Nos. 12-3841 & 13-1077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYRIL B. KORTE et al., *Plaintiffs-Appellants*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES et al., *Defendants-Appellees*.	**On Appeal from the United States District Court for the Southern District of Illinois (3:12-cv-01072) (Reagan, J.)**
GROTE INDUSTRIES, LLC et al., *Plaintiffs-Appellants*, v. KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., *Defendants-Appellees*.	**On Appeal from the United States District Court for the Southern District of Indiana (4:12-cv-00134) (Evans Barker, J.)**

CONSOLIDATED BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS; THE ANTI-DEFAMATION LEAGUE; CATHOLICS FOR CHOICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; THE INTERFAITH ALLIANCE FOUNDATION; THE NATIONAL COALITION OF AMERICAN NUNS; THE NATIONAL COUNCIL OF JEWISH WOMEN; PROTESTANTS FOR THE COMMON GOOD; THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; THE RELIGIOUS INSTITUTE; THE UNITARIAN UNIVERSALIST ASSOCIATION; AND THE UNITARIAN UNIVERSALIST WOMEN'S FEDERATION, IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court Nos: 12-3841 & 13-1077

Short Caption: Korte v. U.S. Dep't of Health & Human Servs. & Grote Indus., LLC v. Sebelius

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i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: /s/ Richard Muniz Date: March 8, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Regulations

State Statutes

STATEMENT OF *AMICI*

Amici are organizations that have a strong commitment to defending the fundamental right to religious liberty. *Amici* provide this brief to respectfully request that this Court affirm the district court's denial of a preliminary injunction in each of the consolidated cases. Specifically, *Amici* argue that Appellants are unlikely to succeed on the merits of their Religious Freedom Restoration Act claims because requiring an employer – particularly a for-profit employer – to provide comprehensive health insurance to its employees does not substantially burden the company's owner's religious exercise.

IDENTITY OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan public interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution. The ACLU of Illinois, the organization's affiliate in Illinois, was founded to protect and advance civil rights and civil liberties, and currently has over 25,000 members and supporters in the state. The ACLU has a long history of defending religious liberty, and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the ACLU routinely brings cases designed to

protect individuals' right to worship and express their religious beliefs. At the same time, the ACLU vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation and entanglement with religion, and strives to advance individual religious liberty. ADL counts among its core beliefs strict adherence to the separation of church and state embodied in the Establishment Clause, and also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. In striving to support a robust, religiously diverse society, ADL believes that efforts to impose one group's religious beliefs on others are antithetical to the notions of religious freedom on which the United States was founded.

Catholics for Choice was founded in 1973 to serve as a voice for Catholics who believe that the Catholic tradition supports a woman's moral

and legal right to follow her conscience in matters of sexuality and reproductive health. It is dedicated to the principle of freedom of religion for all people and to quality health care for people of all faiths.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in initiating and supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the fundamental principle of the free exercise of religion. Hadassah strongly believes that women have the right to make family planning decisions privately, in consultation with medical advice, and in accordance with one's own religious, moral and ethical values. Consistent with those commitments, Hadassah is a strong supporter of the contraceptive rule and an advocate for the position that the rule's implementation does not violate the Religious Freedom Restoration Act.

The Interfaith Alliance Foundation is a 501(c)(3) non-profit organization, which celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions

as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The National Coalition of American Nuns ("NCAN") is an organization that began in 1969 to study and speak out on issues of justice in church and society. NCAN works for justice and peacemaking in our personal lives, ministries, congregations, churches and civil society. NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's Principles state that "[r]eligious liberty and the separation of

religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." Consistent with its Principles and Resolutions, NCJW joins this brief.

Protestants for the Common Good ("PCG"), founded in 1995, is an association of clergy and laypersons in Illinois that brings an informed and strategic religious voice to public life and offers education resources and advocacy opportunities to people of faith on matters of public policy. PCG recently merged with the Community Renewal Society, a faith-based organization that fights racism and poverty. As the mission statement declares: "Protestants for the Common Good educates and mobilizes people of faith to participate in political democracy for the sake of social justice and the beloved community." PCG has a strong, grassroots network of support from individuals, congregations, and denominations, with more than 4,500 constituents. PCG is a strong supporter of the contraceptive coverage rule and its implementation to assure access to contraception for millions of women.

Founded in 1973, the Religious Coalition for Reproductive Choice ("RCRC") is dedicated to mobilizing the moral power of the faith community for reproductive justice through direct service, education, organizing and advocacy. For RCRC, reproductive justice means that all

people and communities should have the social, spiritual, economic, and political means to experience the sacred gift of sexuality with health and wholeness.

Founded in 2001, and an independent 501(c)(3) since 2012, the Religious Institute is a multi-faith organization dedicated to advocating within faith communities and society for sexual health, education, and justice. The Religious Institute is a national leadership organization working at the intersection of sexuality and religion. Our staff provides clergy, congregations, and denominational bodies with technical assistance in addressing sexuality and reproductive health, and assists sexual and reproductive health organizations in their efforts to address religious issues and to develop outreach to faith communities. The Religious Institute is strongly committed to assuring that all women have equal access to contraception and firmly believes that the contraceptive coverage rule does not create a substantial burden on religious exercise.

The Unitarian Universalist Association ("UUA") comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state. The UUA participates in this *amicus curiae* brief because it believes that the federal

contraceptive rule does not create a substantial burden on religious exercise under the Religious Freedom Restoration Act.

The Unitarian Universalist Women's Federation has had an abiding interest in the protection of reproductive rights and access to these health services since its formation nearly 50 years ago. As an affiliate organization of the Unitarian Universalist Association of Congregations, its membership of local Unitarian Universalist women's groups, alliances and individuals has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights, with the affordable availability of birth control being essential and fundamental. The Unitarian Universalist Women's Federation has long recognized and will continue to oppose structural constraints posed when health care systems and health insurance providers limit or deny access to contraception and other reproductive health care.

AUTHORITY TO FILE *AMICUS* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* have obtained consent from all parties to file this brief.

AUTHORSHIP AND FUNDING OF *AMICUS* BRIEF

No party's counsel authored this brief in whole or in part. With the exception of *amici*'s counsel, no one, including any party or party's counsel,

contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Appellants are not likely to succeed on their claim that the federal contraceptive rule, which requires contraception to be offered in health insurance plans without cost-sharing, *see* 45 C.F.R. § 147.130(a)(1)(iv), substantially burdens their religious exercise under the Religious Freedom Restoration Act ("RFRA"). While a motions panel of this Court granted Appellants' requests for injunctions pending appeal, *see Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012); *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725, at *4 (7th Cir. Jan. 30, 2013), Judge Rovner, who dissented from each of these decisions, demonstrated at length why the Appellants' claims of substantial burden must ultimately fail. *Korte*, 2012 WL 6757353, at *5 (Rovner, J., dissenting); *Grote*, 2013 WL 362725, at *4-14 (Rovner, J., dissenting). Judge Rovner's opinions align with those of the Courts of Appeals for the Third, Sixth, and Tenth Circuits in cases in which the courts denied requests for injunctions pending appeal in challenges to the same contraceptive rule at issue here. *Conestoga Wood Specialities Corp. v. Sec'y U.S. Dep't of Health & Human Servs.*, No. 13-1144 (3d Cir. Feb. 7, 2013); *Autocam Corp. v. Sebelius*, No. 12-3841 (6th

Cir. Dec. 28, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), *application for injunction pending appeal denied*, 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice).

Appellants have failed to show that the contraception rule likely places a "substantial burden" on their exercise of religion in two ways. First, the connection between the contraceptive rule and any impact on Appellants' religious exercise is simply too attenuated to rise to the level of a "substantial burden." The law does not require Appellants to use contraception themselves, to physically provide contraception to their employees, or to endorse the use of contraception. The contraceptive rule creates no more infringement on Appellants' religious exercise than many other actions that Appellants readily undertake, such as paying an employee's salary, which that employee could then use to purchase contraception. Second, the employee's independent decision about whether to obtain contraception breaks the causal chain between the government action and any potential burden on Appellants' religious exercise.

Furthermore, RFRA does not permit Appellants to impose their religious beliefs on their employees. As another court has noted in upholding the federal contraceptive rule, RFRA "is a shield, not a sword." *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476-CEJ,

2012 WL 4481208, at *6 (E.D. Mo. Sept. 28, 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Id.*

Finally, Appellants in the *Korte* matter cannot demonstrate that the federal contraceptive rule imposes a substantial burden on their exercise of religion, because Illinois law already requires the group health plan that insures their employees to cover contraception, and the *Korte* Appellants have not alleged that they have purchased a plan that is exempt from the state law requirements. The fact that the *Korte* Appellants have been providing contraception coverage to their employees under the Illinois law for years further demonstrates that the federal contraception rule does not impose a substantial burden on their religious exercise. Accordingly, this Court should affirm the decisions below.

ARGUMENT

I. The Federal Contraceptive Rule Does Not Substantially Burden Appellants' Exercise of Religion Under the Religious Freedom Restoration Act.

RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), to restore

the strict scrutiny test for claims alleging substantial burdens on the exercise of religion. Specifically, RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

Although RFRA does not define "substantial burden," this Court has held that "a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*").[1] This Court has further directed that "the adjective 'substantial' must be taken seriously." *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009). Otherwise, the term would be rendered "meaningless" and "the slightest obstacle to religious exercise, . . . however minor the burden it were to impose," could trigger a RFRA violation. *CLUB*, 342 F.3d at 761; *see also*

[1] Although *CLUB* is a Religious Land Use and Institutionalized Persons Act ("RLUIPA") case, cases under RLUIPA are instructive because that statute also prohibits government-imposed "substantial burdens" on religious exercise. 42 U.S.C. § 2000cc(a)(1).

Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.").

Thus, while a RFRA claim may proceed when the plaintiff alleges that he or she was forced by the government to act in a manner that is inconsistent with his or her religious beliefs, not "every infringement on religious exercise will constitute a substantial burden." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010). As the Eleventh Circuit has held, "a substantial burden must place more than an inconvenience on religious exercise," and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[2] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *see also, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a substantial burden on religious

[2] Although some of the cases cited herein are free exercise cases decided prior to *Smith*, courts have held that those cases are instructive in the RFRA context "since RFRA does not purport to create a new substantial burden test" but rather restores the pre-*Smith* test. *Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); *see also Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007) ("Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence[.]").

exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted).

The party claiming a RFRA violation must establish that the governmental policy at issue substantially burdens the sincere exercise of his or her religion. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006); *see also Mack v. O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). Only after the plaintiff establishes a substantial burden does the burden shift to the government to prove that the challenged policy is the least restrictive means of furthering a compelling government interest. *Gonzales*, 546 U.S. at 428-29; *see also Mack*, 80 F.3d at 1180. Appellants here cannot meet their duty of demonstrating that their religious exercise is substantially burdened.

There is no doubt as to the sincerity of Appellants' religious opposition to contraception. But that does not mean that the courts need not assess whether the contraceptive rule imposes a "substantial burden" on the exercise of that sincerely held religious belief. *See Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (holding in a RFRA challenge that although the government conceded that the plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other*

grounds by City of Boerne v. Flores, 521 U.S. 507 (1997); *see also Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (although, on a motion to dismiss, courts assessing RFRA claims must "accept[] as true the factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," whether the exercise of those beliefs is "substantially burdened" is a question of law properly left to the judgment of the courts).

A. The Connection Between the Contraceptive Rule and the Impact on Appellants' Religious Exercise Is Too Attenuated to Rise to the Level of "Substantial Burden."

The contraceptive rule does not render the Appellants' religious exercise "effectively impracticable": The rule neither requires employers to physically provide contraception to their employees, nor forces them to endorse the use of contraception, and does not prohibit any religious practice or otherwise substantially burden Appellants' religious exercise. *CLUB*, 342 F.3d at 761. The rule only requires Appellants to provide a comprehensive health insurance plan. While that health insurance plan might be used by a third party to obtain health care that is inconsistent with Appellants' faith, such indirect financial support of a practice from which Appellants wish to abstain according to religious principles does not constitute a substantial burden on Appellants' religious exercise.

The motions panel here concluded that the rule "coerced coverage of contraception," and that that alone constitutes a "substantial burden." *Korte*, 2012 WL 6757353, at *3 (emphasis omitted). However, paying for a health plan that contains coverage Appellants sincerely believe to be religiously objectionable does not "bear[] [a] *direct*, primary, and fundamental" relation to Appellants' "religious exercise." *CLUB*, 342 F.3d at 761 (emphasis added). As the Tenth Circuit explained:

> 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 that is condemned by plaintiffs' religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Hobby Lobby Stores, Inc., 2012 WL 6930302, at *3 (internal citations and quotations marks omitted). Thus, the court concluded that there was not a substantial likelihood that the court would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.*; *see also Grote*, 2013 WL 362725, at *3 (Rovner, J., dissenting).

This conclusion is unaffected by the existence of a self-insured health plan. Like the Appellants in *Grote* here, the Appellants in *Hobby Lobby* sponsor a self-insured health plan for the benefit of their employees. *See*

Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE, 2012 WL 5844972, at * 2 (W.D. Okla. Nov. 19, 2012). As the district court here correctly noted, there still remains an "attenuated gap between payment into the [self-insured plan] and the eventual use of the funds" by employees, in consultation with their health care providers, to cover the costs of health care, including contraceptive care. *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012).

These decisions are consistent with cases presenting similar facts. For example, in *Goehring v. Brophy*, the Ninth Circuit rejected a RFRA claim strikingly similar to Appellants' claims here. 94 F.3d 1294 (9th Cir. 1996). In that case, public university students objected to paying a registration fee on the ground that the fee was used to subsidize the school's health insurance program, which covered abortion care. *Id*. at 1297. The court rejected the plaintiffs' RFRA and free exercise claims, reasoning that the payments did not impose a substantial burden on the plaintiffs' religious beliefs, but at most placed a "minimal limitation" on their free exercise rights. *Id*. at 1300. The court noted that the plaintiffs are not "required [themselves] to accept, participate in, or advocate in any manner for the provision of abortion services." *Id*.

In *Seven-Sky v. Holder*, the D.C. Circuit upheld the Affordable Care Act's requirement that individuals maintain health insurance coverage in the face of a claim that the requirement violated RFRA because it required the plaintiffs to purchase health insurance in contravention of their belief that God would provide for their health. The appellate court affirmed a district court holding that the requirement imposed only a *de minimis* burden on the plaintiffs' religious beliefs. 661 F.3d 1, 5 n.4 (D.C. Cir. 2011), *affirming Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The district court held that inconsequential burdens on religious practice, like the requirement to have health insurance, "do[] not rise to the level of a substantial burden." *Mead*, 766 F. Supp. 2d at 42.

Similarly, the Fourth Circuit in *Dole v. Shenandoah Baptist Church* held that a religiously affiliated school's religious practice was not substantially burdened by compliance with the Fair Labor Standards Act ("FLSA"). 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990). The school paid married male, but not married female, teachers a "salary supplement" based on the school's religious belief that the husband is the head of the household. *Id*. at 1392. This "head of the household" supplement resulted in a wage disparity between male and female teachers,

and, accordingly, a violation of FLSA. The Fourth Circuit rejected the school's claim that compliance with FLSA burdened the exercise of its religious beliefs, holding that compliance with FLSA imposed, "at most, a limited burden" on the school's free exercise rights. *Id*. at 1398. "The fact that [the school] must incur increased payroll expense to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id*.; *see also Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (rejecting Free Exercise Clause challenge to FLSA because compliance with those laws cannot "possibly have any direct impact on appellants' freedom to worship and evangelize as they please. The only effect at all on appellants is that they will derive less revenue from their business enterprises if they are required to pay the standard living wage to the workers."), *aff'd*, 471 U.S. 290, 303 (1985).

There are strong parallels between the cases cited above and the instant actions. Just as the plaintiffs in *Goehring* failed to state a claim under RFRA because the burden on religion was too attenuated, the same is true here. The mere fact that someone might have used the student health insurance in *Goehring* to obtain an abortion, or the fact that Appellants' employees might use their health insurance to obtain contraception, does not impose a "substantial" burden on others' religious practice. *Cf. DeSimone v.*

Bartow, 355 F. App'x 44, 46 (7th Cir. 2009) (the fact that "other patients might obtain and read [a mental health patient's] journals" did not support the patient's claim that the facility's ban on encoded writing constituted a substantial burden). Moreover, just as in *Shenandoah*, a requirement that employers provide comprehensive, equal benefits to their female employees does not substantially burden religious exercise. Appellants remain free to exercise their faith by not using contraceptives and by discouraging employees from using contraceptives.[3]

Indeed, the burden on Appellants' religious exercise is just as remote as other activities they subsidize that are also at odds with their religious beliefs. For example, Appellants pay salaries to their employees – money the employees may use to purchase contraceptives. And just as the court recognized in *Mead*, Appellants "routinely contribute to other forms of insurance" via their taxes that include contraception coverage such as Medicaid, and they contribute to federally funded family planning programs. 766 F. Supp. 2d at 42. These federal programs "present the same conflict with their [religious] beliefs." *Id*. But like the federal contraceptive rule, the

[3] Moreover, the same would be true if a company owned by a Jehovah's Witness insisted on excluding blood transfusions from its employees' health plan because of the owner's beliefs, or if a Christian Scientist business owner refused, in violation of the ACA, to provide health insurance coverage based on his or her religious beliefs.

connection between these programs and Appellants' religious beliefs is too attenuated. Indeed, the Eighth Circuit has held that a religious objection to the use of taxes for medical care funded by the government does not even create a cognizable injury. *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that plaintiffs lacked standing to challenge under the Free Exercise Clause the expenditure of state funds on abortion care for indigent women).

B. An Employee's Independent Decision to Use Her Health Insurance to Obtain Contraception Breaks the Causal Chain Between the Government's Action and Any Potential Impact on Appellants' Religious Exercise.

It is a long road from Appellants' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for contraceptives. That is, the independent action of an employee breaks the causal chain for any violation of RFRA. In this respect, the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is instructive. In *Zelman*, the Court held that a school voucher program did not violate the Establishment Clause because parents' "genuine and independent private choice" to use the voucher to send their children to religious schools broke "the circuit between government and religion." *Id*. at 652. Here, as the Tenth Circuit concluded, an employer may end up subsidizing activity with which it disagrees only after a "series of independent decisions by health care providers and patients" covered by

the company's health plan. *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (citation omitted). Therefore, as in *Zelman*, this scenario involves an employee's independent and private choice, which breaks the causal chain between government mandate and the exercise of religion. *See Grote*, 2013 WL 362725, at *10 (Rovner, J., dissenting) ("The *Zelman* decision supports an argument that independent decisionmaking by an insured employee and her physician severs the connection between the employer's funding of a health care plan and the use of plan money to pay for contraceptives."). Any slight burden on Appellants' religious exercise is far too remote to warrant a finding of a RFRA violation.

II. RFRA Does Not Grant Appellants a Right to Impose Their Religious Beliefs on Their Employees.

RFRA cannot be used to force one's religious practices upon others and to deny them rights and benefits. This case, and most of the cases discussed above, implicate the rights of third parties, such as providing employees with fair pay, *see Shenandoah*, or ensuring that health insurance benefits of others are not diminished, *see Goehring*. Unlike the seminal cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, where only the plaintiffs' rights were at issue, Appellants here are attempting to invoke RFRA to deny equal health benefits to their female employees, whose beliefs about contraception –

religious or otherwise – may be different than those of their employers. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004) ("[A]ny exemption from the [California contraceptive equity law] sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). As the Tenth Circuit concluded, the instant action is different from "other cases enforcing RFRA," which were brought "to protect a plaintiff's *own* participation in (or abstention from) a specific practice required (or condemned) by his religion." *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (emphasis added). Furthermore, as another court has held, "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." *O'Brien*, 2012 WL 4481208, at *6. Finally, as the Supreme Court noted in rejecting an employer's religious objection to paying social security taxes: "Granting an exemption . . . operates to impose the

employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982). RFRA cannot be invoked as "a sword" to impose Appellants' religious beliefs on their employees. *O'Brien*, 2012 WL 4481208, at *6.

III. The *Korte* Appellants Cannot Demonstrate that the Contraceptive Rule Imposes a Substantial Burden on Their Exercise of Religion Because Their Group Health Plan Must Cover Contraception Under Illinois Law.

In light of the requirements of Illinois' state contraceptive equity law, the *Korte* Appellants cannot show that federal governmental action has or will substantially burden their religious exercise, as they must in order to prevail on their RFRA claim. The Illinois contraceptive equity statute requires insurance plans that cover outpatient services and prescription drugs and devices to cover outpatient contraceptive services and outpatient contraceptive drugs and devices. 215 ILCS 5/356z.4. By its terms, and as evidenced by its location in the Illinois Insurance Code, the Illinois contraceptive equity law governs health insurance companies, *see id.* § 5/352(a), not employers like the *Korte* Appellants.[4] Therefore, any group

[4] The contraceptive equity law also applies to the State's employee health insurance plan, *see* 5 ILCS 375/6.11, plans sold by health maintenance organizations, *see* 215 ILCS 125/5-3, and plans offered by volunteer health services plan corporations, *see id.* § 165/10.

health plan sold to the *Korte* Appellants must comport with the Illinois statute.

Under the Illinois Health Care Right of Conscience Act ("HCRCA"), 745 ILCS 70/ *et seq.*, certain health insurance companies (and similar risk-bearing health care payers) can claim an exemption from the requirements of the contraceptive equity law by virtue of documented religious or conscience based objections, and only such entities may lawfully sell to employers group health insurance policies that do not comport with the contraceptive equity law. *See* 745 ILCS 70/11.2 (immunizing "health care payers" from civil and criminal liability for refusing "to pay for or arrange for the payment of any particular form of health care services that violate the health care payer's conscience").[5] Unless the *Korte* Appellants have purchased a group health plan from such an insurer – which they have not alleged – Illinois law requires that the policy sold to them comport with the contraceptive equity law.

Absent an allegation that they have purchased a plan exempt from Illinois' contraceptive equity law, the *Korte* Appellants cannot claim that the

[5] *See* 745 ILCS 70/3(f) (defining "health care payers" as "health maintenance organization[s], insurance compan[ies], management services organization[s], or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product").

federal rule imposes a substantial burden, because their insurance plan must cover contraception under state law.[6] Moreover, the fact that the *Korte* Appellants have been providing their employees with contraceptive coverage for years under Illinois law further undermines their claim of substantial burden. In *Shenandoah*, for example, the fact that the school had come into compliance with the FLSA was one relevant factor in the court's determination that compliance with the FLSA would not substantially burden the school's religious exercise. 899 F.2d at 1397-98. Here compliance with the Illinois law further demonstrates that the federal contraceptive rule burdens the *Korte* Appellants' religious exercise only minimally, if at all.

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[6] Contrary to their assertion, *Korte*-Appellants Br. at 14. n.6, the *Korte* Appellants are not "health care payers" under the HCRCA. They are not a health maintenance organization, insurance company, management services organization or an "other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product," 745 ILCS 70/3(f), which, under the canon of *ejusdem generis*, must be read to be "like," and not "different from," the three enumerated entities. *People v. Capuzi*, 20 Ill. 2d 486, 493-94 (1960). Insurance companies, HMOs, and MSOs have in common three significant qualities – each is a (1) third-party, (2) risk-bearing entity (3) that is organized under the laws of Illinois (or another state) to conduct business in the payment or arrangement of payment of health care services on behalf of others. *See* 215 ILCS 5/2(e) (defining insurance "company"); *id.* § 5/370g(b) (defining "insurer"); *id.* § 125/1-2(9) (defining "health maintenance organization"); *see also id.* § 5/368a(a) (providing other examples of "payors"); Ill. Admin. Code tit. 50, § 2051.220 ("Payor means an entity responsible for bearing the risk of health care services."). The *Korte* Appellants are none of these.

CONCLUSION

Accordingly, this Court should affirm the decisions below.

March 8, 2013

Respectfully submitted,

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DATED: March 8, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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