IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CYRIL B. KORTE, JANE E. KORTE, and KORTE & LUITJOHAN CONTRACTORS, INC.,	)	
Plaintiffs,	)	
vs.	)	
	)	Case No. 3:12-CV-01072-MJR
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, UNITED STATES DEPARTMENT OF THE TREASURY, TIMOTHY F. GEITHNER, UNITED STATES DEPARTMENT OF LABOR, and HILDA L. SOLIS,	)	
Defendants.	)	

MEMORANDUM AND ORDER

2010). Plaintiffs name as defendants the three agencies charged with implementing and administering the mandate, and their respective heads: the Department of Health and Human Services and Secretary Kathleen Sebelius; the Department of the Treasury and Secretary Timothy F. Geithner; and the Department of Labor and Secretary Hilda L. Solis.

As a general matter, the ACA "aims to increase the number of Americans covered

contraception, sterilization and actions intended to terminate human life are immoral and gravely sinful.[5] Also, the Kortes seek to manage and operate Korte & Luitjohan Contractors, Inc. ("K & L") in a way that reflects the teachings, mission and values of their Catholic faith.[6] As of September 27, 2012 (13 days before this action was filed), K&L established written "Ethical Guidelines" to that effect, but an exception is made when a physician certifies that certain sterilization procedures or drugs commonly used as contraception are prescribed with the intent to treat certain medical conditions, not with the intent to prevent or terminate pregnancy (Doc. 7-2, p. 6).[7] However, Plaintiffs acknowledge that in August 2012 they learned that their current group health plan covers contraception. The Kortes investigated ways to obtain coverage that would comply with their beliefs and corporate policy, but they have yet to find an insurer that will issue a policy that does not cover contraception.[8] Plaintiffs acknowledge that they could self-insure, but that does not relieve them of their legal obligation to comply with the ACA mandate.

K&L currently has approximately 90 full-time employees; about 70 of those employees belong to unions and about 20 employees are nonunion. As a "noncash benefit," K&L provides group health insurance for its nonunion employees. Union employees are covered by

[5] In furtherance of their Catholic faith, the Kortes both "strongly support, financially and

separate health insurance through their respective unions, over which Plaintiffs have no control.[9] If K&L does not provide the mandated contraceptive coverage, it estimates that it will be required to pay approximately $730,000 per year as a tax and/or penalty, which it considers "ruinous." K&L does not want to abandon providing health coverage because it would severely impact K&L's ability to compete with other companies that offer such coverage, and K&L employees would have to obtain expensive individual policies in the private marketplace.[10]

Plaintiffs have brought suit contending that the ACA mandate violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb–1 (2006), the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, the Due Process Clause of the Fifth Amendment, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(b)-(c), 706(2)(A), 706(2)(D) (2006).

Plaintiffs now move for a preliminary injunction relative to Counts I and II of the complaint, their RFRA and Free Exercise Clause claims (Docs. 6 and 7). Defendants filed a memorandum in opposition (Doc. 22), to which Plaintiffs replied (Doc. 26). The Court has also received briefs u□ u□ , from: the American Civil Liberties Union and American Civil soCa thunction r7q7ebDocs.pIlluinins,inmsuopprat o Defendants (Doc.3(2;: the(soCa ty,Lifen andLawtion

Defendants assert that K&L, a secular, for-profit corporation, is not a "person" and cannot exercise religion; therefore, the ACA mandate does not violate the Free Exercise Clause or RFRA. From Defendants' perspective, K&L is attempting to eliminate the legal separation provided by the corporate form in order to impose the personal religious beliefs of its directors upon K&L's employees. Defendants further fear opening the door to for-profit corporations claiming a variety of exemptions from untold general commercial laws, obviating the government's ability to tackle national problems by way of rules of general applicability.

I. Applicable Legal Standards

A. Injunctive Relief

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; and (3) irreparable harm absent the injunction. , . . , 699 F.3d 962, 972 (7th Cir. 2012). *A* . *A* , 679 F.3d 583, 589–590 (7th Cir. 2012); . , 453 F.3d 853, 859 (7th Cir. 2006); . , 378 F.3d 613, 619 (7th Cir. 2004). If this threshold showing is made, the Court balances the harm to the parties if the injunction is granted or denied, as well as the effect of an injunction on the public interest. *A* , 679 F.3d at 589–590; , 453 F.3d at 859. "The more likely it is that [the moving party] will win its case on the merits, the less the balance of harms need weigh in its favor." *G* u□ u□ u□ , . . *G* u□ , ., 549 F.3d 1079, 1100 (7th Cir. 2008).

The Court of Appeals for the Seventh Circuit has advised that, relative to preliminary injunctions in First Amendment cases:

person's" exercise of religion, "even if the burden results from a rule of general applicability" (§ 2000bb-1(a)), except when the government can "demonstrat[e] that application of the burden to the person-(1) [furthers] a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest," (§ 2000bb-1(b)). A statutory cause of action is created under 42 U.S.C. § 2000bb-1(c), and standing to bring such a suit is determined under the general rules for standing under Article III of the Constitution.

RFRA affords more protection than the Free Exercise Clause. Congress enacted RFRA in response to , 494 U.S. 872, 883-890 (1990), where, in upholding a generally applicable law that burdened a religious practice, the Supreme Court held that the Free Exercise Clause does not require a case-by-case assessment of the burdens imposed by facially constitutional laws. , __U.S.__, 131 S.Ct. 1651, 1656 (2011); , 546 U.S. 418, 424 (2006). RFRA was designed to restore the "compelling interest" test as set forth in , 374 U.S. 398 (1963), and , 406 U.S. 205 (1972), where free exercise of religion is substantially burdened.

II. Issues and Analysis

A. Standing and Ripeness

Defendants' contentions that K&L is a secular corporation that cannot exercise religion, and that any burden on religious exercise is too attenuated to be actionable, along with the uncertainty regarding whether any K&L employee will ever seek coverage for contraception, beg the questions of standing and ripeness.

> An Article III court enjoys jurisdiction over a case only if the plaintiff demonstrates that he suffered an injury in fact, the defendant's

> 556 (1984); *A* . *A* , 679 F.3d [583,] 590–91[(7th Cir. 2012)]. When the plaintiff applies for prospective relief against a harm not yet suffered—or one he believes he will suffer again—he must establish that he "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct [,] and [that] the injury or threat of injury [is] both real and immediate, not conjectural or hypothetical." *A* . , 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted). Otherwise, he fails to allege an actual case or controversy before the court. U.S. CONST. art. III, § 2, cl. 1.

B . , 697 F.3d 445, 451 (7th Cir. 2012); *u* . , 504 U.S. 555, 560-561 (1992). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." . , 523 U.S. 296, 300 (1998).

In *520* *A* *u* *A* . . . , 433 F.3d 961, 962-963 (7th

Thomas, J.)). However, whether secular corporations can exercise religion is an open question. This Court does not need to specifically decide whether a secular, for-profit corporation can exercise religion. A corporation may engage in activities to advance a belief system, and may assert constitutional rights on its own behalf and on behalf of its members.

, 371 U.S. 415, 428-430 (1963).

Relative to the Kortes, in

K&L have standing to sue; their injuries are sufficiently concrete. Further, more rigorous analysis of the merits of Plaintiffs' claims will follow.

Although K&L has yet to violate the statute, the monetary assessment that awaits if it does not comply with the mandate is certain, and the deadline for securing insurance is fast approaching. This imminent, substantial threat is sufficient for ripeness. *A* *G* , 387 U.S. 136, 149-153 (1967) (a declaratory judgment action is ripe if the regulation at issue requires "immediate and significant" conduct).

B. Likelihood of Success on the Merits

Adhering to the analytical framework for securing a preliminary injunction, Plaintiffs' likelihood of success on their Free Exercise Clause and RFRA claims must be addressed. Plaintiffs contend that " likelihood of success on the merits" is all that is required—suggesting a very light burden. *u* , ., 695 F.3d 676, 678 (7th Cir. 2012) (emphasis added); *A* . *A* , 679 F.3d 583, 590 (7th Cir. 2012). However, the court of appeals' most recent iteration of the standard specifies a " likelihood of success on the merits." , . . , 699 F.3d 962, 972 (7th Cir. 2012) (emphasis added). Furthermore, in the context of securing such an extraordinary remedy, a "possibility" has been found to be less than a "likelihood." . *u* *u* *u* , ., 555 U.S. 7, 22 (2008) (parsing the meaning of "likely" relative to the "irreparable harm" requirement for issuance of a preliminary injunction). As already noted, the stronger the chance of success on the merits, the less the balance of harms must tip in Plaintiffs' favor. , ., 699 F.3d at 972.

Plaintiffs have moved for summary judgment on the merits, but the time for Defendants to respond has not passed. However, during oral argument on the motion for a preliminary injunction Plaintiffs indicated that the arguments currently before the Court relative to the injunction are all that they have to present. The Court's analysis regarding the likelihood of success is, therefore, less speculative and more in-depth than is often the case. Of course, the Court's ruling on the motion for an injunction is not dispositive of Plaintiffs' motion for summary judgment.

1. Free Exercise

As in , , F.Supp.2d__, 2012 WL 5844972, at *5 (W.D. Okla. Nov. 19, 2012), the undersigned district judge views the exercise of religion as a "purely personal" guarantee that cannot be extended to corporations. *B B* . *B* , 435 U.S. 765, 778 n. 14 (1978) (observing that corporate identity has been determinative of why corporations are denied, for example, the privilege against self-incrimination (. , 221 U.S. 361, 382-386 (1911)), or the right to privacy on a par with individuals (*B A* . , 416 U.S. 21, 65-67 (1974)). In *B* , 435 U.S. at 778 n. 14, the Supreme Court indicated that whether a constitutional guarantee is "purely personal" "depends on the nature, history, and purpose of the particular provision." In . , 472 U.S. 38, 49 (1985), the Supreme Court explained: "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." James Madison eloquently stated, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." .

u□ , ., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (quoting 2 Writings of James Madison 184 (G. Hunt ed. 1901)). Thus, a corporation may be able to advance a belief system, but it cannot exercise religion. In any event, Plaintiffs' Free Exercise Clause claim has little or no chance of success on its merits, regardless of whether a corporation can exercise religion.

From Plaintiffs' perspective, the mandate is not a neutral law of general applicability, and it substantially burdens their exercise of religion; therefore, strict scrutiny should apply (similar to the RFRA analysis). Plaintiffs note that nonprofit churches and religious institutions are exempted under the government's definition of a "religious employer," but no exemption is afforded to for-profit religious employers like K&L. Plaintiffs perceive a religious preference in favor of religious entities that fall within the statute's definition, as opposed to religious neutrality. Also, Plaintiffs see the mandate as targeting religiously motivated conduct. Plaintiffs further argue that the mandate is not generally applicable because it does not apply to employers with fewer than 50 full-time employees (26 U.S.C. § 4980H(c)(2)(A)), "grandfathered" plans in existence since March 23, 2010 (75 Fed. Reg. 41726, 41731 (Jul. 19, 2010)), nonprofit religious employers (76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012)), or health care sharing ministries (26 U.S.C. §§ 5000A(d)(2)(A)(i), (ii), (B)(ii)). Plaintiffs highlight that in *u*□ , *u*□*u*□ *B* *u*□*A* , . , 508 U.S. 520 (1993), the Supreme Court stated that, where the government "has in place a system of individual exemptions, it may not refuse to extend the system to cases of 'religious hardships' without compelling reasons." . at 568 (internal citations omitted).

Relative to the neutrality of the mandate, in *u*□ , *u*□*u*□ *B* *u*□*A* , the

. at 534, 535, 540. On its face, the ACA mandate makes no mention of religion whatsoever. The legislative history does not reflect any impermissible object; rather, the purpose was tied to

impermissibly favors nonprofit religious organizations, and excludes for-profit organizations, such as K&L, that are operated consistent with religious beliefs.

The Supreme Court has long recognized that one's religious beliefs cannot exempt one from complying with an otherwise valid law; otherwise, every citizen's beliefs would trump the law of the land—exceptions would swallow every rule. , 98 U.S. 145, 166-167 (1878); , , 494 U.S. 872, 878-879 (1990) (in response to , RFRA was passed, requiring the least restrictive means be used). Furthermore, "the course of constitutional neutrality in this area cannot be an absolutely straight line." , 397 U.S. 664, 669 (1970). Accordingly, statutory accommodations and exemptions for nonprofit religious organizations have been permitted as a mere accommodation of, and attempt to balance, the Free Exercise and Establishment Clauses. , 397 U.S. at 659-672 (discussing the First Amendment "tight rope" that must be traversed relative to tax exemptions for nonprofit religious organizations).

Plaintiffs see no difference between their efforts to run the for-profit K&L construction business in a manner consistent with religious principles and a traditional nonprofit, religious organization. Most recently, in - , __U.S.__, 132 S.Ct. 694 (Jan. 11, 2012), the Supreme Court recognized a fine line between religious and secular associations. First Amendment analysis for a religious organization, such as the Lutheran Church, was found to be different than the analysis that would be used relative to, for example, a labor union or social club. . at 706. The high court distinguished between teachers with a formal religious imprimatur and lay teachers. A religious exemption from compliance with the Americans with Disabilities Act was applied to the "called"

teacher, despite the fact that all teachers were performing the same duties at the same religious school. Thus, a corporation that has primarily a secular purpose, such as construction, can be distinguished from a "religious" corporation (as defined by statute).

Lastly, even if in practice the law incidentally impacts Plaintiffs' religious beliefs (or prefers those who do not hold such religious convictions), it does not necessarily follow that

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b. Substantial Burden

Plaintiffs must initially show a substantial burden on their religious beliefs. , 546 U.S. 418, 429 (2006).

While neither dispositive nor determinative, the Court again notes the Plaintiffs' current health insurance plan covers the very preventive health services they seek to enjoin. There is a palpable inconsistency in claiming the ACA contraception mandate substantially burdens their religious beliefs while they currently maintain the same coverage in their existing pre-ACA health plan.

Plaintiffs claim that the ACA contraception coverage mandate forces them to choose between adhering to their religious beliefs and paying "ruinous" penalties for non-compliance. K&L foresees losing their employees' goodwill, and being placed at a competitive disadvantage in the business marketplace. During oral argument, Plaintiffs emphasized that they do not seek to impose their religious beliefs upon others; rather, they just do not want to be forced to foster or sponsor a plan that is contrary to their religious beliefs.[15] As evidence that the government recognizes the substantial burden the mandate imposes, Plaintiffs cite the current exemption for nonprofit religious employers (76 Fed. Reg. 46621, 46626 (Aug. 3, 2011)), and the temporary "safe harbor" from enforcement afforded to non-grandfathered group health plans sponsored by nonprofit organizations with religious objections to contraception coverage (77 Fed. Reg. 8725, 8726-8727 (Feb. 15, 2012)).

Defendants do not challenge the sincerity of the Kortes' religious beliefs, but they do question the burden imposed under the mandate, particularly in light of the fact that K&L's

[15] Under the RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb–2 (defining "exercise of religion" as defined in 42 U.S.C. § 2000cc–5).

current insurance plan covers contraception. From Defendants' perspective, any burden is and too attenuated to trigger strict scrutiny. This Court agrees, albeit for more nuanced reasons.

In , 406 U.S. 205 (1972), a compulsory school-attendance law was found to violate the Free Exercise Clause because parents were forced to choose between endangering their salvation and criminal penalties (a fine of not less than $5, nor more than $50, and imprisonment for up to three months). In , 450 U.S. 707 (1981), the plaintiff was denied unemployment benefits after he felt compelled to leave his job in a foundry because his religious beliefs. The tenets of his religion forbade his involvement in the production of weapons, and his employer had just started manufacturing military tank parts. The Supreme Court explained that, where the receipt or denial of an important benefit is conditioned upon conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon religion exists. . at 717-718. , 374 U.S. 398 (1963), similarly illustrates that the pressure does not have to be direct. In , a Free Exercise Clause violation was found relative to an individual whose religious beliefs prevented work on Saturdays and consequently disqualified that person from state unemployment compensation benefits, which required one to accept work when offered.

In , 342 F.3d 752, 760-761 (7th Cir. 2003), relative to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, the Court of Appeals for the Seventh Circuit looked to RFRA and Free Exercise precedents and concluded that the burden be "substantial" to trigger strict scrutiny:

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

B , 342 F.3d at 761. . *B* , 523 F.3d 789, 799 (7th Cir. 2008) (looking to , 450 U.S. at 718, to define "effectively impracticable"). From this Court's perspective, the ACA mandate (and its penalty/tax) will not be directly, primarily and fundamentally responsible for rendering the Kortes' adversity to abortifacients effectively impracticable.

Any inference of support for contraception stemming from complying with the neutral and generally applicable mandate is a *u* burden. It appears that Plaintiffs' objection presupposes that an insured will actually use the contraception coverage. Even assuming that there is a substantial likelihood that a K&L employee will do so, at that point the connection between the government regulation and the burden upon the Kortes' religious beliefs is too distant to constitute a substantial burden.

Plaintiffs see their situation as being analogous, if not identical, to , and . However, in , and individuals faced a choice, even when the pressure was indirect. K&L is not a person and only reflects the Kortes' religious beliefs. The fact that a "corporate veil" (regardless of how thin) stands between the Kortes and K& L, and another legal "veil" is between K&L and the group health plan, cannot be ignored.

In . . . , 455 U.S. 252, 261 (1982), the Amish plaintiff was self-employed and did not qualify for a religious exemption from paying social security taxes. Social Security runs counter to the Amish religious belief in providing for themselves. Although Lee involved a self-employed person, the Supreme Court still recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own

conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." Similarly, by assuming the corporate form, the Kortes chose to accept the limitations of that form. Plaintiffs would rather obliterate any distinction between business entities and individuals. Specific to the ACA contraception coverage mandate, two other district courts have acknowledged how an individual can become distanced by what are often characterized as "legal fictions.

In , u□, u□ , , . . . , u□, __F.Supp.2d __, 2012 WL 5817323 at *13 (D.D.C. Nov. 16, 2012), the plaintiff prevailed; a substantial burden was found and a preliminary injunction was issued. Nevertheless, the district court considered it a "crucial distinction" that the plaintiff corporation was self-insured, "thereby removing one of the 'degrees' of separation." . The court in was attempting to distinguish O'B , . , , , , , , , , , , , u□ , , , , __F.Supp.2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), where a secular, for-profit limited liability corporation was contributing to a health insurance plan. In O'B , , the district court concluded: "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." . at *6.[16]

Because this Court does not perceive that the ACA contraception mandate imposes a substantial burden on Plaintiffs' free exercise of religion, the Court must find that Plaintiffs have failed to satisfy their burden, which leads to the conclusion that Plaintiffs do not

[16] During oral argument, Plaintiffs made much of the fact that the district court's order in O'B , had just been stayed pending appeal, in effect granting the plaintiff corporation a preliminary injunction. O'B , . , , , , , , , , , , , u□ , , , No. 12-3357 (8th Cir. Nov. 28, 2012). Plaintiffs seem to consider the appellate court's one-sentence order as being tantamount to a holding that a substantial burden and successful RFRA claim had been found, which remains to be seen.

have a reasonable likelihood of success on the merits of their RFRA claim. Consequently, no further analysis of the RFRA claim is necessary.

III. Conclusion

For the reasons stated, the Court finds that Plaintiffs Cyril B. Korte, Jane E. Korte, and Korte & Luitjohan Contractors, Inc., have failed to show a reasonable likelihood of success on the merits of either their Free Exercise Clause or RFRA claims, which is necessary to secure a preliminary injunction. In