United States Court of Appeals for the Eighth Circuit

A13-1118

Annex Medical, Inc., Stuart Lind, Tom Janas,

Appellants,

vs.

Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services; Hilda Solis, in her official capacity as Secretary of the United States Department of Labor; Timothy F. Geithner, in his official capacity as Secretary of the United States Department of Treasury; United States Department of Health and Human Services; United States Department of Labor; United States Department of Treasury,

Appellees.

APPELLANTS' PRINCIPAL BRIEF

Erick G. Kaardal, MN 229647
Mohrman & Kaardal, P.A.
33 S. Sixth Street, Suite 4100
Minneapolis, MN 55402
Telephone: 612-341-1074

Kaylan L. Phillips, IN 30405-84
Noel H. Johnson, WI 1068004
ACTRIGHT Legal Foundation
209 W. Main Street
Plainfield, IN 46168
Telephone: 202-683-9405
Attorneys for Appellants

Mark B. Stern
Alisa B. Klein
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7235
Washington, D.C. 20530
Telephone: 202-514-1597
Attorneys for Appellees

Summary of the Case and Request for Oral Argument

Appellees require under penalty of law that all employers that offer group health insurance to their employees must pay for and provide cost-free coverage for contraception, sterilization, abortifacient drugs and related education and counseling. This appeal asks whether such a requirement violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq*. ("RFRA"), when applied to a business owner whose sincerely-held religious beliefs require him to provide health insurance for his employees, but prohibit the purchase and provision of contraception, sterilization, abortifacient drugs and education and counseling related to the same.

The district court denied Appellants' request for preliminary injunctive relief on January 8, 2012. (JA-88; Addm-1.)[1] Appellants now appeal that denial.

Because this appeal presents issues touching on the fundamental right of free religious exercise, Appellants request 20 minutes of oral argument time per side.

[1] References to the Joint Appendix are designated "JA" throughout this brief. Where applicable, cross-references to the Addendum are designated "Addm."

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, Annex Medical, Inc. states that there is no publicly held corporation owning 10% or more of its stock.

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Jurisdictional Statement

This action arises under the Constitution and laws of the United States. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361, and had jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 & 2202, 42 U.S.C. § 2000bb-1, and 5 U.S.C. § 702.

The district court entered a final order denying Appellants' motion for a preliminary injunction on the RFRA claim on January 8, 2013. (JA-104.) The Notice of Appeal was filed on January 11, 2013. (JA-105.) This Court has jurisdiction over appeals of preliminary injunction orders under 28 U.S.C. §§ 1292(a)(1) and 1294(1).

Statement of Issues

1. Whether the district court erred when it declined to preliminarily enjoin the federal preventive services mandate that requires all employers that offer group health insurance to their employees to pay for and provide cost-free coverage for contraception, sterilization, abortifacient drugs and related education and counseling on the grounds that it did not violate the Religious Freedom Restoration Act.

Most apposite cases:

- *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)
- *Sherbert v. Verner*, 374 U.S. 398 (1963)
- *Wisconsin v. Yoder*, 406 U.S. 205 (1972)
- *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012)

Most apposite constitutional and statutory provisions:

- Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

Statement of the Case

Appellants Annex Medical and Stuart Lind (collectively, "Lind")[2] filed this action alleging that the women's preventive services mandate of the Patient Protection and Affordable Care Act (the "Mandate"), which requires that all employers offering group health insurance to their employees must pay for and

[2] Tom Janas is also a plaintiff in the underlying action, but did not join the motion for preliminary injunction that is the subject of the present appeal.

provide cost-free coverage for contraception, sterilization, abortifacient drugs and related education and counseling, violates RFRA, the Religion Clauses of the First Amendment and the Administrative Procedures Act. (JA-38–45, ¶¶ 210-72.)

In accordance with his sincerely held Catholic beliefs, Lind alleged that he cannot "intentionally participate in, pay for, facilitate access to, or otherwise support contraception, sterilization, abortifacient drugs, and related education and counseling through their inclusion in [his]… group health plan[]." (JA-11, ¶ 55.) He furthered alleged that his faith also obligates him to provide for the needs of his employees, including their health care. (JA-12, ¶¶ 58-59.) The district court did not question the sincerity of these beliefs.

Lind explained the Mandate forces him to act contrary to his sincerely held beliefs. He must either subsidize products and services the Catholic religion teaches are sinful and immoral or he must terminate his insurance coverage and neglect his religious obligations to his employees. In no event can he satisfy his conscience.

Lind moved for a preliminary injunction on the sole ground that the Mandate violates RFRA. (*See* JA-51.) Despite his allegations, the district court denied the motion, rejecting Lind's claim that the Mandate imposes a "substantial burden" on his religious exercise. (JA-100; Addm-13.)

The court's conclusion cannot be squared with Lind's uncontroverted assertion that the Mandate compels conduct his religion forbids. Lind requests that this Court reverse the decision of the lower court and preliminarily enjoin the Mandate.

Statement of Facts

The Contraception Mandate

On March 23, 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), was signed into law by President Barack Obama. The ACA requires all group health insurance plans to provide, at no cost, "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA").[3] 42 U.S.C. § 300gg-13(a)(4). Appellees ordered HRSA to determine which women's "preventive care and screenings" would be required under the ACA. 75 Fed. Reg. 41728 (July 19, 2010). HRSA directed a private organization, the Institute of Medicine ("IOM"), to create guidelines describing which drugs and services should be required as preventive care in all group health plans. IOM then prepared a report in which it recommended that preventive care include "the full range of Food and Drug Administration-approved

[3] HRSA is an agency of the U.S. Department of Health and Human Services ("HHS").

contraceptive methods, sterilization procedures, and patient education and counseling."[4] FDA-approved "contraceptive methods" include, among other things, birth-control pills, implanted contraceptive devices, and the abortifacient drugs Plan B (the "morning after pill") and Ella (the "week after pill").[5] Based solely on IOM's report, HRSA adopted IOM's recommendations in full. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited March 4, 2013) ("HRSA Guidelines").

On August 1, 2011, Appellees issued an "interim final rule" adopting the HRSA Guidelines and mandating that all "group health plan[s] and … health insurance issuer[s] offering group or individual insurance coverage provide benefits for and prohibit the imposition of cost-sharing with respect to" the women's preventive care and services included in the HRSA Guidelines for plan years beginning on or after August 1, 2012. 76 Fed. Reg. 46622, 46629 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv). On February 15, 2012, Appellees issued final

[4] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 109-10 (2011), *available at* http://cnsnews.com/sites/default/files/documents/PREVENTIVE%20SERVICES-IOM%20REPORT.pdf (last visited March 4, 2013).

[5] FDA Office of Women's Health, Birth Control Guide, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last visited March 4, 2013).

regulations by adopting the August 1 interim final rule "without change." 77 Fed. Reg. 8725-30 (Feb. 15, 2012) (the "Mandate").

Exemptions

Not all employers and individuals must comply with the Mandate. Employers with fewer than fifty employees, such as Lind, are exempted from the Mandate via their exemption from the ACA's requirement to provide group health insurance coverage. *See* 26 U.S.C. § 4980H(a) (imposing an "assessable payment" on employers with fifty or more employees who fail to offer ACA-compliant health coverage). However, all employers that offer a group health plan must comply with the Mandate or face substantial fines and penalties, and possibly lawsuits. *See* 26 U.S.C. § 4980D (imposing $100 per-day, per-employee fine on employers that offer group health plans that do not comply with the coverage requirements of the Mandate); 29 U.S.C. § 1132(a) (providing for civil enforcement actions brought by the Department of Labor and insurance plan participants).

Further, group health plans in existence on or before March 23, 2010 are considered "grandfathered," and exempt from the Mandate indefinitely if they avoid certain changes in coverage.[6]

[6] *See* 42 U.S.C. § 18011(a)(2); 45 C.F.R. § 147.140; 75 Fed. Reg. 34538, 34545 (June 17, 2010); *see also* HealthReform.gov, "Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans,"

By Appellees' own calculations, approximately 191 million people belonged to health care plans that qualified for the grandfathered exemption when the ACA was enacted. *See, e.g.*, *Newland v. Sebelius*, 881 F.Supp.2d 1287, 1291 (D. Colo. 2012) (citing 75 Fed. Reg. at 34550). Appellees' estimates "suggest that approximately 98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. at 41732. While grandfathered plans are exempt from compliance with the Mandate, they must comply with other provisions of the ACA. 42 U.S.C. § 18011(a)(3)-(4).

Appellees have also exempted certain non-profit entities they define as "religious employers." Under the 2012 final rules, religious employers must meet all of the following criteria to qualify for an exemption:

> (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130(a)(1)(iv)(B)(1)-(4).[7] On January 30, 2013, Appellees proposed changes to these rules that would amend the definition of "religious employer" by

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http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html (last visited March 4, 2013).

[7] Appellees received "over 200,000 responses" to the amended interim final regulations, many of which came from religious citizens and business owners who explained that the Mandate was wholly contrary to their religious beliefs. *See* 77

eliminating the first three prongs of the test, while clarifying the fourth criteria. 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013). Thus, under the proposed rules, the "religious employer" exemption remains limited to those non-profit entities referred to in section 6033(a)(3)(A)(i) or (iii) of the Code—"churches, their integrated auxiliaries, and conventions or associations of churches[.]"

Lastly, Appellees have implemented a "temporary enforcement safe harbor" for non-profit entities that object to the Mandate on religious grounds, but do not qualify as "religious employers."[8] "The safe harbor is in effect until the first plan year that begins on or after August 1, 2013." 77 Fed. Reg. 16501, 16503 (March 21, 2012). During this time, Appellees will not penalize qualifying non-profit entities who do not comply with the Mandate. *Id*. at 16502-03.

Fed. Reg. at 8726-27. Appellees were warned that "if the definition of religious employer is not broadened, [employers] could cease to offer health coverage to their employees in order to avoid having to offer coverage to which they object on religious grounds." *Id*. at 8727. Yet Appellees chose not to expand this exemption beyond an extremely limited subset of non-profit entities. *Id*.; *see also* 78 Fed. Reg. at 8461(explaining, "The Departments believe that this proposal would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules.").

These predicted consequences have now come to fruition. To avoid offering coverage he finds morally and religiously objectionable, Lind has terminated his group health plan.

[8] HHS, Revised Guidance on the Temporary Enforcement Safe Harbor at 1 n.1, http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf (last visited March 4, 2013).

Neither the proposed rules nor the safe harbor make any accommodation for Lind or any other for-profit employer despite his objections to the Mandate on the very same religious grounds upon which Appellees have exempted other religious employers.[9]

Stuart Lind and Annex Medical

Annex Medical, Inc. is a Minnesota-based manufacturer of medical devices. (JA-8, ¶ 36.) Stuart Lind owns and operates Annex Medical as well as a separate entity, Sacred Heart Medical, Inc., which sells products developed by Annex Medical. (JA-8, 13, ¶¶ 35, 66, 69.) Annex Medical has been family-owned since 1991. (JA-54, ¶¶ 5-6.)[10]

Lind is a devout Catholic who is steadfastly committed to following the religious, ethical and moral teachings of the Catholic Church. (JA-9, ¶ 44.) As relevant here, Lind adheres to the Church's fundamental and universal teachings with respect to the sanctity of life and the immorality of contraception, sterilization and abortifacient drugs. Lind believes that "[h]uman life must be respected and protected absolutely from the moment of conception." Catechism of the Catholic

[9] Appellees have also exempted individuals of certain religions who object to the acceptance of insurance benefits. 26 U.S.C. §§ 5000A(d)(2)(a)(i); 1402(g)(1).

[10] At the time this action was filed, Annex Medical's shareholders consisted of Stuart Lind, who owned approximately 96.5% of the shares, and the estate of his recently deceased father, Dean Lind, which owned the remaining shares. (JA-54, ¶ 6.) Stuart has since purchased his father's estate's shares.

Church, ¶ 2270. And in accordance with Pope Paul VI's 1968 encyclical *Humanae Vitae*, Lind also believes that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation" is a grave sin. (JA-10, ¶ 48; JA-54, ¶ 6.) Consistently, the Catholic Church explicitly teaches that contraception, sterilization, abortion and use of abortifacient drugs are intrinsically evil and immoral because they are capable of preventing and destroying a human life. (JA-10, ¶ 49.) It is not just *use* of these things that is sinful, but also "cooperation" with them. *See, e.g.*, Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUD. 280, 282 (2000) (defining "cooperation," as used in moral theology, to mean "somehow contribute, in a subordinate way, to a morally unacceptable action plan designed and controlled by someone else….") (citations omitted). Thus, anyone who provides for or facilitates access to contraception is also guilty of a sin. (JA-10, ¶ 51; JA-54, ¶ 5.) For this reason, Catholic leaders have explained that Catholic employers cannot do precisely what the Mandate requires—pay for group health insurance that provides coverage for contraception, sterilization and abortifacient drugs—without violating Catholic religious teaching.[11] (*See, e.g.*, JA-10, ¶¶ 50-51.) Lind

[11] *See Cardinal Burke Says Catholic Employers Cannot Conscientiously Comply with HHS Regulation*, CNS News, http://cnsnews.com/video/national/cardinal-burke-says-catholic-employers-cannot-conscientiously-comply-hhs-regulation (video interview explaining that employers who comply with the mandate are formally cooperating with the sin of contraception); *see also* Pope John Paul II,

therefore sincerely believes it is immoral and sinful to intentionally participate in, pay for, facilitate access to, or otherwise support contraception, sterilization, abortifacient drugs, and related education and counseling through their inclusion in Annex Medical's group health plan, as is required by the Mandate. (JA-11, ¶ 54-55; JA-54, ¶ 7.)

The Catholic Church also teaches that all employers are to provide just wages and benefits to their employees, regardless of their religious affiliations or beliefs. (JA-55, ¶ 8 ("Catholic social teaching supports the principle that workers have a right to a just wage and certain social benefits intended to ensure the life and health of workers.").) This moral and religious obligation includes providing employees with health insurance. *See, e.g.*, Pope John Paul II, *Laborem Exercens*, § 19 (1981) ("The expenses involved in health care, especially in the case of accidents at work, demand that medical assistance should be easily available for workers, and that as far as possible it should be cheap or even free of charge."). As part of his commitment to fulfilling this moral and religious duty, Lind has, since 1998, provided a group health insurance plan for his employees and their families. (JA-12, ¶ 59.) Yet to avoid impermissible cooperation with the sin of

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Evagelium Vitae, § 74 (1995) ("Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law.").

contraception, Lind was forced to terminate his group health plan on January 31, 2013, after the lower court declined his request for injunctive relief.[12]

Lind does not believe his Catholic faith is a private matter. Rather, he strives, as he believes he must, to adhere to Catholic teachings in all aspects of his life, including his operation of his businesses.[13] (JA-9, 13, ¶¶ 45-46, 70.) Lind has adopted mission statements that commit his companies to "conducting business in a way that is pleasing to God and is faithful to Biblical principles and values." (JA-14, ¶ 71; JA-59, ¶ 12.) In 2001, Lind officially consecrated his businesses to the

[12] Since obtaining the injunction pending appeal from a motions panel of this Court, *Annex Med. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8th Cir. Minn. Feb. 1, 2013), Lind has endeavored to purchase a group health plan that excludes coverage for the products and services required by the Mandate but to no avail. Thus far, the injunction has not enabled him to purchase such a plan. Group plan providers are unwilling to exclude some or any of the mandated coverage from their plans or do not currently offer a plan that excludes these items and are unwilling to submit such a plan to the Minnesota Department of Commerce for approval as required by law. It is apparent that changes in law, including those made by the ACA and the Mandate, have all but eliminated the market for the type of group plan desired by Lind. If true, the adequacy of judicially crafted as-applied exemptions is called into question and additional briefing may be necessary to establish whether an injunction against the whole Mandate is necessary to provide effective relief to Lind and others similarly situated.

[13] In an address given to Catholic Bishops during his visit to the United States in 2008, Pope Benedict XVI remarked, "Is it consistent to profess our beliefs in church on Sunday, and then during the week to promote business practices or medical procedures contrary to those beliefs?... Any tendency to treat religion as a private matter must be resisted. Only when their faith permeates every aspect of their lives do Christians become truly open to the transforming power of the Gospel." Catholic League, *The Words of the Holy Father* (May 2008), *available at* http://www.catholicleague.org/the-words-of-the-holy-father/.

Sacred Heart of Jesus, a public profession of Lind's faith and a formal commitment to operate his businesses in accordance with the teaching of Jesus Christ. (JA-14, ¶ 72; JA-59, ¶ 13.)

Consistent with his commitment, Lind's operation of his companies reflects his sincere religious beliefs. (JA-60, ¶ 14.) When Lind's businesses engage in or cooperate with activity that violates Catholic teaching, Lind believes it is a violation of his own religious beliefs. (JA-60, ¶ 15.) Consequently, when Lind's businesses have engaged in or cooperated with activities that violate Catholic teaching on the sanctity of life, he has attempted, where possible, to cause them to cease such activity or cooperation with the same. (JA-60, ¶ 16.) For example, in 1998, Lind made the difficult and costly decision to discontinue Annex Medical's line of heart biopsy forceps after learning they were being used on transplanted hearts that most likely were removed from donors prematurely, causing the death of the donor. (JA-60, ¶ 17.) Lind discontinued this promising product line so as to not be complicit with this morally unacceptable act. (*Id.*) Then, in 2001, Lind ended his seven-year relationship with American Express, which he was using to facilitate his employee retirement plans, upon learning that American Express contributes money to Planned Parenthood, a provider of abortion and abortion services. (JA-15, ¶ 76; JA-68–70.)

Lind has also taken proactive steps to ensure that his businesses do not cooperate with sinful and immoral activates, including contraception, sterilization and abortion. (JA-61, ¶ 19.) For example, distributors and sales representatives that contract to purchase his products must represent that they will "at no time distribute or represent products that are labeled with indications for contraception, sterilization, abortion, pregnancy termination, or in vitro fertilization." (JA-15, VC ¶ 74; JA-72.)

The national controversy surrounding the Mandate caused Lind to verify whether Annex Medical's group health plan conformed to Catholic religious teaching. (JA-16, ¶¶ 82-83; JA-61, ¶ 20.) During the examination of Annex Medical's insurance policy, Lind discovered that his group plan provided coverage for abortions, abortifacient drugs, sterilization and contraception. (JA-16, ¶ 83.) Coverage for these products and services was not included knowingly as to do so would violate Lind's sincerely-held religious beliefs. (JA-16, ¶ 84.)

Lind took numerous steps to exclude the objectionable coverage (JA-13, 17, ¶¶ 65, 85, 87-88); however, because the Mandate requires all insurance issuers to include Mandate-compliant coverage in all group health plans purchased after August 1, 2012, *see* 42 U.S.C. § 300gg-13; 77 Fed. Reg. at 8725-26, Lind is stripped of any choice to select a new group health plan that provides coverage that

conforms to his Catholic faith. Lind cannot provide a group health plan without violating his religious beliefs. (JA-17, ¶ 89.)

For these reasons, Lind filed the instant action, alleging that "[t]he Mandate illegally and unconstitutionally forces [him] and Annex Medical to violate their religious beliefs with respect to contraception, sterilization and abortifacient drugs in order to exercise their religiously-held duty to provide for the physical health of their employees." (JA-20, ¶ 101.)

Denied relief by the lower court, Lind was forced to terminate his group health plan on January 31, 2013.[14] In so doing, he is now in neglect of his religious duty to provide for the physical needs of Annex Medical's employees. (JA-12, 18, ¶¶ 58-59, 91; JA-58, ¶ 10.) The Mandate forces Lind to neglect this duty and prevents him from freely engaging in this religious exercise because to do so would require cooperation with the sins of contraception, sterilization and abortifacient drugs.

Forced to terminate his insurance coverage, Lind must now suffer additional burdens. Annex Medical will face significant competitive disadvantages in the marketplace, in that it will not be able to offer current and prospective employees the important benefit of health insurance, whereas other employers will be able to

[14] Lind's decision to terminate his group health plan came after several consultations with his pastor, who advised him that he must do so to avoid violating his Christian conscience which is formed by Catholic religious teaching. (JA-18, ¶¶ 91-93; JA-63, ¶¶ 31-32; JA-54, ¶ 4.)

do so without violating their consciences. (JA-19, ¶ 96.) Lind is concerned this may make it more difficult to attract and retain employees who possess the necessary dexterity to produce the delicate wire assemblies in Annex Medical's products. (JA-64, ¶ 35.) Annex Medical must also forfeit a tax credit available to small businesses that offer group health insurance plans. 26 U.S.C. § 45R.

Lind simply wishes to operate Annex Medical in accordance with Catholic religious teaching, and would do so, but for the Mandate.

Challenges to the Mandate

This case is one of *forty eight* challenges to the Mandate nationwide,[15] eighteen of which involve for-profit businesses and their owners. To date, twelve of these businesses have been granted injunctive relief (either preliminary injunctions or injunctions pending appeal) against enforcement of the Mandate, while five have been denied such relief. One challenge has been filed, but has not received a decision. *Hall v. Sebelius*, No. 13-cv-00295 (D. Minn. filed Feb. 5, 2013).

Cases Granting Injunctions

- *Annex Medical, Inc. v. Sebelius*, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013)
- *O'Brien v. United States HHS*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012)

[15] *See* Becket Fund for Religious Liberty, HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/ (last visited March 4, 2013).

- *Grote v. Sebelius*, 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013)
- *Korte v. Sebelius*, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012)
- *Newland v. Sebelius*, 881 F.Supp.2d 1287 (D. Colo. 2012)
- *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012)
- *Tyndale House Publrs., Inc. v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012)
- *Am. Pulverizer Co. v. United States HHS*, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012)
- *Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857 (E.D. Mich. Dec. 30, 2012)
- *Sharpe Holdings v. United States HHS*, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012)
- *Triune Health Group, Inc. v. United States HHS*, No. 12-cv-6756 (N.D. Ill. Jan. 3, 2013) (order granting preliminary injunction (Dkt. 49))
- *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-cv-00036 (W.D. Mo. Feb. 28, 2013) (order granting preliminary injunction and staying proceedings (Dkt. 9))

Cases Denying Injunctions

- *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers)
- *Autocam Corp. v. Sebelius*, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012)
- *Conestoga Wood Specialities Corp. v. Sec'y of the United States HHS*, 2013 U.S. App. LEXIS 2706 (3d Cir. Feb. 7, 2013)
- *Briscoe v. Sebelius*, 2013 U.S. Dist. LEXIS 26911 (D. Colo. Feb. 27, 2013)
- *Gilardi v. Sebelius*, 2013 U.S. Dist. LEXIS 28719 (D.D.C. March 4, 2013)

Summary of the Argument

Lind appeals the denial of his motion for preliminary injunction. The district court reached an erroneous legal conclusion when it determined that the Mandate does not impose substantial burdens on Lind's exercises of religion under RFRA. The court's error stemmed primarily from its failure to credit the true nature of the Catholic religious beliefs at issue in this case. In the Verified Complaint, Lind

alleged that his Catholic beliefs prohibit compliance with the Mandate. (JA-11, ¶ 55.) The lower court was required to accept Lind's own interpretation of his religious beliefs unless they are "so bizarre [and] so clearly nonreligious in motivation" as to not warrant protection. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981). Neither the court nor Appellees questioned the sincerity of Lind's beliefs. Yet rather than accept Lind's beliefs as represented, the court's decision impermissibly "turn[ed] upon a judicial perception of the particular belief or practice in question[.]" *Id*. at 714. Had the court accepted Lind's interpretation of his own faith, it would have found the Mandate unquestionably imposes substantial burdens on his religious exercise.

Appellees cannot justify these burdens under RFRA's strict scrutiny. The evidence upon which the Mandate is based is insufficient to demonstrate an "actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2738 (2011). And Appellees cannot plausibly claim the Mandate is necessary to advance an interest of "the highest order," *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) when they have voluntarily exempted group plans covering *millions* from the requirement to offer cost-free insurance coverage for contraceptive services. But even assuming Appellees' interests are compelling, this Court should reject any claim that the Mandate is the *least* restrictive means of achieving those interests. 42 U.S.C. § 2000bb-1(b)(1). The availability of viable alternatives, some of which

the government currently uses on a massive scale, completely undermine any claim that the government must force Lind to violate his beliefs to ensure women have access to contraceptive services.

This Court should reverse the district court and hold that the Mandate violates RFRA as applied to Lind.

Argument

I. Introduction

For over two decades, Stuart Lind has operated Annex Medical "in a way that is pleasing to God and is faithful to Biblical principles and values." (JA-14 ¶ 71; JA-59, ¶ 12.) But according to Appellees, he had no *right* to do this. This is not because the government seeks to promote a public interest of the highest order to which his free-exercise rights must necessarily give way. No. According to Appellees, this is because Lind has forfeited his right to the free exercise of religion simply by operating a for-profit corporation in this country.

Appellees position is unfounded. As Judge John T. Noonan of the Ninth Circuit Court of Appeals has observed,

> The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free. A statute cannot subtract from their freedom.

EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting). Indeed, religious freedom is not something to be doled out by our political leaders, but inherently belongs to all, whether they express such freedom in their homes, houses of worship or through the corporations they run.

But Appellees wish to have it otherwise. Via statutory mandate, Appellees have compelled, under penalty of law, Lind and countless other religiously-motivated business owners to operate their businesses in violation of their sincerely-held religious beliefs. This directive is more than a "*de minimis*" inconvenience; the mandate imposed upon Lind substantially burdens beliefs and practices that are central to Catholic religious doctrine. Burdens of such magnitude cannot stand absent *compelling* justification, which the government has not and cannot provide. Therefore, this Court should reverse the lower court's ruling.

II. Standard of Review

The lower court's denial of a preliminary injunction is reviewed for an abuse of discretion, "which occurs when the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012) (citations and quotations omitted). Legal conclusions are reviewed de novo. *Id*.

This Court applies the same preliminary injunction test applied by the lower court, *see id.*, which "depends upon a 'flexible' consideration of (1) the threat of

irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest[,]" *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) ("*MCCL*") (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1991) (en banc)).

"[T]he burdens at the preliminary injunction stage track the burdens at trial." *O Centro*, 546 U.S. at 429. So under strict scrutiny, the *government*, even at the preliminary-injunction stage, must prove that the Mandate is the least restrictive means to further a compelling interest. *See id*. at 428-29.

III. The District Court Erred by Not Preliminarily Enjoining the Mandate.

The district court reached an erroneous legal conclusion in finding that the Mandate does not substantially burden Lind's free exercise of religion under RFRA. (JA-100; Addm-13.) The court's legal error caused it to abuse its discretion in denying Lind the preliminary injunctive relief sought. The court's decision rests on a misunderstanding of the Catholic beliefs at issue. Catholic teaching forbids not only the *use* of contraceptives, but also *supporting*, *subsidizing or providing access to them*. Catholic teaching also requires that employers provide their employees with just wages and benefits, including health care. The Mandate

prevents adherence to both religious commands for Lind must subsidize contraceptives if he provides group health insurance.

The Mandate not only "affirmatively compels" Lind to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Thomas*, 450 U.S. 707, but "put[s] substantial pressure on [Lind] to modify his behavior and to violate his beliefs," *id*. at 717-18. Simply put, the Mandate provides "'no consistent and dependable way'" to observe Catholic religious practices. *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (quoting *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000)). Properly understood, these consequences amount to substantial burdens on Lind's religious exercise.

RFRA requires the government to justify substantial burdens with a compelling interest and demonstrate that the Mandate is the least restrictive means to advance that interest. Appellees cannot satisfy this strict scrutiny test.

A. Lind Is Likely to Succeed on His Claim That the Mandate Violates RFRA.

Congress passed RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb-(b)(1). RFRA strictly prohibits the federal government from "substantially burden[ing] a person's exercise of religion

even if the burden results from a rule of general applicability."[16] *Id*. § 2000bb-1(a). RFRA recognizes only one exception, which "requires the Government to satisfy the compelling interest test—'to demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *O Centro*, 546 U.S. at 424 (quoting 42 U.S.C § 2000bb-1(b)). The government may not use a "categorical approach"; rather, RFRA requires the government to satisfy the compelling interest test "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.

RFRA "applies to all Federal law, and the implementation of that law, statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a). Statutory law is subject to RFRA "unless such law

[16] Because "person" is undefined by RFRA, it is interpreted in accordance with 1 U.S.C. § 1, which provides, "the words 'person' and 'whoever' include corporations…as well as individuals[.]" Annex Medical and Lind may therefore each assert claims under RFRA.

Annex may also assert free-exercise rights as a "pass-through instrumentality" of its owners. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (adjudicating free-exercise claim of closely-held, for-profit pharmacy corporation); *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (for-profit corporation could assert free exercise rights of owners); *see also, e.g.*, *Legatus*, 2012 U.S. Dist. LEXIS 156144 at *11 (permitting for-profit corporation to challenge Mandate as "pass-through instrumentality" of it owners).

explicitly excludes such application…." *Id*. § 2000bb-3(b). The ACA did not exclude the Mandate from RFRA.

1. Lind's Offering and Operation of His Group Health Insurance Plan in Accordance with Catholic Teaching Are Exercises of Religion under RFRA.

The first step in the RFRA analysis is properly identifying the religious exercise at issue. 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." *See* 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" in 42 U.S.C. § 2000bb-2(4)); *See also United States v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1418 (8th Cir. 1996) (explaining that RFRA protects "religiously motivated as well as religiously compelled conduct"). RFRA's "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Ali*, 682 F.3d at 710 (citations and quotations omitted). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. To merit protection, beliefs need not be purely religious, but "can be both secular and religious." *Love*, 216 F.3d at 689.

Further, "exercise of religion" is not constrained to "belief and profession" but includes the "performance of (or abstention from) physical acts." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990). Indeed, the very cases forming the

basis for RFRA involved litigants whose religious beliefs required them to refrain from engaging in certain conduct. *Verner*, 374 U.S. 398 (work on Saturdays); *Yoder*, 406 U.S. 205 (enrollment of children in public school beyond the eighth grade).

Judicial inquiry into a plaintiff's religious exercise or belief is extremely limited. "It is not within the judicial function and judicial competence to inquire" whether an adherent correctly understands his religious doctrine as "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. In other words, the "determination of what is a 'religious' belief or practice…is not to turn upon a judicial perception of the particular belief or practice in question[.]" *Id*. at 714. The court's task is to "simply evaluat[e] whether [a] practice [is] rooted in [the plaintiff's] sincerely held religious beliefs." *Ali*, 682 F.3d at 710-11. Only where a practice or belief is "so bizarre [and] so clearly nonreligious in motivation" should a court find a claimed religious exercise is not entitled to protection. *Thomas*, 450 U.S. at 715.

Neither the district court nor Appellees have questioned the sincerity of Lind's religious practices.[17] (JA-136, lines 19-20 ("[D]efendants are not saying that

[17] In fact, Appellees have conceded that employers are engaged in an "exercise of religion" when they abstain from providing coverage for contraception, sterilization, and abortifacient drugs. *See* 76 Fed. Reg. at 46623 (explaining that "it is appropriate that HRSA…takes into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in

Mr. Lind's beliefs are bizarre in any way.").) Lind's provision of health insurance is an exercise of his sincere belief in Catholic teaching that requires all employers to provide just wages and benefits to their employees. *See* Pope John Paul II, *Laborem Exercens*, § 19 (1981); (*see also* JA-55, ¶ 8.) Likewise, Lind's desire and efforts (JA-17, ¶¶ 85-88), to exclude coverage for contraception, sterilization, abortifacient drugs and related education and counseling from his group health plan are exercises of his sincere belief in universal Catholic teaching that forbids any cooperation with such products and services. *See* Pope Paul VI, *Humanae Vitae*, § 14 (1968). The religious exercises at issue are thus unquestionably "rooted in [Lind's] sincerely held religious beliefs." *Ali*, 682 F.3d at 710-11.

Despite Lind's clear assertions, the lower court failed to properly acknowledge the religious exercises as pleaded. (JA-97–98; Addm-10–11.) What is at issue is Lind's sincere religious objection to being forced to pay for contraceptives, sterilization, abortifacient drugs through their inclusion in his group health insurance plan, not the *use* of these products and services by Lind, or anyone else. Yet that is precisely how the lower court interpreted Lind's claims: "Plaintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives." (JA-97; Addm-10.) But such

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the group health plans in which employees in certain religious positions participate.").

statements are irrelevant to the task at hand.[18] The court must evaluate Lind's beliefs as pleaded; it may not rest its decision on "judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714.

The court's failure to properly credit Lind's beliefs was not harmless; rather, it caused the court to erroneously conclude that the Mandate does not substantially burden Lind's exercise of religion.

2. The Mandate Substantially Burdens Lind's Religious Exercises Under RFRA.

RFRA does not define "substantial burden." However, the Eighth Circuit explains, that "in a RFRA analysis, a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both 'sincerely held' by and 'rooted in [the] religious belief[s]' of the party asserting the claim or defense. *Ali*, 682 F.3d at 709 (quoting *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007). To evaluate the substantiality of burdens on religious exercise, courts frequently look to free exercise cases predating *Employment Division v. Smith*. *See*

[18] The court further misunderstands Catholic religious teaching when it suggests that Lind could comply with the Mandate while "discouraging employees from using contraceptives." (JA-97, Addm-10.) As a Catholic, Lind is forbidden from "misrepresenting the truth in [his] relations with others." Catechism of the Catholic Church, ¶ 2464. "Truth or truthfulness is the virtue which consists in showing oneself true in deeds and truthful in words, and in guarding against duplicity, dissimulation, and hypocrisy." *Id*. at 2468. To use the familiar adage, Lind must "practice what he preaches." It would be morally unacceptable to condemn contraception with his words, but support it through its provision in his insurance plan.

e.g., *Goodall by Goodall v. Stafford Cnty. School Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("we may look to pre-RFRA cases in order to assess burden on the plaintiffs for their RFRA claim").

The Supreme Court cases that form the basis for RFRA illustrate what constitutes a substantial burden on religious exercise. *See Children's Healthcare Is a Legal Duty, Inc. v. De Parle*, 212 F.3d 1084, 1094 (8th Cir. 2000) ("[T]he burden in *Sherbert* [*v. Verner*] was sufficient to require religious accommodation."). In *Verner*, the appellant was denied unemployment benefits due to her refusal to work on Saturday, the Sabbath Day of her faith. 374 U.S. at 399-401. The Court found this placed an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. Even though the government did not "directly compel" the appellant to work on Saturday in violation of her faith, the Court found the "pressure" on her to do so was "unmistakable." *Id*.

In *Yoder*, Amish parents whose religious beliefs required that they educate their children at home after the eighth grade were fined at least five dollars each for violating Wisconsin's compulsory school-attendance law. 406 U.S. at 208. The Court affirmed the lower court's decision to strike the law, finding that it created a

"severe" and "inescapable" impact on the practice of the Amish religion because it "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id*. at 218.

Also instructive is *Thomas*, 450 U.S. 707. There, a Jehovah's Witness was denied unemployment benefits because he quit his job that required him to produce armaments in violation of his religious beliefs against working on the production of weapons. *Id*. at 710-11. Though the compulsion was "indirect," the infringement on Thomas's free exercise was nonetheless "substantial." *Id*. at 718. The Court held that where a rule "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id*. at 717-18.

Lind's duty to offer health insurance and duty to exclude coverage for contraceptive services are both "sincerely held" and "rooted in [his] religious beliefs." *Ali*, 682 F.3d at 709. Neither Appellees nor the lower court contested these sincere convictions. Therefore, the substantial burden analysis should have been simple. As in *Yoder*, the Mandate "affirmatively compels" Lind to "perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," 406 U.S. at 218—by requiring him to pay for and facilitate access to contraception, sterilization, and abortifacient drugs through their inclusion in his group health plan. The consequences for offering a non-compliant group health plan are substantial—(1) a $100 per day, per employee, 26 U.S.C. § 4980D, dwarfing the

five dollar fine seen as creating a "severe" and "inescapable" impact on practice of the Amish religion, *Yoder*, 406 U.S. at 218; and (2) civil enforcement actions, 29 U.S.C. § 1132(a).

Declining to provide his employees with health insurance is not a morally acceptable alternative for Lind because Catholic teaching compels him to provide such a benefit as part of a just wage. (JA-55, ¶ 8.) Yet the requirement that any group health plan he offers include coverage for contraception, sterilization, and abortifacient drugs, 42 U.S.C. § 300gg-13(a)(4), has forced to him to terminate his insurance policy. In other words, the Mandate has "put[] substantial pressure on [Lind] to modify his behavior and to violate his beliefs[.]"*Thomas*, 450 at 717-18.

As in *Verner*, the Mandate puts Lind to a choice. But unlike *Verner*, Lind must choose between two exercises of religion—fulfill his obligation to provide employee health care and violate his beliefs with respect to contraception or abstain from cooperation with contraception and violate his obligation to provide employee health care. Not only does this choice force Lind to "modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 718, i.e., impose a substantial burden, it provides Lind "'no consistent and dependable way' to observe a religious practice." *Ali*, 682 F.3d at 710 (quoting *Love*, 216 F.3d at 689). It "is really no choice at all." *Love*, 216 F.3d at 689.

Lind's inability to offer health insurance forces him to bear additional burdens. Annex Medical will be exposed to significant competitive disadvantages in the marketplace in that it will be unable to offer current and prospective employees an important part of the Annex Medical's benefits package.[19] Lind believes this may make it more difficult to attract and retain employees who possess the necessary dexterity to produce the delicate wire assemblies in Annex Medical's products. (JA-64, ¶ 35.) Annex Medical must also forfeit a tax credit available to small businesses that offer group health insurance plans. 26 U.S.C. § 45R. [20] Thus the consequences of terminating Annex Medical's group health plan likewise put "substantial pressure," *Thomas*, 450 U.S. at 718, on Lind to purchase insurance and provide contraception, sterilization and abortifacient drugs—in other words, to "modify his behavior and to violate his beliefs," *id*.[21]

[19] That Lind may also derive economic benefits from offering health insurance does not diminish its religious significance. "'[A] belief can be both secular and religious. The categories are not mutually exclusive. The first amendment presumably protects the area where the two overlap.'" *Love*, 216 F.3d at 689 (quoting *Wiggins v. Sargent*, 753 F.2d 663, 666-667 (8th Cir. 1985)).

[20] These burdens are far more substantial than those the Supreme Court has previously struck. In *Verner*, the appellant's religious observance of her Sabbath rendered her merely ineligible for unemployment benefits, yet the Court found her ineligibility placed "unmistakable" pressure on her to forego that observance. *Id*. at 404.

[21] The availability of so-called "exit options" does not alter the "substantial burden" analysis. Of course, the *Yoders* could have moved their family to a state where they would not have not faced penalties for removing their children from

The district court did not consider these consequences; nor did the court engage in any substantial burden analysis with respect to Lind's religious obligation to provide health insurance. Failure to consider the full breadth of the burdens facing Lind constitutes an abuse of discretion for it prevented the court from properly weighing Appellants' likelihood of success on the RFRA claim. *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 362 (8th Cir. 2007) (quotations and citations omitted) ("An abuse of discretion occurs…when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.").

Those burdens the court did consider were held "de minimis, not substantial," under RFRA. (JA-100; Addm-14.) This conclusion is erroneous in several respects. Primarily, it ignores the nature of Lind's religious beliefs. As the Seventh Circuit has prudently recognized, "[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Korte*, 2012 U.S. App. LEXIS 26734 at *10 (emphasis in original). Therefore, it is irrelevant to the substantial burden analysis that Lind may "remain free to exercise [his] religion" in

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public schools. This "option" did not alter the Court's opinion that the $5 fine created substantial infringement with the *Yoder*'s free exercise of religion.

other ways—"by not using contraceptives and by discouraging employees from using contraceptives." (JA-97; Addm-10.) For the same reason, "[t]he burden of which [Lind] complain[s]" is not mitigated by the fact that "someone else[]" is *using* the contraceptive services. (JA-98; Addm-11.) As a matter of Catholic moral theology, one who knowingly assists in a forbidden action, such as contraceptive use, is also guilty of a sin. There is no "moral attenuation" with Catholic religious beliefs regarding the Mandate. As Catholic leaders have explained, it is a violation of Catholic religious teaching for employers to do exactly what the Mandate requires. *See supra* note 11.

Of course, the Mandate does not force anyone to *use* contraception, but it clearly forces Lind to directly subsidize it in violation of his religious beliefs. Appellees even acknowledge that this scheme burdens religious exercise to an extent that requires certain employers and non-profit entities be exempted. *See supra* at 6-9. Indeed, if Lind were instead running a *non-profit* corporation, the burdens imposed by the Mandate would likely entitle him to at least a temporary exemption by Appellees' own standards. Yet those *same beliefs* when professed by Lind as the owner of Annex Medical, are not, in the court's opinion, burdened any more than a de minimis amount.

Fundamentally, the court is in no position to make such a theological judgment. *Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect

religious beliefs…."). It may not determine for itself which sincerely-held beliefs it will acknowledge or weigh the importance of those beliefs; rather, it must accept beliefs as they are represented. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, [the Supreme Court 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.").

For these reasons, when a plaintiff claims his sincerely-held religious belief is substantially burdened, the Supreme Court has rejected attempts to question the legitimacy of that claim. For example, in *Thomas*, the lower court had rejected Thomas's claims, finding that his willingness to produce "the raw [steel] product necessary for any kind of tank" to be inconsistent with his religious objection to producing the actual "turrets for military tanks" *Id*. at 715. The Supreme Court rejected this attempt to "dissect" Thomas's belief and accepted them as represented: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id*.

Similarly, in *United States v. Lee*, 455 U.S. 252 (1982), an Amish business owner challenged the requirement that he withhold social security taxes, on the grounds that it impermissibly interfered with the Amish "religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system." *Id*. at 257. Specifically, the Amish employer alleged

that the Amish religion prohibited the acceptance of social security benefits and barred all contributions by Amish to the social security system. *Id*. at 255. The government contended that the "payment of social security taxes will not threaten the integrity of the Amish religious belief or observance." *Id*. at 257. Citing *Thomas*, the Court again rejected this argument, explaining, "It is not within 'the judicial function and judicial competence,'…to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[courts] are not arbiters of scriptural interpretation.'" *Id*. (quoting *Thomas*, 450 U.S. at 716.) The Court "therefore accept[ed]" Lee's beliefs as pleaded and held, "Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights."[22] *Id*.

Accordingly, several courts have assumed that the Mandate substantially burdens practices that are central to Catholicism. *See Monaghan*, 2012 U.S. Dist. LEXIS at *10-11 ("[T]he Court will assume that abiding by the mandate would substantially burden Monaghan's adherence to the Catholic Church's teachings."); *Legatus*, 2012 U.S. Dist. LEXIS 156144 at *21 ([T]he court assumes that the

[22] This circuit has likewise refrained from questioning the legitimacy of a plaintiff's claim that a particular regulation substantially burdens his or her free exercise of religion. *See Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) ("For purposes of our analysis, we assume that the regulations and policies at issue in the present case substantially burden Hamilton's exercise of his religion.").

[plaintiffs] are likely to show at trial that the HRSA Mandate substantially burdens the observance of the tenets of Catholicism.").

Lind has alleged that the Mandate both compels conduct forbidden by his religion and prevents conduct compelled by his religion. Had the lower court accepted Lind's interpretation of his own faith, as it must under *Lee* and *Thomas*, it would have found that the Mandate imposes a substantial burden on Lind's religious exercise.

3. The Mandate Fails Strict Scrutiny.

Because the Mandate imposes "substantial burdens" on Lind's religious exercise under RFRA, it must satisfy strict scrutiny.[23] Appellees must demonstrate that the Mandate "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b)(1)-(2). The government must satisfy strict scrutiny "through application of the challenged law to…the particular claimant

[23] Having concluded that the Mandate is not substantially burdensome, the district court did not subject it to RFRA's compelling interest test. (*See* JA-100; Addm-13.) Yet because the district court's erroneous conclusion as to whether Appellees have "satisf[ied] the statutorily imposed test under RFRA is a question of law which is subject to de novo review[,]" *Hamilton*, 74 F.3d at 1552, this Court may subject the Mandate to strict scrutiny even in the absence of any analysis by the district court, *see Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1186 (8th Cir. 2000) ("Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.") (citations and quotations omitted).

whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31. In other words, this Court must look beyond the government's "broadly formulated interests justifying the general applicability of [the Mandate] and scrutinize[] the asserted harm of granting specific exemptions to [Lind]." *Id*. at 431.

Strict scrutiny "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). When properly analyzed, it is clear the Mandate fails to satisfy it.

i. The Mandate Is Not Justified by Compelling Interests.

Compelling interests are "only those interests of the highest order and those not otherwise served." *Yoder*, 406 U.S. at 216. Only interests of such magnitude "can overbalance legitimate claims to the free exercise of religion." *Id*. "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of religious exercise." *Verner*, 374 U.S. at 406.

Appellees' burden under strict scrutiny begins with "specifically identify[ing] an 'actual problem' in need of solving." *Brown*, 131 S.Ct. at 2738. The evidence needed to "demonstrate"[24] this "actual problem" cannot be "ambiguous," but must "prove" that the thing Appellees are seeking to regulate is the "*cause*" of the harm they are seeking to prevent. *Id*. at 2379 (emphasis in

[24] RFRA defines "demonstrate" to mean "meets the burden going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3).

original). Evidence "based on correlation" between lack of regulation and harm is insufficient. *Id*. Appellees may not simply "make a predictive judgment that such a link exists, based on competing…studies." *Id*. at 2738. Appellees' evidence falls well short of this demanding standard.

But even if the evidence sufficed, Appellees' conscious choice to exempt group health plans covering millions of women from compliance with the Mandate completely undermines any compelling interest Appellees may have in forcing Lind to violate his religious beliefs. *See O Centro*, 546 U.S. at 429. Appellees' alleged interests are simply not compelling when they have "fail[ed] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort" that it is seeking to prevent. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) ("*Lukumi*").

a. The Research Upon Which the Mandate Is Based Fails to Show Compelling Interests.

The document providing nearly the sole basis for the Mandate is a report issued by the Institute of Medicine ("IOM") entitled *Clinical Preventive Services for Women: Closing the Gaps*[25] (the "Report"). The Report was commissioned by HHS, which charged IOM with "review[ing] what…should be considered in the development of comprehensive guidelines for preventive services for women." *Id*. at 2. HHS "use[d] information and recommendations from the [Report] to guide

[25] *Clinical Preventive Services for Women: Closing the Gaps*, *supra* note 4.

policy and program development related to provisions in the Affordable Care Act addressing preventive services for women." *Id*. In fact, the HRSA Guidelines, which require all group health plans to cover ''[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling[,]" were "based on recommendations of the independent [IOM.]" 77 Fed. Reg. at 8725-26.

Appellees have advanced two general justifications for the Mandate—"promoting the public health and promoting gender equality." (JA-142, lines 24-25.) According to the Report, however, the Mandate's goals are much narrower. The Report claims that employers must provide cost-free contraception, sterilization and abortifacient drugs to their employees because such cost-free provision will prevent "unintended pregnancies," which Appellees claim are the cause of certain negative health consequences for both women and children. Due to a variety of flaws, the Report, and therefore Appellees, fails to "*prove*" that lack of access to contraception is the "cause" of these harms. *Brown*, 131 S.Ct. at 2739.

First, the Mandate aims to increase *access* to contraception by making it available in group health plans at no cost.[26] Yet the Report's claims are not based

[26] *See* Press Release, Kathleen Sebelius, Sec'y U.S. Dep't of HHS. (Jan 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html. ("Today the department is announcing that the final rule on preventive health services will ensure that women with health insurance coverage will have *access* to

on mere *access*, but on *use*. *See* Report at 105 ("[E]vidence exists that greater use of contraception within the population produces lower unintended pregnancy and abortion rates nationally."). Accordingly, Appellees' evidence fails to prove a causal connection between increased access to contraceptives and fewer unintended pregnancies.

With respect to the causal link between use of contraception and lower unintended pregnancy rates, the Report relies on two studies.[27] These studies are cited as evidence that "*use* of contraception within the population *produces* lower unintended pregnancy and abortion rates nationally." Report at 105 (emphasis added). Yet the Report acknowledges that the study by Santelli and Melnikas (hereinafter, "the Santelli study") merely demonstrates that changes in unintended pregnancy rates among adolescents and teens are "*associated*" with (as opposed to caused by) changes in contraceptive usage rates. *Id*. The Report also fails to acknowledge other portions of the Santelli study suggesting that numerous other factors may contribute to changes in unintended pregnancy rates, including contraception use itself. *See* Santelli study at 375 ("Earlier initiation of sexual

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the full range of the Institute of Medicine's recommended preventive services, including all FDA-approved forms of contraception." (emphasis added)).

[27] Santelli & Melnikas, *Teen Fertility in Transition: Recent and Historic Trends in the United States*, 31 Ann. Rev. Pub. Health 371 (2010), *available at* http://nclc203seminarf.pbworks.com/f/Santelli,%20Melnikas%202010.pdf; Boonstra & Gold, The Guttmacher Institute, *Abortion in Women's Lives* (2006) *available at* http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf.

intercourse followed closely the introduction of modern contraception in 1960.") Other factors include abstinence, *id*. at 376, and "changes in population composition…, economic change, changes in family dynamics or structure, changes in social mores, and new influences such as the pandemic of HIV/AIDS or media influences such as access to the Internet," *id*. at 377. As the study indicates, these factors are "difficult to track and to link definitively to changes in sexual behavior or fertility." *Id*. The study makes no mention of whether it attempted to control for these factors.

Perhaps most damaging is the authors' concession that they "do not attempt to resolve this debate" concerning the "causes and consequences of teen pregnancy." *Id*. at 373. Yet the Report uses their study precisely as if it did.

Likewise, the study by Boonstra and Gold (hereinafter, the "Boonstra study") fails to show the required causal link between contraceptive use and unintended pregnancy, explaining only that an increase in the number of "unmarried women at risk of unintended pregnancy who were using contraceptives" was "*accompanied by* a decline in unmarried women's unintended pregnancy rate…over the same period." Boonstra study at 18 (emphasis added). Whatever relationship this may show is weakened by different data also produced by the Guttmacher Institute. According to that data, the unintended pregnancy rate

was 54.2 per 1000 in 1981and declined to 44.7 per 1000 by 1994.[28] Yet by 2001, the rate had increased to 51 per 1000.[29] This period nearly overlaps with the period covered by the Boonstra study, during which the author estimates that contraceptive use *increased* from 80% to 86% among unmarried women. Boonstra study at 18. This increase in unintended pregnancy rate also occurred during a period, as the Report acknowledges, 28 states[30] passed laws requiring private insurers to cover contraceptives. Report at 108.

Lastly, the Santelli study and the Boonstra study focused on narrow subsets of the population across limited time spans. Report at 105 (studying, respectively, teens and adolescents from early 1990s to early 2000s and unmarried women from 1982 to 2002). Even assuming these studies demonstrate a sufficient causal link between contraceptive use and lower unintended pregnancy rates within the populations studied, they have not proven that this remains true across the much wider population covered by the Mandate, or more importantly, among those women covered by Lind's group health plan.

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[28] Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 Fam. Plan. Persps. 24 (1998) *available at* http://www.guttmacher.org/pubs/journals/3002498.pdf.

[29] Finer & Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 Persps. on Sex Reprod. Health 90 (2006), *available at* http://www.guttmacher.org/pubs/journals/3809006.pdf.

[30] *See* National Conference of State Legislatures, Insurance Coverage for Contraception Laws (Updated February 2012), http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx.

A more significant shortcoming of these studies is that they attempt to measure the effects of contraception *use*, rather than *access*, which is all the Mandate aims to accomplish. *See supra* note 26.Thus, Appellees cannot show a compelling interest in forcing employers to provide cost-free access to contraception unless they also demonstrate that cost-free access to contraceptive services increases effective usage.

The Report not only fails to demonstrate this link, it tends to show the opposite is true. As the Report acknowledges, the rates of unintended pregnancies are highest among young, unmarried women who "have a low income, who are not high school graduates, and who are members of a racial or ethnic minority group." Report at 102. In other words, the rate is highest among women *not affected by the Mandate*. The Report also acknowledges that these same women have the widest access to cost-free or nearly cost-free contraception: "Contraceptive coverage has become standard practice for most private insurance and federally funded insurance programs." *Id*. at 108. Such cost-free access is not new, but has been available for decades. "Since 1972, Medicaid, the state-federal program for certain low-income individuals, has required coverage for family planning in all state programs and has exempted family planning services and supplies from cost-sharing requirements." *Id*. Such access is even greater in over half of the states: "26 states currently operate special Medicaid-funded family planning programs for

low-income women who either no longer qualify for Medicaid or do not meet the program's categorical requirements." *Id*. Secretary Sebelius has also explained that contraceptive services are available at "community health centers, public clinics, and hospitals with income based support."[31] Thus, even the tenuous "association" the Report claims to demonstrate is of questionable reliability when those already receiving the bulk of free contraception account for the highest rates of pregnancy.

Among those most affected by the Mandate—employed women (and their daughters)—the Report indicates that access is not lacking. Report at 109 (85% of large employers and 62% of small employers already offer coverage of FDA-approved contraceptives). And other studies show that overall usage is high. In fact, the Guttmacher Institute estimates, "Among women who are at risk of unintended pregnancy, 89% are currently using contraceptives."[32]

Appellees cannot show that mandating cost-free coverage for contraceptive services in group health plans will eliminate this 11% disparity, even assuming that this group is comprised of women affected by the Mandate. Among those who are not practicing contraception, lack of access due to cost is not a significant factor. According, to a Center for Disease Control (CDC) study cited in the Report, "the

[31] Press Release, HHS Sec'y Sebelius, *supra* note 26.

[32] Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (July 2012) http://www.guttmacher.org/pubs/fb_contr_use.html (last visited March 5, 2013).

leading reason given for nonuse of contraception was 'You did not think you could get pregnant,' cited by 44% of these women who had unintended pregnancies in recent years."[33] Other reasons included they did not expect to have sex (14%); they "didn't really mind" if they got pregnant (23%); and they were "worried about the side effects" of birth control methods (16%).[34] Cost is not mentioned.

The number of women citing cost as a prohibitive factor is extremely low. According to a recent study, only 2.3% of women indicated they did not use contraception because it was "too expensive." *See Contraception in America, Unmet Needs Survey, Executive Summary* at 14 (Fig. 10), 16 (Fig. 12) (2012) http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf (last visited March 4, 2013). Thus, even if the government could show that the Mandate will *cause* this small percentage of the population to experience fewer unintended pregnancies, it would not amount to a compelling interest for "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S.Ct. at 2741, n.9 (rejecting claim that government had a compelling interest in further deterring the "20% of those under 17 [that] are still able to buy [violent video] games.").

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[33] Centers for Disease Control, *Use of Contraception in the United States: 1982-2008 (2010)*, 23 Vital and Health Stats 29 at 14 (August 2010) *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf (hereafter "CDC Report").

[34] *Id.*

The Report nevertheless claims that elimination of cost sharing "*could* greatly increase use" of contraceptive services. Report at 109 (emphasis added). In the one paragraph devoted to this claim, the evidence inadequately supports this assertion. For one, some of the research cited focuses on "the impact of cost sharing on the use of health care services," as opposed to contraceptive services specifically. *Id*. This research also found that cost-sharing requirements merely "*can*" pose barriers to health care services and that such barriers are a problem "particularly for low-income populations." *Id*. Low-income women, however, are not affected by the Mandate and already have broad access to the mandated services, making such findings nearly irrelevant. Other sources are completely irrelevant. *See id*. (noting cost sharing's effect on *mammogram services*). Even the study claiming "women were more likely to rely on more effective long-acting contraceptive" when out-of-pocket costs were eliminated is of questionable relevance. *See id*. This study does not show that elimination of cost sharing causes those not using contraception to begin using it, but only that women may choose a *more effective method* when cost is reduced.[35]

[35] Even increased *usage* rates cannot guarantee a significant decline in unintended pregnancies. Among women regularly using contraception, the probability of experiencing an unintended pregnancy is 12%, a statistic that has not changed since 1995, CDC Report at 15, a time during which 28 states have enacted laws similar to the Mandate.

Even if Appellees could overcome all of these flaws, they must still show that unintended pregnancy causes poor health outcomes for women. The Report claims the "consequences of an unintended pregnancy" include depression, domestic violence, and smoking and alcohol consumption during pregnancy.[36] Report at 103. Yet the 1995 IOM Report cited concedes that "*research is limited* in its ability to explain the personal and interpersonal issues that affect contraceptive use and the risk of an unintended pregnancy among all of the populations in whom unintended pregnancy occurs."[37] The same report explains further that it does not "establish definitively whether the [negative] effect is *caused by* or merely *associated with* unwanted pregnancy." IOM Report 1995 at 65 (emphasis in original). While this study claims that establishing such a distinction is not "necessary" for its purposes, *id*., it is fatal for Appellees' purpose as a showing of

[36] The Report also claims that a lack of contraception use threatens children's health. Report at 103. Fundamentally, this line of reasoning suffers from a major logical flaw—children's health cannot benefit from products and services designed to prevent their existence. *See Legatus*, 2012 U.S. Dist. LEXIS 156144 at *23 (noting the "odd implication by the Government that the *use* of contraception could somehow have a beneficial impact on a 'developing fetus' that contraceptive use is itself designed to avoid[.]").

[37] Institute of Medicine, *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* (1995), *available at* http://www.iom.edu/Reports/1995/The-Best-Intentions-Unintended-Pregnancy-and-the-Well-Being-of-Children-and-Families.aspx (hereinafter "1995 IOM Report").

causality is necessary under strict scrutiny.[38] *See Brown* 130 S.Ct. at 2739 (citations and quotations omitted) ("[N]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.").

The Report shows "at best some correlation," *id*., between lack of contraception *use* (as opposed to access) and unintended pregnancy. But this is insufficient. *See id.* The evidence on which the Report relies is exactly the type of "ambiguous" proof the Supreme Court rejected in *Brown*.

Under RFRA, Appellees' burden is to demonstrate a compelling interest "to…the particular claimant whose sincere exercise of religion is being substantially burdened[,]" i.e., Lind. *O Centro*, 546 U.S. at 430-31. Yet even on a general scale, Appellees' have not "specifically identif[ied] an 'actual problem' in need of solving." *Brown* 131 S.Ct. at 2738. Appellees therefore do not have a compelling interest in forcing Lind to violate his beliefs.

b. The Mandate's Exemptions Undermine Any Compelling Interest in Applying the Mandate to Lind.

Appellees' must not only demonstrate an interest "of the highest order," *Yoder*, 406 U.S. at 215, they must demonstrate that "some substantial threat to

[38] The 1995 IOM Report does claim that negative health effects are "closely linked to unwanted pregnancy." 1995 IOM Report at 65. However, this relationship falls short of the required causality under *Brown*. 130 S.Ct. at 2739.

public safety, peace or order" will occur if Lind is exempted from the Mandate. *Id*. at 230; *O Centro*, 546 U.S. at 430-31. Even assuming Appellees' proffered interests are compelling in the abstract, the Mandate must still fail as exempting Lind's 18 employees will not pose a "substantial threat" to any compelling interest.

Under strict scrutiny, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."[39] *Lukumi*, 508 U.S. at 547 (quotations and citations omitted). Appellees, however, have exposed millions of women to "appreciable damage" by consciously exempting group health plans covering these women from compliance with the Mandate.

Most significantly, the government chose not to impose the Mandate on those belonging to "grandfathered" plans.[40] 76 Fed. Reg. at 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans."). Using the government's estimates, at

[39] Notably, Congress exempted "grandfathered" plans from the Mandate, but not other provisions of the ACA. *See* 42 U.S.C. § 18011(a)(3)-(4) (specifying those provisions of the ACA that apply to grandfathered health plans). Appellees' position that their interests are "of the highest order" is further undercut by Congress's conclusion that the Mandate's goals were subordinate to its other interests.

[40] According to the Congressional Research Services, "[e]nrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, PRIVATE HEALTH INSURANCE PROVISIONS IN PPACA (May 4, 2012), *available at* http://www.ncsl.org/documents/health/privhlthins2.pdf (emphasis added).

least three different courts found that at least "191 million Americans belong to plans which may be grandfathered under the ACA." *Newland*, 881 F.Supp.2d at 1291 (citing 75 Fed. Reg. at 34550); *Tyndale*, 2012 U.S. Dist. LEXIS 163965 at *60 (same); *Legatus*, 2012 U.S. Dist. LEXIS 156144 at *29 (estimating 193 million people in grandfathered plans). Appellees' other estimates "suggest that approximately 98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. at 41732. Appellees have "fail[ed] to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47. Appellees cannot plausibly assert an interest "of the highest order" in forcing Lind to violate his beliefs when they have left millions vulnerable to the harms the Mandate is allegedly designed to remedy.

The Supreme Court's decision in *O Centro* confirms that Appellees have no compelling interest in denying Lind an exemption under RFRA. In *O Centro*, a church sought a RFRA exemption to the Controlled Substances Act ("CSA") to permit its members to use an illegal hallucinogen ("DMT") in a tea that church members received during communion. 546 U.S. at 423. The government asserted a compelling interest in the uniform application of the CSA such that *no* exceptions could be made to accommodate the church's sincere religious practice. *Id.* Yet for 35 years prior, Native Americans had a regulatory exemption from the CSA for

religious use of peyote, which, like DMT, was banned under Schedule I of the CSA. *Id*. at 433. Noting that DMT was "exceptionally dangerous," *id*. at 432, the Court nonetheless held the peyote exemption "fatally undermines" the government's alleged compelling interest in denying an exemption to the church, *id*. at 434-35.

This case is nearly indistinguishable from *O Centro*. The CSA's peyote exception for "hundreds of thousands" of Native Americans negated the government's alleged interest in enforcing a ban on an "exceptionally dangerous" drug as applied to approximately 130 church members. *Id*. Here, the ACA's grandfathering provisions exempt a much greater number—*tens of millions*. And this case deals not with curbing dangerous drug use, but with promoting marginally-incremental *access* to already widely-available women's health services. *O Centro* compels the conclusion that "this massive exemption completely undermines any compelling interest in applying the…mandate to [Lind]." *Newland*, 881 F.Supp.2d at 1298.

Grandfathered plans are not the only plans exempt from the Mandate. Rather, employers with fewer than fifty employees, such as Lind, are not required to provide group health insurance, 26 U.S.C. § 4980H(a), and are therefore not

forced to comply with the Mandate.[41] Appellees cannot have a compelling interest in enforcing the Mandate against Lind over his religious objections given the government's decision to exempt Lind altogether. Nothing in the Report suggests that Appellees' alleged interests in the Mandate apply to employees of large companies, but not small companies. *See O Centro*, 546 U.S. at 433.

Nor can Appellees explain how forcing Lind to terminate his insurance coverage is a preferable alternative, vis-à-vis their interests, to offering a group health plan, but excluding coverage for contraceptive services. As this case demonstrates, imposing the Mandate on religiously-motivated small businesses like Annex Medical can frustrate the overall purpose of the ACA by leaving employees without *any* health coverage. Of course, Appellees were aware this might happen, *see* 77 Fed. Reg. at 8727; yet still imposed the Mandate on Lind and others with similar sincere religious objections. This choice further undermines Appellees' asserted interest in serving women's health and equality.

In sum, Appellees' massive scheme of exemptions[42] prevents them from demonstrating that granting an additional exemption to Annex Medical and its 18

[41] The small employer exemption is not insignificant. According to the United States Census, there are over *five million businesses* employing less than *twenty* employees. *See* U.S. Census Bureau, Statistics About Business Size (Including Small Business), http://www.census.gov/econ/smallbus.html (last visited March 4, 2013).

[42] The Mandate is also inapplicable to "member[s] of a recognized religious sect or division thereof" who are "conscientiously opposed to acceptance of the benefits of

employees would result in appreciable harm to those interests. *See O Centro*, 546 U.S. at 431 (In RFRA cases, the court must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."). The Mandate must necessarily give way to Lind's faith, as "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 216.

c. The Mandate Does Not Use the Least Restrictive Means.

If no compelling interest exists, the Mandate violates RFRA. But even if a compelling interest is sufficiently demonstrated, it does not mean no violation has occurred. Rather, RFRA requires Appellees to also demonstrate that its chosen means of regulation are the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). The government must demonstrate that substantially burdening Lind's free exercise of religion is "actually necessary to the solution." *Brown*, 131 S.Ct. at 2738.

As the Supreme Court has put it, strict scrutiny requires "[p]recision of regulation." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). "If the

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any private or public insurance," 26 U.S.C. §§ 5000A(d)(2)(a)(i), 1402(g)(1), as well as entities they define as "religious employers," from compliance with the Mandate. 45 C.F.R. § 147.130(a)(1)(iv)(A); 78 Fed. Reg. 8456.

[government] has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Id*. (citations and quotations omitted). Where "a less restrictive alternative would serve the Government's purpose, the legislature *must use that alternative*." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (emphasis added).

Appellees cannot satisfy the "least restrictive means" requirement for two fundamental reasons. First, Appellee's failure to consider RFRA when enacting and implementing the ACA and the Mandate prevent it from demonstrating that it has used the least restrictive means. *See Gartrell v. Ashcroft*, 191 F.Supp.2d 23, 39 (D.D.C. 2002) ("[T]he government cannot meet its burden to prove least restrictive means unless it has actually considered and rejected the efficacy of less restrictive measures *before* adopting the challenged practice.") (emphasis added). RFRA mandates that the government apply RFRA's requirements to "all Federal law, and the implementation of that law[.]", to 42 U.S.C. § 2000bb-3(a). Yet evidence that Appellees considered RFRA appears nowhere in the ACA or the interim final rules concerning the Mandate.[43] In fact, Secretary Sebelius testified that she never requested an analysis of the Mandate's effect on religious freedom from the

[43] Not until February 15, 2012 did Appellees claim that the Mandate is consistent with RFRA. *See* 77 Fed. Reg. at 8729. Yet Appellees did nothing more than claim it was so. Nowhere do Appellees claim to have considered and rejected alternatives to forcing religiously-motivated business owners to violate their beliefs.

Department of Justice. *The President's Budget for Fiscal Year 2013: Hearing before the S. Comm. on Finance*, 112th Con. (Feb. 15, 2012) (statement of Kathleen Sebelius, Sec'y of HHS). Where Appellees sought to accommodate the religious beliefs of "certain religious employers," i.e. churches, 76 Fed. Reg. at 46623, they seemingly ignored RFRA, and instead sought to be "be consistent with the policies of *States* that require contraceptive services coverage," *id*. (emphasis added). This approach is quite troubling considering RFRA is inapplicable against States and local governments under *City of Boerne*, 521 U.S. 507.

Second, Appellees' scheme of exemptions again undermines any claim that denying Lind an exemption is "*actually necessary*" to further its interests. In other words, "the government cannot justify the religious restrictions created by a policy as necessary to further the policy's aims if that same policy is riddled with exceptions to promote the interests of other religious practitioners or other non-religious interests." *United States v. Hardman*, 622 F. Supp. 2d 1129, 1131 (D. Utah 2009). As explained, the ACA is "riddled" with significant exceptions that promote both types of interests, but not Lind's interests.

Even if these exemptions did not exists, Appellees cannot demonstrate the Mandate is the least restrictive means because it has several viable, yet far "less drastic" ways of satisfying its alleged interests that do not impose a substantial burden on Lind's free exercise of religion.

First and foremost, the government could subsidize the coverage required by the Mandate itself. This is something the government is already doing on a massive scale. In 2010, "[t]he joint federal-state Medicaid program spent $1.8 billion for family planning services," while Title X of the Public Health Services Act, which subsidizes services for women and men who do not qualify for Medicaid, contributed "$228 million" to family planning services. Guttmacher Institute, *Fact Sheet: Facts on Publicly Funded Contraceptive Services in the United States* (May 2012) http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited March 5, 2013).

The burden on the government to expand its current operations to cover those individuals not qualifying for contraception coverage under Medicaid or other government programs would be minimal given that "[n]ine in 10 employer-based insurance plans" already cover the "full range of prescription contraceptives." *See Contraceptive Use in the United States*, *supra* note 32.

The government could also further its interests by directly reimbursing individuals who purchase contraceptives or allow those individuals to claim tax credits or deductions. Or, as the government has done to insurance issuers, the government could impose a mandate on the manufacturers of contraceptive drugs and devices to provide such products free of charge through community health centers, public clinics and hospitals. Contraception services are already made

available through these entities for people with income-based support.[44] The government could effectively make them available for all citizens through such a mandate.

The government may believe it is easiest to force employers to provide contraception services, but "a court should not assume a plausible, less restrictive alternative would be ineffective." *Playboy Entm't Group*, 529 U.S. at 824. All of these alternatives are far "less drastic," yet effective means of ensuring cost-free access to contraceptive services without imposing burdens on the religious exercise rights of Lind and others similarly situated. Thus, even assuming Appellees have demonstrated an "actual problem in need of solving," the Mandate must fail because substantially burdening Lind's free exercise of religion is not "actually necessary to the solution." *Brown*, 131 S.Ct. at 2738.

The Mandate compels Lind to act contrary to his sincerely held Catholic beliefs. His free exercise of religion is thereby substantially burdened. Appellees cannot satisfy strict scrutiny and Lind is therefore substantially likely to succeed on the merits of his RFRA challenge and an injunction should enter. *See MCCL*, 692 F.3d at 870 ("When a Plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.") (citations and quotations omitted).

[44] Press Release, HHS Sec'y Sebelius, *supra* note 26.

B. Lind Satisfies the Remaining Preliminary Injunction Factors.

The lower court found that because "[Lind] can demonstrate the possibility of irreparable harm" upon a more developed record, the irreparable harm "factor weighs in favor of injunctive relief." (JA-101–02; Addm-14–15.) This is because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). Lind's demonstration of likely success on his RFRA claim compels a finding that he is likely to suffer irreparable harm. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("courts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"). The courts that have recently enjoined enforcement of the Mandate have reached similar conclusions. *Newland*, 881 F.Supp.2d at 1294 ("[I]t is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm."); *Legatus*, 2012 U.S. Dist. LEXIS 156144 at *40. Indeed, absent relief, Lind has "no consistent and dependable way" to exercise his faith. *Ali*, 682 F.3d at 710. He can neither fulfill his religiously held obligation to provide just wages and benefits nor exclude coverage for contraceptive services in any group health plan he offers.

Because Lind is suffering irreparable harm, the balance of equities strongly favors injunctive relief. Appellees will face no harm from being prevented from

enforcing the Mandate against Annex Medical, a business the government chose to exempt from the requirement to provide health insurance altogether. Under the pressure of the Mandate, Lind has been forced to terminate his group health plan. So, if anything, injunctive relief will further Appellees' interests by permitting Lind to offering his employees the protection of health insurance while the lower court considers the merits of his claims.

Appellees have voluntarily exempted health plans covering over 190 million individuals from compliance with the Mandate. The minimal harm they may face if unable to enforce the Mandate against Annex Medical and its 18 employees, "pales in comparison to the possible infringement upon [Lind's] constitutional and statutory rights." *Newland*, 881 F.Supp.2d at 1295(finding "[t]his factor strongly favors entry of injunctive relief").

As the lower court recognized, "the determination of where the public interest lies...is dependent on the determination of the likelihood of success... because it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (citations omitted), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012) (en banc). Likelihood of success being established, the public interest favors Lind.

Conclusion

In her concurring opinion in *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012), the Supreme Court's decision upholding the ACA's "individual mandate," Justice Ginsburg observed, "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause. *Id.* at 2624. Though Justice Ginsberg may have been hypothesizing, she has adequately described the present circumstances. The government's mandate to purchase contraceptive services creates clear and substantial interference with the free exercise of religion in violation of RFRA. Accordingly, this Court should reverse the district court and enjoin the Mandate.

Respectfully submitted this 5th day of March, 2013.

s/Erick G. Kaardal
Erick G. Kaardal (Minn. 229647)
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
Minneapolis MN 55402
Telephone: (612) 341-1074
Facsimile: (612) 341-1076
kaardal@mklaw.com
Lead Counsel for Plaintiffs

Kaylan L. Phillips (Ind. 30405-84)
Noel H. Johnson (Wisc. 1068004)
ActRight Legal Foundation
209 West Main Street
Plainfield, Indiana 46168
Telephone (202) 683-9405
Facsimile (888) 815-5641
kphillips@actright.com
njohnson@actright.com

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s/Erick G. Kaardal
Erick G. Kaardal

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