax code. *See* 45 C.F.R. § 147.130(a)(iv)(B)(1)–(4). These criteria openly do what *Lukumi* says a neutral law cannot do: refer to religious qualities without any discernible secular reason. *Lukumi*, 508 U.S. at 533. There is no conceivable secular purpose, for instance, in limiting conscience protection to religious groups that "primarily serve" co-religionists while denying it to those who serve persons regardless of their faith. These criteria practice religious "discriminat[ion] on [their] face" and therefore trigger strict scrutiny. *Lukumi*, 508 U.S. at 533.

The Mandate is also subject to strict scrutiny under the Free Exercise Clause because it is not generally applicable. A law is not generally applicable if it regulates religiously-motivated conduct, yet leaves unregulated similar secular conduct. *See,*

e.g., Lukumi, 508 U.S. at 544–45. As explained above, the Mandate here exempts 191 million Americans on a variety of grounds, including "most" large employers like Grote, but refuses to exempt Grote based on its religious objections. In *Fraternal Order of Police*, the Third Circuit held that a police department's no-beard policy was not generally applicable because it allowed a medical exemption but refused religious exemptions. "[T]he medical exemption raises concern because it indicates that the [police department] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." 170 F.3d at 366 (Alito, J.). *See also Blackhawk v. Pennsylvania*, 381 F.3d 202, 210–11, 214 (3d Cir. 2004) (Alito, J.) (rule against religious bear-keeping violated Free Exercise Clause due to categorical exemptions for zoos and circuses); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements were not generally applicable where they included categorical exemptions for newspapers and media, but not for churches); *Mitchell County. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012) (categorical exemptions for secular conduct allowed Mennonite farmers to use steel-wheeled tractors on county roads).

The religious exemption from the Mandate in particular is not generally applicable because PPACA itself awards Defendants unlimited discretion to shape its scope. Defendants "*may* establish exemptions," 45 C.F.R. § 147.130 (emphasis added), and pursuant to 42 U.S.C. § 300gg-13 Defendants' discretion to craft its exemptions is unlimited. 76 Fed. Reg. at 46623 (asserting that § 300gg-13 grants HHS/HRSA "authority to develop comprehensive guideless" under which Defendants believe "it is

appropriate that HRSA, in issuing these Guidelines, takes into account the effect on the religious beliefs of certain religious employers") Using their unfettered assessments, Defendants continue to change their exemptions and accommodations. This is evidenced by two different versions of a "safe harbor" they issued *in addition to* the religious exemption itself, and the fact that in recent rulemaking, yet another category of non-profit religious entities subject to different treatment than the Mandate will be created, 77 Fed. Reg. 16501. This built-in discretion means that Defendants have broad discretion to create exemptions based on an "individualized … assessment of the reasons for the relevant conduct," a feature that deprives the Mandate of general applicability and subjects it to strict scrutiny. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

C. THE MANDATE VIOLATES THE ESTABLISHMENT CLAUSE.

The Mandate also violates the Establishment Clause of the First Amendment. The Mandate's "religious employer" exemption, as discussed above, sets forth Defendants' notion of what "counts" as religion and what doesn't for the purposes of who will be exempt under the Mandate. But the government may not adopt a caste system of different religious organizations and belief-levels when it imposes a burden. Instead it "must treat individual religions and religious institutions 'without discrimination or preference.'" *Colo. Christian U. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); *Larson v. Valente*, 456 U.S. 228 (1982); *see also Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990) (holding that section 19 of the National Labor Relations Act, which exempts from mandatory union membership any employee who "is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect

which has historically held conscientious objections to joining or financially supporting labor organizations," is unconstitutional because it discriminates among religions and would involve an impermissible government inquiry into religious tenets), *cert. denied*, 505 U.S. 1218 (1992). The Mandate's religious exemption deems organizations insufficiently "religious" if they do not focus on co-religionists in hiring and service, which would involve the government's probing of what exactly count as the organization's religious "tenets."

D. THE MANDATE VIOLATES THE FREE SPEECH CLAUSE.

The Mandate additionally violates the First Amendment by coercing Grote to provide for speech that is contrary to its and its owners' religious beliefs. The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted).

The Mandate compels expressive speech. It requires Grote to cover "education and counseling" in favor of abortifacients. Education and counseling are, by definition, speech. As a self-insurer, Grote is required to pay for this speech directly. The Supreme Court has explained that its compelled speech jurisprudence is triggered when the government forces a speaker to fund objectionable speech. *See, e.g, Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234–35 (1977) (forced contributions for union political speech); *United States v. United Foods*, 533 U.S. 405, 411 (2001) (forced contributions

for advertising). The Supreme Court recently reaffirmed that "compulsory subsidies for private speech" violate the First Amendment unless they involve a "mandated association" that meets the compelling interest / least restrictive means test. *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (June 21, 2012). Here there is no "mandated association" because the government omits many employers from the Mandate, and the Mandate violates the compelling interest test.

E. THE MANDATE VIOLATES THE DUE PROCESS CLAUSE.

The Mandate violates the rights of Grote and its owners under the Due Process Clause of the Fifth Amendment. As referenced in the Free Exercise Clause argument, the Mandate creates a standardless, blank check for Defendants to discriminatorily select whatever they want to call "religious" and offer or withhold whatever accommodations they choose. That is exactly what Defendants have done. When a law is so "standardless that it authorizes or encourages seriously discriminatory enforcement," the law does not comport with due process. *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). If a law is so vague that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," it fails to provide constitutional due process. *Williams*, 553 U.S. at 304.

42 U.S.C. § 300gg-13 gives Defendants unlimited discretion to pick and choose what religious groups to impose its Mandate against, and to what extent. 76 Fed. Reg. at 46623 The statute literally contains no standards regarding these decisions; it offers zero guidance, not even key words or phrases, about who counts as religious and what kind of accommodation such religious persons or entities should be provided. No

person can read § 300gg-13 and have any notion of whom Defendants may impose their Mandate against, and to what extent.

Section 300gg-13 is therefore a quintessential law so "standardless that it authorizes or encourages seriously discriminatory enforcement." Defendants could literally decide that Buddhists get exemptions while Sikhs do not, without running afoul of the standards of that section, because the section has no standards. The law practically invites discriminatory enforcement, and that is exactly what Defendants have done with it. Defendants have used their discretion to create: an arbitrary four-part "religious employer" exemption; two different "safe harbors" of non-enforcement; and a proposed "accommodation" for some non-exempt entities yet to be determined in new rulemaking, 77 Fed. Reg. 16501. Grote has suffered exclusion from all these discretionary decisions. These discriminatory decisions involve the government deciding who the religious are and what religion is; what levels of moral participation should be acceptable to conscience; whose religion gets put into different levels of accommodation; and who is allowed to convert to religious views against birth control based on whether they did so by an arbitrary deadline.

F. THE MANDATE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

Defendants finalized the Mandate while transparently, even admittedly, refusing to satisfy their statutory duty to actually "consider" objections issued during the comment period. Section 706 of the APA provides that courts "shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Defendants must follow the procedure found in § 553, which requires administrative agencies to: (1) publish notice

of proposed rulemaking in the Federal Register; (2) "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) consider all relevant matter presented before adopting a final rule that includes a statement of its basis and purpose. 5 U.S.C. § 553(b) & (c).

"An agency is required to provide a meaningful opportunity for comments, which means that the agency's mind must be open to considering them." *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455, 468 (D.C. Cir. 1998) (citing *McLouth Steel Products Corporation v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988)); *Cf*. *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 531 (7th Cir. 1993) ("An agency should not be able to avoid the notice-and-comment process with fancy interpretive footwork."). The Court need not engage in any subjective judgment about whether Defendants provided due consideration to objections to the Mandate. In this case Defendants essentially admit that they did not do so. Central to this implicit concession are facts acknowledged by Defendants themselves:

(1) PPACA prohibits the Mandate from going into effect until one year after it is in final, unchanged form. 75 Fed. Reg. at 41726; 76 Fed. Reg. at 46624.

(2) Defendants themselves insisted, in August 2011, prior to the comment period, that they believed the Mandate must exist in final form unchanged from as it was written on August 1, 2011, in order to deliver Mandated items to college women by August 2012. 76 Fed. Reg. 46621–26.

(3) Defendants delivered on their promise to ignore comments by finalizing their rule "without change" in February 2012. 77 Fed. Reg. 8725–30

(4) Due to public outcry Defendants then admitted in a new regulatory process in March 2012, 77 Fed. Reg. 16501, that the same objections offered in the 2011 comment period actually did require alterations that they had refused to consider in 2011 but would now pursue.

(5) Yet Defendants continue to impose their Mandate on Grote and others as if their rule had actually been finalized in August 2011 *in a process that meaningfully considered suggested changes prior to finalization*.

If Defendants had not been close-minded about their Mandate, it would not have been finalized without change in February 2012, and would still not be finalized (because the March 2012 process continues indefinitely). Thus if the government had complied with the APA, Grote would not be subject to it now; instead Grote would be more than a year away from its effect.

Defendants' mockery of the notice and comment process has led to palpable injury to Grote. The Mandate's adoption of HRSA's preventive services guidelines against religious objectors should be vacated and remanded to the Defendant agencies until they actually finalize a Mandate after meaningful consideration, and *then* wait an additional year to impose it.

The Mandate also violates the APA for being "contrary to law" and "constitutional right" under 5 U.S.C. § 706(2)(A) & (B). *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–17 (1971). It is contrary to law and constitutional right for all the reasons stated above: its violation of RFRA, the First Amendment clauses, and the Due Process Clause.

II. GROTE WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

Granting preliminary injunctive relief is necessary to prevent Grote from suffering harm that is irreparable and imminent. Application of the mandate to Grote will violate its rights under the First Amendment and RFRA. It is settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord ACLU v. Alvarez,*

679 F.3d 583, 589 (7th Cir. 2012). Deprivation of rights secured by RFRA—which affords even greater protection to religious freedom than the Free Exercise Clause—also constitutes irreparable harm. *See, e.g., Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that "courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (explaining under RFRA that "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"); *W. Presbyterian Church v. Bd. of Zoning Adjustment of Dist. of Columbia*, 849 F. Supp. 77, 79 (D.D.C. 1994) (granting a preliminary injunction against a zoning ordinance prohibiting a church's feeding of the homeless based on likely violations of the First Amendment and RFRA). The District Court in Colorado reached the same conclusion in the *Newland* case. *See Newland*, 2012 WL 3069154 at *4 (noting "it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted).

Finally, these irreparable harms apply to Grote already. Grote does not qualify for any of Defendants' exemptions or non-enforcement. Grote is therefore subject to the Mandate with its next policy year, which begins January 1, 2013. The process for obtaining and finalizing coverage is likely to take several weeks. However, the religious beliefs of the Grote Family prohibit them from complying with the Mandate. Thus Grote faces an imminent likelihood of lawsuits from the Secretary of Labor, fines and regulatory penalties. The imminent risk of harm and the need for clarification of Grote's

rights in time to secure appropriate insurance coverage means Grote will suffer irreparable harm in the absence of injunctive relief.

III. THE BALANCE OF EQUITIES TIPS IN GROTE'S FAVOR.

Here, the balance of equities overwhelmingly favors Grote. Granting preliminary injunctive relief will merely prevent Defendants from enforcing the Mandate against one religious entity. This will simply preserve the *status quo* between the parties, counseling in favor of granting preliminary relief. Defendants have already exempted a number of churches and church-related entities from the mandate. Even more notably, Defendants have granted what nearly amounts to its own voluntary "injunction" by granting delayed enforcement of the Mandate against a broad array of religious organizations until their first plan years start after August 2013. HHS Bulletin, *supra* note 1. Omission of Grote from that "safe harbor" is arbitrary and unwarranted in the first place. Defendants cannot possibly show that applying the Mandate to *one* entity would "substantially injure" others' interests.

Balanced against this *de minimis* injury to Defendants is the real and immediate threat to Grote's and its owners' integrity of religious belief. Grote faces the imminent prospect of penalties that Defendants obstinately declare they intend to apply. In sum, any minimal harm in not applying the Mandate against one additional entity, in light of Defendants' willingness to not enforce it against thousands of others, "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland*, 2012 WL 3069154 at *4.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, a preliminary injunction will serve the public interest by protecting Grote's First Amendment and RFRA rights. The public can have no interest in enforcement of a regulation against a business that coerces it to violate its own faith. *See, e.g., Newland*, 2012 WL 3069154 at *5 (finding "'there is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme]'") (quoting *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), aff'd and remanded, *O Centro*, 546 U.S. 418). Furthermore, any interest of Defendants in uniform application of the mandate "is … undermined by the creation of exemptions for certain religious organizations and employers with grandfathered health insurance plans and a temporary enforcement safe harbor for non-profit organizations." *Newland*, 2012 WL 3069154 at *4.

CONCLUSION

Grote asks the Court to enter a preliminary injunction against the HHS mandate in accordance with its accompanying motion and proposed order.

Respectfully submitted this 30th day of October, 2012.

***Attorneys for Plaintiffs*:**

s/Michael J. Cork
Michael J. Cork
Bamberger Foreman Oswald & Hahn, LLP
201 N. Illinois St., Suite 1225
Indianapolis, IN 46204-4219
(317) 464-1594
(317) 464-1592 (Fax)
mcork@bamberger.com

Michael A. Wilkins
Of Counsel
Broyles Kight & Ricafort, PC
8250 Haverstick Road, Suite 100
Indianapolis, IN 46240
317-428-4527 Direct
317-571-3610 Fax
mwilkins@bkrlaw.com

Bryan Beauman (Admission *pro hac vice* motion forthcoming)
Alliance Defending Freedom

P.O. Box 779
Paris, KY 40362-0779
(859) 340-1127
bbeauman@alliancedefendingfreedom.com

Matthew S. Bowman (Admission *pro hac vice* motion forthcoming)
Alliance Defending Freedom
801 G Street NW, Suite 509
Washington, D.C. 20001
(202) 393-8690
(202) 237-3622 (facsimile)
mbowman@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, a copy of the foregoing Brief in Support of Motion for Preliminary Injunction was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

I further certify that on October 30, 2012, a copy of the foregoing Brief in Support of Motion for Preliminary Injunction was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

Timothy Geithner
in his official capacity as Secretary of the
U.S. Dep't. of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Kathleen Sebelius
in her official capacity as Secretary of the U.S.
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Hilda Solis
in her offiicial capacity as Secretary of the
U. S. Dep't. of Labor
Frances Perkins Bldg.
200 Constitution Avenue, N.W.
Washington, DC 20201

U. S. Dep't. of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

U. S. Dep't. of Labor
Frances Perkins Bldg.
200 Constitution Avenue, N.W.
Washington, DC 20201

U. S. Dep't. of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

s/ Michael J. Cork
Michael J. Cork