No. 12-6294

In the United States Court of Appeals for the Tenth Circuit

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

Appellants-Petitioners,

v.

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

Appellees-Respondents.

On appeal from the United States District Court for the Western District of Oklahoma

PETITION FOR HEARING EN BANC

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Dated: January 10, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Appellants states the following:

Appellants David Green, Barbara Green, Steven Green, Mart Green and Darsee Lett (collectively "the Green family") are individuals.

Appellant Hobby Lobby Stores, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

Mardel, Inc. is a privately-held company that is wholly owned by trusts controlled by the Green family. No publicly-held corporation owns 10% or more of its stock.

s/ *S. Kyle Duncan*
S. Kyle Duncan
Attorney for Appellants-Petitioners

RULE 35(B) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(b), counsel for Appellants states as follows:

En banc hearing is warranted because this appeal involves a question of exceptional importance. Appellants are business owners who are required by their religion to exclude certain drugs from their health insurance offerings. This appeal presents the question whether the government can use the threat of severe fines to force Appellants to abandon that religious exercise without violating the Religious Freedom Restoration Act and the First Amendment.

This issue is currently being considered by several different circuit courts, is presented in two separate appeals pending in this Circuit, and has already provoked the Seventh Circuit to criticize the approach taken by a motions panel of this Circuit in this appeal. *En banc* hearing in the first instance will (1) conserve judicial resources, (2) secure uniformity of this Court's decisions, (3) avoid placing this Circuit out of step with the majority of courts that have correctly granted injunctive relief to similarly-situated business owners, and (4) ensure that the parties and other courts receive the benefit of this Court's plenary consideration of this exceedingly important issue.

s/ *S. Kyle Duncan*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

INTRODUCTION

The Court should hear this appeal *en banc* in the first instance. FED. R. APP. P. 35(b)(1). The question presented—whether a federal regulation (the "mandate") may force business owners to cover drugs and devices against their religious beliefs or pay severe fines—is one of exceptional importance that is pending before this Court in this appeal and another appeal, *see Newland v. Sebelius*, *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), and also before three other circuits.[1] Numerous federal courts, including motions panels of the Seventh and Eighth Circuits,[2] have already concluded that such business owners deserve preliminary injunctive relief under the Religious Freedom Restoration Act (RFRA). A motions panel of this Court, however, has taken the opposite view that business owners like Appellants are effectively excluded from seeking RFRA protection from the mandate. Order of Dec. 20, 2012 (denying injunction pending appeal) (Ex. B). That decision has been expressly rejected by a Seventh Circuit motions panel as "misunderstand[ing] the substance of [the religious liberty]

[1] *O'Brien v. HHS*, *appeal docketed*, No. 12-3357 (8th Cir. Oct. 2, 2012); *Autocam Corp. v. Sebelius*, *appeal docketed*, No. 12-2673 (6th Cir. Dec. 26, 2012); *Korte v. Sebelius*, *appeal docketed*, No. 12-3841 (7th Cir. Dec. 17, 2012).

[2] *See Korte v. Sebelius*, No. 12-3841 (7th Cir. Dec. 28, 2012) (order granting injunction pending appeal); *O'Brien v. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012) (same); *but see Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012) (denying relief).

claim." *Korte v. Sebelius*, No. 12-3841, slip op. at 5 (7th Cir. Dec. 28, 2012) (order granting injunction pending appeal) (Ex. C).

This appeal thus presents the extraordinary situation where initial *en banc* hearing is needed to secure the uniformity of this Court's decisions—and their consistency with other circuits—on a question of national importance. *See* FED. R. APP. P. 35(a)(1) (uniformity), (b)(1) (exceptional importance). Hearing the instant appeal through the normal panel process would waste judicial resources and likely produce either conflicting panel decisions, divergence with other circuits, or both, leading to future *en banc* review. *See, e.g., United States v. Sturm*, Nos. 09-1386, 09-5022, 2011 WL 6261657, at *1 (10th Cir. Apr. 4, 2011) (ordering *en banc* rehearing, *sua sponte*, "for purposes of consistency" where simultaneous panel decisions addressed "a common and important issue"); FED. R. APP. P. 35(b), advisory committee's note ("an *en banc* proceeding provides a safeguard against unnecessary intercircuit conflicts"). Consequently, *en banc* hearing of this appeal in the first instance is the most efficient way of ensuring that this Court speaks with one voice on this question of exceptional importance on which numerous federal courts have disagreed and will likely continue to do so.[3]

[3] Appellants do not seek *en banc* rehearing of their motion for injunction pending appeal. *See* 10TH CIR. R. 35.7. However, the motions panel opinion denying that motion—and its rejection by the Seventh Circuit—underscore the need for hearing *en banc* of this appeal of the district court's decision.

STATEMENT OF FACTS

I. THE GREEN FAMILY AND HOBBY LOBBY

The facts of this case are not in dispute. Appellants are the Green family and the companies they own and operate: Hobby Lobby Stores, Inc. and Mardel, Inc. Verified Compl. ("VC") ¶¶ 18-24. Founded by David Green in 1970, Hobby Lobby has grown from a small picture frame company into one of the nation's leading arts and crafts chains, operating over 500 stores in 41 states with over 13,000 full-time employees. VC ¶¶ 2, 18, 32-36. David and his wife Barbara co-own Hobby Lobby and a chain of Christian bookstores known as Mardel (collectively, "Hobby Lobby"), with their three children. VC ¶¶ 18-22, 36-38. The Green family alone controls Hobby Lobby's operations and policies through a management trust. VC ¶¶ 38.

The Greens sign a Statement of Faith and a Trustee Commitment to run Hobby Lobby according to Christian religious beliefs. VC ¶¶ 38, 39-52. They and their companies engage in numerous exercises of religion through their business activities. For example, Hobby Lobby takes out hundreds of full-page ads every Christmas and Easter celebrating the religious nature of the holidays, and inviting people to learn about Jesus Christ. VC ¶ 47.[4] The company monitors merchandise,

[4] This year's holiday ad, inviting readers to "call Need Him Ministry at 1-888-NEED-HIM" if they "would like to know Jesus as Lord and Savior," can be found at http://www.hobbylobby.com/assets/pdf/holiday_messages/current_message.pdf.

marketing, and operations to make sure Appellants do not participate in anything they believe is immoral or harmful to others. VC ¶¶ 43-44. Chaplains, spiritual counseling, and religiously-themed financial management classes are available for employees. VC ¶ 51. And all of Appellants' stores close on Sundays—at significant cost—to give employees a day of rest. VC ¶ 45.

Particularly relevant here is Appellants' religious exercise concerning what insurance coverage they can purchase consistent with their religious beliefs about unborn human life. VC ¶ 53. Appellants have no objection to providing insurance coverage for most contraceptives. VC ¶57. However, Appellants' religious beliefs prohibit them from purchasing insurance coverage for drugs or devices that could cause an abortion. VC ¶¶ 44, 52-56, 103. Appellants therefore exclude from their self-funded health insurance plan emergency contraceptive devices that can cause abortion (such as IUDs) and pregnancy-terminating drugs like RU-486, Plan B and Ella. VC ¶¶ 52-56, 95, 103-114, 146.[5] Neither the district court nor the government questioned the sincerity of this religious exercise. Op. 5, 20.

[5] At one time, two of the relevant drugs were inadvertently covered. As the district court correctly found, this coverage was not "due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. [The government] does not dispute that the company's policies otherwise long excluded abortion-inducing drugs." 870 F. Supp. 2d 1278, 1286 (W.D. Okla. 2012) (Ex. A).

II. THE HHS MANDATE

It is also undisputed that the federal regulation at issue in this case (the "mandate") would require Appellants to abandon their religious exercise concerning coverage of abortion-causing drugs. Specifically, the mandate requires that employer health insurance cover all FDA-approved contraceptives and sterilization methods, including drugs and devices—namely, Plan B, Ella, and certain IUDs—that may prevent implantation of a fertilized egg in the womb and that Appellants are therefore religiously obligated to exclude. 42 U.S.C § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); VC ¶¶ 86-96. Although the government has exempted plans covering millions,[6] Appellants do not qualify for any exemption.

The mandate takes effect against Appellants when Hobby Lobby's new plan year begins on July 1, 2013. *See* 42 U.S.C. § 300gg-13(b); 76 Fed. Reg. 46621, 46623.[7] At that time, Appellants must either abandon their religious exercise of

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[6] For example, Defendants have exempted "grandfathered" plans—*i.e.*, plans that have not undergone significant changes since 2010. 42 U.S.C. § 18011(a)(2); VC ¶ 68-70. Appellees acknowledge that grandfathered plans will cover millions in upcoming years. *See* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html). Also exempt are some non-profit religious employers—essentially houses of worship under the tax code. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4); VC ¶ 123.

[7] When suit was filed in September 2012, Hobby Lobby was scheduled to begin a new plan year on January 1, 2013. VC ¶¶121, 132. However, after being denied temporary relief by Justice Sotomayor on December 26, 2012, 568 U.S. __ (2012) (No. 12A644), Appellants learned that ERISA allowed them to make a

excluding abortion-causing drugs from their health plan, or be exposed to severe penalties—including potential fines of up to $1.3 million per day, 26 U.S.C. § 4980D, annual penalties of about $26 million, *id.* § 4980H, and exposure to private suits. 29 U.S.C. §§ 1185d(a)(1), 1132; VC ¶¶ 134-44.

III. THE DECISION BELOW

Appellants sued in September 2012, challenging the mandate under RFRA, the First Amendment, and the Administrative Procedure Act. VC ¶¶ 12, 13. They simultaneously moved for a preliminary injunction, which the court denied on purely legal grounds. 870 F. Supp. 2d 1278, 1290-96 (W.D. Okla. 2012) (Ex. A). The court accepted the sincerity of Appellants' beliefs and the character of their religious exercise.[8] Yet it nonetheless denied relief because it deemed the mandate's burden on the religious exercise to be not "direct and personal," *Id.* at 1296, but instead "indirect and attenuated," because it applies to the Greens' businesses and is linked to an employee's decision to use certain drugs. *Id.* at 1294

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retroactive modification to their plan year. Accordingly, Appellants' plan year has now changed so that the mandate will not take effect against them until July 1, 2013.

[8] *See* 870 F. Supp. 2d at 1293 (noting that "no one questions" the Greens' sincerity or that the mandate burdens their religious exercise, "at least indirectly"); *Id.* at 1285 (noting the Greens' beliefs "'prohibit them from deliberately providing insurance coverage for prescription drugs or devices inconsistent with their faith, in particular abortion-causing drugs and devices'") (quoting VC ¶¶ 53-54).

(citing *O'Brien v. HHS*, __ F.Supp.2d __, 2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012).[9]

IV. THE MOTIONS PANEL DECISION AND THE SEVENTH CIRCUIT RESPONSE

Appellants filed a notice of appeal the same day the district court's order issued. The next day, Appellants sought an injunction pending appeal from this Court. *See* FED. R. APP. P. 8. A month later, a two-judge panel denied Appellants' motion. Like the district court, the panel believed—admittedly "without the benefit of full merits briefing and oral argument"—that the mandate's burden on the Greens was "indirect and attenuated," because, in its view, the Greens merely complain about contributing "funds" to a health plan that *employees* might use for purposes "condemned by [the Greens'] religion." No. 12-6294, slip op. at 7 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal) ("Mot. Op.") (Ex. B). Consequently, the panel concluded Appellants had invoked RFRA not "to protect [their] own participation in (or abstention from) a specific practice required (or condemned) by [their] religion," but rather to "extend the reach of RFRA to

[9] The Eighth Circuit has since significantly undermined the district court's decision in *O'Brien* (upon which the district court here relied) by granting O'Brien's motion for an injunction pending appeal. *O'Brien*, No. 12-3357 (8th Cir. Nov. 28, 2012) (order granting injunction pending appeal).

encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship," which the panel deemed unlikely to succeed. *Id.* [10]

A week later, on December 28, 2012, a Seventh Circuit motions panel explicitly rejected the *Hobby Lobby* motion panel's analysis and granted a business owner injunctive relief pending appeal. *See Korte* ,2012 WL 6757353 at *3. After quoting the *Hobby Lobby* panel decision at length, the Seventh Circuit panel concluded:

> With respect, we think [the *Hobby Lobby* panel's approach] misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.

Id. (emphases in original).

ARGUMENT

I. THIS APPEAL RAISES QUESTIONS OF EXCEPTIONAL AND NATIONWIDE IMPORTANCE CONCERNING FUNDAMENTAL CIVIL RIGHTS.

A. The issue raised here is the subject of a rapidly developing circuit split and is already presented by two appeals before this Court.

The central question raised in this appeal—whether the federal government can use the threat of massive fines to force business owners to abandon their religious objections to providing insurance coverage for certain drugs—is a matter of

[10] Justice Sotomayor subsequently issued an in-chambers opinion denying an injunction under the All Writs Act, explaining that such "extraordinary" relief would be granted only "sparingly." *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. __ (2012) (No. 12A644); *see also Korte*, 2012 WL 6757353 at *4 (All Writs Act standard "differs significantly from the standard applicable to a motion for a stay or injunction pending appeal in this court").

exceptional importance meriting *en banc* consideration. *See* FED. R. APP. P. 35 (*en banc* hearing may be ordered where "the proceeding involves a question of exceptional importance"). Even as the Supreme Court upheld the Patient Protection and Affordable Care Act's individual mandate as a matter of Congressional power, more than one Justice suggested that the Act's novel insurance-purchase mandates could raise serious civil rights questions. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2624 (2012) (Ginsberg, J., dissenting in part) (observing that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict … interfered with the free exercise of religion"). This case starkly presents one of those questions. The mandate at issue here commands the family owners of a well-known American business—on pain of draconian fines—to abandon their sincere, public, and longstanding religious exercise of refusing to provide insurance coverage for abortion-causing drugs. That mandate threatens not only the Green family's faith, but also—as a result of possible fines—their ability to continue providing jobs and health benefits to more than 13,000 full-time employees who work in the company's 500 stores across the nation.

If this appeal affected only the Greens, Hobby Lobby, and their employees and families, that alone would merit *en banc* consideration. But the issues have much broader importance. Although the mandate went into effect only on August 1, 2012, it has already provoked more than 40 different federal lawsuits brought by

more than 100 different plaintiffs across the country.[11] Moreover, this nationwide litigation has produced some fourteen judicial opinions addressing the precise question at issue here: whether religiously-objecting business owners have any recourse under the Religious Freedom Restoration Act (RFRA) against the mandate's coercion of their religious exercise. The clear majority of those opinions—including the District of Colorado's opinion in *Newland v. Sebelius*—favor business owners, and, indeed, to date two other circuits' motion panels have granted injunctive relief pending appeal to business owners who were denied preliminary injunctions below.[12] Yet, the two decisions in this case have taken the

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[11] The cases are tracked at http://www.becketfund.org/hhsinformationcentral/ (last visited January 10, 2013).

[12] Ten courts (including motions panels of the Seventh and Eighth Circuits) have granted injunctive relief. *See* (1). *Korte v. Sebelius*, 2012 WL 6757353, at *1 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal); (2). *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012) (same); (3). *Triune Health Grp., Inc. v. HHS*, No. 12 C 6756, slip op. at 1 (N.D. Ill. Jan. 3, 2012) (granting preliminary injunction); (4). *Sharpe Holdings, Inc. v. HHS*, No. 2:12-CV-92, slip op. at 1 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); (5). *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *3-6 (E.D. Mich. Dec. 30, 2012) (same); (6). *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, slip op. at 1 (E.D. Pa. Dec. 28, 2012) (same); (7). *Am. Pulverizer Co. v. HHS*, No. 12-3459, slip op. at 1 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction); (8). *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012) (same); (9). *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6 (E.D. Mich. Oct. 31, 2012) (same); (10). *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *6-8 (D. Colo. July 27, 2012) (same), appeal docketed, No. 12-1380 (10th Cir. Sept. 26, 2012). Four courts (including motions panels of this Court and the Sixth Circuit) have denied temporary relief. *See* (1). *Autocam Corp. v. Sebelius*, No. 12-2673, at 2-3 (6th Cir., Dec. 28, 2012) (denying injunctive relief pending appeal); (2). *Hobby Lobby*, No.

erroneous minority position that business owners are effectively excluded from raising a religious objection to whatever drugs, devices, or procedures the government requires them to include in the health insurance they pay for and offer to employees. Most courts, and two other circuits have already rejected this dubious approach. In fact, when granting an injunction pending appeal to another business owner, the Seventh Circuit expressly criticized this Court's denial of similar relief as "misunderstand[ing]" the religious liberty claim at issue:

> On an interlocutory appeal from the district court's denial of a preliminary injunction, the Tenth Circuit denied an injunction pending appeal, noting that "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion." *Id.* at 7 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)). 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 or related services.

Korte v. Sebelius, No. 12-3841 (7th Cir., Dec. 28, 2012) (emphases in original); *see also O'Brien v. Sebelius*, No. 12-3357 (8th Cir. Nov. 28, 2012) (granting injunction to business owner plaintiff).

12-6294, at 7 (same); (3). *Grote Indus. v. Sebelius*, No. 4:12-cv-00134, 2012 WL 6725905, at *6-7 (S.D. Ind. Dec. 27, 2012) (denying preliminary injunction); (4). *Annex Medical, Inc. v. Sebelius*, No. 12-2804, slip op. at 6-16 (D. Minn. Jan 8, 2013) (same).

The rapid development of conflicting judicial opinions on the same issue during nationwide litigation underscores the exceptional importance of this appeal. *Cf.* FED. R. APP. P. 35 (issue exceptionally important "if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"). At least four circuits—the Sixth, Seventh, Eighth, and Tenth—will hear appeals on the same RFRA issue in the upcoming months. Two appeals (including this one) are now being briefed before this Court. If this appeal is heard under the normal panel process, it is virtually inevitable that this Court will be asked to re-hear one or both cases *en banc*—either because panel decisions conflict or because a panel decision conflicts with another circuit's decision. FED. R. APP. P. 35(a)(1), (a)(2). Judicial efficiency and consistency would therefore best be served by hearing this appeal *en banc* now. This would aid the parties and other courts, all of whom would have the benefit of this Circuit's plenary consideration of this critically important national issue.

B. *En banc* hearing will avoid conflicts with Circuit and Supreme Court precedent.

Another consideration counsels *en banc* hearing: if a merits panel follows the analysis of the motions panel, the result would draw this Circuit into direct conflict with Circuit and Supreme Court precedent. *See* 10TH CIR. R. 35.1(A) (*en banc* hearing "intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United

States Supreme Court or of this court"). *En banc* hearing would avoid this dilemma.

Following the district court, the motions panel ruled that the mandate's burden on the Greens was not "substantial" under RFRA because it was "indirect and attenuated." Mot. Op. at 7. But a decision on that basis violates Circuit precedent, which makes no distinction between "direct" and "indirect" burdens. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (explaining that a law substantially burdens religious exercise by "requir[ing] participation" in religiously-prohibited activities, by "prevent[ing] participation" in religiously-motivated activities, or by "plac[ing] substantial pressure" on a believer to violate religious exercise). Here, there can be no serious doubt that the mandate "requires participation" in the religiously-prohibited activity of providing insurance coverage for the drugs and devices at issue. Nor can there be any question that the mandate and its accompanying enforcement mechanisms impose (and, obviously, are designed to impose) "substantial pressure" on Appellants to make them provide this insurance coverage. Moreover, the "indirect and attenuated" standard adopted by the motions panel was taken from a discredited Seventh Circuit opinion which other circuits have rejected and which the Seventh Circuit itself did not mention

when—in direct contradiction to the motions panel here—it granted injunctive relief in *Korte*.[13]

More fundamentally, the Supreme Court has long rejected any distinction between "direct" and "indirect" burdens in evaluating whether laws substantially burden religious exercise. *See Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (invalidating religious burden under free exercise that was "only an indirect result" of unemployment laws); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (explaining that, "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"). The motion panel's approach would thus create a direct conflict with decades of Supreme Court precedent, which is why numerous other courts have declined to follow it in granting business owners injunctive relief from the mandate. *See, e.g., Newland*, 2012 WL 3069154, at *9 (rejecting this approach "out of hand" because it requires "impermissible line drawing" in violation of *Thomas*).

[13] *See* 870 F. Supp. 2d at 1294 (relying on *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*"). Three circuits have rejected *CLUB*: *see Adkins v. Kaspar*, 393 F.3d 559, 568-70 (5th Cir. 2004); *Guru Nanak Sikh Soc'y v. Cnty. of Sutter*, 456 F.3d 978, 988 & n.12 (9th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). The Seventh Circuit itself has significantly limited *CLUB*. *See, e.g., Saints Constantine and Helen Greek Orth. Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899-900 (7th Cir. 2005) (distinguishing *CLUB*).

En banc hearing will ensure that this appeal's outcome will not—unlike the motions panel's approach—bring this Circuit into conflict with itself, with other circuits, and with longstanding Supreme Court jurisprudence.

CONCLUSION

This appeal lies at the epicenter of a national controversy over whether the federal government may override the consciences of business owners. *En banc* hearing is warranted because this exceptionally important issue is presented in appeals before multiple circuits (including two before this Court), and because a motions panel of this Court has already drawn itself into conflict with two other circuits. The normal panel process would almost certainly bring this Court into internal conflict, into conflict with other circuits, or both, necessitating *en banc* rehearing. Appellants therefore ask the Court to grant hearing *en banc* now.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 10, 2013, I caused the foregoing *Petition for Hearing En Banc* to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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All other case participants will be served via the Court's electronic filing system as well.

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

(1) all required privacy redactions have been made;

(2) no hard copies are required to be filed;

(3) the ECF submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (last updated January 10, 2013) and, according to the program, is free of viruses.

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HOBBY LOBBY STORES, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
vs.	)	NO. CIV-12-1000-HE
	)	
KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Plaintiffs, Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Steve Green, Mart Green and Darsee Lett sued Kathleen Sebelius, Secretary of the United States Department of Health and Human Services ("HHS"), and other government officials and agencies challenging regulations issued under the Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 124 Stat. 119 (2010), as amended by the Heath Care and Education Reconciliation Act, Publ. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA"). Specifically, plaintiffs object to the preventive care coverage regulations or mandate which they allege forces them to "provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling." Complaint, ¶ 8. Plaintiffs contend the mandate violates their statutory and constitutional rights and seek both declaratory and injunctive relief. Presently at issue is plaintiffs' motion for preliminary injunction in which they ask the court to prohibit defendants from enforcing the mandate against them. A hearing on the motion was held on November 1, 2012.

This lawsuit is one of many challenging various aspects of the Affordable Care Act. While the legislation is controversial, as another judge has stated in similar circumstances, "this Court's personal views on the necessity, prudence, or effectiveness of the Affordable Care Act are of no moment whatsoever. The only issues concerning the ACA presently before this Court are those raised by the parties: namely, whether [the preventive services coverage provision] passes muster under the Constitution of the United States, and whether it violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq." Mead v. Holder, 766 F.Supp.2d 16, 19 (D.D.C. 2011), *aff'd on other grounds,* Nat'l Fed'n of Indep. Bus. v. Sebelius, ___U.S. ___ (2012).

Background

The ACA, signed into law on March 23, 2010, effected a variety of changes to the healthcare system. The Act includes a preventive services provision which provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... (4) with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration[1] for purposes of this paragraph.

42 U.S.C. § 300gg–13(a). The Health Resources and Services Administration (HRSA) commissioned the Institute of Medicine (IOM) to develop recommendations for the HSRS guidelines. The IOM published a report which proposed, among other things, that insurance plans cover "[a]ll Food and Drug Administration approved contraceptive methods,

[1]*The Health Resources and Services Administration (HRSA) is an agency within HHS.*

sterilization procedures, and patient education and counseling for all women with reproductive capacity."[2] Included among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices.[3]

On August 1, 2011, HRSA adopted IOM's recommendations in full, *see* 76 Fed.Reg. 46621; 45 C.F.R. § 147.130, and, on February 15, 2012, HHS, the Department of Labor and the Department of Treasury published rules finalizing the HRSA guidelines. Unless grandfathered or otherwise exempt, employers' group health plans must provide coverage conforming with the guidelines for plan years beginning on or after August 1, 2012. 75 Fed.Reg. 41726, 41729.

Grandfathered health plans are not subject to the preventive services provision of the ACA. 75 Fed.Reg. 34538–01 (June 17, 2010).[4] Some religious employers also are exempt from providing plans that cover contraceptive services. To qualify as a "religious employer" an employer must satisfy the following criteria:

(1) The inculcation of religious values is the purpose of the organization; (2)

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[2]*See http://www.hrsa.gov/womensguidelines/.*

[3]*See www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm. FreePublications/UCM282014.pdf (last updated Aug. 2012).*

[4]*A grandfathered plan is one that was in existence on March 23, 2010, and which has not undergone any of a defined set of changes. See 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. The government estimates that by 2013, a majority of group health plans will lose their grandfathered status.*

> The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(I) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B); 76 Fed.Reg. 46621–01, 46623. A temporary enforcement safe-harbor provision applies to other non-profit organizations that do not qualify for any other exemption and "do not provide some or all of the contraceptive coverage otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization." 77 Fed.Reg. 16501, 16502 (March 21, 2012); 77 Fed.Reg. 8725 (Feb. 15, 2012).[5] Finally, an employer with fewer than 50 employees is not required to provide any health insurance plan. 26 U.S.C. § 4980H(c)(2)(A).

The individual plaintiffs (collectively the "Greens"), are members of a family that owns and operates Hobby Lobby Stores, Inc. and Mardel, Inc., privately held, for-profit corporations. Hobby Lobby operates 514 arts and crafts stores in 41 states with 13,240 full-time employees. Mardel is a bookstore and educational supply company that specializes in Christian materials. It has 35 stores in 7 states with 372 employees. Both Hobby Lobby and Mardel are operated through a management trust which owns all the voting stock in the corporations.[6] Each member of the Green family is a trustee of the trust.

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[5]*The government is in the process of finalizing amendments to the preventive services coverage regulations to accommodate the religious objections of non-exempt, non-grandfathered religious organizations to providing coverage for contraceptive services. See 77 Fed.Reg. at 8728.*

[6]*It is not altogether clear from the parties' submissions whether Hobby Lobby and Mardel are wholly owned by the Green plaintiffs or just wholly controlled by them, with some portion of the non-voting, equity ownership of the companies held by others. See Complaint, ¶38. The*

Although Hobby Lobby and Mardel are for-profit, secular corporations, the Green family operates them according to their Christian faith. "As part of their religious obligations" the Green family provides health insurance coverage to Hobby Lobby's and Mardel's employees through a self-insured plan. Complaint, ¶52. However, "[t]he Green family's religious beliefs prohibit them from deliberately providing insurance coverage for prescription drugs or devices inconsistent with their faith, in particular abortion-causing drugs and devices. Hobby Lobby's insurance policies have long explicitly excluded – consistent with their religious beliefs – contraceptive devices that might cause abortions and pregnancy-termination drugs like RU-486." *Id.* at ¶¶ 53-54. The government does not dispute the sincerity of the Greens' beliefs.

Hobby Lobby and Mardel, as secular, for-profit companies, do not satisfy the ACA's definition of a "religious employer" and are ineligible for the protection of the safe-harbor provision. Their health plans also are not grandfathered under the Act. The mandate takes effect as to the corporations' employee health plan on January 1, 2013, as that is the date upon which the plan year begins. Plaintiffs assert that they "face an unconscionable choice: either violate the law, or violate their faith." *Id.* at ¶ 133. If Hobby Lobby fails to provide the mandated coverage, plaintiffs contend the corporation will incur penalties of about $1.3 million a day. Mardel also will be fined if it does not comply with the mandate. Plaintiffs seek a preliminary injunction to prevent defendants from enforcing the mandate against them,

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complaint alleges only voting control. The distinction does not affect the disposition of the pending motion.

arguing that the mandate violates their right to free exercise of religion under the First Amendment and their statutory rights under the Religious Freedom Restoration Act of 1993. ("RFRA"), 42 U.S.C. § 2000bb-1.

Legal Standard

A preliminary injunction is an extraordinary remedy and should "not be issued unless the movant's right to relief is 'clear and unequivocal.'" Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). To obtain a preliminary injunction the moving party must establish that:

> (1) [the movant] will suffer irreparable injury unless the injunction issues; (2) the threatened injury ... outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Id. (quoting Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992). Plaintiffs, as the movants, have the burden of demonstrating that each factor tips in their favor. *Id.* at 1188-89.

The Tenth Circuit has applied a relaxed "probability of success" requirement when the moving party has "established that the three'harm' factors tip *decidedly* in its favor." *Id.* at 1189. The movant in such cases "need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Id.* (internal quotations omitted). Plaintiffs urge application of the "'less rigorous fair-ground-for-litigation standard.'" Heideman, 348 F.3d at 1189 (quoting Sweeney v. Bane, 996 F.2d 1384, 1388 (2d Cir.1993)).

The relaxed standard does not apply if the injunction "is one that alters the status quo and therefore is disfavored." Northern Natural Gas Co. v. L.D. Drilling, Inc., ___ F.3d ___, ___ , 2012 WL 4902833 at *4 (10th Cir. 2012). Defendants argue that plaintiffs are not seeking to maintain the status quo because, prior to the enactment of the mandate, Hobby Lobby provided coverage for emergency contraceptives that could cause an abortion. The court is not persuaded that the coverage was due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. Defendants do not dispute that the company's policies have otherwise long excluded abortion-inducing drugs. Here plaintiffs are not seeking a disfavored injunction, but rather ask the court to preserve the status quo.

The court agrees with plaintiffs that the questions presented here are "serious, substantial, difficult and doubtful." However, an additional limitation on the applicability of the "less rigorous fair-ground-for-litigation standard" exists. The Tenth Circuit has concluded the "'liberal definition of the 'probability of success' requirement'" does not apply "'where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme.'" Nova Health Systems v. Edmondson, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006) (quoting Heideman, 348 F.3d at 1189).[7] Here, plaintiffs challenge a regulatory requirement imposed pursuant to a statutory or regulatory

[7]*Defendants argue that in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008), the Supreme court abrogated the more flexible standard for the preliminary injunction. The court does not have to reach that issue, due to its conclusion that, because plaintiffs are seeking to enjoin the enforcement of an action taken, pursuant to a statutory scheme, they "must meet the traditional substantial likelihood of success' standard." Nova Health Systems, 460 F.3d at 1298 n.6.*

scheme. As a result, the more liberal "fair ground for litigation" standard does not apply.

One court in this circuit has reached a contrary conclusion.[8] In Newland v. Sebilius, ___F.Supp.2d ___ , 2012 WL 3069154 (D.Colo. 2012), a factually similar case, the court concluded the relaxed "likelihood of success" standard should be applied because the "government's creation of numerous exceptions to the preventive care coverage mandate has undermined its alleged public interest." *Id.* at 2012 WL 3069154, at *5. However, for purposes of determining the appropriate preliminary injunction standard, the question is not whether the public interest is strong or compelling, but rather whether it is in the public interest at all. And as to that question, the court is obliged to defer to the determination of Congress. As the Tenth Circuit observed in a somewhat similar context, applying the Heideman rule, "we presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'" Aid for Women v. Foulston, 441 F.3d 1101, 1115 n. 15 (10th Cir. 2006)(more relaxed standard inapplicable to plaintiff's challenge to a Kansas statute requiring reporting of minors' voluntary sexual activity). In like manner, this court presumes the challenged government actions at issue here are taken in the public interest within the meaning of the Heideman standard, notwithstanding the existence of exceptions to the coverage requirement.[9]

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[8]*Two district courts in other circuits have issued preliminary injunctions in similar cases, employing different standards than those adopted by the Tenth Circuit. See Legatus v. Sebelius, ___ F.Supp.2d ___, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) and Tyndale House Publishers, Inc. v. Sebelius, ___ F.Supp.2d ___, 2012 WL 5817323 (D.D.C. Nov. 16, 2012).*

[9]*And, as noted above, the presumption is made without regard to the court's owns views of whether the ACA or the particular regulatory requirements at issue are sound public policy.*

Similarly unpersuasive is plaintiff's argument that the more flexible preliminary injunction standard applies here because they are not attacking the entire statutory scheme, just a small part of it. First, the Heideman exception, as articulated by the Tenth Circuit, does not require the challenge to be to an entire statutory scheme. Instead, it refers to attempts to "stay governmental action taken in the public interest" that is "pursuant to a statutory or regulatory scheme." Heideman, 348 F.3d at 1189 (internal quotations omitted). The mandate at issue here is both (1) an action in the public interest, as determined by Congress, and (2) one taken pursuant to the statute. That is all that is required. Moreover, none of the cases plaintiffs cite offer any explicit support for their view and at least some of them clearly involve challenges to less than a whole "scheme." For example, in Foulston, the challenge was not to the entire scheme (which imposed a reporting requirement on various professionals for instances of physical, mental or emotional abuse or neglect or sexual abuse of a child), but to a limited aspect of it (mandatory reporting of consensual sex between minors).

As plaintiffs are challenging a coverage requirement imposed as part of a regulatory or statutory scheme, the "fair ground for litigation standard" does not apply. To obtain injunctive relief, they must show a substantial likelihood of success on the merits, in addition to the standard's three other requirements. The requirement for showing a substantial likelihood of success on the merits is determinative of the present motion for the reasons which follow.

First Amendment – Free Exercise of Religion

The First Amendment's Free Exercise Clause states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Plaintiffs maintain they exercise their religion by complying with their religious beliefs which prohibit them from providing coverage, or access to coverage, for abortion-causing drugs or devices or related education and counseling. The mandate forces them, plaintiff's argue, to violate their religious beliefs and substantially burdens their religious exercise.

The question of whether plaintiffs are likely to prevail on their constitutional claims requires a threshold determination of whether the particular plaintiffs have constitutional "free exercise" rights subject to being violated. As to the Greens, the answer to that is obviously yes. However, as to the corporations — Hobby Lobby and Mardel — the court concludes otherwise.

Corporations have constitutional rights in some circumstances, such as the right to free speech, but the rights of corporate persons and natural persons are not coextensive. Courts have not extended all constitutional rights to all corporations. Corporations do not possess a "right to exercise a privilege against self-incrimination." Application to Enforce Admin.Subpoenas Duces Tecum of the § v. Knowles, 87 F.3d 413, 416 n.3 (10th Cir.1996), They have been denied "[c]ertain'purely personal' guarantees ... because the 'historic function' of the particular guarantee has been limited to the protection of individuals." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 14 (1978) (citing United States v. White, 322 U.S. 694, 698-701 (1944)). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature,

history, and purpose of the particular constitutional provision." *Id.*

The purpose of the free exercise clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (emphasis added). Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause, *see* Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, ___ U.S.___, ___, 132 S.Ct. 694, 706 (2012); Lukumi, 508 U.S. at 531-32, because believers "exercise their religion through religious organizations." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (BRENNAN, J. concurring) (internal quotations omitted). However, Hobby Lobby and Mardel are not religious organizations. Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations such as Hobby Lobby and Mardel have a constitutional right to the free exercise of religion. *See* Anselmo v. Cnty. of Shasta, ___ F.Supp.2d ___, 2012 WL 2090437, at *12 (E.D.Cal 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills.").[10] The court concludes plaintiffs Hobby Lobby and Mardel do not have constitutional free exercise rights as corporations and that they therefore cannot show a likelihood of success as to any

[10]*The court has considerable doubt whether the corporations would have standing to assert a claim on behalf of the Greens. See generally Grace,451 F.3d at 670 (discussing prerequisites for associational standing as stated by the Supreme Court in Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). However, as the Greens are parties appearing and asserting their own rights, it is unnecessary to belabor the issue.*

constitutional claims they may assert. Plaintiffs' ability to show a likelihood of success therefore depends on evaluation of the claims of the individual plaintiffs — the Greens.

The question of whether the Greens can establish a free exercise constitutional violation by reason of restrictions or requirements imposed on general business corporations they own or control involves largely uncharted waters. However, the court concludes it is unnecessary, as to the constitutional claims, to resolve those questions here as the challenged statutory scheme and regulations are substantially likely to survive constitutional scrutiny in any event.

"While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct." Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006). "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). If a law is both neutral and generally applicable, it only has to be "rationally related to a legitimate governmental interest to survive a constitutional challenge." Grace,451 F.3d at 649. A law that burdens a religious practice and is not neutral or generally applicable is subject to strict scrutiny. *Id.* "[U]nless it is narrowly tailored to advance a compelling governmental interest," the law violates the Free Exercise Clause. *Id.*

To analyze plaintiffs' free exercise claims the court must first determine the level of scrutiny to apply. *Id.* A law is neutral if its object is "something other than the infringement or restriction of religious practices." *Id.* at 649-50. Citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), plaintiffs argue that the mandate is not neutral because it exempts some religious employers from compliance while compelling others to provide coverage for preventive services. They contend it discriminates between religious objectors, exempting "only 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." Plaintiffs' motion, p. 18,

Carving out an exemption for defined religious entities does not make a law nonneutral as to others. Plaintiffs do not allege that "the object of [the mandate] is to infringe upon or restrict practices because of their religious motivation." Lukumi, 508 U.S. at 533 (emphasis added);[11] *see* Grace, 451 F.3d at 649-50. They do not dispute that the mandate's purpose is secular in nature and intended to promote public health and gender equality. "[T]here is no evidence that the exception is in any way based on religious categorization or discrimination." Grace, 451 F.3d at 652 (quoting Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701 (10th Cir.1998)); *see* Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) ("A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability.");Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1232-33

[11]*Plaintiffs also do not argue that the preventive care coverage regulations lack "facial neutrality." See Lukumi, 508 U.S. at 533.*

(10th Cir. 2009); Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (N.Y. 2006). In fact, the religious employer exemption and the safe harbor provision suggest the opposite of what plaintiffs argue and must show to warrant strict scrutiny of the mandate. Using well established criteria to determine eligibility for an exemption based on religious belief, such as the nonsecular nature of the organization and its nonprofit status, the ACA, through its implementing rules and regulations, both recognizes and protects the exercise of religion. The fact that the exceptions do not extend as far as plaintiffs would like does not make the mandate nonneutral. O'Brien v. United States Dep't of Health and Human Servs., ___ F.Supp.2d ___, ___, 2012 WL 4481208, at *8 (E.D. Mo. 2012) ("[T]he religious employer exemption does not compromise the neutrality of the regulations by favoring certain religious employers over others. Rather . . . the religious employer exemption presents a strong argument in favor of neutrality . . . ."). As the New York Court of Appeals explained in Serio, a case involving a free exercise challenge to a state law requiring employers providing coverage for prescription drugs to include coverage for contraceptives:

> The neutral purpose of the challenged portions of the [health care law]—to make contraceptive coverage broadly available to New York women—is not altered because the Legislature chose to exempt some religious institutions and not others. To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion.

Serio, 859 N.E. 2d at 464. "[T]he neutrality inquiry leads to one conclusion: The [preventive services coverage regulations] [did not have] as their object the suppression of religion." Lukumi, 508 U.S. at 542.

The second requirement of the constitutional test is that "laws burdening religious practice must be of general applicability." *Id.* "The Free Exercise Clause protect[s] religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43 (internal citation and quotations omitted).

Plaintiffs contend the mandate is not generally applicable because of the numerous exemptions, including those for grandfathered plans and religious employers. However, the mandate does not "pursue[] ... governmental interests only against conduct motivated by religious belief." *Id.* at 545. As the court noted in O'Brien, 2102 WL 4481208, at *8, "[t]he regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations." *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009) ("Pharmacies and pharmacists who do not have a religious objection to Plan B must comply with the rules to the same extent—no more and no less—than pharmacies and pharmacists who may have a religious objection to Plan B. Therefore, the rules are generally applicable.").

As the court concludes the mandate is neutral and of general applicability, it is subject only to rational basis scrutiny under the First Amendment. Smith, 494 U.S. at 883-85. Plaintiffs do not argue that there is no legitimate government interest for the mandate or that the regulations are not rationally related to protect that interest, and the court finds no basis on the present showing to conclude the law, under the rational basis test, is unconstitutional.

Applying these principles, the court concludes plaintiffs have not established a

likelihood of success as to their constitutional claims. The corporations lack free exercise rights subject to being violated and, as the challenged statutes/regulations are neutral and of general applicability as contemplated by the constitutional standard, plaintiffs are unlikely to successfully establish a constitutional violation in any event.

Religious Freedom Restoration Act

Plaintiffs' claims under the Religious Freedom Restoration Act of 1993 present a closer question. RFRA applies standards which are more protective of religious exercise than the constitutional standard. It prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that application of the burden to the person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006). The Act "provides a statutory claim to individuals whose religious exercise is burdened by the federal government." United States v. Wilgus, 638 F.3d 1274, 1279 (10th Cir. 2011). Congress passed RFRA to restore the compelling interest test that had been applied to laws substantially burdening religious exercise before the Supreme Court's decision in Smith.

RFRA provides that:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception

> Government may substantially burden a person's exercise of religion only 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.

As was the case with plaintiffs' constitutional claims, a threshold question here is whether all the plaintiffs are in a position to assert rights under RFRA. That depends on whether particular plaintiffs qualify as a "person" within the meaning of the statute. The Greens are unquestionably "persons" under the statute, entitled to assert its potential application to them. Less clear is the status of Hobby Lobby and Mardel.

RFRA does not include a specific definition of "person." Plaintiffs argue that Hobby Lobby and Mardel qualify as "persons" based on the general definition included in 1 U.S.C. § 1. That section provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words 'person' and 'whoever' includes corporations ... as well as individuals." As used in § 1, "'[c]ontext' . . . means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning . . . ." Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993). While context "has a narrow compass, the 'indication' contemplated by 1 U.S.C. § 1 has a broader one." *Id.* at 200. The qualification "unless the context indicates otherwise," is intended to assist the court "in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. § 1 seems not to fit." *Id.* That

is the situation here. General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters referenced in Bellotti which is not the province of a general business corporation. As applied to 1 U.S.C. § 1 and the question of whether these corporations are "persons" within the meaning of RFRA, the context "indicates otherwise."

"Plaintiffs assert that "[i]t is settled law that corporations may exercise religion." Plaintiffs' reply, p. 8. However, the cases they cite, Gonzales and Lukumi involved religious organizations, not general business corporations.[12] The same reasons behind the court's conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not "persons" for purposes of the RFRA.[13] This conclusion is buttressed by RFRA's reference to principles of standing:

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[12]*Centro Espirita Beneficiente Uniao do Vegetal is described in Gonzales as a religious sect. There is no indication it was incorporated. The church in Lukumi was a non-profit corporation, 508 U.S. at 525, and nothing in Gonzales indicates the religious sect operated a secular, for profit business. Plaintiffs also cite Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295 (11th Cir.2006) for the proposition that a commercial corporation's rights can include religious exercise. However, in resolving the issue of whether the plaintiff had standing to assert a violation of free exercise rights under the First Amendment, the Eleventh Circuit stated: "we easily conclude that Primera, as an incorporated religious organization, stated a section 1983 claim for the alleged violation of its ... free exercise rights." Id. at 1306.*

[13]*Plaintiffs argue that "the Supreme Court has at least twice allowed commercial proprietors to assert religious exercise claims against regulations impacting their businesses," citing United States v. Lee, 455 U.S. 252 (1982) and Braunfeld v. Brown,366 U.S. 599 (1961). Plaintiffs' reply,*

"Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution." 42 U.S.C. § 2000bb-1(c).

In any event, the court concludes that plaintiffs have not established a likelihood of success as to any claims asserted by Hobby Lobby and Mardel under RFRA. The question then becomes whether plaintiffs have established a likelihood of success as to the RFRA claims of the Greens.

"[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion."[14] Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001). Once the plaintiff establishes these elements, "the burden shifts to the government to demonstrate

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p. 4 . However, neither case appears to have involved a corporation and, in any event, it is clear that the religious beliefs that were allegedly being interfered with were those of the owners. Braunfeld, 366 U.S. at 601 ("[T]he only question for consideration is whether the statute interferes with the free exercise of appellants' religion. . . . Each of the appellants is a member of the Orthodox Jewish faith."). Plaintiffs also rely on two Ninth Circuit cases, Storman's, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) and EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988). Neither supports their argument. In Storman's, 586 F.3d at 1119, the Ninth Circuit stated "We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine the rights at issue as those of the corporate owners." Similarly, in Townley, 859 F.2d at 619-20, the court stated: " Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. Townley presents no rights of its own different from or greater than its owners' rights.") .

[14]*The term "religious exercise" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); 42 U.S.C. § 2000bb-2(4); see generally Smith, 494 U.S. at 877 ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").*

that 'application of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 961-62 (quoting 42 U.S.C. § 2000bb–1(b)); Gonzales,546 U.S. at 428-30.

The second and third elements of plaintiffs' prima facie case are not in dispute. No one questions that the Greens' beliefs are sincerely held or that the mandate burdens, at least indirectly, the Greens' "own exercise of [their] sincerely held religious beliefs."[15] Abdulhaseeb v. Calbone, 600 F.3d 1301, 1314 (10th Cir. 2010), *cert. denied*, ___ U.S. ___ (2010). The critical question is whether the mandate imposes a "substantial" burden on the Greens for purposes of the RFRA. Defendants contend that any burden the mandate imposes on the Greens is indirect, "result[ing]s from obligations that the preventive services coverage regulations impose on a legally separate, secular entity." Defendants' response, pp. 18-19. They argue that "[t]his type of attenuated burden is not cognizable under the RFRA." *Id.* at p. 19. Plaintiffs counter that defendants' "attenuation argument rewrites their faith. The government may not, they contend "re-draw the theological lines in religious belief systems." Plaintiffs' reply, p. 13. They contend the mandate substantially burdens their religious exercise "by forcing them to choose between following their convictions and paying enormous fines." Plaintiffs' motion, p. 9.

The present circumstances require charting a course through the "treacherous terrain"

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[15]*Plaintiffs assert that they "exercise religion by avoiding participation in abortion, an act forbidden by their faith. Plaintiffs' reply, p. 3.*

at the intersection of the federal government's duty to avoid imposing burdens on the individual's practice of religion and the protection of competing interests. *See* Wilgus, 638 F.3d at 1281. No Supreme Court or Tenth Circuit authority applying or discussing RFRA's "substantial burden" requirement does so in circumstances like those present here — where regulatory requirements applicable to a general business corporation are alleged to infringe on the religious exercise rights of the corporation's owners or officers. Similarly, the cases decided under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5, which applies essentially the same standard,[16] do not provide specific guidance. However, certain principles emerge from the cases which guide the court's determination.

First, it is clear, as plaintiffs argue, that it is not the province of the court to tell the plaintiffs what their religious beliefs are, i.e. whether their beliefs about abortion should be understood to extend to how they run their corporations or the like, or to decide whether such beliefs are fundamental to their belief system or peripheral to it. RFRA makes clear it does not matter whether the particular exercise of religion at issue is or is not central to the individual's religious beliefs. 42 U.S.C. § 2000cc-5(7)(A); *see* Abdulhaseeb, 600 F.3d at 1314 at n.6. Nonetheless, even assuming, as appears to be the case with plaintiffs, that they object as a matter of religious faith to any act supporting or facilitating abortion, no matter

[16]*RLUIPA cases are instructive as "RLUIPA's legislative history reveals that 'substantial burden' is to be interpreted by reference to the Religious Freedom Act of 1993 ... and First Amendment jurisprudence." Grace, 451 F.3d at 661 (citing 146 Cong. Rec. 7774-01, 7776).*

how indirect, that does not end the issue. RFRA's provisions do not apply to any burden on religious exercise, but rather to a "substantial" burden on that exercise. As the Seventh Circuit observed in Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003):

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use - however minor the burden it were to impose - could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.[17]

342 F.3d 752, 761. Recognizing that the word "substantial" must have some meaning, the Civil Liberties court went on to conclude that

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

Id. (emphasis added). Civil Liberties thus concludes, in general, that a "substantial burden" on religious exercise is one that bears in some relatively direct manner on it.

The view of substantial burden adopted by the Seventh Circuit in Civil Liberties is not the only approach that has emerged. *See* Adkins v. Kaspar, 393 F.3d 559, 567-71(5th Cir. 2004) (discussing cases); Living Water Church of God v. Charter Twp. of Meridian, 258 Fed.Appx. 729, 2007 WL 4322157 at 6-8 (6th Cir. 2007) (unpublished) (discussing cases).

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[17] *Civil Liberties was decided under RLIUPA but, as noted above, RLIUPA's standards for what constitutes a "substantial burden" are the same as RFRA's.*

However, the Tenth Circuit has cited Civil Liberties with approval in the context of determining what constitutes a "substantial burden," Grace, 451 F.3d at 661, suggesting that it shares the view that some level of "directness" must be present. The Tenth Circuit has, of course, also noted that a substantial burden may, in some circumstances, be based on compulsion that is indirect. Abdulhaseeb, 600 F.3d at 1315; *see also* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981). Giving effect to both principles, the result appears to be that, while no bright line rule has been stated by the Supreme Court or the Tenth Circuit (or perhaps could be, in this context), the degree to which the challenged government action operates directly and primarily on the individual's religious exercise is a significant factor to be evaluated in determining whether a "substantial burden" is present.

Evaluating the "directness" factor here, the court concludes the Greens are unlikely to be able to establish a "substantial burden" on them within the meaning of RFRA. The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners. Further, the particular "burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned by plaintiff's religion." O'Brien, 2012 WL 4481208, at *6. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Other cases decided by the Tenth Circuit under RFRA/RLUIPA are consistent with the view that some reasonably direct and personal connection between the religious exercise

and the restraint in question must be present. In Abdulhaseeb, the restriction in question directly impacted the religious exercise of the plaintiff by denying him the diet that was necessary to his religious beliefs. In Wilgus, the defendant personally possessed the eagle feathers. In Kikumura, the prisoner was denied pastoral visits by a minister he claimed was particularly well suited to provide him with spiritual guidance.

Similarly, the principal Supreme Court case construing RFRA, Gonzales, also involved a close or personal connection between the religious exercise and the infringing government action. The religious sect in Gonzales was prohibited from engaging in communion. Its members were faced with the choice of foregoing a religious sacrament or violating the Controlled Substances Act.

Consideration of Supreme Court decisions addressing the constitutional standard in this area also provides some support for the view that the necessary "substantial burden" is unlikely to be established here. Grace notes that the legislative history of RFRA and RLUIPA indicates that the term "substantial burden" should not be given a broader interpretation that the Supreme Court's articulation of the concept. Grace, 451 F.3d at 661. *See* O'Brien, 2012 WL 4481208 at *5 ("Courts frequently look to free exercise cases predating Employment Div. v. Smith to determine which burdens cross the threshold of substantiality"); Anselmo, 2012 WL 2090437, at *8 ("The Ninth Circuit has explained that the Supreme Court's free exercise jurisprudence ... is instructive in defining a substantial burden under RLUIPA . . . ."") (quoting Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir.2006)). As with the Tenth Circuit cases, the Supreme

Court decisions have also involved situations where the restraint in question operated with some level of directness on the individual. For example, the plaintiff in Sherbert v. Verner, 374 U.S. 398 (1963), was forced "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." 374 U.S. at 404. The compulsory attendance law at issue in Yoder, 406 U.S. 205 (1972), required the Amish plaintiffs to elect between "abandon[ing] belief and be[ing] assimilated into society at large, or be[ing] forced to migrate to some other and more tolerant region." 406 U.S. at 218. In Thomas, the employee's personal participation in activity to which he objected was involved.

Finally, the court notes the Supreme Court's approach in Lee. Although Lee was a free exercise case and focused principally on the nature and application of the compelling interest test, its discussion of the impact of commercial activity provides some guidance on the issue of what constitutes a "substantial burden." The Court noted that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." Lee, 455 U.S. at 261. The plain import is that there must be more than some burden on religious exercise. The burden must be substantial. The Court then went on to state that

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer.

455 U.S. at 261. The Court's discussion reflected a concern with the impact of the employer's faith-based decisions on his employees. While that appears not to have been a matter critical in Lee, as Lee's employees were also Amish, it would be potentially significant here. Hobby Lobby and Mardel employ over 13,500 people and "welcome[] employees of all faiths or no faith." Complaint, ¶ 51. Many of those employees are likely to have different religious views. Moreover, the employees' rights being affected are of constitutional dimension — related to matters of procreation, marriage contraception, and abortion.[18] While such considerations (and the discussion in Lee referenced above) go most directly to a determination of whether a compelling governmental interest is shown in a particular circumstance, rather than to what is here the determinative issue — what constitutes a "substantial burden" — they nonetheless suggest that term should be given meaningful application.

In sum, while the meaning and reach of the term "substantial burden" in this context is considerably less than crystal clear, it appears to impose a requirement that the burden on religious exercise be more direct and personal than has been shown here as to the Greens and their management of nationwide general business corporations.

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[18]*The matter of a constitutional right to abortion has been highly controversial since the right was discovered among the penumbras of the Due Process Clause some forty years ago. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973). Nonetheless, the right is now clearly established and necessarily shapes the nature of the rights and interests of plaintiffs' employees. See Gonzales v. Carhart, 550 U.S. 124(2007); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).*

Conclusion

Plaintiffs have not shown a "clear and unequivocal" right to injunctive relief in light of the standards applicable to their request. Heideman, 348 F.3d at 1188 (internal quotations omitted). The court is not unsympathetic to plaintiffs' circumstances and recognizes that the ACA's substantial expansion of employer obligations results in concerns and issues not previously confronted by companies or their owners. However, for the reasons previously stated, the court concludes plaintiffs have not made the necessary showing of a likelihood of success on the merits to warrant a preliminary injunction in the circumstances existing here.

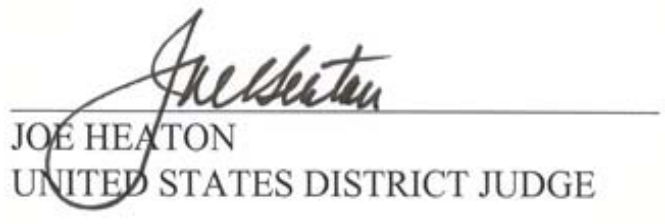
Plaintiffs have not demonstrated a probability of success on their First Amendment claims. Hobby Lobby and Mardel, secular, for- profit corporations, do not have free exercise rights. The Greens do have such rights, but are unlikely to prevail as to their constitutional claims because the preventive care coverage regulations they challenge are neutral laws of general applicability which are rationally related to a legitimate governmental objective.

Plaintiffs also have failed to demonstrate a probability of success on their Religious Freedom Restoration Act claims. Hobby Lobby and Mardel are not "persons" for purposes of the RFRA and the Greens have not established that compliance with the preventive care coverage regulations would "substantially burden" their religious exercise, as the term "substantially burdened" is used in the statute. Therefore, plaintiffs have not met their prima facie burden under RFRA and have not demonstrated a probability of success as to their

RFRA claims.[19] Accordingly, the motion for preliminary injunction [Doc. #6] is **DENIED**.

IT IS SO ORDERED.

Dated this 19th day of November, 2012.



JOE HEATON
UNITED STATES DISTRICT JUDGE

[19]*Because plaintiffs have not demonstrated a substantial likelihood of success on the merits, it is unnecessary to determine whether the three other factors tip in their favor.*

FILED
United States Court of Appeals
Tenth Circuit

December 20, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

No. 12-6294
(D.C. No. 5:12-CV-01000-HE)
(W.D. Okla.)

ORDER

Before **LUCERO** and **EBEL**, Circuit Judges.

Plaintiffs-Appellants Hobby Lobby Stores, Inc. and Mardel, Inc. (corporate plaintiffs), and David Green, Barbara Green, Mart Green, Steve Green, and Darsee Lett (individual plaintiffs) who indirectly own and control the closely-held corporate

plaintiffs, have moved for an injunction pending resolution of this appeal. For reasons explained below, we conclude they have failed to demonstrate an entitlement to such relief and therefore deny the motion.

Plaintiffs brought this action for declaratory and injunctive relief to challenge the regulatory implementation of one aspect of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. They object to implementation of the preventive health services provision, 42 U.S.C. § 300gg-13(a), which mandates coverage, without cost-sharing requirements, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." Their primary claim is that HRSA guidelines allowing for abortion-inducing contraceptive drugs and devices violate their free-exercise rights under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4. Along with their complaint, plaintiffs filed a motion for a preliminary injunction to preclude enforcement of the mandate, which would otherwise take effect with respect to the corporate plaintiffs' employee insurance plans on January 1, 2013. After briefing and a hearing, the district court denied the motion. This appeal, and the motion for associated injunctive relief, followed.

In ruling on a motion for injunction pending appeal, "this court makes the same inquiry as it would when reviewing a district court's grant or denial of a

preliminary injunction," *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (per curiam), which means this motions panel must assess the same factors that will control the merits panel's review of the underlying appeal. Of course, our assessment is based on a preliminary record without the benefit of full merits briefing and oral argument, and hence our necessarily tentative conclusions do not purport to constrain the ultimate determination of the case, *Homans v. City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004). With that caveat, we turn to the considerations that govern the grant or denial of preliminary injunctive relief.

To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits;[1] (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury outweighs any damage the injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). The burden on the movant with respect to this showing may be heightened or relaxed, depending on the nature of the injunctive relief sought. Three types of preliminary injunctions are specifically disfavored: injunctions that alter the

[1] In this respect, an injunction pending appeal and a preliminary injunction differ in focus, as the former involves success on appeal, *Homans*, 264 F.3d at 1243, while the latter involves success at trial, *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 777 (10th Cir. 2009).

status quo;[2] mandatory injunctions;[3] and injunctions that afford the movant all of the relief it could recover at the conclusion of a full trial on the merits. *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012). For these, the movant must show that the factors cited above "weigh heavily and compellingly in its favor." *Id.* (internal quotation marks omitted). Plaintiffs do not seek injunctive relief of this sort: the status quo is reflected in the coverage provided in their current health plans, which the injunction would preserve; the injunction would require forbearance, not affirmative action, by the government; and a full trial on the merits could provide plaintiffs with permanent declaratory and injunctive relief beyond the temporary injunctive relief now at issue.

On the other hand, a relaxed standard may be applied to the success factor if the movant establishes that the others "tip decidedly in its favor." *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006) (internal quotation marks omitted). In that case, instead of showing a substantial likelihood of success, the movant need only show "questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation." *Id.* (internal

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[2] "Status quo" here refers to "the last peaceable uncontested status existing between the parties before the dispute developed." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1071 (10th Cir. 2009) (internal quotation marks omitted).

[3] Mandatory injunctions "require the nonmoving party to take affirmative action . . . before a trial on the merits occurs." *Tyson Foods*, 565 F.3d at 776 (internal quotation marks omitted).

quotation marks omitted). Plaintiffs insist they are entitled to this relaxed standard. The district court disagreed, but not on the basis of the showing on the other factors. Rather, the district court invoked an independent categorical limitation on the availability of the relaxed standard: "'where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not be applied.'" *Id.* (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (further quotation omitted)). Plaintiffs advance two objections to this conclusion.

First, they contend the sheer number of exemptions currently allowed to forestall enforcement of the challenged mandate so diminishes the public interest involved that the *Heideman*/*Nova Health* principle is inapposite. We agree with the district court that the principle is triggered once a legislative or regulatory judgment is made that a scheme is needed to protect the public interest, and it is not up to the courts to second-guess that judgment or reassess the weight of the public interest.

Second, plaintiffs contend the *Heideman*/*Nova Health* principle should not apply when the proposed injunctive interference with the challenged scheme is counterbalanced by the enforcement of a contrary scheme—in this instance RFRA. Plaintiffs do not cite any authority for their major premise that the *Heideman*/*Nova Health* principle is inapplicable in cases involving competing schemes. Nor do they support their minor premise that RFRA constitutes a legislative or regulatory scheme for governmental action within the meaning of *Heideman*/*Nova Health*. RFRA is a

singular constraint on all governmental action, not a comprehensive directive for governmental action in a particular sphere. Given this double weakness in plaintiffs' effort to distinguish our otherwise controlling precedent, we adhere to that precedent here and thus use a substantial-likelihood-of-success standard in assessing their motion for injunctive relief on appeal.

We agree with the district court that plaintiffs failed to satisfy this standard on the first element of their RFRA claim, that the challenged mandate "substantially burden[ed] [their] exercise of religion."[4] 42 U.S.C. § 2000bb-1(a); *see also Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (setting out elements of prima facie case under RFRA). Thus, like the district court, we need not consider whether defendants have shown that the mandate is "'in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" *Kikumura*, 242 F.3d at 962 (quoting 42 U.S.C. § 2000bb-1(b) for burden placed on government if prima facie case under RFRA is made).

[4] The district court held that the for-profit corporate plaintiffs are not "persons" who can invoke RFRA to protect an "exercise of religion" within the meaning of 42 U.S.C. § 2000bb-1(a), even if they are closely held by individuals who invoke RFRA. That is a point vigorously contested by plaintiffs. We do not distinguish at this preliminary stage of the proceedings between the corporate and individual plaintiffs, as their common failure to demonstrate a substantial likelihood of success on the RFRA prima face case suffices to dispose of the motion before us.

The central point of the district court's substantial-burden analysis was succinctly stated:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012) (citation and internal quotation marks omitted). We agree. As the district court noted, other cases enforcing RFRA have done so to protect a plaintiff's own participation in (or abstention from) a specific practice required (or condemned) by his religion. We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship.

The motion for an injunction pending appeal is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 28, 2012

Before

JOEL M. FLAUM, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 12-3841

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

v.

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services, et al.,
Defendants-Appellees.

Appeal from the
United States District Court for the
Southern District of Illinois.

No. 3:12-CV-01072-MJR

Michael J. Reagan,
Judge.

O R D E R

The following are before the court:

1. PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE JANUARY 1, 2013, filed on December 18, 2012, by counsel for the appellants.

2. OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL, filed on December 21, 2012, by counsel for the appellees.

3. PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE JANUARY 1, 2013, filed December 21, 2012, by counsel for the appellants.

Cyril and Jane Korte and their construction company, Korte & Luitjohan Contractors, Inc. ("K & L Contractors"), appeal the denial of their motion for a preliminary injunction against the enforcement of provisions of the Patient Protection and Affordable Care Act ("ACA") and related regulations requiring that K & L Contractors purchase an employee health-insurance plan that includes no-cost-sharing coverage for contraception and sterilization procedures. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). They have moved for an injunction pending appeal. *See* FED. R. APP. P. 8. For the reasons that follow, the motion is granted.

The record at this stage of the proceedings is necessarily limited, but the parties do not substantially disagree about the facts. Cyril and Jane Korte own K & L Contractors, a construction firm with approximately 90 full-time employees. About 70 of their employees belong to a union, which sponsors their health-insurance plan; K & L Contractors provides a group health-insurance plan for the remaining 20 nonunion employees. The Kortes are Roman Catholic, and they seek to manage their company in a manner consistent with their Catholic faith, including its teachings regarding the sanctity of human life, abortion, contraception, and sterilization. In August 2012 they discovered that the company's current health-insurance plan includes coverage for contraception. The plan renewal date is January 1, 2013. The Kortes want to terminate this coverage and substitute a health plan (or a plan of self-insurance) that conforms to the requirements of their faith. The ACA's preventive-care provision and implementing regulations prohibit them from doing so.

More specifically, as relevant here, the ACA requires nongrandfathered and nonexempt group health-insurance plans to cover certain preventive health services without cost-sharing, *see* 42 U.S.C. § 300gg-13(a)(4), and regulations promulgated by the United States Department of Health and Human Services ("HHS") specify that the required coverage must include all FDA-approved contraceptive methods and sterilization procedures, *see* 77 Fed. Reg. 8725 (Feb. 15, 2012) ("the contraception mandate" or "the mandate"). This includes oral contraceptives with abortifacient effect (such as the "morning-after pill") and intrauterine devices. *See id.*; OFFICE OF WOMEN'S HEALTH, FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE 10-12, 16-20 (2012), http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf.

The contraception mandate takes effect starting in the first plan year after August 1, 2012. 77 Fed. Reg. 8725-26. For the Kortes and their company, that date is January 1, 2013. Employers who do not comply are subject to enforcement actions and substantial financial

penalties. *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H (approximately $2,000 per employee annual tax assessment for noncompliance). The Kortes estimate that for K & L Contractors, the penalties could be as much as $730,000 per year, an amount that would be financially ruinous for their company and for them personally.

On October 9, 2012, the Kortes and K & L Contractors (collectively, "the Kortes") filed suit against HHS Secretary Kathleen Sebelius seeking declaratory and injunctive relief against the enforcement of the contraception mandate, alleging that it violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1; the First Amendment's Free Exercise, Establishment, and Speech Clauses; the Fifth Amendment's Due Process Clause; and the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 706(2)(A), (D). They immediately moved for a preliminary injunction. On December 14, 2012, the district court denied the motion. On December 17, 2012, the Kortes appealed, *see* 28 U.S.C. § 1292(a)(1), and the next day they filed an emergency motion for an injunction pending appeal. For purposes of the motion, they rely solely on their RFRA claim.

We evaluate a motion for an injunction pending appeal using the same factors and "sliding scale" approach that govern an application for a preliminary injunction. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). The Kortes must establish that they have "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011); *see also Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012), *cert. denied*, No. 12-318, 2012 WL 4050487 (U.S. Nov. 26, 2012). Once the threshold requirements are met, the court weighs the equities, balancing each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). The more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail. *Abbott Labs.*, 971 F.2d at 12. In other words, the sliding-scale approach requires us "simply to weigh[] [the] harm to a party by the merit of his case." *Cavel*, 500 F.3d at 547.

We conclude that the Kortes have established both a reasonable likelihood of success on the merits and irreparable harm, and that the balance of harms tips in their favor. RFRA prohibits the federal government from imposing a "substantial[] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" *unless* the government demonstrates that the burden "(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(a), (b). This is the strict-scrutiny test

established in *Sherbert v. Verner*, 374 U.S. 398 (1963), for evaluating claims under the Free Exercise Clause. It was displaced by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), but Congress codified it in RFRA. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006); *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 379 (7th Cir. 2010) (Sykes, J., dissenting). It is an exacting standard, and the government bears the burden of satisfying it.

The Kortes contend that the contraception mandate substantially burdens their exercise of religion by requiring them, on pain of substantial financial penalties, to provide and pay for an employee health plan that includes no-cost-sharing coverage for contraception, sterilization, and related medical services that their Catholic religion teaches are gravely immoral. They further contend that the mandate fails RFRA's strict-scrutiny requirement because the government's interest in making contraception and sterilization accessible on a cost-free basis is not sufficiently strong to qualify as compelling, and that coercing religious objectors to provide this coverage is not the least restrictive means of achieving that objective. They point out that some health plans are either grandfathered or exempt from the mandate, illustrating that the interest served by the mandate is far from compelling. And they argue that the government has other methods of furthering its interest in free access to contraception without imposing this burden on their religious liberty—for example, by offering tax deductions or credits for the purchase of contraception or incentives to pharmaceutical companies or medical providers to offer the services.

In response, the government's primary argument is that because K & L Contractors is a secular, for-profit enterprise, no rights under RFRA are implicated at all. This ignores that Cyril and Jane Korte are also plaintiffs. Together they own nearly 88% of K & L Contractors. It is a family-run business, and they manage the company in accordance with their religious beliefs. This includes the health plan that the company sponsors and funds for the benefit of its nonunion workforce. That the Kortes operate their business in the corporate form is not dispositive of their claim. *See generally Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). The contraception mandate applies to K & L Contractors as an employer of more than 50 employees, and the Kortes would have to violate their religious beliefs to operate their company in compliance with it.

The government also argues that any burden on religious exercise is minimal and attenuated, relying on a recent decision by the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012). *Hobby Lobby*, like this case, involves a claim for injunctive and declaratory relief against the mandate brought by a secular, for-profit employer. On an interlocutory appeal from the district court's denial of a preliminary injunction, the Tenth Circuit denied an injunction pending appeal, noting that "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute

to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion." *Id.* at 7 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)). 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 or related services.

We note that the Eighth Circuit apparently disagrees with our colleagues in the Tenth. In a similar lawsuit, the Eighth Circuit granted a motion for an injunction pending appeal, *see O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012), albeit without discussion. We note as well that on December 26, 2012, Justice Sotomayor, as Circuit Justice for the Tenth Circuit, issued an in-chambers decision in *Hobby Lobby* denying the plaintiffs' motion for an injunction pending appellate review. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Sotomayor, Circuit Justice Dec. 26, 2012). But the "demanding standard" for issuance of an extraordinary writ by the Supreme Court, *id.* at *1, differs significantly from the standard applicable to a motion for a stay or injunction pending appeal in this court. As Justice Sotomayor noted, the entitlement to relief must be "'indisputably clear.'" *Id.* (quoting *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (Roberts, Circuit Justice 2010)).[1]

Finally, the government emphasizes the fact that K & L Contractors' current employee health plan covers contraception. But it is well-established that a religious believer does not, by inadvertent nonobservance, forfeit or diminish his free-exercise rights. *See Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance").

In short, the Kortes have established a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise. As such, the burden will be on the government to demonstrate that the contraception mandate is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C.

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[1] Four district courts have granted preliminary injunctions or temporary restraining orders in similar cases. *Conestoga Wood Specialities Corp. v. Sebelius*, No. 12-6744 (E.D. Pa. Dec. 28, 2012); *Tyndale House Publishers v. Sebelius*, Civil Action No. 12-1635 (RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012); *Newland v. Sebelius*, Civil Action No. 1:12-cv-1123-JLK, 2012 WL 3069154 (D. Colo. July 27, 2012). A second district court in this circuit denied preliminary injunctive relief in a similar case. *See Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML (S.D. Ind. Dec. 27, 2012).

§ 2000bb-a(1), (b). Given this high bar, we think the Kortes have established a reasonable likelihood of success on their RFRA claim. At this stage of the proceedings, the government invokes only a generalized interest in "ensuring that employees and their families have access to recommended preventative health services," and somewhat more specifically, "ensur[ing] that decisions about whether to use contraception and which form to use are made by a woman and her doctor—not by her employer or insurer." Whether these interests qualify as "compelling" remains for later in this interlocutory appeal; the government has not advanced an argument that the contraception mandate is the least restrictive means of furthering these interests. Reserving judgment for our plenary consideration of the appeal, we conclude at this early juncture that the Kortes have established a reasonable likelihood of success on their RFRA claim.

They have also established irreparable harm. Without an injunction pending appeal, the Kortes will be forced to choose between violating their religious beliefs by maintaining insurance coverage for contraception and sterilization services contrary to the teachings of their faith and subjecting their company to substantial financial penalties. RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny; the loss of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Alvarez*, 679 F.3d at 589. In this context "quantification of injury is difficult and damages are therefore not an adequate remedy." *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982).

We also conclude that the balance of harms tips strongly in the Kortes's favor. An injunction pending appeal temporarily interferes with the government's goal of increasing cost-free access to contraception and sterilization. That interest, while not insignificant, is outweighed by the harm to the substantial religious-liberty interests on the other side. The cost of error is best minimized by granting an injunction pending appeal.

Accordingly, IT IS ORDERED that the motion for an injunction pending appeal is GRANTED. The defendants are enjoined pending resolution of this appeal from enforcing the contraception mandate against the Kortes and K & L Contractors.

ROVNER, *Circuit Judge*, dissenting. I would deny the appellants' emergency request for temporary injunctive relief. I do not believe that the appellants have demonstrated either a reasonable likelihood of success on the merits of their appeal or irreparable harm in the absence of an injunction pending the resolution of the appeal.

Although the Kortes contend that complying with the Patient Protection and Affordable Care Act's insurance mandate violates their religious liberties, they are removed

by multiple steps from the contraceptive services to which they object. First, it is the corporation rather than the Kortes individually which will pay for the insurance coverage. The corporate form may not be dispositive of the claims raised in this litigation, but neither is it meaningless: it does separate the Kortes, in some real measure, from the actions of their company. Second, the firm itself will not be paying directly for contraceptive services. Instead, their company will be required to purchase insurance which covers a wide range of health care services. It will be up to an employee and her physician whether she will avail herself of contraception, and if she does, it will be the insurer, rather than the Kortes, which will be funding those services. In the usual course of events, an employer is not involved in the delivery of medical care to its employee or even aware (by virtue of physician-patient privilege and statutory privacy protections) of what medical choices the employee is making in consultation with her physician; only the employee, her physician, and the insurer have knowledge of what services are being provided. What the Kortes wish to do is to preemptively declare that their company need not pay for insurance which covers particular types of medical care to which they object, despite the fact that neither the company nor its owners are involved with the decision to use particular services, nor do they write the checks to pay the providers for those services. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, Order at 7 (10th Cir. Dec. 20, 2012) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W. D. Okla. 2012) ("[T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary 'substantial burden.'") (emphasis in original)), *application for injunction denied by Circuit Justice*, 2012 WL 6698888 (U.S. Dec. 26, 2012) (Sotomayor, J.). If an employer has this right, it is not clear to me what limits there might be on the ability to limit the insurance coverage the employer provides to its employees, for any number of medical services (or decisions to use particular medical services in particular circumstances) might be inconsistent with an employer's (or its individual owners') individual religious beliefs. In short, the Kortes have not shown that complying with the insurance mandate substantially burdens the free exercise of their religious rights, in violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

I am also dubious of the notion that the Kortes will be irreparably harmed in the absence of a temporary injunction relieving them of the obligation to comply with the mandate to purchase insurance covering contraceptive services. First, the insurance plan currently in effect for their company's non-union employees, which plan the company voluntarily entered into, already covers the relevant contraceptive services. The Kortes aver that they were unaware of this fact until shortly before they filed this litigation. The limited record before us does not reveal how long this has been going on, nor does it tell us what

steps, if any, the Kortes took in the past to determine what services would be covered by the insurance their firm acquired for its non-union employees. I accept that their prior, inadvertent failure to act in compliance with their professed religious beliefs does not necessarily defeat the claims that they are pursuing in this litigation. *See Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance"). But the fact that the Kortes' company is already voluntarily (if inadvertently) paying for the type of insurance coverage to which they object – for at least the past year, and possibly longer – suggests that they will not be irreparably harmed by continuing to pay for the same coverage in compliance with the Affordable Care Act while this appeal is being resolved. Second, the regulations imposing the insurance mandate were issued in August 2011. As of that time, the Kortes knew that their company would be required to fund insurance coverage that included contraceptive services. Yet, they waited for more than a year to file this suit and seek a preliminary injunction relieving their firm of the duty to comply with the statute and the implementing regulations. If the insurance mandate poses as dire of a choice as the Kortes aver that it does (to act in violation of their religious beliefs, or pay a hefty fine for failing to comply with the statutory mandate), then they were obliged to take more prompt action than they did. Their belated discovery that their firm was already voluntarily providing to its employees coverage for services they claim they cannot countenance, coupled with their tardy decision to file suit seeking injunctive relief relieving their firm from the insurance mandate, suggests that they will not be irreparably harmed if they are denied preliminary relief while the merits of this appeal are being resolved.

I respectfully dissent.