No. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND; PAUL NEWLAND; JAMES NEWLAND; CHRISTINE KETTERHAGEN; ANDREW NEWLAND; and HERCULES INDUSTRIES, INC., a Colorado Corporation,

Plaintiffs- Appellees,

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, in her official capacity as Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury, and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants- Appellants.

On Appeal from the United States District Court for the District of Colorado (No. 1:12-cv-01123) (Kane, J.)

BRIEF AMICI CURIAE OF THE ARCHDIOCESE OF DENVER, THE DIOCESE OF PUEBLO, AND THE DIOCESE OF COLORADO SPRINGS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Archdiocese of Denver, the Diocese of Pueblo, and the Diocese of Colorado Springs disclose that they have no parent corporations and are nonprofit entities that issue no stock. Accordingly, no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF INTEREST[1]

The Archdiocese of Denver (the "Archdiocese"), the Diocese of Pueblo, and the Diocese of Colorado Springs (the "Dioceses") are communities of Roman Catholics under the respective leadership of Archbishop Samuel J. Aquila, Bishop Fernando Isern, and Bishop Michael J. Sheridan that provide a wide range of spiritual, educational, and social services to residents throughout Colorado.

The regulations at issue here (the "Mandate"), which require the provision of insurance coverage for abortion-inducing drugs, contraception, sterilization, and related education and counseling, force Catholic business owners to choose between facilitating services and speech that violate their religious beliefs or exposing their companies to devastating penalties. As the authorities responsible for the accurate proclamation of Catholic doctrine within their borders, the Archdiocese and the Dioceses are particularly troubled by the fact that the Government and its Amici urge this Court to improperly and erroneously delve into matters of religious doctrine when addressing the issue of substantial burden under the Religious Freedom Restoration Act ("RFRA"). Because the Constitution ensures that private citizens and religious institutions—not federal courts—are the

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person, other than the amicus curiae or their counsel contributed money intended to fund the preparation or submission of this brief.

ultimate arbiters of matters of faith, Amici have a unique interest in ensuring the proper application of the substantial burden test.

STATEMENT OF THE CASE

Under the auspices of the Patient Protection and Affordable Care Act, Appellants enacted a Mandate requiring group health plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 75 Fed. Reg. 41,726 (July 19, 2010). Failure to provide the mandated coverage is punishable by annual fines of $2,000 per employee, 26 U.S.C. § 4980H(a), (c)(1), or daily fines of $100 per affected beneficiary, *id.* § 4980D(b). Although a narrow category of "religious employers" is exempt from the Mandate, that exemption cannot benefit for-profit entities, such as Appellee Hercules Industries, Inc., or their Catholic owners, such as Appellees William Newland, Paul Newland, James Newland, Christine Ketterhagen, and Andrew Newland.

In response to the public uproar over the Mandate, the Government announced (1) a temporary safe harbor for nonexempt, nonprofit religious employers,[2] and (2) an intention to "propose and finalize a new regulation" to

[2] Press Release, U.S. Dep't of Health & Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres /01/20120120a.html.

attempt to address "religious objections."[3] The Government thereafter issued an Advance Notice of Proposed Rulemaking ("ANPRM"), 77 Fed. Reg. 16,501 (Mar. 21, 2012), and a Notice of Proposed Rulemaking ("NPRM"), 78 Fed. Reg. 8456 (Feb. 6, 2013), seeking comments on how to structure this proposed "accommodation." Neither the ANPRM nor the NPRM, however, offers any relief to for-profit institutions or their owners.

Accordingly, Appellees filed suit, alleging violations of, *inter alia*, RFRA and the First Amendment. The district court granted their request for a preliminary injunction. *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012). The Government has appealed that decision, arguing that with respect to the owners' RFRA claim, the burden to their religious exercise is insufficiently direct to be substantial.[4] Appellants' Br. at 18–24.

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[3] White House, Office of the Press Secretary, FACT SHEET: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

[4] The Government also maintains that the claims of Hercules Industries are not cognizable on the grounds that secular, for-profit companies cannot exercise religion. Appellants' Br. at 14–18. This is clearly wrong: It is tantamount to saying that the New York Times, a for-profit company, cannot assert Free Speech claims. The Supreme Court, however, has long rejected that proposition. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Citizens United v. FEC*, 558 U.S. 310 (2010). Nor does the First Amendment or RFRA distinguish between for-profit and nonprofit organizations. The Government's position, therefore, would imply that nonprofit organizations—indeed, that churches themselves—are

INTRODUCTION AND SUMMARY OF ARGUMENT

RFRA requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In identifying the relevant exercise of religion, a court must accept the "line" drawn by plaintiffs as to the nature and scope of their religious beliefs. *Id.* at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs.

Here, the Government asks this Court to disregard this straightforward two-step analysis. Ignoring the decisions of the majority of courts that have decided this question,[5] the Government instead points to the fundamentally flawed

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outside the protection of the First Amendment and RFRA. *But see Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). That said, this brief focuses on the Government's erroneous interpretation of RFRA's substantial burden analysis.

[5] Courts in eleven cases have accorded preliminary relief to plaintiffs like Appellees. *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs*., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs*., No. 12-6756 (N.D. Ill. Jan. 3,

reasoning of several courts that have improperly conflated RFRA's "religious exercise" and "substantial burden" inquiries.[6] The Government thus argues that this Court should find that any violation of Appellees' beliefs is too "'indirect and attenuated'" to be cognizable, because Appellants would subsidize their employees' use of contraceptives only "'after a series of independent decisions by

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2013); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs*., No. 2:12-CV-92, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 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*, 881 F. Supp. 2d 1287.

[6] *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *10–14 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144, 2013 U.S. App. LEXIS 2706, at *6 (3d Cir. Jan. 29, 2012) (denying injunction pending appeal); *Grote Indus., LLC v. Sebelius*, No. 12-00134, 2012 WL 6725905, at *5–7 (S.D. Ind. Dec. 27, 2012); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072, 2012 WL 6553996, at *10 (S.D. Ill. Dec. 14, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012*), appeal docketed*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (same). Some courts have even suggested plaintiffs' religious beliefs would not be violated so long as they themselves refrain from using the objectionable items. *See, e.g.*, *Annex Med., Inc. v. Sebelius*, No. 12-2804, 2013 WL 101927, at *4 (D. Minn. Jan. 8, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476, 2012 WL 4481208, at *4–6 (E.D. Mo. Sept. 28, 2012). Others have reasoned that providing the mandated coverage is no more morally problematic than providing employees a salary with which they can obtain contraceptives. *See, e.g.*, *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677, at *6 (W.D. Mich. Dec. 24, 2012), *appeal docketed*, No. 12-2673, 2012 U.S. App. LEXIS 26736, at *4 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *O'Brien*, 2012 WL 4481208, at *7.

health care providers and patients covered by [Appellees'] plan.'" Appellants' Br. at 23–24 (quoting *Hobby Lobby*, 2012 WL 6930302, at *3). Under that approach, however, this Court would not be evaluating the pressure placed on Appellees' to modify their behavior. Instead, it would be making the *religious* judgment that compliance with the Mandate does not really violate Appellees' beliefs—or that it only violates those beliefs in an "indirect and attenuated" way.

In advancing this position, the Government makes the same error as the decisions it relies upon: both erroneously view the word "substantial" as requiring an inquiry into the nature of the employer's religious beliefs, rather than an inquiry into the degree of pressure the Mandate places on the objecting employer to violate its beliefs. The question, however, is not whether compliance with the Mandate is a *substantial violation* of an objecting employer's beliefs; instead, the question is whether compliance with the Mandate places *substantial pressure* on objecting employers to violate their beliefs.

This subtle, yet radical, transformation of the substantial burden analysis from a measure of the government's coercive mechanism into a judicial exploration of moral theology runs contrary to black-letter law. Simply put, "[i]t is not within the judicial function and judicial competence" to determine whether a plaintiff "has the proper interpretation of [his] faith." *United States v. Lee*, 455 U.S. 252, 257 (1982) (internal quotation marks omitted). Although courts can

question whether the *pressure* placed on individuals to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action in fact transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [the courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that the Mandate places substantial pressure on Appellees to cross that line. In accordance with Catholic doctrine, Appellees oppose facilitating coverage for abortion-inducing drugs, contraceptives, sterilization, and related education and counseling. Requiring them to provide this coverage thus forces them to do precisely what their religion forbids. It is therefore beyond question that the Mandate imposes a substantial burden on Appellees' religious exercise. This burden, moreover, cannot be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends. Accordingly, the decision of the district court should be affirmed.

ARGUMENT

I. THE GOVERNMENT FUNDAMENTALLY MISUNDERSTANDS THE NATURE OF THE SUBSTANTIAL BURDEN INQUIRY

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral and generally applicable laws burdening religious practices

did not violate the Free Exercise Clause. Repudiating *Smith*, Congress enacted RFRA "to restore the compelling interest test" set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)–(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* This initial inquiry necessarily requires courts to (1) identify the particular exercise of religion at issue, and then (2) assess whether the law substantially burdens the identified exercise of religion. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

Here, the Government asks this Court to improperly merge these steps. Instead of first identifying the religious beliefs at issue, and then assessing whether the Mandate pressures objectors to violate those beliefs, the Government would have this Court assess whether the Mandate requires Appellees' to violate their religious beliefs at all—or at least, whether it requires them to "substantially" violate those beliefs. But failing to accept Appellees' own characterization of their beliefs and, even more egregiously, making an inherently religious judgment about

the extent to which the Mandate violates those beliefs, would run roughshod over well-established Supreme Court precedent that has repeatedly warned courts not to delve into religious matters. Accepting at face value Appellees' sincerely held belief that sponsoring the mandated coverage violates their religion, it becomes all too apparent that the Mandate imposes a substantial burden on Appellees' religious exercise.

A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion

RFRA defines "exercise of religion" broadly to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). An exercise of religion is a precept or practice "rooted in the religious beliefs of the party asserting the claim or defense." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotation marks and alteration omitted). It involves "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

Whether a particular belief or practice is religious, and thus entitled to protection, is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept the plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.*

at 714–15 (refusing to question the moral line drawn by the plaintiff); *see also Lee*, 455 U.S. at 257 (same); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting the government's efforts to dispute plaintiff's representation that a medical test would violate his religion).

The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. It is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Id.*; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."); *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so."); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs.").

For this reason, the Supreme Court "[r]epeatedly and in many different contexts" has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494

U.S. at 887. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of religious doctrine or beliefs. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As the Supreme Court recently reiterated, each religion is entitled to "shape its own faith," free of judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). Acknowledging their "profound limitation" to make judgments about religious matters, courts have recognized that judicial competence only "extends to determining 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.'" *Patrick*, 745 F.2d at 157 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)); *see also Colvin v. Caruso*, 605 F.3d 282, 298 (6th Cir. 2010) ("[T]he touchstone for determining whether a religious belief is entitled to free-exercise protection is an assessment of 'whether the beliefs professed . . . are *sincerely held*,' not whether 'the belief is accurate or logical.'" (citation omitted)); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens *Mr. Abdulhaseeb's* own exercise of his sincerely held religious beliefs"); *Kikumura*, 242 F.3d at 960 (noting that a religious belief must

be sincere in order to establish a prima facie claim under RFRA); *Jolly*, 76 F.3d at 476 (same).

In short, the notion that a federal court would don ecclesiastical robes and purport to tell citizens that they do not correctly perceive the tenets of their faith is entirely foreign to American law.

Yet that is exactly what the Government would have this Court do. Though not contesting the sincerity of Appellees' beliefs, the Government asks this Court to conduct its own analysis of whether compliance with the Mandate would transgress the precepts of Catholic doctrine. Appellants' Br. at 23–25. The Government argues that any violation of Appellees' beliefs is "'indirect and attenuated,'" and thus insubstantial, because Appellees would subsidize their employees' use of contraceptives only "'after a series of independent decisions by health care providers and patients covered by [Appellees's] plan.'" *Id.* at 23–24 (quoting *Hobby Lobby*, 2012 WL 6930302, at *3).[7] This Court, however, has no

[7] The Government also argues that the burden is insubstantial because the Mandate applies only to Hercules, not to its officers or owners. Appellants' Br. at 18–20. But the fact that the Mandate operates directly against the corporate entities and only indirectly against the owners is of little significance so long as the Mandate has the effect of substantially pressuring the owners to act against their religious beliefs. Supreme Court precedent makes clear that a burden is not insubstantial simply because it is indirect. *See Thomas*, 450 U.S. at 717–18 (noting that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

authority to disregard Appellees' representations regarding their religious beliefs simply because those beliefs prohibit them from "indirect[ly]" facilitating access to abortion-inducing drugs and devices. *Id.* at 24 (internal citation and quotation marks omitted). Indeed, the Supreme Court has squarely rejected such analysis.

For example, in *Thomas*, the Court held that the denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his pacifist convictions as a Jehovah's Witness. 450 U.S. at 713–18. Rather than questioning whether working in a factory—as opposed to being handed a gun and sent off to war—was too "indirect and attenuated" a breach of those beliefs, the Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Likewise, in *Lee*, the Court rejected the Government's contention that payment of social security taxes into the general treasury was too indirect a violation to "threaten the integrity of" the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the Amish's own representation that "the payment of the taxes" "violate[d] [their] religious beliefs." *Id.* at 257; *Abdulhaseeb*, 600 F.3d at 1316 (same).

Like the Supreme Court in *Thomas* and *Lee*, this Court must accept at face value Appellees' earnest belief that providing the mandated coverage would

violate the tenets of their faith. The question for this Court, then, is whether the penalties for failing to provide that coverage would substantially pressure Appellees to abandon their religious convictions. The Government, however, would have this Court forgo that analysis entirely and instead assess whether the Mandate substantially *violates* Appellees' beliefs.[8] In other words, rather than analyzing whether the Mandate puts substantial pressure on Appellees to abandon their religious opposition to providing the mandated coverage, the Government would have this Court evaluate whether compliance with the Mandate amounts to a substantial violation of Appellees' religious beliefs.

This distinction is not without a difference: the former analysis involves an exercise of *legal* judgment, while the latter analysis involves an inherently *religious* inquiry into whether, in the Court's view, providing the objectionable coverage constitutes a "'slight,'" as opposed to a "substantial" violation of Appellees' beliefs. Appellants' Br. at 24 (quoting *O'Brien*, 2012 WL 4481208, at

[8] This error is confirmed by the Government's emphasis on the point that "'RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a substantial burden on that exercise.'" Appellants' Br. at 23 (quoting *Hobby Lobby*, 870 F. Supp. 2d at 1293). This is, of course, entirely true. But the Government proceeds to use this point to suggest that this Court should evaluate the *substance* of Appellees' religious beliefs—namely, whether, this Court believes Appellees would be deemed substantially responsible for their employees' use of contraceptives—not to determine whether the Mandate "put[s] substantial pressure on [Appellees] to modify [their] behavior and to violate [their] beliefs," as they, the Appellees, understand them. *Thomas*, 450 U.S. at 717–18.

*6). "Th[is] Court," however, "is in no position to declare that acting through [their] company to provide certain health care coverage to [their] employees does not violate [Appellees'] religious beliefs. They are, after all, [*their*] religious beliefs." *Monaghan*, 2012 WL 6738476, at *3. If Appellees interpret the "creeds" of Catholicism to prohibit provision of the mandated coverage, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699. Ultimately, courts simply have no competence to determine the point at which degrees of separation render conduct religiously permissible. The question of whether providing insurance coverage constitutes illicit facilitation of prohibited practices is one for religious authorities and individuals, not the courts. *See supra* pp. 10–12. Here, Appellees' answer to that question—that providing insurance coverage for contraception, abortion-inducing drugs, and sterilization violates their religious beliefs—must be respected, regardless of whether a court finds it to be "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714.[9]

[9] For similar reasons, despite the urging of the Government and its Amici, Appellants' Br. at 25; ACLU Br. at 15, this Court lacks authority to make the *religious* claim that "the contribution to a health care plan has no more than a de minimus [sic] impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees," which they may then use to purchase contraceptives, *O'Brien*, 2012 WL 4481208, at *7; *Autocam*, 2012 WL 6845677, at *6. Again, even were the line between salary and health insurance "unreasonable," it would not be for a court to second guess an employer that had drawn that line. *See Thomas*, 450 U.S. at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate

Nor can it be argued that the burden is too attenuated because the Mandate merely requires Appellees to subsidize "'*someone else's* participation in an activity that is condemned by plaintiff[s'] religion.'" Appellants' Br. at 23 (quoting *Hobby Lobby*, 2012 WL 6930302, at *3). Indeed, the assertion that RFRA's protections are inapplicable whenever the religious belief at issue forbids aiding and abetting activities by others is, to put it mildly, astounding. Supreme Court precedent is clear: courts must accept plaintiffs' sincere representations regarding the nature of their beliefs. *See, e.g.*, *Thomas*, 450 U.S. at 715. It is wholly immaterial that the

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turrets for tanks); *Tyndale*, 2012 WL 5817323, at *14 (stating that "the Supreme Court has cautioned courts to avoid parsing a plaintiff's religious beliefs for inconsistency"). As the district court remarked, this "argument requires impermissible line drawing, and [should be] reject[ed] out of hand." *Newland*, 818 F. Supp. at 1296 n.9.

But in any case, the line here is eminently reasonable. Employees may use their paycheck to purchase contraceptives, cocaine, cotton candy, or anything in between. An employee's salary simply belongs to the employee, and the employer has no input into its use. But when an employer purchases contraceptive coverage, it effectively hands its employees a free ticket that can only be redeemed for those services. Under those circumstances, there is a specific line item in the health plan provided by the employer entitling its employees to contraceptives, and the employer's premiums necessarily go toward paying for them. The employer is thus made complicit in the purchase of products to which it objects. *See* Comments of U.S. Conference of Catholic Bishops at 12 (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf. In that respect, mandating that employers purchase objectionable coverage for their employees is qualitatively different from leaving it up to the employees to use their paychecks as they see fit.

particular beliefs at issue prohibit the facilitation of illicit acts by others. Here, "[b]ecause it is the coverage, not just the use, of [contraceptives] to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties." *Tyndale*, 2012 WL 5817323, at *13 (rejecting "the proposition that a plaintiff can never demonstrate that its religious exercise is substantially burdened by a law that forces it to pay for services to which it objects that are ultimately chosen and used by third parties"); *see also Korte*, 2012 WL 6757353, at *3 ("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 contraceptives or related services."); *Grote*, 2013 WL 362725, at *3 (same).[10]

To be sure, Appellees are not themselves "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 2012 WL 4481208, at *6,

[10] This concept of responsibility for an act committed by another is not unique to the Catholic faith. Indeed, it is the basis for the federal statute criminalizing acts that "aid" or "abet" the commission of a crime by another. 18 U.S.C. § 2. Just as an individual may be held accountable for aiding and abetting a crime even if he did not personally commit it, so too may a Catholic act in violation of the moral law if he cooperates in the commission by others of acts that are contrary to Catholic beliefs. The same applies to Catholic entities, which bear a particular responsibility to witness to the Church's teachings and which commit the further offense of giving scandal when they act in a way inconsistent with those teachings. *See* Catechism of the Catholic Church ¶¶ 2284–87.

but for purposes of this Court's inquiry, *it is equally improper* to require them to facilitate the use of contraception, abortion-inducing drugs, and sterilization procedures by others. *Cf. Sherbert*, 374 U.S. at 404 ("Governmental imposition of such a choice [like that facing plaintiffs] puts the same kind of burden upon the free exercise of religion as would a fine imposed [for] Saturday worship."). After all, by its very terms, RFRA protects "*any* exercise of religion." 42 U.S.C. §2000cc-5(7)(A) (emphasis added).

The Government and its Amici similarly err by asserting that exempting employers from covering religiously-objectionable services would be tantamount to imposing the employers' beliefs on their employees. Appellant's Br. at 24; ACLU Br. at 17–18; Am. United Br. at 30–38; *see also Hobby Lobby*, 870 F. Supp. 2d at 1295–96 (stating that the term "substantial burden" should be given "meaningful application" due to "the impact of the employer's faith-based decisions on his employees"). Observing that RFRA "'is not a means to force one's religious practices upon others,'" the Government argues that "'RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.'" Appellants' Br. at 24 (quoting *O'Brien*, 2012 WL 4481208, at *6).

Needless to say, the refusal to pay for services that violate one's religion hardly forces one's religious practices upon others. Indeed, the Government's suggestion gets things exactly backwards. Appellees' employees remain free to use whatever services they want whether Appellees pay for them or not. But it is the Government, through the Mandate, that forces Appellees to pay for the choices of their employees, even though doing so conflicts with Appellees' sincerely held religious beliefs.

It should come as no surprise, therefore, that this misguided reading of RFRA runs contrary to the statute's legislative history, which confirms that Congress enacted RFRA precisely to prevent the Government from compelling persons and organizations to provide religiously-objectionable services to others. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute safeguarded "such familiar practices" as "permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of Nadine Strossen, President, Am. Civ. Liberties Union). Members of Congress made similar statements on the floor. *See* 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an

opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same). Ultimately, there can be little doubt that RFRA does protect individuals and entities from being forced to facilitate the use of religiously-objectionable services by others.

In the end, by arguing that compliance with the Mandate would only amount to an "indirect" and "attenuated" violation of Appellees' sincerely held beliefs, the Government asks this Court to engage in a fundamentally religious inquiry. The judicial branch, however, is neither authorized nor equipped to make such pronouncements. Instead, this Court must accept Appellees' representation that their religious beliefs preclude them from providing the mandated coverage. The only question properly before this Court is whether the Mandate imposes substantial pressure on Appellees to violate those beliefs.[11] As explained below, it plainly does.

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[11] Amici's parade of horribles is unfounded. *See, e.g.*, Am. United Br. at 35–38 (arguing that this standard would lead to rampant exemptions from otherwise generally applicable laws). For one, binding Supreme Court precedent leaves no doubt that this standard is and has long been the law. *See, e.g.*, *Thomas*, 450 U.S. at 715. Amici's argument thus mirrors the "classic rejoinder of bureaucrats throughout history" that the Supreme Court rejected in *O Centro*, 546 U.S. at 436: "If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.* As *O Centro* explained, RFRA was enacted precisely to provide the opportunity for the exceptions the district court decries. *Id.*

Moreover, despite Amici's concerns, Am. United Br. at 11, this standard does not give religious actors carte blanche to exempt themselves from federal law.

B. The Mandate Imposes a Substantial Burden on Appellees' Religious Beliefs

Once Appellees' religious exercise is properly identified, the substantial burden analysis is straightforward. Although RFRA does not itself define "substantial burden," courts routinely apply the standard found in pre-*Smith* cases like *Yoder* and *Sherbert*. Thus, the Government "substantially burdens" the exercise of religion if it compels an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs" on threat of penalty, *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18; *Abdulhaseeb*, 600 F.3d at 1315 (explaining that a law substantially burdens religious exercise by "require[ing] participation" in objectionable activities or by "substantial[ly] pressur[ing]" participation in those activities).

(continued…)

Courts still must evaluate whether (1) the religious belief is sincerely held, (2) the law places "substantial pressure" on adherents to modify their beliefs; (3) the Government has a "compelling interest" in the law; and (4) the law is the least restrictive means of achieving that interest. 42 U.S.C. § 2000bb-1(b); *supra* p. 11. Likewise, courts need not accept claims that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection." *Thomas*, 450 U.S. at 715. While none of those circumstances are at issue here, for decades, these judicial safeguards have proved more than equal to the task of preventing religious actors from becoming a law unto themselves.

Here, the Mandate plainly puts substantial pressure on Appellees to violate their Catholic faith by forcing them to choose between providing coverage for abortion-inducing drugs, contraceptives, and sterilization in violation of their religious beliefs or paying onerous monetary penalties. If Appellees offer their employees health care but fail to include the mandated coverage, then they face a penalty of $100 per affected beneficiary for each day of noncompliance. 26 U.S.C. § 4980D(b). If they altogether forgo offering their employees health care coverage, then they face annual fines of $2,000 per employee. *Id.* § 4980H(a), (c)(1). By contrast, the Supreme Court has found that a penalty as low as $5 was enough to impose a substantial burden. *Yoder*, 406 U.S. at 208, 218.[12]

In short, putting Appellees to the choice of breaching their faith or paying a penalty creates precisely the sort of pressure to abandon sincerely held religious beliefs that constitutes a substantial burden. The Government is wrong to contend otherwise.[13]

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[12] The absence of this analysis from the briefs of the Government or its Amici provides further evidence that they ask this court to improperly assess the substance of Appellees' beliefs, rather than the pressure placed on them to violate those beliefs.

[13] The result is no different if the Seventh Circuit's articulation of the substantial burden test for use in RLUIPA cases is applied. By putting Appellees to the inescapable choice of financial ruin or violating their beliefs, the Mandate has a "direct, primary, and fundamental responsibility for rendering [their]

II. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY

Because the Mandate substantially burdens Appellees' religious exercise, the Government must prove it furthers "a compelling governmental interest" through "the least restrictive means." 42 U.S.C. § 2000bb-1(b). As the district court recognized, and as Appellees' persuasively explain, the Government has not remotely carried its burden of proof here. *See Newland*, 818 F. Supp. 2d at 1297–99; Appellees' Br. at 35–51.

A. The Government Cannot Demonstrate a Compelling Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, cannot rely on blithe assertions of generalized interests, but rather must show a compelling interest in

(continued…)

religious exercise" "effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 799 (7th Cir. 2003).

dragooning Appellees—"the particular claimant[s] whose sincere exercise of religion is being substantially burdened"—into being the instruments by which its purported goals are advanced. *O Centro*, 546 U.S. at 430–31; *Tyndale*, 2012 WL 5817323, at *15 (same). Ultimately, the Government must establish an interest so compelling that it can require Appellees to take actions they would otherwise find anathema. This, it cannot begin to do.

At the most basic level, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547; *see also O Centro*, 546 U.S. at 433; *Newland*, 881 F. Supp. 2d at 1297–98. Here, the Government cannot possibly claim an interest of the "highest order" where it exempts millions of employees from the Mandate through the Act's grandfathering provisions. In other words, the Government cannot plausibly maintain that Appellees' employees must be provided with the mandated coverage when it already exempts millions of women receiving insurance through grandfathered plans simply to fulfill the President's promise that "if you like your plan, you can keep it."[14] An interest is hardly compelling if it can be trumped for reasons of political expediency. Such a broad

[14] Press Release, U.S. Dep't of Health & Human Servs., U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under the Affordable Care Act (June 14, 2010), *available at* http://www.hhs.gov/news/press/2010pres/06/20100614e.html.

exemption "completely undermines any compelling interest in applying the preventive care coverage mandate." *Newland*, 881 F. Supp. 2d at 1298; *Tyndale*, 2012 WL 5817323, at *18.

The Mandate's narrow "religious employer" exemption further undermines the Government's claim that its interests are "compelling." In *O Centro*, a religious group sought an exemption from the Controlled Substances Act to use hoasca—a hallucinogen—for religious purposes. When granting the exemption, the Supreme Court refused to credit the Government's alleged interest in public health and safety when the Act already contained an exemption for the religious use of another hallucinogen—peyote. "Everything the Government says about the DMT in *hoasca*," the Court explained, "applies in equal measure to the mescaline in peyote." *O Centro*, 546 U.S. at 433. Because Congress permitted peyote use in the face of concerns regarding health and public safety, "it [wa]s difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of hoasca. *Id.* Likewise, "everything the Government says" about its interests in requiring Appellees to provide the mandated coverage "applies in equal measure" to entities that meet the Mandate's definition of "religious employer."

Finally, the Government's interest cannot be compelling where, at best, the Mandate would only "[f]ill [a] modest gap" in contraceptive coverage. *Brown v.*

Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2741 (2011). Indeed, the Government's own admissions demonstrate that the Mandate creates a solution in search of a problem. The Government acknowledges that contraceptives are widely available and covered by "over 85 percent of employer-sponsored health insurance plans," 75 Fed. Reg. at 41,732; Press Release, *supra* note 2. In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). Simply put, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

B. The Government Cannot Demonstrate That the Mandate Is the Least Restrictive Means to Accomplish Its Asserted Interests

The Mandate also fails strict scrutiny because the Government cannot show that it is the least restrictive means of achieving its interests. Under that test, "[i]f there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (noting that "'least restrictive means' is a severe form of the more commonly used 'narrowly tailored' test" (citation omitted)); *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) ("A statute or regulation is the least restrictive means if 'no alternative forms of regulation would

[accomplish the compelling interest] without infringing [religious exercise] rights.'" (quoting *Sherbert*, 374 U.S. at 407)); *Lukumi*, 508 U.S. at 546 (invalidating local ordinance in part because the asserted "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree"). "Nor can the government slide through the test merely because another alternative would not be quite as good." *Hodgkins v. Peterson*, 355 F.3d 1048, 1060 (7th Cir. 2004).

Here, the Government has at its disposal myriad ways to achieve its stated interests without burdening Appellees' beliefs. Amici in no way recommend these alternatives, and, indeed, oppose many of them as a matter of policy. The fact, however, that they remain available to the Government demonstrates that the Mandate cannot survive RFRA's narrow-tailoring requirement. For example, the Government could: (i) directly provide contraceptive services to the few individuals who do not receive it under their health plans; (ii) offer grants to entities that already provide contraceptive services at free or subsidized rates and/or work with these entities to expand delivery of the services; (iii) directly offer insurance coverage for contraceptive services; (iv) grant tax credits or deductions to women who purchase contraceptive services; or (v) allow Appellees to comply with the Mandate by providing coverage for methods of family planning consistent with Catholic beliefs (i.e., Natural Family Planning training and materials). Indeed, the Government is *already* providing "free contraception to

women," including through the Title X Family Planning Program. *Newland*, 881 F. Supp. 2d at 1299. The Government's failure to consider these alternatives is fatal, as strict scrutiny requires a "serious, good faith consideration of workable . . . alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

CONCLUSION

The Government's position is clearly, and dangerously, wrong. Under its analysis, federal courts, not individuals or religious entities, would be the ultimate arbiters of matters of faith and morals. If correct, the Government in principle would be free not only to require employers to provide coverage for contraceptives, but also to force them to cover surgical abortions or assisted suicide as well—these burdens, too, would apparently be deemed too "attenuated" to be cognizable. This is not, and cannot possibly be, the law. Indeed, RFRA was enacted precisely to prevent such oppressive governmental action. The district court's decision below should therefore be affirmed.

March 1, 2013

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

3. Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that: a) all required privacy redactions have been made; b) the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and c) the ECF submission was scanned for viruses with the most recent version of McAfee VirusScan Enterprise (last updated March 1, 2013) and, according to the program, is free of viruses.

March 1, 2013

/s/ Noel J. Francisco
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CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of March, 2013, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which served counsel of record at their designated electronic mail addresses.

I also certify that on March 1, 2013, I caused seven paper copies of the foregoing brief to be sent by for delivery within two business days, to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, 1823 Stout Street, Denver, Colorado 80257.

March 1, 2013

/s/ Noel J. Francisco
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Addendum of Unpublished Cases

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	12 C 6756	DATE	1/3/2013
CASE TITLE	Triune Health Group, Inc vs. United States Dept of Health & Human Services et al		

DOCKET ENTRY TEXT

The Court grants Plaintiffs' motion for a preliminary injunction [36].

■[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Before the Court is Plaintiffs' motion for a preliminary injunction. (R. 36, Inj. Mot.) Plaintiffs filed a memorandum of law supporting both their motion for preliminary injunction and in opposition to Defendants' motion to dismiss. (R. 37, Inj. Mem.) The Court addresses only the preliminary injunction at this time. For the following reasons, the Court grants Plaintiffs' motion.

BACKGROUND

"Plaintiffs[] Christopher and Mary Anne Yep are ardent and faithful adherents of the Roman Catholic religion." (R. 21, Amend. Compl. ¶ 2.) The Yeps own and control Plaintiff Triune Health Group, Inc., a for-profit corporation. (*Id.* ¶¶ 3, 12.) Triune is a corporation that specializes in facilitating the re-entry of injured workers into the workforce. (*Id.* ¶ 19.)

The 2010 Patient Protection and Affordable Care Act ("the PPACA") included regulations mandating that employers include in their group health benefit plans coverage for preventative care for women that Plaintiffs deem "wholly at odds with their religious and moral values and sincere religious beliefs and sacred commitments." (*Id.* ¶ 5); *see also* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs specifically believe that abortion, contraception (including abortifacients), and sterilization are "gravely wrong and sinful." (*Id.* ¶ 33.) "Plaintiffs believe that providing their employees with coverage for drugs and services that facilitate such immoral practices constitutes cooperation with evil that violates the laws of God." (*Id.* ¶ 34.) Under the PPACA's mandate, however, Triune would be required to provide a group health plan covering the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and to provide education and counseling with respect to these matters for all women with reproductive capacity. (*Id.* ¶ 40); *see also* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130.

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The PPACA provides exemptions for religious employers and exempts some organizations through a "grandfathering" provision, however, Triune does not qualify for any exemption. (*Id*. ¶¶ 43-45.) Triune's health plan was due for renewal on January 1, 2013. (*Id*. ¶ 47.) According to Plaintiffs, they, therefore, must "either choose to comply with the federal mandate's requirements in violation of their religious beliefs, or pay ruinous fines that would have a crippling impact on their business and force them to shut down." (*Id*. ¶ 53.) As a result, Plaintiffs allege that the PPACA's mandate violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA"), the First and Fifth Amendments of the United States Constitution, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Triune's current group health plan includes coverage for contraceptives, sterilization, and abortion. (Inj. Mem. at 9.) According to Plaintiffs, this coverage is an error and contrary to what Plaintiffs want based on their religious beliefs. (*Id*.) Plaintiffs have been unable to find a group healthcare policy that comports with both the PPACA and their religious beliefs. (*Id*. at 9-10.) Plaintiffs, therefore, seek an injunction from the PPACA's mandate so that they may purchase an insurance policy that excludes coverage for drugs and services to which they object based on their religious convictions. (Amend. Compl. ¶ 48.)

LEGAL STANDARD

"To obtain a preliminary injunction, the moving party must demonstrate a reasonable likelihood of success on the merits, no adequate remedy at law, and irreparable harm absent the injunction." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. Health,* 699 F.3d 962, 972 (7th Cir. 2012) (citing *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 619 (7th Cir. 2004)). "If the moving party makes this threshold showing, the court 'weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.'" *Alvarez*, 679 F.3d at 589 (quoting *Ezell v. City of Chi*., 651 F.3d 684, 694 (7th Cir. 2011)).

ANALYSIS

The Seventh Circuit recently granted a preliminary injunction pending appeal in favor of a for-profit employer challenging the PPACA's preventative care mandate on the same grounds as presented here. *See Korte et al. v. Sebelius et al*., No. 12-3841 (7th Cir. Dec. 28, 2012). The plaintiffs in *Korte*, as here, challenge the PPACA under the RFRA, the First and Fifth Amendments, and the Administrative Procedure Act. Similar to Triune and the Yeps, the plaintiffs in *Korte* discovered this summer that the company's health insurance plan covered women's health services that contradict the owners' deeply-held religious beliefs, and therefore sought an injunction from the application of the PPACA in order to enroll in a conscience-compliant plan on January 1, 2013. The Seventh Circuit concluded that the *Korte* plaintiffs established a reasonable likelihood of success on the merits and irreparable harm, with the balance of harms tipping in their favor. In light of this binding precedent, the Court grants Triune's motion for a preliminary injunction.